

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 13AP-114
 : (C.P.C. No. 01CR-06-3599)
 Clive N. Melhado, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on August 15, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Clive N. Melhado, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Clive N. Melhado, appeals from a judgment of the Franklin County Court of Common Pleas denying his "motion to vacate/void judgment." For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} Arising out of the shooting death of Jerome Cunningham, appellant was indicted on June 21, 2001 on two counts of aggravated murder, with specification, in violation of R.C. 2903.01, and one count of aggravated robbery, in violation of R.C. 2911.01. A firearm specification was also included on each count. A jury found appellant guilty on one count of the lesser-included offense of murder, one count of aggravated

murder with specification, and one count of aggravated robbery. Appellant was also found guilty on each firearm specification.

{¶ 3} On March 28, 2002, the trial court merged the murder conviction with the conviction for aggravated murder and sentenced appellant to a term of life imprisonment without the possibility of parole based on the aggravated murder conviction. The trial court imposed a concurrent eight-year sentence on the aggravated robbery conviction. Additionally, the trial court imposed a total of three years of incarceration on the firearm specifications.

{¶ 4} The specific facts giving rise to appellant's convictions were set forth by this court in his direct appeal in *State v. Melhado*, 10th Dist. No. 02AP-458, 2003-Ohio-4763, wherein we affirmed his convictions. The Supreme Court of Ohio declined a discretionary appeal in *State v. Melhado*, 100 Ohio St.3d 1547, 2003-Ohio-6879.

{¶ 5} On January 18, 2005, appellant filed a petition for post-conviction relief, arguing that (1) his constitutional right to a speedy trial was denied, (2) his constitutional right to self-representation was denied in violation of *Faretta v. California*, 422 U.S. 806 (1975), and (3) double jeopardy barred his conviction for aggravated murder in violation of R.C. 2903.01 when the jury acquitted him on the first count for aggravated murder in violation of R.C. 2903.02 and instead found him guilty of the lesser-included offense of murder in violation of R.C. 2903.01. The trial court found that appellant's petition was untimely and that res judicata barred appellant's petition because the claims either were raised or should have been raised on direct appeal. Additionally, the trial court denied appellant's request for an evidentiary hearing because the trial court found that the evidentiary documentation lacked credibility. Consequently, the trial court dismissed the petition. This court affirmed in *State v. Melhado*, 10th Dist. No. 05AP-272, 2006-Ohio-641, and the Supreme Court of Ohio denied review in *State v. Melhado*, 110 Ohio St.3d 1443, 2006-Ohio-3862.

{¶ 6} Appellant filed a motion to vacate void judgment in April 2010 arguing that his judgment of conviction and sentence was not a final appealable order, that he was improperly sentenced, and that post-release control was not correctly imposed. The trial court denied appellant's motion to vacate void judgment. Appellant filed an appeal of the

trial court's judgment, but the appeal was dismissed due to appellant's failure to file a brief.

{¶ 7} On May 10, 2012, appellant filed a "motion to vacate/void sentence," the disposition of which is currently before this court. In the motion, appellant argued he was not advised of his ability to appeal his convictions, post-release control was not properly imposed, and his offenses were not properly merged. The trial court denied appellant's motion.

II. ASSIGNMENTS OF ERROR

{¶ 8} Appellant timely appealed and brings the following five assignments of error for our review:

[I.] Trial Court failed to properly impose Post-Release Control pursuant to Ohio Revised Code 2967.28.

[II.] Trial Court erred by not considering the necessary factors set forth in Ohio Revised Code 2929.11 and 2929.12.

[III.] Trial Court erred in not advising of the right to appeal pursuant to Ohio Criminal Rule 32(B).

[IV.] Trial Court erred by convicting of charges that were to be considered as allied offenses of similar import pursuant to Ohio Revised Code 2941.25.

[V.] Trial Court erred to make separate findings pursuant to Ohio Revised Code 2929.03(F).

III. DISCUSSION

{¶ 9} At the outset, we construe appellant's motion to vacate or correct sentences as a petition for post-conviction relief. *See State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997) (in construing definition of criteria under which post-conviction relief may be sought, "where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21"). *See also State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586, ¶ 11 (treating defendant's motion to vacate or set aside sentence imposed pursuant to R.C. 2941.25 "as a petition for post-conviction relief since it was filed

subsequent to his direct appeal, it is based on an alleged violation of his constitutional rights, he asserts that the judgment is void, and he requests that his sentence be vacated").

