[Cite as *State v. Watts*, 2019-Ohio-4356.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108296
v.	:	
KORDEYA D. WATTS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 24, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-13-575542-A, CR-14-587180-A, CR-14-588844-A,
and CR-14-588905-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory J. Ochocki, Assistant Prosecuting Attorney, *for appellee*.

Kordeya Watts II, *pro se*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Kordeya Watts, brings the instant appeal challenging the trial court's judgment denying his motion "to impose valid sentence pursuant to [Crim.R.] 32(C)." Specifically, Watts argues that the trial court erred by

failing to issue findings of fact and conclusions of law, the trial court's judgment entries are void based on the court's failure to comply with Crim.R. 32(C), and that the trial court erred by failing to merge allied offenses at sentencing. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} In March 2015, Watts pled guilty in four criminal cases.

> In Cuyahoga C.P. Nos. CR-13-575542-A and CR-14-58890[5]-A, Watts pleaded guilty in each case to one count of receiving stolen property. In Case No. CR-14-588844-A, Watts pleaded guilty to aggravated robbery with a one-year firearm specification and having weapons while under disability. In Case No. CR-14-587180-A, Watts pleaded guilty to aggravated robbery with a one-year firearm specification, robbery, and having weapons while under disability.

State v. Watts, 8th Dist. Cuyahoga No. 103568, 2016-Ohio-4960, ¶ 2.

{¶ 3} The trial court held a sentencing hearing on April 7, 2015. The trial court imposed an aggregate prison term of 14 years, concluding that the sentences on the four cases should run consecutively to one another. *Id.*

{¶ 4} On September 30, 2015, Watts filed a direct appeal challenging the trial court's judgment. Specifically, he argued that the trial court failed to make the requisite findings under R.C. 2929.14(C)(4) in imposing consecutive sentences, and that he was denied his constitutional right to effective assistance of counsel based on counsel's failure to present mitigating evidence at sentencing. The state conceded that the trial court failed to make the required consecutive sentence findings to support the imposition of consecutive sentences. *Id*. at ¶ 7. On appeal, this court affirmed Watts's convictions and vacated the trial court's sentence. This

court remanded the matter to the trial court "for the limited purpose of considering whether consecutive sentences are appropriate and, if so, to make the findings required by R.C. 2929.14(C)(4) on the record and to incorporate those findings into the sentencing entry." *Id*. at ¶ 8.

{¶ 5} The trial court held a resentencing hearing on January 30, 2017, during which it again imposed an aggregate prison sentence in all four cases of 14 years. The trial court stated, "I think the sentences that I imposed in April of 2015 are appropriate. And at this point I am going to re-impose exactly the sentence that I did [in April 2015]." (Tr. 40.)

{¶ 6} Watts filed motions for judicial release on March 15 and 19, 2018. The trial court denied these motions on March 26, 2018.

{¶ 7} On February 26, 2019, Watts filed a motion "to impose valid sentence pursuant to [Crim.R.] 32(C)." Therein, he appeared to argue that the trial court failed to comply with R.C. 2929.14(C)(4) at resentencing when it imposed the same sentence; he also argued that the trial court's sentencing journal entries were "void ab initio" because the trial court failed to comply with R.C. 2967.28 in imposing postrelease control.

{¶ 8} A review of Watts's motion, however, reflects that his primary argument was that the trial court erred by failing to merge his aggravated robbery convictions as allied offenses at sentencing: "it should be noted that the true arguments rests in the allied offense statute, R.C. 2941.25(A)." Watts asserted that the trial court was required to hold a resentencing hearing "to determine whether

the [aggravated robbery] offenses in the journal entr[ies] are in fact allied offenses of similar import."

{¶ 9} The trial court denied Watts's motion to impose valid sentence on February 27, 2019. It is from this judgment that Watts filed the instant appeal on March 12, 2019. He assigns three errors for review:

> I. The trial court failed to issue findings of fact and conclusions of law for the appellate court to review the denial of [Watts's] [m]otion to [v]acate [v]oid [s]entence.
>
> II. The trial court's misapplication of [Crim.R.] 32(C) has made the [j]ournal [e]ntries [v]oid.
>
> III. The trial court failed to merge [Watts's] sentence and clearly violated R.C. 2941.25(A), the [a]llied [o]ffense [s]tatute.

For ease of discussion, Watts's assignments of error will be addressed out of order.

II. Law and Analysis

{¶ 10} All three of Watts's assignments of error pertain to the trial court's February 27, 2019 judgment denying his motion to impose valid sentence. The motion that is at issue in this appeal was captioned, "motion to impose valid sentence pursuant to [Crim.R.] 32(C)." Notwithstanding its caption, the motion is a petition for postconviction relief because it was filed subsequently to Watts's direct appeal and Watts is seeking vacation or correction of the trial court's judgment on the basis that his constitutional rights have been violated. *See State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus.

A. Petition for Postconviction Relief

1. Standard of Review

{¶ 11} This court reviews a trial court's judgment denying a petition for postconviction relief for an abuse of discretion. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). A trial court abuses its discretion when its judgment is unreasonable, arbitrary, or unconscionable. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 46. "'[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence.'" *Id.* at ¶ 45, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

{¶ 12} The record reflects that Watts's motion is untimely. When he filed his motion on February 26, 2019, the statutory deadline for filing a timely petition for postconviction relief had long since passed. R.C. 2953.21(A)(2) provides that a postconviction petition "shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction * * *." In Watts's direct appeal, the trial court's record was filed in this court on January 8, 2016. Therefore, Watts's motion to impose valid sentence was filed more than three years after the 365-day deadline had expired.

{¶ 13} R.C. 2953.23(A), governing untimely petitions for postconviction relief, provides, in relevant part:

> (A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:
>
> (1) Both of the following apply:
>
> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶ 14} After reviewing the record, we find that Watts has failed to demonstrate that any of these exceptions apply in this case.

2. Postrelease Control

{¶ 15} In his second assignment of error, Watts argues that the trial court failed to comply with Crim.R. 32(C) in imposing postrelease control.

{¶ 16} Watts contends that the trial court's use of the language "may or may not" regarding postrelease control in the sentencing journal entries was "confusing

and extremely prejudicial to [his] right to understand the maximum penalties involved." Appellant's brief at 6.

{¶ 17} The trial court's sentencing judgment entries in CR-14-587180-A and CR-14-588844-A, filed January 30, 2017, provide, in relevant part,

> Post release control is part of this prison sentence for 5 years mandatory for the above felony(s) under R.C. 2967.28. Defendant advised that if/when post release control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of post release control under R.C. 2967.131(B), parole board *may impose a prison term* as part of the sentence of up to one-half of the stated prison term originally imposed upon the offender.

(Emphasis added.)

{¶ 18} The trial court's sentencing judgment entries in CR-13-575542-A and CR-14-588905-A contain the same advisement, but specify that "post release control is part of this prison sentence for up to 3 years for the above felony(s) under R.C. 2967.28."

{¶ 19} Watts appears to argue that it was improper for the trial court to use the word "may" in its journal entries regarding the imposition of postrelease control. Watts appears to interpret the journal entries as indicating that he "may" be subject to postrelease control upon his release. Watts's arguments are misplaced and unsupported by the record.

{¶ 20} As an initial matter, during the change-of-plea hearing, the original sentencing hearing, and the resentencing hearing, the trial court properly advised Watts that he faced (1) postrelease control for up to three years in CR-13-575542-A

and CR-14-588905-A, and (2) a mandatory five-year term of postrelease control in CR-14-587180-A and CR-14-588844-A.

{¶ 21} Regarding Watts's argument about the trial court's sentencing journal entries, the trial court unequivocally stated in all four journal entries that postrelease control was a part of Watts's sentence. The trial court incorporated the word "may" with respect to the parole board's authority and discretion to send Watts back to prison in the event that he violates the conditions of postrelease control upon his release. The trial court's language in its journal entries complies with the language set forth in R.C. 2967.28(D)(1) and (F)(2) and (3).

{¶ 22} Finally, as noted above, Watts asserts that the trial court's use of the word "may" in its sentencing journal entries was "confusing and extremely prejudicial to [his] right to understand the maximum penalties involved." Appellant's brief at 6. To the extent that Watts is attempting to raise a Crim.R. 11(C)(2)(a) argument or challenge the knowing, intelligent, and voluntary nature of his guilty pleas, any such argument is barred by res judicata. Watts could have, but failed to raise this argument on direct appeal, nor did he specifically challenge the validity of his guilty pleas in his motion to impose valid sentence. Watts is barred from raising the issue for the first time in this appeal.

{¶ 23} For all of the foregoing reasons, Watts's second assignment of error is overruled in this respect.

3. Federal Sentencing Package Doctrine

{¶ 24} Watts also appears to argue in his second assignment of error that the trial court should have applied federal sentencing guidelines or the "federal sentencing doctrine." Watts's argument is misplaced.

{¶ 25} In support of his argument, Watts directs this court to *In re Mitchell*, 10th Dist. Franklin No. 01AP-74, 2001 Ohio App. LEXIS 2856, 9 (June 28, 2001), in which the Tenth District adopted the federal "sentencing package" doctrine, that requires courts "to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 5, citing *State v. Webb*, 8th Dist. Cuyahoga No. 85318, 2005-Ohio-3839, *State v. Jackson*, 10th Dist. Franklin No. 03AP-698, 2004-Ohio-1005, and *In re Mitchell*.

{¶ 26} In *Saxon*, the Ohio Supreme Court rejected this doctrine, concluding that it has no application in Ohio based on the following two reasons:

> First, the "sentencing package" doctrine ignores the sentencing scheme set forth by the Revised Code, which provides a particular, independent sanction or range of sanctions for each offense and does not authorize a trial court at sentencing to consider multiple offenses together. *Id*. at ¶ 8-9. Thus, in *Saxon*, we stated that the rationale for the doctrine "fails in Ohio where there is no potential for an error in the sentence for one offense to permeate the entire multicount group of sentences." *Id*. at ¶ 8. Second, we reasoned that our ruling promotes finality in sentencing, as well as judicial economy, by denying a criminal defendant the opportunity to raise, on remand or on subsequent appeal from a resentencing order, issues that could have been raised in his or her direct appeal. *Id*. at ¶ 16-19.

State v. Evans, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, ¶ 12; *see State v. Grayson*, 8th Dist. Cuyahoga No. 106578, 2019-Ohio-864, ¶ 27, citing *Saxon* at paragraph two of the syllabus, and *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 6 (recognizing that the Ohio Supreme Court has rejected the sentencing package doctrine approach).

{¶ 27} Based on the foregoing analysis, we reject any argument presented by Watts that the trial court is required to resentence him pursuant to the federal sentencing package doctrine. Watts's second assignment of error is overruled in this respect.

4. Allied Offenses

{¶ 28} In his third assignment of error, Watts argues that the trial court erred by failing to merge allied offenses of similar import at sentencing. Watts does not specify which offenses to which he pled guilty should have been merged as allied offenses. Rather, he summarily asserts that he "was sentenced and convicted of clearly established '[a]llied [o]ffenses.'" Appellant's brief at 9.

{¶ 29} As noted above, Watts argued in his motion to impose valid sentence that his aggravated robbery convictions should have been merged for sentencing purposes. Watts pled guilty to aggravated robbery offenses with underlying one-year firearm specifications in both CR-14-588844-A and CR-14-587180-A.

{¶ 30} In the instant matter, there was no stipulation that the offenses to which Watts was pleading guilty were not allied offenses of similar import. *See State v. Torres*, 8th Dist. Cuyahoga No. 100106, 2014-Ohio-1622, ¶ 11 (when there is a

stipulation that offenses are not allied offenses of similar import, the trial court is not obligated to determine whether the offenses were allied offenses); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 20 (in cases involving such stipulations, the defendant waives the protection afforded by R.C. 2941.25 and intentionally relinquishes the opportunity to argue that the offenses were committed with the same conduct and animus).

{¶ 31} The record reflects that the allied offenses issue was neither raised nor discussed by the state, defense counsel, or the trial court during the change-of-plea hearing. The plea agreement negotiated between the state and Watts was silent on the allied offenses issue. Nor was the allied offenses issue raised by either party or the court at sentencing.

{¶ 32} When a plea agreement is silent on the allied offenses issue, "the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 29.

> In *Rogers*, the Ohio Supreme Court held that where a defendant fails to seek the merger of his or her convictions as allied offenses of similar import in the trial court, he or she forfeits any allied offenses claim, except to the extent it constitutes plain error. *Rogers* at ¶ 21-25, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15-16. "Crim.R. 52(B) affords appellate courts discretion to correct '[p]lain errors or defects affecting substantial rights' notwithstanding the accused's failure to meet his obligation to bring those errors to the attention of the trial court." *Rogers* at ¶ 22. The defendant "bears the burden of proof to demonstrate plain error on the record." *Id.*, citing *Quarterman* at ¶ 16. To demonstrate plain error, the defendant must show "'an error, i.e., a deviation from a legal rule' that constitutes 'an "obvious" defect in the trial proceedings'" and that

> the error affected a substantial right, i.e., the defendant must demonstrate a "reasonable probability" that the error resulted in prejudice, affecting the outcome of the trial. *Rogers* at ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "We recognize plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Lyndhurst v. Smith*, 8th Dist. Cuyahoga No. 101019, 2015-Ohio-2512, ¶ 32, quoting *State v. Landrum*, 53 Ohio St.3d 107, 110, 559 N.E.2d 710 (1990).

State v. Black, 2016-Ohio-383, 58 N.E.3d 561, ¶ 20 (8th Dist.).

{¶ 33} The *Rogers* court explained that unless a defendant can demonstrate, based on the facts in the record, a reasonable probability that his or her convictions are for allied offenses of similar import — committed by the same conduct and without a separate animus — he or she cannot demonstrate that the trial court's failure to inquire whether the convictions merged for sentencing was plain error. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 29.

{¶ 34} In the instant matter, we initially note that Watts's allied offenses argument is barred by res judicata. The Ohio Supreme Court has held that the doctrine of res judicata applies in all proceedings pertaining to postconviction relief. *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996). "Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal." *State v. Osborn*, 8th Dist. Cuyahoga No. 107423, 2019-Ohio-2325, ¶ 30, citing *Szefcyk* at syllabus, and *Reynolds*, 79 Ohio St.3d at 161, 679 N.E.2d 1131.

{¶ 35} Here, Watts was represented by counsel, both during the trial court proceedings and on direct appeal. Although he challenged the trial court's imposition of consecutive sentences, he did not raise an allied offenses argument. The allied offenses issue could have, and should have, been raised by Watts on direct appeal. He failed to do so, and as a result, his argument is barred by res judicata.

{¶ 36} Nevertheless, the record reflects that Watts's allied offenses argument fails on the merits. Assuming that Watts is challenging the trial court's failure to merge the aggravated robbery offenses in CR-14-588844-A and CR-14-587180-A, as he did in his motion to impose valid sentence, the record reflects that the offenses were committed separately, and Watts victimized more than one person, and as a result, caused separate, distinct, and identifiable harm. *See State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 24-26.

{¶ 37} The aggravated robbery offense charged in Count 1 of CR-14-588844-A, to which Watts pled guilty, was committed on or about July 3, 2014, against victim M.C. Watts pled guilty to two counts of aggravated robbery in CR-14-587180-A. The aggravated robbery offense charged in Count 2 was committed on or about July 5, 2014, against victim R.M.H. The aggravated robbery offense charged in Count 7 was committed on or about July 5, 2014, against victim R.F.

{¶ 38} For all of the foregoing reasons, Watts's third assignment of error is overruled. Watts's allied offenses argument is barred by res judicata, and his claim also fails on the merits.

5. Findings of Fact and Conclusions of Law

{¶ 39} Finally, in his first assignment of error, Watts argues that the trial court erred in denying his motion to impose valid sentence without issuing findings of fact and conclusions of law. He acknowledges that he did not request findings of fact and conclusions of law from the trial court, but appears to argue that he did not have an opportunity to do so because the trial court denied his motion one day after it was filed. He appears to argue that this court does not have an adequate basis upon which to review the trial court's judgment based on the trial court's failure to issue findings of fact and conclusions of law. After reviewing the record, we disagree and find Watts's argument to be misplaced.

{¶ 40} As noted above, Watts's motion to impose valid sentence was an untimely petition for postconviction relief. "The Supreme Court of Ohio has established that a trial court has no legal duty to issue findings of fact and conclusions of law for an untimely postconviction relief petition." *State ex rel. Harris v. Sutula*, 8th Dist. Cuyahoga No. 107662, 2018-Ohio-5045, ¶ 9, citing *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155, and *State ex rel. Dillon v. Cottrill*, 145 Ohio St.3d 264, 2016-Ohio-626, 48 N.E.3d 552; *see State v. Beckwith*, 8th Dist. Cuyahoga No. 106479, 2018-Ohio-2227, ¶ 12, citing *State v. Davis*, 7th Dist. Mahoning No. 08 MA 174, 2009-Ohio-4634, ¶ 19 ("[i]f the petition for postconviction relief fails to allege facts that, if proved, would entitle the petitioner to relief, the trial court may summarily dismiss the petition"); *State v. Dilley*, 8th Dist. Cuyahoga No. 99680, 2013-Ohio-4480, ¶ 9 (a trial court need not

issue findings of fact and conclusions of law for an untimely petition for postconviction relief).

{¶ 41} In the instant matter, Watts did not request findings of fact and conclusions of law in his motion to impose valid sentence, and the trial court had no obligation to issue findings of fact and conclusions of law in ruling on Watts's untimely petition for postconviction relief. Based on the evidence in the record before this court and the procedural history of this matter, we are able to conduct a thorough and meaningful review of the trial court's judgment.

{¶ 42} For all of the foregoing reasons, Watts's first assignment of error is overruled.

III. Conclusion

{¶ 43} After thoroughly reviewing the record, we affirm the trial court's judgment denying Watts's motion to impose valid sentence — an untimely petition for postconviction relief. The trial court did not err in imposing postrelease control; the trial court did not err in failing to merge allied offenses of similar import at sentencing; and the trial court had no obligation to issue findings of fact and conclusions of law in ruling on Watts's motion.

{¶ 44} 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.

_____
FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR