

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	Case No. 17CA3
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
ALAN D. BRIGNER,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 06/09/2017

APPEARANCES:

Alan D. Brigner, Chillicothe, Ohio, pro se.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

Harsha, J.

{¶1} Alan D. Brigner appeals from a judgment denying his postconviction motion to correct his sentence. Brigner filed his motion after his time to appeal his convictions and sentence had expired. He asserts that the trial court erred in denying his motion because his three rape convictions should have been merged as allied offenses of similar import.

{¶2} We reject Brigner's assertion because res judicata barred his sentencing claim that the trial court erred when it failed to merge allied offenses. Neither the parties nor the trial court addressed the issue of whether the rape offenses were allied at sentencing. That issue had to have been raised and addressed initially in the court below and on direct appeal or it was subject to being barred.

I. FACTS

{¶3} The Athens County Grand Jury returned an indictment charging Brigner with six counts of rape. The parties entered into a plea agreement, which the trial court

accepted, whereby Brigner pleaded guilty to three counts of rape in return for the dismissal of the remaining three rape counts. After the trial court sentenced Brigner to an aggregate 20-year prison term, he appealed. We reversed and remanded the cause for further proceedings because the trial court failed to substantially comply with Crim.R. 11(C)(2)(a), which invalidated his guilty plea. *State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015-Ohio-2526.

{¶4} On remand Brigner again pleaded guilty to three rape charges in exchange for the dismissal of the remaining three rape charges; the trial court accepted his guilty plea. In June 2016, the trial court sentenced Brigner separately on each rape conviction, for an aggregate 12-year prison term. No evidence in the record exists of any argument by the parties or finding by the trial court addressing the issue of merger of the rape counts. This time Brigner did not appeal his convictions and sentence.

{¶5} In December 2016, almost six months after the trial court sentenced him, Brigner filed a pro se motion to correct his sentence. Brigner claimed that because they are allied offenses of similar import, the trial court erred by denying his motion to merge his rape offenses. The trial court denied Brigner's motion citing res judicata as barring his sentencing claim.

II. ASSIGNMENT OF ERROR

{¶6} Brigner assigns the following error for our review:

THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN
FAILING TO MERGE ALL COUNTS.

III. STANDARD OF REVIEW

{¶7} Brigner's motion challenges the propriety of his felony sentences for his rape convictions. When reviewing felony sentences we apply the standard of review set

forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence or may vacate the sentence and remand the matter to the sentencing court if it clearly and convincingly finds either “[t]hat the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant” or “[t]hat the sentence is otherwise contrary to law.” See *State v. Mullins*, 4th Dist. Scioto No. 15CA3716, 2016-Ohio-5486, ¶ 25.

IV. LAW AND ANALYSIS

{¶8} In his assignment of error Brigner asserts because they were allied offenses of similar import, the trial court committed prejudicial error by denying his motion and failing to merge his three rape charges. The trial court determined that res judicata barred Brigner from raising his allied-offenses claim in a postconviction motion to correct sentence when he could have raised his claim in a timely direct appeal from his sentence.

{¶9} “ ‘Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.’ ” *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; see also *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-

1615, 9 N.E.3d 1031, ¶ 28. “ ‘Res judicata does not, however, apply only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised.’ ” *State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016-Ohio-2756, ¶ 18, quoting *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 42 (8th Dist.).

{¶10} Brigner argues because his sentence was “contrary to law,” res judicata does not bar his motion to correct his sentence. In effect Brigner contends that his sentence is void. “ ‘In general, a void judgment is one that had been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. 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. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12. Normally “sentencing errors are not jurisdictional and do not render a judgment void.” *Id.* at ¶ 7.

{¶11} But the Supreme Court of Ohio has at times held that “a sentence that is not in accordance with statutorily mandated terms is void,” and “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.” *Id.* at ¶ 8 and paragraph one of the syllabus.

{¶12} The Supreme Court of Ohio recently resolved the applicability of the doctrine of res judicata to allied-offenses claims. In *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, at ¶ 26, the court held that “when a trial court finds that convictions are not allied offenses of similar import, or when it fails to make any finding regarding whether the offenses are allied, imposing a separate sentence for

each offense is not contrary to law and any error must be asserted in a timely appeal or it will be barred by res judicata.”¹

{¶13} This holding is consistent with our precedent. See *State v Hamilton*, 4th Dist. Hocking No. 16CA17, 2017-Ohio-1294, ¶ 16, citing *State v. Hardie*, 4th Dist. Washington No. 14CA24, 2015-Ohio-1611, ¶ 12 (“allied-offenses claim ‘does not render [appellant’s] sentence void, but is an error that must be raised on [direct] appeal’ ”); see also *State v. Berez*, 4th Dist. Washington No. 16CA15, 2017-Ohio-266, ¶ 22.

{¶14} The record discloses that the trial court did not make any finding regarding whether the three rape charges that Brigner pleaded guilty to were allied offenses of similar import. Nor did the parties raise this issue. Based on *Williams* the trial court correctly ruled that Brigner’s allied-offenses claim was barred by res judicata as he had failed to raise it in a timely appeal from his convictions and sentence. Because the trial court consequently correctly overruled his postconviction motion to correct his sentence, we overrule Brigner’s assignment of error.

V. CONCLUSION

{¶15} Having overruled Brigner’s assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

¹ Conversely, “when a trial court concludes that the accused has in fact been found guilty of allied offenses of similar import, imposing separate sentences for those offenses is contrary to law and the sentences are void on the face of the judgment of conviction.” *Id.* at ¶ 29.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.