

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-T-0089
DWAYNE A. STOUTAMIRE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 07 CR 148.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Dwayne A. Stoutamire, pro se, PID: A532253, Ohio State Penitentiary, 878 Coitsville-Hubbard Road, Youngstown, OH 44505 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Dwayne Stoutamire appeals, pro se, from the judgment of the Trumbull County Court of Common Pleas, which resentenced him in order to correct errors present in his first sentencing entry related to post-release control. The trial court, in response to Mr. Stoutamire's motion for resentencing, issued a nunc pro tunc entry on sentence specifically addressing post-release control; no changes were made to the underlying conviction or associated prison term.

{¶2} In the instant appeal and for the first time at any level, Mr. Stoutamire challenges the trial court's failure to merge his convictions for the purposes of sentencing. He raises no assignments of error related to the most recently issued sentencing entry. We find Mr. Stoutamire's instant appeal to be barred by the doctrine of res judicata, as he previously had an opportunity to raise the issue of allied offenses and merger at the trial level and during the initial direct appeal of his convictions and sentence. Therefore, we affirm the decision of Trumbull County Court of Common Pleas.

Substantive Facts and Procedural Posture

{¶3} In March of 2007, Mr. Stoutamire was indicted on one count of attempted murder with a firearm specification, two counts of having a weapon under a disability, one count of felonious assault with a firearm specification, one count of abduction with a firearm specification, and one count of aggravated robbery with a firearm specification. The six counts stemmed from two separate incidents, involving two separate victims. Except for the attempted murder charge and attendant specification, Mr. Stoutamire was convicted by a jury of all counts and specifications in May of 2007. The trial court sentenced him to an aggregate term of 34 years of incarceration.

{¶4} Mr. Stoutamire filed a timely direct appeal of his convictions and sentence. He raised five assignments of error, none of which related to the issue of allied offenses and merger. This court affirmed his conviction in June of 2008. For a more comprehensive recitation of the facts leading to Mr. Stoutamire's conviction and this court's reasons for upholding the verdict and sentence, the reader is referred to *State v. Stoutamire*, 11th Dist. No. 2007-T-0089, 2008-Ohio-2916 ("*Stoutamire I*"). Mr. Stoutamire then sought post-conviction relief; he did not raise the issue of allied

offenses and merger in this first post-conviction petition. The trial court granted the state's summary judgment motion as to the post-conviction petition in September of 2008. Mr. Stoutamire appealed the trial court's grant of summary judgment to the state, and this court affirmed the trial court's decision in *State v. Stoutamire*, 11th Dist. No. 2008-T-0108, 2009-Ohio-6228 ("*Stoutamire II*").

{¶5} While his appeal of the first post-conviction petition was pending before this court, Mr. Stoutamire filed, pro se, a second petition for post-conviction relief in March of 2009. Upon motion from the state, the trial court dismissed the second post-conviction petition in June of 2009. He appealed the trial court's dismissal of his second petition, and this court affirmed the trial court's decision in *State v. Stoutamire*, 11th Dist. No. 2009-T-0073, 2010-Ohio-1166 ("*Stoutamire III*"). Again, no issues of allied offenses and merger were raised in this second petition, or appeal from its dismissal.

{¶6} In January of 2011, Mr. Stoutamire filed a motion for resentencing with the trial court, arguing that his sentencing did not comply with the post-release control statute, R.C. 2967.28. The trial court agreed that "the oral sentencing colloquy and written Entry on Sentence do not reflect the proper imposition of postrelease control," and scheduled a hearing by video-conference on the matter. During the hearing, Mr. Stoutamire made an oral motion to be resentenced, but the trial court overruled his motion. On September 6, 2011, the trial court issued a "Nunc Pro Tunc Entry to Correct Sentence", clarifying that Mr. Stoutamire would be subject to a mandatory period of post-release control of five years on the robbery count and three years on the assault count, and a discretionary period of post-release control of three years on the weapons and abduction counts. No other changes were made to Mr. Stoutamire's sentence.

{¶7} Mr. Stoutamire timely appealed from the nunc pro tunc entry, and now brings the following assignment of error:

{¶8} “My charges are allied offenses thus the trial court violated my 5th and 14th Constitutional right of the United States double jeopardy and due process and section 10, Article 1 of the Ohio Constitution.”

The Appeal is Barred by Res Judicata

{¶9} In the instant appeal, Mr. Stoutamire challenges the trial court's nunc pro tunc entry from September of 2011, in which it clarified the nature of Mr. Stoutamire's post-release control. However, Mr. Stoutamire does not challenge the propriety of that entry. Rather, Mr. Stoutamire attempts to raise the issue of allied offenses and merger. He argues that his aggravated robbery and felonious assault charges, as well as one having a weapon under a disability charge, are all allied offenses, requiring merger for sentencing purposes. He also argues that his abduction charge and a second having a weapon under a disability charge are allied offenses, and should have been merged. Prior to this appeal, Mr. Stoutamire has never raised the issue of allied offenses, despite having had multiple opportunities to do so.

{¶10} “[A] convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.” *State v. Szefcyk*, 77 Ohio St.3d 93, 96 (1996). “[W]hen a court affirms the convictions in an appellant's first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them are barred. *State v. Harrison*, 8th Dist. No. 88975, 2008 Ohio 921, ¶9. Therefore, in a

subsequent appeal, only arguments relating to the resentencing are proper. *State v. Riggerbach*, 5th Dist. No. 09CA121, 2010-Ohio-3392, affirmed by [128 Ohio St.3d 338,] 2010-Ohio-6336, 944 N.E.2d 221.” *State v. Freeman*, 11th Dist. No. 2010-T-0069, 2011-Ohio-2457, ¶12, quoting *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶11. See also *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238.

{¶11} Because Mr. Stoutamire had the opportunity to raise arguments related to allied offenses and merger before the trial court and in his original appeal, and failed to do so, he is now barred from raising the arguments during this subsequent appeal.

{¶12} “[T]he time to challenge a conviction based on allied offenses is through a direct appeal – not a resentencing hearing.” *Poole, supra*, at ¶13. See also *Freeman, supra*, at ¶13; *State v. Goldsmith*, 8th Dist. No. 95073, 2001-Ohio-840, ¶8-9. Mr. Stoutamire is limited to assignments of error stemming directly from the trial court’s resentencing hearing, nunc pro tunc entry, and the imposition of post-release control. Because he has not raised any assignments of error related to those matters, we find the entire appeal barred by the doctrine of res judicata, and we affirm the decision of the Trumbull County Court of Common Pleas.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.