

[Cite as *State v. Goldsmith*, 2011-Ohio-840.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95073

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO GOLDSMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490295

BEFORE: Gallagher, J., Blackmon, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: February 24, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Antonio Goldsmith appeals his sentence from the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} In October 2007, Goldsmith was convicted of murder, felony murder, two counts of felonious assault, and attendant three-year firearm

specifications. The trial court merged the three-year firearm specifications and sentenced Goldsmith to a cumulative prison term of 18 years to life.

{¶ 3} Goldsmith filed a direct appeal from his conviction. In that appeal, *State v. Goldsmith*, Cuyahoga App. No. 90617, 2008-Ohio-5990 (“*Goldsmith I*”), we affirmed Goldsmith’s conviction, but found plain error in his sentencing. The panel determined that the separate murder convictions should have merged, and that the two felonious assault convictions should have merged. Therefore, Goldsmith’s sentence was vacated and the case was remanded for resentencing. *Goldsmith I* did not address whether the offenses of murder and felonious assault are allied offenses subject to merger.

The state’s appeal of that decision failed on the merits. *State v. Goldsmith*, 123 Ohio St.3d 162, 2009-Ohio-4906, 914 N.E.2d 1052.

{¶ 4} Upon remand, the state elected to proceed to sentencing on Count 1, murder in violation of R.C. 2903.02(A), and Count 4, felonious assault in violation of R.C. 2903.11(A)(2). The trial court imposed a sentence of 15 years to life for murder, a concurrent eight-year term for felonious assault, and a mandatory three-year sentence for the firearm specification.

{¶ 5} Goldsmith timely filed this appeal, raising one assignment of error for review that provides as follows: “The trial court erred as a matter of law by failing to merge for sentencing purposes, two allied offenses of

similar import. Murder and felonious assault must be merged pursuant to Ohio Revised Code _ 2941.25(A).”

{¶ 6} It is well established that res judicata bars the consideration of issues that could have been raised on direct appeal. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 826 N.E.2d 824, ¶ 16-17. The issue of whether two offenses constitute allied offenses of similar import subject to merger has been recognized as an issue that is required to be raised on direct appeal from a conviction, or else res judicata will bar a subsequent attempt to raise the issue. *State v. Abuhilwa*, Summit App. No. 25300, 2010-Ohio-5997; *State v. Rodriquez*, Cuyahoga App. No. 95055, 2010-Ohio-4902.

{¶ 7} We recognize that in the recent decision of *State v. Fischer*, __ Ohio St.3d __, 2010-Ohio-6238, __ N.E.2d __, the Ohio Supreme Court held that principles of res judicata, including the doctrine of the law of the case, do not apply to a sentence that fails to properly impose postrelease control. However, the *Fischer* decision was limited to postrelease control, which is considered a part of the defendant’s sentence. *Id.* The Ohio Supreme Court held that “when a judge fails to impose statutorily mandated postrelease control as part of a defendant’s sentence, that part of the sentence that is void and must be set aside” and it is “only the offending portion of the sentence [that] is subject to review and correction.” *Id.* at ¶ 26-28. In so holding, the court reaffirmed the principle that “[n]o court has the authority to impose a

sentence that is contrary to law” and also “reject[ed] the application of issue preclusion to sentences that do not comply with statutory mandates, as such sentences are illegal and subject to collateral attack or direct appeal by any party.” *Id.* at ¶ 23 and 35.

{¶ 8} In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 26, the court recognized that there is a statutory mandate requiring a trial court to merge allied offenses of similar import at sentencing.

While arguably the logic applied in *Fischer* could be applied to allied offenses, we decline to do so until the Ohio Supreme Court determines that its holding should be extended. Therefore, the determination of whether offenses constitute allied offenses of similar import remains subject to res judicata. As stated in *Fischer*: “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.” *Id.* at paragraph three of the syllabus.

{¶ 9} In *Underwood*, the court held that a trial court commits plain error when it fails to merge allied offenses of similar import. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31. While the issue of merger clearly affects a defendant’s sentencing disposition, the analysis for merging allied offenses of similar import requires a review of the underlying convictions, and thus is not within the scope of the trial court’s limited review of sentencing issues on remand. *State v. Dillard*, Jefferson App. No. 08 JE

35, 2010-Ohio-1407, ¶ 22. See also, *State v. Martin*, Montgomery App. No. 21697, 2007-Ohio-3585. Indeed, the Ohio Supreme Court has recognized that the state retains the right to elect which allied offense to pursue prior to the trial court's imposition of a sentence. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182.

{¶ 10} In *State v. Wilson*, Cuyahoga App. No. 93427, 2010-Ohio-2466, the defendant filed an appeal following resentencing in which he claimed the trial court failed to merge firearm specifications. Although the defendant had not raised the issue in a direct appeal from his conviction, this court held that the defendant was not barred by res judicata from raising the issue. The Ohio Supreme Court reversed this court's decision on the authority of *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, N.E.2d 824. *State v. Wilson*, __ Ohio St.3d __, 2010-Ohio-6285, __ N.E.2d __. In *Saxon*, the court held that "a defendant who fails on direct appeal to challenge a sentence imposed on him for an offense is barred by res judicata from appealing that sentence following a remand for resentencing on other offenses." *Saxon*, supra at ¶ 19.

{¶ 11} In this case, the trial court resentedenced Goldsmith in accordance with our mandate in *Goldsmith I*. Because Goldsmith failed to raise on direct appeal from his conviction the issue concerning whether the offenses challenged herein are allied offenses of similar import subject to merger, we

find that the issue is barred by the doctrine of res judicata. Goldsmith's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

SEAN C. GALLAGHER, JUDGE

PATRICIA A. BLACKMON, P.J., and
JAMES J. SWEENEY, J., CONCUR