

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-909
v.	:	(C.P.C. No. 97CR-06-3627)
	:	
Walter E. Myers,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 19, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Walter E. Myers, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Walter E. Myers, appeals from a judgment of the Franklin County Court of Common Pleas denying his "Motion to Impose a Valid Sentence." For the following reasons, we affirm that judgment.

Factual and Procedural Background

{¶ 2} In 1998, a Franklin County jury found appellant guilty of a number of offenses, including multiple counts of rape and aggravated burglary, as well as counts of burglary and kidnapping. The trial court sentenced him accordingly. This court affirmed appellant's rape and kidnapping convictions but reversed his convictions for burglary and aggravated burglary as well as the sexually violent predator specification. We remanded the matter for resentencing. *State v. Myers* (Sept. 30, 1999), 10th Dist. No. 98AP-1448.

In 2000, the trial court again sentenced appellant, this time only for the rape convictions and the one kidnapping conviction. Appellant did not appeal this sentencing.

{¶ 3} In 2011, however, appellant filed in the trial court a "Motion to Impose a Valid Sentence." In the motion, appellant argued that his sentences were void because (1) the trial court failed to properly impose post-release control, (2) his kidnapping conviction should have merged for purposes of sentencing with his rape conviction, and (3) his jury verdict forms violated R.C. 2945.75. The trial court denied his motion, in part based on res judicata.

{¶ 4} Appellant appeals and assigns the following errors:

First Assignment of Error

The trial court erred when it allowed petitioner to remain incarcerated under a void sentence in violation of the Due Process Clause.

Second Assignment of Error

The trial court erred when it imposed separate sentences for allied offense of similar import.

Third Assignment of Error

The trial court violated R.C. 2945.75 and denied appellant his rights to due process and trial by jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 5, 10, and 16 of the Ohio Constitution, when it convicted him of, and sentenced him * * * in the absence of a jury verdict setting forth the degree of offense for each count or a statement that the required aggravating element had been found to justify a conviction for the greater degree of offense for each count.

Appellant's Second and Third Assignments of Error—Res Judicata

{¶ 5} Appellant's second and third assignments of error are both barred by res judicata. Under the doctrine of res judicata, a final judgment 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 the defendant raised or could have raised at trial or on appeal. *State v. Brown*, 167 Ohio

App.3d 239, 2006-Ohio-3266, ¶ 7 (10th Dist.), citing *State v. Szefcyk*, 77 Ohio St.3d 93, 96 (1996).

{¶ 6} These assignments of error could have been presented in appellant's original appeal to this court. *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, ¶ 22, 30 (arguments regarding merger and jury verdict form's alleged noncompliance with R.C. 2945.75 should have and could have been raised in previous direct appeal from conviction); *State v. Townsend*, 8th Dist. No. 97214, 2012-Ohio-496, ¶ 7-8 (merger issue barred by res judicata); *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 11 (allied offenses argument barred by res judicata). Having failed to do so, res judicata bars him from raising them now.

{¶ 7} We recognize that an exception to the application of res judicata applies to void judgments. *State v. Mitchell*, 187 Ohio App.3d 315, 320, 2010-Ohio-1766, ¶ 22, fn. 1 (6th Dist.), citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 30. However, the arguments appellant presents in these assignments of error would not render the trial court's judgment void. *State v. Hines*, 193 Ohio App.3d 660, 2011-Ohio-3125, ¶ 16 (3d Dist.) (applying res judicata to bar consideration of alleged violation of R.C. 2945.75 because violation would not render conviction void); *State v. Grooms*, 9th Dist. No. 25819, 2011-Ohio-6062, ¶ 11 (same); *Timmons* at ¶ 12 (applying res judicata to bar consideration of alleged merger error that would not render judgment void). Accordingly, res judicata bars consideration of appellant's issues in these assignments of error.

Appellant's First Assignment of Error—Imposition of Post-Release Control

{¶ 8} This assignment of error alleges that appellant's sentence is void because the trial court failed to properly impose post-release control. The improper imposition of post-release control may render at least that portion of a sentence void. *Simpkins*, syllabus. Therefore, res judicata would not bar consideration of this assignment of error. *State v. Taste*, 2d Dist. No. 22955, 2009-Ohio-5867, ¶ 22-26. However, upon a review of appellant's sentencing, we conclude that the trial court properly imposed post-release control.

{¶ 9} A trial court must notify a defendant of post-release control, if applicable, at sentencing and in the court's sentencing judgment entry. *State v. Singleton*, 124 Ohio

St.3d 173, 2009-Ohio-6434, ¶ 22. Appellant concedes the trial court properly advised him of post-release control at his sentencing. However, he contends that the notification in his sentencing entry was insufficient. We disagree.

{¶ 10} Pursuant to R.C. 2929.14(D)(1), a trial court is obligated to include in its sentencing entry "a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division." Here, the trial court's judgment entry imposing appellant's sentence stated that "the Court notified the Defendant orally and in writing, of the * * * applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." Appellant claims that this advisement was insufficient because it did not advise him of the length of post-release control or the consequences of violating the terms of his post-release control. We disagree.

{¶ 11} This court has concluded, in rejecting similar arguments, that post-release control may be properly imposed when the "applicable periods" language in the trial court's sentencing entry, such as in the present case, is combined with other written or oral notification of the imposition of post-release control. *State v. Townsend*, 10th Dist. No. 10AP-983, 2011-Ohio-5056, ¶ 7-14 (analyzing cases from this court that have considered notifications with sentencing entries that contain "applicable periods" language); *State v. Holloman*, 10th Dist. No. 11AP-454, 2011-Ohio-6138, ¶ 11.

{¶ 12} Here, other written and oral notification exists in the record in addition to the sentencing entry's notification. The trial court notified appellant at his original sentencing that he would be subject to a period of post-release control and of the consequences for violating post-release control.¹ Additionally, appellant also signed a form entitled "Notice (Prison Imposed)" on the day of his sentencing. That notice informed him that he would have a period of post-release control after his release from prison. The notice also informed him of the possible consequences that would result from a violation of his post-release control. This was the same information that we found sufficient to properly impose post-release control in *Holloman* at ¶ 12, and *State v. Cunningham*, 10th Dist. No. 10AP-452, 2011-Ohio-2045.

¹ Appellant did not file a transcript of his resentencing hearing. Absent the transcript, we presume the regularity in the proceedings, i.e., that the trial court properly advised appellant of post-release control again. *State v. Williams*, 10th Dist. No. 08AP-1090, 2009-Ohio-3233, ¶ 8.

{¶ 13} Because the trial court properly notified appellant of post-release control, we overrule appellant's first assignment of error.

{¶ 14} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
