

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 12AP-594
	:	(C.P.C. No. 09CR-06-3239)
v.	:	
	:	(REGULAR CALENDAR)
Timothy C. Garnett,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 28, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Timothy C. Garnett, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} This is an appeal by defendant-appellant, Timothy C. Garnett, from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to correct a "void" sentence.

{¶ 2} On June 1, 2009, appellant was indicted on one count of carrying a concealed weapon, in violation of R.C. 2923.12, one count of improperly handling a firearm, in violation of R.C. 2923.16, and one count of having a weapon while under disability, in violation of R.C. 2923.13. Following a jury trial, appellant was found guilty of all three counts. By judgment entry filed November 20, 2009, the trial court sentenced appellant to 18 months on the concealed weapon count, 18 months on the improper handling count, and four years on the weapon under disability count, to be served

concurrently to each other, but consecutive to a sentence imposed in another case (Franklin County Common Pleas Case No. 04CR-6158).

{¶ 3} Appellant filed a direct appeal and raised two assignments of error, arguing that the trial court erred in denying his motion to suppress evidence, and that the court erred in denying his motion to suppress statements made to police. In *State v. Garnett*, 10th Dist. No. 09AP-1149, 2010-Ohio-5865, this court overruled both assignments of error and affirmed the judgment of the trial court.

{¶ 4} On June 10, 2011, appellant filed a pro se "motion for relief from judgment" with the trial court, raising ten "issues of merit," including his claim that the trial court erred in sentencing him on "three charges of similar import." The trial court construed appellant's motion as a petition for post-conviction relief, and denied appellant's request for relief. Appellant appealed that judgment and raised ten assignments of error, including an assertion (under his sixth assignment of error) that the trial court erred in sentencing him on "three separate charges of similar import that he could only be found guilty of only one." *State v. Garnett*, 10th Dist. No. 11AP-1007, 2012-Ohio-5471, ¶ 4 ("*Garnett II*"). In *Garnett II*, this court affirmed the judgment of the trial court, finding that appellant's petition was untimely, and that his claims were barred by res judicata.

{¶ 5} On April 20, 2012, appellant filed with the trial court a motion to correct an "unlawful" and "void" sentence, arguing that his concurrent sentences for carrying a concealed weapon, improper handling of a firearm, and having a weapon while under disability, should have been merged for purposes of sentencing. By entry filed June 11, 2012, the trial court denied the motion, finding that appellant's failure to raise the merger issue on direct appeal resulted in waiver.

{¶ 6} On appeal, appellant, pro se, sets forth the following assignment of error for this court's review:

The trial court committed Plain Error pursuant to Crim.R. 52(B) and prejudice the appellant when it refused Appellant's motion to re-sentence and hold mandatory hearing on merger pursuant to statute ruling that appellants imposed multiple sentences upon multiple convictions from transactions though unlawful were not void, and was thus barred by [res judicata], [a]nd violated appellant's statutory rights and was contrary to

law and legislative intent pursuant to Revised Code Mandate 2941.25.

{¶ 7} Under his single assignment of error, appellant asserts that the trial court committed plain error in failing to merge his sentences. He further contends the trial court's failure to merge the sentences rendered them void.

{¶ 8} Appellant's motion to correct a sentence will be construed as a petition for post-conviction relief. *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 6, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997). Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication." The state notes that appellant's motion in this case was filed well beyond the statutory deadline, and we agree. Further, although R.C. 2953.23(A)(1) "creates an exception to the 180-day filing requirement, courts have held that a defendant does not qualify for such exception where 'the arguments in his postconviction relief petition address only sentencing issues, not issues relating to his guilt.' " *State v. Hughes*, 10th Dist. No. 12AP-165, 2012-Ohio-4513, ¶ 10, quoting *State v. Brown*, 12th Dist. No. CA2006-06-026, 2007-Ohio-128, ¶ 11.

{¶ 9} Even assuming appellant's action had been timely, the trial court properly found that the merger issue could have been raised on direct appeal and, therefore, was barred under the doctrine of res judicata. *See State v. Norris*, 7th Dist. No. 11 MO 4, 2013-Ohio-866, ¶ 15 ("The issue of merger of allied offenses could have been raised on direct appeal, and [defendant's] failure to raise it on direct appeal prevents it from being raised in support of postconviction relief"); *State v. Rutledge*, 10th Dist. No. 11AP-853, 2012-Ohio-2036, ¶ 13 ("Defendant's arguments fail under res judicata, as his allied offenses and merger argument under R.C. 2941.25 could have been resolved in defendant's direct appeal. Res judicata thus bars defendant's raising them in a petition for post-conviction relief."). Further, as indicated under the facts, subsequent to the trial court's decision in the instant case, this court affirmed a decision of the trial court finding that appellant's earlier "motion for relief from judgment," in which he argued in part that the trial court erred by sentencing him on allied offenses of similar import, was untimely and barred by the doctrine of res judicata. *Garnett II*.

{¶ 10} We finally note, contrary to appellant's contention, that "the failure to merge allied offenses at sentencing does not render a sentence void." *State v. Guevara*, 6th Dist. No. L-12-1218, 2013-Ohio-728, ¶ 8. *See also State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975, ¶ 12, quoting *Timmons* at ¶12 ("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.'").

{¶ 11} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
