

[Cite as *State v. Abuhilwa*, 2010-Ohio-5997.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25300

Appellee

v.

RIFAT A. ABUHILWA

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 93 06 1218(B)

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 8, 2010

MOORE, Judge.

{¶1} Appellant, Rifat A. Abuhilwa, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This matter has a lengthy procedural history. On October 12, 1993, Abuhilwa pleaded guilty to one count of aggravated murder and a firearm specification to that charge, one count of aggravated robbery and a firearm specification to that charge, another count of aggravated robbery and one count of carrying a concealed weapon. On November 23, 1993, the trial court sentenced him on each charge.

“The trial court sentenced [him] to a life term for the aggravated murder, a term of ten to twenty-five years for each of the aggravated robberies, a term of two years for carrying the concealed weapon, and two three-year terms of actual incarceration for the firearm specifications. Furthermore, the trial court also ordered the sentences for the aggravated robberies to be served concurrently with each other and consecutively with the life term. The sentence for carrying the concealed weapon was ordered to be served concurrently with the sentences for the aggravated robberies. Finally, the trial court ordered that the sentences of

actual incarceration for the firearm specifications be served consecutively to the life term [and consecutively to each other].” *State v. Abuhilwa* (“*Abuhilwa I*”) (Mar. 29, 1995), 9th Dist. No. 16787, at *1.

{¶3} On June 24, 1994, this Court granted him leave to file a delayed appeal, resulting in *Abuhilwa I*. In that appeal, he argued that:

“(1) his plea of guilty was not voluntarily made under the Ohio Constitution and the Eighth and Fourteenth Amendments of the United States Constitution; (2) his plea of guilty was not voluntarily made under the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution; (3) his indictment was insufficient and duplicitous; and (4) his trial attorneys provided him with ineffective legal assistance.” *Id.*

Abuhilwa I affirmed each conviction.

“[Abuhilwa] filed a petition for postconviction relief under R.C. 2953.21 in the Summit County Court of Common Pleas on November 1, 1995. [He] alleged error stemming from ineffective assistance of counsel and from conduct on the part of the trial court. The state responded in opposition. The trial court denied [his] petition on March 7, 1997. [He] then appealed to this [C]ourt under Court of Appeals Case No. 18444 on April 2, 1997.

“On April 30, 1997, while Case No. 18444 was still pending in this [C]ourt, [he] filed a second petition for postconviction relief under R.C. 2953.21 in the Summit County Court of Common Pleas. He alleged errors by the trial court in the original criminal case, including a faulty colloquy under Crim.R. 11. The trial court denied this second petition on June 23, 1997. [Abuhilwa] appealed that order under Court of Appeals Case No. 18620 on July 11, 1997.” *State v. Abuhilwa* (“*Abuhilwa II*”) (Feb. 18, 1998), 9th Dist. Nos. 18444 & 18620, at *1.

In Court of Appeals Case No. 18444, he contended that the trial court erred in dismissing his petition for postconviction relief on the grounds of res judicata. *Id.* In Court of Appeals Case No. 18620, he raised four additional assignments of error. *Id.* This Court consolidated the appeals and affirmed the trial court. *Id.*

{¶4} On February 11, 2010, approximately sixteen years after his sentencing, Abuhilwa filed a document captioned “Motion to Correct Improper Sentence of Firearm Specification as of [sic] Part of One Transaction.” In the motion, he sought to have the trial court correct his sentence by merging the firearms specifications into a single conviction and

three-year sentence. On February 19, 2010, the State filed a response arguing that Abuhilwa's requested relief is barred by res judicata. On March 1, 2010, the trial court denied the motion.

{¶5} Abuhilwa timely filed a notice of appeal. He has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR/ABUSED ITS DISCRETION WHEN IT SENTENCED [ABUHILWA] TO TWO CONSECUTIVE FIREARM SPECIFICATIONS WHEN THE SPECIFICATIONS CHARGED WERE PART OF THE SAME ACT OR TRANSACTION.”

{¶6} In his assignment of error, Abuhilwa contends that the trial court erred in sentencing him to consecutive mandatory prison terms for two firearm specifications that were based on the same act or transaction.

{¶7} Abuhilwa's request is barred by res judicata; therefore, we need not determine whether the trial court erred in sentencing him to consecutive prison terms for the two firearms specifications. “The application of the doctrine of res judicata is a question of law which a reviewing court resolves without deference to the decision of the lower court.” *Ohio Patrolmen's Benevolent Assn. v. Munroe Falls*, 9th Dist. No. 23898, 2008-Ohio-659, at ¶13, citing *Payne v. Cartee* (1996), 111 Ohio App.3d 580, 587.

{¶8} Abuhilwa's motion contended that the trial court's failure to merge the convictions on the firearm specifications rendered his sentence void. Abuhilwa did not cite any authority in his motion before the trial court or on appeal that stands for the proposition that the failure to merge firearm specifications creates a void sentence. App.R. 16(A)(7). Moreover, the Supreme Court of Ohio has recently addressed a similar issue in *State v. Underwood*, 124 Ohio

St.3d 365, 2010-Ohio-1. In *Underwood*, the Court held that a trial court commits plain error when it fails to merge allied offenses of similar import. *Id.* at ¶31. We see no reason to hold that the failure to merge firearms specifications results in a void sentence when the Supreme Court has held that failure to merge allied offenses of similar import instead results in plain error.

{¶9} We need not reach the merits of this question, however, because the issue is barred by *res judicata*. It is long-standing precedent in Ohio that *res judicata* bars the consideration of issues that could have been raised on direct appeal. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶16-17, citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶37; *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 143. Abuhilwa has already availed himself of the opportunity to appeal his convictions as well as the chance to file two petitions for postconviction relief and a subsequent appeal. He now seeks, not a second bite, but rather to eat the entire apple. Abuhilwa's assignment of error is overruled.

III.

{¶10} Abuhilwa's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CARR, J.
CONCUR

APPEARANCES:

RIFAT A. ABUHILWA, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.