

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-1054
v.	:	(C.P.C. No. 97CR-1639)
	:	
Shaughn C. Boone,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 14, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Shaughn C. Boone, pro se.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶1} Defendant-appellant, Shaughn C. Boone, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for resentencing. Because (1) the post-release control aspect of defendant's sentence is not void, and (2) res judicata bars defendant's contentions that the trial court should have merged defendant's four convictions for felonious assault, we affirm.

I. Facts and Procedural History

{¶2} On March 25, 1997, a Franklin County Grand Jury indicted defendant on four counts of felonious assault, second-degree felonies that included firearm and "drive-by" specifications. At a jury trial on the charges, the state presented evidence that

defendant fired, from the passenger seat of a Ford Explorer, multiple shots at the four occupants of a Chevy Cavalier, severely injuring D'Ondre Welch, a 19-month-old passenger in the Cavalier. The jury found defendant guilty on all charges and specifications.

{¶3} At his sentencing hearing, the trial court spoke to defendant about post-release control stating, "Once you are released on these type of felonies, the prison officials have the authority to place restrictions or conditions upon you for a period of up to five years. It is called post release control." (Tr. 481.) As the court explained to defendant, "If you would violate any of those conditions or restrictions, you could be brought back to prison, even though you had already served the entire sentence imposed by the court, and * * * prison officials have the authority to add an additional nine months for each violation." (Tr. 481.)

{¶4} Defendant also signed a "Prison Imposed" notice at the hearing that advised, "After you are released from prison, you (will, may) have a period of post-release control for ____ years following your release from prison." (R. 179.) Although neither the trial court nor counsel filled in the missing information, a "Note" at the bottom of the page stipulated that "F-1 and felony sex offenders - mandatory 5 years; F-2 and F-3 with harm, mandatory 3 years; other F-3, F-4, F-5 not mandatory - up to 3 years." (R. 179.) The notice also warned defendant that violations of post-release control may result in more restrictive sanctions, including imprisonment for one-half of the stated prison term originally imposed.

{¶5} The trial court filed its amended judgment entry journalizing defendant's sentence on March 23, 1998. The judgment entry addressed post-release control, stating that "[a]fter the imposition of sentence, the Court notified the Defendant, orally and in writing, of * * * the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)." Defendant appealed from the judgment, and this court affirmed his convictions. *State v. Boone*, 10th Dist. No. 98AP-352 (Dec. 24, 1998).

{¶6} On March 19, 2010, defendant filed in the trial court a motion for resentencing pursuant to R.C. 2929.191; the trial court denied it as "premature" on August 2, 2010. In doing so, the court noted that, "[i]f required, Defendant's sentence will

be modified prior to his release. If Defendant's sentence is not modified prior to release, then post release sanctions may not be enforceable." (Decision and Entry.)

{¶7} Defendant did not appeal from the trial court's decision. Instead, on August 2, 2011, defendant filed in the trial court a "Motion for 'Sentencing' [p]ursuant to the provisions of: State v. Bezak; State v. Jordan; and State v. Singleton" (citations omitted). In language similar to the 2010 entry, the trial court denied defendant's motion in a November 9, 2011 decision and entry. The court accurately observed that it "previously denied a similar motion in August, 2010," and in the 2011 decision and entry it reiterated its holding that "[i]f required, Defendant's sentence will be modified prior to his release. If Defendant's sentence is not modified prior to release, then post release sanctions may not be enforceable."

II. Assignments of Error

{¶8} Defendant appeals, assigning the following errors:

Assignment of Error No. 1

Whether the trial court abused its discretion thereby violating due process (U.S.C.A. Const. Amend. 14) when it denied 'without hearing' defendant's properly pled and substantively supported motion for sentencing, State v. Bezak, 114 Ohio St. 3d 94, and failed to grant defendant an oral hearing, Romio v. Maxwell (1967), 10 Ohio St. 2d 266, 267-268 on his motion[.]

Assignment of Error No. 2

Whether, and after the court was put on notice (by reason of defendant's motion for sentencing) 'temporal concerns' under Crim. R. 32(A)(1) are implicated. see: State v. Smith, 2011 WL 3298529 (Ohio App. 10 Dist.), 2011-Ohio-3786[.]

Assignment of Error No. 3

Whether the interest of justice requires the defendant's sentences for the offense(s) alleging 'felonious assault' must merge pursuant to the provisions of: State v. Johnson, ___ N.E. 2d ___, 2010 WL 5392806 (Ohio), 2010-Ohio-6314[.]

