

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-11 (C.P.C. No. 01CR-7338)
Steven M. Greenberg,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*,
for appellee.

Steven M. Greenberg, pro se.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Steven M. Greenberg, appeals from a judgment of the Franklin County Court of Common Pleas denying his "Motion to Correct Sentence." Because H.B. No. 86 does not apply to defendant's sentence, and res judicata bars both his allied offenses and jail-time credit arguments, we affirm.

I. Facts and Procedural History

{¶ 2} The facts underlying defendant's appeal are largely uncontested. By indictment filed December 19, 2001, defendant was charged with rape, kidnapping, sexual battery, unlawful sexual conduct with a minor, aggravated possession of drugs, two counts of possession of cocaine, and three counts of corrupting another with drugs. Defendant ultimately entered a guilty plea to rape, to attempted abduction, the stipulated lesser included offense of abduction, and to two counts of corrupting another with drugs. The

trial court imposed a sentence of 5-years determinant for the rape, 18-months determinant for the attempted abduction, and 18-months determinant with respect to each of the corruption charges, for a total of 9 years and 6 months. The court gave defendant 6 months of jail-time credit. Defendant was labeled a sexual predator by automatic classification under R.C. 2950.09(A).

{¶ 3} Pursuant to R.C. 2929.20, defendant filed a motion for judicial release on June 27, 2008. By entry filed December 22, 2008, the trial court granted defendant's motion and suspended further execution of the sentence. The court placed defendant on community control for a period of five years with special conditions of intensive supervision, subsequently adding conditions that prohibited defendant from personal internet use at any time or internet access at his place of residence. Although one of the conditions was one year of house arrest, the trial court, on defendant's motion, terminated house arrest on July 13, 2009 but noted defendant remained on community control and was required to continue to comply with the rules and restrictions his community control provided.

{¶ 4} On November 30, 2010, defendant's community control officer filed a statement of violations and request that community control be revoked. At a hearing held on January 26, 2011, defendant, represented by counsel, stipulated probable cause and violations. The trial court revoked defendant's community control and, by entry filed February 4, 2011, imposed defendant's original sentence. The court granted defendant 6 years, 7 months and 40 days of jail-time credit. Defendant followed the court's order with a July 25, 2011 motion for reconsideration and a request for an order suspending further execution of sentence; the trial court denied both.

{¶ 5} Defendant filed a motion for jail-time credit on October 27, 2011, seeking 304 additional days of jail-time credit for the time he was incarcerated awaiting extradition to Ohio from Costa Rica. Plaintiff-appellee, the State of Ohio, argued the doctrine of res judicata barred defendant from raising and litigating the issue. Before the trial court determined the motion for jail-time credit, defendant filed a motion to correct sentence on November 17, 2011. Defendant asserted his sentence should be modified under both 2011 Am.Sub.H.B. No. 86 ("H.B. No. 86") and the allied offenses statute, R.C. 2941.25. The State responded with a memorandum opposing defendant's motion. The

state asserted H.B. No. 86 does not apply retroactively and defendant's allied offenses claim, like his jail-time credit contentions, failed under the doctrine of res judicata. Following defendant's response, the trial court issued an entry on December 21, 2011 denying defendant's motions.

II. Assignments of Error

{¶ 6} Defendant appeals, assigning three errors:

ASSIGNMENT OF ERROR I

Whether the trial court abused its [sic] discretion by ruling House Bill 86 is not retroactive.

ASSIGNMENT OF ERROR II

Whether the trial court abused its [sic] discretion by failing to address allied offenses.

ASSIGNMENT OF ERROR III

Whether the trial court abused its [sic] discretion in denying jail time credit.

III. First Assignment of Error - Application of H.B. No. 86

{¶ 7} Defendant's first assignment of error contends the trial court erred in not applying H.B. No. 86 when it sentenced him at the hearing revoking his community control. Defendant asserts that provisions of the legislation require the trial court not only to presume concurrent sentences but to make findings when imposing consecutive sentences.

{¶ 8} Within H.B. No. 86, Section 4 addresses the legislative intent concerning retroactive application, stating that "[t]he amendments * * * apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B)" of R.C. 1.58 "makes the amendments applicable." *State v. Fields*, 5th Dist. No. CT11-0037, 2011-Ohio-6044, ¶ 10-12. Recognizing the legislative intent expressed in Section 4, defendant relies heavily on R.C. 1.58(B), which provides that "[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended."

