

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | No. 12AP-1071 |
| Plaintiff-Appellee, | : | (C.P.C. No. 94CR-2544) |
| v. | : | No. 12AP-1072 |
| David Ayala, | : | (C.P.C. No. 94CR-4359) |
| Defendant-Appellant. | : | (REGULAR CALENDAR) |

D E C I S I O N

Rendered on May 7, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

David Ayala, pro se.

APPEALS from the Franklin County Court of Common Pleas.

McCORMAC, J.

{¶ 1} Defendant-appellant, David Ayala ("appellant"), appeals from judgments of the Franklin County Court of Common Pleas rendered on August 7, 2012. The trial court denied appellant's motion to modify sentence filed on June 14, 2012 contending that merger should have been ordered regarding two firearm specifications, two counts of kidnapping, and complicity and aggravated murder. The state of Ohio, plaintiff-appellee, opposes the motion contending, inter alia, that the motion should be treated as an untimely and successive post-conviction petition and should be denied as such.

{¶ 2} On August 7, 2012, the trial court filed a decision and entry denying the motion. The court concluded that the sentences on the firearm specifications were

proper, that counts involving separate victims do not merge, that the motion was untimely, and the issues were barred by res judicata.

{¶ 3} Appellant filed his notice of appeal on December 20, 2012.

{¶ 4} The state asserts that the appeals are timely and should be considered as a civil, post-conviction matter but, however, the appeals still fail in many aspects.

{¶ 5} A brief history of the case is in order as it has a significant relationship to rulings in this case.

{¶ 6} The facts and procedural history come from the decision of this court affirming appellant's original convictions in the two cases at hand. On May 3, 1994, appellant was indicted by the Franklin County Grand Jury on four counts of kidnapping in violation of R.C. 2905.01, two counts of aggravated robbery in violation of R.C. 2911.01, and two counts of robbery in violation of R.C. 2911.02. In addition, firearm specifications were added to the kidnapping and aggravated robbery counts. In a supplemental indictment filed August 1, 1994, appellant was charged with one count of complicity to aggravated murder in violation of R.C. 2923.03/2903.01(B) with a firearm specification. After consolidation of the cases, a trial was held before a jury which found appellant guilty on all counts plus the specifications in the indictments. We need not go through all of the circumstances of the crimes which have been fully articulated in the direct appeal of the jury's verdict. *See State v. Ayala*, 10th Dist. No. 95APA02-145 (Oct. 31, 1995). Our court affirmed appellant's convictions on direct appeal and the Supreme Court of Ohio declined jurisdiction in an appeal therefrom. *State v. Ayala*, 75 Ohio St.3d 1508 (1996). Our court denied appellant's application for reopening in *State v. Ayala*, 111 Ohio App.3d 627 (10th Dist.1996).

{¶ 7} Our court later affirmed a denial of appellant's post-conviction petition on grounds of untimeliness. *State v. Ayala*, 10th Dist. No. 98AP-349 (Nov. 10, 1998), jurisdiction declined, 85 Ohio St.3d 1424 (1999).

{¶ 8} Over 17 years after his convictions, appellant filed a "Motion to modify sentence" on June 14, 2012 contending that merger should have been ordered regarding two firearm specifications, two counts of kidnapping, and complicity and aggravated murder. (R. 256, 156.)

{¶ 9} On August 7, 2012, the trial court filed a decision and entry denying the motion. The court concluded that the sentence on the firearm specifications was proper, that counts involving separate victims do not merge, that the motion was untimely, and that the issues were barred by res judicata.

{¶ 10} Appellant filed a notice of appeal from that decision on December 20, 2012.

{¶ 11} The present appeals are untimely if they are judged to be "criminal" appeals. If the appeals are a civil, post-conviction matter as the state contends, then the appeals are timely. Noting that the state has no objection and, in fact, asserts that the appeals are to be treated civilly so far as timeliness of the appeals, we will consider them as that and not go through the rationale for timeliness as there are ample other reasons that attest the trial court's denial of appellant's motion.

{¶ 12} Appellant's assignment of error reads as follows:

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR WHEN IT REFUSED TO RESENTENCE THE DEFENDANT CAUSING A MANIFEST MISCARRIAGE OF JUSTICE BEING THAT THE DEFENDANT IS SERVING A SENTENCE THAT IS CONTRARY TO LAW DUE TO THE STATE NOT MERGING ALLIED OFFENSES OF SIMILAR IMPORT AS REQUIRED BY LAW.

{¶ 13} Res judicata applies to bar the raising of allied offense issues. "*Res judicata* is applicable in all post-conviction relief proceedings." (Emphasis sic.) *State v. Szeftcyk*, 77 Ohio St.3d 93, 95 (1996). It also applies to any claim that could have been raised by a defendant in the trial court before a conviction or on direct appeal thereafter. *State v. Perry*, 10 Ohio St.2d 175 (1967). Since *Perry* indicates that res judicata applies in any proceeding other than a direct appeal, the res judicata bar applies to any post-judgment proceeding other than the direct appeal challenging a conviction including motions to "modify" a sentence. Since appellant could have raised merger issues at the time of sentencing or thereafter on direct appeal, those issues are barred.

{¶ 14} A claim of error and failing to merge counts for sentencing purposes is not a "void sentence" issue. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479. Allied offense claims are non-jurisdictional and barred by res judicata. Appellant is not benefited by *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, as it does not prevent

res judicata from applying. "There is no merit to [the] claim that *res judicata* has no application where there is a change in the law due to a judicial decision of this court." (Emphasis sic.) *Szefcyk* at 95. The plain error standard under Crim.R. 52(B) does not assist appellant; it is only available on direct appeal. *United States v. Frady*, 456 U.S. 152 (1982). It does not create a free-standing procedure to obtain review otherwise.

{¶ 15} We need not review the merits of appellant's substantive claims because they were already decided (and rightly so in our judgment) cases that have long since become final. Consequently, none of appellant's arguments change the fact that all of the claims are barred by the doctrine of res judicata. Obviously the doctrine of res judicata also applies to claims of manifest miscarriage of justice and proving a sentence that is contrary to law.

{¶ 16} Appellant's assignment of error is overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

TYACK and DORRIAN, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of the Ohio
Constitution, Article IV, Section 6(C).
