COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,   :

    Plaintiff-Appellee,   :

                                 No. 108498

    v.   :

SAMUEL REED, JR.,   :

    Defendant-Appellant.   :

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED AND REMANDED
RELEASED AND JOURNALIZED: October 3, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-08-515567-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee.*

Samuel Reed, Jr., *pro se.*

MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1.

{¶ 2} Defendant-appellant, Samuel Reed, Jr., appeals his sentence. He raises three assignments of error for our review:

1. The trial court erred when it denied Reed's motion to correct void sentence.

2. The trial court violated Crim.R. 43(A) and the Due Process Clause to the Fourteenth Amendment to the U.S. Constitution by resentencing Reed outside his presence.

3. The trial court violated the Double Jeopardy Clause to the Fifth Amendment of the U.S. Constitution by failing to grant Reed credit for time served.

{¶ 3} Finding merit to Reed's first and second assignments of error, we vacate his sentences for Counts 2, 3, 4, 5, 7, and 8 and remand for the trial court to hold a resentencing hearing at which the state is to elect on which offenses it wishes the trial court to sentence. Our disposition of Reed's first and second assignments of error renders his third assignment of error moot.

I.   Procedural History and Factual Background

{¶ 4} We set forth most of the procedural history of this case in *State v. Reed*, 8th Dist. Cuyahoga No. 93346, 2010-Ohio-1866 ("*Reed I*"), and *State v. Reed*, 8th Dist. Cuyahoga No. 106814, 2018-Ohio-4518 ("*Reed II*").

{¶ 5} On September 17, 2008, the Cuyahoga County Grand Jury indicted Reed on 12 counts with capital murder specifications, including three counts of aggravated murder, three counts of aggravated burglary, three counts of aggravated robbery, two counts of kidnapping, and one count of having a weapon while under disability. The counts for aggravated murder, aggravated burglary, aggravated robbery, and kidnapping each carried a three-year firearm specification, and the counts for aggravated murder carried felony-murder specifications.

{¶ 6}   Reed waived his right to a trial by jury for the count of having a weapon while under disability, and the remaining counts were tried by a jury.

{¶ 7}   In April 2009, the jury found Reed not guilty of aggravated murder in Count 1, guilty of aggravated murder in Counts 2 and 3, with the firearm specifications, and not guilty of all of the felony-murder specifications. The jury found Reed guilty of all of the counts for aggravated burglary, aggravated robbery, and kidnapping (Counts 4 through 11), all with firearm specifications as charged in the indictment. The trial court found Reed guilty of Count 12 as charged in the indictment.

{¶ 8}   At sentencing, the trial court merged Reed's convictions for aggravated murder (Counts 2 and 3), aggravated burglary (Counts 4 and 5), and aggravated robbery (Counts 7 and 8). The trial court stated:

> With respect to counts 2 and 3 of the indictment that merge for purposes of sentencing, sir, you're going to serve a term of incarceration of 25 years to life with a three-year gun spec for a total term of 28 years to life with respect to Counts 2 and 3 as they merge.
>
> Counts 4 and 5 — let's say counts 4 and 5 merging will be a four-year term of incarceration with a three-year gun spec.
>
> * * *
>
> Counts 7 and 8 merging will be a four-year term of incarceration with a three-year gun spec.

The trial court ordered that Reed serve the firearm specifications prior to and consecutive with the terms of imprisonment on the base charges.

{¶ 9}   The trial court's journal entry stated:

The Court imposes a prison sentence at the Lorain Correctional Institution of 32 years to life.

Counts 2 and 3 merge — 3 year firearm specification to be served prior to and consecutive with 25 years to life on base charge on counts 2 and 3;

3 year firearm specification to be served prior to and consecutive with 4 years on the base charge on counts 4 and 5 (run consecutive);

3 year firearm specification to be served prior to and consecutive with 4 years on the base charge on count 6;

3 year firearm specification to be served prior to and consecutive with 4 years on the base charge on counts 7 and 8 — 3 year firearm specs merge;[1]

3 years on counts 9, 10 and 11;

4 years on count 12.

Defendant is sentenced to a total of 32 years to life, with parole after 32 years.

{¶ 10} In *Reed I,* Reed appealed his convictions, arguing that they were not supported by sufficient evidence and were against the manifest weight of the evidence, his trial counsel was ineffective, and the trial court erred in failing to merge his aggravated murder and aggravated burglary convictions. Reed also filed a pro se supplemental response brief in which he argued that his conviction for having a weapon while under disability was structurally defective. We overruled Reed's assignments of error and affirmed his convictions and sentence. *Id.* at ¶ 86.

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[1] The trial court's journal entry stated that the 3-year firearm specifications merged, but the trial court did not state that at the sentencing hearing.

{¶ 11} Following that appeal, in January 2010, Reed filed a pro se petition for postconviction relief in the trial court, alleging that his trial counsel was ineffective, and two separate pro se motions to dismiss. The trial court denied all of those motions.

{¶ 12} In January 2018, Reed filed a motion to correct a void sentence and requested a hearing. Reed argued that "because the jury found him not guilty of the accompanying felony murder specifications on Counts 2 and 3 (aggravated murder), the jury acquitted him of aggravated murder because the not guilty findings negated one or more of the essential elements of aggravated murder[,]" and therefore, the trial court lacked jurisdiction. *Reed II* at ¶ 5-6. The trial court denied his petition, finding that it was an untimely petition for postconviction relief.

{¶ 13} Reed appealed the trial court's denial of his motion in *Reed II*, challenging his convictions and the denial of his motion for postconviction relief, the imposition of postrelease control, and our decision denying his motion to expand the appellate record with transcripts. In November 2018, we found that Reed's motion for postconviction relief was untimely and also barred by res judicata, and we overruled his assignments of error. *Id.* at ¶ 15-16, 25.

{¶ 14} In March 2019, Reed filed a motion to correct void sentence, arguing that (1) because the trial court failed to include the consequences of violating post-release control for his aggravated burglary conviction (Count 5), his sentence was void and the trial court was required to hold a resentencing hearing for that count; (2) his 25-years-to-life sentences for his aggravated murder counts (Counts 2 and 3)

were contrary to law and void under R.C. 2929.03; (3) the trial court's imposition of separate sentences for the aggravated murder counts was unauthorized by law and void because they merged for purposes of sentencing; and (4) his 32-years-to-life aggregate sentence for all of his convictions was "self-contradictory, uncertain, and ambiguous" and, therefore, void. The state opposed Reed's motion.

{¶ 15} On March 25, 2019, the trial court granted Reed's motion in part without a hearing, finding that it should not have sentenced him on Count 3 for aggravated murder. It issued a judgment entry vacating Reed's sentence for that count based on the fact that that count was merged with the other count for aggravated murder (Count 2).

{¶ 16} It is from this judgment that Reed now appeals.

II. Law and Analysis

A. Motion to Correct Void Sentence

{¶ 17} Reed's assignments of error concern the trial court's denial of his motion to correct what Reed alleges are void sentences.

{¶ 18} Although Reed's motion is technically his second petition for postconviction relief, "[w]here a sentence imposed on an individual is void, that individual may challenge the void portions of the sentence at any time." *State v. Williams*, 8th Dist. Cuyahoga No. 105873, 2018-Ohio-688, ¶ 9, citing *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234. Similarly, "[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review" of a void sentence, and the "sentence may be reviewed at

any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 30.

{¶ 19} The Ohio Supreme Court has explained that the difference between a sentence that is "void" from one that is "voidable" is that "a void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act. * * * Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27.

{¶ 20} Therefore, Reed's arguments that certain aspects of his sentences are void raised in his second petition for postconviction relief are not barred by the petition's untimeliness or by res judicata because the alleged void portions of Reed's sentences may be challenged at any time.

B. The Trial Court's "Resentencing" on Count 3

{¶ 21} We will first address Reed's second assignment of error in which he argues that the trial court violated Crim.R. 43(A) and his due process rights under the Fourteenth Amendment to the U.S. Constitution when it resentenced him outside of his presence. Specifically, he contests the trial court's issuance of a journal entry finding that it should not have sentenced him without a hearing for Count 3, aggravated murder, because that count merged with Count 2, aggravated murder.

{¶ 22} Crim.R. 43 provides defendants a right to be present during the imposition of their sentences. Crim.R. 43 states in relevant part, "Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must

be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules."

{¶ 23} Here, Reed argues that the court's failure to hold a resentencing hearing and issuance of a journal entry vacating his sentence for Count 3 violated his rights under Crim.R. 43(A).

{¶ 24} In response, the state concedes that the trial court erred when it imposed a sentence for Count 3, but argues that a remand to hold a resentencing hearing is not necessary.

{¶ 25} "[W]hen a sentencing court concludes that an offender has been found guilty of two or more offenses that are allied offenses of similar import, * * * it should permit the state to select the allied offense to proceed on for purposes of imposing sentence and it should impose sentence for only that offense." *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 2. "Accordingly, imposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void" and "res judicata does not preclude a court from correcting those sentences after a direct appeal." *Id.*

{¶ 26} In *Williams*, the Ohio Supreme Court held that a remand for resentencing based on an allied-offenses error is not necessary when the state "designated one allied offense for sentencing" at the sentencing hearing. *Id.* at ¶ 3. In that case, the court found that a remand to correct an allied-offenses error was not necessary because the state designated the allied offense to sentence on at the

hearing, and as a result, the court modified the judgment and vacated the sentence for the erroneously imposed sentence. *Id.* at ¶ 32.

{¶ 27} In this case, Reed's sentence for Count 3 is clearly void because the trial court found that that count merged with Count 2. However, contrary to the state's assertions, the record does not reflect which aggravated murder count, Count 2 or 3, the state elected to proceed on, and therefore, the state's reliance on *Williams* is misplaced. A remand for a resentencing hearing is necessary to allow the state to elect on which count the trial court should sentence and allow the trial court to then impose a sentence on only that count.

{¶ 28} Moreover, a review of the record shows that there is more than one error with respect to merger and sentencing. The transcript shows that the trial court did not give the state the opportunity to elect any counts on which to sentence, even though Reed's convictions contained three mergers. The trial court merged the counts for aggravated murder (Counts 2 and 3), the counts for aggravated burglary (Counts 4 and 5), and the counts for aggravated robbery (Counts 7 and 8). Despite that, the trial court did not allow the state to elect on which counts to sentence.

{¶ 29} In sum, the trial court erred when it did not allow the state to elect between Counts 2 and 3, Counts 4 and 5, and Counts 7 and 8. Further, although the trial court stated that Counts 2 and 3, Counts 4 and 5, and Counts 7 and 8 merged, it imposed a sentence for each count in the sentencing entry. Therefore, the sentences for all of those counts are void and vacated, and a remand is necessary to allow the state to elect the offenses on which the trial court should sentence Reed.

{¶ 30} Accordingly, we sustain Reed's second assignment of error.

C. Remaining Sentencing Errors

{¶ 31} Because we are reversing Reed's sentences for Counts 2, 3, 4, 5, 7 and 8, we also find it necessary to address the errors that Reed raises in his first assignment of error with respect to those counts.

{¶ 32} Under this assignment of error, he argues that (1) his sentence for Count 5, aggravated burglary, was void because the trial court failed to include the consequences for violating postrelease control in its journal entry; (2) the 25-years-to-life sentences for Counts 2 and 3 were contrary to law and void under R.C. 2929.03; and (3) his 32-years-to-life aggregate sentence for all of his convictions was "self-contradictory, uncertain, and ambiguous" and, therefore, void.

{¶ 33} The Supreme Court of Ohio has stated that "a trial court must provide statutorily compliant notification to a defendant regarding postrelease control at the time of sentencing, including notifying the defendant of the details of the postrelease control and the consequences of violating postrelease control." *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 18. The trial court "must incorporate into its sentencing entry the notifications it provides to the offender relating to postrelease control at the sentencing hearing but that it need not repeat those notifications verbatim in the entry." *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700, ¶ 13. "[T]o validly impose postrelease control, a minimally compliant entry must provide the [Adult Parole Authority] the information it needs to execute the postrelease-control portion of the sentence." *Id.*

{¶ 34} The Supreme Court of Ohio has held that "[a] sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus. "When a judge fails to properly impose statutorily mandated postrelease control as part of a defendant's sentence, the postrelease[-]control sanction is void." *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, paragraph two of the syllabus.

{¶ 35} Because the trial court failed to notify Reed of the consequences of violating postrelease control, his sentence for aggravated burglary is void, vacated, and remanded for the trial court to hold a resentencing hearing at which it must notify Reed of the consequences of violating postrelease control. His first assignment of error is sustained to that extent.

{¶ 36} Reed next argues that his sentences for Counts 2 and 3 are contrary to law and void because it fails to comply with the sentencing provisions set forth in R.C. 2929.03(A). In support of his argument, Reed relies on *State v. Smith*, 8th Dist. Cuyahoga No. 106893, 2019-Ohio-155.

{¶ 37} In *Smith*, the defendant appealed his "20 years to life sentence" for aggravated murder, arguing that it was contrary to law and void because R.C. 2929.03(A) did not authorize such a sentence. In response, the state conceded that the defendant's sentence "[did] not precisely track the statutory language used in R.C. 2929.03(A)," but argued that because the defendant's sentence had the "same

'practical effect[,]'" the defendant's argument on appeal was a "'distinction without a difference.'" *Id.* at ¶ 18. After noting that R.C. 2929.03(A) only authorized a sentence of "life imprisonment with parole eligibility after serving twenty years of imprisonment," we agreed with the defendant. *Id.* at ¶ 16. Despite recognizing the practicality of the state's approach, we found that "[b]ecause the trial court imposed a sentence that does not comport with the statutory language set forth in R.C. 2929.03(A), * * * the trial court exceeded its authority in sentencing." *Id.* at ¶ 25. We accordingly found that the defendant's sentence was void, vacated the sentence, and remanded for resentencing. *Id.* at ¶ 25-26.

{¶ 38} In its appellate brief, the state recognizes our holding in *Smith*, but contends that the case was wrongly decided and reiterates the "practicality argument" it raised in *Smith*. We disagree and find no reason to divert from *Smith*'s holding. As a result, we find that Reed's sentence of "25 years to life" for aggravated murder is also void, vacated, and must be remanded for resentencing, at which the trial court must sentence Reed in accordance with the statutory language set forth in R.C. 2929.03(A). Reed's first assignment of error is also therefore sustained to that extent.

{¶ 39} Finally, Reed also argues that his 32-years-to-life sentence was void because it was "self-contradictory, uncertain, and ambiguous." This issue, however, is moot based upon our disposition of Reed's other assignments of error.

{¶ 40} In sum, Reed's first assignment of error is also sustained to the extent that the trial court failed to advise him of postrelease control for Count 5 and improperly sentenced him to "20 years to life" for Counts 2 and 3.

D. Credit for Time Served

{¶ 41} In his third assignment of error, Reed argues that the trial court violated the Double Jeopardy Clause under the Fifth Amendment to the U.S. Constitution by failing to grant him jail-time credit for the time he spent in prison when it vacated his prison term for Count 3 without a resentencing hearing. He argues that he "did not raise the double jeopardy claim herein in the trial court because the trial court deprived him of the ability to do so by correcting the void sentences on Counts 2 and 3 outside of Reed's presence[.]"

{¶ 42} The trial court's journal entry stated it "grant[ed] credit for all time served; Sheriff to calculate." This is error because "the calculation of jail-time credit is the judge's duty." *State ex rel. Williams v. McGinty*, 129 Ohio St.3d 275, 2011-Ohio-2641, 951 N.E.2d 755, ¶ 2.

{¶ 43} Furthermore, given that we agree with Reed that the trial court erred in failing to hold a resentencing hearing, we find this assignment of error moot. Upon remand to the trial court, Reed is free to move the court for any jail-time credit he believes he is entitled to. However, we offer no opinion on whether that motion should be granted.

{¶ 44} Accordingly, Reed's third assignment of error is moot.

{¶ 45} Judgment vacated and remanded. Specifically, Reed's sentences for Counts 2, 3, 4, 5, 7 and 8 are vacated and remanded. Upon remand, the trial court is to (1) hold a resentencing hearing at which Counts 2 and 3 are to be merged, Counts 4 and 5 are to be merged, and Counts 7 and 8 are to be merged; (2) allow the state to elect which count the trial court should sentence on; and (3) impose a sentence only upon the counts that the state elects. Further, the trial court is to properly inform and impose postrelease control on the appropriate counts, and sentence Reed according to the proper statutory language.

It is ordered that appellant recover from appellee 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.

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MARY J. BOYLE, JUDGE

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