[Cite as *State v. Fitzpatrick*, 2010-Ohio-710.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-030**
- vs -	:	
ZACHARY FITZPATRICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 99 CR 000191.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Zachary Fitzpatrick, pro se, PID: A378-521, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Zachary Fitzpatrick appeals from the judgment of the Lake County Court of Common Pleas, which overruled his "motion to dismiss his case with prejudice and discharge him from prison."

{¶2} Mr. Fitzpatrick's contention that the original indictment was defective because the charges are duplicitous as they were written in the disjunctive, using "or," as it is verbatim in the relevant statutes, instead of the conjunctive "and," fails for numerous reasons.

{¶3} As he raises this claim for the first time in his motion and now on appeal, it is barred by the doctrine of res judicata in addition to being substantively without merit. First, Mr. Fitzpatrick waived any error as to any infirmity in the indictment, if one even existed, when he knowingly, voluntarily, and intelligently pled guilty to two counts of aggravated robbery with firearm specifications, and one count of felonious assault. He should and could have raised this argument in the two direct appeals of his sentence; his "motion to correct sentence," which was treated as a petition for post-conviction relief; and/or his petition for a writ of habeas corpus.

{¶4} Therefore, we find no abuse of discretion in the trial court's dismissal of his motion, and thus, we affirm.

{¶5} **Substantive and Procedural Facts**

{¶6} On April 14, 1999, Mr. Fitzpatrick, while high on the drug commonly known as "wet," robbed a motel in the early hours of the morning. He pushed the victim, struck him on the side of his head, and then dragged him to the ground. Several hours later, at approximately 9:00 a.m., he robbed a bank, placing a gun against the cheeks of two tellers.

{¶7} Mr. Fitzpatrick pled guilty to two counts of aggravated robbery, both with firearm specifications, first degree felonies in violation of R.C. 2911.01 and R.C. 2941.145, respectively; and one count of felonious assault, a second degree felony in violation of R.C. 2903.11.

{¶8} In October 1999, Mr. Fitzpatrick was sentenced to a total term of imprisonment of sixteen years: five-year concurrent terms for each count of aggravated robbery, to be served concurrently to a five-year term for the count of felonious assault;

all to be served consecutively to the two mandatory three-year terms for the firearm specifications.

{¶9} In *State v. Fitzpatrick,* 11th Dist. No. 99-L-164, 2000 Ohio App. LEXIS 5608 ("*Fitzpatrick I*"), Mr. Fitzpatrick appealed his sentence, arguing that the trial court erred in sentencing him to more than the minimum as well as consecutive sentences. We determined his appeal to have merit insofar as the trial court did not follow the pre-*Foster* sentencing guidelines, as it failed to make the requisite findings necessary to impose consecutive sentences pursuant to former R.C. 2929.14(E)(4)(a)-(c). Thus, we remanded for a resentencing hearing.

{¶10} Mr. Fitzpatrick then appealed his resentencing in *State v. Fitzpatrick*, 11th Dist. No. 2001-L-017, 2002-Ohio-1172 ("*Fitzpatrick II*"), contending that the manifest weight of the evidence did not support the consecutive sentences imposed. We affirmed, determining that the trial court followed the law of the case, complied with the then statutory provisions which governed consecutive sentences, and the sentence imposed was more than supported by the evidence as to the harm to the victims caused by his crimes.

{¶11} We then dismissed his petition for a writ of habeas corpus one year later in *State ex. rel. Fitzpatrick v. Trumbull Correctional Inst.*, 11th Dist. No. 2003-T-0080, 2003-Ohio-5005, finding that Mr. Fitzpatrick failed to assert a sufficient allegation to establish the underlying convictions were void. We also found that the trial court's mention during the sentencing hearing of "bad time" did not render his sentence void. We determined that the court's erroneous reference to "bad time," which has since been held unconstitutional by the Supreme Court of Ohio, was merely a procedural

sentencing error. We explained that the validity of a guilty plea cannot be considered on a writ of habeas corpus because it does not relate to the jurisdiction of the trial court to hear the matter, and thus, should have been challenged in a motion to withdraw his guilty plea or a petition for postconviction relief. Thus, Mr. Fitzpatrick failed to allege a viable claim as the basis for a writ of habeas corpus because he did not claim a deprivation of a constitutional right that resulted in a complete lack of due process or that the trial court was deprived of jurisdiction over the case. In any case, Mr. Fitzpatrick was serving the sentence of his conviction, not a sanctioned sentence as a result of "bad time."

{¶12} Several years later, in 2006, Mr. Fitzpatrick filed a "motion to correct sentence." The trial court dismissed Mr. Fitzpatrick's motion without a hearing, treating it as a petition for postconviction relief.

{¶13} Mr. Fitzpatrick then filed a "motion to dismiss his case with prejudice and discharge him from prison," the dismissal of which forms the basis of this appeal. The court disagreed with Mr. Fitzpatrick's contention that the court lacked subject-matter jurisdiction because the indictment against him was "defective," thus rendering his sentence void. Specifically, Mr. Fitzpatrick argued that the indictment against him was invalid because it charged him in the "disjunctive" in regard to the manner he committed the offenses instead of the conjunctive, thus rendering the charges duplicitous.

{¶14} In dismissing Mr. Fitzpatrick's motion, the trial court found that pursuant to R.C. 2941.28(B) and (C), an indictment shall not be dismissed due to any "duplicity" or "uncertainty." Mr. Fitzpatrick never moved for compulsory election or separation of the alleged misjoined offenses pursuant to Crim. R.14 prior to entering his guilty plea.

Most fundamentally, the doctrine of res judicata barred his contention as he never raised this claim in either of his two sentencing appeals, his petition for postconviction relief, or his petition for a writ of habeas corpus.

{¶15} Mr. Fitzpatrick now appeals, raising two assignments of error for our review:

{¶16} "[1.] Whether or not trial court's Jurisdiction [sic] over the subject matter has been properly invoked, in order to make the Jurisdiction of the court complete?

{¶17} "[2.] Whether of [sic] not trial court error [sic] in denying Defendant-Appellant's Motion to Dismiss his case, because counts in the indictment was [sic] duplicitous and could have been severed?"

{¶18} **Subject Matter Jurisdiction**

{¶19} For the sake of coherency, we will address Mr. Fitzpatrick's assignments of error together as they are interrelated. Mr. Fitzpatrick's basic contention is that the indictment in this case was defective because it was "duplicitous" in that the charges were stated in the "disjunctive form." Thus, he argues the trial court lacked subject-matter jurisdiction over the matter, and his sentence is therefore void.

{¶20} **The Doctrine of Res Judicata**

{¶21} First and foremost, Mr. Fitzpatrick's contention that the court is without subject-matter jurisdiction due to a defective indictment is barred by the doctrine of res judicata. Mr. Fitzpatrick was fully aware of the facts at the time he entered his guilty plea, and he does not argue or offer any evidence that he was prejudiced by the wording of the indictment.

{¶22} "'Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant *** 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 the trial*, which resulted in that judgment of conviction, *or on appeal* from that judgment.'" (Emphasis sic.) *State v. Combs*, 11th Dist. No. 2007-P-0075, 2008-Ohio-4158, ¶23, quoting *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus; accord: *State v. Dudas,* 11th Dist. Nos. 2007-L-140 and 2007-L-141, 2008-Ohio-3262, ¶73.

{¶23} "For a defendant to avoid dismissal of [a motion] by res judicata, the evidence supporting the claims *** must be competent, relevant, and material evidence outside of the trial court's record, and it must not be evidence that existed or was available at the time of trial. *** 'To overcome the res judicata bar, evidence offered dehors the record must demonstrate that the [appellant] could not have appealed the constitutional claim based upon the information in the original record.'" Id. at ¶24, quoting *State v. Adams*, 11th Dist. No. 2003-T-0064, 2005-Ohio-348, ¶39, quoting *State v. Lawson* (1995), 103 Ohio App.3d 307, 315; see, also, *Dudas* at ¶74.

{¶24} Thus, "[u]nder 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 that judgment of conviction, or on an appeal from that judgment." *State v. Lorenzo*, 11th Dist. No. 2007-L-085, 2008-Ohio-1333, ¶20, quoting *State v.*

Green, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695, ¶11, quoting *Szefcyk* at syllabus.

{¶25} Because Mr. Fitzpatrick could and should have raised this claim in any of his direct appeals or various postconviction petitions, his claim that the indictment is defective is barred by the doctrine of res judicata.

{¶26} **Waiver upon Guilty Plea**

{¶27} Secondly, when a defendant enters a guilty plea and thereby admits that he is in fact guilty of the charged offenses, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *State v. Banks*, 11th Dist. No. 2008-L-177, 2009-Ohio-6856, ¶21, citing *State v. Smith*, 2d Dist. No. 08CA0060, 2009-Ohio-5048, ¶24, citing *State v. Spates* (1992), 64 Ohio St.3d 269, 272, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267; see, also, *Dudas* at ¶28 (when a criminal defendant admits in open court that he is guilty of an offense, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea). We note that prior to entering his guilty plea he at no time moved the court for severance pursuant to Crim.R. 14 or requested a clarification as to the evidence the state intended to introduce should the case proceed to trial.

{¶28} Thus, Mr. Fitzpatrick's guilty plea to the substantive crimes of aggravated robberies and felonious assault waived any alleged defect in the indictment.

{¶29} **Indictment Offenses Stated in the "Disjunctive"**

{¶30} Finally, Mr. Fitzpatrick's argument is substantively without merit as well. Specifically, he contends that the grand jury's indictment is void because the counts of

aggravated robbery pursuant to R.C. 2911.01, as well as the firearm specifications pursuant to R.C. 2941.145, were worded in the disjunctive. Thus, he argues that because the counts of aggravated robbery stated "in attempting *or* committing a theft offense," and the firearm specifications stated "either the firearm was on his person *or* under control while committing the offense and displayed the firearm, brandished the firearm, indicated he possessed the firearm, *or* used it to facilitate the offense" in effect, charged him with no offense at all, rendering the indictment void and the trial court without subject-matter jurisdiction. (Emphasis added.)

{¶31} The Eighth District Court of Appeals defined duplicitous indictments in *State v. Johnson* (1960), 112 Ohio App. 124: "'[t]he term duplicity in its strictest sense applies to the joinder of separate and distinct offenses in one and the same count ***, but is sometimes made applicable to the misjoinder of offenses in the indictment generally. 42 Corpus Juris Secundum, 1112, Indictment and Information, Section 162.' Id. at 127." *State v. Allen*, 8th Dist. No. 62713, 1992 Ohio App. LEXIS 2806, 7-8.

{¶32} "Pursuant to Crim.R. 8(A) each offense in an indictment must be delineated in a separate count. If more than one offense is stated in a single count, the indictment suffers from duplicity." Id. at 8, citing *State v. Stratton* (1982), 5 Ohio App.3d 228, 230.

{¶33} "Furthermore, the Ohio Supreme Court has recognized that, where a single offense may be committed in any one of two or more different ways, a count in an indictment is not duplicitous which charges the commission of the offense conjunctively in two or more ways, provided there is no repugnancy between the ways charged." Id., citing *State v. Daniels* (1959), 169 Ohio St. 87 (citations omitted).

{¶34} As in *Allen,* the indictment is not duplicitous and proof of any of the averments would establish the essential elements of the crimes. Thus, the use of the disjunctive "or" is more applicable in this case, rather than the conjunctive "and" as Mr. Fitzpatrick contends. Id. at 9.

{¶35} In 1911, the Hamilton County Court of Common Pleas explained this well-established rule: "It appears to be well settled that when an offense against a criminal statute may, in the same transaction, be committed in one or more ways as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute, if they are not repugnant; and proof of any one of them will sustain the indictment.

{¶36} "***

{¶37} "Where an offense created by statute may be committed in various ways, stated in the statute disjunctively, and the same punishment is named for the crime whether it is committed in one or all of the ways named, it may be alleged to have been committed in more than one way." *State v. Baschang* (Feb. 1911), 24 Ohio Dec. 628, 630-632, quoting 1 Bishop, New Crim. Proccd; Sec. 436 and Beale, Crim. Pl. & Pr. Sec. 104.

{¶38} The Supreme Court of Ohio recently addressed this issue, albeit with respect to jury instructions and not a grand jury indictment. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787. In *State v. Minifee*, 8th Dist. No. 91017, 2009-Ohio-3089, ¶57, the Eighth District Court of Appeals found the situation analogous to a grand jury indictment, and applied the *Gardner* rationale: "[a]lthough Crim.R. 31(A) requires juror animity on each element of the crime, jurors need not agree to a single way by which an

element is satisfied. *Richardson v. United States* (1999), 526 U.S. 813, 817. Applying the federal counterpart of Crim.R. 31(A), the *Richardson* court stated that a 'jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.'" Id. at ¶57, quoting *Gardner* at ¶38; see, also, *State v. Gilbert*, 8th Dist. No. 90615, 2009-Ohio-463, ¶17-19 ("firearm specifications found not to be duplicitous when there was substantial evidence to support each alternative means of the specifications"). See, also, *State v. Brime*, 10th Dist. No. 09AP-491, 2009-Ohio-6572.

{¶39} Thus, we determine Mr. Fitzpatrick's assignments of error that the court lacked subject-matter jurisdiction due to a defective indictment to be substantively without merit as well as barred by the doctrine of res judicata, in addition to being validly waived when he substantively pled guilty to the crimes of aggravated robbery and felonious assault. Therefore, we find no abuse of discretion in the trial court's dismissal of Mr. Fitzpatrick's "motion to dismiss his case with prejudice and discharge his sentence."

{¶40} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.