{¶ 10} A trial court may also dismiss a petition for post-conviction relief if it determines that the doctrine of res judicata is applicable. *State v. Aleshire*, 5th Dist. No. 2011-CA-99, 2012-Ohio-772, ¶ 21, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996). Res judicata precludes a defendant from raising an issue "in a motion for postconviction relief if he or she could have raised the issue on direct appeal." *Reynolds* at 161, citing *State v. Duling*, 21 Ohio St.2d 13 (1970). See also *State v. Lester*, 3d Dist. No. 2-11-20, 2012-Ohio-135, ¶ 13, citing *State v. Wilson*, 3d Dist. No. 1-08-60, 2009-Ohio-1735, ¶ 15 ("motions for post-conviction relief will be barred by the doctrine of res judicata if they raise on appeal an issue that could have been raised or was raised on direct appeal").

{¶ 11} Further, R.C. 2953.23(A)(1) provides that a court may not entertain an untimely petition or a "second petition or successive petitions" unless certain conditions are met. As recognized in *State v. Martin*, 10th Dist. No. 05AP-495, 2006-Ohio-4229, before a court may consider an untimely or a second or successive petition for post-conviction relief, a petitioner must demonstrate that: "'(1) he was unavoidably prevented from discovering the facts upon which he bases his petition, or that the petitioner's claim is based upon a newly-created federal or state right; and (2) clear and convincing evidence demonstrates that no reasonable factfinder would have found him guilty in the absence of the alleged constitutional error.'" *Id.* at ¶ 12, quoting *State v. Schoolcraft*, 4th Dist. No. 05CA29, 2006-Ohio-3139, ¶ 7. However, if a trial court receives an untimely or successive petition for post-conviction relief that challenges a void sentence, it must ignore the procedural irregularities, vacate the void sentence, and resentence the offender. *State v. Cunningham*, 10th Dist. No. 10AP-452, 2011-Ohio-2045, ¶ 19.

A. First Assignment of Error

{¶ 12} In his first assignment of error, appellant contends the trial court failed to properly impose post-release control, rendering that part of his sentence void. In support, appellant relies on *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. *Fischer* reaffirmed that if a sentence "does not include the statutorily mandated term of postrelease control," it "is void." *Id.* at paragraph one of the syllabus. The court added that such a void sentence "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.* The court clarified that, although res judicata does not preclude review of a void sentence, "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." *Id.* at paragraph three of the syllabus. At the same time, the court modified *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, holding "[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control." *Fischer* at paragraph two of the syllabus. Thus, when a "judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside" while the rest of the sentence remains in force. (Emphasis sic.) *Id.* at ¶ 26.

{¶ 13} Appellant does not dispute that "an individual sentenced for aggravated murder * * * is not subject to postrelease control, because that crime is an unclassified felony to which the postrelease-control statute does not apply." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 36, citing R.C. 2967.28. Appellant nonetheless argues that because he also was convicted of aggravated robbery, the trial court had a duty to impose a period of post-release control for that offense. *See, e.g., State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445 (concluding that, because defendant, convicted of two counts of aggravated murder, also was convicted of the first-degree felonies of aggravated burglary, aggravated robbery, and kidnapping, the trial court was required to impose the statutorily mandated five-year period of post-release control for those offenses); R.C. 2967.28(B)(1). Accordingly, appellant asserts he is entitled to a de novo sentencing hearing for the imposition of post-release control for his aggravated robbery conviction.

{¶ 14} The state of Ohio, plaintiff-appellee, contends, inter alia, that, under *Fischer*, the trial court's failure to properly impose post-release control on the aggravated robbery conviction affects only the sentence pertaining thereto; therefore, the remedy would be a resentencing for the limited purpose of imposing post-release control on the aggravated robbery conviction. However, because appellant has already served the sentence for aggravated robbery, resentencing on this conviction is not an available remedy. We agree.

{¶ 15} In *State v. Brown*, 8th Dist. No. 95086, 2011-Ohio-345, on December 10, 2003, the defendant was sentenced to two terms of life in prison without the possibility of parole for his two aggravated murder convictions, three years in prison for his aggravated robbery conviction, six months in prison for his carrying a concealed weapon ("CCW") conviction, plus corresponding time for each firearm specification. All sentences, except those pertaining to the firearm specifications, were imposed to run concurrently. On March 15, 2010, the defendant filed a motion to vacate his sentence arguing his sentence was void due to the improper imposition of post-release control in connection with his aggravated robbery and CCW convictions.

{¶ 16} The *Brown* court recognized the well-established principle that when a defendant has been convicted of both an offense that carries mandatory post-release control and an unclassified felony to which post-release control is inapplicable, the trial court's duty to notify of post-release control is not negated. *Id.* at ¶ 8, citing *State v. Taylor*, 2d Dist. No. 20944, 2006-Ohio-843; *State v. Seals*, 2d Dist. No. 2009 CA 4, 2010-Ohio-2843. The court noted that it is also well-settled that once the sentence for the offense that carries post-release control has been served, the court can no longer correct sentencing errors and impose post-release control at resentencing. *Brown* at ¶ 11, citing *Bezak*. Thus, even though the trial court failed to impose post-release control on the aggravated robbery and CCW convictions, because the defendant was sentenced to concurrent terms of incarceration for those convictions and the sentences for those convictions had expired, even though he remained incarcerated, the defendant could not be subject to resentencing on those convictions. *Id.* at ¶ 14-15. *See also State v. Cobb*, 8th Dist. No. 93404, 2010-Ohio-5118 (though the trial court failed to impose post-release control on robbery conviction where defendant was sentenced to 18 to life for murder concurrent to five years for robbery, defendant could not be resentenced on robbery conviction to impose post-release control because the time for that conviction had been served); *State v. O'Hara*, 8th Dist. No. 95575, 2011-Ohio-3060 (though the defendant remained in jail, because concurrent sentence expired, defendant could not be resentenced to impose post-release control); *State v. Turner*, 10th Dist. No. 06AP-491, 2007-Ohio-2187 (the expiration of the journalized sentence rather than the offender's release from prison is determinative of the trial court's authority to resentence); *Bezak*

(once a sentence has been served, the court can no longer correct sentencing error and impose post-release control at resentencing); *State ex rel. Gray v. Karnes*, 10th Dist. No. 10AP-789, 2010-Ohio-5364 (a concurrent sentence is one which runs simultaneously with another sentence; concurrent sentences mean that the prisoner is given the privilege of serving each day a portion of each sentence and if the sentences are of different lengths, the prisoner cannot be discharged until he has served the longest sentence).

{¶ 17} Similarly, in the case sub judice, appellant was sentenced to a term of life imprisonment without the possibility of parole based on his aggravated murder conviction. Additionally, appellant was sentenced to a concurrent eight-year term of imprisonment on the aggravated robbery charge and a three-year term of imprisonment on the firearm specification. The March 28, 2002 sentencing entry, however, fails to make any mention of the imposition of post-release control in connection with the aggravated robbery conviction. While the typical remedy would be a remand for the limited purpose of imposing post-release control for his aggravated robbery conviction, such is not an available remedy in this case. The record reflects that appellant was sentenced to eight years on the aggravated robbery conviction and has been incarcerated for over ten years as he remains incarcerated on the concurrent sentence of life without the possibility of parole. Though appellant remains incarcerated on his aggravated murder conviction, appellant's concurrent sentence for the aggravated robbery conviction has been served. *Brown; Cobb*. Therefore, the court can no longer correct any sentencing error and impose post-release control at a resentencing hearing on the aggravated robbery conviction. *Bezak; Brown; Cobb*.

{¶ 18} Accordingly, appellant's first assignment of error is overruled.

B. Second and Fifth Assignments of Error

{¶ 19} In his second assignment of error, appellant contends the trial court failed to consider the necessary sentencing factors under R.C. 2929.11 and 2929.12. In his fifth assignment of error, appellant contends a three-judge panel should have been convened and made separate findings pertaining to his case. Neither of these issues were raised in appellant's "motion to vacate/void sentence." " 'It is settled law that issues raised for the first time on appeal and not having been raised in the trial court are not properly before this court and will not be addressed.' " (Citations omitted.) *State v. Ikharo*, 10th Dist. No.

05AP-167, 2005-Ohio-6616, ¶ 12, quoting *State v. Schneider*, 2d Dist. No. 95-CA-18 (Dec. 13, 1995); *State v. Awan*, 22 Ohio St.3d 120 (1986); *Hayes v. Toledo*, 62 Ohio App.3d 651, 656 (6th Dist.1989). Having failed to raise these two issues in his motion in the trial court, appellant is barred from raising them in the first instance on appeal. Additionally, because these issues were asserted in an untimely successive post-conviction petition without having satisfied the conditions of R.C. 2953.23, the trial court was precluded from considering them. *Martin*.

{¶ 20} Accordingly, appellant's second and fifth assignments of error are overruled.

C. Third and Fourth Assignments of Error

{¶ 21} In his third assignment of error, appellant contends the trial court did not advise him of his right to appeal. In his fourth assignment of error, appellant contends a different merger analysis should have been applied to his convicted offenses. Both of these issues are barred by the doctrine of res judicata because they either were or could have been presented in a direct appeal from the trial court's sentencing entry; however, they were not. *State v. Richardson*, 10th Dist. No. 12AP-640, 2013-Ohio-292, ¶ 10, citing *State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975 (doctrine of res judicata bars merger issue). Additionally, because these issues were asserted in an untimely successive petition for post-conviction relief and the conditions of R.C. 2953.23 have not been met, the trial court was precluded from considering them. *Martin*.

{¶ 22} Accordingly, appellant's third and fourth assignments of error are overruled.

IV. CONCLUSION

{¶ 23} Based on the foregoing, appellant's five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
