

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25408

Appellee

v.

RONALD R. PHILLIPS, JR.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2005-11-4293(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 23, 2011

MOORE, Judge.

{¶1} Appellant, Ronald R. Phillips, Jr., appeals from the judgment of the Summit County Court of Common Pleas. This Court vacates the judgment.

I.

{¶2} In the direct appeal from Phillips’ conviction, *State v. Phillips*, 9th Dist. No. 24198, 2008-Ohio-6795, this Court set forth the underlying factual and procedural history as follows:

“Akron Police arrested Phillips on November 22, 2005 after conducting a controlled delivery involving approximately 342 grams of methamphetamine. On December 5, 2005, the grand jury indicted Phillips on the following counts: (1) aggravated possession of drugs, pursuant to R.C. 2925.11(A); (2) aggravated trafficking in drugs, pursuant to R.C. 2925.03(A)(2), with a major drug offender specification, pursuant to R.C. 2941.1410; and (3) conspiracy to commit aggravated trafficking, pursuant to R.C. 2925.03(A)(2) and R.C. 2923.01(A)(1)/(2), with a major drug offender specification, pursuant to R.C. 2941.1410. On December 22, 2005, the grand jury returned a supplemental indictment charging the following additional counts: (1) aggravated possession of drugs, pursuant to R.C. 2925.11(A); and (2) possession of marijuana, pursuant to R.C. 2925.11(A). Finally, on May 1, 2006, the grand jury returned a second

supplemental indictment charging Phillips with complicity to commit aggravated trafficking in drugs in violation of R.C. 2923.01, pursuant to R.C. 2925.03(A)(2) and R.C. 2923.03(A)(2)/(3), with a major drug offender specification.

“Phillips initially pled not guilty to all of the foregoing charges, but changed his plea before trial. On December 13, 2006, Phillips came before the trial court with his trial counsel for a plea and sentencing hearing. Phillips signed a ‘written plea of guilt’ in which he pled to the following charges: (1) two counts of aggravated possession, pursuant to R.C. 2925.11(A); (2) possession of marijuana, pursuant to R.C. 2925.11(A); and (3) complicity to commit trafficking, pursuant to R.C. 2925.03(A)(2) and R.C. 2923.03(A)(2)/(3), with a major drug offender specification, pursuant to R.C. 2941.1410.” Id. at ¶2-3.

{¶3} The trial court dismissed the remaining charges and sentenced Phillips to fifteen years of incarceration. On December 23, 2008, this Court affirmed the trial court’s judgment.

{¶4} On February 26, 2010, Phillips filed a motion for leave to withdraw his guilty pleas pursuant to Crim.R. 32.1, the State responded in opposition. On April 22, 2010, the trial court overruled the motion because it determined that Phillips’ contentions were barred by res judicata and law of the case.

{¶5} Phillips timely filed a notice of appeal. He has raised four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING [PHILLIPS’] MOTION TO WITHDRAW GUILTY PLEA DUE TO HIS [SIC] PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY [SIC] AS THE STATUTORY CHARGE IS UNCONSTITUTIONAL AND IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED TO THE PREJUDICE OF [PHILLIPS] BY FINDING THAT A GUILTY PLEA EITHER WAIVE[D] OR FORECLOSED THE RIGHT OF AN ACCUSED TO BRING A FACIAL CONSTITUTIONAL ATTACK ON THE STATUTE UNDERLYING HIS CONVICTION AND/OR THE APPLICATION OF THE DOCTRINE OF RES JUDICATA BARRED SUCH REVIEW.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED TO THE PREJUDICE OF [PHILLIPS] BY FAILING TO DETERMINE SUBSEQUENTLY TO THE CHALLENGE OF THE CONSTITUTIONALITY OF THE STATUTORY CHARGE, WHETHER THE SUBSEQUENT CHARGES AND EVIDENCE WHICH STEMMED AS A RESULT OF THIS INITIAL UNDERLYING OFFENSE QUALITY [SIC] UNDER THE FRUITS OF THE POISONOUS TREE DOCTRINE.”

ASSIGNMENT OF ERROR IV

“[PHILLIPS’] GUILTY PLEA WAS UNKNOWINGLY, INVOLUNTARILY AND UNINTELLIGENTLY ENTERED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 9, 10, AND 16 OF THE OHIO CONSTITUTION.”

{¶6} In his assignments of error, Phillips contends that the trial court should have allowed him to withdraw his guilty pleas because they were not knowingly, intelligently and voluntarily made; the trial court erred in finding that his guilty plea and res judicata foreclosed a facial constitutional attack on the statute underlying his conviction; the trial court failed to determine the constitutionality of the statutory charge and whether the charges stemming from the original search were “fruit of the poisonous tree;” and, the guilty pleas were not knowingly, intelligently and voluntarily made due to ineffective assistance of counsel. We do not reach the merits of any of Phillips’ contentions because we conclude that the trial court was without jurisdiction in the first instance to consider his motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. Accordingly, we vacate the trial court’s judgment.

{¶7} In its brief on appeal, the State directs this Court to *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, to support its contention that the trial court could not have granted Phillips’ motion. Based upon the rule set forth in *Special Prosecutors*, because this Court affirmed Phillips’ direct appeal, the trial court

never had jurisdiction to *consider* the motion to withdraw his guilty plea, let alone grant the motion. *Id.* at 97.

{¶8} In *Special Prosecutors*, a defendant pleaded guilty to murder. He appealed and the trial court affirmed his conviction. Subsequently, he sought to withdraw his guilty plea pursuant to Crim.R. 32.1. *Id.* at 94. The trial court held a hearing and granted the motion. *Id.* The State failed to perfect an appeal from that decision. Subsequently, the trial court scheduled the matter for trial. *Id.* Prior to trial, special prosecutors assigned to the case filed in the court of appeals a complaint for a writ of prohibition to prevent the trial court from conducting a trial “based upon the alleged lack of jurisdiction of the trial court to permit the withdrawal of [defendant’s] plea of guilty.” *Id.* at 94-95. The court of appeals denied the writ and the Supreme Court of Ohio considered the matter as an appeal as of right. *Id.* at 95. The Supreme Court held “that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals’ decision.” *Id.* at 97. The *Special Prosecutors* Court “[found] a total and complete want of jurisdiction by the trial court to grant the motion to withdraw [defendant’s] plea of guilty and to proceed with a new trial.” *Id.*; *State v. Ketterer* 126 Ohio St.3d 448, 2010-Ohio-3831, at ¶62.

{¶9} The relevant procedural history in this case is indistinguishable from *Special Prosecutors*. Phillips pleaded guilty to the charges. He appealed his convictions and was represented by counsel on appeal. Subsequent to this Court’s decision affirming his convictions, he filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. Although the trial court did not grant the motion, it did consider the merits of Phillips’ argument. The trial court had no jurisdiction to do so. *Special Prosecutors*, 55 Ohio St.2d at 95.

{¶10} Accordingly, we vacate the trial court’s judgment.

III.

{¶11} Because the trial court had no jurisdiction to consider Phillips' motion to withdraw his guilty pleas pursuant to Crim.R. 32.1, we vacate the trial court's judgment.

Judgment vacated.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

RONALD R. PHILLIPS, JR. pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.