

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,
Plaintiff-Appellee,

-v-

Cameron D. Williams,
Defendant-Appellant

Case No.: 15-1478

On Appeal From the
Summit County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No. 27482

NOTICE OF CERTIFIED CONFLICT

Cameron D. Williams #543-790
R.C.I.
P.O. Box 7010
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45601

Defendant-Appellant-Pro se

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RECEIVED
SEP 04 2015
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SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Pursuant to section 1 of S. Ct. R. IV, Appellant Cameron Williams gives notice that on August 24, 2015, the Summit County Court of Appeals, Ninth Appellate District issued an order certifying the judgment it entered in State v. Williams, 2015-Ohio-2632; 2015 Ohio App. LEXIS 2633, to this Court for resolution of a conflict. The Court of Appeals has found that the judgment it entered in this case is in conflict with the judgment rendered by the Eighth Appellate District in State v. Holmes, 2014-Ohio-3816; 2014 Ohio App. LEXIS 3742.

The Court of Appeals determined that a conflict exists on the following issue: Where a trial court sentences a defendant on count's that it has previously determined were subject to merger, is the sentence void or do principles of res judicata apply to preclude a defendant from challenging the sentence after direct appeal?

Copies of the order certifying a conflict and the conflicting appellate decision are attached to this Notice.

Respectfully submitted,

Cameron D. Williams # 543-790
CAMERON D. WILLIAMS #543-790
R.C.I.
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45601

Defendant-Appellant-Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Notice of Certified Conflict was served upon Richard S. Kasay, Assistant Summit County Prosecuting Attorney, 53 University Ave., Akron, Ohio 44308 by regular U.S. Mail on this 31st. day of August, 2015.

Cameron D. Williams # 543-790
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Defendant-Appellant-Pro se

IN THE SUPREME COURT OF OHIO

State of Ohio,
Plaintiff-Appellee,

-v-

Cameron D. Williams,
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Case No.:

On Appeal From the
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APPENDIX TO NOTICE OF CERTIFIED CONFLICT

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STATE OF OHIO)

COUNTY OF SUMMIT)

STATE OF OHIO

Appellee

v.

CAMERON D. WILLIAMS

Appellant

COURT OF APPEALS
DANIEL M. HORNER
JUN 30 AM 8:47

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 27482

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2007-08-2540

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

MOORE, Judge.

{¶1} Defendant, Cameron D. Williams, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This Court has addressed the procedural history of this case in a prior appeal as follows:

This case has a long procedural history which has been discussed in varying amounts of detail by this Court and the Supreme Court of Ohio. *See State ex rel. Williams v. Hunter*, Slip Opinion [No. 2014]-Ohio-1022; *State v. Williams*, 9th Dist. Summit No. 26353, 2012-Ohio-4140; *State v. Williams*, 9th Dist. Summit No. 25879, 2011-Ohio-6141; *State v. Williams*, 9th Dist. Summit No. 24169, 2009-Ohio-3162. * * *

“A jury convicted [Mr.] Williams in March 2008 of a number of offenses, including two counts of aggravated murder with capital specifications.” *State ex rel. Williams* at ¶ 3. The trial court merged the aggravated-murder convictions and an additional murder conviction and sentenced Mr. Williams to a total sentence of life in prison with parole eligibility after 69 years. *Id.* On direct appeal, we reversed a conviction for violating a protection order, but otherwise affirmed. *See Williams*, 2009-Ohio-3162, at ¶ 55, 61. The trial court denied Mr.

Williams' initial petition for post-conviction relief while his direct appeal was pending. *State ex rel. Williams* at ¶ 3.

