ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO: 14-1534
Plaintiff/Appellee	:	
-v-	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
DANIEL L. MONK	:	
Defendant/Appellant	:	C.A. CASE NO: 2014 CA 0001

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DANIEL L. MONK

DANIEL L. MONK
1800 Harmon Avenue
Columbus, Ohio 43223
DEFENDANT/APPELLANT

KENNETH W. OSWALT
20 South Second Street, 4th Floor
Newark, Ohio 43055
COUNSEL FOR PLAINTIFF/APPELLEE

FILED
SEP 03 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
SEP 03 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	PAGE(S)
EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1/2
STATEMENT OF THE CASE AND FACTS	3
PROPOSITION OF LAW	4/6
Whether the courts committed prejudicial error in failing to apply established law	
CONCLUSION	6
CERTIFICATE OF SERVICE	7

APPENDIX

Judgment Entry and Opinion, Court of Appeals, Licking County on June 6, 2014, and August 6, 2014.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION

Predictability in the law has been a time-honored concept since Hammurabi first decreed his laws to be inscribed and the Mosaic laws were inculcated by the twelve tribes of Israel. It is this principle of predictability that spawned our Constitution. Moreover, as previously elucidated, it is the legislature that has the inherent power to prescribe crimes and determine punishments. No court has the power to undermine this vested authority.

It is difficult to determine what constitutional infringements hold the most weight in this matter. It is clear that both ineffective assistance of counsel and the fundamental right of due process were denied by the courts. Neither were they compelled to grant any deference to the broad authority of the General Assembly nor the rights enumerated in the Bill of Rights.

The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution ensure Appellant the right to effective assistance of counsel at all critical stages. It is equally important that counsel may not be thrust upon a criminal defendant.

Although the Fourteenth Amendment does not establish a rigid procedure binding this State to proffer counsel in all cases, it does guarantee due process of law.

It is impossible for counsel to marshal the relevant facts and be adequately prepared for trial or any mitigation when counsel had only a few hours before trial. It needs no argument to demonstrate that this misconduct rushed Appellant into a state of helplessness and despondency and caused the acquiescence to an invalid plea.

Notwithstanding the deprivation of due process, the fundamental unfairness which vitiates Appellant's sentence results from the concurrence of three factors: (A) ineffective assistance of counsel; (B) failure to comport with legislative mandates; and (C) non-compliance with Crim.R. 11.

Based on the foregoing, Appellant contends the sentence imposed is facially illegal and contrary to law.

STATEMENT OF THE CASE AND FACTS

Subsequent to multiple continuances by attorney Karen Phipps, Daniel L. Monk, hereinafter Appellant, was set to go to to trial on January 5, 2011.

On the eve of January 4, 2011, attorney Karen Phipps, stated to Appellant, including multiple family and friends, that she was not prepared for trial, nor versed in criminal law concerning sex offenses. Following this bizarre confession, attorney Karen Phipps thrust attorney Matthew Dawson upon Appellant.

On January 5, 2011, being denied any more continuances, attorney Matthew Dawson coerced Appellant into making a no contest plea.

On February 16, 2011, Appellant was sentenced to two counts of Sexual Battery to run consecutively with each other for a total of six years imprisonment.

Being duped again, attorney Matthew Dawson assured Appellant that his remedies were certain at the appellate court level. This remedy resulted in the affirming of the lower court's decision.

The plethora of constitutional infringements require this Court's inquiry and jurisdiction.

PROPOSITION OF LAW

Whether the courts committed prejudicial error in failing to apply established Ohio Law

In 1975, this Court issued a series of decisions that over the years were met with mixed reviews as it concerns the constitutional protections of multiple punishments. See generally State v. Ikner, 44 Ohio St.2d 132, 339 N.E.2d 633 (1975), adopting Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). In 2010, this was followed by State v. Underwood, 124 Ohio St.3d, 2010 Ohio 1, 922 N.E.2d 933, which held that a trial court commits plain error when it fails to merge allied offenses of similar import. Near the end of 2010, in State v. Johnson, 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061, the courts were mandated under R.C. §2941.25 to evaluate a defendant's conduct when considering whether offenses are allied.

In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical of the criminal wrongs committed and the resulting harm. R.C. §2941.25 permits Appellant to be charged with, and tried for, multiple offenses based on the same conduct but permits only one conviction based on conduct that results in similar criminal wrongs that have similar consequences. It is axiomatic in the case sub judice that 2 "separate" counts of Sexual Battery are not only 'similar' but identical.

The court's obvious error to address the merger issue is a deviation from a legal rule and thus in contravention of the General Assembly's intent. This legislative requirement under R.C. §2941.25 to determine allied offenses is likewise mandated by this Court as well.

R.C. §2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Ohio Constitution, Article I, Section 10, which prohibits multiple punishments for the same offense. This failure by the court to include this mandatory provision renders the sentence as imposed contrary to law, or in other words, not authorized by law.

As held by this Court, the Johnson test did not eliminate consideration of the legal elements; it simply made Appellant's conduct the lynchpin for analysis. Thus the court's duty was to use the elements of Appellant's offenses as guideposts to measure Appellant's conduct as it related to the offenses in determining whether multiple offenses could have been committed by the "same conduct." See State v. Hicks, 8th Dist. No. 95169, 2011 Ohio 2780, ¶ 9.

The record concurs that no discussion of merger took place at the plea hearing, nor at sentencing. It is clear that counsel failed to raise this issue at either venue.

The Crim.R. 11 colloquy is silent of a double jeopardy implication, even though this presumption clearly existed. Waivers of such constitutional rights must be voluntary, must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. This waiver of important constitutional rights cannot be presumed from a silent record. State v. Stone, 43 Ohio Ohio St.2d 163, 167, 331 N.E.2d 411 (1975). Concluding a prejudicial claim of ineffective assistance of counsel claim, does not relieve the trial court of the statutorily mandated duty to address the issue of merger. While the facts establishing the conduct of Appellant at the time of the plea may be used to establish that offenses are

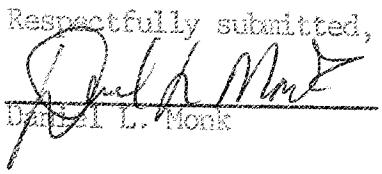
not allied offenses of similar import, the plea alone which does not include a stipulation that the offenses are not allied does not resolve this mandatory requirement and ignores substantial compliance as required by rule. Thus the plea did not constitute a valid waiver of the protections from possible double jeopardy under R.C. §2941.25

Plain error requires: (1) an obvious error, i.e., a deviation from a legal rule, (2) the error must be plain and an obvious defect in the proceedings, and (3) the error must have affected substantial rights. Clearly, being subjected to multiple punishments for offenses that are allied affects Appellant's substantial rights.

CONCLUSION

For the above stated reasons, this Court should accept jurisdiction.

Respectfully submitted,



Daniel L. Monk

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO:
Plaintiff/Appellee	:	
-v-	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
DANIEL L. MONK	:	
Defendant/Appellant	:	C.A. CASE NO: 2014 CA 0001

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DANIEL L. MONK

DANIEL L. MONK
1800 Harmon Avenue
Columbus, Ohio 43223

DEFENDANT/APPELLANT

KENNETH W. OSWALT
20 South Second Street, 4th Floor
Newark, Ohio 43055

COUNSEL FOR PLAINTIFF/APPELLEE

FILED

2014 JUN -6 P 1:24

CLERK OF COURTS
OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J.
Plaintiff-Appellee	:	
-vs-	:	
	:	Case No. 14 CA 1
DANIEL L. MONK	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 526

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR
20 South Second Street, Fourth Floor
Newark, Ohio 43055

For Defendant-Appellant

DANIEL L. MONK, PRO SE
Post Office Box 5500
Chillicothe, Ohio 45601

42/303

Wise, J.

{¶1} Defendant-Appellant Daniel L. Monk appeals the December 16, 2013, decision of the Licking County Common Pleas Court denying his Motion to Correct Sentence.

{¶2} Plaintiff-Appellee is the State of Ohio.

{¶3} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶4} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R.11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form."

{¶5} This appeal shall be considered in accordance with the aforementioned rule.

STATEMENT OF THE CASE AND FACTS

{¶6} Appellant was indicted on two counts of sexual battery and one count of contributing to the delinquency of a minor.

{¶7} On November 8, 2010, Appellant entered an initial plea of not guilty by reason of insanity. The trial court ordered a competency evaluation, and a hearing was scheduled for December 14, 2010. At Appellant's request, the hearing was then continued to January 3, 2011.

304

{¶8} On January 3, 2011, Appellant moved the trial court to continue the trial set for January 5, 2011. Appellant also filed a motion to suppress on the same date. The trial court denied the motions.

{¶9} On January 4, 2011, Appellant retained new counsel.

{¶10} On January 5, 2011, the date scheduled for trial, Appellant's new trial counsel moved the trial court to continue the jury trial. The trial court denied the motion. Appellant then entered a plea of no contest to the charges.

{¶11} On February 16, 2011, the trial court sentenced Appellant to three years incarceration on each count of sexual battery to run consecutively with a six month term on the one count of contributing to the delinquency of a minor charge, for an aggregate prison term of six years.

{¶12} Appellant appealed his sentence and conviction to this Court which, by Opinion filed November 4, 2011, affirmed. *See State v. Monk*, 5th Dist. Licking App. No. 11-CA-28, 2011-Ohio-5751.

{¶13} On July 23, 2013, Appellant filed a Motion to Correct Sentence.

{¶14} On August 6, 2013, the State filed its response in opposition, arguing (a) that the issues raised regarding merger and consecutive sentencing were barred by the doctrine of *res judicata*; (b) that the motion was in fact an untimely petition for post-conviction relief under R.C. 2953.21; and (c) the motion was substantively deficient.

{¶15} On December 18, 2013, the trial court denied Appellant's motion, stating that it did so "[f]or the reasons set out in the state's response..."

{¶16} Appellant now appeals, assigning the following error for review:

ASSIGNMENTS OF ERROR

{¶17} "I. WHETHER THE TRIAL COURT COMMITTED PREJUDICAL ERROR IN FAILING TO ABIDE BY THE SENTENCING PROVISIONS AS LEGISLATIVELY PROMULGATED.

{¶18} "II. WHETHER APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶19} In Appellant's First Assignment of Error, Appellant argues that the trial court erred in sentencing. We disagree.

{¶20} Specifically, Appellant challenges the trial court's failure to merge alleged allied offenses.

{¶21} As stated above, Appellant filed a direct appeal from the imposition of his sentence, which was affirmed by this Court in November, 2011. Then, on July 23, 2013, some 29 months after his sentence was imposed, he filed a pro se "Motion to Correct Sentence" and memorandum in support. Appellant essentially argued that he should not have received consecutive sentences, and that his convictions should have merged.

{¶22} Upon our review, we find Appellant's motion to correct his sentence should be construed as a petition for post-conviction relief and dismissed on the basis of *res judicata*, because Appellant could have raised his claims on direct appeal. As stated by the Supreme Court of Ohio in *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967), paragraphs eight and nine of the syllabus:

{¶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 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.

{¶24} Based on the foregoing, we find that the trial court did not err by denying Appellant's motion to correct sentence. Accordingly, we find Appellant's First Assignment of Error not well-taken and overrule same.

II.

{¶25} In Appellant's Second Assignment of Error, Appellant argues that he was denied the effective assistance of counsel.

{¶26} In this assignment of error, Appellant seems to be arguing that he was denied the effective assistance of counsel at both the trial court level and the appellate level.

{¶27} With regard to any argument that his trial court counsel was ineffective, we find that this argument is barred by the doctrine of res judicata. Appellant did in fact raise this issue in his direct appeal from his sentence, and this Court found said argument not well-taken,

{¶28} As to Appellant's argument that his appellate counsel was ineffective, we find said issue is not properly before this Court. "Claims regarding ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings brought pursuant to R.C. 2953.21." *State v. Love*, 11th Dist. No. 2007–L–030, 2007–Ohio–6256, ¶ 18, citing *Morgan v. Eads*, 104 Ohio St.3d 142, 2004–Ohio–6110, 818 N.E.2d 1157, ¶ 6. Such claims must be raised in an application for reopening filed pursuant to App.R.

26(B). *Morgan* at ¶ 7. Appellant cannot raise claims related to the ineffectiveness of his appellate counsel in these proceedings.

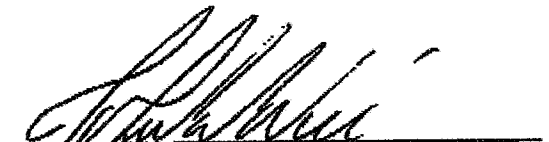
{¶29} Appellant's Second Assignment of Error is overruled.

{¶30} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

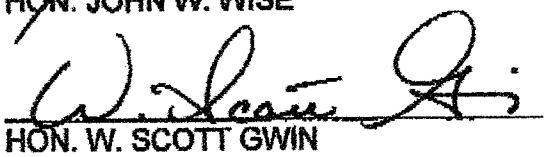
By: Wise, J.,

Gwin, P.J., and

Farmer, J., concur



HON. JOHN W. WISE



HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

JWW/d 0529

FILED

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2014 JUN -6 P 1:28

CLERK OF COURTS
OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

STATE OF OHIO Plaintiff-Appellant	
-vs-	JUDGMENT ENTRY
DANIEL L. MONK Defendant-Appellee	CASE NO. 14 CA 1

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is affirmed.

Costs to Appellant.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

IN COMPLIANCE WITH CIVIL RULE 58, IT IS VERIFIED THAT COPIES HAVE BEEN SENT TO THE PARTIES AND/OR THEIR ATTORNEY OF RECORD IN A MANNER PRESCRIBED BY CIVIL RULE 5(B) ON THIS 6 DAY OF June 2014

42/309

FILED

2014 AUG -6 A 11:05

CLERK OF COURTS
OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

IN THE COURT OF COMMON PLEAS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee Vs. DANIEL L. MONK Defendant-Appellant	:	Case No. 14 CA 1 JUDGMENT ENTRY

{¶1} This matter came before the Court on Appellant Daniel L. Monk's Motion to Certify a Conflict, filed June 18, 2014.

{¶2} Appellant argues that this Court's decision is in conflict with a decision from the First Appellate District: *State v. Anderson*, 1st Dist., Hamilton County, No. C-110029, 2012-Ohio-3347, and the Eighth Appellate District: *State v. Williams*, 8th. Dist. No. 94141, 2011-Ohio-925.

{¶3} Upon review of the cases cited by Appellant, we find that neither of these cases involved the application of the doctrine of *res judicata*, in a post conviction appeal following a direct appeal. We therefore find no conflict.

{¶4} Further, Appellant has failed set forth the issue he wishes this Court to certify to the Supreme Court.

42/646

{¶5} Accordingly, we overrule the Motion to Certify the record for conflict.

JUDGE JOHN W. WISE

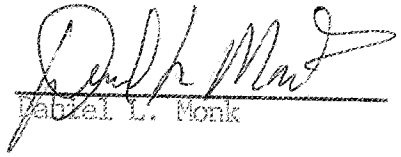
JUDGE W. SCOTT GWIN

JUDGE SHEILA G. FARMER

647

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to Kenneth W. Oswalt, 20 So. Second Street, 4th Floor, Newark, Ohio 43055.



Gabriel L. Monk