

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 16AP-581
 : (C.P.C. No. 00CR09-5294)
 Ryan A. Watkins, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on March 14, 2017

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

On brief: *Ryan A. Watkins*, pro se.

APPEAL from Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Ryan A. Watkins, appeals from a resentencing entry entered by the Franklin County Court of Common Pleas in which the court notified him of post-release control as ordered by this court in *State v. Watkins*, 10th Dist. No. 15AP-694, 2016-Ohio-780. For the following reasons, we affirm.

I. Factual and Procedural Background

{¶ 2} In 2000, a jury found appellant guilty of murder, aggravated robbery, and felonious assault. The trial court also found him guilty of having a weapon while under disability. The trial court sentenced him accordingly. This court affirmed appellant's convictions and sentence. *State v. Watkins*, 10th Dist. No. 01AP-1376, 2002-Ohio-5080 ("*Watkins I*"). In 2015, appellant requested a resentencing based on the trial court's failure to notify him of post-release control at his sentencing hearing. The trial court denied that request but this court reversed that decision and remanded the matter "for a

limited resentencing to properly impose post-release control." *State v. Watkins*, 10th Dist. No. 15AP-694, 2016-Ohio-780, ¶ 7 ("*Watkins II*").

{¶ 3} On remand, the trial court held a resentencing hearing and properly notified appellant of post-release control. At the hearing, appellant argued that certain of his convictions should merge for purposes of sentencing. The trial court concluded that in light of this court's limited remand, the only issue it could address at the resentencing hearing was appellant's post-release control notification. Therefore, the trial court did not consider appellant's merger argument.

II. Appellant's Appeal

{¶ 4} Appellant appeals from his resentencing and assigns the following errors:

[1.] Did the Tenth District Court of Appeals error when it limited Appellants re-sentencing to Constraints of *State v Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, when appellant request a merger hearing to determine defendant's conduct of allied offenses.

[2.] Did the trial court error in failing to hold a Merger Hearing at the request of defendant at his Re sentencing hearing when there was a facial showing of all allied offenses as stated in Ohio Supreme Court's Holding in *State v Rogers*, [143 Ohio St.3d 385], 2015Ohio2459.

[3.] If prior to July 11, 2006 a court imposed a sentence pursuant to R.C. 2929.191 and failed to notify the offender pursuant to R.C. 2967.28 does R.C. 2929.191 allow a De novo Review without the *State v Fischer* constraints to a limited Re sentencing.

[4.] Did the Tenth District Court of Appeals commit plain error pursuant to Crim.R. 52(B) when it failed to sentence Appellant according to R.C. 2941.25 where there was a facial showing the offenses were allied offenses of similar import, without making the determination of whether the offenses were in fact allied offenses of similar import.

(Sic passim.)

{¶ 5} We will address appellant's assignments of error together. In sum, he argues that the trial court erred by not holding a de novo resentencing hearing and by not considering appellant's argument that his convictions should be merged for purposes of sentencing. We disagree.

{¶ 6} First, this court in *Watkins II* specifically instructed the trial court to conduct a limited resentencing solely to properly impose post-release control. " 'Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.' " *Allen v. Bennett*, 9th Dist. No. 25252, 2011-Ohio-1210, ¶ 12, citing *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984), syllabus; *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶ 13; *State v. Aliane*, 10th Dist. No. 03AP-881, 2004-Ohio-3698, ¶ 16 ("In accordance with the law of the case doctrine, a trial court has no discretion to disregard the mandate of a reviewing court and no authority to extend or vary the mandate given."); *Columbus v. Hayes*, 68 Ohio App.3d 184, 186 (10th Dist.1990) ("When a case is remanded to a trial court from an appellate court, the mandate of the appellate court must be followed."). Thus, the trial court properly limited the resentencing hearing to comply with this court's instructions. *State v. Cottrill*, 4th Dist. No. 11CA12, 2012-Ohio-1021, ¶ 7-9 (instructing trial court to comply with appellate court's instructions to conduct a resentencing hearing in order to properly impose post-release control).

{¶ 7} Notwithstanding this court's instructions, appellant argues that he was entitled to a de novo sentencing hearing under *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. We disagree. In *Bezak*, the court held that "when a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, as required by former R.C. 2929.19(B)(3), the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. * * * The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at ¶ 16. However, the Supreme Court of Ohio subsequently limited the new sentencing hearing to which an offender is entitled under *Bezak* to the proper imposition of post-release control. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 29; *State v. Cockroft*, 10th Dist. No. 13AP-532, 2014-Ohio-1644, ¶ 21 (relying on *Fisher* to conclude that relief for deficient notification of post-release control is limited to resentencing regarding post-release control portion of sentence). Appellant's reliance on R.C. 2929.191 is also misplaced, because that statute applies to defendants that were sentenced after its enactment date in 2006. Appellant was sentenced before that date. *Id.*; *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 35, *rev'd on other grounds by Fisher*.

{¶ 8} For these reasons, appellant was not entitled to a de novo resentencing hearing and the trial court did not err by conducting a resentencing hearing limited to the proper imposition of post-release control.

{¶ 9} Additionally, to the extent appellant argues that his convictions should merge for sentencing, that argument was barred by res judicata. The doctrine of res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 59, citing *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus; *State v. Britford*, 10th Dist. No. 11AP-646, 2012-Ohio-1966, ¶ 6. Appellant could have raised a merger argument in his direct appeal of his convictions and sentence but he did not. As a result, res judicata bars him from raising it in this appeal. *State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975, ¶ 12; *State v. Myers*, 10th Dist. No. 11AP-909, 2012-Ohio-2733, ¶ 6; *State v. Garnett*, 10th Dist. No. 12AP-594, 2013-Ohio-1210, ¶ 9; *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, ¶ 22, 30 (arguments regarding merger should have and could have been raised in previous direct appeal from conviction).

{¶ 10} We recognize that an exception to the application of res judicata applies to void judgments. *State v. Mitchell*, 187 Ohio App.3d 315, 320, 2010-Ohio-1766, ¶ 22, fn. 1 (6th Dist.), citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 30. However, the merger argument appellant presents in this appeal would not render the trial court's judgment void. *Myers* at ¶ 7, citing *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 11-12 (allied offenses argument barred by res judicata); *State v. Hall*, 10th Dist. No. 16AP-408, 2017-Ohio-813, ¶ 12 (merger argument would not render judgment void). Accordingly, res judicata bars consideration of appellant's merger argument.

III. Conclusion

{¶ 11} For these reasons, we overrule appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BRUNNER, J., concur.
