

**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 NOS. 2011-T-0072 and 2011-T-0073
ANTHONY CIOFFI, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Trumbull County Court of Common Pleas, Case Nos. 95 CR 696 and 96 CR 599.

Judgment: Affirmed.

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

Anthony Cioffi, Jr., pro se, PID# 332-078, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Anthony Cioffi, Jr., appeals the judgment of the Trumbull County Court of Common Pleas, denying his Motion to Merge Sentence under R.C. 2941.25(A). The issue before this court is whether a criminal sentence, which allegedly violates R.C. 2941.25 (Ohio's multiple counts statute), is a void sentence, so as to require a new sentencing hearing. For the following reasons, we hold that such a sentence is not void and, accordingly, affirm the decision of the court below.

{¶2} On December 4, 1996, Cioffi pled guilty to Gross Sexual Imposition and Kidnapping, in Trumbull County Court of Common Pleas, Case No. 95 CR 696. On the same date, Cioffi pled guilty to three counts of Rape and three counts of Gross Sexual Imposition, in Trumbull County Court of Common Pleas, Case No. 96 CR 599.

{¶3} On December 11, 1996, Cioffi was sentenced to an indeterminate term of imprisonment of ten to twenty-five years for each count of Rape, and a one-year term of imprisonment for each count of Gross Sexual Imposition, in Case No. 96 CR 599.

{¶4} On December 18, 1996, Cioffi was sentenced to a one-year term of imprisonment for Gross Sexual Imposition, and an indeterminate term of imprisonment of three to fifteen years for Kidnapping, in Case No. 95 CR 696. All sentences in both cases were ordered to be served concurrently.

{¶5} Cioffi did not directly appeal his sentence in Case No. 96 CR 599 or Case No. 95 CR 696.

{¶6} On May 23, 2011, Cioffi filed, under both trial court numbers, a Motion of Defendant to Merge Sentence under R.C. 2941.25(A). In this Motion, Cioffi argued that, pursuant to R.C. 2941.25(A), his convictions for Kidnapping and Rape¹ should have been merged, and that his convictions on three counts of Rape and three counts of Gross Sexual Imposition should have been merged.

{¶7} On June 29, 2011, the trial court denied Cioffi's Motion to Merge.

{¶8} On July 8, 2011, Cioffi filed his Notice of Appeal. On appeal, Cioffi raises the following assignment of error:

1. Cioffi was neither indicted nor convicted of Rape in Case No. 95 CR 696, although he argues, both in his Motion to Merge and Appellant's Merit Brief, that "the sentence *** **for kidnapping and rape requires merger.**" (Emphasis sic.) Appellant's Merit Brief, 4.

{¶9} “[1.] The trial court committed plain error to the prejudice of appellant by failing to merge his sentences on multiple charges under the statutory mandate of R.C. 2941.25 and Sixth Amendment to the U.S. Constitution.”

{¶10} Cioffi maintains that his sentence is void and “the trial court’s failure to consider whether merger is required constitutes abuse of discretion requiring a reversal or remanding for the purpose of such a determination.” Reply Brief of Appellant, 4.

{¶11} Under Ohio law, “a sentence that is not in accordance with statutorily mandated terms is void.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 8. We review such a sentence under a clear and convincing standard. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 14 (“the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence ***; this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)”).

{¶12} A void sentence “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.” *Fischer* at paragraph one of the syllabus. “Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court’s judgment is invalid, irregular, or erroneous.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. Moreover, “defendants with a voidable sentence are entitled to resentencing only upon a successful challenge on direct appeal.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 30.

{¶13} Cioffi’s argument that the trial court failed to comply with R.C. 2941.25, if meritorious, would only render the judgment voidable, in that it does not challenge the

court's jurisdiction or authority to sentence, but, rather, the propriety of the sentences imposed. *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6096, 2011 Ohio App. LEXIS 4983, ¶ 15-16; *State v. Abuhilwa*, 9th Dist. No. 25300, 2010-Ohio-5997, 2010 Ohio App. LEXIS 5031, ¶ 8 (“[w]e see no reason to hold that the failure to merge firearms specifications results in a void sentence when the Supreme Court has held that failure to merge allied offenses of similar import instead results in plain error”), citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31.

{¶14} Consistent with the proposition that the failure to merge sentences renders a judgment voidable, this court and others have held that such challenges, if not raised on direct appeal, are barred by the doctrine of res judicata. *Britta* at ¶ 17-18, and the cases cited therein; *State v. Dodson*, 12th Dist. No. CA2011-02-034, 2011-Ohio-6347, 2011 Ohio App. LEXIS 5209, ¶ 9 (“because appellant did not raise the issue of *** allied offenses of similar import in a timely direct appeal, we now find his challenge barred by res judicata”), and the cases cited therein.

{¶15} Cioffi relies on the Ohio Supreme Court decision, *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, for the proposition that his challenge is not barred by res judicata. In *Wilson*, the Ohio Supreme Court held “[a] defendant is not barred by res judicata from raising objections to issues that arise in a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing.” *Id.* at paragraph two of the syllabus.

{¶16} Cioffi's reliance on *Wilson* is misplaced. In *Wilson*, the appellant succeeded in having his sentences vacated for failure to merge **on direct appeal**. *Id.* at ¶ 3-6. The question in *Wilson* was what issues could be raised in an appeal from a

resentencing hearing following remand for an allied-offenses sentencing error. The Ohio Supreme Court held that a defendant could appeal “any issues that arise at his resentencing hearing,” while “any prior issues not successfully challenged [on direct] appeal are outside the scope of his resentencing remand and will be precluded from further review under the principles of res judicata.” *Id.* at ¶ 33.

{¶17} In the present case, Cioffi has not successfully challenged his sentence on direct appeal. Thus, the question of what issues he could raise in an appeal from a resentencing hearing is irrelevant.

{¶18} The sole assignment of error is without merit.

{¶19} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, denying Cioffi’s Motion to Merge Sentence, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.