

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2009-P-0014
TIMOTHY J. PERRI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Municipal Court, Kent Division, Case No. K 04 CRB 1335 S.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Nathan A. Ray, 137 South Main Street, Suite 201, Akron, OH 44308 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This case is submitted to this court on the record and the briefs of the parties. Appellant, Timothy J. Perri, appeals the judgment entered by the Kent Division of the Portage County Municipal Court. The trial court denied Perri's motion to vacate and/or set aside his guilty plea and sentence.

{¶2} In 2004, Perri sent multiple letters to a former classmate.

{¶3} Perri was charged with menacing by stalking, in violation of R.C. 2903.211(A), a first-degree misdemeanor. This complaint was filed in the Portage

County Municipal Court and was assigned case No. K 04 CRB 1335 S. The complaint alleged the offending conduct occurred on June 1, 2004.

{¶4} In a separate complaint, Perri was charged with menacing by stalking, in violation of R.C. 2903.211(A) and (B)(2)(b), a fourth-degree felony. This complaint was filed in the Portage County Municipal Court and was assigned case No. K 04 CRA 1402 S. The complaint alleged the offending conduct occurred on June 9, 2004.

{¶5} The municipal court's docket reveals that case No. K 04 CRA 1402 S was bound over to the Portage County Court of Common Pleas on June 21, 2004. The matter was assigned case No. 2004 CR 00244 in the common pleas court.

{¶6} Perri pled guilty to the misdemeanor menacing by stalking charge in case No. K 04 CRB 1335 S. As part of the plea negotiation process, the state recommended that the felony charge in case No. 2004 CR 00244 be dismissed. The common pleas court dismissed the felony charge.

{¶7} Perri was sentenced to 180 days in jail, with 143 days suspended. In addition, he was given credit for 37 days he had served in jail. Also, Perri was placed on probation for two years.

{¶8} In September 2005, Perri filed a motion to withdraw his guilty plea. The trial court denied Perri's motion. On appeal, this court affirmed the trial court's decision. *State v. Perri*, 11th Dist. No. 2006-P-0018, 2006-Ohio-5185, at ¶42.

{¶9} In November 2008, Perri filed a "motion to vacate and set aside plea and sentence." A personal affidavit from Perri was attached to this motion. In addition, Perri requested a hearing on his motion.

{¶10} A hearing was scheduled for February 13, 2009. Perri filed a motion to continue the hearing, as his counsel had a conflict with that date. Upon considering

Perri's motion to continue, the trial court cancelled the hearing. In a separate judgment entry, the trial court denied Perri's motion to vacate and set aside his plea and sentence, since Perri had previously filed a similar motion.

{¶11} Perri has timely appealed the trial court's judgment denying his motion to vacate and set aside his plea and sentence. Perri raises three assignments of error. We will address Perri's assigned errors out of numerical order. His first and third assignments of error are:

{¶12} "[1.] The trial court erred when it denied appellant's petition. Appellant Perri established that the trial court failed to advise him of all his constitutionally protected rights.

{¶13} "[3.] The trial court erred in dismissing Appellant Perri's motion to vacate plea and sentence as the motion set forth new constitutional claims, contrary to the court[']s finding."

{¶14} The trial court denied Perri's motion because he had previously filed a motion to withdraw his plea.

{¶15} "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in the judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

{¶16} Perri argues that the trial court did not advise him of his right to appeal at the time it accepted his guilty plea. In Perri's prior appeal, this court held "the transcript from the Crim.R. 11 colloquy demonstrates that Perri knew what he was doing when he

entered his guilty plea. It also demonstrates that the plea was voluntary, as Perri indicated he agreed with the plea on two separate occasions.” *State v. Perri*, 2006-Ohio-5185, at ¶35. While Perri did not specifically argue he was not informed of his right to appeal, he *could have* raised this specific argument at that time. Thus, Perri’s current claim that the trial court failed to advise him of his right to appeal is barred by the doctrine of res judicata. See *State v. Szefcyk*, 77 Ohio St.3d 93, syllabus.

{¶17} In his third assignment of error, Perri argues the trial court erred by dismissing his motion because his most recent motion “raised issues that had not been previously raised in the trial court.” Again, since Perri *could have* raised these additional issues in his original motion to withdraw his guilty plea, they are barred by the doctrine of res judicata. Id.

{¶18} Perri’s first and third assignments of error are without merit.

{¶19} Perri’s second assignment of error is:

{¶20} “The trial court erred in denying Appellant Perri’s motion to vacate and set aside plea since Appellant Perri established that the municipal court did not have jurisdiction to accept his plea.”

{¶21} In his motion to vacate and set aside his plea and sentence, Perri argued that the Portage County Municipal Court did not have jurisdiction to accept his plea. Perri’s claim that the municipal court did not have jurisdiction to accept his plea is not barred by the doctrine of res judicata. This is because “subject-matter jurisdiction cannot be waived.” *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, at ¶17. (Citation omitted.)

{¶22} Crim.R. 32.1 provides a means for a criminal defendant to withdraw a guilty plea and states, “[a] motion to withdraw a plea of guilty or no contest may be

made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” The burden is on the defendant to show the existence of the alleged manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus.

{¶23} An appellate court is limited in its review of a trial court’s decision regarding a motion to withdraw a guilty plea to determine whether the trial court abused its discretion. (Citations omitted.) *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, at *6-7. The term “abuse of discretion” implies that the trial court’s decision was arbitrary, unreasonable, or unconscionable. (Citations omitted.) *State v. Adams* (1980), 62 Ohio St.2d 151, 157-158.

{¶24} The trial court should have considered Perri’s argument regarding jurisdiction, since it was not barred by the doctrine of res judicata. However, for the following reasons, we conclude that the trial court’s failure to consider this argument on its merits does not constitute an abuse of discretion.

{¶25} Perri argues the Portage County Court of Common Pleas had jurisdiction over this matter when he entered his plea in the municipal court. Thus, he argues that the municipal court did not have jurisdiction to accept his plea. See, e.g., *State v. Sims*, 9th Dist. No. 22677, 2006-Ohio-2415, at ¶24.

{¶26} Perri was separately charged in the municipal court with two counts of menacing by stalking. These counts arose from separate conduct, which allegedly occurred on two distinct dates.

{¶27} The instant action, assigned case No. K 04 CRB 1335 S, alleged offending conduct that occurred on June 1, 2004. This is the case in which Perri

entered his guilty plea. This case was never transferred to the Portage County Court of Common Pleas.

{¶28} Perri was also charged with a felony version of menacing by stalking in case No. K 04 CRA 1402 S. That complaint alleged the offending conduct occurred on June 9, 2004. Case No. K 04 CRA 1402 S was bound over to the Portage County Court of Common Pleas and assigned case No. 2004 CR 00244 at that court.

{¶29} Accordingly, after case No. K 04 CRA 1402 S was bound over, the Portage County Court of Common Pleas had jurisdiction over the felony charge of menacing by stalking, relating to conduct that allegedly occurred on June 9, 2004. However, the Portage County Municipal Court retained jurisdiction over case No. K 04 CRB 1335 S, relating to conduct that occurred on June 1, 2004. Thus, the Portage County Municipal Court had jurisdiction to accept Perri's guilty plea to one count of first-degree misdemeanor menacing by stalking in case No. K 04 CRB 1335 S.

{¶30} Perri's second assignment of error is without merit.

{¶31} The judgment of the Kent Division of the Portage County Municipal Court is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.