

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 15-1478

STATE OF OHIO

Appellee

v.

CAMERON D. WILLIAMS

Appellant

**On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 27482**

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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STATEMENT OF FACTS

This certified conflict case raises the issue whether a sentence is void where a trial court sentences a defendant on counts it previously determined were subject to merger or whether res judicata applies and precludes the defendant from challenging the sentence after direct appeal. The conflict case is *State v. Holmes*, 8th Dist. No. 10038, 2014-Ohio-3816.

In 2008, a jury found Appellant Williams guilty of murder, two counts of aggravated murder with capital specifications and firearm specifications, kidnapping and a firearm specification, aggravated burglary and a firearm specification, violating a protection order and a firearm specification, escape, having weapons under disability, carrying a concealed weapon, and intimidation of a crime witness and a firearm specification. The jury recommended thirty years to life on the capital charges.

At sentencing, the trial court sentenced Williams to three years on each firearm specification and merged three specifications into the remaining three for a total of nine years. The court imposed life with parole eligibility after fifteen years for murder, and thirty years to life on each aggravated murder. The court merged murder and one aggravated murder into the other aggravated murder for a sentence of thirty years to life.

The court imposed ten years for both kidnapping and aggravated burglary, and five years for both escape and having weapons under disability, all consecutive for another thirty years. The court imposed a concurrent sentence of five years on the remaining counts, concurrent with the other sentences. The total sentence is sixty-nine years to life.

The court of appeals affirmed in part and reversed in part. *State v. Williams*, 9th Dist. No. 24169, 2009-Ohio-3162. The court acquitted Williams on the violation of a protection order charge. *Id.* ¶55.

Williams filed a motion for resentencing alleging that the court sentenced him on allied offenses. Specifically, he said that it was plain error to sentence him for murder and both aggravated murders. The court of appeals found that the motion was a successive petition for post-conviction relief (Williams had filed an earlier petition) and that there was no compliance with R.C. 2953.23. *State v. Williams*, 9th Dist. No. 25879, 2011-Ohio-6141.

Williams filed another motion for resentencing, but did not raise an allied offense issue. The court of appeals found that the motion was another petition for post-conviction relief barred by R.C. 2953.23. *State v. Williams*, 9th Dist. No. 26353, 2012-Ohio-4140.

Williams continued to file motions. One was to correct post-release control and the trial court did hold a hearing addressing post-release control.

On appeal Williams raised numerous alleged errors including that the trial court committed plain error in sentencing him in violation of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. The court of appeals affirmed the denial of the motion finding that claim barred by res judicata among other reasons. *State v. Williams*, 9th Dist. No. 27101, 2014-Ohio-1608, ¶17-¶18.

Continuing to file motions, Williams filed one to “correct sentences which are contrary to law”. Williams argued that the trial court erred in imposing sentences on the homicide convictions and the firearm specifications attached to the aggravated murder counts (2 and 3). After the motion was denied the court of appeals affirmed noting that the claim was raised in *Williams*, 2011-Ohio-6141, and that arguments directed to the sentence were rejected based on res judicata in *Williams*, 2014-Ohio-1608. *State v. Williams*, 9th Dist. No. 27482, 2015-Ohio-2632, ¶5-¶7. The court addressed *Holmes, supra*. The court did not follow *Holmes* based on lack of a clear direction from this Court as to the scope of void sentence jurisprudence. *Williams*, 2015-Ohio-2632, ¶9.

The Ninth District later addressed *Holmes*, in *State v. Robinson*, 9th Dist. No. 27663, 2015-Ohio-3329. There, the defendant argued that an aggravated murder should have merged with murder. The court of appeals rejected the

argument on the basis that failure to merge counts did not result in a void sentence and the motion was a petition barred by R.C. 2953.23. *Id.* ¶5-¶6.

In *Holmes, supra*, the defendant's convictions for rape and kidnapping. The court of appeals affirmed in the direct appeal. A timely petition for post-conviction relief was denied on the basis of res judicata and affirmed on appeal. A nunc pro tunc entry corrected post-release control. The defendant moved to vacate the judgment and sentence. That motion was denied.

On appeal, the defendant argued among other things that the sentence was void because there was a sentence on a count found to be an allied offense. The State argued res judicata. The court of appeals agreed that the essence of this Court's void sentence jurisprudence was that "something that was required was left out of the sentences, or that the trial court simply decided to create its own sentence despite statutory dictates to the contrary." *Holmes*, ¶16, quoting *State v. Grant*, 1st Dist. No. C-120695, 2013-Ohio-3421, ¶15.

The court of appeals noted that alleged errors in merger of allied offenses are avoidable. The court distinguished that rule because it involved the issue whether offenses were allied. In the case before the court, the alleged error was that a sentence was imposed on offenses found by the trial

court to be allied. A sentence was imposed on the offenses and then they were merged. *Id.* ¶17-¶18.

The court of appeals noted that under Double Jeopardy and R.C. 2941.25, there can be only one sentence on offenses that are allied. The court held that where two sentences were imposed the sentence was not authorized by law, contrary to R.C. 2941.25(A), and thus void. *Id.* ¶19-¶20. The sentence was equivalent to ordering sentences on allied offenses to run concurrent. *Id.* ¶21.

The court went on to state somewhat confusingly that even if the sentence was not void, res judicata would not bar the issue because res judicata should not bar correcting a sentence where the correction is fair and just; “res judicata should not be used to permit a void sentence to stand.” *Id.* ¶23, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶25-¶27. The court believed that the result in the case was fact specific and “likely will not present itself again.” ¶24.

PROPOSITION OF LAW I

Where A Trial Court Sentences A Defendant On Counts That It Had Previously, Or Subsequently Determined Were Subject To Merger, The Sentence Is Not Void And Principles Of Res Judicata Apply To Preclude A Defendant From Challenging The Sentence After Direct Appeal.

LAW AND ARGUMENT

The State contends that the trial court committed error in 2008 by imposing separate sentences on allied offenses but that the sentence is not void. Absent objection the error would be reviewed for plain error on direct appeal and is subject to res judicata.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25.

It is erroneous to impose concurrent sentences where the offenses are allied. *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, ¶17; *See Shinholster v. Bradshaw*, No. 14-3026 (6th Cir. November 26, 2014) (The defendant was impermissibly punished by multiple convictions on allied

offenses even though the sentences were concurrent.) Proper procedure is to impose one sentence while keeping the finding of guilt on the allied offense(s) intact. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶24, ¶26.

Where a defendant agrees to separate sentences on multiple offenses and separate sentences are imposed, concurrent, but no allied offense analysis is imposed, the defendant may appeal arguing that she could not be sentenced for allied offenses of similar import. “[a] trial court is prohibited [by R.C. 2941.25] from imposing individual sentences for counts that constitute allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶26. But, [i]mposition of multiple sentences for allied offenses of similar import is plain error.” *Id.* ¶31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶96-¶102; *See State v. Abuhilwa*, 9th Dist. No. 25300, 2010-Ohio-5997, ¶8-¶9 (*Underwood* holds that it is plain error when allied offenses of similar import are not merged. An error alleging firearm specifications should have been merged is subject to res judicata.)

Any imposition of a void sentence is plain error. *See State v. Craft*, 52 Ohio App.2d 1, 4 (1st Dist. 1977). Not all plain errors involve errors that render the judgment void. *State v. Moore*, 7th Dist. No. 12MA91, 2013-Ohio-1431, ¶15 (“There is a fundamental difference between a void judgment and one that merely contains an alleged error.”); *State v. Payne*, 114 Ohio St.3d

502, 2007-Ohio-4642, ¶27 (“void and voidable sentences are distinguishable”.); A “void sentence is one that a court imposes despite lacking subject matter - jurisdiction or the authority to act.” *Payne, supra* ¶27. Voidable sentences are subject to res judicata. *State v. Ware*, 11th Dist. No. 2014-L-076, 2015-Ohio-5206, ¶11; *State v. Knuckles*, 9th Dist. No. 27571, 2015-Ohio-2840, ¶11.

As recently explained,

A “voidable” judgment is distinctly different from a judgment that is “void.” When a court has subject matter jurisdiction over a controversy, an “invalid, irregular, or erroneous “judgment is considered “voidable;” that is, subject to reversal.***. In the criminal law, “a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously***.”

State v. Sowell, 8th Dist. No. 102752, 2015-Ohio-4770, ¶6.

This Court addressed void sentences in *State v. Holdcroft*, 137 Ohio St.3d 526, 2015-Ohio-5014. There, this Court stated that void sentence jurisprudence flowing from *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 does not apply to most sentencing challenges. Examples are errors in complying with the general felony sentencing guidance statutes, whether offenses are allied, and whether sentences are to be served consecutively. The “*Fischer* rule” applies in limited circumstances, to a void sanction. *Id.* ¶8. A

sanction is a sentence, as opposed to a conviction that is composed of a finding of guilt and a sentence. *Id.* ¶6.

What sort of plain error, void or voidable, is *Underwood* plain error? The answer should be in *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, a direct appeal case. There, separate sentences were imposed on several offenses and the defendant made no allied offense claim at sentencing. This Court rejected the argument that a trial court has a duty to inquire about allied offenses (*but see Underwood, supra*) if the defendant does not raise the issue. *Id.* ¶5. The defendant buttressed this argument with claims that a court lacks authority to impose separate sentences for allied offenses of similar import and to do so is contrary to law as Double Jeopardy protections cannot be waived. *Id.* ¶15.

This Court echoed *Underwood, supra* by affirming that under R.C. 2941.25 the defendant cannot be convicted, that is sentenced, for more than one allied offense. *Id.* ¶18, citing *State v. Whitfield, supra*, ¶13, ¶18. Be that as it may, this Court applied a plain error test, including that the error must have affected the outcome of the trial; the defendant must demonstrate “a reasonable *probability* that the error resulted in prejudice***.” *Rogers*, ¶22.

More, even if plain error were shown, the appellate court was not under

a duty to correct it. *Id.* ¶23. An appellate court should not have discretion to pass over a void sentence.

This Court stated that “There may be instances when a trial court’s failure to merge allied offenses can constitute plain error; but this case” is not one of them. *Id.* ¶26. Accordingly, the defendant must demonstrate plain error on appeal where allied offenses are not addressed at sentencing. *Rogers* ¶3.

The State contends that if separate sentences on allied offenses result in a void sentence, then the correct outcome in *Rogers* would be to order a remand to examine the allied offense issue rather than require the defendant to demonstrate a probability that had the issue been examined, the outcome would be affected. Accordingly, plain error where separate sentences may have been imposed on allied offenses does not equate to a void sentence.

The State recognizes that in this case the trial court found the homicide offenses to be allied. That should make no difference. There will be instances when a sentencing court imposes separate sentences on allied offenses and no objection is made. The plain error test in *Rogers* will apply.

Moreover, as stated in *Underwood*, the defendant can expressly waive R.C. 2941.25 protection, by “stipulating in the plea agreement that the offenses were committed with separate animus.” *Rogers*, ¶20, quoting

Underwood, supra ¶29. This holding is unqualified by language that the offenses were in fact committed with a separate animus. The State does not believe that defendants will be most concerned with separating out allied offenses in a plea bargain; common sense teaches that the primary goal will be to get the minimum sentence possible even if that means agreeing to separate sentences on allied offenses. As the parties surely cannot confer authority on a court to impose a void sentence, a sentence that is a nullity, *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-427, paragraph two of the syllabus, the sentence is not void.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Allen Vender, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, on the 2nd day of March, 2016.



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APPENDIX

[Cite as *State v. Williams*, 2015-Ohio-2632.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

CAMERON D. WILLIAMS

Appellant

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:

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[Cite as *State v. Holmes*, 2014-Ohio-3816.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100388

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DESMON HOLMES

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-07-502442

BEFORE: Keough, J., Rocco, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: September 4, 2014

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KATHLEEN ANN KEOUGH, J.:

{¶1} 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.

{¶2} 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.*

{¶3} Subsequent to his appeal, Holmes filed a petition for postconviction relief 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*”).

{¶4} 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.

{¶5} 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

{¶6} 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.

{¶7} Holmes's challenge to the jury verdict forms are barred by res judicata. He could have and should have raised such errors in his direct appeal. Appellate courts, including this court, that have addressed this issue have found that, 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.

{¶8} Accordingly, Holmes's second assignment of error is overruled.

II. Void Entry of Conviction

{¶9} 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.

{¶10} The trial court at sentencing and upon recommendation by the state, 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.”

{¶11} 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.

{¶12} “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, or erroneous.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12.

{¶13} 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.

{¶14} 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.

{¶15} 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 sentence does not lie within the statutorily mandated terms. *Id.* at ¶ 8.

{¶16} The First Appellate District recently explained and summarized the Ohio Supreme Court’s holdings as it applies to void sentences.

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.

{¶17} 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 not void; thus, res judicata will prevent any collateral attack challenging the imposition of allied offenses. *See, e.g., State v. Hough*, 8th Dist. Cuyahoga Nos. 98480 and 98482, 2013-Ohio-1543, *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*.

{¶18} 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.”

{¶19} 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 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.

{¶20} 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. 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.

{¶21} 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 are more than authorized by law. *Underwood* at ¶ 26, citing *State v. Gibson*, 8th Dist. Cuyahoga No. 92275, 2009-Ohio-4984, ¶ 29 (“Even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.”)

{¶22} 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.

{¶23} 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,

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 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.

{¶24} 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 *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, *Segines*, 8th Dist. Cuyahoga No. 99789, 2013-Ohio-5259

{¶25} Accordingly, we reverse Holmes’s sentence and remand to the trial court 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.

{¶26} 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.

{¶27} 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