[Cite as *State ex rel. Porterfield v. McKay*, 2012-Ohio-5027.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

THE STATE OF OHIO ON THE RELATION OF ERIC LEE PORTERFIELD,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2012-T-0012**
- vs -	:	
JUDGE W. WYATT MCKAY, et al.,	:	
Respondents.		

Original Action for Writ of Mandamus and/or Procedendo

Judgment: Petition dismissed.

Eric Lee Porterfield, pro se, PID 420-502, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Relator).

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

PER CURIAM.

{¶1} This mandamus action is before this court for final disposition of the motion to dismiss of respondents, Judge W. Wyatt McKay and the Trumbull County Court of Common Pleas. As the primary basis for their motion, respondents assert that the petition of relator, Eric Lee Porterfield, fails to state a viable claim for a writ because his factual allegations support the conclusion that he had an adequate remedy at law. Specifically, they argue that relator cannot employ an original action to contest alleged

sentencing errors in his underlying criminal case because such errors could have been addressed in the direct appeal from his conviction.

{¶2} A review of relator's petition shows that his mandamus claim is predicated upon the following general allegations. In October 2001, relator was the defendant in a criminal proceeding before Judge McKay. The charges against him were based upon an incident in which he and a second individual entered a Trumbull County residence during the course of a party and shot two persons to death.

{¶3} The indictment in the criminal case contained two charges of aggravated murder and five other felony counts. Originally, each of the aggravated murder counts had specifications regarding the imposition of the death penalty. However, as part of a plea bargain that was negotiated before the case could proceed to trial, the state agreed to eliminate the death penalty specifications. Relator then entered a plea of guilty to the following charges: (1) two counts of aggravated murder, first-degree felonies under R.C. 2903.01; (2) one count of attempted aggravated murder, a first-degree felony under R.C. 2903.01 and 2923.02; (3) two counts of kidnapping, first-degree felonies under R.C. 2905.01; (4) one count of aggravated burglary, a first-degree felony under R.C. 2911.11; and (5) one count of aggravated robbery, a first-degree felony under R.C. 2911.01.

{¶4} After accepting the guilty plea and holding a separate sentencing hearing, Judge McKay sentenced appellant to an aggregate term of 53 years to life, in accordance with the agreement between relator and the state. First, as to the two aggravated murder counts, Judge McKay imposed two consecutive terms of 20 years to life. Second, as to the five remaining counts, relator was sentenced to a ten-year term

on each, to be served concurrently with each other, but consecutive to the life sentences under the two aggravated murder counts. Finally, Judge McKay merged the firearm specifications under all seven counts, and imposed a single three-year term, to be served prior to and consecutive to the ten-year term and the two life sentences.

{¶5} Relator pursued a direct appeal of the foregoing conviction and sentence to our court. Although we ultimately upheld his conviction in all respects, we did reverse the imposition of consecutive sentences on the basis that Judge McKay did not make the necessary findings of fact; therefore, we remanded the case to him for resentencing. *State v. Porterfield*, 11th Dist. No. 2002-T-0045, 2004-Ohio-520. Before Judge McKay could proceed, though, the Supreme Court of Ohio reversed our holding on the grounds that relator's sentence could not be subject to appellate review under R.C. 2953.08(D). *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095. Specifically, the Supreme Court held that no appellate review is permissible when relator's sentence was authorized by law, had been jointly recommended by relator and the state, and was imposed by the sentencing judge. *Id*. at ¶25.

{¶6} Notwithstanding the Supreme Court's ruling, relator filed a number of post-judgment motions before Judge McKay over the next six years. In turn, Judge McKay's disposition of the new submissions led to the filing of six additional appeals by relator. Despite the quantity of his post-judgment submissions, relator was never able to obtain any modification of his conviction or sentence.

{¶7} In May 2011, relator moved Judge McKay to render a valid final judgment in the underlying criminal action. According to relator, a new judgment was necessary because the original sentencing entry had to be declared void in light of an error in the

imposition of his sentence. In support of this new argument, relator stated that, prior to determining the specific prison term for each particular charge, Judge McKay had failed to consider whether any of the offenses should be merged as allied offenses of similar import. He further maintained that, if Judge McKay had properly considered this point, he would have been obligated to conclude that at least three of the "lesser" counts had to be merged with the two aggravated murder counts for purposes of sentencing.

