

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-154
- vs -	:	<u>OPINION</u>
	:	3/12/2012
KEYAWN JACKSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2001-02-0265

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43146, defendant-appellant, pro se

**POWELL, P.J.**

{¶ 1} Defendant-appellant, Keyawn Jackson, appeals a decision of the Butler County Court of Common Pleas denying his "Motion to Merge Allied Offenses" under R.C. 2941.25(A).<sup>1</sup>

{¶ 2} On August 15, 2001, appellant was convicted of reckless homicide, involuntary

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1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

manslaughter, felonious assault, illegal possession of a firearm in a liquor permit premises, and having a firearm under a disability. Appellant subsequently filed a direct appeal to this court, alleging errors relating to: (1) jury instructions; (2) Crim.R. 29; and (3) manifest weight of the evidence. On September 9, 2002, we overruled each of appellant's arguments and affirmed the trial court's judgment. On January 15, 2003, the Supreme Court of Ohio declined to accept jurisdiction over appellant's discretionary appeal. See *State v. Jackson*, 12th Dist. No. CA2001-10-239, 2002-Ohio-4705.

{¶ 3} On December 15, 2009, appellant filed a "Motion to Vacate a Void Sentence," arguing an error in the imposition of postrelease control. The trial court denied appellant's motion, at which time appellant appealed to this court. In an accelerated judgment entry, we reversed in part and remanded, based upon an inconsistency between the court's oral notification at the sentencing hearing and its written notification in its sentencing entry regarding postrelease control. *State v. Jackson*, 12th Dist. No. CA2010-02-031 (July 19, 2010) (accelerated calendar judgment entry). However, because appellant failed to provide a transcript of the original sentencing hearing, we were unable to determine the extent of the error.

{¶ 4} In our decision, we noted that the sentencing entry stated appellant was subject to a term of postrelease control "up to a maximum of 5 years," rather than for a term of 5 years. As such, we directed the trial court to determine whether the entry was mistaken as a result of a clerical error, or instead was an accurate reflection of an incorrect pronouncement during the sentencing hearing. Prior to resentencing, however, appellant filed a "Motion to Merge Allied Offenses," arguing for the first time that pursuant to R.C. 2941.25(A), his convictions for involuntary manslaughter and felonious assault should have been merged. The trial court denied the motion and this appeal followed.

{¶ 5} Assignment of Error No. 1:

{¶ 6} TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED DEFENDANT TO CONSECUTIVE SENTENCES FOR INVOLUNTARY MANSLAUGHTER, FELONIOUS ASSAULT THAT BOTH RESULTED FROM A SINGLE INCIDENT.

{¶ 7} Appellant now argues the trial court erred by failing to merge his involuntary manslaughter and felonious assault convictions. While appellant admittedly failed to raise the merger issue on direct appeal, he argues this court must apply plain-error analysis to the trial court's decision. The State counters that appellant's argument is barred by res judicata.

{¶ 8} Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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 an appeal from that judgment. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 16-17; *State v. Carter*, Clinton App. Nos. CA2010-07-012, CA2010-08-016, 2011-Ohio-414, ¶ 7. "In turn, the time to challenge a conviction based on allied offenses is through a direct appeal." See *State v. Dodson*, 12th Dist. No. CA2011-02-034, 2011-Ohio-6347, ¶ 8-9; *State v. Ballou*, 8th Dist. No. 95733, 2011-Ohio-2925, ¶ 11; *State v. Hall*, 1st Dist. No. C-100097, 2011-Ohio-2527, ¶ 11-12; *State v. Goldsmith*, 8th Dist. No. 95073, 2011-Ohio-840, ¶ 11; *State v. Woods*, 8th Dist. No. 96487, 2011-Ohio-5825, ¶ 21 ("the issue of merger of allied offenses is res judicata on an appeal from a resentencing"). Accordingly, because appellant did not raise the merger issue in his direct appeal, we now find his challenge is barred by res judicata.

{¶ 9} The Ohio Supreme Court's recent holding in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, further limits the scope of appellant's current appeal. In *Fischer*, the court found that when a trial court fails to properly impose postrelease control, "that *part* of the sentence \* \* \* is void and must be set aside." (Emphasis sic.) *Id.* at ¶ 26, 28. The

defendant is not entitled to be resentenced on the entire sentence - "only the portion that is void may be vacated and otherwise amended." *Id.* at ¶ 28; *State v. Gonzalez*, 195 Ohio App.3d 262, 2011-Ohio-4219, ¶ 5 (1st Dist.) ("the Ohio Supreme Court has not held that a judgment of conviction is rendered void by the imposition of multiple sentences in violation of R.C. 2941.25"). The *Fischer* court concluded "[t]he scope of an appeal from a resentencing hearing in which a mandatory term of post release control is imposed is limited to issues arising at the resentencing hearing." *Id.* at ¶ 40. See also *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298, ¶ 43-44; *State v. Cioffi*, 11th Dist. Nos. 2011-T-0072, 2011-T-0073, 2012-Ohio-299, ¶ 13-14.

{¶ 10} Based upon the foregoing, we find appellant's appeal is strictly limited to issues arising from the resentencing, which, as a reminder, was limited to postrelease control. *Id.* In other words, our remand ordering the trial court to correct postrelease control errors did not open the door for appellant to attack his underlying convictions or other unrelated matters. See *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶ 13. Had the trial court attempted to merge the offenses of which appellant had already been convicted, it would have erred, since doing so would have been outside the scope of its mandate which was merely to correct postrelease control errors in accordance with *Fischer*.

{¶ 11} Thus, appellant's argument is barred on the basis of res judicata and in conformity with *Fischer* and its progeny.

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

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE TRIAL COURT ERRED AT SENTENCING WHEN IT SENTENCED APPELLANT TO CONCURRENT 4 YEARS FOR RECKLESS HOMICIDE ALONG WITH THE OTHER OFFENSES THAT ALL OCCURRED OUT OF A SINGLE INCIDENT.

{¶ 15} In addition to involuntary manslaughter and felonious assault, appellant now

argues the trial court erred in failing to merge a third conviction, namely, reckless homicide.

{¶ 16} Upon review, we find appellant has waived this argument because he failed to raise it with the trial court at any time, including in his motion to merge allied offenses. It is well-settled that issues not raised in the trial court may not be raised for the first time on appeal. *State v. Guzman-Martinez*, 12th Dist. No. CA2010-06-059, 2011-Ohio-1310, ¶ 9. As such, the matter is waived and we need not consider it. We note that even if appellant had raised the argument with the trial court, it would remain barred by res judicata, as he failed to present the issue on direct appeal. *Dodson*, 2011-Ohio-6347 at ¶ 8-9.

{¶ 17} Appellant's second assignment of error is overruled.

{¶ 18} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.