

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio

Court of Appeals No. E-12-017

Appellee

Trial Court No. 1989-CR-119

v.

Steven W. Yee

**DECISION AND JUDGMENT**

Appellant

Decided: November 22, 2013

\* \* \* \* \*

Kevin J. Baxter, Erie County Prosecuting Attorney,  
Ashley L. Thomas and Frank Romeo Zeleznikar, Assistant  
Prosecuting Attorneys, for appellee.

Kreig J. Brusnahan, limited appearance for appellant.

Steven W. Yee, pro se.

\* \* \* \* \*

**JENSEN, J.**

{¶ 1} This is an appeal from a March 21, 2012 judgment entry of the Erie County Court of Common Pleas denying Steven W. Yee's petition for postconviction relief. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} In March 1989, the Erie County Grand Jury issued a six count indictment against appellant, Steven W. Yee, charging three counts of aggravated murder, murder, kidnapping and aggravated robbery. The indictment included both capital and firearm specifications.

{¶ 3} Yee entered into a plea agreement wherein the state promised to nolle four counts of the indictment and the capital specifications. In exchange, Yee agreed to enter a plea of guilty to one count of aggravated murder with a firearm specification and one count of aggravated robbery with a firearm specification. On August 30, 1993, Yee appeared in court, withdrew his previous pleas of not guilty and entered pleas of guilty pursuant to the agreement. When entering his plea, Yee reserved the right to appeal the trial court's authority to sentence him to two consecutive terms of incarceration on the firearm specifications.

{¶ 4} A sentencing hearing was held in September 1993. As to the charge of aggravated murder, Yee was sentenced to life in prison with eligibility of parole after 20 years. As to the charge of aggravated robbery, Yee was sentenced to 10-25 years in prison. Yee was sentenced to three years each for the two firearm specifications. The trial court ordered that the sentences for the aggravated murder and aggravated robbery be served concurrently. The sentences for the firearm specifications were ordered to be served consecutive to each other and consecutive to the concurrent sentences for aggravated murder and aggravated robbery.

{¶ 5} Yee appealed. Upon review, we vacated the portion of the sentence which imposed two consecutive three-year terms of incarceration for the firearm specifications. *See State v. Yee*, 6th Dist. Erie No. E-93-72, 1994 WL 645744 (Nov. 18, 1994). We explained,

The situation here is directly analogous to the circumstances when one is convicted of allied offenses of similar import. R.C. 2941.24(A) provides that where the same conduct constitutes two or more allied offenses of similar import, the defendant may be charged with and found, or plead, guilty to all such offenses but a judgment of conviction may be entered only on one such offense. *State v. Kent* (1980), 68 Ohio App.2d 151, 154. Similarly, R.C. 2929.71(B) provides that when a defendant has separate gun specifications attached to separate felonies which were committed as part of the same act or transaction and is found, or pleads, guilty to such multiple felonies and specifications, “\* \* \* only one three-year term of actual incarceration shall be imposed for those offenses \* \* \*.” With either of these sentencing schemes, it is the responsibility of the trial court to make, upon the facts adduced at trial, the legal determination as to whether offenses are allied offenses of similar import with a single animus, R.C. 2941.25(A) & (B), or whether multiple felonies arose from the same act or transaction. R.C. 2929.71(B). *Id.* at \*3.

We remanded the matter to the trial court.

{¶ 6} On December 28, 1995, with consent of counsel, the trial judge issued a judgment entry nunc pro tunc merging the firearm specifications and imposing three years of actual incarceration for the specifications. The stated purpose of the entry was to “reflect the correct language as to the sentence imposed on the firearm specifications.” The judgment entry was filed with the clerk of courts on January 4, 1996.

{¶ 7} On July 27, 2004, Yee filed a motion for leave to withdraw his guilty pleas or, in the alternative, to vacate and set aside the judgment of conviction. The trial court denied Yee’s motion. On April 8, 2011, Yee filed a motion to vacate his conviction or withdraw his guilty plea. Again, the trial court denied Yee’s motion.

{¶ 8} On February 29, 2012, Yee filed a motion for de novo resentencing pursuant to the Ohio Supreme Court’s decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. The trial court, construing the motion as a petition for postconviction relief under R.C. 2953.21, denied the motion as untimely. The trial court also found that Yee’s claims were barred by the doctrine of res judicata. Yee filed the instant appeal and sets forth the following assignments of error:

I. THE TRIAL COURT COMMITTED PLAIN ERROR BY  
FAILING TO MERGE THE DEFENDANT’S CHARGES OF  
AGGRAVATED MURDER AND AGGRAVATED ROBBERY THAT  
BOTH OCCURRED BY THE SAME CONDUCT AT THE SAME TIME,  
PURSUANT TO THE INTERVENING OHIO SUPREME COURT

“RETROSPECTIVE” INTERPRETATION OF R.C. 2941.25, STATE V. JOHNSON, 128 Ohio St.3d 153, 943 N.E.2d 1061.

II. THE TRIAL COURT COMMITTED PLAIN ERROR BY RESENTENCING THE DEFENDANT WITH A NUNC PRO TUNC JOURNAL ENTRY TO REFLECT WHAT DID NOT OCCUR AT THE ORIGINAL SENTENCING HEARING.

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY RESENTENCING THE DEFENDANT WITHOUT HIS PRESENCE BEFORE THE COURT FOR SENTENCE AND/OR ORAL OR WRITTEN WAIVER.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR BY RESENTENCING THE DEFENDANT WITHOUT AFFORDING HIM HIS ALLOCATION [SIC] RIGHTS.

V. THE TRIAL COURT COMMITTED PLAIN ERROR RESENTENCING THE DEFENDANT IN ABSENTIA.

VI. THE TRIAL COURT COMMITTED PLAIN ERROR BY RESENTENCING THE DEFENDANT WITHOUT COMPLYING WITH CRIM.R. 32.

### **First Assignment of Error**

{¶ 9} Appellant asserts three arguments under his assignment of error. First, appellant asserts that his aggravated murder and aggravated robbery offenses were “allied

offenses of similar import” subject to merger under R.C. 2941.25(A). Therefore, appellant contends, the trial court erred when it denied his postconviction petition for resentencing.

{¶ 10} In response, the state asserts that the trial court did not err when it denied the postconviction petition because Yee’s merger claim was barred by res judicata. Under the doctrine of res judicata, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject of the previous action.” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus. “The res judicata bar applies to any defense that was raised or could have been raised in a criminal defendant’s prior direct appeal from his conviction and/or sentence.” *State v. Collins*, 2d Dist. Montgomery No. 25614, 2013-Ohio-3645, ¶ 9, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶ 11} In his direct appeal, Yee asserted three assignments of error. The assignments did not raise the issue of merger as to the charges of aggravated murder and aggravated burglary; they only raised the issue of merger as to the firearm specifications. Therefore, the instant claim is barred by the doctrine of res judicata. Accordingly, Yee’s first argument under his first assignment of error is not well-taken.

{¶ 12} In his second argument under his first assignment of error, Yee attempts to avoid the res judicata bar by reliance on *Johnson*, which was decided subsequent to his conviction and resentencing. However, it is well settled that a new judicial ruling applies

only to cases that are pending on the announcement date of the new ruling, and may not be applied retroactively to a conviction that has become final. *Ali v. State of Ohio*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6. *Johnson* was decided in 2010, several years after Yee's conviction became final. Thus, *Johnson* does not apply retroactively. See *State v. Walker*, 6th Dist. Lucas No. L-12-1204, 2013-Ohio-2131, ¶ 10. Accordingly, Yee's second argument under his first assignment of error is not well-taken.

{¶ 13} In his third argument under his first assignment of error, Yee contends that the trial court's December 28, 1995 nunc pro tunc judgment entry is void; therefore, res judicata does not apply.

{¶ 14} Recently, in *State v. Porter*, 6th Dist. Lucas No. L-12-1243, 2013-Ohio-1360, we held that the failure to merge allied offenses at sentencing does not render a sentence void, merely voidable. *Id.* at ¶ 12, citing *State v. Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728, ¶ 8. See also *State v. Moore*, 7th Dist. Mahoning No. 12 MA 91, 2013-Ohio-1431, ¶ 15; *State v. Garnett*, 10th Dist. Franklin No. 12AP-594, 2013-Ohio-1210, ¶ 10; *State v. Miller*, 4th Dist. Lawrence No. 11CA14, 2012-Ohio-1922, ¶ 6; *State v. Parson*, 2d Dist. Montgomery No. 24641, 2012-Ohio-730, ¶ 9. The void sentence exception to res judicata is inapplicable here. Accordingly, Yee's third argument under his first assignment of error is not well-taken.

{¶ 15} For the foregoing reasons, we hold that the trial court did not abuse its discretion in denying Yee’s petition for postconviction relief. Yee’s first assignment of error is not well-taken.

### **Second, Third, Fourth, Fifth and Sixth Assignments of Error**

{¶ 16} Appellant’s remaining assignments allege plain error and relate to the December 28, 1995 nunc pro tunc judgment entry. Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” *Id.* “Plain error is the only exception to the res judicata bar as plain errors are not waivable.” *State v. Chism*, 7th Dist. Mahoning No. 98 CA 121, 1999 WL 783957, \*3 (Sept. 27, 1999).

{¶ 17} The plain error rule “places three limitations on a reviewing court’s decision to correct an error despite the absence of a timely objection at trial.” *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). The *Barnes* court explained:

First, there must be an error, i.e. a deviation from a legal rule. \* \* \* Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. \* \* \* Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial. *Id.* (citations omitted).

{¶ 18} We begin our plain error analysis with a review of our decision in *Yee*. There, we held that the statement made by the prosecutor at the change of plea hearing



was “insufficient for us to make an informed determination as to whether the felonies appellant committed were part of the same act or transaction.” *Yee*, 6th Dist. Erie No. E-93-72, 1994 WL 645744 at \*2. We vacated the portion of the sentence relating to the firearm specifications, remanded the matter, and instructed the trial court to either (a) conduct an evidentiary hearing or (b) accept a stipulated statement of facts and determine whether or not the felonies and firearm specifications were part of the same transaction or act. *Id.* at \*3.

{¶ 19} There is no indication on the record before us whether an evidentiary hearing was held or a stipulated statement of facts was accepted. It is clear, however, that with the consent of counsel, the trial court entered a nunc pro tunc judgment entry imposing one three-year sentence for the “merged” firearm specifications. In its entry, the trial court explained why it merged the specifications,

as to the firearm specifications found under counts No. 1 and 6, said  
specifications merge as mandated by the Court of Appeals, Sixth Judicial  
District, wherein the Court of Appeals determined that the firearm  
specifications were predicated on felonies committed as part of the same act  
or transaction, therefore, the Court imposes three years actual incarceration  
as to the gun specifications;

The trial court’s explanation is, at the very least, indicative of a misunderstanding<sup>1</sup> of our decision in *Yee*. We did not determine, as stated by the trial court, “that the firearm specifications were predicated on felonies committed as part of the same act or transaction.” To the contrary, we clearly and specifically held that there was insufficient information in the record to make such a determination. Under the first and second prongs of the plain error test, we find that the trial court committed an obvious error when it issued a nunc pro tunc judgment entry plainly misstating our holding in *Yee*.

{¶ 20} Under the third prong of the plain error test, we consider whether the error effected Yee’s substantial rights. Under our mandate on the partial remand, the trial court had two sentencing options for the firearm specifications: one three-year term of incarceration or two three-year terms of incarceration. The sentence was dependent upon a determination as to whether the underlying felonies were committed as part of the same act or transaction. Contrary to the mandate, the trial court failed to undertake the “same act or transaction” analysis. Instead, in an apparent misinterpretation of our decision, it simply merged the firearm specifications and imposed one three-year term of incarceration. We cannot say that but for the trial court’s error, there was a reasonable probability that Yee would have received a lesser sentence. In fact, the trial court’s error reduced Yee’s sentence by three years of actual incarceration. The trial court’s failure to

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<sup>1</sup> This misunderstanding prohibits us from interpreting the nunc pro tunc judgment entry as a stipulated statement of facts.

adhere to our mandate did not create a manifest miscarriage of justice, and thus did not rise to the level of plain error.

{¶ 21} In his remaining assignments, Yee argues that the trial court committed plain error when it resentenced him by nunc pro tunc judgment entry, in absentia, without a waiver, without affording him his right of allocution, and without complying with Crim.R. 32.

{¶ 22} Assuming, arguendo, that the trial court committed the errors and that such errors were obvious, the third prong of the plain error test remains unsatisfied. To the extent the trial court's actions were improper; Yee was not prejudiced when the trial court imposed the lesser of two sentencing options available to it. As such, Yee's second, third, fourth, fifth and sixth assignments of error are not well-taken.

{¶ 23} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, J.

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JUDGE

James D. Jensen, J.

CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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