

[Cite as *State v. Williams*, 2015-Ohio-5425.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102825

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**TYRONE WILLIAMS**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-574782-B

**BEFORE:** E.T. Gallagher, J., Celebrezze, A.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** December 24, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Tyrone Williams (“Williams”), appeals his convictions and sentence. He raises the following five assignments of error for our review:

1. The trial court erred by failing to hold a de novo resentencing hearing and appellant’s sentence is contrary to law.
2. Appellant’s convictions are not supported by sufficient evidence and the trial court erred by denying his motions for acquittal.
3. The convictions were against the manifest weight of the evidence.
4. The admission of the unauthenticated pre-trial photographic array identification evidence at appellant’s trial was plain error, an abuse of discretion, and the result of ineffective assistance of counsel in violation of appellant’s state and constitutional rights.
5. The trial court erred by denying appellant’s motion to dismiss for violation of his federal and state constitutional right to a speedy trial.

{¶2} We find some merit to the appeal and affirm the trial court’s judgment in part, but remand the case to the trial court for the limited purpose of properly imposing postrelease control.

### **I. Facts and Procedural History**

{¶3} Williams was charged with one count of kidnapping, two counts of felonious assault, one count of improperly discharging a firearm into a habitation, one count of aggravated burglary, one count of criminal damaging/endangering, and one count of having a weapon while under disability. The charges included repeat violent offender and firearm specifications and notices of prior conviction.

{¶4} Following a bench trial, the court found Williams guilty of one count each of felonious assault, misdemeanor assault, improperly discharging a firearm into a habitation, criminal damaging, and having a weapon while under disability. The court sentenced Williams to an aggregate three-year prison term on the underlying offenses, to be served concurrently with each other. However, the court ordered the concurrent prison terms to be served consecutive to the three-year prison term on the firearm specifications, for an aggregate six-year sentence.

{¶5} Williams appealed his convictions and sentence to this court. In *State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475 (“*Williams I*”), this court affirmed the trial court’s guilty findings on each of the counts but reversed some convictions and remanded the case to the trial court for merger of allied offenses. Specifically, this court held:

We reverse the judgment of conviction on (1) the felonious assault and assault counts and (2) the improper discharge into a habitation and criminal damaging counts and (3) remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against Williams. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at paragraphs one and two of the syllabus. But the determination of Williams’s guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. *Id.* at paragraph three of the syllabus.

*Williams I* at ¶ 43.

{¶6} At the resentencing hearing, Williams’s counsel asked the court to impose the minimum sentence on each count. In response, the court stated: “I am limited as to what I can do at this point, my order from the Court of Appeals is simply to follow their

mandate and order that the counts merge.” After affording Williams an opportunity to speak on his own behalf, which he declined, the court again imposed an aggregate six-year prison sentence. Williams now appeals from that judgment.

## **II. Law and Analysis**

### **A. Resentencing**

{¶7} In the first assignment of error, Williams argues the sentence he received on resentencing is contrary to law because the trial court erred by failing to hold a de novo resentencing hearing.

{¶8} The Ohio Supreme Court discussed the scope of the resentencing hearing that must be held following remand for an allied-offenses sentencing error in *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381. In that case, the court held that a remand for a new sentencing hearing “generally anticipates a de novo sentencing hearing,” but noted there may be exceptions to this general rule. *Id.* at ¶ 15, citing R.C. 2929.19(A). For example, when the parties stipulate to the sentencing court’s consideration of the record as it stood at the first sentencing hearing, a de novo resentencing is not necessary. *Id.* There are no exceptions in this case that would narrow the scope of the resentencing hearing.

{¶9} However, “only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review.” *Id.*, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, paragraph three of the

syllabus. A trial court lacks the authority to review and/or modify the sentences for the unaffected offenses. *Id.* At a resentencing hearing for the purpose of merging allied offenses, the trial court “must accept the state’s selection, merge the offenses accordingly for the purposes of sentencing, and *impose a sentence that is appropriate for the remaining offense or offenses.*” *Id.* (Emphasis added.)

{¶10} When fashioning an appropriate sentence for a particular offense, courts are required to consider the purposes and principles in felony sentencing. R.C. 2929.11 and 2929.12. Further, R.C. 2929.19(A), which governs sentencing hearings, provides, in part, that “[t]he court shall hold a sentencing hearing \* \* \* before resentencing an offender who was convicted of \* \* \* a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code.”

{¶11} Williams appealed his original sentence pursuant to R.C. 2953.08, arguing the trial court erred in failing to merge allied offenses of similar import.

Indeed, the failure to merge allied offenses is contrary to law. Thus, on remand, the trial court in this case was required to hold a de novo resentencing hearing only on the allied offenses that should have been merged at the original sentencing hearing. We, therefore, review Williams’s new sentence on allied offenses to determine if the court held a de novo sentencing hearing.

{¶12} R.C. 2929.19 sets forth the requirements of a proper sentencing hearing. As relevant here, R.C. 2929.19(A) provides that the court “must inform the offender of the jury verdict or finding of the court and ask the offender whether the offender has

anything to say as to why sentence should not be imposed upon the offender.” The court must also consider the record, any information presented at the hearing, and a presentence investigation report, if one was prepared, before imposing sentence. *Id.*

{¶13} Further, the court must include the name and section number for each offense in the sentencing entry and advise the defendant if any of the sentences are mandatory. R.C. 2929.19(B)(2)(a). The court must also advise the defendant if he will be subject to supervision pursuant to R.C. 2967.28 and the terms of supervision. R.C. 2929.19(B)(2)(a)-(e). Finally, the court must consider arguments from both sides regarding the sentence and credit the offender for any time he may have served in a correctional institution. R.C. 2929.19(B)(2)(g).

{¶14} At the resentencing hearing, the state elected to pursue sentencing on the firing a weapon into a habitation and felonious assault charges and asked the court to reimpose the original six-year sentence. Williams’s counsel asked for the minimum sentence. Prior to imposing the sentence, the trial court advised Williams that he was “limited as to what [he] could do,” but nevertheless gave Williams an opportunity to speak on his own behalf, which he declined. The trial court also notified Williams of the number of days of jail-time credit he had accumulated. The sentencing journal entry indicates that the court considered “all required factors of the law” and determined that “prison is consistent with the purpose of R.C. 2929.11.” As required by R.C. 2929.19(B)(2)(b), the court identified the name and code section for the offenses on which Williams was resentenced.

{¶15} However, the trial court failed to orally advise Williams at the sentencing hearing that he would be subject to postrelease control supervision pursuant to R.C. 2967.28, and thus did not explain the consequences of violating postrelease control as required by R.C. 2929.19(B)(2)(c)-(e). Pursuant to R.C. 2929.19(B)(2)(c)-(e), when imposing sentence, the trial court must notify the offender at the sentencing hearing that he will be supervised pursuant to R.C. 2967.28, and that upon violating supervision or a condition of postrelease control, the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender. R.C. 2929.19(B)(3)(c) and (e). *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 2; *see also State v. Loyed*, 8th Dist. Cuyahoga No. 101504, 2014-Ohio-5141, ¶ 5; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 8.

{¶16} The court's duty to advise the offender about postrelease control at the sentencing hearing is the same as any other statutorily mandated term of a sentence. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 26. The failure to advise the defendant of postrelease control, or of the possible consequences of violating postrelease control, at the sentencing hearing renders that part of the sentence contrary to law and void. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 26.

{¶17} When a court fails to impose postrelease control or postrelease control is otherwise invalid, the case must be remanded to the trial court, but only for the proper imposition of postrelease control. *Fischer* at paragraph two of the syllabus.

{¶18} The record shows the trial court complied with all of its statutory duties except with respect to postrelease control, which must be remedied by a limited remand solely to correct that error.

{¶19} Therefore, the first assignment of error is affirmed in part and reversed in part.

### **B. Remaining Assignments of Error**

{¶20} In the second and third assignments of error, Williams argues his convictions are against the manifest weight of the evidence and are not supported by sufficient evidence. In the fourth assignment of error, he contends the admission of an unauthenticated photographic array was plain error, and that his counsel was ineffective. In the fifth assignment of error, he argues the trial court erred in denying his motion to dismiss for violation of his right to a speedy trial. Because this court previously addressed these assigned errors in *Williams I*, they are barred by the doctrine of res judicata. Williams concedes the fact that we cannot review these errors but reasserts them in this appeal for purposes of further appeal.

{¶21} Therefore, the second, third, fourth, and fifth assignments of error are overruled.

### **III. Conclusion**

{¶22} The trial court properly conducted a de novo resentencing hearing on the merger of allied offenses. However, it failed to properly impose postrelease control.

We therefore remand the case to the trial court for the proper imposition of postrelease control.

{¶23} Judgment affirmed in part, reversed in part, and cause remanded to the trial court for the limited purpose of imposing postrelease control.

It is ordered that appellee and appellant split the 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 the limited purpose of properly imposing postrelease control.

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

EILEEN T. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
EILEEN A. GALLAGHER, J., CONCUR