[Cite as *State v. Fayne*, 2017-Ohio-8889.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105641

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLOS FAYNE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-02-421497-ZA and CR-02-421687-B

BEFORE: Celebrezze, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 7, 2017

FOR APPELLANT

Carlos Fayne, pro se
Inmate No. A451159
Toledo Correctional Institution
2001 East Central Avenue
P.O. Box 80033
Toledo, Ohio 43608

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Frank Romeo Zeleznikar
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Carlos Fayne, appeals from the denial of his "motion to vacate void sentences and merge allied offenses of similar import." Appellant argues that the court erred in denying the motion because his sentences in two criminal cases are void where appellant was sentenced for offenses that should have merged. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} In 2002, appellant was convicted of murder, attempted murder, felonious assault, kidnapping, and having weapons while under disability across two cases — Cuyahoga C.P. Nos. CR-02-421497-ZA and CR-02-421687-B. In his direct appeal, appellant raised issues of ineffective assistance of counsel, sufficiency and manifest weight of the evidence, his right to self-representation, and the trial of his separate indictments together in one proceeding. *State v. Fayne*, 8th Dist. Cuyahoga No. 83267, 2004-Ohio-4625. This court affirmed appellant's convictions and sentences, overruling all of his assigned errors. *Id*.

{¶3} On February 28, 2017, appellant filed a pro se motion styled "motion to vacate void sentences and merge allied offenses of similar import." Appellant's memorandum in support consisted entirely of the following:

> On June , [sic] 2003 the trial court sentenced Defendant to a term of Twenty-three years to Life of imprisonment. The sentence is void under *State v. Williams* (Ohio2016), 2016-Ohio-7658, id., at ¶¶ 28 and 29 [sic].

> WHEREFORE, this court must Vacate the Void Sentences of Defendant, and hold an entirely new sentencing hearing in compliance with *State v. Williams*, supra. It is further requested that the Court issue an Order remanding custody of Defendant, and/or grant his release pending bail. Crim.R. 46; R.C.§2937.34,et seq. *Turner v. Sutula* 2014-Ohio-5696 (December 23, 2014), id. at ¶¶ 3, and 4 [sic].

{¶4} The state filed a brief in opposition, and the trial court denied appellant's motion on March 6, 2017. Appellant then filed the instant appeal, pro se, assigning three errors for review:

> 1. The trial court erred by convicting and sentencing [appellant] to consecutive sentences that were allied offenses of similar import, and therefore, failing to merge the allied offenses as mandated by R.C. 2941.25.
>
> 2. The court committed reversible error by failing to merge [appellant's] firearm specifications, and sentencing defendant on multiple firearm specifications in contravention to R.C. 2929.14(D)(1)(b).
>
> 3. [Appellant's] sentences are void and must be vacated.

II. Law and Analysis

A. Void Sentences

{¶5} Appellant argues that his sentences in two cases are void. He claims the court imposed sentence on allied offenses in two respects. First, he claims that the court should have merged his kidnapping, felonious assault, and attempted murder offenses. Next, he argues that the court improperly imposed sentences on firearm specifications prior to merging them. Finally, he claims that the court improperly ordered the firearm

specifications in two cases to be served consecutive to each other.

{¶6} Where a sentence imposed on an individual is void, that individual may challenge the void portions of the sentence at any time. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22. However, where the sentence is not void, the appropriate method to challenge it is through direct appeal. *Id*. at ¶ 23. Therefore, this appeal turns on whether appellant's sentences are void. If they are not, principles of res judicata preclude further challenge. As such, appellant's assigned errors will be addressed together.

{¶7} Appellant's arguments fail because none of the alleged errors advanced render his sentences void and, therefore, res judicata bars his untimely arguments. Under the doctrine of res judicata,

> a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in that judgment of conviction or on an appeal from that judgment.

State v. Padgett, 8th Dist. Cuyahoga No. 95065, 2011-Ohio-1927, ¶ 8, citing *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967).

{¶8} In his motion before the trial court, appellant did not advance the arguments he now raises on appeal in any detailed way. The only thing clearly advanced below is that appellant claimed the Ohio Supreme Court's holding in *Williams* applied to his case.

{¶9} The Ohio Supreme Court recently clarified the application of res judicata to postconviction proceedings that raise issues of voidness due to sentences imposed on allied offenses. The *Williams* court concluded that where sentences are imposed on offenses and no findings regarding allied offenses are made, or the court finds that the offenses were not allied, the sentences are not void. *Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, at ¶ 23-25, citing *Mosely v. Echols*, 62 Ohio St.3d 75, 76, 578 N.E.2d 454 (1991); *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 8; *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. This means the issue must be raised on direct appeal. *Id*. at ¶ 26.

{¶10} The *Williams* court recognized an exception to the general rule it announced — when a trial court finds that counts are in fact allied but imposes concurrent sentences on those counts, the sentences are void. The *Williams* court found that such an improper sentence is void because the court has a mandatory duty to merge such offenses. *Id*. at ¶ 28. Appellant does not assert that the court found that his offenses of attempted murder, felonious assault, and kidnapping were allied and imposed sentence anyway. Therefore, *Williams* does not apply to this aspect of his sentences. Appellant did not raise the issue in his previous appeal. Therefore, his argument that his convictions for kidnapping, felonious assault, and attempted murder are allied offenses is barred by res judicata.

{¶11} Appellant argues that, in CR-02-421687-B, the court imposed sentence on the firearm specifications prior to merging them and this constitutes the sort of error the Ohio Supreme Court held constituted a void sentence in *Williams*. That is not the case.

According to the journal entry, the trial court merged the firearm specifications after imposing a sentence on each. However, that is not the same as imposing concurrent sentences. The court merged the sentences it imposed, meaning that any error in imposing sentence on those firearm specifications prior to merger was harmless because the entry specified that only one three-year firearm specification sentence survived merger. This did not render his sentence void.

{¶12} Therefore, appellant's three assignments of error are overruled.

III. Conclusion

{¶13} The trial court's merger of the firearm specifications means that appellant's sentences are not void. Further, res judicata bars litigation of the propriety of the court's decision regarding the merger of other offenses that should have been raised in a direct appeal.

{¶14} Judgment affirmed.

It is ordered that appellee recover of appellant 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.

FRANK D. CELEBREZZE, JR., JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR