

[Cite as *State v. Brown*, 2011-Ohio-1029.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-100309
		C-100310
Plaintiff-Appellee,	:	TRIAL NOS. B-0709635
		B-0705146(B)
vs.	:	
		<i>OPINION.</i>
JAMES BROWN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 9, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

Please note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} In 2007, defendant-appellant James Brown robbed the Delhi branch of the Northside Bank & Trust Company. He now appeals from the sentence imposed by the trial court in its third sentencing proceeding held in May 2010. Because Brown's argument that the trial court had erred in entering multiple convictions for allied offenses of similar import was precluded by the doctrine of res judicata, and because the trial court did not abuse its discretion in imposing sentence, we affirm.

{¶2} Following a 2008 jury trial, Brown had been found guilty of and sentenced on two counts of robbery of the bank, as well as three counts of kidnapping the bank's tellers. Brown was also convicted of separate counts of escape and vandalism for damage that he had caused to his jail cell while awaiting trial on the bank-robbery offenses. The trial court imposed an aggregate sentence of 49 years' imprisonment.

{¶3} In April 2009, in Brown's first direct appeal, this court reversed the trial court's judgment in part.¹ In the resolution of his fifth assignment of error, we concluded that the three kidnapping convictions had been committed with an animus separate from that of the robbery and thus that the trial court had properly entered separate convictions for those offenses. But we held that the two robbery convictions involved allied offenses of similar import that could not be separately punished.² We remanded the case so that the trial court could impose a single sentence for the merged robbery offenses.³ Because the kidnapping victims had been released in a safe place and unharmed, we also instructed

¹ See *State v. Brown*, 1st Dist. Nos. C-080320 and C-080321, 2009-Ohio-1889, ¶29 ("*Brown I*").

² See *id.* at ¶26 and 27.

³ See *id.* at ¶29.

the trial court upon remand to “correct its judgment to reflect that the kidnappings were second-degree felonies.”⁴ In all other respects, we affirmed the trial court’s judgment.⁵

{¶4} In Brown’s second appeal, we reviewed the trial court’s June 2009 resentencing at which it had imposed an aggregate sentence of 41 years’ imprisonment.⁶ But contrary to this court’s mandate in *Brown I*, the trial court had failed to merge the two robbery convictions, although it had ordered the prison sentences for those convictions to be served concurrently. During the sentencing hearing, the trial court also had failed to notify Brown that he would be subject to postrelease control as part of his sentence. And the trial court also had failed to ensure that its judgment entry identified the kidnapping convictions as felonies of the second degree.

{¶5} Without citation to authority, we determined that the trial court’s failure to properly include postrelease-control notice rendered the sentence void. Therefore, we affirmed the trial court’s judgment in part, vacated the sentence, and remanded the case “for a new sentencing hearing so that the trial court can impose only one robbery sentence and appropriately inform Brown about postrelease control.”⁷

{¶6} The trial court held a third sentencing hearing at which it merged the robbery offenses and notified Brown of his postrelease-control obligations. But presumably acting in conformity with the Ohio Supreme Court’s 2007 decision in *State v. Bezak*, the trial court conducted a de novo resentencing.⁸ It sentenced Brown on each of the felony offenses “as if there had been no original sentence.”⁹ The trial court again imposed maximum, consecutive sentences for each offense—one count of robbery,

⁴ Id.; see, also, R.C. 2905.01(C)(1).

⁵ See *Brown I* at ¶29.

⁶ See *State v. Brown* (Mar. 10, 2010), 1st Dist. Nos. C-090404 and C-090405 (“*Brown II*”).

⁷ Id.

⁸ 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus.

⁹ Id. at ¶16.

three counts of kidnapping, one count of escape, and one count of vandalism—totaling 41 years’ imprisonment. And Brown has again appealed.

{¶7} In his single assignment of error, Brown now asserts that the trial court erred as a matter of law in imposing sentence. Brown first argues that the trial court erred in imposing a sentence for both the single robbery offense and the three kidnapping offenses. He asserts, as he had in his first and second appeals, that these offenses were allied offenses of similar import under R.C. 2941.25.

{¶8} First, we note that because the trial court had imposed each of Brown’s sentences after the July 11, 2006, effective date of R.C. 2929.191, the court was not authorized to conduct a de novo resentencing. Rather the trial court should have applied the procedures set forth in R.C. 2929.191 to correct the postrelease-control sentencing error.¹⁰ As we held in *State v. Williams*, “[t]hose procedures contemplate only a correction of the postrelease-control defect and not a de novo resentencing.”¹¹

{¶9} Next, during the pendency of this appeal, the Ohio Supreme Court released its decision in *State v. Fischer*, which further limited the *Bezak* remedy.¹² The court clarified the scope of the sentencing hearing that the trial court must undertake on remand. When a trial court does not properly impose postrelease control as part of a defendant’s sentence, “that *part* of the sentence * * * is void and must be set aside.”¹³

{¶10} Because “only the offending portion of [a] sentence is subject to review and correction,”¹⁴ on remand, the new sentencing hearing “is limited to [the] proper imposition of postrelease control.”¹⁵ Thus “[t]he scope of an appeal from a resentencing

¹⁰ *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus.

¹¹ 1st Dist. No. C-081148, 2010-Ohio-1879, ¶22, citing *State v. Singleton* at ¶23 and ¶27 et seq.

¹² ___ Ohio St.3d ___, 2010-Ohio-6328, ___ N.E.2d ___, paragraph two of the syllabus.

¹³ *Id.* at ¶26 (italics in the original).

¹⁴ *Id.* at ¶27.

¹⁵ *Id.* at paragraph two of the syllabus.

hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.”¹⁶

{¶11} Here, the only issues arising at the resentencing, and thus subject to review, were those surrounding the postrelease-control notification and the imposition of a single conviction and sentence for robbery. The trial court’s failure to notify Brown of postrelease control following the *Brown II* remand had rendered the sentence void.¹⁷ The issue of sentencing was thus properly before the trial court for correction in May 2010. But the trial court’s remand authority was limited under *Fischer* and R.C. 2929.191 to correction of the postrelease-control defect.¹⁸ The trial court’s failure to enter a single conviction for robbery was also properly before the trial court because this court had mandated the merger of those two robbery convictions in *Brown I*.¹⁹

{¶12} While these issues properly arose at the resentencing hearing and are properly before us for review, the doctrine of res judicata “still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.”²⁰ Brown had raised his allied-offenses argument relating to the kidnapping offenses in his first direct appeal. And we rejected that argument in *Brown I*.²¹ He is thus precluded by res judicata from again raising that argument in this appeal.²²

{¶13} Brown next argues that the trial court erred in imposing maximum, consecutive sentences without considering the purposes and principles of felony

¹⁶ Id. at paragraph four of the syllabus; see, also, *State v. Singleton* at ¶24 (“The hearing contemplated by R.C. 2929.191[C] and the correction contemplated by R.C. 2929.191[A] and [B] pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender’s sentence.”).

¹⁷ See id. at paragraph one of the syllabus; see, also, *State v. Bezak*, syllabus.

¹⁸ See id. at ¶27.

¹⁹ See id. at ¶27 and 29; see, also, *State v. Paulo*, 1st Dist. No. C-060969, 2007-Ohio-4316, ¶6 (a trial court is required to follow the mandate of a reviewing court), citing *State ex rel. Sharif v. McDonnell*, 91 Ohio St.3d 46, 2001-Ohio-240, 741 N.E.2d 127.

²⁰ *State v. Fischer* at paragraph three of the syllabus.

²¹ See *Brown I* at ¶26 and 27.

²² See *State v. Fischer* at paragraph three of the syllabus.

sentencing.²³ Under *Fischer*, only Brown's claim that the trial court erred in imposing a maximum sentence for robbery and making it consecutive to the sentence for every other offense is properly before this court for review. We conduct a two-part review of Brown's sentence of imprisonment.²⁴ First we must determine whether the sentence was contrary to law.²⁵ Then, if the sentence was not contrary to law, we must review it to determine whether the trial court abused its discretion in imposing it.²⁶

{¶14} Here, the sentence imposed was not contrary to law. The sentence for robbery was within the range provided by statute for second-degree felonies.²⁷ And the trial court was not obligated to engage in judicial fact-finding prior to making that sentence consecutive to the other sentences imposed in these cases.²⁸ Although the trial court did not specifically state that it had considered R.C. 2929.11 and 2929.12, we may presume that it did.²⁹ Having presided over the jury trial, the trial court was well acquainted with the facts of the bank robbery. It listened to trial counsel's argument in mitigation. On the state of this record, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in imposing the sentence.³⁰

{¶15} We note, however, that the trial court failed to ensure that its May 2010 judgment entry identified the kidnapping convictions as felonies of the second degree as we had mandated in *Brown I*. Neither party has raised this issue in their appellate briefs. "Although trial courts generally lack authority to reconsider their own valid final judgments in criminal cases, they retain continuing jurisdiction to correct clerical errors in

²³ See R.C. 2929.11 and 2929.12.

²⁴ See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

²⁵ See *id.* at ¶14.

²⁶ See *id.* at ¶17.

²⁷ See R.C. 2929.14(A)(2); see, also, *State v. Kalish* at ¶11-12.

²⁸ See *State v. Kalish* at ¶11; see, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶100; *State v. Hodge*, ___ Ohio St.3d ___, 2010-Ohio-6320, ___ N.E.2d ___, paragraphs two and three of the syllabus.

²⁹ See *State v. Kalish* at fn. 4.

³⁰ See *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

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judgments by nunc pro tunc entry to reflect what the court actually decided.”³¹ Because Brown was notified of the proper, statutorily authorized eight-year term of imprisonment at his sentencing hearing, the trial court’s mistaken designation of Brown’s kidnapping convictions as felonies of the first degree in its judgment entry is a clerical error amenable to correction by a nunc pro tunc entry.³² The assignment of error is overruled.

{¶16} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

HILDEBRANDT, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

³¹ *State ex rel. Womack v. Marsh*, ___ Ohio St. 3d ___, 2011-Ohio-229, ___ N.E.2d ___, ¶13, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19, and Crim.R. 36.

³² See *id.* at ¶14.