[Cite as *State v. Kemp*, 2019-Ohio-5094.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

THOMAS A. KEMP,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0044

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 88 CR 634.

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed in part. Reversed and Remanded in part.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Thomas A. Kemp, Pro se, #209-194, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, Ohio 44044.

Dated: December 5, 2019

WAITE, P.J.

{¶1} Appellant Thomas A. Kemp appeals a March 22, 2019 Mahoning County Court of Common Pleas judgment entry denying his "Motion to Correct a Facially Illegal Sentence." Appellant argues that his four sentencing entries issued by the trial court in 1989 violate the "one judgment entry rule" announced in *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. Appellant also claims that the court's imposition of a concurrent firearm specification sentence is contrary to law because those offenses merged for sentencing purposes. Appellant also generally contests the court's underlying decision regarding sentencing. For the reasons provided, Appellant's arguments have merit in part. Accordingly, the matter is remanded to the trial court for purposes of issuing corrected sentencing entries that specify the fact of conviction. Further, Appellant's sentencing entry is to be amended to clearly reflect that he is serving a single three-year sentence on the merged firearm specifications. The remaining aspects of the trial court judgment are affirmed.

Factual and Procedural History

{¶2} On January 17, 1989, Appellant was indicted on: one count of aggravated murder, an unclassified felony in violation of R.C. 2903.01(A) with an attendant death penalty specification; one count of aggravated murder, an unclassified felony in violation of R.C 2903.01(B) with an attendant death penalty specification; two counts of kidnapping, felonies of the first degree in violation of R.C. 2903.11(B)(2), each with an

attendant firearm specification; two counts of felonious assault, felonies of the second degree in violation of R.C. 2903.11(A)(2), each with an attendant firearm specification.

{¶3} On February 27, 1989, Appellant pleaded no contest to all charges, however, the death specifications were dismissed. On February 28, 1989, the trial court imposed the following sentence: incarceration of twenty years to life on each aggravated murder count, ten to twenty-five years on each count of kidnapping, and eight to fifteen years on each count of felonious assault. Additionally, the trial court merged the firearm specifications for sentencing purposes and imposed a three-year sentence. All sentences were ordered to run concurrently. We affirmed Appellant's convictions and sentence in *State v. Kemp,* 7th Dist. Mahoning No. 89 C.A. 43, 1990 WL 12130 (Feb. 13, 1990).

{¶4} On April 25, 1996, the trial court vacated Appellant's sentence for his R.C. 2903.01(B) aggravated murder conviction. It is unclear whether this action was undertaken *sua sponte* or whether Appellant had filed a motion. Appellant then filed a postconviction petition alleging that his trial counsel's representation had been tainted by a conflict of interest. Appellant's trial counsel had previously represented his step-daughter, who was a victim of his crimes and a witness against him. The trial court dismissed the petition and we reversed and remanded the matter for an evidentiary hearing to determine whether a conflict existed. *State v. Kemp,* 7th Dist. Mahoning No. 97 CA 123, 1999 WL 1124758 (Nov. 24, 1999). On remand, the trial court determined that no conflict existed. We affirmed the trial court's decision in *State v. Kemp,* 7th Dist. Mahoning No. 04 MA 54, 2005-Ohio-2115.

{¶5} On September 10, 2008, Appellant filed a "Motion to Vacate Void Proceedings and Sentence." The trial court denied this motion and we affirmed the decision in *State v. Kemp,* 7th Dist. Mahoning No. 09-MA-21, 2009-Ohio-6399.

{¶6} On March 30, 2012, Appellant was released from prison on parole after serving approximately twenty-three years of his sentence. However, on December 16, 2012, Appellant was arrested for an unspecified felony of the fourth degree and was sentenced to thirty days of incarceration. In addition to this thirty-day sentence, Appellant's parole was revoked and he currently remains incarcerated as a result.

{¶7} We note that the record on appeal does not include the trial court's sentencing entry following Appellant's parole violation. The docket sheet reflects that a parole hearing was scheduled for January 20, 2013, however, the record does not indicate whether the hearing proceeded as scheduled.