{¶ 9} Here, defendant originally was sentenced on October 14, 2003; the trial court resentenced defendant on February 4, 2011 when it revoked his community control. Because defendant's sentence was already imposed at the time H.B. No. 86 became effective on September 30, R.C. 1.58(B) does not assist defendant in making H.B. No. 86 apply to his sentence. Defendant's first assignment of error is overruled.

IV. Second and Third Assignments of Error - Allied Offenses and Jail-Time Credit

{¶ 10} Defendant's second and third assignments of error contend the trial court erred when it refused to conduct an allied offenses analysis of his sentence and determine whether any of the sentences should merge under R.C. 2941.25. Defendant's motion for jail-time credit contends the court erred in failing to credit him with time he spent in a Costa Rican jail pending extradition. The trial court correctly concluded res judicata bars both claims.

{¶ 11} "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. Myers*, 10th Dist. No. 11AP-909, 2012-Ohio-2733, ¶ 5, citing *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). Even so, "[a] sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus.

{¶ 12} Here, defendant could have raised his allied offenses argument in a direct appeal from the court's sentencing but did not. As a result, res judicata bars him from raising it in this appeal. *Myers, supra*; *State v. Townsend*, 8th Dist. No. 97214, 2012-Ohio-496, ¶ 7-8 (concluding the doctrine of res judicata bars a merger issue); *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 11 (determining res judicata bars allied offenses contentions). To the extent defendant contends an error in applying R.C. 2941.25 and the allied offenses analysis renders his sentence void and not subject to res judicata, this court rejected the argument in *Timmons*, concluding an allied offenses error

renders the sentence voidable. "Arguments challenging the imposition of a sentence that is voidable are barred by the doctrine of res judicata if not raised on direct appeal." *Timmons* at ¶ 12, quoting *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6096, ¶ 15-16. Accordingly, res judicata bars defendant's argument under R.C. 2941.25, as he failed to raise it in a direct appeal. Defendant's second assignment of error is overruled.

{¶ 13} Res judicata similarly bars defendant's third assignment of error. Due to res judicata, a defendant generally "may only contest a trial court's calculation of jail-time credit in an appeal from the judgment entry containing the allegedly incorrect calculation." *State v. Lomack*, 10th Dist. No. 04AP-648, 2005-Ohio-2716, ¶ 11, citing *State v. Parsons*, 10th Dist. No. 03AP-1176, 2005-Ohio-457, ¶ 7, and *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶ 10.

{¶ 14} If, however, the trial court's alleged mistake in calculating the jail-time credit is a mathematical error rather than an erroneous legal determination, then the defendant may pursue his or her remedy through a motion before the trial court seeking correction of the alleged mistake. *Id.*, citing *State ex rel. Corder v. Wilson*, 68 Ohio App.3d 567, 573 (10th Dist.1991), *State v. Eble*, 10th Dist. No. 04AP-334, 2004-Ohio-6721, ¶ 10, and *State v. Fincher*, 10th Dist. No. 97APA08-1084 (Mar. 31, 1998). "To constitute an error of 'legal determination,' the error claimed must be, essentially, a substantive claim, as opposed to a mistake in simple arithmetic." *State v. Chafin*, 10th Dist. No. 06AP-1108, 2007-Ohio-1840, ¶ 12.

{¶ 15} Here, defendant's motion concerned an erroneous legal determination of jail-time credit. Defendant does not suggest the trial court incorrectly calculated or made a mistake in arithmetic in determining the number of days of jail-time credit due to him. Rather, defendant asserts he was "denied credit for a *category of time* to which he believed he was entitled" under R.C. 2967.191. (Emphasis sic.) *Chafin* at ¶ 12. As a result, "[t]he inclusion or exclusion of that period of time should have been raised during sentencing before the trial court or on direct appeal, not in a motion for correction." *Id.* Because defendant did not raise the issue at sentencing or file a direct appeal, res judicata bars his raising it through his motion in the trial court or in an appeal from the trial court's decision denying his motion. Defendant's third assignment of error is overruled.

V. Disposition

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

Judgment affirmed.

SADLER and TYACK, JJ., concur.
