[Cite as *State v. Freeman*, 2011-Ohio-2457.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0069**
- vs -	:	
GENTRY WILLIAM FREEMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 02 CR 282.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Gentry William Freeman, appeals the judgment of the Trumbull County Court of Common Pleas. Freeman received an eight-year sentence for one count of voluntary manslaughter and an eight-year sentence for one count of kidnapping. Freeman was sentenced to a cumulative prison term of 16 years. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This case stems from an incident in 2002, in which Freeman encountered Denise Angelo. Angelo's dead body was later found in a ditch near Freeman's residence. Angelo suffered from 44 stab wounds. In 2003, after entering a plea of guilty, Freeman was sentenced to a 16-year term of imprisonment: an eight-year sentence for the voluntary manslaughter conviction, in violation of R.C. 2903.03(A), and an eight-year sentence for the kidnapping conviction, in violation of R.C. 2905.01(A)(2), with the sentences running consecutively.

{¶3} Freeman filed a motion for a delayed appeal, which was granted by this court. In that appeal, Freeman argued, inter alia, that voluntary manslaughter and kidnapping constitute allied offenses of similar import. *State v. Freeman*, 11th Dist. No. 2004-T-0055, 2006-Ohio-492 [*Freeman I*], at ¶10-16. Affirming the judgment of the trial court, this court determined that "voluntary manslaughter and kidnapping are not allied offenses of similar import," and, therefore, "the trial court did not err by convicting Freemen of both offenses and ordering the sentences be served consecutively." Id. at ¶16.

{¶4} In 2010, the trial court resentenced Freeman, as it failed to properly inform him of post-release control at the sentencing hearing on December 9, 2003. The trial court sentenced Freeman to the same term of imprisonment as previously imposed.

{¶5} Freeman filed a timely notice of appeal and asserts the following assigned error for our review:

{¶6} "The trial court erred, as a matter of law, by sentencing the appellant to separate sentences for the offenses involved, to run consecutively."

{¶7} Freeman argues that because the elements of kidnapping were violated in commission of voluntary manslaughter, the two crimes should have been merged as allied offenses of similar import. The state of Ohio maintains that Freeman's argument is barred by the law of the case doctrine.

{¶8} "The law of the case is a longstanding doctrine in Ohio jurisprudence. 'The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' *** The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. ***" (Internal citations omitted.) *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, at ¶15.

{¶9} Recently, the Supreme Court of Ohio released *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. Fischer was sentenced in 2002, prior to the enactment of R.C. 2929.191.[1] On appeal, Fischer's convictions were affirmed by the court of appeals. Id. at ¶2. Thereafter, Fischer moved pro se for resentencing, as the trial court failed to properly notify him of his post-release control obligations. Id. at ¶3. After his resentencing, Fischer filed an appeal asserting four assignments of error. Id. at ¶4. Fischer argued that since his original conviction was void, he could raise "any and all

1. {**¶a**} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio addressed R.C. 2929.191, the statutory remedy to correct the trial court's failure to properly impose post-release control. The *Singleton* Court held:

{**¶b**} "[F]or sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio. However, for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Id. at ¶1.

issues relating to his conviction." Id. The appellate court determined that the law of the case doctrine governed the appeal and precluded Fischer from raising any and all issues relating to his resentencing hearing. Id. The appeals court, however, did address Fischer's assigned errors relating to the resentencing.

{¶10} The Supreme Court of Ohio affirmed the appellate court ruling, and held:

{¶11} "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. Although the doctrine of res judicata does not preclude review of a void sentence, *res judicata still applies to other aspects of the merits of a conviction, including the determination of guilty and the lawful elements of the ensuing sentence*." (Emphasis added.) Id. at ¶1.

{¶12} "Thus, when a court affirms the convictions in an appellant's first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them are barred. *State v. Harrison*, 8th Dist. No. 88975, 2008-Ohio-921, at ¶9. Therefore, in a subsequent appeal, only arguments relating to the resentencing are proper. *State v. Riggenbach*, 5th Dist. No. 09CA121, 2010-Ohio-3392, affirmed by [128 Ohio St.3d 338,] 2010-Ohio-6336." *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, at ¶11.

{¶13} The Eighth Appellate District, in *Poole*, supra, held that Poole's argument relating to merger of allied offenses was barred by the doctrine of res judicata, as this error had been raised and overruled in his direct appeal. Poole was sentenced in 2001; however, the trial court failed to advise him of post-release control. Id. at ¶2.

Therefore, the trial court held a resentencing hearing in 2010, and Poole filed an appeal arguing the issue of allied offenses. Id. at ¶3. In its decision, the appellate court considered both the holding in *Fischer*, supra, and *State v. Johnson*, where the Supreme Court of Ohio stated that, "'under R.C. 2941.25, the court must determine *prior* to sentencing whether the offenses were committed by the same conduct.' *State v. Johnson*, [128 Ohio St.3d 1535,] 2010-Ohio-6314, at the syllabus." (Emphasis sic.) Id. at ¶12. Consequently, "[t]he time to challenge a conviction based on allied offenses is through a direct appeal – not at a resentencing hearing." Id. at ¶13. See, also, *State v. Goldsmith*, 8th Dist. No. 95073, 2011-Ohio-840, at ¶8-9. ("[T]he determination of whether offenses constitute allied offenses of similar import remains subject to res judicata. *** While the issue of merger clearly affects a defendant's sentencing disposition, the analysis for merging allied offenses of similar import requires a review of the underlying convictions, and thus is not within the scope of the trial court's limited review of sentencing issues on remand.") (Citation omitted.)

{¶14} In *State v. Carter*, 12th Dist. Nos. CA2010-07-012 & CA2010-08-016, 2011-Ohio-414, the Twelfth Appellate District also determined that since the appellant raised the issue of allied offenses of similar import in his direct appeal, he could not raise it again on appeal after a resentencing hearing. The *Carter* court held that the appellant's assigned error was barred by the doctrine of res judicata.

{¶15} The Supreme Court of Ohio has recognized that, "[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating *** any defense or any claimed lack of

due process that was raised or could have been raised *** on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶16} As previously noted, this court has already ruled on Freeman's assignment of error in *Freeman I*. Furthermore, because Freeman had the opportunity to raise this argument in his original appeal, and did so, he is barred from raising this argument again in a subsequent appeal. Freeman's assigned error is without merit, and the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.