

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 108947
	:	
v.	:	
	:	
KERRI REYES,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: November 21, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-621689-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Tasha Forchione, Assistant Prosecuting Attorney, *for appellee*.

Kerri Reyes, *pro se*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Kerri Reyes, pro se, appeals her sentence and claims the following two errors:

1. The trial court erred by denying defendant's motion to vacate and set aside her sentence as [sic] the journal entry was void and violated defendant's constitutional rights to due process and protection

against double jeopardy because the trial court imposed a sentence on a count that the court found to be allied and subject to merger.

2. The doctrine of res judicata has no application on a void judgment and the judgment can be challenged on direct appeal or by collateral attack at any time.

{¶ 2} The trial court failed to merge allied offenses. We, therefore, reverse and remand the case to the trial court for resentencing.

I. Facts and Procedural History

{¶ 3} Reyes was charged with one count of burglary in violation of R.C. 2911.12(A)(2), a second-degree felony, and one count of theft in violation of R.C. 2913.02(A)(1), a first-degree misdemeanor. Pursuant to a plea agreement, Reyes pleaded guilty to one count of burglary, as amended to a third-degree felony, and one count of theft, as charged in the indictment. The court's journal entry of the plea hearing states, in relevant part, that "Count 2 merges into Count 1" and that the state elected to proceed to sentencing on Count 1, the amended burglary charge.

{¶ 4} The court sentenced Reyes to an 18-month prison sentence on Count 1 and a 180-day prison sentence on Count 2, to be served concurrently. Six months later, Reyes filed a pro se motion to vacate the sentence, arguing the sentence was void. Although the state filed a response, the state did not oppose the motion; it requested a resentencing hearing. The trial court denied the motions. Reyes now appeals the denial of the motion to vacate her sentence. In response, the state filed a notice of conceded error pursuant to Loc.App.R. 16(B), agreeing that the trial court erred in sentencing her on counts that it had previously determined were subject to merger.

II. Law and Analysis

{¶ 5} In the first assignment of error, Reyes argues the trial court erred in denying the motion to vacate her sentence. She argues her sentence is void because it violates double jeopardy by imposing multiple sentences on allied offenses. In the second assignment of error, Reyes argues that her allied offenses argument is not barred by res judicata even though she did not raise it in a direct appeal because her sentence is void. We discuss these assigned errors together because they are interrelated.

{¶ 6} “R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, which prohibits multiple punishments for the same offense.” *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. Under R.C. 2941.25(A), when the same conduct by the defendant “can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.” However, R.C. 2941.25(B) provides:

Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 7} The court’s journal entry of the plea hearing, dated November 8, 2018, indicates the court found that Reyes’s burglary conviction merged with her

theft conviction. In *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, the Ohio Supreme Court observed that “[a] court only has authority to impose a sentence that conforms to law, and [that] R.C. 2941.25 prohibits the imposition of multiple sentences for allied offenses of similar import.” *Id.* at ¶ 2.

Therefore, the court explained that

when a sentencing court concludes that an offender has been found guilty of two or more offenses that are allied offenses of similar import, in conformity with *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, 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. Accordingly, imposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void. Therefore, *res judicata* does not preclude a court from correcting those sentences after a direct appeal.

Id.

{¶ 8} As previously stated, the trial court concluded in its journal entry of the plea hearing that Reyes was guilty of allied offenses of similar import under R.C. 2941.25. Therefore, the imposition of separate sentences on those offenses was contrary to law, and the sentences are void. Although the court ordered the sentences to be served concurrently, “the imposition of concurrent sentences is not the equivalent of merging allied offenses of similar import.” *Id.* at ¶ 34. A resentencing hearing limited to correcting a void sentence is the proper remedy for a trial court’s failure to comply with mandatory sentencing laws. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 29. On remand, the state has the right to elect which offense to pursue at resentencing. *Whitfield* at ¶ 21.

{¶ 9} Reyes’s assignments of error are sustained.

{¶ 10} The trial court's judgment is reversed, and the case is remanded to the trial court for the limited purpose of resentencing on one of the allied offenses.

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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR