

[Cite as *State v. Rodriguez*, 2010-Ohio-4902.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95055

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FARLEY RODRIQUEZ

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502705

BEFORE: Rocco, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: October 7, 2010

ATTORNEY FOR APPELLANT

John B. Gibbons
2000 The Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Mary McGrath
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, P.J.:

{¶ 1} In this appeal assigned to the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1, defendant-appellant Farley Rodriguez appeals from the trial court's re-imposition of sentence following an order of remand from this court.

{¶ 2} The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158; App.R. 11.1(E).

{¶ 3} Upon a review of the record, this court finds the trial court committed no error in resentencing Rodriquez, but its journal entry is flawed. Therefore, this case must be remanded once again for correction of the journal entry of sentence.

{¶ 4} This court considered Rodriquez's original appeal of his convictions and sentence in *State v. Rodriquez*, Cuyahoga App. No. 92231, 2009-Ohio-6101 ("*Rodriquez I*"). In relevant part, the opinion stated:

{¶ 5} "On October 29, 2007, a Cuyahoga County Grand Jury indicted Rodriquez in a three-count indictment charging two counts of rape, in violation of R.C. 2907.02(A)(2), with sexually violent predator specifications in violation of R.C. 2941.148, and one- and three-year firearm specifications in violation of R.C. 2941.141 and 2941.145, respectively, and one count of kidnapping, in violation of R.C. 2905.01(A)(2) and/or (A)(4).

{¶ 6} "On June 18, 2008, Rodriquez validly executed a jury waiver and proceeded to a bench trial. At that time, Rodriquez's trial counsel moved the court to dismiss the indictment as defective for failing to state a mens rea requirement on the authority of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*).

{¶ 7} "On July 29, 2008, after the issues were fully briefed, the court denied Rodriquez's motion to dismiss with respect to the two rape counts, but

dismissed the kidnapping charge against Rodriguez because it found the indictment defective for failing to state a mens rea requirement as to that count.

{¶ 8} “On August 1, 2008, the court found Rodriguez guilty of two counts of rape, together with the sexually violent predator specifications, and the one- and three-year firearm specifications in each count.

{¶ 9} “At the sentencing hearing on September 18, 2008, the State dismissed the sexually violent predator specifications before the court sentenced Rodriguez to a sixteen-year term of incarceration, which included consecutive three-year terms of incarceration on the firearm specifications, followed by two concurrent ten-year terms of incarceration on the two counts of rape, for a total of sixteen years of incarceration.” *Id.*, ¶5-9.

{¶ 10} Rodriguez challenged his convictions in his first two assignments of error. Each was overruled; then this court addressed his third assignment of error, as follows:

{¶ 11} “Rodriguez argues that the one- and three-year firearm specifications underlying the two counts of rape in this case are but a single transaction or event, and that the individual firearms specifications for each crime should be merged for sentencing purposes. Rodriguez argues that the trial court’s failure to merge the firearm specifications *for sentencing purposes* is contrary to law and constitutes an abuse of discretion. We agree.

{¶ 12} “* * *

{¶ 13} “From the facts presented, we find that the use of the firearm to commit these crimes is related by time and space to a series of continuous acts, and directed toward a single criminal objective. This criminal conduct was therefore part of a single transaction *for sentencing purposes* related to the firearm specification. In such cases where ‘the underlying felonies were clearly committed * * * as part of the same transaction * * * the trial court, pursuant to R.C. 2929.14(D)(1)(a)(i),’ is required to sentence offenders ‘to only one three-year prison term for a single firearm specification.’ (Citations omitted).

{¶ 14} “* * *

{¶ 15} “We find that the two counts of rape were committed as a part of the same criminal transaction for purposes of R.C. 2929.14(D)(1)(b), bound together by time in that they were committed successively, within minutes of one another. * * *[T]he events all transpired in the front seat of Rodriguez’s car. The crimes, though distinct, were bound together by the same purpose: to compel [the victim] to submit to sexual contact by force or threat of force. Accordingly, we sustain Rodriguez’s third assignment of error.

{¶ 16} “Rodriguez’s rape convictions are affirmed. The *sentence for one firearm specification is vacated*, and the matter is remanded *for correction of the journal entry* to reflect one term of incarceration on the accompanying firearm specification.” (Emphasis added.) *Id.*, ¶32-38.

{¶ 17} Upon remand, the trial court did not merely correct the journal entry, but, instead, conducted a full resentencing hearing. Rodriguez at this time challenged the decision the trial court made at his original sentencing to impose sentence in this case consecutive to his sentence in CR-486526. The trial court declined to alter its decision.

{¶ 18} Thus, the resulting journal entry states in relevant part:

{¶ 19} “The court imposes a prison sentence * * * of 13 year(s). 3 year firearm spec to be served prior to and consecutive with 10 years on the base charge on Counts 1 and 2 for a total of 13 years. Sentence to run consecutive to CR 486526.”

{¶ 20} Rodriguez argues in his sole assignment of error in this appeal that the trial court abused its discretion in imposing a sentence to be served consecutive to one imposed for his convictions in another case. Rodriguez’s argument is rejected based upon *State v. McCauley*, Cuyahoga App. No. 86671, 2006-Ohio-2875. In addressing a similar argument, this court observed in *McCauley* that:

{¶ 21} “In his third assignment of error, McCauley contends that the trial court erred in entering separate convictions for the offenses of tampering with evidence and obstruction of justice because the offenses are allied offenses of similar import.

{¶ 22} “McCauley’s argument is barred by the doctrine of res judicata because he did not raise it in *McCauley I*. As the Supreme Court of Ohio explained in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus:

{¶ 23} “‘Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised *or could have been raised by the defendant * * * on an appeal from that judgment.*’ (Emphasis in original).

{¶ 24} “Thus, ‘any issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings.’ (Citations omitted). The doctrine precludes a defendant who has had his day in court from seeking a second on that same issue. In doing so, res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard. (Citations omitted).

{¶ 25} “Because McCauley had an opportunity to raise this issue in *McCauley I* and failed to do so, the issue is res judicata and not subject to review in this appeal.” *Id.*, ¶21-25.

{¶ 26} Since Rodriguez failed to raise the issue of consecutive terms in *Rodriguez I*, he is precluded from obtaining a review of it at this point. Moreover, the trial court lacked authority to change Rodriguez's sentence in such a manner.

{¶ 27} "In accordance with the law of the case doctrine, a trial court has no discretion to disregard the mandate of a reviewing court and no authority to extend or vary the mandate given." *State v. Aliane*, Franklin App. No. 03AP-881, 2004-Ohio-3698, at ¶16. "When a case is remanded to a trial court from an appellate court, the mandate of the appellate court must be followed." *Columbus v. Hayes* (1990), 68 Ohio App.3d 184, 186." *McCauley*, ¶11.

{¶ 28} In *Rodriguez I*, this case was remanded only "for correction of the journal entry to reflect one term of incarceration on the * * * firearm specification."

This court has provided such a mandate in other cases. See, e.g., *State v. Robinson*, Cuyahoga App. No. 92565, 2010-Ohio-150; cf., *State v. Holloway*, Cuyahoga App. No. 93809, 2010-Ohio-3315.

{¶ 29} For the foregoing reasons, Rodriguez's assignment of error is overruled. His sentence is affirmed.

{¶ 30} However, a review of the journal entry of resentencing demonstrates the trial court incorrectly neglected to include the fact that the state dismissed the sexually violent predator specifications attached to Counts 1 and 2. Thus, this case is remanded only for correction of the journal entry to reflect that fact.

{¶ 31} The trial court is reminded that a resentencing hearing is unnecessary, but the journal entry must comply with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. In all other respects, the judgment is 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. 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.

KENNETH A. ROCCO, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR