

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-08-016
- vs -	:	<u>OPINION</u>
	:	4/20/2015
ALEXANDER O. BABYAK,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI20090065

Stephen J. Pronai, Madison County Prosecuting Attorney, Rachel M. Price, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Alexander O. Babyak, #A616575, Madison Correctional Institution, P.O. Box 740, London, Ohio 43140, defendant-appellant, pro se

PIPER, P.J.

{¶ 1} Plaintiff-appellant, Alexander O. Babyak, appeals pro se from the decision of the Madison County Court of Common Pleas denying his "Motion to Correct Void Sentence."

{¶ 2} On September 28, 2009, after a trial lasting several days, the jury returned verdicts finding Babyak guilty of one count of aggravated robbery and three counts of kidnapping. The trial court proceeded directly to a sentencing hearing, and sentenced

Babyak to a ten-year prison term on the aggravated robbery charge, and eight-year sentences for each kidnapping charge. The sentences for the kidnapping charges were to run concurrently to each other, but consecutive to the aggravated robbery charge, for an aggregate prison term of 18 years.

{¶ 3} The trial court also notified Babyak at the sentencing hearing that he was subject to postrelease control for five years upon his release from prison, but did not inform Babyak of the potential consequences for violating postrelease control. The sentencing entry filed on October 8, 2009, however, did include a notification of the consequences of violating postrelease control, but the entry incorrectly indicated only that Babyak "may be" subject to postrelease control for five years. On October 19, 2009, the trial court filed a corrected sentencing entry for the limited purpose of clarifying that, prior to trial, the state had dismissed the firearm specifications originally attached to Babyak's charges. The corrected entry did not alter Babyak's sentence in any way.

{¶ 4} On October 20, 2009, Babyak filed a notice of appeal. In January 2010, while the appeal was pending, the state moved the trial court to correct Babyak's sentence on the ground that he received improper notification of postrelease control. That same month, the trial court held a resentencing hearing with Babyak and his counsel present, and specified that Babyak was subject to five years of mandatory postrelease control. In addition, the trial court stated that Babyak's ten-year prison term for the aggravated robbery charge, and his eight-year concurrent prison terms for the kidnapping charges, were also mandatory terms. Neither the state nor Babyak raised any objections at the resentencing hearing. On February 26, 2010, the trial court filed a "Judgment Entry of Re-Sentence" that was consistent with the trial court's statements at the resentencing hearing.

{¶ 5} Babyak appealed from his resentencing entry, and that appeal was

consolidated with his original appeal. *State v. Babyak*, 12th Dist. Madison Nos. CA2009-10-023 and CA2010-03-006 (Mar. 22, 2010) (Entry of Consolidation). Nevertheless, the sole assignment of error Babyak presented to this court on direct appeal was that the jury's verdict finding him guilty was against the manifest weight of the evidence. *State v. Babyak*, 12th Dist. Madison Nos. CA2009-10-023 and CA2010-03-006, 2010-Ohio-3820, ¶ 15. In August 2010, this court issued its decision in the direct appeal, and affirmed Babyak's conviction. *Id.* at ¶ 21.

{¶ 6} In May 2014, Babyak filed a "Motion to Correct Void Sentence," contending his constitutional rights were violated by the "enhanced" sentence he received at his resentencing hearing, that his aggravated robbery and kidnapping offenses should have been merged for sentencing, and that the trial court erred by sentencing him to consecutive, maximum sentences without making the proper statutory findings. On July 22, 2014, the trial court denied the motion.

{¶ 7} Babyak now appeals, raising three assignments of error.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED BY DENYING DEFENDANT HIS *FIFTH AMENDMENT* [sic] RIGHTS WHEN HIS SENTENCE WAS INCREASED AFTER HE HAD COMMENCED SERVICE OF HIS SENTENCE.

