[Cite as *State v. Amos*, 2019-Ohio-3651.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN E. AMOS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0003

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 07 CR 56

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Dan Fry, Belmont County Prosecutor, *Atty. J. Flanagan,* Chief Assistant Prosecutor*,* 147 A West Main Street, St. Clairsville, Ohio 43950. No Brief Filed for Plaintiff-Appellee and

John Amos, pro se, #548-814, P.O. Box 57, Marion, Ohio 43301 for Defendant-Appellant.

Dated: September 5, 2019

Robb, J.

{¶1} Defendant-Appellant John E. Amos appeals the decision of the Belmont County Common Pleas Court denying his post-conviction motion asking for an allied offense determination. Appellant complains the trial court did not merge any offenses and suggests the court failed to conduct a merger analysis after the jury found him guilty of five counts of rape in 2007. He concludes this would render his sentence void. However, this allied offense issue would not make the judgment void; therefore, Appellant's argument is barred by the principle of res judicata as it could have been raised in a direct appeal. Accordingly, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On March 7, 2007, Appellant was indicted on seven counts of rape in violation of R.C. 2907.02(A)(2) for purposely compelling another to engage in sexual conduct by force or threat of force. A jury found him guilty on five counts (counts one, two, three, four, and seven) and not guilty on two counts. Count one involved victim JH, and the other four counts involved victim KS, Appellant's daughter. Both counts one and two were alleged to have occurred at the end of 2003 when Appellant, another male, and both victims were present at an unknown location in Belmont County. The indictment charged count three as occurring in March 2005 and count four as occurring between January 2003 and August 2006; according to the bill of particulars, both took place in Martins Ferry, Ohio while Appellant's wife was present. The location for count seven was described as a former lumber company building in Lansing, Ohio.

{¶3} A sentencing and sexual predator hearing occurred on April 27, 2007. In a May 4, 2007 entry, the court sentenced Appellant to a maximum sentence of ten years on each of the five counts to run consecutively. In a separate entry filed the same day, the court labeled Appellant a sexual predator. In doing so, the entry noted: there were two victims (KS and JH); JH was 19 years old at the time of Appellant's offense; and the other four counts related to KS when she was between 13 and 17 years old.

{¶4} Appellant filed a timely appeal where he raised issues with: the testimony of his daughter (victim KS) disclosing that he started visiting her after he was released

from prison; the sufficiency of the evidence regarding venue on counts one and two; the court's answer to a jury question identifying the counts; and the sentencing statutes. *State v. Amos*, 7th Dist. Belmont No. 07 BE 22, 2008-Ohio-7138. In overruling Appellant's first three arguments, our decision referred to facts relevant to Appellant's current merger argument. For instance, while finding sufficient evidence on venue for counts one and two, this court pointed to the testimony of three witnesses (the other male involved, victim JH, and victim KS) who all spoke of driving around and drinking alcohol with Appellant in Belmont County before he committed those rapes. *Id.* at ¶ 20, 26.

{¶5} Additionally, in overruling Appellant's argument on the answer to a jury question, we explained how the trial court labeled the offenses for the jury: "Count 1 refers to JH only. Count 2 refers to KS at the same time as Count 1. Count 3 refers to threesome, March 2005. Count 4 refers to threesome. * * * Count 7 is [a lumber company]." *Id.* at ¶ 37-44. We noted how this itemization reiterated facts which the prosecution and the defense both relied upon in opening statements and closing arguments. *Id.* at ¶ 47. We concluded by remanding for resentencing due to former Supreme Court precedent which barred sentencing courts from utilizing the statutory sentencing provisions for maximum and consecutive sentences. *Id.* at ¶ 32-34.

{¶6} The trial court held the resentencing hearing on August 29, 2008, and imposed the same sentence of ten years on each count to run consecutively. The entry noted: Appellant's daughter was the victim in four separate counts; Appellant used alcohol on one occasion and threatened her with a handgun; and the victim in the other count was the daughter's friend. Consistent with the first sentencing entry, the court said it considered the trial evidence and the results of the presentence investigation report, including the police report. Appellant did not appeal the September 2, 2008 sentencing entry.

{¶7} As for post-conviction proceedings, Appellant filed a petition for post-conviction relief under R.C. 2953.21 in 2008, arguing the testimony of the victims lacked credibility. The trial court overruled that petition on October 2, 2008, and no appeal was taken.

{¶8} In 2017, Appellant filed two motions for arrest of judgment, arguing the charged offenses were not within the jurisdiction of the court and the indictment did not

allege facts constituting an offense. The trial court overruled these motions on June 7 and 10, 2017.

{¶9} In September 2017, Appellant filed a motion to correct a void sentence, arguing the indictment was insufficient to charge an offense and post-release control was not properly imposed. The trial court overruled the motion, and this court affirmed. On the indictment issue, we found the petition untimely with no demonstration of the requirements for an untimely petition and concluded the issue was barred by res judicata as it could have been raised on direct appeal. *State v. Amos*, 7th Dist. Belmont No. 17 BE 0041, ¶ 10-14, 20-21.

{¶10} In January 2019, Appellant filed a petition entitled a "Motion for an Allied Offense Determination." He said the record was silent as to whether the trial court addressed the issue of allied offenses of similar import under R.C. 2941.25 and the court therefore must have failed to consider merger. He mentioned ineffective assistance of counsel for failure to raise the issue and plain error for failing to consider merger, concluding the judgment was contrary to law because it imposed a sentence without evincing compliance with the merger statute. He claimed the argument was not barred by res judicata because the merger issue would render the judgment void.

{¶11} On January 15, 2019, the trial court overruled Appellant's motion. The court pointed out that Appellant did not address the alleged merger issue in the direct appeal from his criminal conviction. The court cited cases from the Ohio Supreme Court and this district holding merger of allied offenses must be asserted in a timely appeal or it will be barred by res judicata principles where the trial court found the offenses were not subject to merger or failed to make any finding on the topic. The trial court also concluded that Appellant failed to show why his offenses should have been merged based upon the conduct presented to the jury. The court noted count one involved victim JH, the other four counts involved victim KS on four different occasions, and counts two, three, and four were indicted with different date ranges. Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

{¶12} Appellant's sole assignment of error provides:

"TRIAL COUNSEL WAS INEFFECTIVE AND THE TRIAL COURT ERRED FOR FAILING TO MOTION AND/OR MERGE COUNTS PURSUANT TO R.C. 2941.25."

{¶13} Appellant states the court’s sentencing entry failed to specifically address whether any counts should be merged. Acknowledging merger could have been raised on appeal from his conviction and sentence, he claims this issue results in a void judgment and is not subject to res judicata. Initially, Appellant speaks of plain error to support his contention. As explained below, plain error is not the doctrine which makes a judgment void and does not nullify the doctrine of res judicata.

{¶14} “Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.” R.C. 2941.25(A). “Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.” R.C. 2941.25(B).

{¶15} A court's failure to merge allied offenses can constitute plain error in certain cases even though the defendant failed to raise the issue at or before sentencing. In the direct appeal of a conviction, the defendant who forfeited such error below would fail on appeal if he “failed to demonstrate any probability that he has, in fact, been convicted of allied offenses of similar import committed with the same conduct and with the same animus, and he therefore failed to show any prejudicial effect on the outcome of the proceeding.” *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 25, 29 (required to show reasonable probability the convictions were allied offenses of similar import).

{¶16} Contrary to Appellant’s assertion, *Rogers* does not support his position because (1) it found the defendant failed to show merger was probable and (2) it employed plain error in a direct appeal. First, Appellant failed to demonstrate any probability he was convicted of allied offenses of similar import. Below, he merely said the court failed to address merger and claimed the record showed one or more offenses could have been allied. On appeal, he claims counts one and two should be merged and counts three and four should be merged. However, as the trial court pointed out, counts one and two involved the rape of two different victims. “[T]wo or more offenses of

dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 23.

{¶17} As for counts three and four, which involved the same victim, count three occurred in March 2005, while count four had a date range between January 2003 and August 2006, suggesting these were different events occurring on different dates. "If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation." *Id.* at ¶ 25. If rapes are committed on different dates, then they would not merge as the offenses are committed separately and the harm is separately identifiable. *See State v. Lett*, 7th Dist. Mahoning No. 15 MA 0128, 2016-Ohio-4811, ¶ 47 (noting offenses do not merge where they involve different dates, different victims, or separate conduct). Appellant mentions no facts of the case relevant to the issue of merger and fails to cite any portions of the trial transcript to support his contention that the counts against his daughter were not committed separately, were not performed with a separate animus, or did not cause a separately identifiable harm.

{¶18} Regardless, the doctrine of plain error is employed when considering whether an error forfeited below should be invoked by the court in the direct appeal from the pertinent proceedings. *See* Crim.R. 52(B) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). The doctrine does not provide for post-conviction relief where an issue is barred under res judicata. *See, e.g., State v. Dominguez*, 2d Dist. Montgomery No. 26853, 2016-Ohio-5051, ¶ 10 ("res judicata precludes consideration of [the defendant's] allied-offense argument, even in the context of plain error, because he could have raised the issue on direct appeal"), citing *State v. Haynes*, 2d Dist. Clark No. 2013 CA 90, 2014-Ohio-2675, ¶ 14 ("the issues raised in Haynes's assignments of error could have been raised on direct appeal, and are barred by res judicata, regardless of whether they might be characterized as plain error."). In other words, the fact that an error could have been labeled as plain

error in a direct appeal does not make the judgment void or otherwise eviscerate the res judicata bar.

{¶19} Next, we point out that Appellant's motion falls well outside the statutory time deadlines for filing a timely post-conviction relief petition. See *Amos*, 7th Dist. Belmont No. 17 BE 0041 at ¶ 11-12 (discussing one of his earlier petitions). *See also* former R.C. 2953.21(A)(2) (under the prior version, a petition could be filed no later than 180 days after the date the trial transcripts were filed in the direct appeal, unless no direct appeal was filed, in which case the time starts from when the time expired for filing the appeal; effective March 23, 2015, the number of days changed to 365). The pertinent exception for an untimely petition requires the petitioner to show: (a) he was unavoidably prevented from discovering the facts upon which he must rely or the United States Supreme Court recognized a new federal or state right that applies retroactively to his situation; and (b) clear and convincing evidence demonstrates that but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense. R.C. 2953.23(A)(1).

{¶20} Appellant does not contend that his petition fell under the exception for an untimely petition. Nor does he dispute that the claim he makes could have been raised on direct appeal from his conviction. "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). "Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant's petition for postconviction relief." *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus.

{¶21} In an attempt to skirt this res judicata bar, Appellant relies on the contention that a sentence is void for failing to address merger. As Appellant points out, principles of res judicata do not preclude appellate review of a void sentence, which may be reviewed at any time, on direct appeal or by collateral attack. *State v. Williams*, 148 Ohio

St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22. "But if the sentencing court had jurisdiction and statutory authority to act, sentencing errors do not render the sentence void and the sentence can be set aside only if successfully challenged on direct appeal." *Id.* at ¶ 23.

{¶22} Contrary to Appellant's contention and as explained further below, the failure to address merger at sentencing does not result in a void sentence. More specifically, Appellant appears to focus on a failure to address merger in the sentencing entry.[1] However, the trial court does not render a void judgment by failing to specifically make a declaration that no offenses should be merged.

{¶23} In *Williams*, the Court reviewed its position "that the trial court's failure to find that the offender has been convicted of allied offenses of similar import, even if erroneous, does not render the sentence void" and the jurisprudence on a void sentence does not apply to the sentencing court's determination of *whether* the offenses are allied. *Id.* at ¶ 24, citing *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 8, and *Mosely v. Echols*, 62 Ohio St.3d 75, 76, 578 N.E.2d 454 (1991). The Court summarized: "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 principles of res judicata." *Williams* at ¶ 26.

{¶24} A distinction was made for the particular fact before the Court in *Williams* where the trial court expressly found the offenses were subject to merger but then imposed a sentence on each offense (to run concurrent). Based on *the trial court's express conclusion that the offenses were allied offenses of similar import*, the Supreme Court found two of the three sentences void and modified the sentence. *Id.* at ¶ 32-33 (where the state had already voiced its election at sentencing). The Court explained:

[1] At the time the trial court was ruling on Appellant's petition, the record did not include the 2008 sentencing transcript, which was never generated as no appeal was filed from the September 2, 2008 sentencing entry. New matter cannot be added to the record on appeal. *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500, 502 (1978) (appellate court was not permitted to add the transcript to the record when it was never presented to the trial court).

"when a trial court concludes that an accused has in fact been found guilty of allied offenses of similar import, it cannot impose a separate sentence for each offense * * * even if imposed concurrently * * *. In the absence of a statutory remedy, those sentences are void." *Id.* at ¶ 28.

{¶25} Contrary to Appellant's contention, this part of the *Williams* holding does not apply to the case at bar. Appellant's whole argument is based upon his contention that the trial court failed to engage in a merger analysis (or failed to find merger proper), not that the trial court found the offenses subject to merger and then failed to merge them. The *Williams* Court specifically distinguished its conclusion from prior cases, including *Rogers*, and explained that separate sentences are not void on the face of the judgment if the issue of merger was not raised and the court did not find the convictions should merge. *Williams* at ¶ 29.

{¶26} As confirmed in *Gallagher*, the Court "held in *Williams* that a judgment of sentence is void in one particular circumstance: when the trial court determines that multiple counts should be merged but then proceeds to impose separate sentences in disregard of its own ruling." *State ex rel. Cowan v. Gallagher*, 153 Ohio St.3d 13, 2018-Ohio-1463, 100 N.E.3d 407 (applying res judicata to an argument that the trial court ignored the state's merger admission and imposed multiple sentences on offenses that should have been merged). "However, '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 principles of res judicata.'" *Id.*, quoting *Williams*, 148 Ohio St.3d 403 at ¶ 26.

{¶27} Accordingly, a trial court's alleged failure to engage in a merger analysis or a trial court's erroneous finding that offenses should not merge will not render a sentence void. The merger issue presented here is therefore barred by res judicata as it could have been raised on direct appeal. For the foregoing reasons, Appellant's assignment of error is without merit, and the trial court's judgment is affirmed.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.