

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-085
- vs -	:	<u>OPINION</u> 5/14/2012
LINDSEY M. WILLIAMS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CR23884

David P. Fornshell, Warren County Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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POWELL, P.J.

{¶ 1} Defendant-appellant, Lindsey Williams, appeals from a decision of the Warren County Court of Common Pleas dismissing his motion to resentence and his motion to withdraw his guilty plea. We affirm.

{¶ 2} In 2006, police surrounded Williams' home after receiving a phone call that he and his girlfriend had a confrontation. The police saw Williams approach the front door of his

home with a handgun. Williams' twin brother, Lance Williams, exited the house and ended up in a struggle with police that ultimately resulted in the police using a Taser to subdue him. Upon seeing this, Williams threatened to shoot one of the officers, and then actually began shooting at them. A standoff ensued for four and one-half hours, during which Williams fired 134 rounds of ammunition at the officers. Williams was able to steal a police cruiser and flee, but was later captured along I-75 after being shot by police.

{¶ 3} In 2007, Williams was indicted on 12 counts of felonious assault, with a seven-year firearm specification attached to each count; one count each of aggravated robbery, inducing panic, improperly discharging a firearm at or into a habitation, and failure to comply with an order or signal of a police officer, with a three-year firearm specification attached to each count; and four counts of misdemeanor aggravated menacing. Williams pled guilty to the counts and specifications in the indictment. The trial court accepted Williams' guilty plea, found him guilty as charged, and sentenced him to a total of 22 years in prison. In 2009, this court affirmed Williams' conviction in *State v. Williams*, 12th Dist. No. CA2007-12-136, 2009-Ohio-435 (*Williams I*).

{¶ 4} Shortly before this court issued its decision in *Williams I*, Williams filed a motion to withdraw his guilty plea in the trial court, alleging that his trial counsel had provided him with ineffective assistance of counsel. Shortly after this court issued its decision in *Williams I*, the trial court denied Williams' motion to withdraw his guilty plea. On November 30, 2009, this court affirmed the trial court's decision denying Williams' motion to withdraw his guilty plea. *State v. Williams*, 12th Dist. No. CA2009-03-032, 2009-Ohio-6240 (*Williams II*). On January 29, 2010, Williams filed a notice of appeal and a motion for delayed appeal of this court's decision in *Williams II* in the Ohio Supreme Court.

{¶ 5} On March 1, 2010, Williams filed an App.R. 26(B) application to reopen his direct appeal in *Williams I*, arguing his appellate counsel provided him with ineffective

assistance by, among other things, failing to argue the trial court erred by not properly informing him about postrelease control at his 2007 sentencing hearing. On March 11, 2010, the state moved the trial court to resentence Williams to resolve his claim that the trial court failed to inform him about postrelease control at his 2007 sentencing hearing.

{¶ 6} On March 24, 2010, the Ohio Supreme Court granted Williams' motion to file a delayed appeal from this court's decision in *Williams II* and ordered him to file a memorandum in support of jurisdiction within 30 days. *State v. Williams*, 124 Ohio St.3d 1519, 2010-Ohio-1075. On March 31, 2010, Williams filed in the Ohio Supreme Court a memorandum in support of jurisdiction, arguing in his two propositions of law that (1) a court cannot dismiss an affidavit filed in support of a motion to withdraw a plea based on unsubstantiated speculation and deny a hearing on the basis of such speculation, and (2) a defendant cannot be required to provide "overly specific" information in support of his motion to withdraw his plea when such information is not in his possession because of his trial counsel's ineffectiveness.

{¶ 7} Also on March 31, 2010, Williams filed with the trial court a second motion to withdraw his guilty plea, arguing his trial counsel provided him with ineffective assistance of counsel and the state "potentially" failed to provide him with certain, unspecified *Brady* evidence in the case. Williams further argued that because he was not informed of postrelease control at his 2007 sentencing hearing, his sentence was void, and therefore under *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, ¶ 8-10, his motion to withdraw his plea had to be considered under the "freely and liberally granted" standard applicable to presentence motions to withdraw a plea rather than the "manifest injustice" standard applicable to post-sentence motions to withdraw a plea.

{¶ 8} On May 4, 2010, the trial court issued a decision and entry denying Williams' second motion to withdraw his guilty plea. In support of its decision, the trial court first noted

that even under *Boswell*, a defendant does not have an absolute right to withdraw his guilty plea. The trial court then found that Williams had made a knowing, intelligent and voluntary guilty plea and that none of the evidence he presented in support of his motion to withdraw his guilty plea negated this conclusion, but instead showed merely that he was dissatisfied with his sentence, which the trial court concluded was an insufficient basis for allowing him to withdraw his plea.

{¶ 9} On June 23, 2010, the Ohio Supreme Court denied Williams leave to appeal and dismissed his appeal as not involving any substantial constitutional questions. *State v. Williams*, 125 Ohio St.3d 1462, 2010-Ohio 2753. On July 2, 2010, the trial court held a resentencing hearing for Williams, at which it personally addressed Williams and informed him that at the conclusion of his sentence he was subject to a mandatory, five-year period of postrelease control. On July 13, 2010, the trial court issued a "Re-Sentencing Entry" in which the trial court stated that it held the July 2, 2010 resentencing hearing "for the sole purpose of verbally informing [Williams] of post-release control[.]" and that it had so informed Williams about postrelease control at the resentencing hearing.

{¶ 10} On November 3, 2010, this court denied Williams' application to reopen his appeal in *Williams I*, finding that since Williams had been properly informed about postrelease control at his July 2, 2010 resentencing hearing, his appellate counsel could not be deemed to have provided him with ineffective assistance for that reason or for any other. *State v. Williams*, 12th Dist. No. 2009-03-032 (Nov. 3, 2010) (Entry Denying Application to Reopen Appeal).

{¶ 11} On April 18, 2011, this court dismissed Williams' appeal from the trial court's decision denying his second motion to withdraw his guilty plea, holding that under *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94 (1978) and its progeny, the trial court lacked jurisdiction to rule on Williams' second motion to withdraw his

guilty plea, because this court already had affirmed Williams' conviction in *Williams I*. *State v. Williams*, 12th Dist. No. CA2010-06-050, 2011-Ohio-1875, ¶ 12-13 (*Williams III*).

{¶ 12} On April 29, 2011, Williams, acting pro se, filed an application for reconsideration of our decision in *Williams III*. On June 14, 2011, this court denied Williams' pro se application for reconsideration, stating in relevant part:

[A]ppellant argues that if the trial court lacked jurisdiction to rule on his second motion to withdraw his guilty plea, it likewise had no jurisdiction to conduct another sentencing hearing. This argument presents a new issue not previously argued in this appeal. Further, it ignores R.C. 2929.191 and case law which holds that a trial court has jurisdiction to conduct a new sentencing hearing on the limited issue of post-release control.

State v. Williams, 12th Dist. No. CA2010-06-050 (June 14, 2011) (Entry Denying Application for Reconsideration).

{¶ 13} On May 18, 2011, Williams filed in the trial court a motion to resentence, arguing that under *Williams III*, the trial court lacked jurisdiction to resentence him on July 13, 2010, while his appeal of this court's decision in *Williams II* to the Ohio Supreme Court remained pending, and that the trial court "did not regain jurisdiction to entertain motions filed during the pendency of [his appeal to the Ohio Supreme Court] because there was no remand." On June 2, 2011, Williams filed a third motion to withdraw his guilty plea, arguing as he had in his first two motions to withdraw his guilty plea, that his trial counsel had provided him with ineffective assistance of counsel and that the state failed to turn over certain *Brady* material to him.

{¶ 14} On July 11, 2011, the trial court dismissed Williams' motion to resentence and his third motion to withdraw his guilty plea. In dismissing Williams' motion to resentence, the trial court found that while Williams was correct in arguing that the trial court did not have jurisdiction to rule on the state's motion to resentence him during the pendency of his appeal of this court's decision in *Williams II* to the Ohio Supreme Court, the trial court did not

resentence Williams until after the Ohio Supreme Court dismissed his appeal from *Williams II*. The trial court also found that under R.C. 2929.191, it had jurisdiction to resentence Williams to inform him about postrelease control at any time before he is released from prison.

{¶ 15} The trial court, in dismissing Williams' third motion to withdraw his guilty plea, found that Williams had raised the arguments presented therein in his first two motions to withdraw his guilty plea and that this court had affirmed Williams' conviction on direct appeal, and therefore Williams was barred by res judicata from raising those same arguments again. The trial court also found that under *Williams III*, 2011-Ohio-1875 at ¶ 12-14, once an appeal is taken, a trial court loses jurisdiction to rule on a post-sentence motion unless the matter is remanded by an appellate court, and therefore it lacked jurisdiction to rule on Williams' third motion to withdraw his guilty plea.

{¶ 16} Williams now appeals from the trial court's decision dismissing his motion to resentence and his third motion to withdraw his guilty plea, assigning the following as error:

{¶ 17} Assignment of Error No. 1:

{¶ 18} A TRIAL COURT CANNOT ENTERTAIN A MOTION TO RE-SENTENCE WHILE AN APPEAL IS PENDING IN FRONT OF THE STATE SUPREME COURT.

{¶ 19} Assignment of Error No. 2:

{¶ 20} EVIDENCE TAKEN AT A VOID HEARING CANNOT BE USED TO INVOKE THE DOCTRINE OF RES JUDICATA.

{¶ 21} In his first assignment of error, Williams essentially argues that while his appeal from *Williams II* was pending in the Ohio Supreme Court, "all actions taken subsequent to the filing of that appeal are void[.]" including the trial court's decisions to overrule his second motion to withdraw his guilty plea and to resentence him on July 13, 2010, and therefore his second motion to withdraw his guilty plea "must be reinstated." We disagree with this

argument.

{¶ 22} Williams contends that under *Williams III*, this court stated "that because an appeal was pending with the Supreme Court of Ohio in this matter, the Trial Court was without jurisdiction to entertain [his] Motion to Withdraw Plea filed during the pendency of this appeal." He also contends that this court held in *Williams III* that the trial court's actions on his second motion to withdraw his guilty plea "were void[,]" but that this court did not address the trial court's July 13, 2010 resentencing of him. Williams asserts that the trial court's July 13, 2010 resentencing of him was also void. However, Williams has mischaracterized this court's holding in *Williams III*.

{¶ 23} Contrary to what Williams contends, this court did not hold in *Williams III* that the trial court was without jurisdiction to entertain Williams' second motion to withdraw his guilty plea because his appeal from this court's decision in *Williams II* was pending before the Ohio Supreme Court. Rather, this court held in *Williams III* that under *Special Prosecutors*, 55 Ohio St.2d 94 and its progeny, the trial court was without jurisdiction to decide Williams' second motion to withdraw his guilty plea, because this court had affirmed his conviction on his direct appeal in *Williams I*. *Williams III*, 2011-Ohio-1875 at ¶ 12-13. This court also rejected Williams' assertion that the trial court regained jurisdiction to entertain his second motion to withdraw his guilty plea once the Ohio Supreme Court denied jurisdiction to hear his appeal from this court's decision in *Williams II*, finding that "[a] trial court loses jurisdiction to decide * * * a motion [to withdraw a plea] once an appeal is taken, 'and, absent a remand, it does not regain jurisdiction subsequent to the Court of Appeals' decision.'" *Williams III* at ¶ 14, quoting *Special Prosecutors* at 97.

{¶ 24} Furthermore, a trial court retains jurisdiction under R.C. 2929.191 to correct a void sentence at any time by holding a hearing as mandated under that section if the sentence was imposed after July 11, 2006, so long as the offender has not completed the

prison term imposed in his original sentence. *State v. Perry*, Butler App. Nos. CA2011-01-008 & CA2011-02-107, 2011-Ohio-3637, ¶ 19.

{¶ 25} Here, Williams was originally sentenced in 2007, and thus after July 11, 2006, and at the time the trial court resentenced Williams on July 13, 2010, he had yet to complete the 22-year sentence imposed on him in 2007. Therefore, the trial court had jurisdiction under R.C. 2929.191 to correct Williams' void sentence by informing him about postrelease control at the July 2, 2010 resentencing hearing and then issuing the July 13, 2010 resentencing entry. Moreover, even though the trial court did not have jurisdiction to take action on the state's March 11, 2010 motion to resentence Williams while his appeal of this court's decision in *Williams II* was pending before the Ohio Supreme Court, the trial court did not resentence Williams until after the Ohio Supreme Court declined to accept jurisdiction over Williams' appeal on June 23, 2010. At that point, the trial court had jurisdiction to resentence Williams, in order to inform him about postrelease control.

{¶ 26} Williams appears to have conceded much of the foregoing during oral argument. Nevertheless, he contends that the trial court did not have jurisdiction to resentence him in July 2010 because the trial court did not resentence him sua sponte, but only at the state's request, and since the state raised its motion to resentence at a time when his appeal from *Williams II* was pending in the Ohio Supreme Court, the trial court lacked the jurisdiction to act on it even after the Ohio Supreme Court dismissed his appeal on June 23, 2010. However, Williams has not cited any authority nor provided any sound argument in support of this contention, and we are aware of none.

{¶ 27} Williams also argues that when the trial court resentenced him, "his charges were altered to increase the felony level for one of the counts of his indictment without changing the elements of the offense[.]" and therefore, even if this court found his resentencing to be valid, "one charge remains void and as such, any motion filed to withdraw

the plea is pre-sentence." This argument lacks merit.

{¶ 28} Initially, there is no evidence to support Williams' claim that the trial court, in resentencing him, altered the charges against him "by increasing the felony level for one of the counts of his indictment without changing the elements of the offense," irrespective of what Williams means by the phrase "without changing the elements of the offense." Indeed, the trial court stated in its July 13 , 2010 resentencing entry that it held the resentencing hearing for Williams for the "sole purpose" of informing him about postrelease control. Moreover, there is nothing in the resentencing entry to support Williams' claim that in resentencing him, the trial court increased the felony level for one of the counts of his indictment.

{¶ 29} The argument that Williams might be trying to make here is the one he made in his application to reopen his direct appeal, in which he argued that the trial court lacked jurisdiction over the count in the indictment charging him with failure to comply with a signal or order of a police officer. If this is what Williams is arguing, we reject it for the same reasons we rejected it in denying his application to reopen, to wit: Williams' indictment was not defective, because the indictment included the degree of the offense and thus was sufficient to state a charge under R.C. 2945.75(A)(1). *Williams*, 12th Dist. No. CA2009-03-032, citing *State v. Hill*, 6th Dist. No. WD-07-022, 2008-Ohio-5798; and *State v. Fields*, 4th Dist. No. 06CA3080, 2007-Ohio-4191.

{¶ 30} In light of the foregoing, Williams' first assignment of error is overruled.

{¶ 31} In his second assignment of error, Williams argues since the trial court's "hearing and ruling" on his second motion to withdraw his guilty plea was void, "then nothing in these void proceedings can be said to exist in any context[,]" and that any evidence taken at a void hearing "is a nullity" and cannot be used to invoke the doctrine of res judicata since "[r]es judicata does not apply to a nullity." Therefore, he asserts, this matter must be

remanded to the trial court to rule on his second motion to withdraw his guilty plea "as a post-sentence motion newly filed." We disagree with this argument.

{¶ 32} Williams' argument ignores this court's ruling in *Williams III*, in which we held that a trial court lacks jurisdiction to consider a motion to withdraw a guilty plea once a higher court has affirmed the trial court's judgment of conviction on appeal. *Id.* at ¶ 12, citing *State v. Allen*, 12th Dist. 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.* at ¶ 12, quoting *Special Prosecutors*, 55 Ohio St.2d at 98. *See also*, *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 61, which is cited in *Allen*.

{¶ 33} Because this court affirmed Williams' conviction in *Williams I*, the trial court was without jurisdiction to decide his third motion to withdraw his guilty plea, just as it was without jurisdiction to decide his second motion to withdraw his guilty plea, and therefore the trial court did not err by dismissing Williams' third motion to withdraw his guilty plea. *Williams III* at ¶ 13.

{¶ 34} In light of the foregoing, Williams' second assignment of error is overruled.

{¶ 35} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.