{¶8} After the state had submitted a response, Judge McKay issued a separate judgment overruling the new motion. In the first part of his legal analysis, Judge McKay concluded that relator's motion had to be characterized as a petition for post-conviction relief under R.C. 2953.21. He then held that he lacked the basic authority to proceed on the petition because it had not been filed in a timely manner. Even though this holding would have disposed of the matter, Judge McKay proceeded to address the substance of relator's "allied offenses" argument. Specifically, he reasoned that the argument was barred under the doctrine of res judicata because relator could have raised the point as part of his original direct appeal from his conviction.

{¶9} Instead of appealing Judge McKay's ruling on his motion to impose a valid sentence, relator filed the instant original action before this court. Under his mandamus claim, he requested the issuance of a writ to mandate Judge McKay to conduct a new sentencing hearing and render a new sentencing judgment which is consistent with R.C. 2941.25(A), the statutory section governing the merging of allied offenses for purposes of sentencing. In a memorandum accompanying his petition, relator maintained that the original sentencing judgment had to be declared void because, by failing to order the merger of the three "lesser" counts, Judge McKay had imposed a sentence which was

contrary to a mandatory sentencing statute. In light of this, he further asserted that the doctrine of res judicata was not applicable to this type of issue, and that the propriety of the imposed sentence could be challenged in a post-judgment motion or in a collateral proceeding.

{¶10} In now moving to dismiss relator's mandamus claim under Civ.R. 12(B)(6), Judge McKay and the common pleas court, respondents, submit that the allegations in his petition are legally insufficient to set forth a viable claim for a writ. Essentially, they contend that, even if an error did occur in deciding whether any of the underlying felony offenses should have been merged under R.C. 2941.25(A), such a mistake would have only rendered the October 2001 sentencing judgment voidable. Based upon this, they also contend that relator cannot employ an original action to contest the "allied offenses" issue because he had an opportunity to raise the point as part of his direct appeal from the sentencing judgment.

{¶11} Before addressing the merits of respondent's argument, this court again indicates that the Supreme Court of Ohio has already held that the substance of relator's sentence is not subject to any form of revision. That is, because the sentence was authorized by law, was jointly recommended by relator and the prosecution, and was imposed by a sentencing judge, it could not be subject to appellate review. *Porterfield*, 2005-Ohio-3095, at ¶25. Although the "allied offenses" issue was not expressly raised in relator's Supreme Court appeal, the logic of the Supreme Court holding would clearly still apply; i.e., since the "allied offenses" issue pertains to sentencing, it can never be subsequently modified because relator agreed to it. On this

basis alone, Judge McKay was justified in denying relator's motion to issue a valid sentence.

{¶12} In addition to the foregoing, and alternatively, this court will address respondents' primary argument in their motion to dismiss. As mentioned in the summary of relator's mandamus claim, his request for the writ was predicated upon the contention that the failure to merge allied offenses of similar import has the effect of making a final judgment in a criminal action void. As a general proposition, a judgment will be deemed void when it is issued by a court which did not have subject matter jurisdiction or otherwise lacked the authority to act. *State v. Miller*, 4th Dist. No. 11CA14, 2012-Ohio-1922, ¶5, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶6. On the other hand, "'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. Cioffi*, 11th Dist. Nos. 2011-T-0072 & 2011-T-0073, 2012-Ohio-299, ¶12, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶12.

{¶13} Under well-established Ohio law, if a judgment is void, the doctrine of res judicata has no application, and the propriety of the decision can only be challenged on direct appeal or by collateral attack. *Miller*, 2012-Ohio-1922, at ¶5, quoting *Fischer*, 2010-Ohio-6238, at paragraph one of the syllabus. If a judgment in question is merely voidable, though, the doctrine of res judicata does apply, and any argument regarding the merits of the decision is considered waived for all purposes unless it is asserted as part of the direct appeal. *State v. Parson*, 2nd Dist. No. 24641, 2012-Ohio-730, ¶10.

{¶14} In relation to sentencing issues in the context of a criminal proceeding, it has generally been held that sentencing errors do not render a judgment void because

such errors have no effect upon the trial court's jurisdiction. *Miller*, 2012-Ohio-1922, at ¶5, quoting *Fischer*, 2010-Ohio-6238, at ¶7. However, one significant exception to the foregoing rule has been recognized: i.e., a sentencing judgment will be considered void when the imposed sentence does not lie within the statutorily mandated terms. *Cioffi*, 2012-Ohio-299, at ¶11, quoting *Fischer*, 2010-Ohio-6238, at ¶8.

{¶15} In applying both the general rule and the single exception to alleged errors involving the merger of allied offenses, the courts of this state have expressly concluded that this type of judicial mistake does not cause the resulting judgment to be void. First, in the context of a habeas corpus action, the Supreme Court of Ohio has indicated that "merger" errors are not jurisdictional in nature. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, ¶10. Second, the Second Appellate District has stated that an argument as to the application of R.C. 2941.25(A) is not the same as an assertion that the sentence was not in accordance with statutorily mandated terms. *Parson*, 2012-Ohio-730, at ¶9. While not specifically expressed in *Parson*, the appellate court's statement was clearly based upon the fact that, although the "merger" concept, as set forth in R.C. 2941.25, is relevant to determining the total length of a defendant's sentence, the statute does not delineate any actual terms of imprisonment which must be served for a particular crime.

{¶16} In *Cioffi*, *supra*, the defendant filed a post-judgment motion for the merger of the three counts of rape and three counts of gross sexual imposition. After the trial court overruled the motion, the defendant appealed the decision to this court, expressly arguing that his original sentencing judgment was void due to the "merger" error. In the first part of our discussion, this court held that, even if the defendant's argument under

R.C. 2941.25 had merit, such an error would only render the original judgment voidable. *Cioffi*, 2012-Ohio-299, at ¶13. Building upon this point, we ultimately concluded that any issue pertaining to the merger of the underlying offenses could only be raised in a direct appeal from the original judgment, and that the doctrine of res judicata barred the defendant's use of a post-judgment motion to challenge the propriety of his sentence. Id at ¶17.

{¶17} Despite the fact that the instant matter is an original action in mandamus, the *Cioffi* analysis would still apply. That is, since R.C. 2941.25 does not set forth any mandated terms of imprisonment, any violation of its provisions regarding the merger of allied offenses would have only caused Judge McKay's original sentencing judgment to be voidable, not void. Under such circumstances, even if relator's "allied offenses" argument was not covered under the Supreme Court's holding in his original appeal, he only had one opportunity to assert the "merger" issue: i.e., in his direct appeal from the October 2001 final judgment. Regardless of whether the issue was raised in his original appeal, he is now foreclosed under the doctrine of res judicata from challenging the propriety of his sentence in any collateral proceeding, such as an action in mandamus.

{¶18} Before a writ of mandamus will lie, the relator must be able to demonstrate that: "(1) he has a clear legal right to have a specific act performed by a public official; (2) the public official has a corresponding duty to perform that act; and (3) there is no other legal remedy that could be pursued to adequately resolve the matter." *State ex rel. Sanders v. Enlow*, 11th Dist. No. 2010-P-0022, 2010-Ohio-5053, ¶14. Pursuant to the foregoing analysis, this court concludes that relator's allegations in the instant case were not legally sufficient to satisfy any of the three elements for the writ. As to the first

two elements, regardless of whether the "allied offenses" issue was still reviewable, Judge McKay has no legal obligation to vacate the original judgment and issue a new sentencing order; similarly, relator has no legal right to such relief. Additionally, relator's own allegations indicate that he possessed an adequate legal remedy because he could have raised the "merger" issue in his original direct appeal. As to the latter point, we would emphasize that a writ of mandamus may not be used as a substitute remedy when the relator previously failed to take the proper steps to invoke an existing remedy. *Id.*, at ¶12.

{¶19} Finally, as a separate claim under his petition, relator has also requested a writ of procedendo to require Judge McKay to go forward and render a new sentencing judgment. However, in order for a writ of procedendo to lie, it must be established, inter alia, that the judge has a clear legal duty to enter a new judgment. *See Brody v. Lucci*, 11th Dist. No. 2011-L-139, 2012-Ohio-1132, ¶27. Consistent with our analysis as to the mandamus claim, this court holds that relator's allegations were not legally sufficient to demonstrate the need for the issuance of a new judgment. That is, Judge McKay has met his legal duties by rendering a valid final judgment in October 2001, and disposing of all subsequent post-judgment motions.

{¶20} Even when interpreted in a manner most favorable to relator, the factual allegations in his petition indicate beyond any reasonable doubt that he will not be able to prove a set of facts under which he would be entitled to either a writ of mandamus or a writ of procedendo. For this reason, the dismissal of relator's petition is justified under Civ.R. 12(B)(6) because he has failed a viable claim for any requested relief. Therefore,

respondents' motion to dismiss is granted. It is the order and judgment of this court that relator's petition in mandamus and procedendo is hereby dismissed in its entirety.

DIANE V. GRENDELL, J., MARY JANE TRAPP, J., THOMAS R. WRIGHT, J., concur.