{¶8} On March 11, 2019, Appellant filed a "Motion to Correct a Facially Illegal Sentence." The trial court denied the motion in a one-line judgment entry. It is from this entry that Appellant timely appeals.

Postconviction Petition

{¶9} A motion not specifically authorized under the Ohio Rules of Criminal Procedure is classified as a postconviction petition if "it is a motion that (1) was filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence." *State v. Hudson*, 7th Dist. Jefferson No. 16 JE 0007, 2017-Ohio-4280, ¶ 9, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997).

{¶10} In order to successfully assert a postconviction petition, "the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction sufficient to render the conviction void or voidable under the Ohio or United States Constitutions." *State v. Agee*, 7th Dist. Mahoning No. 14 MA 0094, 2016-Ohio-7183, ¶ 9, citing R.C. 2953.21(A)(1). The petitioner is not automatically entitled to a hearing. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982). Pursuant to R.C. 2953.21(C), the petitioner bears the burden of demonstrating "substantive grounds for relief" through the record or any supporting affidavits. However, as a postconviction petition does not provide a forum to relitigate issues that could have been raised on direct appeal, *res judicata* bars many claims. *Agee* at ¶ 10.

{¶11} The doctrine of *res judicata* "bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal." *State v. Croom*, 7th Dist. Mahoning No. 13 MA 98, 2014-Ohio-5635, ¶ 7, citing *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). However, where "an alleged constitutional error is supported by evidence that is de hors the record, res judicata will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal." *State v. Green*, 7th Dist. Mahoning No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997). To overcome the *res judicata* bar, the petitioner must demonstrate that the claim could not have been appealed based on the original trial record. *Agee* at ¶ 11, citing *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994).

{¶12} Appellant argues that the state is barred by *res judicata* from raising any argument in this matter as it failed to file a brief in the trial court proceedings. Appellant

mistakenly applies *res judicata* to the state, which has not filed any claims in this matter subject to *res judicata*. Regardless, in the interests of justice we have previously considered the arguments of a party who did not file in the trial court but files a response brief on appeal. *U.S. Bank, National Assoc. v. Smith,* 7th Dist. Mahoning No. 17 MA 0093, 2018-Ohio-3770, ¶ 5-6.

Timeliness

{¶13} The state contends that Appellant's arguments are barred, as they stem from an untimely and successive postconviction petition. R.C. 2953.21(A)(2) and R.C. 2953.23(A)(1) require a petitioner to file a petition within one year after the trial transcripts are filed in the court of appeals. The state argues that failure to comply with these statutes is fatal to a petition unless the petitioner can show that he was unavoidably prevented from discovering facts necessary to his claim or that the U.S. Supreme Court has recognized a new retroactive right and no reasonable factfinder could find him guilty but for the alleged error. The state urges that Appellant has filed this petition twenty years after his conviction and has failed to explain his delay.

{¶14} In relevant part, R.C. 2953.21(A)(2) provides that a postconviction petition "shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction." Ohio law provides a two-part exception to this rule if the petitioner can demonstrate that he meets the criteria found in R.C. 2953.23(A)(1)(a)-(b). Pursuant to R.C. 2953.23(A)(1)(a), the petitioner must either show that he: "was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, * * * the United States Supreme Court recognized a new federal or state right that applies

retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right."

{¶15} Although this record does not provide the date on which the trial transcripts were filed with this Court, the Opinion resulting from his direct appeal was released on February 13, 1990. Based on this date, it is readily apparent that Appellant's petition would be untimely. However, a court of appeals must consider certain arguments related to a defendant's sentence even if those arguments are raised in an untimely postconviction petition. See *State v. Fischer,* 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.

ASSIGNMENT OF ERROR NO. 1

> A journal entry is not a final appealable order when the judgment of conviction is in violation of the one document rule as stated in State v. Baker, 119 Ohio St. 3d 197, 2008-Ohio-3330, 893 N.E.2d 163, and violates State v. Lester, 130 Ohio St.3d 303, 2011-Ohio- 5204, 958 N.E.2d 142, where the sentencing entry fails to set forth the sentence.

{¶16} Appellant correctly asserts that in 1989 the trial court filed four different sentencing entries, each pertaining to a separate revised code violation. Appellant argues that according to the Ohio Supreme Court, only one document can constitute a final, appealable order and a trial court cannot combine entries to create a final, appealable order. He argues that each of the four sentencing entries sets forth his sentence in a piecemeal fashion and none of the entries, alone, completely resolves his

sentence. Although Appellant's petition is untimely and successive, he is not barred from raising the issue if his sentencing entry is not a final, appealable order.

{¶17} The caselaw regarding whether multiple entries constitute a final, appealable order is still evolving. The current state of the law begins with *Baker*. The *Baker* Court was presented with the issue of whether the judgment of conviction must contain the defendant's plea, verdict or findings, and the sentence in one document in order to be final and appealable. *Baker* answered the question in the affirmative in 2008 and held that there must be one document that sets forth the fact of, and the manner of, conviction and sentence in order to create a final, appealable order. *Id.* at ¶ 18.

{¶18} Three years later, the Supreme Court acknowledged the practical difficulties in applying *Baker* and modified its ruling in *State v. Lester,* 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. The *Lester* Court altered only the law pertaining to the manner of conviction, holding that the judgment entry of conviction need not specify how the conviction was effected so long as it sets forth the fact of the conviction. *Id.* at ¶ 14.

{¶19} Hence, the one-document rule expressed in *Baker* and *Lester* stands for the proposition that the fact of conviction and the sentence must be within one document. Contrary to Appellant's arguments, the one-document rule has not been applied so as to classify multiple sentencing entries pertaining to separate violations of the revised code as non-final orders. However, caselaw from this Court does address the issue.

{¶20} We interpreted *Lester* in *State v. Gilmore,* 7th Dist. Mahoning No. 11 MA 30, 2012-Ohio-5989 ("*Gilmore I*") and *State v. Gilmore,* 7th Dist. Mahoning No. 11 MA 30, 2014-Ohio-5059 ("*Gilmore II*"). In 1991, the appellant was convicted of one count of complicity to commit aggravated murder, two counts of complicity to commit aggravated

robbery, and three firearm specifications. *Gilmore I* at ¶ 2. In separate judgment entries, the trial court sentenced the appellant to life in prison for complicity to commit aggravated murder, two indeterminate sentences of ten to twenty-five years for the aggravated robbery convictions, and three years on each firearm specification. On appeal, the appellant argued that the trial court's issuance of multiple sentencing entries violated the one-document rule of *Lester.* Each sentencing entry pertained to a separate revised code violation and included the fact of conviction, the sentence, judge's signature, and time-stamp. Thus, they individually complied with Crim.R. 32. We held that the one-document rule is not violated merely because multiple entries are used to address separate violations of the revised code, so long as each entry individually complies with Crim.R. 32.

{¶21} In *Gilmore II,* the appellant argued that *Gilmore I* was in conflict with *State v. Savage,* 4th Dist. Meigs No. 11CA7, 2012-Ohio-2276 and *State v. Thompson,* 4th Dist. Ross No. 10CA3177, 2011-Ohio-1564. We declined to certify a conflict on the basis that *Gilmore I* was factually distinguishable from *Savage* and *Thompson*. *Savage* and *Thompson* involved multiple sentencing entries in which the respective sentencing entries stated the sentence but failed to include restitution, which was scheduled to be resolved at a later date. Thus, the entries did not impose a complete sentence. *Id.* at ¶ 4-5. We emphasized that, unlike *Savage* and *Thompson*, the *Gilmore* entries each fully complied with Crim.R. 32. The fact that multiple entries were used to address each different revised code violation was deemed irrelevant so long as the entries each comply with Crim.R. 32. *Id*. at ¶ 11. The Fourth District confirmed the distinguishable fact patterns when it declined

to certify a conflict between *Gilmore I* and *State v. Lemaster,* 4th Dist. Meigs No. 14CA8, 2015-Ohio-4734.

{¶22} Pursuant to *Gilmore I* and *Gilmore II,* multiple sentencing entries do constitute a final, appealable order if the elements of Crim.R. 32 are satisfied for each individual entry. At the time Appellant was sentenced in 1989, Crim.R. 32 required the judgment of conviction to state the fact of conviction and the sentence.

{¶23} Here, there are four sentencing entries all time-stamped on February 23, 1989. Each of the entries sets forth Appellant's sentence for a separate revised code violation. We note that Appellant's conviction pursuant to R.C. 2903.01(B) was vacated on April 25, 1996, leaving three judgment entries at issue in this matter. Because the language in each entry mirrors the others, only one entry is quoted here: "It is the Order of the Court that for the crime of Aggravated Murder, a violation of Ohio Revised Code Section 2903.01(A) that the Defendant be sentenced for a minimum term of 20 year(s) and a maximum term of Life to the Correctional Reception Center at Orient, Ohio. Defendant is also ordered to pay the costs." The entry also provides a sentence for the attendant firearm specifications, which are later addressed.

{¶24} The entries unquestionably stated the sentence. However, the only reference to the fact of conviction is the line "for the crime of Aggravated Murder, a violation of Ohio Revised Code Section 2903.01(A)." This phrase does not clearly indicate that Appellant was convicted as there is no reference to a conviction, nor is there a finding of guilt. As such, the three sentencing entries do not comply with the requirements of Crim.R. 32 as the rule existed at the time Appellant was convicted.

{¶25} The remedy for a violation of Crim.R. 32 is to remand the matter to the trial court for a corrected sentencing entry. *State ex rel. Staffrey v. D'Apolito,* 188 Ohio App.3d 56, 2010-Ohio-2529, 934 N.E.2d 388, ¶ 12 (7th Dist.), citing *Dunn v. Smith,* 119 Ohio St.3d 364, 2008-Ohio-4565, 894 N.E.2d 312. In so doing, we are aware we are in some ways promoting form over function in this matter, as issuance of a new, corrected entry on remand does not give Appellant the ability to directly appeal the corrected entry, because it does not create a new final, appealable order. *Staffrey* at ¶ 22, citing *State ex rel. Culgan v. Medina Cty. Court of Common Pleas,* 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶ 10-11 (Abrogated on other grounds); *Dunn, supra,* at ¶ 8; *McAllister v. Smith,* 119 Ohio St.3d 163, 2008-Ohio-3881, 892 N.E.2d 914, ¶ 7.

{¶26} Because the 1989 entries do not state the fact of conviction, the entries do not comply with either the version of Crim.R. 32 in existence in 1989 or as currently written. Appellant's first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred as a matter of law by sentencing Kemp to 20 year(s) and a maximum term of life on both counts of aggravated murder.

{¶27} Appellant asserts that R.C. 2929.03(A) provides a penalty of life imprisonment with the possibility of parole after twenty years. He argues that the trial court's sentence of twenty years to life in prison conflicts with R.C. 2929.03(A).

{¶28} At the time Appellant was sentenced, R.C. 2929.02(A) read as follows: "[w]hoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death

or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code."

{¶29} In relevant part, the former version of R.C. 2929.03(A) provided:

> If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

{¶30} The relevant portion of the trial court's entry states that Appellant was sentenced to: "a minimum term of 20 year(s) and a maximum term of Life." (2/23/89 J.E.) The sentencing entry appears to be a pre-printed form where the trial court filled in blanks indicating the defendant's sentence. In this case, the two available blanks were filled in with "20" and "Life." The form does not provide a more detailed mechanism to reflect the possibility of parole.

{¶31} However, it is apparent from the pre-printed nature of the form that the trial court's use of twenty years as the minimum and life as the maximum sentence is the manner in which the court conveyed that while Appellant defendant was eligible for parole after twenty years he remained subject to a life sentence. This is supported by the fact that Appellant was granted parole after serving approximately twenty-three years. Appellant's sentence does not conflict with the version of R.C. 2929.03(A) that was in place at the time he was sentenced.

{¶32} Accordingly, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> The trial court erred as a matter of law when sentencing Kemp to serve an additional three (3) years sentence for the gun specifications. In addition to each count, all sentences and gun specifications shall be served concurrently, and the Court having determined that the gun specifications contained in the indictment are merged is a void sentence.

{¶33} Appellant admits that the trial court correctly merged his convictions on three firearm specifications. However, he argues that the trial court erroneously ordered the merged specifications to run concurrently.

{¶34} "[W]here two offenses must be merged, this must be performed prior to sentencing so that a sentence is only entered on one offense." *State v. Gardner*, 7th Dist. Mahoning No. 10 MA 52, 2011-Ohio-2644, ¶ 24, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 17-18. A trial court cannot impose concurrent sentences when the offenses have merged. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234. "Rather, the court must refrain from entering a sentence on one of the merged offenses. 'Sentencing concurrently on merged counts does not satisfy the merger doctrine as no sentence at all should be entered on one of the two merged counts.' " *State v. Tapscott*, 2012-Ohio-4213, 978 N.E.2d 210, ¶ 48 (7th Dist.), citing *Gardner*, *supra*, ¶ 24; *Whitfield*, *supra*, ¶ 17.

{¶35} Because the imposition of separate sentences for merged offenses is contrary to law, such sentences are void. *Williams*. at ¶ 2. As such, "*res judicata* does not preclude a court from correcting those sentences after a direct appeal." *Id.*

{¶36} The language used by the trial court in 1989 can be read in a manner that raises some confusion on this issue. Again, each of the entries at issue in this matter use the same language, thus only one entry will be cited. According to the entry: "[t]he Court further orders that the Defendant serve an additional three (3) years sentence for the gun specification contained in the said count of the Indictment. *All sentences and gun specifications shall be served concurrently*, the Court having determined that the gun specifications contained in the Indictment are merged." (Emphasis added.) (2/23/89 J.E.) As Appellant has not provided us with the sentencing transcripts, we have no way to determine the court advised Appellant at his sentencing hearing in regard to the merged offenses.

{¶37} The trial court used the plural form of "gun specification" when addressing the concurrent sentences, and specifically stated that all gun specifications were ordered to run concurrently. Thus, the trial court appears to have run the merged offenses concurrently. Generally, the remedy is to remand the matter to the trial court for the purpose of allowing the state to elect on which offense it wishes to seek sentencing. See *Williams* at ¶ 30. However, "[c]orrecting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court, as here, had no sentencing discretion." *Williams, supra,* at ¶ 31, citing *Whitfield, supra,* at ¶ 29. Here, each of the firearm specifications resulted in a three-year sentence. As there is no discretion in the sentencing on these offenses, we amend

Appellant's sentence to reflect that Appellant is subject to serve only a single three-year term of incarceration on the gun specification.

{¶38} Because it appears the trial court improperly ran the merged firearm specifications concurrently, Appellant's third assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 4

> The trial court erred as a matter of law and abused its discretion when it denied Defendant's motion to correct a facially illegal sentence.

{¶39} Appellant generally argues that the trial court abused its discretion when it denied his motion to correct his sentence.

{¶40} Due to the resolution of Appellant's other assignments of error, and because Appellant does not appear to advance any new arguments within this assignment of error, Appellant's fourth assignment of error is moot.

Conclusion

{¶41} Appellant argues that the trial court violated the one-document rule when it filed four separate sentencing entries in his case and that the trial court's imposition of sentencing on his firearm specification is contrary to law. Appellant additionally argues that the trial court erred when it sentenced him to incarceration of twenty years to life in 1989 and that the trial court in 2019 abused its discretion when ruling on his motion to correct his sentence. For the reasons provided, Appellant's arguments have merit in part. Accordingly, we remand this matter to the trial court only for purposes of issuing a corrected sentencing entry to reflect the fact of his convictions. We amend Appellant's

sentence to accurately reflect that he is serving a single three-year sentence on the merged firearm specifications. The remaining aspects of the trial court's decision are affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first and third assignments of error are sustained, his second assignment is overruled and his fourth assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. Appellant's sentence is hereby amended to reflect that he is serving a single three-year sentence on the merged firearm specifications. We remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.