[Cite as *State v. Rose,* 2010-Ohio-5669.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-03-059
	:	O P I N I O N
- vs -		11/22/2010
	:	
JERRY R. ROSE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-07-1192

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Rion, Rion & Rion, L.P.A., Inc., John H. Rion, Jon Paul Rion, 130 W. Second Street, Suite 2150, P.O. Box 10126, Dayton, Ohio 45402, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Jerry R. Rose, appeals a decision of the Butler County Court of Common Pleas dismissing his motion to withdraw his guilty pleas and his petition for postconviction relief. For the reasons discussed below, we affirm the judgment of the trial court.

{¶2} This case has a protracted procedural history and, therefore, this court will

confine itself to the basic facts relevant to this appeal. On July 18, 2007, appellant pled guilty to one first-degree felony count of selling unregistered securities, as well as one count each of perjury and forgery, felonies of the third degree. The record indicates that from 2000 to 2007 appellant, a licensed insurance agent, operated a multi-million dollar Ponzi scheme involving approximately 200 investors. Subsequently, on April 29, 2008, following a three-day sentencing hearing during which a number of investors testified regarding their financial losses, appellant was sentenced to maximum, consecutive prison terms on each count for an aggregate term of 20 years.

{¶3} On direct appeal, this court affirmed appellant's sentence in *State v. Rose* (Oct. 19, 2009), Butler App. No. CA2008-04-109, accelerated calendar judgment entry. The Ohio Supreme Court declined to accept appellant's appeal of this court's decision. See *State v. Rose*, 126 Ohio St.3d 1544, 2010-Ohio-3855.

{¶4} In February 2009, while his appeal was pending in this court, appellant filed a petition for postconviction relief. In his petition, appellant claimed that his guilty pleas were void as a result of the ineffective assistance of his trial counsel, and that the trial court's sentencing decision violated his due process rights. He also asserted that the prosecuting attorney violated the terms of his plea agreement. The trial court dismissed his petition on jurisdictional grounds after finding that it was filed after the expiration of the 180-day deadline imposed by R.C. 2953.21(A)(2). This court subsequently affirmed the trial court's decision on appeal. See *State v. Rose* (July 27, 2009), Butler App. No. CA2009-04-097, accelerated calendar judgment entry.

{¶5} The instant appeal involves appellant's December 2, 2009 motion entitled, "Motion to Vacate Plea; Motion to Vacate Sentence; Alternatively, Petition for Post Conviction Relief." Appellant raised several arguments in his motion, many of which were identical to those made in his February 2009 petition.

{¶6} In his motion, appellant sought to withdraw his guilty pleas pursuant to Crim.R. 32.1. He argued that his pleas were not made voluntarily or intelligently as a result of the ineffective assistance of his trial counsel, and that the prosecutor breached the terms of the plea agreement. He also claimed that his pleas should be withdrawn as a result of "fraudulent information" the investors presented to the trial court at sentencing. According to appellant, reports provided to him by the court-appointed receiver after sentencing refuted the majority of the investors' claims regarding their financial losses.

{¶7} In the alternative, appellant requested postconviction relief pursuant to R.C. 2953.21. Appellant argued that his sentence was void as a result of the information in the receiver's reports, and claimed that he was unavoidably prevented from discovering it at the time of sentencing. Appellant further argued that he was entitled to a new sentencing hearing to refute the claims made by the investors.

{¶8} In its February 19, 2010 decision, the trial court dismissed appellant's requests for relief without a hearing. The court concluded, inter alia, that it was without jurisdiction to consider appellant's Crim.R. 32.1 motion after his direct appeal to this court had been finalized. The court also found that it lacked jurisdiction to consider his second postconviction relief petition because it was not timely filed and appellant failed to establish the requirements of R.C. 2953.23(A)(1).

{¶9} Appellant appeals the decision of the trial court, raising a single assignment of error for our review:

{¶10} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO VACATE HIS PLEA OR SENTENCE WITHOUT A HEARING."

{¶11} In his sole assignment of error, appellant challenges the trial court's dismissal of his motion to withdraw his guilty pleas and his request for postconviction relief without first

holding an evidentiary hearing.

{¶12} At the outset, we observe that appellant's brief is less than clear with regard to the bases for his challenges on appeal. It is difficult to ascertain whether his arguments fall under his motion to withdraw his guilty pleas, or whether they are positioned in the context of his request for postconviction relief. A motion to withdraw a guilty plea made pursuant to Crim.R. 32.1 is separate and distinct from a petition for postconviction relief filed under R.C. 2953.21. *State v. Finkbine*, Warren App. No. CA2005-06-068, 2006-Ohio-1788, fn.1, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶14. After a close review of appellant's brief, we have construed several arguments in support of each claim for relief.

Crim.R. 32.1 Motion

{¶13} Appellant presented several arguments to the trial court in support of his Crim.R. 32.1 motion to withdraw his guilty pleas. However, on appeal, appellant contends only that his pleas were not made knowingly, voluntarily, or intelligently because he "did not know the gravity of the harm involved, nor the damages to be assessed." According to appellant, his guilty pleas were based on "fabricated or exaggerated" claims by investors. Appellant argues that although the investors claimed losses of approximately $17 million, subsequent reports from the receivership indicated that the amounts taken from the investors were less than those claimed at sentencing. He has failed to present any evidence in support of this assertion.

{¶14} Pursuant to Crim.R. 32.1, "'[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.'" *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶10, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A manifest injustice is defined as a "fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process." *State v. McMahon*, Fayette App. No.

CA2009-06-008, 2010-Ohio-2055, ¶6.

{¶15} A trial court's decision regarding a post-sentence motion to withdraw a guilty plea is reviewed on appeal under an abuse of discretion standard. *State v. Williams*, Warren App. No. CA2009-03-032, 2009-Ohio-6240, ¶13. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Pointer*, Fayette App. No. CA2010-03-003, 2010-Ohio-5067, ¶9. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶16} Although a trial court is permitted to consider a post-sentence motion to withdraw a guilty plea, the court lacks jurisdiction to consider such a motion once a higher court has affirmed the trial court's judgment on appeal. *State v. Allen*, Warren App. No. CA2006-01-001, 2006-Ohio-5990, ¶12. Crim.R. 32.1 "'does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.'" Id., quoting *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 98. See, also, *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶61.

{¶17} In this case, appellant filed his motion to withdraw his pleas more than two years after pleading guilty to the charges, and more than one year after this court affirmed his sentence on direct appeal. The trial court did not abuse its discretion in determining that it was without jurisdiction to consider claims related to its sentencing decision after this court affirmed the trial court's judgment on appeal. *Allen* at ¶14-15. Without jurisdiction to consider appellant's claims, the trial court did not err in failing to hold a hearing.

{¶18} In addition, to the extent that appellant asserts that his guilty pleas were not made knowingly, voluntarily, or intelligently in light of the alleged newly-discovered evidence,

we find his claim barred by res judicata. This doctrine "'bars claims raised in a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea that were raised or could have been raised in a prior proceeding.'" *State v. Combs*, Portage App. No. 2007-P-0075, 2008-Ohio-4158, ¶26, quoting *State v. McDonald*, Lake App. No. 2003-L-155, 2004-Ohio-6332, ¶22.

{¶19} Contrary to his argument in the instant appeal, the record indicates that prior to entering his guilty plea to each charge, appellant provided the receiver with the financial records in his possession that were relevant to the case. In its decision, the trial court noted that the receiver's reports to which appellant eludes likely consisted of an audit of appellant's own records. This information would have been known to appellant at the time his pleas were entered in 2007, and any claim regarding the validity of his pleas could have been raised in his first appeal. In failing to raise the issue in his previous appeal, appellant is precluded from asserting any error with respect to his pleas in the context of a post-sentence Crim.R. 32.1 motion. See *State v. Sanchez*, Defiance App. No. 4-06-31, 2007-Ohio-218, ¶18.

Postconviction Relief Petition

{¶20} Turning our attention to his alternative request for postconviction relief, appellant claims generally that his sentence is void in light of the investors' "perjured testimony" at sentencing. In his motion, appellant argued that the receiver reports constituted new evidence which could not have been discovered through due diligence prior to sentencing, and that he was entitled to a new sentencing hearing pursuant to R.C. 2930.14(B). He also claimed that the reports "exonerate[d] [his] guilt."

{¶21} The decision to grant or deny a petition for postconviction relief is committed to the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Carter*, Clinton App. No. CA2006-03-010, 2006-Ohio-4205, ¶10.

{¶22} Pursuant to R.C. 2953.21(A)(2), a petition for postconviction relief "shall be filed

no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication * * *." If a postconviction relief petition is filed beyond the 180-day time limitation, or the petition is a second or successive petition for postconviction relief, a trial court lacks jurisdiction to consider it unless the provisions of R.C. 2953.23(A) apply. *State v. Bryant*, Mahoning App. No. 10-MA-11, 2010-Ohio-4401, ¶15. R.C. 2953.23(A)(1) provides that a trial court may entertain a petition filed after the expiration of the 180-day time period if a petitioner establishes both of the following requirements:

{¶23} "(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period described in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

{¶24} "(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable fact-finder would have found the petitioner eligible for the death sentence."

{¶25} Appellant does not dispute that his second petition was filed outside the 180-day statutory period. However, he claims that he established the requirements of R.C. 2953.23(A)(1) for the trial court's consideration of an untimely petition.

{¶26} As we previously discussed, appellant's vague assertion that the receiver reports rendered the investors' testimony "fraudulent" cannot be viewed as new evidence. Having provided the financial records associated with the criminal scheme to the receiver,

appellant has not established that he was unavoidably prevented from discovering those records. Appellant was and is in the best position to know the financial records relevant to the case.

{¶27} Moreover, although appellant claimed generally that the alleged new evidence would exonerate him, he failed to demonstrate that, but for constitutional error, no reasonable fact-finder would have found him guilty of the offenses. The arguments in his petition and on appeal relate solely to sentencing issues. As this court has consistently determined, "'[t]he plain language of R.C. 2953.23(A)(1)(b) extends only to trial error and does not extend to sentencing errors, except those occurring within the capital punishment context.'" *Carter*, 2006-Ohio-4205, ¶16, quoting *State v. Schroyer*, Clermont App. No. CA2005-05-032, 2006-Ohio-1782, ¶23. See, also, *State v. Shannon*, Preble App. No. CA2005-09-016, 2006-Ohio-2720, ¶17; *State v. Wells*, Warren App. No. CA2006-11-129, 2007-Ohio-5388, ¶11.

{¶28} In addition, appellant's assertion that he is entitled to a new sentencing hearing under R.C. 2930.14(B) is meritless. This section provides, in part, that "[t]he court shall consider a victim's statement * * * along with other factors that the court is required to consider in imposing sentence or in determining the order of disposition. If the statement includes new material facts, the court shall not rely on the new material facts unless it continues the sentencing or dispositional proceedings or takes other appropriate action to allow the defendant * * * an adequate opportunity to respond to the new material facts."

{¶29} Having determined that appellant failed to establish that the receiver's reports constituted new evidence, it cannot be said that the investors' victim impact statements regarding their financial investments and losses were "new material facts" of which appellant was not aware. Moreover, because this information was available to appellant at the time of his sentencing and first appeal, the doctrine of res judicata precludes him from raising this issue in a second petition for postconviction relief. See *State v. Stojetz*, Madison App. No.

CA2009-06-013, 2010-Ohio-2544, ¶13; *State v. McCall*, Muskingum App. No. CT2010-0001, 2010-Ohio-4623, ¶17.

{¶30} We conclude that the trial court did not abuse its discretion in dismissing appellant's petition for postconviction relief, as he failed to meet the requirements of R.C. 2953.23(A)(1)(b). Without jurisdiction to consider the merits of appellant's claims, the trial court was not required to hold an evidentiary hearing on the matter. *State v. Robinson*, Monroe App. No. 09 MO 6, 2010-Ohio-2698, ¶19.

{¶31} Based on the foregoing, appellant's sole assignment of error is overruled.

{¶32} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.

[Cite as *State v. Rose*, 2010-Ohio-5669.]