

[Cite as *State v. Thomas*, 2010-Ohio-4856.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090716
		C-090463
Plaintiff-Respondent-Appellee,	:	TRIAL NO. B-0801083
vs.	:	
		<i>DECISION.</i>
AKO THOMAS,	:	
Defendant-Petitioner-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in C-090716; Appeal Dismissed in C-090463

Date of Judgment Entry on Appeal: October 6, 2010

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,  
Assistant Prosecuting Attorney, for Plaintiff-Respondent-Appellee,

*Ako Thomas*, pro se.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Petitioner-appellant Ako Thomas has taken these consolidated appeals from the Hamilton County Common Pleas Court’s judgments denying his R.C. 2953.21 petition for postconviction relief and overruling his “Motion Requesting Resentencing to Correct a Void Sentence.” We affirm.

{¶2} In 2008, Thomas was convicted upon his guilty plea to cocaine trafficking and sentenced to four years in prison. We affirmed his conviction on appeal.<sup>1</sup>

{¶3} In March 2009, while his appeal was pending, Thomas filed with the common pleas court his motion requesting resentencing and a Crim.R. 32.1 motion to withdraw his guilty plea. In April, he filed his postconviction petition. The court overruled the motions and denied the petition, and these appeals followed.

***Appeal No. C-090463***

{¶4} We note preliminarily that, in the appeal numbered C-090463, Thomas appeals from the judgment overruling his motion requesting resentencing. But in his brief, he does not assign as error the overruling of the motion. We, therefore, dismiss as abandoned the appeal numbered C-090463.<sup>2</sup>

***Appeal No. C-090716***

{¶5} In the appeal numbered C-090716, Thomas appeals from, and advances a single assignment of error challenging, the denial of his postconviction petition without a hearing. This challenge is untenable.

{¶6} To prevail on a postconviction claim, the petitioner must demonstrate an infringement of his rights in the proceedings resulting in his conviction that

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<sup>1</sup> See *State v. Thomas* (Oct. 7, 2009), 1st Dist. No. C-080940.

<sup>2</sup> See *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶49; *State v. Perez*, 1st Dist. Nos. C-040363, C-040364, and C-040365, 2005-Ohio-1326, ¶24; *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶8.

rendered the conviction void or voidable under the state or federal constitution.<sup>3</sup> The petitioner bears the initial burden of demonstrating, through his petition, supporting affidavits, and the case record, “substantive grounds for relief.”<sup>4</sup> A common pleas court may dismiss a postconviction claim without a hearing if the petitioner has failed to submit with his petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief.<sup>5</sup>

**{¶7} First postconviction claim: ineffective assistance of trial counsel.**

In his first postconviction claim, Thomas contended that he had been denied his constitutional right to the effective assistance of counsel, when his trial counsel had failed to move to suppress the cocaine seized incident to his arrest on an outstanding warrant, following a traffic stop. Thomas supported his claim with outside evidence in the form of his and his girlfriend’s affidavits. The pair averred that a police officer had stopped the girlfriend’s car and had arrested Thomas, the car’s passenger, on an outstanding warrant. The officer, they asserted, did not give them a reason for stopping the car, did not tell Thomas “exactly what [he] was being arrest[ed] for,” and did not cite Thomas’s girlfriend for a traffic violation. Thus, Thomas argued, the stop was not, consistent with the Fourth Amendment to the United States Constitution, effected upon “probable cause,” and his trial counsel was ineffective in refusing to accede to his request to move to suppress the fruits of the stop.

{¶8} A knowing, voluntary, and intelligent guilty plea waives any “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea,”<sup>6</sup> including a challenge to trial counsel’s failure to

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<sup>3</sup> See R.C. 2953.21(A)(1); *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13.

<sup>4</sup> See R.C. 2953.21(C).

<sup>5</sup> See *id.*; *State v. Pankey* (1981), 68 Ohio St.2d 58, 59, 428 N.E.2d 413; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus.

<sup>6</sup> *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602; accord *State v. Morgan*, 1st Dist. No. C-080011, 2009-Ohio-1370, ¶25.

file a pretrial motion to suppress.<sup>7</sup> Thomas's direct appeal was submitted, and we determined the appeal, consistent with the procedure set forth in *Anders v. California*.<sup>8</sup> Thus, in affirming Thomas's conviction, we necessarily concluded that Thomas had entered his guilty plea knowingly, voluntarily, and intelligently.

{¶9} The affidavits offered by Thomas in support of his first postconviction claim may fairly be read to allege otherwise. But his self-serving suggestion that his guilty plea was unknowing or involuntary because his counsel had disregarded his request to move for suppression is discredited by his confirmation, both in his plea form and during the Crim.R. 11 colloquy at the plea hearing, that he was entering his plea knowingly and voluntarily.<sup>9</sup>

{¶10} Thomas thus failed to sustain his burden of submitting evidentiary material setting forth sufficient operative facts to demonstrate that his guilty plea had been the unknowing or involuntary product of his trial counsel's ineffectiveness in failing to file a motion to suppress.<sup>10</sup> Therefore, Thomas's guilty plea waived his first postconviction claim, and the common pleas court properly denied the claim without an evidentiary hearing.

{¶11} ***Second postconviction claim: void sentence.*** In his second postconviction claim, Thomas sought relief from his sentence on the ground that the sentence was void because it did not include a statutorily mandated driver's license suspension. This court has previously held that although a sentence is void when it does not contain a statutorily mandated term like postrelease-control notification, a driver's license suspension is not a "statutorily mandated term" akin to postrelease control.<sup>11</sup> Consequently, under *State v. Fain*, a trial court's omission of a statutorily

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<sup>7</sup> See *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶116.

<sup>8</sup> (1967), 386 U.S. 738, 87 S.Ct. 1396.

<sup>9</sup> See *State v. Calhoun*, 86 Ohio St.3d 279, 284-285, 1999-Ohio-102, 714 N.E.2d 905.

<sup>10</sup> See R.C. 2953.21(C); *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

<sup>11</sup> See *State v. Fain*, 1st Dist. Nos. C-080830 and C-080832, 2010-Ohio-2455.

mandated driver's license suspension does not render void an otherwise lawful sentence. We conclude that the trial court properly denied Thomas's postconviction claim contending that his sentence was void because the doctrine of res judicata applied to bar that claim.

{¶12} “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 the trial [that] resulted in that judgment of conviction[] or on an appeal from that judgment.”<sup>12</sup> Thus, res judicata bars a postconviction claim that could fairly have been determined in the direct appeal, based upon the trial record and without resort to evidence outside the record.<sup>13</sup> Thomas's second postconviction claim could fairly have been determined in Thomas's direct appeal from his conviction, and the claim was accordingly barred by res judicata in this case.

{¶13} **Conclusion.** The common pleas court properly denied Thomas's postconviction petition. We, therefore, overrule the assignment of error and affirm the common pleas court's judgment denying the petition.

Judgment accordingly.

**SUNDERMANN, P.J., HENDON and MALLORY, JJ.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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<sup>12</sup> *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

<sup>13</sup> See *id.*; *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.