

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2012-L-025
DANIEL K. SIMMONS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 04 CR 000149.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (Plaintiff-Appellee).

Daniel K. Simmons, pro se, PID: A470929, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, taken from a final judgment of the Lake County Court of Common Pleas. Appellant, Daniel K. Simmons, seeks reversal of the trial court's decision overruling his motion for the imposition of a new sentence. In essence, he submits that the trial court erred in failing to address the basic substance of his contention concerning whether certain charges should have been merged as allied offenses of similar import.

{¶2} The underlying criminal action began in May 2004, when the Lake County Grand Jury returned a four-count indictment against appellant. After the trial court ruled that appellant properly waived his constitutional right to counsel and would be permitted to represent himself, a three-day jury trial was held in August 2004. Although the jury found against the state on the first count of the indictment, it also returned guilty verdicts on the following three charges: (1) abduction, a third-degree felony under R.C. 2905.02; (2) kidnapping, a first-degree felony under R.C. 2905.01; and (3) operating a motor vehicle without a valid license, a first-degree misdemeanor under R.C. 4507.02.

{¶3} Upon accepting the jury verdicts, the trial court immediately proceeded to sentencing, ordering appellant to serve four years on the abduction count, eight years on the kidnapping count, and six months on the license count. The court further ordered that these three terms are to be served concurrently to each other, but consecutive to a five-year term imposed in a separate criminal matter, for a total prison term of thirteen years.

{¶4} Appellant pursued a direct appeal of the foregoing conviction before this court. Under one of his five assignments of error, appellant contested the merits of the trial court's decision to have the two prison terms run consecutively. But, he did not set forth any argument concerning whether the abduction and kidnapping charges should have been found to be allied offenses of similar import. In *State v. Simmons*, 11th Dist. No. 2004-L-154, 2005-Ohio-6896, we upheld all aspects of appellant's conviction and sentence.

{¶5} Appellant appealed our determination to the Supreme Court of Ohio. In *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 411, 2006-Ohio-2394, the

Supreme Court affirmed appellant's conviction, but reversed and remanded the case to the trial court for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶6} Upon remand, the trial court appointed new counsel for appellant and held a new sentencing hearing. Nevertheless, in the second sentencing judgment in June 2006, the trial court imposed the same sentence that had originally been imposed for the three offenses. In addition, the court again ordered the eight-year term to be served consecutively to the five-year term in the separate case.

{¶7} Again, appellant filed an appeal of the new sentencing judgment with this court. In challenging the re-imposition of the identical sentence, appellant asserted five new assignments, each of which argued that the trial court had erred in ordering "more-than-the-minimum" and consecutive prison terms. As in his first appeal, none of his five assignments addressed the question of whether the abduction and kidnapping charges should have been merged. In *State v. Simmons*, 11th Dist. Nos. 2006-L-132 and 2006-L-133, 2007-Ohio-1376, this court affirmed the second sentencing judgment in all respects.

{¶8} Approximately five years following the issuance of our second opinion on this action, appellant moved the trial court to impose a new sentence pursuant to R.C. 2941.25. As the basis for the motion, he contended that the existing sentencing order was void and unenforceable because, at the time the sentence was imposed, the trial court did not consider whether the two charges of abduction and kidnapping should be merged as allied offenses of similar import. He further argued that, under the governing case law, merger of the two charges was mandated, and that he was therefore entitled

to a new sentencing hearing.

{¶9} After the state submitted a response, the trial court issued a separate judgment overruling appellant's "new sentence" request. Besides noting that appellant had not referenced any authority which would allow the imposition of a new sentence at that juncture of the proceeding, the trial court held that the "allied offenses" argument was barred by the doctrine of res judicata because it could have been raised at the time of his original sentencing or in his direct appeal from his conviction.

{¶10} In appealing the denial of his post-judgment motion, appellant has raised two assignments of error for review:

{¶11} "[1.] The trial court committed a reversible error in failing to conduct a hearing mandated in R.C. 2941.25 in violation of the 5th Amendment to the United States Constitution and Article 1, Sec. 10, 16 of the Ohio Constitution.

{¶12} "[2.] Defendant-Appellant's protection against double jeopardy was violated when the trial court failed to merge Appellant's multiple convictions and sentence under Ohio Revised Code 2941.25 and the 5th Amendment to the United States Constitution."

{¶13} Since the foregoing two assignments assert similar arguments, they will be addressed together. In again maintaining that he is entitled to be resentenced on the three offenses in the underlying conviction, appellant does not focus upon the analysis of the trial court in the appealed judgment. Instead, he points to the procedure the trial court employed in imposing his existing sentence. Under his first assignment, he argues that the trial court erred in not holding an oral hearing on the "merger" question prior to determining the extent of prison term for each offense. Under the second

assignment, he submits that, by not concluding that the charges of abduction and kidnapping are allied offenses of similar import for purposes of his case, the trial court improperly gave him multiple punishments for one criminal offense.

{¶14} As was noted above, in ruling upon the merits of appellant's motion for a new sentence, the trial court never considered the substance of his "merger" contention. Rather, the trial court predicated its decision upon the holding that appellant was barred from contesting the propriety of his sentence under the doctrine of res judicata. Before this court, appellant has not tried to present a full-scale argument on the application of the doctrine in this type of situation, but has merely made the general statement that the failure to merge allied offenses of similar import can be challenged in a post-judgment motion. At the trial level, though, he asserted that the trial court's failure to comply with the requirements of R.C. 2941.25 had rendered the existing sentencing order void.

