

**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 NOS. 2014-L-005
	:	and 2014-L-006
CARL P. ARCHIBALD,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Lake County Court of Common Pleas, Case Nos. 05 CR 000734 and 05 CR 000496.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Carl P. Archibald, pro se, PID: A502055, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Carl P. Archibald, appeals the sentence of the Lake County Court of Common Pleas on a jury verdict finding him guilty of rape, kidnapping, and sexual battery in Case No. 05 CR 000734 (“the rape case”). He also appeals the trial court’s sentence following his guilty plea to domestic violence with a prior domestic violence conviction in Case No. 05 CR 000496 (“the domestic violence case”). The two cases were consolidated on appeal. This is appellant’s third appeal of his sentence in

the rape case and his second appeal of his sentence in the domestic violence case. At issue is whether the trial court committed plain error in sentencing appellant in violation of R.C. 5145.01. For the reasons that follow, we affirm.

{¶2} In the rape case, on April 29, 2005, appellant called the victim Christina Rusnak, his wife's girlfriend. He said he and his wife had been having marital problems and he needed to talk to someone. He asked Ms. Rusnak if she would meet with him at a local bar to talk. She agreed but said she could only stay one-half hour. While at the bar, appellant lured her to the house he was renting. After arriving at his house, he told her that his wife had kicked him out of their home and was refusing to talk to him. As he talked about his wife, appellant became increasingly agitated. After about one-half hour, Ms. Rusnak said she had to leave. As she started to leave, appellant grabbed her. He took a pair of handcuffs out of his back pocket and, while Ms. Rusnak was struggling with him, he handcuffed her. She was screaming and appellant told her to shut up and that he had a gun.

{¶3} Appellant told Ms. Rusnak that she deserved this because it was her fault that his wife was cheating on him. He accused Ms. Rusnak of knowing his wife's paramour and said Ms. Rusnak should have told him about it. He then forced her to take various pills by physically putting them down her throat.

{¶4} Appellant dragged Ms. Rusnak into a bedroom. He forced her to ingest a powdery material that Ms. Rusnak believed was cocaine. He took off her clothes. He then forced her to perform oral sex on him, and took photographs of this activity with his cell phone. He said he was going to show them to his wife to get back at her for cheating on him.

{¶5} Appellant then grabbed Ms. Rusnak by her arms and lifted her up. He walked her backward toward the bed and pushed her on it while her hands were handcuffed behind her back. He then proceeded to further rape her digitally, vaginally, and anally. She sustained numerous cuts, abrasions, and scratches to her wrists, lower back, and buttocks from the handcuffs.

{¶6} Following a jury trial, appellant was found guilty of five counts of rape, felonies of the first degree; two counts of kidnapping, felonies of the first degree; and five counts of sexual battery, felonies of the third degree. The trial court sentenced appellant to nine years in prison on each of the rape counts, each to run concurrently to the others, and four years on the first kidnapping charge, to run consecutively to the nine years imposed on the rape counts, for a total of 13 years in prison. The court found the second kidnapping count merged with the first, and that the sexual battery counts merged with the rape counts. In that case appellant was also classified as a sexual predator.

{¶7} In the domestic violence case, appellant pled guilty to domestic violence against his wife, having previously been convicted of domestic violence, a felony of the fourth degree. This case was pending when appellant was indicted in the rape case. Appellant was sentenced for domestic violence to 17 months in prison, to run consecutively to his sentence in the rape case.

{¶8} Appellant appealed his conviction and sentence in the rape case; his sexual predator classification in that case; and his sentence in the domestic violence case. Both cases were consolidated in his direct appeal. In *State v. Archibald*, 11th Dist. Lake Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966 ("*Archibald I*"), this court

affirmed the jury verdict and sexual predator classification in the rape case, but reversed in part and remanded both cases for re-sentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Archibald I* at ¶103. Appellant filed an appeal in the Supreme Court of Ohio, but his discretionary appeal was not allowed at 116 Ohio St.3d 1508, 2008-Ohio-381.

{¶9} At the re-sentencing hearing, the trial court imposed the same sentence it had originally imposed in both cases. Thereafter, appellant appealed his sentence in the rape case only.

{¶10} In *State v. Archibald*, 11th Dist. Lake No. 2008-L-123, 2009-Ohio-5425 (“*Archibald II*”), this court affirmed appellant’s sentence in the rape case. Appellant again filed an appeal in the Supreme Court of Ohio, and, once again, his discretionary appeal was not allowed at 124 Ohio St.3d 1419, 2009-Ohio-6816.

{¶11} This court released its decision in *Archibald II* on October 9, 2009. More than four years later, on November 27, 2013, appellant filed a pro se petition for relief after judgment pursuant to R.C. 5145.01, arguing that under this statute, the trial court should have given him concurrent, rather than consecutive, sentences. By judgment, dated December 3, 2013, the trial court denied appellant’s petition.

{¶12} Appellant now appeals the trial court’s denial of his petition for relief after judgment, asserting three assignments of error. For his first assigned error, he alleges:

{¶13} “Trial Court Abused it’s [sic] Discretion In Not Granting The Ohio Revised Code 5145.01 Request.”

{¶14} In appellant’s “petition for relief after judgment,” he argues he was entitled to concurrent, rather than consecutive, sentences pursuant to R.C. 5145.01. That

statute, which governs state correctional institutions, provides: “If a prisoner is sentenced for two or more separate felonies, the prisoner’s term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of [R.C] 2929.14 and [R.C] 2929.41 * * * apply.”

{¶15} As a preliminary matter, we note that appellant failed to raise this issue at any time during his sentencing, in *Archibald I*, during his re-sentencing on remand, or in *Archibald II*. Generally, an appellate court will not consider any error which a party complaining of the trial court’s judgment could have called, but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court. *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). Appellant’s argument that his sentence ran afoul of R.C. 5145.01 was apparent but yet not made at the trial court level until more than four years after his re-sentencing. As a result, this argument is waived except for plain error.

{¶16} Crim.R. 52(B) allows us to correct “[p]lain errors or defects affecting substantial rights” that were not brought to the attention of the trial court. In *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), the Supreme Court of Ohio set forth strict limitations on what constitutes plain error. First, there must be an error, i.e., a deviation from a legal rule. *Id.* Second, the error must be plain, i.e., the error must be an “obvious” defect in the proceedings. *Id.* Third, the error must have affected “substantial rights.” *Id.*

{¶17} In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, the Supreme Court of Ohio held that the defendant has the burden of demonstrating plain error. *Id.* at ¶17. A reversal is warranted only if the defendant can prove the outcome would have been different absent the error. *Id.* If a defendant does not raise an issue in the trial

court, the issue is waived for purposes of appeal unless he demonstrates plain error. *State v. Gotel*, 11th Dist. Lake No. 2006-L-015, 2007-Ohio-888, ¶23.

{¶18} Further, the decision to correct a plain error is discretionary and should be made “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Barnes, supra*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Appellant does not demonstrate and we do not discern plain error resulting from his failure to timely raise this issue. For this reason alone, his first assignment of error lacks merit.

{¶19} In any event, even if the issue was not waived, it would still lack merit. Before addressing appellant’s R.C. 5145.01 argument, based on our initial review of appellant’s petition, it is unclear whether it is a petition for post-conviction relief or simply a post-sentence motion to modify his sentence. We recognize that courts may recast irregular motions into whatever category is necessary to identify and establish the criteria by which the motion should be judged. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶10.

{¶20} While appellant cast his request for relief as a “petition for relief after judgment,” it does not meet the test of a petition for post-conviction relief. A petition for post-conviction relief pursuant to R.C. 2953.21(A)(1) is defined as a petition that is (1) filed subsequent to the defendant’s direct appeal; (2) claims a denial of constitutional rights; (3) seeks to render the judgment void; and (4) requests vacation of the judgment and sentence. *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997). While the petition filed by appellant was filed subsequent to his direct appeal, it did not seek to vacate his sentence or to render it void. Instead, it seeks to modify appellant’s sentence from

consecutive to concurrent. Moreover, appellant's petition did not claim a denial of his constitutional rights. To the contrary, the petition was based on an alleged violation of R.C. 5145.01. We conclude, therefore, that the petition filed by appellant was not a petition for post-conviction relief.

{¶21} Rather, appellant's petition can best be characterized as a motion to modify his sentence since he sought to modify, not vacate, his sentence. However, "[o]nce a trial court has carried into execution a valid sentence, the court no longer has the power to modify that sentence absent statutory authority to do so. *State v. Longmire*, 11th Dist. Portage No. 2001-P-0014, 2002-Ohio-7153, ¶14. Thus, a trial court does not have jurisdiction to modify a valid sentence of imprisonment once imprisonment has begun. *Id.* at ¶15.

{¶22} While appellant argues he was entitled to a modification of his sentence from consecutive to concurrent pursuant to R.C. 5145.01, he fails to demonstrate his re-sentence was invalid because, based on the authority discussed below, R.C. 5145.01 did not bar the trial court from imposing consecutive sentences for appellant's crimes. Because appellant's sentence is valid, the trial court did not have jurisdiction to modify it from consecutive to concurrent. For this additional reason, appellant's first assigned error lacks merit.

{¶23} This court previously addressed the same argument raised by appellant in *State v. Stalnaker*, 11th Dist. Lake No. 2011-L-151, 2012-Ohio-3028. In that case the defendant argued, just as appellant argues here, that the trial court erred in denying his petition for relief from judgment because, he claimed, R.C. 5145.01 required that he serve concurrent, not consecutive, sentences.

{¶24} In *Stalnaker*, this court held that “R.C. 5145.01 governs *state correctional institutions* and does not instruct sentencing courts.” (Emphasis added.) *Stalnaker* at ¶14, citing *State v. Terrell*, 4th Dist. Washington No. 10CA39, 2012-Ohio-1926, ¶10. Further, in *Stalnaker*, this court stated that Ohio courts have uniformly held that R.C. 5145.01 does not require that sentencing courts impose concurrent sentences. *Id.*, citing *Terrell*, *supra*.

{¶25} Moreover, post-*Foster*, the Supreme Court of Ohio held that consecutive sentencing is within the trial court’s sound, inherent discretion. See e.g. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶33. More recently, the Supreme Court reiterated that after *Foster*’s act of excision, there remained no specific statute limiting the court’s ability to impose consecutive sentences. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶12-13. For this additional reason, appellant’s first assigned error lacks merit.

{¶26} In addition, appellant argues that his sentence should be modified to allow for concurrent prison time because the trial court did not give reasons for its consecutive sentences. In *Foster*, decided on February 27, 2006, the Supreme Court excised those portions of R.C. 2929.14 that required judicial findings to support consecutive sentences. *Id.* at paragraph three of the syllabus. Moreover, the Court held that trial courts are no longer required to make findings or give their reasons for imposing consecutive sentences. *Id.* at paragraph seven of the syllabus. Thus, at the time of appellant’s sentencing (on February 28, 2006) and re-sentencing (on July 30, 2008), the trial court was not required to provide reasons or to make findings in support of appellant’s consecutive sentences.

{¶27} The General Assembly later enacted H.B. 86, effective September 30, 2011, which amended R.C. 2929.14, and required judicial fact-finding for consecutive sentences. However, this court held that H.B. 86 does not apply retroactively. *Stalnaker, supra*, at ¶15. Thus, R.C. 2929.14(C), as amended, did not apply to appellant, who was originally sentenced and re-sentenced more than three years prior to the effective date of H.B. 86. *Stalnaker, supra*. As a result, contrary to appellant's argument, the trial court was not required to give reasons for appellant's consecutive sentences at his sentencing or re-sentencing. For this additional reason, appellant's first assignment of error lacks merit.

{¶28} Further, appellant's argument concerning R.C. 5145.01 is barred by res judicata because it could have been, but was not, raised during any one or more of the following proceedings: his original sentencing; in *Archibald I*; during his re-sentencing on remand; and/or in *Archibald II*. In the context of criminal cases, "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. Szeftcyk*, 77 Ohio St.3d 93, 96 (1996).

{¶29} Finally, we note that the trial court merged several of the offenses of which appellant was convicted, and appellant does *not* argue on appeal that any of the other offenses of which he was convicted should have been merged pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶48. Consequently, that issue is waived. In any event, based upon our exhaustive statement of the facts in *Archibald I*,

other than the offenses merged by the trial court, each of the offenses of which appellant was convicted was committed separately and with a separate animus. Thus, even if an issue under *Johnson* had been raised, it would lack merit.

{¶30} Appellant's first assignment of error is overruled.

{¶31} Because appellant's second and third assignments of error are related, they are considered together. They allege:

{¶32} "[2.] Under *Blakely*, *Apprendi*, And *Booker*, Appellant, Carl P. Archibald, Received An Excessive Sentence For a First-Time Offender.

{¶33} "[3.] The Charges Against Defendant-Appellant, Carl P. Archibald, Are In Violation Of The Double Jeopardy Clause Of The Fifth And Fourteenth Amendment Of The United States Constitution, And Under The Authority Of *Valentine Vs. Konteh*, 395 F.3d 626 (Sic Throughout.)"

{¶34} Before addressing the merits of these assigned errors, we note that appellant failed to raise the argument contained in either of them in his present motion for relief after judgment. As a result, the argument raised in these two assigned errors is waived. *Awan, supra* (constitutional rights may be lost as finally as any others by failing to timely assert them). Moreover, appellant fails to demonstrate and we discern no plain error resulting from his failure to timely raise these issues. For this reason alone, his second and third assignments of error lack merit.

{¶35} In any event, even if appellant had raised these issues at the proper time, they would have lacked merit. First, appellant argues his sentence was excessive. However, appellant was sentenced and re-sentenced post-*Foster*. Pursuant to *Foster, supra*, "[t]rial courts have full discretion to impose a prison sentence within the statutory

range * * *.” Further, appellant concedes his sentence was within the statutory range, and he does not argue or make any showing that his sentence was inconsistent pursuant to R.C. 2929.11. As a result, appellant’s sentence was not excessive.

{¶36} Moreover, appellant essentially argued his sentence was excessive, and this court rejected this argument in *Archibald II* at ¶9-16. Thus, appellant’s argument is additionally barred by res judicata.

{¶37} Next, appellant argues for the first time in his reply brief that the trial court failed to properly advise him regarding post-release control. Appellant does not explain how he believes the court erred in notifying him about post-release control. For this reason alone, the argument lacks merit. App.R. 16(A)(7). In any event, our review of the sentencing transcript and judgment on re-sentence reveals that the trial court correctly notified appellant regarding post-release control.

{¶38} Further, appellant argues that various due process violations allegedly occurred at trial, which, he contends, equate to a violation of the Double Jeopardy Clause of the Federal Constitution. As examples of such due process violations, he argues that the evidence was insufficient to prove he kidnapped and raped the victim; that he was improperly classified as a sexual predator; that without DNA evidence, a charge of rape is frivolous; that he could not be convicted of multiple offenses because the evidence did not support each conviction; that multiple undifferentiated charges in the indictment violated his right to notice; and that as a first-time offender, he could not lawfully receive consecutive sentences.

{¶39} Because appellant previously appealed his sentence without asserting his double jeopardy argument, which was apparent to him at that time, and we affirmed the

trial court's imposition of consecutive sentences, his double jeopardy argument is barred by the doctrine of res judicata. *State v. Gann*, 12th Dist. Butler No. CA2004-01-028, 2005-Ohio-678, ¶12.

{¶40} Appellant's second and third assignments of error are overruled.

{¶41} For the reasons stated in the Opinion of this court, the assignments of error lack merit and are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.