[Cite as *State v. Britta*, 2011-Ohio-6096.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-041**
- vs -	:	
ALDO J. BRITTA, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000261.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Kenneth A. Bossin, 1392 S.O.M. Center Road, Mayfield Heights, OH 44124 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Aldo J. Britta, Jr., appeals the March 17, 2011 Judgment Entry of the Lake County Court of Common Pleas, denying his Motion for Resentencing. At issue in this appeal is whether a criminal sentence, which allegedly violates R.C. 2941.25 (Ohio's multiple counts statute), is a void sentence, such that it may be considered a nullity. For the following reasons, such a sentence is not void. Accordingly, we affirm the judgment of the court below.

{¶2} On July 18, 2008, Britta was indicted by the Lake County Grand Jury on four counts of Gross Sexual Imposition, felonies of the third degree in violation of R.C. 2907.05(A)(4).

{¶3} A jury trial was held on November 18 and 19, 2008. The jury returned a verdict finding Britta guilty of four counts of Gross Sexual Imposition.

{¶4} On January 5, 2009, Britta filed a Motion to Merge Counts One and Two and Three and Four, on the grounds that the first and second Counts were allied offenses committed with the same animus, as were the third and fourth Counts.

{¶5} On January 9, 2009, a sentencing hearing was held. The court denied Britta's Motion to Merge, citing *State v. While*, 11th Dist. No. 2001-T-0051, 2003-Ohio-4594, at ¶19 (holding that, where the "appellant maneuvered his hand over two separate erogenous zones (the victim's breast and genital area) ***, the nature of appellant's conduct requires an inference of a separate and distinct animus for each act" sufficient to support separate counts of Gross Sexual Imposition).

{¶6} On January 14, 2009, the trial court issued its Judgment Entry of Sentence, sentencing Britta to four years of imprisonment for each count of Gross Sexual Imposition, with two of the sentences running concurrently to the others, for an aggregate prison term of eight years. The court further advised Britta that he was classified as a Tier II sexual offender and would be subject to post release control upon the completion of his prison sentence.

{¶7} Britta appealed his convictions to this court.

{¶8} On March 15, 2010, this court issued its decision, affirming Britta's convictions. See *State v. Britta*, 11th Dist. No. 2009-L-017, 2010-Ohio-971.

{¶9} On February 24, 2011, Britta filed a Motion for Resentencing. Britta asserted that the sentence imposed on January 14, 2009, was rendered void by the Ohio Supreme Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Britta argued that the *While* case, on which the denial of January 5, 2009 Motion to Merge was based, interpreted the multiple counts statute, R.C. 2941.25, in accordance with the Ohio Supreme Court's decision in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. Whereas *Rance* held that, when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, "the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*," 85 Ohio St.3d 632, paragraph one of the syllabus, *Johnson* required that "the conduct of the accused must be considered," thereby overruling *Rance*. 2010-Ohio-6341, syllabus. Under the standard established by *Johnson*, Britta argued the first and second Counts and the third and fourth Counts should have been merged.

{¶10} On March 17, 2011, the trial court entered an Opinion and Judgment Entry, denying Britta's Motion for Resentencing. The court noted that "Britta failed to cite any authority in his motion that stands for the proposition that the failure to merge counts creates a void sentence," and the "Courts have ruled otherwise." Thus, the court concluded that Britta's sentence was not void because of the alleged errors in applying R.C. 2941.25.

{¶11} On April 7, 2011, Britta filed a Notice of Appeal. On appeal, Britta raises the following assignment of error:

{¶12} "[1.] The trial court erred when it failed to perform an animus analysis as required by State v. Johnson (2010), 128 Ohio St.3d 153, and resentence the Appellant."

{¶13} Under Ohio law, "a sentence that is not in accordance with statutorily mandated terms is void." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, at ¶8. We review such a sentence under a clear and convincing standard. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶14 ("the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence ***, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)").

{¶14} A void sentence "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." *Fischer*, 2010-Ohio-6238, paragraph one of the syllabus. "Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶12. Moreover, "defendants with a voidable sentence are entitled to resentencing only upon a successful challenge on direct appeal." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶30.

{¶15} The claims raised in Britta's Motion for Resentencing demonstrate that, at most, his sentence is voidable. The concept behind a void sentence is that "[j]udges have no inherent power to create sentences." *Fischer*, 2010-Ohio-6238, at ¶22. "[T]he only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is

either greater or lesser than that provided for by law." Id., quoting *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. Britta does not claim that his sentence is not in conformity with statutorily mandated terms, or is not provided for by law, or even that the sentence fails to comply with the formal requirements of R.C. 2941.25.

{¶16} The multiple count statute expressly provides that the same conduct may support multiple convictions where the offenses are "committed separately or with a separate animus." R.C. 2941.25(B). In conformity with this statute, the trial court stated that the four offenses of which Britta was convicted "consist[ed] of separate and distinct acts and there was a separate animus for each crime." To the extent this conclusion might be erroneous, Britta's sentence would be voidable; but in no way is the sentence illegal so as to render it void.

{¶17} Arguments challenging the imposition of a sentence that is voidable are barred by the doctrine of res judicata if not raised on direct appeal. *Simpkins*, 2008-Ohio-1197, at ¶30 (res judicata "operate[s] to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the voidable sentence"). Since Britta's sentence, assuming his allied-offense argument had merit, would be voidable, he is barred by the doctrine of res judicata from challenging his sentence on those grounds collaterally through a motion for resentencing. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, at ¶¶10-11 ("allied-offense claims are nonjurisdictional," and, thus, barred by the doctrine of res judicata where they were raised, or could have been raised, on direct appeal).

{¶18} This is the conclusion reached by numerous appellate districts of this state, including this one. See *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-

1298, at ¶43 ("[b]ecause Mr. Hobbs failed to raise the allied offenses claim in his direct appeal, it is now barred by res judicata"); *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, at ¶¶28-30 (the same); *State v. Gonzalez*, 1st Dist. No. C-100710, 2011-Ohio-4219, at ¶5 ("the Ohio Supreme Court has not held that a judgment of conviction is rendered void by the imposition of multiple sentences in violation of R.C. 2941.25") (footnote omitted); *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, at ¶13 ("the time to challenge a conviction based on allied offenses is through a direct appeal — not at a resentencing hearing").

{¶19} The sole assignment of error is without merit.

{¶20} For the foregoing reasons, the March 17, 2011 Judgment Entry of the Lake County Court of Common Pleas, denying Britta's Motion for Resentencing, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.