

[Cite as *State v. Santiago*, 2018-Ohio-964.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106158

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JESUS SANTIAGO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-10-533862-C

BEFORE: McCormack, P.J., Boyle, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 15, 2018

FOR APPELLANT

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Jesus Santiago appeals from a judgment of the Cuyahoga County Court of Common Pleas denying his “motion to notice plain error and correct manifest miscarriage of justice.” For the reasons that follow, we affirm the trial court.

Procedural History

{¶2} In February 2010, Santiago was indicted on two counts of drug trafficking in violation of R.C. 2925.03(A)(2), two counts of drug possession in violation of R.C. 2925.11(A) (one count for possession of heroin, the other for possession of cocaine), and one count of possessing criminal tools in violation of R.C. 2923.24(A). The jury found him not guilty of the drug trafficking offenses but guilty of both drug possession charges and guilty of possessing criminal tools. The trial court sentenced him to eight years incarceration for the possession of heroin and two years for the possession of cocaine, to be served consecutively, and one year for the possessing criminal tools conviction, to be served concurrently, for a total of ten years incarceration.

{¶3} Santiago appealed his convictions, arguing insufficient evidence, manifest weight of the evidence, error in instructing the jury, ineffective assistance of counsel, and cumulative error that deprived him of a fair trial. Santiago also claimed that the trial court’s journal entries incorrectly referenced forfeiture specifications that were dismissed.

State v. Santiago, 8th Dist. Cuyahoga No. 95333, 2011-Ohio-1691 (“*Santiago I*”). We affirmed Santiago’s convictions but remanded for the trial court to issue a nunc pro tunc

entry to correct the clerical error in the journal entry to reflect that the forfeiture specifications had been deleted. *Id.*

{¶4} In April 2013, Santiago filed a “motion for reduced punishment,” in which he argued that his convictions for possession of heroin and possession of cocaine were allied offenses that should have merged at sentencing. The trial court denied the motion, and this court subsequently dismissed Santiago’s appeal for failure to file the record. *State v. Santiago*, 8th Dist. Cuyahoga No. 100029 (July 23, 2013) (“*Santiago II*”).

{¶5} In February 2014, Santiago filed a “Motion for reduced punishment,” in which he again argued that his convictions for possession of heroin and possession of cocaine were allied offenses that should have merged at sentencing. The trial court denied the motion, finding that the offenses were not allied because one involved the possession of heroin and the other involved the possession of cocaine. This court affirmed the trial court, agreeing with the trial court’s determination and also finding that Santiago’s argument is barred by res judicata because he failed to raise this issue in his direct appeal. *State v. Santiago*, 8th Dist. Cuyahoga No. 101601, 2015-Ohio-1300 (“*Santiago III*”).

{¶6} In July 2017, Santiago filed a pro se “motion to notice plain error and correct manifest miscarriage of justice.” The trial court denied his motion. Santiago now files this pro se appeal, assigning two errors for our review:

I. The trial court’s judgment denying appellant’s Crim.R. 52(B) motion to notice plain error and correct manifest miscarriage of justice is contrary to the manifest weight of the evidence and requires reversal.

II. Appellant is actually innocent regarding possession of heroin and cocaine, but for double jeopardy violation, no juror acting reasonable, would have voted, find him guilty, beyond a reasonable doubt.

Law and Analysis

{¶7} In his first assignment of error, Santiago purportedly contends that his convictions were against the manifest weight of the evidence. In support, he argues that the trial court failed to merge the drug trafficking and drug possession counts. In his second assignment of error, he again contends that the offenses of trafficking and possession are allied, arguing that because he was acquitted of drug trafficking, he should have been acquitted of the possession charges. Because Santiago's claims are interrelated, we address them together and find that Santiago's argument in its entirety is barred by res judicata.

{¶8} 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 that judgment of conviction, or on an appeal from that judgment.

State v. Reynolds, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997), citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), syllabus. Res judicata prevents repeated attacks on a final judgment, and it applies to all issues that were or might have been litigated. *State v. Orr*, 8th Dist. Cuyahoga No. 100841, 2014-Ohio-5274, ¶ 3. The issue of whether two offenses constitute allied offenses subject to merger must be raised on

direct appeal from a conviction, or res judicata applies to bar any subsequent attempts to raise the issue. *State v. Fayne*, 8th Dist. Cuyahoga No. 105641, 2017-Ohio-8889, ¶ 9, citing *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 26.

{¶9} First, we note that Santiago claimed in his direct appeal that his convictions were against the manifest weight of the evidence. Such a claim is therefore barred by res judicata. Secondly, to the extent that Santiago argues the trial court erred because drug trafficking and drug possession are allied offenses and should have been merged, this claim is also barred by res judicata.

{¶10} In *Santiago III*, Santiago argued that his convictions for possession of heroin and possession of cocaine were allied offenses that should have merged at sentencing. In that appeal, we held that because Santiago did not raise any “issues regarding his sentence or whether the trial court erred in failing to consider allied offenses prior to sentencing” through his direct appeal, his allied offense claim was barred by res judicata. *Santiago III* at ¶ 8. Although *Santiago III* addressed the issue of merging the possession of cocaine and possession of heroin counts, the same analysis holds true for this appeal. Because Santiago failed to claim on direct appeal that drug trafficking is an allied offense of drug possession, he cannot now raise the issue in this, his fourth, appeal.

{¶11} Santiago’s first and second assignments of error are overruled.

{¶12} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR