

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 12AP-165
 : (C.P.C. No. 05CR-01-0125)
 v. :
 : (ACCELERATED CALENDAR)
 Stephen L. Hughes, :
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

The Law Office of Wendy R. Calaway, Co., LPA, and *Wendy R. Calaway*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Stephen L. Hughes, from a judgment of the Franklin County Court of Common Pleas denying appellant's "motion to correct a void sentence."

{¶ 2} On January 7, 2005, appellant was indicted on one count of aggravated burglary, in violation of R.C. 2911.11, two counts of kidnapping, in violation of R.C. 2905.01, two counts of attempted murder, in violation of R.C. 2923.02, two counts of felonious assault, in violation of R.C. 2903.11, two counts of violating a protective order or consent agreement, in violation of R.C. 2919.27, and one count of menacing by stalking, in

violation of R.C. 2903.211. Prior to trial, the state of Ohio, plaintiff-appellee, dismissed both counts of felonious assault.

{¶ 3} Following a jury trial, appellant was found guilty of one count of aggravated burglary, one count of kidnapping, one count of abduction, and two counts of violating a protective order or consent agreement. The trial court sentenced appellant by judgment entry filed November 9, 2005. The court imposed consecutive sentences on all counts, with the exception of the aggravated burglary count.

{¶ 4} Appellant timely appealed his convictions, raising three assignments of error. In *State v. Hughes*, 10th Dist. No. 05AP-1287, 2006-Ohio-5411, this court overruled appellant's first and second assignments of error, in which appellant challenged his conviction for kidnapping as not supported by sufficient evidence and as against the manifest weight of the evidence. We sustained, however, appellant's third assignment of error, in which the state conceded that appellant was entitled to re-sentencing, pursuant to the Supreme Court of Ohio's recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; we therefore affirmed that portion of the trial court's decision which found him guilty of the subject offenses, but remanded the matter for re-sentencing.

{¶ 5} On December 1, 2006, the trial court conducted a re-sentencing hearing. The trial court filed a re-sentencing entry on December 6, 2006, again imposing consecutive sentences on all counts except the aggravated burglary count. Appellant filed an appeal from the trial court's re-sentencing entry, asserting that the trial court erred in failing to impose minimum, concurrent sentences based upon the argument that the severance remedy in *Foster* was violative of due process and ex post facto principles. In *State v. Hughes*, 10th Dist. No. 07AP-4, 2007-Ohio-3625, this court overruled appellant's assignment of error and affirmed the judgment of the trial court.

{¶ 6} On December 14, 2011, appellant filed a motion to correct a void sentence, arguing that he was entitled to be sentenced under the law that was in effect at the time of his conviction, and that the trial court erred in failing to make required findings. Appellant further argued that his sentence was void because he was convicted of multiple offenses for the same act, in violation of R.C. 2941.25. The trial court denied appellant's motion by entry filed February 3, 2012.

{¶ 7} On appeal, appellant sets forth the following three assignments of error for this court's review:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN CONVICTING AND SENTENCING DEFENDANT ON ALLIED OFFENSES OF SIMILAR IMPORT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IN FAILING [TO] GRANT APPELLANT'S MOTION TO CORRECT A VOID SENTENCE.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ANALYZING APPELLANT'S MOTION TO CORRECT A VOID SENTENCE AS A DELAYED MOTION FOR POSTCONVICTION RELIEF IN VIOLATION OF THE FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO CORRECT A VOID SENTENCE WHERE THE TRIAL COURT FAILED TO FOLLOW THE SENTENCING GUIDELINES AND THE SENTENCE WAS VOID.

{¶ 8} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant argues the trial court erred by: (1) sentencing him on allied offenses of similar import, in violation of his right to be free from double jeopardy; (2) analyzing his motion to correct a void sentence as a delayed motion for post-conviction relief; and (3) failing to follow the sentencing guidelines as set forth in the statutes as amended by H.B. No. 86.

{¶ 9} In the present case, the trial court denied appellant's motion to correct a void sentence based upon the court's determination that H.B. No. 86 does not apply retroactively, and the sentence imposed on appellant was lawful at the time of his sentencing. The court further found that the issues could have been raised by appellant on appeal, and were therefore barred under the doctrine of res judicata. Finally, the court

held that appellant's allied-offense claim lacked merit because his two convictions involved different victims.

{¶ 10} At the outset, we note that the trial court treated appellant's motion to correct a void sentence as the equivalent of a petition for post-conviction relief. The trial court further found the motion to be untimely, as it was not filed within 180 days after the time for filing an appeal expired. *See* R.C. 2953.21(A)(2) and 2953.23(A). While R.C. 2953.23(A)(1) creates an exception to the 180-day filing requirement, courts have held that a defendant does not qualify for such exception where "the arguments in his postconviction relief petition address only sentencing issues, not issues relating to his guilt." *State v. Brown*, 12th Dist. No. CA2006-06-026, 2007-Ohio-128, ¶ 11, citing *State v. Carter*, 12th Dist. No. CA2006-03-010, 2006-Ohio-4205, ¶ 16.

{¶ 11} The Supreme Court of Ohio has held that, "where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997). In the present case, appellant's motion alleged that his sentence was imposed for multiple allied offenses in violation of prohibitions against double jeopardy.

{¶ 12} Appellant argues, however, that the trial court erred in analyzing his motion to correct a void sentence as a motion for post-conviction relief. In asserting that his sentence is void, appellant relies upon the provisions of H.B. No. 86, effective on September 30, 2011, to argue that the Ohio legislature has revived the pre-*Foster* presumption of concurrent sentences and the limit on consecutive sentences.

{¶ 13} As found by the trial court, however, appellant was sentenced prior to the effective date of H.B. No. 86, and the provisions of H.B. No. 86 are "not to be applied retroactively." *State v. King*, 5th Dist. No. CT12-0018, 2012-Ohio-4070, ¶ 26. *See also State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975, ¶ 9 (trial court did not err in holding H.B. No. 86 is not retroactive); *State v. Fields*, 5th Dist. No. CT11-0037, 2011-Ohio-6044, ¶ 10 ("Contained within H.B. 86 at Section 4 is the specific legislative intent not to make the changes retroactive."). Thus, the trial court did not err in finding that the sentence imposed on appellant was lawful at the time of his sentencing.

{¶ 14} Appellant also contends that the trial court erred by sentencing him on allied offenses of similar import, in violation of his right to be free from double jeopardy. Specifically, appellant argues that there is no way to commit the offense of violating a protective order without committing a predicate felony (i.e., in this case, either aggravated burglary or kidnapping). In support, appellant relies upon two Supreme Court of Ohio cases rendered subsequent to his conviction and sentence, *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶ 15} In the present case, the trial court concluded that appellant could have raised the issue of merger on direct appeal, and that the doctrine of res judicata applied to bar his attempt to do so in the instant action. We agree. See *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 11, quoting *State v. Rutledge*, 10th Dist. No. 11AP-853, 2012-Ohio-2036, ¶ 13 ("even assuming that appellant's petition had been timely, the trial court would have been barred from considering the claims under the doctrine of res judicata as appellant's arguments with respect to allied offenses and merger 'under R.C. 2941.25 could have been resolved in defendant's direct appeal' "); *Greenberg* at ¶ 12 ("defendant could have raised his allied offenses argument in a direct appeal from the court's sentencing but did not. As a result, res judicata bars him from raising it in this appeal"); *State v. Rice*, 2d Dist. No. 2011-CA-74, 2012-Ohio-4084, ¶ 6 (defendant "could have raised his allied-offense argument in a direct appeal. Res judicata precludes him from doing so now").¹

{¶ 16} Finally, appellant's attempt to avoid res judicata by relying upon the decisions in *Cabrales* and *Johnson*, both decided subsequent to his conviction and sentence, is not persuasive, as "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." *State v. Boyce*, 2d Dist. No. 11CA0095, 2012-Ohio-3713, ¶ 12 (declining to apply *Johnson* to defendant's allied-offenses challenge). See also *State v. Banks*, 8th Dist. No. 93880, 2010-Ohio-3206, ¶ 24 ("even though *Cabrales* modified the analysis relating to allied offenses, res judicata applies even if there has been a subsequent change in decisional law."); *State v. Hickman*, 5th Dist. No. 11-CA-54,

¹ We note that this court has previously rejected the argument that an error in applying R.C. 2941.25 renders a sentence void. See *Timmons* at ¶ 12 (an allied-offense error renders sentence voidable, not void).

2012-Ohio-2182, ¶ 17 ("Appellant's conviction and sentence were final prior to the Ohio Supreme Court's holding in *Johnson*, * * * which does not apply retroactively. A new judicial ruling may be applied only to cases pending on the announcement date.").

{¶ 17} Based upon the foregoing, the trial court did not err in denying appellant's motion to correct a void sentence. Accordingly, appellant's three assignments of error are not well-taken and are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.
