[Cite as *State v. Santiago*, 2015-Ohio-1300.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101601

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JESUS SANTIAGO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-10-533862-C

BEFORE: Keough, P.J., Kilbane, J., and Stewart, J.

RELEASED AND JOURNALIZED: April 2, 2015

APPELLANT

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Jesus Santiago, pro se, appeals from the trial court's judgment denying his "motion to correct illegal sentence." For the reasons that follow, we affirm.

I. Background

{¶2} Santiago was indicted in 2010 on two counts of drug trafficking in violation of R.C. 2925.03(A)(2), two counts of drug possession in violation of R.C. 2925.11(A)(one count for possession of heroin, the other for possession of cocaine), and one count of possessing criminal tools in violation of R.C. 2923.24(A). The jury found him not guilty of the drug trafficking offenses, but guilty of both drug possession charges and guilty of possessing criminal tools. The trial court sentenced him to eight years incarceration for the heroin possession conviction and two years for the possession of cocaine conviction, to be served consecutively, and one year for the possessing criminal tools conviction, concurrent, for a total of ten years incarceration.

{¶3} On appeal, this court affirmed Santiago's convictions in all respects, but reversed for the trial court to issue a nunc pro tunc order correcting a clerical error in the judgment entry of sentencing because it included forfeiture specifications that the state had asked to be deleted. *State v. Santiago*, 8th Dist. Cuyahoga No. 95333, 2011-Ohio-1691. On November 17, 2011, upon remand, the trial court issued a

corrected nunc pro tunc entry that again included an aggregate prison sentence of ten years. Santiago did not appeal from this judgment.

{¶4} Subsequently, in April 2013, he filed a "motion for reduced punishment" in which he argued that his convictions for possession of heroin and possession of cocaine were allied offenses that should have merged at sentencing. The trial court denied the motion. This court subsequently dismissed Santiago's appeal for failure to file the record. *State v. Santiago*, 8th Dist. Cuyahoga No. 100029 (July 23, 2013).

{¶5} In February 2014, Santiago filed a "motion to correct illegal sentence" in which he again argued that his convictions for possession of heroin and possession of cocaine were allied offenses that should have merged at sentencing. The trial court denied the motion, finding that the offenses were not allied because one involved the possession of heroin and the other involved the possession of cocaine. This appeal followed.

II. Analysis

{¶6} In a single assignment of error, Santiago contends that the trial court erred in denying his "motion to correct illegal sentence" because the court did not conduct a hearing prior to sentencing to determine whether his convictions for possession of heroin and possession of cocaine were allied offenses subject to merger. Santiago's argument is barred by res judicata.

{¶7} It is well-established that the doctrine of res judicata bars the consideration of issues that were or could have been raised on direct appeal. *State v. Saxon*, 109 Ohio

St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 17; *State v. Hough*, 2013-Ohio-1543, 990 N.E.2d 653, ¶ 29. This court has recognized that the issue of whether two offenses constitute allied offenses subject to merger must be raised on direct appeal from a conviction, or res judicata will bar a subsequent attempt to raise the issue. *State v. Williams*, 8th Dist. Cuyahoga No. 100135, 2014-Ohio-1239, ¶ 9, citing *State v. Allen*, 8th Dist. Cuyahoga No. 97552, 2012-Ohio-3364, ¶ 20; *State v. Poole*, 8th Dist. Cuyahoga No. 94759, 2011-Ohio-716, ¶13 (issue is settled that "the time to challenge a conviction based on allied offenses is through a direct appeal").

{¶8} In this case, Santiago argued on direct appeal that there was insufficient evidence to support his convictions, his convictions were against the manifest weight of the evidence, he was denied his right to effective assistance of counsel, and cumulative error deprived him of a fair trial. *State v. Santiago*, 8th Dist. Cuyahoga No. 95333, 2011-Ohio-1691, at ¶ 1. He raised no issues regarding his sentence or whether the trial court erred in failing to consider allied offenses prior to sentencing. Accordingly, his allied offenses argument is barred by the doctrine of res judicata. *State v. Robinson*, 8th Dist. Cuyahoga No. 101426, 2014-Ohio-5435,¶ 15; *State v. Davis*, 8th Dist. Cuyahoga No. 100645, 2014-Ohio-3591, ¶ 6.

{¶9} Santiago's argument also fails on the merits. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court reiterated that for purposes of the merger of allied offenses under R.C. 2941.25, "a person may be punished for multiple offenses arising from a single criminal act without violating the Double

Jeopardy Clauses of the United States and Ohio Constitutions so long as the General Assembly intended cumulative punishment." *Id.* at ¶ 25. Thus, "the lodestar for allied offenses is whether the legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes." *Id.*

{¶10} In *State v. Delfino*, 22 Ohio St.3d 270, 490 N.E.2d 884 (1986), the Ohio Supreme Court reviewed the legislative intent of R.C. 2925.11 and held that "the legislature intended the possession of different drug groups to constitute different offenses." *Id.* at 274.

{¶11} Applying *Johnson* and *Delfino*, the Sixth District found in *State v. Heflin*, 6th Dist. Lucas No. L-11-113, 2012-Ohio-3988, that "convictions for simultaneous possession of cocaine and heroin are not subject to merger as allied offenses of similar import under R.C. 2941.25." The court reasoned that "possession of different drug groups constitutes different offenses under R.C. 2925.11" and the "possession of either cocaine or heroin will never support a conviction for possession of the other." *Id.* at ¶ 14. The Fourth District reached the same conclusion in *State v. Williams*, 4th Dist. Scioto No. 11CA3408, 2012-Ohio-4693, finding that the defendant's convictions did not merge because the legislative intent is that the simultaneous possession of different types of controlled substances constitutes multiple offenses under R.C. 2925.11. Likewise, in *State v. Huber*, 2d Dist. Clark No. 2010-CA-83, 2011-Ohio-6175, the Second District held that the defendant's convictions for possession of methadone, hydrocodone, oxycodone, and fentanyl did not merge because the legislature intended that the

possession of different drug groups constitutes different offenses under R.C. 2925.11. *See also State v. Johnson*, 6th Dist. Ottawa No. OT-13-022, 2014-Ohio-1558 (defendant's simultaneous possession of heroin, cocaine, and oxycodone did not constitute allied offenses of similar import for sentencing because the simultaneous possession of different types of controlled substances can constitute multiple offenses under R.C. 2925.11).

{¶12} We agree with the reasoning of these cases. Santiago's simultaneous possession of heroin and cocaine, each recognized as a separate offense under R.C. 2925.11, does not constitute allied offenses of similar import for sentencing. Accordingly, the trial court did not err in denying his "motion to correct illegal sentence," and the assignment of error is overruled.

{¶13} 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.

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
MELODY J. STEWART, J., CONCUR