The Supreme Court summarized Mr. Williams' post-conviction filings as follows:

"[Mr.] Williams then filed a number of motions, including one for a new trial and one to dismiss an aggravated-burglary count, both of which were denied. He did not appeal the order denying the motion for a new trial, and his appeal of the order denying the motion to dismiss was dismissed when he failed to file a brief. He also filed a motion for resentencing, arguing that he had been improperly sentenced on allied offenses of similar import. That motion was denied. The court of appeals affirmed the denial on the basis that the motion was in fact an impermissible successive post[-]conviction petition. In August and December 2011, [Mr.] Williams filed additional motions for resentencing and for a final, appealable order, which were denied as barred by *res judicata* and by the prohibition against successive petitions for post[-]conviction relief. The court of appeals affirmed." (Internal citations omitted.) *Id.* at ¶ 4-5.

Mr. Williams continued to file various motions, including one in December 2012 entitled "Petition to Vacate or Set Aside Judgment of Conviction or Sentence" and another in April 2013 entitled "Motion to Correct an Illegal Sentence Pursuant to[] R.C. 2967.28(B), R.C. 2953.08(G)(2)(b), R.C. 2929.191[.]" On May 30, 2013, the trial court issued an entry denying Mr. Williams' motion for a final, appealable order and petition to vacate or set aside judgment of conviction or sentence but granting his motion to correct an illegal sentence "only as it relates to the imposition of post-release control." The trial court concluded that it was required to hold a resentencing hearing to correct the post-release control notifications. Mr. Williams did not appeal from the trial court's May 30, 2013 entry.

Mr. Williams continued to file various motions in the trial court, including July 2013 motions for *de novo* resentencing, for waiver of prosecution costs, to correct illegal sentences, and for a new trial. In August 2013, he filed a motion "requesting a 'plain error' analysis pursuant to Criminal Rule 52(B), and hearing scheduled to correct post-release control error." In September 2013, he filed another motion for resentencing.

The trial court conducted a hearing on September 10, 2013, "to correct notification to [Mr. Williams] of his post-release control requirements." That entry was journalized on September 30, 2013. Additionally, on September 30, 2013, the trial court denied Mr. Williams' motion for plain error analysis and motion for a new trial. On October 8, 2013, Mr. Williams filed a notice of appeal from the trial court's "judgment and sentence" of September 30, 2013. The only entry attached to the docketing statement was the trial court's September 30, 2013 entry correcting post-release control notification.

State v. Williams, 9th Dist. Summit No. 27101, 2014-Ohio-1608, ¶ 2-7. On appeal from the September 30, 2013 entry correcting his post-release control notification, this Court affirmed, but we remanded the matter solely for the trial court to correct the September 30, 2013 entry to reflect that it was issued as a nunc pro tunc entry. *Id.* at ¶ 13.

{¶3} In 2014, Mr. Williams filed a motion entitled “motion to correct sentences which are ‘contrary to law’ pursuant to: *State v. Burns*, [9th Dist. Summit No. 26332,] 2013-Ohio-4784, *State v. Roper*, [9th Dist. Summit Nos. 26631, 26632,] 2013-Ohio-2176, and *State v. Kalish*, 120 Ohio St.3d 23[, 2008-Ohio-4912,] and motion to waive prosecution costs, including any fees permitted pursuant to R.C. 2929.18(A)(4) pursuant to: R.C. 2949.092.” In his motion, Mr. Williams argued that the trial court, despite merging counts one and two of his indictment into the third count of his indictment, impermissibly proceeded to sentence him on all three of those counts and on firearm specifications attendant to counts two and three. Mr. Williams further argued that the trial court impermissibly ordered him to pay prosecution costs after his release from prison without orally informing him of this obligation at the time of sentencing. The trial court denied Mr. Williams’ motion in an entry dated July 29, 2014. Mr. Williams timely appealed from the July 29, 2014 entry, and he now raises two assignments of error for our review. We have consolidated the assignments of error to facilitate our discussion.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY APPLYING RES JUDICATA WHEN MR. WILLIAMS[?] DIRECT APPEAL WAS PENDING ON THE ANNOUNCEMENT DATE OF *KALISH*.

ASSIGNMENT OF ERROR II

THE TRIAL COURT IMPROPERLY IMPOSED A PENALTY ENHANCEMENT UNDER CIRCUMSTANCES WHERE THERE CAN BE NO

SENTENCE IMPOSED FOR AN UNDERLYING PREDICATE OFFENSE WHICH IS CONTRARY TO LAW AND ABUSED IT[S] DISCRETION BY IMPERMISSIBLY SENTENCING [MR.] WILLIAMS ON THE MERGED COUNTS.

{¶4} In his assignments of error, Mr. Williams argues that the trial court erred in applying res judicata to his motion and that the trial court erred in sentencing him on merged counts and on two firearm specifications attendant to the counts that had merged.

{¶5} In *Williams*, 2011-Ohio-6141, at ¶ 12, we addressed the trial court's denial of Mr. Williams' motion for resentencing wherein he argued "that the trial court committed plain error in sentencing him on his convictions for murder and two counts of aggravated murder, as the crimes were allied offenses of similar import." We concluded that the motion must be construed as a petition for post-conviction relief. *See id.* at ¶ 13. We then determined that the petition was untimely and successive. *See id.* at ¶ 14-16. *See also* R.C. 2953.21 and R.C. 2953.23(A). Because Mr. Williams had not advised the trial court as to any manner by which he was unavoidably prevented from discovering the facts upon which his petition was based, and he did not claim a new retroactive right that had been recognized by the United States Supreme Court, we concluded that the trial court lacked authority to consider his petition. *Williams*, 2011-Ohio-6141, at ¶ 16.

{¶6} As part of his April 23, 2014 motion, Mr. Williams again raised the argument that the trial court impermissibly sentenced him on counts that had merged. However, again, Mr. Williams did not advise the trial court as to how he was unavoidably prevented from discovering the facts upon which his petition was based, and he did not claim a new retroactive right that had been recognized by the United States Supreme Court. *See id.* at ¶ 16. Therefore, for the same reasons set forth in *Williams*, 2011-Ohio-6141, the trial court lacked authority to consider Mr. Williams' April 23, 2014 motion.

{¶7} Moreover, in *Williams*, 2014-Ohio-1608, Mr. Williams appealed from the trial court's September 30, 2013 entry correcting the imposition of postrelease control. *Id.* at ¶ 7-8. There, he assigned as error several arguments pertaining to his sentence. *Id.* at ¶ 16. We concluded that these arguments were barred by res judicata. *Id.* at ¶ 18. Although Mr. Williams distinguishes his 2014 appeal from his present appeal in that his 2014 appeal was taken from his resentencing entry, such a procedural difference does not alter the principal that 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. Knuckles*, 9th Dist. Summit No. 26830, 2013-Ohio-4024, ¶ 7, quoting *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. Here, because Mr. Williams could have raised his arguments pertaining to his sentence and court costs in a direct appeal, he is now barred from asserting these arguments under the doctrine of res judicata.

{¶8} Lastly, we note that, in his reply brief, Mr. Williams directed this Court to the decision of the Eighth District in *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816, in support of his position that his argument is not barred by res judicata. There, the Eighth District addressed, in an appeal from a post-conviction motion to vacate, a situation where the trial court had found the offenses at issue to be allied, but the trial court imposed a sentence on each of the counts prior to ordering that the counts merge. *Id.* at ¶ 18. In concluding that res judicata did not bar the defendant's argument that the trial court improperly imposed sentence on both counts, the Eighth District determined that the sentence was void. *Id.* at ¶ 21-22.

{¶9} However, this Court has held that "the Ohio Supreme Court has applied its void-sentence analysis in limited circumstances[,] [and] [we] will not extend its reach without clear direction from the Supreme Court." *State v. Jones*, 9th Dist. Wayne No. 10CA0022, 2011-Ohio-

1450, ¶ 10, quoting *State v. Culgan*, 9th Dist. Medina No. 09CA0060-M, 2010-Ohio-2992, ¶ 20. Mr. Williams has not directed this Court to any Ohio Supreme Court cases holding that the imposition of a concurrent sentence for a count that has been merged with another count in the indictment results in a void sentence. Therefore, we decline to adopt the position of the Eighth District in *Holmes*. See *State v. Coleman*, 9th Dist. Lorain No. 06CA008877, 2006-Ohio-6329, ¶ 9 (“[T]his Court is not bound by the decisions of its sister districts.”).

{¶10} Accordingly, Mr. Williams’ assignments of error are overruled.

III.

{¶11} Mr. Williams’ assignments of error are overruled. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

CAMERON D. WILLIAMS, pro so, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

COPY

APPENDIX A-8

STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

2015 AUG 24 AM 10:29

C.A. No. 27482

Appellee

COURT OF APPEALS
NINTH JUDICIAL DISTRICT

v.

CAMERON D. WILLIAMS

Appellant

JOURNAL ENTRY

On July 10, 2015, Appellant moved this Court to certify a conflict under App.R. 25 between this Court's June 30, 2015 decision and the following case: *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816. Appellee has not responded in opposition.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment * * * is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law – not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596 (1993).

Upon review, we conclude that a conflict exists between this Court's judgment and the Eighth District's judgment in *Holmes*. Accordingly, we certify the following question:

Where a trial court sentences a defendant on counts that it had previously determined were subject to merger, is the sentence void or do principles of res judicata apply to preclude a defendant from challenging the sentence after direct appeal?



Judge

Concur:
Carr, P.J.
Whitmore, J.

2014-Ohio-3816, *; 2014 Ohio App. LEXIS 3742, **

STATE OF OHIO, PLAINTIFF-APPELLEE vs. DESMON HOLMES, DEFENDANT-APPELLANT

No. 100388

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2014-Ohio-3816; 2014 Ohio App. LEXIS 3742

September 4, 2014, Released
September 4, 2014, Journalized

PRIOR HISTORY: [**1] Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-07-502442.

State v. Holmes, 2009 Ohio 3736, 2009 Ohio App. LEXIS 3175 (Ohio Ct. App., Cuyahoga County, July 30, 2009)

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY

OVERVIEW: HOLDINGS: [1]-Defendant's challenge to his jury verdict forms was barred by res judicata, as he could have and should have raised such an error in his direct appeal; [2]-Defendant's sentence was void because having determined that the two offenses were allied, the trial court, contrary to R.C. 2941.25, imposed a sentence on both counts instead of merging both counts and imposing a sentence on one; [3]-Res judicata did not bar consideration of this issue, as correcting this error in defendant's sentence was both fair and just and res judicata should not be used to permit a void sentence to stand.

OUTCOME: Reversed and remanded.

CORE TERMS: sentence, sentencing, allied, void, res judicata, journal entry, merger, direct appeal, merge, assignments of error, collateral attack, mandatory, challenging, postrelease, voidable, mandated, vacate, jury verdicts, postconviction, ordering, nunc pro tunc, elect, trial counsel, sentencing errors, unauthorized, statutorily, kidnapping, sentenced, voidness, override

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[Criminal Law & Procedure](#) > [Verdicts](#) > [General Overview](#).

[Criminal Law & Procedure](#) > [Double Jeopardy](#) > [Res Judicata](#).

HN1 Where the appellant filed and argued a direct appeal but did not raise any arguments related to the inadequacy of the jury verdict form, res judicata applies to subsequent appeals. [More](#)

Like This Headnote

Criminal Law & Procedure > Trials > Entry of Judgments.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction.

Governments > Courts > Authority to Adjudicate.

HN2 A judgment will be deemed void when it is issued by a court which did not have subject matter jurisdiction or otherwise lacked the authority to act. On the other hand, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous. More Like This Headnote

Criminal Law & Procedure > Double Jeopardy > Res Judicata.

Criminal Law & Procedure > Sentencing > General Overview.

HN3 If a judgment is void, the doctrine of res judicata has no application, and the propriety of the decision can be challenged on direct appeal or by collateral attack. If a sentencing judgment is voidable, the doctrine of res judicata applies and any argument regarding the merits of the decision is considered waived for all purposes unless it is asserted as part of the direct appeal. More Like This Headnote

Criminal Law & Procedure > Sentencing > General Overview.

HN4 Generally, sentencing errors do not render a judgment void because such errors have no effect upon the trial court's jurisdiction. One exception to this general rule is that a sentencing judgment will be considered void when the imposed sentence does not lie within the statutorily mandated terms. More Like This Headnote

Criminal Law & Procedure > Sentencing > General Overview.

HN5 The commonality of the voidness cases is that they all involve situations where the court has failed to impose a sentence term that it was mandated by law to impose (postrelease control, driver's license suspension, statutorily mandated fine), or where a court has attempted to impose a sentence that was completely unauthorized by statute. They involve instances where a trial court has refused or neglected to do what the General Assembly has commanded with respect to a mandatory criminal sentencing term, rather than where the trial court got the law wrong. Either something that was required was left out of the sentences, or the trial court simply decided to create its own sentence despite statutory dictates to the contrary. More Like This Headnote

Criminal Law & Procedure > Sentencing > Merger.

Criminal Law & Procedure > Double Jeopardy > Res Judicata.

HN6 In applying the "void v. voidable" concept to allied offenses and merger, courts of Ohio have

consistently held that sentences that involve alleged errors in the merger of allied offenses are voidable and not void; thus, res judicata will prevent any collateral attack challenging the imposition of allied offenses. More Like This Headnote

Criminal Law & Procedure > Sentencing > Merger.

HN7 R.C. 2941.25 codifies the protections of the Double Jeopardy Clause, and it clearly provides that there may be only one conviction for allied offenses of similar import; a defendant may be sentenced for only one offense. Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. This duty is mandatory, not discretionary. A sentence that contains an allied-offenses error is contrary to law. Because a sentence is authorized by law only if it comports with all mandatory sentencing provisions, the directive in R.C. 2941.25 contains such mandatory provision. More Like This Headnote

Criminal Law & Procedure > Sentencing > Merger.

HN8 Once a trial court determines that two offenses are allied and are subject to merger, the trial court acts without authority when it imposes a sentence on both offenses. Thus, acting without authority renders the sentence void. More Like This Headnote

Criminal Law & Procedure > Sentencing > Concurrent Sentences.

HN9 Even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law. More Like This Headnote

Criminal Law & Procedure > Double Jeopardy > Res Judicata.

Criminal Law & Procedure > Sentencing > General Overview.

HN10 Res judicata is a rule of fundamental and substantial justice, that is to be applied in particular situations as fairness and justice require, and that is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. A court would achieve neither fairness nor justice by permitting a void sentence to stand. Although res judicata is an important doctrine, it is not so vital that it can override society's interest in enforcing the law, and in meting out the punishment the legislature has deemed just. Every judge has a duty to impose lawful sentences. Confidence in and respect for the criminal-justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law. The interests that underlie res judicata, although critically important, do not override the court's duty to sentence defendants as required by the law. More Like This Headnote

Criminal Law & Procedure > Double Jeopardy > Res Judicata.

Criminal Law & Procedure > Sentencing > Merger.

HN11 Res judicata will continue to bar any collateral attack challenging a determination of

whether a defendant's sentence contains allied offenses. [More Like This Headnote](#)

COUNSEL: FOR APPELLANT: Joseph V. Pagano, Rocky River, Ohio.

FOR APPELLEE: Timothy J. McGinty, Cuyahoga County Prosecutor, By: Joseph J. Ricotta, Assistant Prosecuting Attorney, Cleveland, Ohio.

JUDGES: BEFORE: Keough, J., Rocco, P.J., and Kilbane, J. KATHLEEN ANN KEOUGH, JUDGE. KENNETH A. ROCCO, P.J., and MARY EILEEN KILBANE, J., CONCUR.

OPINION BY: KATHLEEN ANN KEOUGH

OPINION

JOURNAL ENTRY AND OPINION

KATHLEEN ANN KEOUGH, J.:

[*P1] Defendant-appellant, Desmon Holmes, appeals the trial court's decision denying his motion to vacate and from the nunc pro tunc sentencing entry issued in May 2012. For the reasons that follow, we reverse and remand for resentencing.

[*P2] On July 17, 2008, a jury found Holmes guilty of rape and kidnapping, and the trial court sentenced him to a ten-year term of imprisonment. Holmes directly appealed his conviction challenging the manifest weight of the evidence, and issues pertaining to speedy trial, confrontation of witnesses, and effective assistance of trial counsel. State v. Holmes, 8th Dist. Cuyahoga No. 91948, 2009-Ohio-3736 ("*Holmes I*"). This court affirmed his convictions. *Id.*

[*P3] Subsequent to his appeal, Holmes filed a petition for postconviction relief [**2] pursuant to R.C. 2953.21, arguing that his trial counsel was ineffective. The trial court dismissed his petition on the grounds of res judicata. Holmes appealed and this court affirmed the trial court's decision. State v. Holmes, 8th Dist. Cuyahoga No. 96479, 2011-Ohio-5848 ("*Holmes II*").

[*P4] In May 2012, the trial court issued a nunc pro tunc sentencing journal entry to reflect that the five-year term of postrelease control ordered at sentencing in 2008 was mandatory. In April 2013, Holmes moved the trial court to vacate or set aside his judgment and sentence, which the trial court summarily denied.

[*P5] This court granted Holmes's request for a delayed appeal to challenge the trial court's nunc pro tunc sentencing journal entry and the denial of his motion to vacate or set aside the judgment and sentence. Holmes raises three assignments of error for our review, which will be addressed out of order.

I. Finding of Guilt

[*P6] In his second assignment of error, Holmes contends that the trial court erred by denying his motion to vacate or set aside judgment and sentence because the jury verdicts and judgment were insufficient to sustain a first-degree felony offense.

[*P7] Holmes's challenge to the jury verdict forms are barred by res judicata. He could have and should have raised [*3] such errors in his direct appeal. Appellate courts, including this court, that have addressed this issue have found that, **HN1**, where the appellant filed and argued a direct appeal but did not raise any arguments related to the inadequacy of the jury verdict form, res judicata applies to subsequent appeals. *See, e.g., State v. Cardamone*, 8th Dist. Cuyahoga No. 94405, 2011-Ohio-818, ¶ 19; *State v. Garner*, 11th Dist. Lake No. 2010-L-111, 2011-Ohio-3426; *State v. Evans*, 9th Dist. Wayne No. 10CA0027, 2011-Ohio-1449; *State v. Foy*, 5th Dist. Stark No. 2009-CA-00239, 2010-Ohio-2445.

[*P8] Accordingly, Holmes's second assignment of error is overruled.

II. Void Entry of Conviction

[*P9] In his first assignment of error, Holmes contends that the trial court erred by denying his motion to set aside his conviction and sentence because the sentencing journal entries were void and violated his constitutional rights to due process and protection against double jeopardy. Specifically, he challenges (1) the trial court's imposition of a sentence on a count that the court found to be allied and subject to merger; (2) the state's failure to elect which count survived merger; and (3) the trial court's assessment of court costs in the sentencing journal entry when he was not advised at sentencing that costs would be imposed. We find the first issue dispositive.

