

[Cite as *State v. Black*, 2009-Ohio-3608.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JAMES D. BLACK

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 08 CA 41

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case Nos. 05 CR 780 and 06 CR
1033

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 23, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Appellant James D. Black appeals the decision of the Richland County Court of Common Pleas, which revoked his community control sanction. The relevant facts leading to this appeal are as follows.

{¶2} On October 6, 2005, appellant was indicted under Richland County Court of Common Pleas case number 2005-CR-0780 on one count of theft of credit cards, a felony of the fifth degree. This charge stemmed from appellant's theft and subsequent use of credit cards belonging to Wendy Flauger. On July 20, 2006, appellant entered a guilty plea in said case. Appellant was sentenced on August 29, 2006 to eleven months in prison, to run consecutive to the sentences imposed for similar offenses in other counties. Appellant was judicially released on April 16, 2007, and was placed on four years of community control.

{¶3} On December 6, 2006, in Richland County Court of Common Pleas case number 2006-CR-1033, appellant was indicted on one count of receiving stolen property, a felony of the fifth degree, and one count of forgery, a felony of the fifth degree. Those charges arose from his possession and use of a credit card belonging to Catherine George. In said case, appellant entered a guilty plea to both counts in the indictment on April 16, 2007. On the same date, the trial court sentenced appellant to three years of community control, to run consecutively to the community control term in 2005-CR-0780.

{¶4} On October 15, 2007, appellant was charged with probation violations for failing to report to his probation officer, and for testing positive for drugs. He admitted to the violations and was continued on community control.

{¶15} In March 2008, another probation violation was filed against appellant. As a result of this second violation, the trial court revoked appellant's community control on April 7, 2008. Appellant was thereupon sentenced to twelve months in prison on each charge, to run consecutive to each other and to a separate case from Hamilton County, Ohio, but concurrent to his sentence in Richland County case number 2005-CR-0780.¹

{¶16} On April 21, 2008, appellant thereafter filed a notice of appeal of the revocation judgment entry. In addition, on July 1, 2008, appellant filed a pro se motion to withdraw his guilty plea in case numbers 2005-CR-0780 and 2006-CR-1033. The trial court overruled the motion via a judgment entry filed July 14, 2008.

{¶17} Appellant herein raises the following four Assignments of Error:

{¶18} "I. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY (SIC) THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION, AS WELL AS THE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶19} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING THE MOTION TO WITHDRAW A GUILTY PLEA BY ITS JUDGMENT ENTRY DATED JULY 14, 2008.

{¶10} "III. THE TRIAL COURT DENIED APPELLANT DUE PROCESS BY PERMITTING APPELLANT TO BE CONVICTED AND SENTENCE (SIC) WHEN THE TRIAL COURT LACKED JURISDICTION.

¹ Community control was also revoked in 2005-CR-0780. Appellant appears to focus on 2006-CR-1033 in this appeal.

{¶11} “IV. THE TRIAL COURT COMMITTED PLAIN ERROR BY SENTENCING [APPELLANT] TO CONSECUTIVE SENTENCES ON MULTIPLE OFFENSES THAT WERE ALLIED OFFENSES OF SIMILAR IMPORT.”

I.

{¶12} In his First Assignment of Error, appellant contends he was deprived of the effective assistance of counsel at the revocation hearing of April 7, 2008.

{¶13} This Court has recognized claims of ineffective assistance in the context of appeals from community control proceedings. See *State v. Krouskoupf*, Muskingum App.No. CT2005-0024, 2006-Ohio-783. There is a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the proceeding is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have been different. *Id.* Defense counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267.

{¶14} The gist of appellant's present argument is that his counsel at the revocation hearing should have asked for a hearing to determine if the counts of

receiving stolen property and forgery in case 2006-CR-1033 were allied offenses of similar import. See R.C. 2941.25(A).

{¶15} However, as discussed further in regard to appellant's third and fourth Assignments of Error, *infra*, under the circumstances of this case, we find, in light of the doctrine of *res judicata*, the trial court was under no duty to review the "allied offense" issue at the community control revocation hearing on April 7, 2008, as such issue would have been ripe for appeal at the time of appellant's conviction and sentence in April 2007. As such, appellant's counsel's decision in this regard at the revocation hearing was not violative of any of his essential duties to his client.

{¶16} Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶17} In his Second Assignment of Error, appellant argues the trial court erred in overruling his motion to withdraw his plea.

{¶18} A review of the procedural history in this matter reveals that appellant filed a notice of appeal and docketing statement regarding only the trial court's revocation of community control, which was memorialized in the court's judgment entries of April 7, 2008. In contrast, the judgment entry denying the motion to withdraw plea under Crim.R. 32.1 was not filed until July 14, 2008, and no notice of appeal thereto is extant in the present case. We are therefore without jurisdiction to address appellant's Second Assignment of Error. See, e.g., *State v. Culgan*, Medina App.No. 08CA0080-M, 2009-Ohio-2783, ¶9.

III., IV.

{¶19} In his Third Assignment of Error, appellant maintains the trial court lacked jurisdiction to impose a felony sentence due to an allegedly flawed indictment.

{¶20} In his Fourth Assignment of Error, appellant contends the trial court improperly sentenced him based on the alleged existence of allied offenses of similar import.

{¶21} In *State v. Gibson*, Ashland App.No. 05 COA 032, 2006-Ohio-4052, we held that a defendant must raise a “fundamental flaw” sentencing challenge via a direct appeal from the original sentencing entry, rather than by appealing from a subsequent revocation entry. However, in the case sub judice, it is not even necessary that we reach the issue addressed in *Gibson*. In other words, although appellant herein attempts to couch his arguments as sentencing errors, he again is seeking to challenge in this appeal aspects of his conviction for receiving stolen property and forgery which could have been raised upon timely direct appeal in 2007. We find such challenges are barred by res judicata.

{¶22} Accordingly, appellant's Third and Fourth Assignments of Error are overruled.

{¶23} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Richland County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

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