{¶15} In considering the substance of similar post-judgment motions in which a criminal defendant has sought the issuance of a new sentence based upon an alleged "merger" error, this court has previously rejected the contention that such an error has the effect of rendering the final sentencing judgment unenforceable. In *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6096, the criminal defendant moved the trial court for merger under R.C. 2941.25 after he had been found guilty of four charges of gross sexual imposition. When the trial court denied the pre-sentencing motion and imposed an aggregate prison term of eight years, the defendant appealed his conviction to this court, but we affirmed the sentencing judgment in all respects. Approximately one year following the release of our first opinion, the *Britta* defendant submitted a post-judgment motion for resentencing, contending that his original sentence had been rendered void

as a result of a new Supreme Court decision regarding allied offenses of similar import. In overruling the post-judgment motion, the *Britta* trial court concluded that any error in the merger of offenses did not create a void sentence. The defendant then pursued a second appeal to this court.

{¶16} In upholding the judgment and analysis of the *Britta* trial court, our opinion first indicated that a criminal sentence can be void only when the imposed prison term is not consistent with the statutorily mandated term. *Id.* at ¶13. Applying this standard to the *Britta* defendant's assertions regarding the failure to merge allied offenses of similar import under R.C. 2941.25, this court then held that he was unable to carry the burden of establishing that his original sentence was void:

{¶17} "The claims raised in Britta's Motion for Resentencing demonstrate that, at most, his sentence is voidable. The concept behind a void sentence is that "(j)udges have no inherent power to create sentences.' [State v.] Fischer, 128 Ohio St.3d 92, 2010 Ohio 6238, at ¶22, * * *. '(T)he only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by the statute or one that is greater or lesser than that provided for by law.' *Id.*, quoting *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438, * * *. Britta does not claim that his sentence is not in conformity with statutorily mandated terms, or is not provided for by law, or even that the sentence fails to comply with the formal requirements of R.C. 2941.25.

{¶18} "The multiple count statute expressly provides that the same conduct may support multiple convictions where the offenses are 'committed separately or with a separate animus.' R.C. 2941.25(B). In conformity with the statute, the trial court stated

that the four offenses of which Britta was convicted ‘consist(ed) of separate and distinct acts and there was a separate animus for each crime.’ To the extent this conclusion might be erroneous, Britta’s sentence would be voidable; but in no way is the sentence illegal so as to render it void.” *Id.* at ¶15-16.

{¶19} In light of the conclusion that a “merger” error could only lead to a voidable sentencing judgment, the *Britta* court also indicated that the merits of such an error was only contestable in a direct appeal from that particular judgment. *Id.* at ¶14. In turn, this meant that the defendant was barred under the doctrine of res judicata from raising the issue in a post-judgment motion for resentencing. *Id.* at ¶17.

{¶20} The *Britta* analysis applies. Any error regarding merger of the abduction and kidnapping charges would only render the original sentencing judgment voidable. Accordingly, appellant was required to raise the issue in his direct appeal from the conviction. As previously noted, a review of our first *Simmons* opinion readily shows that appellant did not advance a “merger” argument. Moreover, the issue was not asserted in his second appeal upon resentencing. Res judicata prevents appellant from raising the issue in a post-judgment motion now.

{¶21} Without providing any discussion on the point in his brief, appellant cites *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669 for the proposition that any issue as to the merger of allied offenses under R.C. 2941.25 cannot be subject to res judicata. In the second paragraph of its syllabus, the *Wilson* opinion 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.”

{¶22} In considering the ramifications of the *Wilson* holding in a similar context, this court has stated that *Wilson* does not stand for the concept that there is no limit as to when an allied-offense issue can be raised after the issuance of the final sentencing order. In *State v. Cioffi*, 11th Dist. Nos. 2011-T-0072 and 2011-T-0073, 2012-Ohio-299, the defendant sought to assert the allied-offense issue in a motion to merge which was filed almost fifteen years following the conviction. In upholding the trial court’s decision to deny the motion to merge, the *Cioffi* court first cited our prior holding in *Britta* that the failure to properly merge allied offenses is an error that can only be challenged in a direct appeal of the conviction. *Id.* at ¶14. In the second part of the *Cioffi* analysis, this court then addressed the possible effect of the *Wilson* decision:

{¶23} “Cioffi’s reliance on *Wilson* is misplaced. In *Wilson*, the appellant succeeded in having his sentences vacated for failure to merge on direct appeal. [*Wilson*, 2011-Ohio-2669] 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.

{¶24} “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.” *Cioffi*, 2012-Ohio-299, at ¶16-17.

{¶25} Given that the *Wilson* case involved a situation in which the defendant *did* raise the “merger” issue in his direct appeal from his conviction, there can be no dispute

that Ohio Supreme Court never addressed the specific question of whether the “merger” issue is waived under the doctrine of res judicata if it is not asserted in the original direct appeal. For this reason, the *Wilson* decision does not conflict with our holding in *Britta* concerning the application of res judicata to the “merger” issue. At best, *Wilson* stands only for the proposition that, in pursuing a second appeal after a resentencing hearing has been held upon remand, the defendant can raise arguments as to issues raised at the resentencing hearing even if those issues were not asserted at the first sentencing hearing. Even if this court assumes, *for the sake of argument only*, that there can be circumstances under which the “merger” issue can be asserted for the first time during a *resentencing* hearing, we would again emphasize that, in maintaining his second appeal following the resentencing hearing in the underlying case, appellant did not raise any argument on the “merger” point. Therefore, the merits of appellant’s “merger” argument cannot be addressed because he failed to assert the issue in a timely manner.

{¶26} Pursuant to the foregoing, the trial court properly concluded that appellant’s argument concerning the merger of the abduction and kidnapping charges is barred by res judicata. Accordingly, both of appellant’s assignments of error are without merit and the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.