[Cite as *State v. Helms*, 2015-Ohio-1708.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 14 MA 96
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
RONNIE HELMS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 11CR1019

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman St., 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Mr. Ronnie Helms #632-238
Chillicothe Correctional Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

JUDGES:
Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: 4/28/15

ROBB, J.

{¶1} Defendant-appellant Ronnie Helms ("Appellant") appeals the decision of the Mahoning County Common Pleas Court denying the post-sentence motions he filed *pro se*. He argues that his speedy trial rights were violated and thus counsel should not have allowed him to plead guilty. He claims that a speedy trial violation left the trial court without subject matter jurisdiction. Yet, a speedy trial violation does not involve subject matter jurisdiction, and Appellant's speedy trial rights were not violated.

{¶2} Appellant also states that his rape and kidnapping offenses were allied offenses of similar import that should have been merged. However, this argument is not properly before this court. Appellant did not raise this issue in the motions being appealed. Moreover, any issues that could have been raised upon direct appeal are barred by the doctrine of res judicata. For these and the following reasons, the trial court's decision is upheld.

STATEMENT OF THE CASE

{¶3} On September 15, 2011, Appellant was indicted for rape in violation of R.C. 2907.02(A)(2) for purposely compelling the victim to submit to sexual conduct by force or threat of force. A sexually violent predator specification cited to a 1993 rape conviction. Appellant was also indicted for kidnapping in violation of R.C. 2905.01(A)(4) for removing the victim from the place she was found or restraining her liberty by force, threat, or deception for the purpose of engaging in sexual activity against her will. Attached to this count was a sexual motivation specification pursuant to R.C. 2941.147.

{¶4} On September 24, 2012, Appellant agreed to plead guilty to rape and kidnapping, and the state agreed to dismiss the two specifications. With the specifications dismissed, each of the two first-degree felonies carried a maximum

sentence of eleven years. *See* R.C. 2929.14(A)(1). The parties entered into an agreed sentencing recommendation of 13 years in prison.[1]

{¶5} The court accepted the plea and immediately proceeded to sentencing. In a September 27, 2012 entry, Appellant was sentenced to ten years for rape and three years for kidnapping to run consecutive for a total of 13 years, as jointly recommended by the parties. Defendant was labeled a Tier III sex offender. No appeal was filed.

{¶6} On January 30, 2014, Appellant filed Crim.R. 32.1 motion to withdraw his guilty plea. He argued that counsel's ineffectiveness resulted in a miscounseled decision to plead, stating that counsel should have filed a motion to dismiss on speedy trial grounds.[2] The state filed a memorandum in opposition arguing: Appellant's plea withdrawal motion was not timely; the defendant articulated no legitimate basis for plea withdrawal; and he was represented by competent lawyers who zealously represented his interests in multiple plea negotiations.

{¶7} On May 16, 2014, Appellant filed a motion asking the court to immediately release him due to the alleged speedy trial violation, adding that the court lacked jurisdiction. He explained that his confinement in the local jail began on September 8, 2011 and that he was still incarcerated on December 8, 2011, the date on which he believed his speedy trial time expired. He asserted that no request for a continuance was made prior to that date. He also claimed that he did not become aware of the triple time provision for defendants held in jail in lieu of bail until he was incarcerated and generally stated that he used due diligence in filing the motion.

{¶8} On June 23, 2014, the trial court denied Appellant's motions. The within timely appeal followed.

CRIM.R. 32.1

{¶9} Pursuant to Crim.R. 32.1: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest

[1]It appears the sexually violent predator specification could have resulted in an indefinite term of imprisonment of ten years to life. *See* R.C. 2929.14(E)(1); R.C. 2971.03(A)(3)(d)(ii).

[2]On March 21, 2014, Appellant filed a motion to vacate an illegal sentence and to withdraw his guilty plea, wherein he made arguments not related to those addressed on appeal.

injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The post-sentence motion to withdraw a guilty plea is reserved for extraordinary circumstances. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). The defendant has the burden of establishing the existence of manifest injustice. *State v. Caraballo*, 17 Ohio St.3d 66, 67, 47 N.E.2d 627 (1985); *Smith*, 49 Ohio St.2d at 264.

{¶10} The trial court's decision is generally a discretionary one and often involves the court's resolution of the credibility and the weight of the claims. *Id.* Although Crim.R. 32.1 contains no strict time requirement, "undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-5643, 773 N.E.2d 522, ¶ 14 (but not subject to timelines in post-conviction relief statute), quoting *Smith*, 49 Ohio St.2d at 264.

{¶11} Manifest injustice to support withdrawal of a guilty plea can take the form of ineffective assistance of counsel. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, 793 N.E.2d 509 ¶ 18 (10th Dist.). *See also State v. Howard,* 7th Dist. No. 12MA41, 2012-Ohio-1437. In seeking to invalidate a guilty plea based on ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by the deficiency, i.e. a reasonable probability that he would not have agreed to plead guilty but for counsel's deficiency. *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992) (a presentence motion case), applying *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (setting forth the basic two-part test for evaluating counsel's performance) and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (applying *Strickland* to an attorney's representation at the plea stage).

ASSIGNMENT OF ERROR NUMBER ONE

{¶12} Appellant's first assignment of error provides:

"The Appellant contends that the trial court violated his constitutional rights to due process and equal protection of the law under the 6th and 14th

amendments to the United States Constitutions when the court convicted and sentenced appellant without having subject matter jurisdiction over the case due to a clear fast and speedy trial violation."

{¶13} The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. This guarantee is implemented in R.C. 2945.71, which provides the specific time limits within which a person must be brought to trial. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 10. The trial time tolling provisions are set forth in R.C. 2945.72.

{¶14} If a defendant demonstrates that his speedy trial right has been violated, he may seek dismissal of the criminal charges. R.C. 2945.73. This statute specifies: "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." *Id.* Consequently, the right is not self-executing but must be timely asserted. *State v. Trummer*, 114 Ohio App.3d 456, 470-471, 685 N.E.2d 1318 (7th Dist.1996).

{¶15} Appellant initially frames his speedy trial allegation as a lack of subject matter jurisdiction, which he claims would void his plea. That is, when subject matter is lacking it can be raised at any time, it is not barred by the doctrine of res judicata, and it renders a judgment void as opposed to voidable. *See State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶ 17; *State v. Wilson*, 73 Ohio St.3d 40, 45, 652 N.E.2d 196 (1995), fn. 6. *See also State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraphs six and nine of the syllabus.

{¶16} However, speedy trial issues do not eliminate a criminal court's subject matter jurisdiction and do not result in void proceedings. *State v. Moore*, 7th Dist. No. 12MA197, 2013-Ohio-4000, ¶14-18 (and explaining void versus voidable); *State v. Weaver*, 7th Dist. No. 12BE21, 2013-Ohio-430, ¶15 (speedy trial issue does not void conviction or sentence). The argument contained in the text of Appellant's assignment of error is without merit.

{¶17} Appellant also states that counsel should not have allowed him to plead guilty if he could have been discharged for a speedy trial violation. Some initial (and alternative) observations are warranted prior to disposing of the merits of the speedy trial argument. The state points out that a defendant who pleads guilty waives the right to allege a statutory speedy trial violation on appeal. *State v. Kelley*, 57 Ohio St.3d 127, 130, 566 N.E.2d 658 (1991); *Montpelier v. Greeno*, 25 Ohio St.3d 170, 172, 495 N.E.2d 581 (1986). Still, if the issue is framed as one of ineffective assistance of counsel for the failure to file a speedy trial motion resulting in a plea that was not knowing and intelligent, then the matter can still be presented in that context on appeal. *Kelley*, 57 Ohio St.3d at 130.

{¶18} However, this is not a direct appeal of the conviction. Rather, this is an appeal from the denial of a post-sentence motion to withdraw a guilty plea filed sixteen months after the sentence. As for his delay, Appellant merely claims that he did not become aware of the three-for-one provision "until after the fact." He mentioned below that he did not learn about the provision "until he was incarcerated." These statements do not explain the timing or the extent of the delay.

{¶19} Moreover, the state urges that the matter is res judicata as Appellant failed to file a direct appeal. A final judgment of conviction bars a defendant from raising in any proceeding, except the direct appeal from that conviction, non-jurisdictional issues that were raised or could have been raised by the defendant at trial or on an appeal from that judgment. *Perry*, 10 Ohio St.2d 175 at paragraphs six and nine of the syllabus. *See also State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982).

{¶20} "Ohio courts of appeals have applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59. This district has stated that issues that could have been raised on direct appeal are res judicata in a post-sentence motion to withdraw a guilty plea under Crim.R. 32.1. *See, e.g.*, *State v. Maggianetti*, 7th Dist. No. 10-MA-169, 2011-Ohio-6370, ¶ 15 (defendant, who claimed that he did not knowingly enter his plea

because he was unaware of the possible prison term, could have raised this issue on direct appeal); *State v. Reed*, 7th Dist. No. 04MA236, 2005-Ohio-2925, ¶ 11-13 (noting that it is comparable to Civ.R. 60(B), which cannot be used as a substitute for appeal, and res judicata applies as it does for post-conviction petitions), citing cases from other districts; *State v. Wright*, 7th Dist. No. 01 CA 80, 2002-Ohio-6096, ¶ 37. As established infra, Appellant's claim that counsel should have filed a motion to dismiss based upon speedy trial is based upon items in the record, and this is not a case hinging upon items de hors the record.

{¶21} Even if res judicata did not present a bar in this case, Appellant has not established that a speedy trial motion would have been warranted. As Appellant recites, he was held in jail on a felony in lieu of bail and was to be brought to trial within ninety days. *See* R.C. 2945.71(C)(2) (A person held on a pending felony charge, shall be brought to trial within 270 days after that person's arrest); R.C. 2945.71(E) (In computing this time, each day the defendant is held in jail in lieu of bail is counted as three days).

{¶22} In his motions before the trial court, Appellant alleged that he was incarcerated in Ohio on September 8, 2011. Applying triple time for being held in jail in lieu of bail, his time expired on December 8, 2011. Appellant claimed that no continuances had been sought by the defense until after that time, citing to a December 29, 2011 joint motion for a continuance due to DNA testing.

{¶23} In his argument on appeal, he moves the start of the speedy trial clock back to August 25, 2011. He states that he was arrested in Pennsylvania at that time and then extradited to Ohio on September 8. He now asserts that his 90 days elapsed on November 25, 2011. However, he did not present this argument to the trial court, and it is thus not appropriate here. Regardless, his time in Pennsylvania would not have started the clock.

{¶24} Speedy trial is tolled for any time "during which the accused is unavailable for hearing or trial * * * by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability." R.C. 2945.72(A). It has

been concluded that, where the prosecution did not unreasonably delay extradition, arrest in another state on an Ohio warrant and confinement awaiting extradition does not count toward the speedy trial clock and the time is tolled until the defendant arrives in Ohio. *State v. Haney*, 11th Dist. No. 2012-L-098, 2013-Ohio-2823 ¶ 23-25, citing *State v. Patrick*, 2d Dist. No. 15225 (June 14, 1996) and *State v. Adkins*, 4 Ohio App.3d 231, 232, 447 N.E.2d 1413 (3d Dist.1982) (where defendant was arrested in Kentucky and waived extradition, time began to run when he arrived in Ohio); *State v. Tullis*, 10th Dist. No. 04AP-333, 2005-Ohio-2205, ¶ 22 (time involved between arrest in Missouri and transfer to Ohio did not raise concerns of a lack of diligence). On this topic, this district has observed

> the period of incarceration, from January 24, 1984 until February 14, 1984, was by reason of the pendency of extradition proceedings. We recognize the fact that the Appellant waived extradition on January 27, 1984, however, it is reasonable to conclude that the pendency of extradition proceedings includes not only the time spent in the legal processes of extradition but the time involved in transporting the Appellant back to the county in which the charge has been filed. There is no indication that the prosecution did not exercise reasonable diligence to secure the Appellant's availability and, accordingly, the time within which the Appellant should have been brought to trial was extended by the period from January 24, 1984 until February 14, 1984.

State v. Owens, 7th Dist. No. 84CA131 (Mar. 29, 1996) (citing our prior June 24, 1986 opinion in same case).

{¶25} For these reasons, Appellant's Ohio arrest date is not the earlier date that he claims for the first time on appeal. As he argued in his motion to the trial court, Appellant's September 8, 2011 arrival in Ohio was his arrest date for purposes of speedy trial time. We begin the clock on September 9, the day after his Ohio arrest date. *See State v. Matland*, 7th Dist. No. 09MA115, 2010-Ohio-6585, ¶ 30, citing *State v. Turner*, 7th Dist. No. 93 CA 91, 2004-Ohio-1545, at ¶ 23 (the actual day of arrest is not counted).

{¶26} Either way, Appellant's argument that his speedy trial time expired exactly ninety days after arrest with no period of tolling is incorrect. A jury trial was originally set for November 7, 2011. The defense requested discovery on October 11, 2011 and filed motions in support, the state supplemented the discovery with medical records on October 20, 2011, and the trial court ruled on the defense discovery motions on October 24, 2011. A defendant's discovery request tolls the speedy trial clock. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, ¶ 26, applying R.C. 2945.72(E) (clock tolled by any period of delay necessitated by defendant's motion). Thirty-two days ran on the speedy trial clock by the time the first tolling period began on October 11.

{¶27} After the court's October 24 ruling, two days passed, bringing the count to thirty-four days. *On October 27, 2011,* the defense orally moved for a continuance of the November 7 trial. Appellant apparently did not notice this request in constructing his argument here or below, as he asserted that the motion filed *on December 29, 2011* was the first request for a continuance in the case.

{¶28} The trial court granted the defense's motion for a continuance in a November 1, 2011 judgment entry, disclosing that counsel needed additional time to prepare and was anticipating additional evidence would be forthcoming from a rape kit. The court moved the trial date to November 28, 2011. As speedy trial time is tolled by the period of any continuance granted on the accused's own motion, the clock stopped on October 27, 2011. *See* R.C. 2945.72(H). *See also* R.C. 2975.72(E) (speedy trial time is tolled during any period of delay necessitated by reason of a motion made by the accused).

{¶29} Thereafter, a November 25, 2011 judgment entry (also overlooked by Appellant) continued the trial on motion of both parties pending DNA testing and stated that speedy trial time was tolled. The trial was reset for the first available trial date of January 2, 2012. The time remained tolled upon this motion and request for continuance that was joined by the defense. It also represents a reasonable continuance on request of the state. *See* R.C. 2975.72(E) (defense motion tolls clock), (H) (speedy trial clock stops for period of any continuance granted on the

accused's own motion and the period of any reasonable continuance granted other than upon the accused's own motion).

{¶30} As the new trial date approached, the state filed a motion to continue the trial, asserting the continuance was upon a joint motion as the defendant provided samples of his DNA and the parties were awaiting BCI testing of his DNA against the rape kit. It was expressed that BCI projected the testing would be done by the end of January. The court granted the motion on December 30, 2011. As the state pointed out, a reasonable continuance even solely on the state's motion tolls speedy trial time. *See* R.C. 2945.72(H) (a reasonable continuance on request of the state or any other entity will extend the speedy trial deadline). *See also State v. High*, 143 Ohio App.3d 232, 757 N.E.2d 1176 (7th Dist.2001) (noting that Appellant consented to the testing upon which the continuance was based and that testing, without obtaining the results therefrom, would be a vain act).

{¶31} While time was already tolled from the back-to-back continuances pending DNA results, Appellant then filed a pro se request to lower his bond, which the court received on February 6, 2012 and which came before the court on February 14. *See State v. Kozic*, 7th Dist. No. 11MA160, 2014-Ohio-3788, ¶ 92 (two motions to amend bond serving as an additional basis to toll the speedy trial clock); *State v. Gibson*, 8th Dist. No. 100727, 2014-Ohio-3421, ¶ 18 (time was tolled based on various motions, including motion to reduce bond and supplemental motion to reduce bond); *State v. Lawson*, 7th Dist. No. 12 MA194, 2014-Ohio-879, ¶ 38 (motion to amend bond tolls time). *See also* R.C. 2945.72(E). A February 22, 2012 judgment entry denied Appellant's motion.

{¶32} The next day, counsel moved to withdraw, stating that he visited Appellant in jail on February 20 to inform him of the results of a DNA test and to discuss the health problems Appellant mentioned to the court in the request for reduced bond. Appellant insisted counsel file another motion to reduce bond. Counsel refused, advising his client that the court already stated that bond would not be reduced. Counsel related that Appellant then became verbally abusive to him. Time was tolled by this motion to withdraw as counsel instituted due to Appellant's

behavior toward his attorney. *See, e.g., State v. Christian*, 7th Dist. No. 12MA164, 2014-Ohio-2590, ¶ 11-12; *State v. Martin*, 7th Dist. No. 09CO43, 2011-Ohio-6537, ¶ 54; R.C. 2945.72 (E).

{¶33} A February 29 hearing on counsel's motion to withdraw had to be rescheduled until March 6 as the court was in trial on another case, which case was specified in the court's entry. This further tolled the time. *See* R.C. 2945.72(H) (reasonable continuance other than defendant's motion). On March 6, the hearing was held, and counsel was permitted to withdraw in a March 8, 2012 entry. Also on March 8, the court appointed replacement counsel and stated that speedy trial time was tolled to allow counsel to familiarize himself with the case.

{¶34} Time was tolled for a reasonable time thereafter. *See* R.C. 2945.72 (D) (period of delay occasioned by improper act of accused). *See also* R.C. 2945.72(C) (period of delay necessitated by lack of counsel). A pretrial was held on March 28. The entry filed the next day noted that the parties agreed to schedule the jury trial for April 16, 2012, which was not an unreasonably lengthy continuance after the granting of new counsel on March 8, 2012.

{¶35} On April 10, 2012, new counsel asked for a continuance of the trial date in order to further investigate, to file motions about the DNA evidence, to consider whether to obtain a DNA expert to examine the state's DNA report and retest, and to listen to the new evidence in the form of jailhouse telephone calls made by Appellant. The court granted the requested continuance. Time was tolled for a reasonable time thereafter. See R.C. 2945.72(E), (H).

{¶36} At an April 16, 2012 hearing, the parties advised that plea negotiations were ongoing. Appellant filed a motion to permit defense counsel to be heard ex parte on obtaining a DNA expert. The court granted the defense $1,500 to pay for the services of a DNA expert. The case was set for a June 1, 2012 status hearing.

{¶37} On May 4, 2012, the defense filed a special discovery demand asking for specific documents, notes, manuals, records, resumes, and certificates from BCI in order to investigate the DNA results more thoroughly. After the June 1 hearing, the court ordered BCI to email the requested materials to the prosecutor who was to

forward them to the defense. The June 7, 2012 judgment entry further noted that the defendant's motion tolled the speedy trial time.

{¶38} Two pretrials were then held and continued as the defense was still coordinating with its DNA expert. For instance, the court's August 17, 2012 entry stated that speedy trial time was tolled as the pretrial was continued so defense counsel could meet with his potential DNA expert and the parties mutually selected a jury trial date of October 1, 2012. Appellant entered his plea and was sentenced on September 24, 2012. *See* Sept. 27, 2012 J.E.

{¶39} As can be seen, Appellant's speedy trial time had not expired at the time he was convicted and sentenced. Time continually tolled after the first request for a continuance. Appellant's specific argument, that the time expired exactly 90 days after his arrest, is clearly erroneous.

{¶40} Finally, we note that Appellant argued in his plea withdrawal motion that besides his statutory speedy trial right, his constitutional speedy trial right was also violated. *Citing Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (balancing test involving: the length of the delay; the reason for the delay; the defendant's assertion of his right; and prejudice). Appellant does not reiterate this position on appeal except to cite the Sixth Amendment. Therefore, his argument under *Barker* is not preserved here. *See* App.R. 12(A)(2) ("The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)."). It should also be noted that there was no assertion of the right during the trial proceedings, there is no reasonable probability that this argument would have been successful had a motion been made prior to the plea because nearly every tolling period involved the defense, and no prejudice is ascertainable. *See Barker*, 407 U.S. at 530.

{¶41} For all of the foregoing reasons, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶42} Appellant's second assignment of error provides:

"The Appellant contends that his fifth and fourteenth amendment rights to due process and equal protection of law w[ere] violated along with Ohio's 14th amendment article 1 section 10 where Appellant was subjected to and suffered double jeopardy and punishment."

{¶43} Appellant proposes for the first time that the kidnapping charge should have been merged into the rape charge for purposes of sentencing. He states that the offenses were committed by the same conduct with a single animus and that the facts do not show conduct in excess of that required to commit the rape in order to support a separate kidnapping sentence. He recites: after dropping his girlfriend off, he agreed to drive the victim home; he stopped the car by her home and made sexual advances which were rejected; he called her a "bitch" and told her she was not getting out of the car; he put the car in drive and locked the doors; he then held her down while she struggled, hit her near her left eye and in the left side of her stomach, and raped her. Some of these facts are in a bill of particulars; he adds some facts not in the court record (such as where he hit her). Notably, he fails to specify that he drove to a different location, which occurred after he was rejected, after he locked the doors, and after he instructed her that she was not alighting from the car. That is, he did not rape her in the location where he began making sexual advances.

{¶44} Pursuant to R.C. 2941.25 (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." However, "[w]here 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(B).

{¶45} The first step in determining whether offenses merge prior to sentencing is to ascertain whether the offenses are allied offenses of similar import, which involves comparing the elements of the two crimes to see if they correspond to

a sufficient degree. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 17, citing *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816 (1988). The elements are considered in the factual context of the defendant's conduct (and not in the abstract). *Id.* at ¶ 20, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (majority voted to overrule abstract test). The question is "whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other." *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 8, quoting and applying plurality in *Johnson,* 128 Ohio St.3d 153 at ¶ 48.

{¶46} If the offenses are not allied but are of dissimilar import, then sentencing can proceed on both offenses. R.C. 2941.25(A)-(B). It they are allied, then the court moves to the second step to ascertain whether the offenses were committed separately or with separate animus. *Miranda*, 138 Ohio St.3d 184 at ¶ 8; R.C. 2941.25(B). If they were either committed separately or with separate animus, then sentencing can also proceed on both offenses. *Id.*

{¶47} It has been observed that implicit in every forcible rape is a kidnapping and that such offenses are allied offenses of similar import. *See State v. Powell*, 49 Ohio St.3d 255, 262, 552 N.E.2d 191 (1990). In looking at the offenses of rape and kidnapping, courts move to evaluate the second step. Animus involves the defendant's "immediate motive." *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), syllabus. In order "to determine whether kidnapping and rape are committed with a separate animus so as to permit separate punishment under R.C. 2941.25(B)," the Court has established guidelines:

> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

Williams, 134 Ohio St.3d 482 at ¶ 23, quoting *Logan*, 60 Ohio St.2d 126 at syllabus.

{¶48} In *Logan*, the Court found no separate animus for kidnapping where the defendant forced a victim into an alley and down a flight of stairs before raping her. *Id.* at 132. The Court said the movement had no significance except for facilitating the offense of rape and determined that it did not present a substantial increase in harm above that presented by the rape itself. *Id.* at 135. In another case, however, the Court found a separate animus for kidnapping where the defendant moved the victim from an outside stairway into his apartment and then to his bedroom. *State v. Rogers*, 17 Ohio St.3d 174, 181-182, 478 N.E.2d 984 (1985).

{¶49} The state does not analyze the issue due to its position that Appellant is barred from addressing the issue. First, it is noted that Appellant's sentence and the consecutive nature of it resulted from an agreed upon sentence that was jointly recommended by the state and the defense. The state suggests that a joint sentence does not permit a defendant to raise a merger issue on appeal.

