

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NO. 2009-P-0023
- vs -	:	
SETH DEAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 98 CR 0110.

Judgment: Reversed, sentence vacated, and cause remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Aaron T. Baker, 2000 The Illuminating Building, 55 Public Square, Cleveland, OH 44113 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Seth Dean appeals from the judgment of the Portage County Court of Common Pleas, resentencing him to consecutive seven year terms of imprisonment for aggravated robbery, felonious assault, and kidnapping, and imposing mandatory postrelease control. In resentencing him, the trial court found, as it had originally, that aggravated robbery and felonious assault were allied offenses of similar import, and merged them. It also found, inter alia, that kidnapping was not an allied offense of

similar import to aggravated robbery under the facts of the case, and refused to merge that sentence with the other. Mr. Dean contends this was error. We find that his sentence is clearly and convincingly contrary to law, being void, vacate his sentence, and remand for a new resentencing hearing.

{¶2} April 9, 1998, Joseph Schossler was at a laundromat in Kent, Portage County, Ohio, when he started talking with Mr. Dean. Mr. Dean invited Mr. Schossler to attend a party. Using Mr. Schossler's car, the two drove to a bar in Lake Milton, to pick up Matthew Chapman, who was also attending the party. The three then drove to another location, to pick up a young woman. Upon reaching the alleged residence of this young woman, all three men left the car to knock on the door. On receiving no answer, Mr. Schossler tried to return to his car. However, Mr. Dean and Mr. Chapman commenced beating Mr. Schossler with barbells. Mr. Schossler fell to the ground, while Mr. Dean and Mr. Chapman kicked him. Mr. Dean then went to recover Mr. Schossler's car, but returned to advise Mr. Chapman to make certain he killed Mr. Schossler. Whereupon Mr. Chapman kicked Mr. Schossler several more times.

{¶3} Mr. Schossler sustained severe and permanent injuries.

{¶4} Mr. Dean was arrested the following day. April 16, 1998, the Portage County Grand Jury indicted him for aggravated robbery, felonious assault, and kidnapping. Mr. Dean pleaded not guilty. Thereafter, his counsel entered Crim.R. 11(F) negotiations with the state. These were reduced to writing and filed with the trial court June 10, 1998. Mr. Dean agreed to plead guilty to all the charges against him, and to testify against Mr. Chapman. That same day, he appeared before the trial court, and

changed his plea. The trial court accepted the plea and ordered an investigation and report from the Adult Probation Department.

{¶5} The matter came on for sentencing hearing September 8, 1998.¹ By a judgment entry filed September 10, 1998, the trial court merged the aggravated robbery and felonious assault for sentencing purposes, finding them allied offenses of similar import, and sentenced Mr. Dean to serve seven years imprisonment on the aggravated robbery count. The trial court found that the aggravated robbery and kidnapping were not allied offenses of similar import, and sentenced Mr. Dean to serve seven years imprisonment for kidnapping, consecutive to his aggravated robbery sentence. Mr. Dean was assessed costs, and given jail time credit. However, the trial court failed to include in its judgment entry any reference to mandatory postrelease control. A nunc pro tunc judgment entry was filed September 23, 1998.

{¶6} Mr. Dean never appealed his sentence, nor has he ever filed a petition for post conviction relief.

{¶7} August 2, 2006, Attorneys William Summers and Edwin Vargas filed a motion for resentencing with the trial court, noting that Mr. Dean's sentence was void, due to the trial court's failure to notify him of mandatory postrelease control. Hearing was set for November 13, 2006 – but, on that day, Mr. Summers withdrew the motion.

{¶8} December 30, 2008, Mr. Dean filed a pro se motion for resentencing. The trial court denied it that same day.

1. While nothing appears on the docket, there are several mentions in the record that an earlier sentencing did occur, at which the trial court possibly failed to merge the aggravated robbery and felonious assault counts.

{¶9} January 30, 2009, Attorney Aaron Baker filed the motion for resentencing subject of this appeal. Hearing was held March 16, 2009. At the hearing, Mr. Baker argued (amongst other things) that the kidnapping charge against Mr. Dean should have merged with the aggravated robbery charge. Unfortunately for Mr. Dean, the trial court re-imposed the same sentence as before, which judgment was memorialized in an entry filed March 19, 2009.

{¶10} Mr. Dean timely noticed this appeal, assigning a single error:

{¶11} “THE TRIAL COURT ERRED AND VIOLATED APPELLANT’S FIFTH AMENDMENT RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHEN IT ORDERED SEPARATE AND CONSECUTIVE SENTENCES FOR ALLIED OFFENSES[.]”

{¶12} When reviewing an alleged sentencing error, Ohio’s appellate courts must apply the two-pronged test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, the appellate court determines if the sentencing court “has adhered to all applicable rules and statutes in imposing the sentence.” *Id.* at ¶14. The standard for this determination is whether the trial court’s application of the appropriate rules and statutes is “clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.* If the sentence passes this prong of the test, the appellate court then reviews for abuse of discretion. *Id.* at ¶17.

{¶13} In support of his assignment of error, Mr. Dean argues that the Supreme Court of Ohio has found aggravated robbery and kidnapping to be allied offenses of similar import, thus requiring merger of the counts in his case pursuant to R.C. 2941.25. The state counters that this court should not consider the error assigned, since Mr.

Dean failed to notify the state that merger would be an issue at his R.C. 2929.191 resentencing hearing. It further argues that, if we choose to consider the error assigned, the offenses were not allied offenses of similar import under the facts in this case.

{¶14} We find the trial court's judgment does not pass the first prong of the *Kalish* test, as it fails to comport with the requirements of R.C. 2919.191, as interpreted by the Supreme Court of Ohio. When resentencing a defendant for failure to include notice of mandatory postrelease control at the original sentencing hearing and in the original judgment entry of sentence, a trial court must include notice of the length of that term. Cf. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶69. In this case, the trial court did neither. Consequently, Mr. Dean's sentence is void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at the syllabus. As such, his failure to raise this issue by way of direct appeal effects no waiver, as the "trial court must resentence the offender as if there had been no original sentence." *Id.* at ¶16.

{¶15} Having found his sentence void, we deem Mr. Dean's assignment of error moot.

{¶16} The judgment of the Portage County Court of Common Pleas is reversed, the sentence is vacated, and this matter is remanded for further proceedings consistent with this opinion.

{¶17} It is ordered that appellee is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDALL, J., dissents.