

[Cite as *State v. Poole*, 2011-Ohio-716.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94759

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD POOLE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-387741

BEFORE: Jones, J., Kilbane, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Reginald Poole (“Poole”), appeals his sentence.

Finding no merit to the appeal, we affirm.

{¶ 2} In 2001, a jury found Poole guilty of two counts of felonious assault with firearm specifications. Poole pled guilty to a having weapon while under disability charge from the same case and the trial court sentenced him to a total aggregate sentence of 15 years in prison. We upheld his conviction on appeal. *State v. Poole*, Cuyahoga App. No. 80150, 2002-Ohio-5065 (“*Poole I*”).

{¶ 3} The sentencing court, however, failed to properly inform Poole of his postrelease control obligations, so the court held a resentencing hearing in 2010 via video

conference. Poole's counsel raised the issue of whether his convictions for felonious assault should merge as allied offenses of similar import and the trial court stated that the issue was not properly before the court. The court proceeded to resentence Poole to the same 15 years in prison. The trial court also advised Poole he would be subject to three years of postrelease control upon his release from prison.

{¶ 4} Poole now appeals, raising the following assignment of error for our review:

{¶ 5} "I. The trial court erred in failing to consider the properly raised issue of merger when it resentenced appellant pursuant to a previous void sentence."

{¶ 6} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel 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 trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Reynolds*, 79 Ohio St.3d 158, 161, 1997-Ohio-304, 679 N.E.2d 1131, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, at the syllabus; *State v. Sneed*, Cuyahoga App. No. 84964, 2005-Ohio-1865; *State v. Brown*, Cuyahoga App. No. 84322, 2004-Ohio-6421.

{¶ 7} Poole claims that the trial court should have considered whether his convictions for felonious assault should have merged as allied offenses of similar import since he was being subjected to a de novo resentencing. The state argues that Poole's claim is barred by res judicata since he had previously raised the issue on appeal.

{¶ 8} During recent developments in the law surrounding postrelease control issues, the argument has been raised that since a trial court's failure to inform a defendant of postrelease control at sentencing renders that sentence void, the defendant should be allowed to collaterally attack his conviction. See, e.g., *State v. Dillard*, Jefferson App. No. 08 JE 35, 2010-Ohio-1407.

{¶ 9} In *State v. Marshall*, Cuyahoga App. No. 89409, 2007-Ohio-6830, this court rejected a defendant's argument that the trial court, at his resentencing, erred when it failed to merge his robbery and kidnapping convictions because they were allied offenses of similar import. This court found that the trial court properly rejected the defendant's argument because he had already raised the issue, which this court rejected on direct appeal. In *State v. Martin*, Montgomery App. No. 21697, 2007-Ohio-3585, the court found that the analysis of merger constituted a review of the defendant's underlying convictions, and thus was not within the scope of the trial court's limited review of sentencing issues on remand. See, also, *State v. McCauley*, Cuyahoga App. No. 86671, 2006-Ohio-2875 (finding that the defendant's allied offenses argument was barred by res judicata because it was not raised on direct appeal).

{¶ 10} Recently, the Ohio Supreme Court, in an attempt to wade through the quagmire of law on postrelease control, held that "void sentences are not precluded from appellate review by principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack. We further hold that although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of

the ensuing sentence. The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.” *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238.

{¶ 11} Thus, when a court affirms the convictions in an appellant’s first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them are barred. *State v. Harrison*, Cuyahoga App. No. 88957, 2008-Ohio-921, at ¶9. Therefore, in a subsequent appeal, only arguments relating to the resentencing are proper. *State v. Riggenbach*, Richland App. No. 09CA121, 2010-Ohio-3392, affirmed by Slip Opinion No. 2010-Ohio-6336.

{¶ 12} In further clarification on this issue, we note that the Ohio Supreme Court recently stated that “under R.C. 2941.25, the court must determine *prior* to sentencing whether the offenses were committed by the same conduct.” *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, at the syllabus. (Emphasis added.)

{¶ 13} Thus, in considering the holdings in *Fischer* and the language the Ohio Supreme Court used in *Johnson*, we find that the trial court did not err when it stated that the issue of allied offenses was not properly before it. Although we are aware that the issue of merger clearly affects a defendant’s sentencing disposition, the question of whether the verdicts on all counts can be used to support separate convictions for all offenses charged is decided by the trial court prior to its determination of a defendant’s sentence. *Dillard*, *supra*. Thus, we now consider the issue settled and hold that the time to challenge a conviction based on allied offenses is through a direct appeal — not at a resentencing hearing.

{¶ 14} In this case, Poole argued in *Poole I* that the trial court erred when it did not consider merging his felonious assault convictions. We overruled the assignment of error, finding that the offenses did not merge because there were two separate victims:

“In the second assignment of error, pro se, the appellant argues that his two convictions for felonious assault pursuant to R.C. 2903.11 should have been merged for purposes of sentencing because they were allied offenses. The appellant essentially argues that there was no separate animus when shots were fired at Karr and at Simmons.

“R.C. 2941.25(B) states that where a defendant’s conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment may contain counts for all such offenses, and the defendant may be convicted of all of them. This court has held that felonious assault is a crime defined in terms of conduct towards another and that where there are two victims, there is a dissimilar import for each person and the two charges of felonious assault are not allied offenses of similar import. *State v. Richard* (Nov. 10, 1999), Cuyahoga App. No. 74814.

“* * *

“The trial court did not err in sentencing the appellant to separate terms of imprisonment and this assignment of error, pro so[sic], is overruled.” *Id.* at ¶32-35.

{¶ 15} Because this court already affirmed Poole’s convictions in *Poole I*, the trial court’s jurisdiction was limited to a consideration of sentencing issues. Poole is prohibited from making a collateral attack on his underlying convictions through an appeal of his sentencing, and his argument is barred by res judicata.

{¶ 16} Therefore, the sole assignment of error is overruled.

{¶ 17} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, A.J., and
KENNETH A. ROCCO, J., CONCUR