

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
MATTHEW HILL	:	Case No. CT2012-0005
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. CR2004-0030

JUDGMENT: Affirmed

DATE OF JUDGMENT: January 31, 2013

APPEARANCES:

For Plaintiff-Appellee

RON WELCH
27 North Fifth Street
Zanesville, OH 43701

For Defendant-Appellant

ERIC J. ALLEN
713 South Front Street
Columbus, OH 43206

Farmer, J.

{¶1} By entry filed September 24, 2004, appellant, Matthew Hill, was sentenced to an aggregate term of twenty-two years in prison on two counts of felonious assault (R.C. 2903.11), each with a firearm specification (R.C. 2941.145).

{¶2} Appellant filed an appeal, challenging the trial court's imposition of consecutive, maximum sentences. Appellant argued the trial court failed to conduct the required judicial fact-finding prior to imposing consecutive, maximum sentences, and the offenses should have been merged because they were allied offenses. This court denied the assignments of error and affirmed appellant's conviction and sentence. *State v. Hill*, 5th Dist. No. CT2004-0047, 2006-Ohio-2565, Nunc Pro Tunc.

{¶3} On April 14, 2006, appellant filed with the trial court a motion to vacate or set aside judgment of conviction or sentence pursuant to Civ.R. 60(B)(4), (5), and (6). By journal entry filed March 7, 2007, the trial court denied the motion.

{¶4} Appellant filed an appeal, again challenging his sentence. Appellant argued he was entitled to resentencing pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. This court denied the assignments of error and affirmed the trial court's decision. *State v. Hill*, 5th Dist. No. CT07-23, 2007-Ohio-6763.

{¶5} On November 4, 2008, pursuant to a writ of habeas corpus, the United States District Court for the Southern District of Ohio, Eastern Division, issued an opinion and order vacating appellant's sentence and ordering a resentence within sixty days. *Hill v. Sheets*, 627 F.Supp.2d 810 (S.D. Ohio 2008). The District Court found ineffective assistance of counsel for failing to preserve appellant's *Blakely* claim.

Following a hearing on December 29, 2008, the trial court again sentenced appellant to an aggregate term of twenty-two years in prison. See, Amended Entry filed April 3, 2009.

{¶6} On May 5, 2009, appellant filed an appeal which was dismissed on May 15, 2009 for failure to file a timely notice of appeal (Case No. CT2009-0023).

{¶7} On April 14, 2011, appellant filed a motion to correct illegal sentence pursuant to R.C. 2941.25(A), claiming the trial court erred in sentencing him to consecutive sentences because the offenses were allied offenses. By journal entry filed April 20, 2011, the trial court denied the motion.

{¶8} Appellant filed an appeal, again challenging his sentence. This court denied appellant's assignments of error on the basis of res judicata. *State v. Hill*, 5th Dist. No. CT11-0020, 2011-Ohio-3644.

{¶9} On January 31, 2012, appellant filed a motion for leave to appeal the trial court's amended entry filed April 3, 2009. This court granted the motion on March 14, 2012, and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶10} "THE TRIAL COURT ERRED BY FAILING TO MERGE COUNTS THREE (3) AND FOUR (4) AS THEY WERE ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO R.C. 2941.25."

II

{¶11} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO MAXIMUM, CONSECUTIVE SENTENCES."

I, II

{¶12} Appellant once again challenges his sentence, claiming the trial court erred in failing to merge the two felonious assault counts as they were allied offenses of similar import, and erred in sentencing appellant to maximum, consecutive sentences. We disagree.

{¶13} After the trial court sentenced appellant via amended entry filed April 3, 2009, the subject of this appeal, appellant filed a motion to correct illegal sentence pursuant to R.C. 2941.25(A), claiming the trial court erred in sentencing him to consecutive sentences because the offenses were allied offenses. By journal entry filed April 20, 2011, the trial court denied the motion.

{¶14} Appellant filed an appeal, arguing the trial court erred in denying his motion because the offenses were in fact allied offenses and therefore he should not have been sentenced to consecutive sentences. This court reviewed appellant's arguments therein and denied them on the basis of res judicata as the court had already determined the issue in *State v. Hill*, 5th Dist. No. CT2004-0047, 2006-Ohio-2565, Nunc Pro Tunc. See, *State v. Hill*, 5th Dist. No. CT11-0020, 2011-Ohio-3644, ¶18-22. We once again deny appellant's arguments under the doctrine of res judicata.

{¶15} As for any additional arguments on maximum, consecutive sentences under *State v. Kalish*, 120 Ohio St.3d 23 (2008), we note the 2004 opinion also denied appellant's arguments on maximum, consecutive sentences under the more stringent requirement of judicial fact-finding prior to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. See, *State v. Hill*, 5th Dist. No. CT2004-0047, 2006-Ohio-2565, Nunc Pro Tunc,

Assignments of Error I and II. Any arguments on the issue of maximum, consecutive sentences are barred by res judicata.

{¶16} Assignments of Error I and II are denied.

{¶17} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, J.

Delaney, P. J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ Patricia A. Delaney

s/ William B. Hoffman

JUDGES