{¶ 10} In his first assignment of error, Babyak argues the mandatory prison terms imposed at his resentencing hearing resulted in a sentence that was more severe than his original sentence, and that the increase in severity was a violation of his Fifth Amendment rights under the United States Constitution. However, before we can reach Babyak's constitutional claim, we must first address an issue not raised by either Babyak or the state in this appeal, namely, the jurisdiction of the trial court to resentence Babyak during the

pendency of his direct appeal.

{¶ 11} Pursuant to R.C. 2505.04, an appeal of a final order, judgment, or decree is perfected when a written notice of appeal is filed in accordance with the Rules of Appellate Procedure. "[O]nce an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Rock v. Sch. Emp. Ret. Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, ¶ 8; *State v. Dunning*, 12th Dist. Warren Nos. CA2013-05-048 and CA2013-06-058, 2014-Ohio-253, ¶ 8. In the context of a criminal conviction, one such matter is the trial court's ability to correct a sentencing error. *See, e.g., State v. Triplett*, 4th Dist. Lawrence No. 11CA3, 2011-Ohio-5431, ¶ 3, 6 (finding the trial court did not have jurisdiction to correct an error with respect to postrelease control while the defendant's appeal was pending).

{¶ 12} In the present case, the trial court filed the original sentencing entry on October 8, 2009, followed by the corrected sentencing entry on October 19, 2009. As the corrected sentencing entry was intended merely to clarify that the firearm specifications initially attached to the aggravated robbery and kidnapping charges had been dismissed before trial, that entry was within the trial court's inherent authority to correct clerical errors in its judgment entries. Crim.R. 36. *See also State v. Waltz*, 12th Dist. Clermont No. CA2013-10-077, 2014-Ohio-2474, ¶ 16. However, once Babyak filed his written notice of appeal on October 20, 2009, the trial court was divested of jurisdiction to make any substantive changes. *Dunning* at ¶ 10; *State v. Liso*, 12th Dist. Brown No. CA2012-08-017, 2013-Ohio-4759, ¶ 37-38. As a result, the trial court's resentencing entry filed on February 26, 2010 – approximately four months after Babyak's appeal was perfected, but six months before this court rendered a decision – was a nullity. *Mason v. Lawhorn*, 12th Dist. Warren App. No. CA2006-05-060, 2007-Ohio-2289, ¶ 7.

{¶ 13} Although the trial court was without jurisdiction to correct the error during the pendency of Babyak's direct appeal, we note that the court correctly discerned its failure to properly impose postrelease control in the first instance.¹ R.C. 2929.19 provides that when a court imposes a sentence that includes postrelease control, the court must notify the offender at the sentencing hearing (1) that he will be supervised pursuant to R.C. 2967.28 upon his release from prison, and (2) that violation of a condition of postrelease control may result in the imposition by the parole board of a prison term of up to one-half of the prison term originally imposed upon the offender. R.C. 2929.19(B)(2)(c) and (e); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 2.² Failure to make either of the foregoing notifications renders that part of the sentence void, and it must be set aside. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 26. Further, a sentencing entry is improper if it informs an offender facing a mandatory term of postrelease control that he could be subject to something less than the statutorily-required term. See, e.g., *State v. Chasteen*, 12th Dist. Butler No. CA2012-12-247, 2013-Ohio-3573, ¶ 20 (finding an entry informing an offender he was subject to a term of postrelease control "up to" the mandatory term was improper).

{¶ 14} In the present case, the trial court failed to properly notify Babyak regarding the terms of his postrelease control, both at the original sentencing hearing and in the original and corrected sentencing entries. At the original sentencing hearing, the trial court's notification of postrelease control consisted entirely of the statement, "[y]ou're sentenced to five years post-release [sic] control upon release from the institution." The court did not

1. The trial court also appears to have perceived an error in the prison terms it imposed upon Babyak, as the resentencing entry included language (regarding "mandatory" prison terms) that was not present in either the original or the corrected sentencing entry. Yet, because the trial court did not cite to any authority or otherwise explain this change, it is not clear from the record what basis the trial court used to insert "mandatory" prison terms as part of the original sentence. The record does not reflect that Babyak has the necessary predicate prior conviction to support mandatory prison terms pursuant to R.C. 2929.13(F)(6).

2. R.C. 2929.19 has been amended since Babyak's sentencing. Accordingly, what was R.C. 2929.19(B)(3) at Babyak's original sentencing hearing is now R.C. 2929.19(B)(2). See Am.Sub.H.B. No. 86, 2011 Ohio Laws 29.

inform Babyak of the potential consequences of violating postrelease control as required by R.C. 2929.19(B)(2)(e). In addition, both the original and corrected sentencing entries were improper because they indicated only that Babyak "may be" subject to five years of postrelease control. This wrongly suggested it was possible that Babyak could somehow get less than the statutorily-required term. See R.C. 2967.28(B)(1).

{¶ 15} Consequently, we set aside that part of the corrected sentencing entry purporting to impose postrelease control and remand the cause to the trial court for the limited purpose of correcting the improper imposition of postrelease control according to the procedures outlined in R.C. 2929.191. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 35; *State v. Schleiger*, 12th Dist. Preble No. CA2009-09-026, 2010-Ohio-4080, ¶ 5.

{¶ 16} In conclusion, the resentencing entry must be vacated, and that part of the corrected sentencing entry purporting to impose postrelease control must be set aside. Babyak's first assignment of error is sustained to the limited extent indicated above.

{¶ 17} Having vacated the resentencing entry, and set aside that part of the corrected sentencing entry purporting to impose postrelease control, we must now consider Babyak's second and third assignments of error, which relate to that part of the corrected sentencing entry that remains intact. See, e.g., *Gibson v. Bradshaw*, 5th Dist. Richland No. 13CA11, 2013-Ohio-1867, ¶ 11 (finding that when a court of appeals vacated parts of a resentencing entry, "it in effect left the original sentence intact").

{¶ 18} Assignment of Error No. 2:

{¶ 19} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT WHEN IT FAILED TO MERGE DEFENDANT'S ROBBERY AND KIDNAPPING CONVICTIONS.

{¶ 20} Assignment of Error No. 3:

{¶ 21} THE TRIAL COURT ERRED BY SENTENCING DEFENDANT TO CONSECUTIVE, MAXIMUM SENTENCES WITHOUT MAKING SPECIFIC FINDINGS.

{¶ 22} Babyak's second and third assignments of error assert that the trial court erred by failing to merge his aggravated robbery and kidnapping offenses as allied offenses of similar import, and by failing to make the necessary findings before imposing consecutive and maximum sentences.

{¶ 23} 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 trial or on direct appeal. *State v. Dodson*, 12th Dist. Butler No. CA2011-02-034, 2011-Ohio-6347, ¶ 9, citing *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. Thus, the proper time to challenge a trial court's failure to merge allied offenses is on direct appeal. *Dodson* at ¶ 9. Indeed, most sentencing issues, including challenges to the trial court's imposition of consecutive sentences and maximum sentences, must be presented in a timely direct appeal under R.C. 2953.08. *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, ¶ 8; *State v. Pearce*, 12th Dist. Clermont No. CA2013-12-091, 2014-Ohio-3783, ¶ 8.

{¶ 24} In the present case, Babyak's sole assignment of error on direct appeal was that his conviction was against the manifest weight of the evidence. *Babyak*, 2010-Ohio-3820 at ¶ 15. Therefore, he is precluded from raising in this appeal his allied offenses argument, and his challenges to the imposition of consecutive, maximum sentences.

{¶ 25} Accordingly, Babyak's second and third assignments of error are overruled.

{¶ 26} Judgment reversed in part, and remanded with instructions to the trial court to

correct the improper imposition of postrelease control pursuant to the procedures outlined in R.C. 2929.191. In all other respects, the judgment of the trial court is affirmed.

HENDRICKSON and M. POWELL, JJ., concur.