{¶50} "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1). The Ohio Supreme Court has decided that the merger statute falls under "the authorized by law" test in R.C. 2953.08(D)(1) and thus an issue of merger is not barred on appeal merely because the sentence was jointly recommended. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23-33. Therefore, an appeal even after a jointly recommended sentence is possible, and plain error can be applied to an allied offense issue. *Id.*

{¶51} Appellant attempts to invoke the plain error doctrine here. Pursuant to Crim.R. 52(B), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The plain error doctrine

can only be used in exceptional circumstances where it is necessary to avoid a manifest miscarriage of justice. *State v. Hughbanks*, 99 Ohio St.3d 365, 792 N.E.2d 1081, 2003-Ohio-4121, ¶ 39. Plain error is a discretionary doctrine which may, but need not, be employed if warranted. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 62; *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. *See also* Crim.R. 52(B).

{¶52} The *Underwood* case was a direct appeal of a conviction where the state conceded the offenses were allied. Had Appellant appealed his sentence, he could have to resorted to plain error to raise merger in this case. Yet, he did not do so.

{¶53} The state therefore asserts this topic is barred by res judicata. As aforementioned, a final judgment of conviction bars defendant from raising in any proceeding, except the direct appeal from that conviction, non-jurisdictional issues that were raised, or could have been raised, by the defendant at trial or on an appeal from that judgment. *Perry*, 10 Ohio St.2d 175 at paragraphs six and nine of the syllabus. The Supreme Court has stated that "Ohio courts of appeals have applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59. *See also Maggianetti*, 7th Dist. No. 10-MA-169 at ¶ 15; *Reed*, 7th Dist. No. 04MA236 at ¶ 11-13.

{¶54} "[C]hallenges to the trial court's failure to merge allied offenses are barred by the doctrine of res judicata if they could have been, but were not, raised on direct appeal." *State v. Jefferson*, 2d Dist. No.26022, 2014-Ohio-2444, ¶ 8 (rejecting defendant's argument in support of motion to withdraw guilty plea). *See also State v. Hopkins*, 12th Dist. No. CA2012–12–246, 2013-Ohio-3674, ¶ 11-13. To the extent Appellant's position relies on evidence within the record, res judicata would apply.

{¶55} Notably, Appellant did not have the plea/sentencing transcript prepared for the trial court's review in presenting the motions that are currently on appeal. A record must be made below in order for a proper record to exist for the reviewing court. *See State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d

661, ¶ 18-20, 23 (review entire record, including sentencing hearing, and the burden is on the defense to show entitlement to merger). Items cannot be added to the record on appeal. *State v. Ishmail*, 54 Ohio St.2d 402, 405-406, 377 N.E.2d 500 (1978). Consequently, we cannot have a transcript prepared for this appeal that was not presented to the trial court below.

{¶56} Moreover, even if the topic could be raised in a post-sentence motion to withdraw a guilty plea, none of Appellant's post-sentence motions presented a merger argument, let alone supported it. The failure to make the argument to the trial court in the post-sentence motions precludes our review on appeal from the denial of those motions. Contrary to Appellant's argument, this is not the type of scenario where the plain error doctrine is applied. A trial court does not commit plain error in denying a motion to withdraw a guilty plea (or to vacate a sentence) by not independently attempting to scour the case file for other possible topics that Appellant could have placed in his post-sentence motions. These were Appellant's motions.

{¶57} Lastly, just as a speedy trial issue does not render a sentence void, neither does a merger issue render a sentence void. *See Moore*, 7th Dist. No. 12MA197 at ¶116, citing *State v. Simmons*, 7th Dist. No. 06JE4, ¶ 14-15 (Jan. 8, 2013 J.E., denying reconsideration). *See also Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, 894 N.E.2d 44, ¶ 10 ("allied-offense claims are nonjurisdictional").

{¶58} This assignment of error is overruled. Accordingly, the trial court's decision denying Appellant's post-sentence motions is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.