

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2012-T-0009
JAMAL D. STRICKLAND,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 04 CR 232.

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).

Jamal D. Strickland, pro se, PID: 480-030, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Jamal D. Strickland, appeals the judgment of the Trumbull County Court of Common Pleas denying his pro se motion to merge allied offenses of similar import for sentencing purposes. For the reasons that follow, the judgment is affirmed.

{¶2} In the early morning hours of April 13, 2004, appellant robbed an adult bookstore in Niles, Ohio, and assaulted the store clerk. Appellant was brought to trial

on an amended indictment. The jury found appellant guilty on all counts: aggravated robbery, aggravated burglary, kidnapping, felonious assault, and tampering with evidence. However, the trial court granted appellant's motion for directed verdict of acquittal on the aggravated burglary charge.

{¶3} The trial court merged appellant's felonious assault conviction with his aggravated robbery conviction for purposes of sentencing. The trial court sentenced appellant to a nine-year prison term for aggravated robbery; a nine-year prison term for kidnapping; and a one-year prison term for tampering with evidence. The trial court ordered appellant's sentences to be served consecutively to each other. Thus, appellant's aggregate prison sentence was 19 years.

{¶4} In *State v. Strickland*, 11th Dist. No. 2005-T-0002, 2006-Ohio-2498, this court affirmed appellant's convictions but reversed the trial court's judgment entry regarding his sentence and remanded the matter to the trial court for a resentencing hearing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Id.* at ¶39. The trial court conducted a de novo resentencing hearing and sentenced appellant to an identical 19-year term of incarceration.

{¶5} Appellant again appealed. In *State v. Strickland*, 11th Dist. No. 2006-T-0104, 2008-Ohio-731, this court rejected the argument that the trial court erred by failing to make any findings at the resentencing hearing to justify the imposition of its sentence.

{¶6} Appellant subsequently filed a pro se motion for sentencing relief, arguing the charges in his prison sentence should have merged. The trial court denied the motion, finding appellant's arguments to be barred by the doctrine of res judicata. Appellant now appeals from this denial and asserts two assignments of error:

{¶7} [1.] The trial court committed a reversible error in failing to conduct a hearing mandated in R.C. 2941.25 in violation of the 5th Amendment to the United States Constitution and Article 1, Sec. 10, 16 of the Ohio Constitution.

{¶8} [2.] Defendant-Appellant's protection against double jeopardy was violated when the trial court failed to merge Appellant's multiple convictions and sentence under Ohio Revised Code 2941.25 and Fifth Amendment to United States Constitution.

{¶9} In his first and second assignments of error, appellant contends that his offenses should have merged for the purposes of sentencing, pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶10} Initially, it must be noted appellant was sentenced before *Johnson* was decided. As the Second Appellate District recently explained, an appellant seeking to challenge his *pre-Johnson* sentencing on the grounds of merger cannot rely on *Johnson* "because '[a] new judicial ruling may be applied only to cases that are pending on the announcement date. * * * The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e. where the accused has exhausted all of his appellate remedies.'" *State v. Parson*, 2d Dist. No. 24641, 2012-Ohio-730, ¶11, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶6.

{¶11} Moreover, this court has continually held that when an appellant does not raise the issue of allied offenses of similar import in a timely direct appeal, the challenge is barred by the doctrine of res judicata. *State v. Dukes*, 11th Dist. Nos. 2011-P-0098 & 2011-P-0099, 2012-Ohio-3033, ¶9; *State v. Cioffi*, 11th Dist. Nos. 2011-T-0072 & 2011-

T-0073, 2012-Ohio-299, ¶14; *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6096, ¶17-18; *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298, ¶43. “[A]ny issues that were raised or could have been raised by a defendant at the trial court level or on direct appeal are res judicata and not subject to review in subsequent proceedings.” *State v. Lintz*, 11th Dist. No. 2010-L-067, 2011-Ohio-6511, ¶36, citing *State v. Perry*, 10 Ohio St.2d 175 (1967). As appellant did not raise the issue of merger in his direct appeal, the argument is barred by res judicata.

{¶12} This court already affirmed appellant’s underlying conviction in *Strickland*, 2006-Ohio-2498. We simply remanded the matter for resentencing in accordance with *State v. Foster*. The effect of this remand was to address appellant’s sentence; this court’s remand did not authorize or require revisiting appellant’s conviction, which was affirmed on direct appeal. Certainly, “the renewed ability to address sentencing issues might lead one to conclude that the issue of merger may therefore be addressed.” *State v. Dillard*, 7th Dist. No. 08 JE 35, 2010-Ohio-1407, ¶21. However, “a merger analysis does not exclusively involve sentencing issues.” *Id.* at ¶22. Indeed, as recently noted by the Eighth Appellate District, “the question of whether the verdicts on all counts can be used to support separate convictions for all offenses charged is *decided by the trial court prior to its determination of a defendant’s sentence.*” *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶13. (Emphasis added). Therefore, merger is “one of various issues which are barred by res judicata in *Foster* resentencing appeals.” *Dillard*, ¶22. See also *State v. Martin*, 2d Dist. No. 21697, 2007-Ohio-3585 (barring appellant’s claims in his appeal following *Foster* resentencing on res judicata grounds).

{¶13} Thus, appellant had the opportunity to raise the issue of merger in his initial, direct appeal. He failed to do so. Compounding the failure is the fact that the matter would have been barred by res judicata at appellant's resentencing hearing and his appeal from the resentencing. See *Martin*, 2007-Ohio-3585, ¶15. ("Had the trial court purported to further merge the offenses of which Martin had already been convicted, it would have erred, since to do so would have been outside the scope of its mandate from the Ohio Supreme Court, which was merely to re-sentence [appellant], in accordance with *State v. Foster, supra.*")

{¶14} It logically follows that appellant's merger argument continues to be barred by res judicata in this present appeal. Appellant's assignments of error are therefore without merit.

{¶15} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.