

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2011-P-0098 and 2011-P-0099
DARRELL L. DUKES,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Court of Common Pleas, Case Nos. 2009 CR 00405 and 2009 CR 00491.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Darrell L. Dukes, pro se, PID: A582418, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Darrell L. Dukes, pro se, appeals the judgments of the Portage County Court of Common Pleas denying his pro se motions for resentencing. For the following reasons, the judgment is affirmed.

{¶2} In July 2009, a three-count indictment was filed against appellant, charging him with two counts of trafficking in cocaine and one count of possessing criminal tools. In August 2009, another three-count indictment was filed against

appellant, charging him with complicity to murder, aggravated burglary, and aggravated robbery.

{¶3} In March 2010, appellant negotiated guilty pleas as to both respective indictments. On the second indictment, appellant pled guilty to aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(1)(B), and aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(3). The state entered a nolle prosequi on the remaining count of complicity to murder. Appellant was sentenced to seven years in prison for the aggravated burglary and a consecutive term of eight years for the aggravated robbery, for a total of 15 years in prison. On the first indictment, appellant pled guilty to all counts: trafficking in cocaine (both counts), fourth-degree felonies in violation of R.C. 2925.03(A)(C)(4)(c), and possession of criminal tools, a fifth-degree felony in violation of R.C. 2923.24(A)(C). The trial court sentenced appellant to three consecutive one-year terms for these offenses, which were ordered to be served concurrent with his 15-year sentence.

{¶4} In October 2011, appellant filed two motions “to alter, amend or vacate” his sentences, arguing the court erred in its March 2010 sentencing and seeking a de novo resentencing hearing. In his motions, appellant argued that many of his offenses were allied offenses of similar import and should have merged. The trial court denied both motions.

{¶5} Appellant now appeals. This court, sua sponte, consolidated appellant’s cases for the purpose of this appeal. Appellant asserts two assignments of error:

{¶6} [1.] The Trial Court erred when it denied Appellant's motion for re-sentencing when it found Appellant to have had a separate animus for each of his offenses.

{¶7} [2.] The Trial Court erred improperly sentencing [sic] Appellant to separate sentences for offenses which should have been merged as allied offenses of similar import pursuant to Ohio Revised Code §2941.25(A).

{¶8} It is well founded that any issues that could have been raised by a defendant on direct appeal are res judicata and not subject to appellate review. *State v. Lintz*, 11th Dist. No. 2010-L-067, 2011-Ohio-6511, ¶36, citing *State v. Perry*, 10 Ohio St.2d 175 (1967). Here, appellant argues that his sentences are void and therefore *not* precluded from review by principles of res judicata. While appellant correctly notes that the doctrine of res judicata does not preclude review of a void sentence, the doctrine still applies to "other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph three of the syllabus. The Ohio Supreme Court in *Fischer* recognized that sentences considered void are typically those in which the trial court lacked subject-matter jurisdiction. *Id.* at ¶7. In the normal course, sentencing errors are not jurisdictional as to render a judgment void. *Id.* The *Fischer* Court merely defined the failure to impose post-release control in accordance with the statutorily-mandated terms as a narrow and limited exception to that rule. *Id.* at ¶12.

{¶9} This court has declined to expand the holding in *Fischer* and has continually held that the failure to merge sentences does not render a judgment void,

but *voidable*; therefore, “such challenges, if not raised on direct appeal, are barred by the doctrine of res judicata.” *State v. Cioffi*, 11th Dist. Nos. 2011-T-0072 & 2011-T-0073, 2012-Ohio-299, ¶14, citing *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6069, ¶¶17-18. See also *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298, ¶43 and *State v. Freeman*, 11th Dist. No. 2010-T-0069, 2011-Ohio-2457, ¶16. Thus, when an appellant does not raise the issue of allied offenses of similar import in a timely direct appeal, the challenge is barred by the doctrine of res judicata. *Cioffi, supra*, ¶14, citing *State v. Dodson*, 12th Dist No. CA2011-02-034, 2011-Ohio-6347, ¶9. See also *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶13 (“the time to challenge a conviction based on allied offenses is through a direct appeal—not a resentencing hearing”); and *State v. Goldsmith*, 8th Dist. No. 95073, 2011-Ohio-840, ¶11 (“[b]ecause [appellant] failed to raise on direct appeal from his conviction the issue concerning whether the offenses challenged herein are allied offenses of similar import subject to merger, we find that the issue is barred by the doctrine of res judicata”).

{¶10} Appellant is attempting to use the denials of his motions for sentencing relief to raise issues that could and should have been raised on a direct appeal. Appellant claims the court erred in its March 4, 2010 entry by failing to merge certain offenses. Appellant had the opportunity to timely file a direct appeal from this entry. He failed to do so. Instead, appellant waited approximately 19 months to challenge his sentences by filing a motion for sentencing relief with the trial court. Appellant cannot now collaterally attack his original sentences by the denial of his present motions.

{¶11} Further, even if this issue could be considered, appellant’s argument would still fail. Appellant contends that many of his offenses should have merged for

the purposes of sentencing, pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6313. However, appellant was sentenced before *Johnson* was decided. As the Second Appellate District recently explained, an appellant seeking to challenge his pre-*Johnson* sentencing on the grounds of merger cannot rely on *Johnson* “because ‘[a] new judicial ruling may be applied only to cases that are pending on the announcement date. * * * The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e. where the accused has exhausted all of his appellate remedies.’” *State v. Parson*, 2d Dist. No. 24641, 2012-Ohio-730, ¶11, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶6.

{¶12} Consequently, the judgments of the Portage County Court of Common Pleas are affirmed.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.