

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-11-029

Appellee

Trial Court No. 2002-CR-429

v.

Dionta Jesse Young

DECISION AND JUDGMENT

Appellant

Decided: March 16, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

James E.L. Watson, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Dionta Jesse Young, appeals from his sentence entered by the Erie County Court of Common Pleas, in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On September 18, 2002, appellant was indicted by the Erie County Grand Jury in case No. 2002-CR-429 for trafficking in cocaine in violation of R.C. 2925.03(A)(1) (under Counts 1 and 3 of the indictment), trafficking in crack cocaine in violation of R.C. 2925.03(A)(1) (under Count 5 of the indictment), preparation of cocaine for sale in violation of R.C. 2925.03(A)(2) (under Counts 2 and 4 of the indictment), preparation of crack cocaine for sale in violation of R.C. 2925.03(A)(2) (under Count 6 of the indictment), complicity to commit possession of crack cocaine in violation of R.C. 2923.03(A)(3) and 2925.11 (under Count 7 of the indictment), corrupting another with drugs in violation of R.C. 2925.02 (under Count 8 of the indictment), tampering with evidence in violation of 2921.12(A)(1) (under Count 9 of the indictment), and possession of criminal tools in violation of R.C. 2923.24(A) (under Count 10 of the indictment).

{¶ 3} On November 15, 2002, the Erie County Grand Jury indicted appellant in case No. 2002-CR-531 for possession of crack cocaine, tampering with evidence, and assault.

{¶ 4} The cases were joined for the purpose of a jury trial, which commenced on May 8, 2003. Appellant was found guilty of all offenses except for the offense of assault.

{¶ 5} The trial court imposed a sentence that included a total of 22 years imprisonment, as evidenced by judgment entries journalized on June 11, 2003, in case No. 2002-CR-429, and on June 12, 2003, in case No. 2002-CR-531.

{¶ 6} On June 11, 2003, appellant filed a notice of appeal from the trial court's judgment entries. Upon review of the appeal, this court found that the trial court had

failed to state its reasons for imposing consecutive sentences and remanded the case for resentencing. See *State v. Young*, 6th Dist. No. E-03-033, 2004-Ohio-5896.

{¶ 7} On February 24, 2005, the matter came before the trial court for resentencing, at which time the trial court imposed a sentence for a revised total of 19 years imprisonment.

{¶ 8} On March 2, 2005, appellant filed a notice of appeal from the resentencing. This court affirmed the judgment of the trial court. See *State v. Young*, 6th Dist. No. E-05-013, E-06-014, 2006-Ohio-728.

{¶ 9} On April 4, 2008, appellant filed, pro se, a petition to vacate or set aside sentence. The trial court denied the petition, as evidenced by a judgment entry journalized on April 15, 2008.

{¶ 10} On May 15, 2008, appellant filed a notice of appeal from the trial court's April 15, 2008 judgment entry. This court affirmed the trial court's decision, in *State v. Young*, 6th Dist. No. E-08-041, 2009-Ohio-1118.

{¶ 11} On March 8, 2011, the case again came before the trial court for purposes of resentencing. This time, the matter of resentencing arose pursuant to a request for proper notification of postrelease control that was filed by the Ohio Department of Rehabilitation and Correction, and pursuant to a motion to resentence that was filed by appellant, in which appellant raised, for the first time, the issue of merger of allied offenses.

{¶ 12} In response to the parties' filings, the trial court vacated its February 25, 2005 judgment entry and proceeded to resentencing, finding, however, that appellant's motion to resentence based upon merger of allied offenses was not well-taken and, further, limiting the scope of resentencing to proper notification of postrelease control. Upon resentencing, the trial court again sentenced appellant for a total of 19 years imprisonment, as evidenced by its March 9, 2011 judgment entry.

{¶ 13} On April 6, 2011, appellant appealed from the trial court's March 9, 2011 judgment entry, raising the following sole assignment of error:

The trial court erred in imposing multiple sentences for allied offenses and when the trial court failed to inquire as to the facts of the case and the defendant's conduct to determine if the convictions were for allied offenses.

{¶ 14} In examining appellant's assignment of error, we are mindful that in a criminal case, *res judicata* bars the further litigation of issues that were or could have been raised previously in a direct appeal. *State v. Leek*, 8th Dist. No. 74338, 2000 WL 868501 (June 21, 2000), citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. There is no dispute that appellant, in this case, could have raised the issue of merger of allied offenses on direct appeal but did not do so.

{¶ 15} In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E. 2d 332, the Supreme Court of Ohio made clear that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence

is void and must be set aside.” *Id.* at ¶ 26 (emphasis in original). However, “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 ¶ 40. Thus, “[t]he 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.” *Id.*

{¶ 16} The Eighth District Court of Appeals, in *State v. Padgett*, 8th Dist. No. 95065, 2011-Ohio-1927, held, upon consideration of the defendant’s appeal from resentencing to impose postrelease control, that in light of the decision in *Fischer*, the issue of merger of allied offenses was barred by res judicata, because the issue did not arise from the resentencing hearing. *Id.* at ¶ 8; *see also State v. Gates*, 6th Dist. No. L-10-1163, 2011-Ohio-3492, (citing *Padgett, supra*, with approval, this court declined to address the merits of the defendant-appellant’s assignments of error, on the grounds that they stemmed from actions by the trial court at resentencing that were unrelated to the imposition of postrelease control.)

{¶ 17} Quoting *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, the court in *Padgett* concluded that “the time to challenge a conviction based on allied offenses is through a direct appeal – not at a resentencing hearing.” *Id.*

{¶ 18} We reach the same conclusion here, and find that the proper avenue for appellant’s merger challenge would have been in his direct appeal from his original, June 2003, sentencing. As such, appellant’s assignment of error is found to be outside the

scope of his present appeal from resentencing and is barred under the doctrine of res judicata. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 19} For all of the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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