[*P10] The trial court at sentencing and upon recommendation by the state, [*4] found that both Count 1, rape and Count 2, kidnapping were allied offenses and subject to merger. In its announcement of the sentence, the trial court stated on the record: "[t]he court does find the two offenses merge for the purposes of sentencing. And it is ordered the defendant serve a stated term of ten years in prison on the merged counts." The court's sentencing journal entry ordered: "10 years on each of Counts 1 and 2, Counts 1 and 2 merge for sentencing."

[*P11] Holmes contends that the imposition of a sentence on a count that was allied and the state's subsequent failure to elect which count survives merger renders his sentence void. While the state concedes that it did not elect which count Holmes should receive his sentence, the state claims that Holmes's challenge regarding allied offenses is barred by res judicata because he could have raised this issue in his direct appeal.

[*P12] **HN2**: "A judgment will be deemed void when it is issued by a court which did not have subject matter jurisdiction or otherwise lacked the authority to act." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6. On the other hand, "a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, [*5] or erroneous." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12.

[*P13] **HN3**: "If a judgment is void, the doctrine of res judicata has no application, and the propriety of the decision can be challenged on direct appeal or by collateral attack. *Fischer* at paragraph one of the syllabus (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 collateral attack"); *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 10 ("if a trial court imposes a sentence that is unauthorized by law, the sentence is void"). If a sentencing judgment is voidable, the doctrine of res judicata applies and any argument regarding the merits of the decision is considered waived for all purposes unless it is asserted as part of the direct appeal. *State ex rel. Porterfield v. McKay*, 11th Dist. Trumbull No. 1012-T-0012,

2012-Ohio-5027, ¶ 13.

[*P14] Therefore, the issue before this court is whether Holmes's sentence is void because the trial court imposed a prison sentence on both counts that were determined to be allied. We find that it is.

[*P15] **HN4** Generally, sentencing errors do not render a judgment void because such errors have no effect upon the trial court's jurisdiction. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 7. One exception to this general rule is that a sentencing judgment will be considered void when the imposed [**6] sentence does not lie within the statutorily mandated terms. Id. at ¶ 8.

[*P16] The First Appellate District recently explained and summarized the Ohio Supreme Court's holdings as it applies to void sentences.

HN5 The commonality of the voidness cases is that they all involve situations where the court has failed to impose a sentence term that it was mandated by law to impose (postrelease control, driver's license suspension, statutorily mandated fine), or where a court has attempted to impose a sentence that was completely unauthorized by statute. They involve instances where a trial court has refused or neglected to do what the General Assembly has commanded with respect to a mandatory criminal sentencing term, *see Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 15 and fn. 1,* rather than where the trial court got the law wrong. Either something that was required was left out of the sentences, or the trial court simply decided to create its own sentence despite statutory dictates to the contrary.

State v. Grant, 1st Dist. Hamilton No. C-120695, 2013-Ohio-3421, ¶ 15. See Fischer; State v. Harris, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509; State v. Moore, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432.

[*P17] **HN6** In applying the "void v. voidable" concept to allied offenses and merger, courts of this state, including this court, have consistently held that sentences that involve alleged errors in the merger of allied offenses are voidable and [**7] not void; thus, res judicata will prevent any collateral attack challenging the imposition of allied offenses. *See, e.g., State v. Hough, 2013-Ohio-1543, 990 N.E.2d 653, State v. Segines, 8th Dist. Cuyahoga No. 99789, 2013-Ohio-5259* (res judicata bars postconviction appeals collaterally attacking the trial court's failure to merge allied offenses at sentencing when the issue was not raised on direct appeal); Grant.

[*P18] However, those line of cases involved the issue of whether certain offenses were allied — the determination stage of the allied analysis. Whereas in this case before this court, the trial court found the offenses allied, yet imposed a sentence on both counts prior to ordering that the counts "merge."

[*P19] **HN7** R.C. 2941.25, codifies the protections of the Double Jeopardy Clause, and it "clearly provides that there may be only one conviction for allied offenses of similar import; a defendant may be sentenced for only one offense." State v. Underwood, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 26. "Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. This duty is mandatory, not discretionary." *Id.* "A sentence that contains an allied-offenses error is contrary to law." State v. Wilson, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 14. In *Underwood*, the Ohio Supreme Court found that because a sentence is authorized by [**8] law only if it comports with all mandatory sentencing provisions, the directive in R.C. 2941.25 contains such mandatory provision. Underwood at ¶ 23-30.

[*P20] In this case, on the face of the sentencing journal entry, the sentence imposed on these allied offenses is contrary to R.C. 2941.25(A), not authorized by law, and thus void. The trial court when sentencing Holmes determined that the two offenses were allied. However, instead of merging both counts and imposing a sentence on one, the court imposed a sentence on both counts. **HN8** Once a trial court determines that two offenses are allied and are subject to merger, the trial court acts without authority when it imposes a sentence on both offenses. Thus, acting without authority renders the sentence void. Although the court stated "counts 1 and 2 merge," the sentencing journal entry does not reflect which count Holmes is serving his ten-year sentence on.

[*P21] In so far as the trial court in this case stated that the ten-year sentence on each count "merged," this action is equivalent to a court ordering sentences to run concurrent when the offenses are allied. The trial court's failure to properly merge the offenses as required means that Holmes has two "convictions" which **[**9]** are more than authorized by law. Underwood at ¶ 26, citing State v. Gibson, 8th Dist. Cuyahoga No. 92275, 2009-Ohio-4984, ¶ 29 (**HN9**: "Even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.")

[*P22] Accordingly, because Holmes's sentence is contrary to R.C. 2941.25 and not authorized by law, we find his sentence is void. This limited conclusion falls in the narrow exception of instances where a sentencing error does not lie within the statutory mandated terms. This error is apparent from the face of the sentencing journal entry.

[*P23] Even if the voidness doctrine does not apply in this instance, we find that res judicata should not bar consideration of this issue. As the Ohio Supreme Court explained,

HN10 Res judicata is a rule of fundamental and substantial justice, that "is to be applied in particular situations as fairness and justice require, and that * * * is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice." We would achieve neither fairness nor justice by permitting a void sentence to stand.

Although res judicata is an important doctrine, it is not so vital that it can override "society's interest in enforcing the law, and in meting out the punishment the **[**10]** legislature has deemed just."

Every judge has a duty to impose lawful sentences. "Confidence in and respect for the criminal-justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law." The interests that underlie res judicata, although critically important, do not override our duty to sentence defendants as required by the law.

(Citations omitted.) State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 25-27. Correcting this error in Holmes's sentence is both fair and just and res judicata should not be used to permit a void sentence to stand.

[*P24] Our review of the case law reveals that this issue is fact specific and likely will not present itself again. Our decision is not to be read broadly encapsulating all collateral attacks on allied offenses. Nor does our holding create any conflict in our district concerning this court's treatment and disposition of postconviction attacks on allied offenses. It remains that **HN11** res judicata will continue to bar any collateral attack challenging a determination of whether a defendant's sentence contains allied offenses. *See, e.g., Hough, 8th Dist. Cuyahoga Nos. 98480 and 98482, 2013-Ohio-1543, 990 N.E.2d 653,*

Segines, 8th Dist. Cuyahoga No. 99789, 2013-Ohio-5259

[*P25] Accordingly, we reverse Holmes's sentence and remand to the trial court [**11] to conduct a new sentencing hearing to allow the state to make an election on which count survives merger. The trial court must then impose sentence only on that count, advise Holmes regarding the assessment of costs, unless waived, and also properly advise Holmes of postrelease control.

[*P26] Having sustained the first issue raised by Holmes in his first assignment error and ordering a new sentencing hearing, we find the second issue presented in this assignment of error regarding the imposition of court costs and the third assignment of error challenging postrelease control, moot.

[*P27] Reversed and remanded for further proceedings consistent with this court's opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE
KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR