

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|                       |   |                           |
|-----------------------|---|---------------------------|
| State of Ohio,        | : |                           |
|                       | : |                           |
| Plaintiff-Appellee,   | : |                           |
|                       | : | No. 12AP-640              |
| v.                    | : | (C.P.C. No. 05CR-01-0594) |
|                       | : |                           |
| Donald L. Richardson, | : | (REGULAR CALENDAR)        |
|                       | : |                           |
| Defendant-Appellant.  | : |                           |

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D E C I S I O N

Rendered on January 31, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*,  
for appellee.

*Donald L. Richardson*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Donald L. Richardson, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to modify sentence. For the following reasons, we affirm the judgment of the trial court.

**I. BACKGROUND**

{¶ 2} As a result of an automobile collision that occurred on December 25, 2004, appellant was indicted on January 27, 2005 for multiple counts of aggravated vehicular homicide and operating a vehicle while under the influence of alcohol or drugs. In September 2005, appellant entered pleas of guilty to three counts of aggravated vehicular

homicide, felonies of the second degree, in violation of R.C. 2903.06(A)(1). At the sentencing hearing, the trial court imposed an aggregate 20-year term of incarceration. The sentence imposed was jointly recommended by the parties and was comprised of one six-year and two seven-year terms of incarceration ordered to be served consecutively.

{¶ 3} On March 10, 2006, appellant filed a motion for leave to file a delayed appeal, which this court denied on April 25, 2006. Thereafter, appellant filed a motion in the trial court to vacate his conviction and sentence. After finding appellant failed to set forth operative facts that would entitle him to a hearing on his motion, the trial court dismissed appellant's motion for postconviction relief. In December 2010, appellant filed a motion to modify sentence; however, a disposition of this motion does not appear in the record.

{¶ 4} On February 13, 2012, appellant filed a motion to modify sentence arguing that during sentencing the trial court failed to make appropriate findings, and his sentence was not proportional when compared to sentences of similarly situated defendants. The trial court denied appellant's motion on July 10, 2012, finding that the challenges to the jointly-recommended sentence raised in appellant's motion were barred by the doctrine of res judicata.

## **II. ASSIGNMENT OF ERROR**

{¶ 5} This appeal followed, and appellant brings the following assignment of error for our review:

The Trial Court error and Deproved the Appellant of Due Process of Law in Violation of the 5th, 6th and 14th Amendment to the U.S. Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution in that the Appellant should have been given an Concurrent Sentence with respect to his Offenses being Allied Offenses.

(Sic passim.)

## **III. DISCUSSION**

{¶ 6} Under his assigned error, appellant asserts the sentence imposed is disproportionate to sentences imposed on others convicted of similar offenses. Appellant also asserts the trial court failed to make appropriate findings, and that his offenses should have been merged for purposes of sentencing.

{¶ 7} We construe appellant's motion to correct sentence as a petition for postconviction relief. *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 6, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997); *State v. McAllister*, 10th Dist. No. 06AP-843, 2007-Ohio-1816, ¶ 6 (vaguely titled motion to correct or vacate sentence should be construed as a motion for postconviction relief under R.C. 2953.21); *State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586, ¶ 11 (claim for denial of rights and seeking to void judgment and vacate sentence filed after the time for direct appeal had passed properly construed as a petition for postconviction relief).

{¶ 8} The postconviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained" in the trial court record. *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000). Postconviction review is not a constitutional right, but, rather, is a narrow remedy which affords a petitioner no rights beyond those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999).

{¶ 9} When an R.C. 2953.21 petition is filed, the trial court must grant an evidentiary hearing unless it determines that the files and records of the case show that the petitioner is not entitled to relief. R.C. 2953.21(E). A trial court may also dismiss a petition for postconviction relief without holding a hearing when the doctrine of res judicata bars the claims raised in the petition. *State v. Szefcyk*, 77 Ohio St.3d 93 (1996). "Res judicata is applicable in all postconviction relief proceedings." *Id.* at 95. Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.*; *Reynolds* at 161.

{¶ 10} The arguments presented by appellant in the present case could have been presented in a direct appeal from the trial court's sentencing entry, but they were not. As a result, res judicata bars appellant from raising them in this appeal. *State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975 (doctrine of res judicata bars merger issue); *Timmons* (res judicata bars allied offense arguments); *State v. Lawson*, 10th Dist. No. 02AP-148, 2002-Ohio-3329 (arguments pertaining to consistency of sentences barred by res judicata); *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650 (assertion

that sentence failed to comply with statutory sentencing provisions barred by res judicata).

{¶ 11} Accordingly, the trial court properly concluded that the doctrine of res judicata bars the arguments raised in appellant's motion to modify sentence, and the trial court did err in denying appellant's motion. Consequently, we overrule appellant's asserted assignment of error.

#### **IV. CONCLUSION**

{¶ 12} For the foregoing reasons, 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 DORRIAN, JJ., concur.

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