III. First and Second Assignments of Error - Post-release Control

{¶9} Defendant's first and second assignments of error are interrelated, so we address them together. Defendant's first assignment of error asserts the trial court abused its discretion where it "recognized that the underlying sentence was/is 'declared void' by operation of law" but nevertheless "refuse[d] to correct its error * * * on the proposition that, and at some unspecified future date, it will or may correct that plain error." (Appellant's brief, at 3, 1.) Defendant's second assignment of error contends the court's refusal created an unreasonable delay in his sentencing in violation of Crim.R. 32(A)(1). Underlying both assignments of error is defendant's contention that his original sentence is void because the trial court failed to properly notify him of post-release control at his sentencing.

A. Preliminary Matters

{¶10} The State preliminarily contends res judicata bars defendant's claims. Under the doctrine of res judicata, "a final judgment bars a 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 the defendant raised or could have raised at trial or on appeal." *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 7 (10th Dist.). Res judicata, however, does "not apply to void sentences because, by definition, a void sentence means that no final judgment of conviction has been announced." *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, ¶ 8. Accordingly, because "[a] sentence that does not include the statutorily mandated term of postrelease control is void," it is "not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus.

{¶11} The state correctly notes on appeal that defendant already sought and received a ruling about post-release control issues in his first motion, and defendant did not appeal from that ruling even though he could have.

{¶12} The trial court's response to defendant's two motions, however, does not provide defendant a resolution to questions regarding defendant's post-release control. In defendant's understanding, the trial court recognized defendant's sentence was void but then postponed addressing the problem until "some unspecified future date." (Appellant's

brief, at 2.) The State, by contrast, interprets the trial court's ruling to mean "the court was not concluding that there was a void-sentence problem requiring correction, but, rather, only a *potential* problem that *might* require correction." (Emphasis sic.) (Appellee's brief, at 9.) At the least, the trial court's resolution of defendant's motion could confuse defendant as to his appropriate next step. Accordingly, we address defendant's first and second assigned errors.

B. Post-release Control under Ohio Supreme Court Decisions

{¶13} Where, as here, the trial court sentences an offender for a felony of the first or second degree, the trial court "at the sentencing hearing," must "[n]otify the offender that the offender will be supervised" under R.C. 2967.28 "after the offender leaves prison." R.C. 2929.19(B)(2)(c). As relevant to this case, R.C. 2967.28(B) states that "[e]ach sentence to a prison term for a felony * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." For a felony of the second degree, the period of post-release control required is three years. R.C. 2967.28(B)(2). The statute further requires the trial court to notify the offender at the sentencing hearing of the potential consequences for violating post-release control. R.C. 2929.19(B)(3)(e). Finally, "the imposed postrelease-control sanctions are to be included in the judgment entry journalized by the court." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 11. See also R.C. 2929.14(D)(1).

{¶14} Defendant argues that his sentence is void because the trial court failed to advise him properly "about mandatory postrelease control or the consequences involved with a violation of a postrelease control sanction." (Appellant's brief, at 2.) The State responds that the trial court properly denied defendant's motion because the trial court's procedures included sufficient reference to post-release control; as the State explains, "claims that [post-release control] was inartfully imposed should be raised, if at all, on direct appeal." (Appellee's brief, at 6-7.)

{¶15} The line of cases defendant cites began when a trial court imposed a sentence less than the statutory minimum, causing the Supreme Court of Ohio to hold "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley*, 14 Ohio St.3d 74, 75

(1984). Applying that principle, the court later analyzed the consequences of a trial court's failure to notify a defendant of post-release control. The court held that if a trial court failed to notify an offender about post-release control pursuant to R.C. 2929.19(B)(3), the appellate court should vacate the sentence and remand the matter to the trial court for resentencing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus.

{¶16} After *Jordan*, the Supreme Court in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, held that where an offender was not properly informed about the imposition of post-release control at the sentencing hearing, the "sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at syllabus. See also *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 6, *cert. denied*, 129 S.Ct. 463 (2008) (stating that "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence"); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 2, 27 (explaining sentence is void if "the court fails to follow the statutory mandates to impose postrelease control").

{¶17} In 2010, the Supreme Court decided *Fischer*, where it reaffirmed that if a sentence "does not include the statutorily mandated term of postrelease control," it "is void." *Id.* at paragraph one of the syllabus. The court nonetheless clarified that although *res judicata* does not preclude review of a void sentence, "*res judicata* still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *Id.* at paragraph three of the syllabus. Accordingly, the court modified *Bezak*, holding "[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control." *Id.* at paragraph two of the syllabus. Thus, when a "judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside" while the rest of the sentence remains in force. (Emphasis sic.) *Id.* at ¶ 26.

C. Application of Supreme Court Precedent

{¶18} In a series of cases beginning with *State v. Mays*, 10th Dist. No. 10AP-113, 2010-Ohio-4609, *appeal not allowed*, 127 Ohio St.3d 1535, 2011-Ohio-376, this court applied the Supreme Court precedent and concluded the trial court sufficiently fulfilled its statutory obligations when its oral and written notifications, taken as a whole, properly informed the defendant of post-release control. *See State v. Townsend*, 10th Dist. No. 10AP-983, 2011-Ohio-5056, ¶ 7.

{¶19} In *Mays*, though the defendant challenged his resentencing hearing, we declined to address that issue, deciding instead that the trial court properly imposed post-release control in the original sentencing proceeding. In reaching that conclusion, we noted the original sentencing entry included "applicable periods" language that is virtually identical to the statement in the present sentencing entry. *Id.* at ¶ 3. The record also contained (1) a criminal disposition sheet noting "S.B. 186 satisfied," (2) Mays' signature to his guilty plea form indicating five years of mandatory post-release control for a first-degree felony, and (3) Mays' signature to a form entitled "NOTICE (Prison Imposed)" indicating not only a mandatory five-year period of post-release control would follow Mays' release, but also the possible sanctions if Mays violated post-release control.

{¶20} Given those factors, we concluded the trial court included post-release control in the original sentence, even if with some deficiencies, and therefore the subsequent resentencing hearing "was unnecessary and had no legal effect." *Id.* at ¶ 8. Moreover, "even if an error occurred" in the original sentencing, it was correctable through a properly perfected direct appeal following the original sentence. *Id.* *See also State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534 (applying *Mays* to find post-release control properly imposed where the record was substantially similar to the facts in *Mays*).

{¶21} Similarly, in *State v. Addison*, 10th Dist. No. 10AP-554, 2011-Ohio-2113, the judgment entry indicated that the court notified Addison about the "applicable periods" of post-release control pursuant to R.C. 2929.19(B)(3) but did not specifically state whether the period of post-release control was mandatory. *Id.* at ¶ 4, 16. In addition, a "NOTICE (Prison Imposed)" that Addison signed referred to a five-year post-release control period, but the form contained language indicating the defendant "will"

or "may" be subject to such a period had neither option selected. *Id.* Although the record did not contain either a guilty plea form or a disposition sheet indicating compliance with S.B. No. 186, we concluded the transcript from the original sentencing reflected that the trial court adequately explained post-release control and informed defendant that he would be subject to a mandatory five-year period of post-release control, based on the strength of the trial court's notification procedures considered as a whole. *Id.*

{¶22} Recognizing the Supreme Court's recent holding in *Fischer*, *Addison* concluded its result was consistent with the Supreme Court's decision because the trial court properly included the statutorily mandated term of post-release control in the defendant's sentence, though not in the entry. *Id.* at ¶ 20-21. As *Addison* noted, *Fischer* "repeatedly referred to the duty to include post-release control in the sentence as the trial court's obligation to notify the defendant *at the sentencing hearing* of any post-release control obligations. See *Fischer* at ¶ 10, 12." (Emphasis sic.) *Id.* at ¶ 21. See also *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, ¶ 19, citing *Jordan* at ¶ 23; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶ 26; *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶ 52 (holding that the Supreme Court's "main focus in interpreting the sentencing statutes regarding postrelease control has always been on the notification itself and not on the sentencing entry"). *Qualls* at ¶ 19.

{¶23} Recently, this court again applied the *Mays* line of cases in *Townsend*. In *Townsend*, the trial court's sentencing entry employed the same "applicable periods" language set forth in *Mays*, *Addison*, and defendant's sentence here. Because *Townsend* was convicted at a jury trial, the only other written notification of post-release control was a copy of the standard " 'Prison Imposed' notice form." *Id.* at ¶ 12. Notably, as in the present case, "the portions of the form indicating the length of the postrelease control period and whether it was mandatory or discretionary were not filled out, [but] there was a note at the bottom of the form indicating that all first-degree felony convictions were subject to a mandatory five years of postrelease control." *Id.*

{¶24} In that context, we noted the indictment informed *Townsend* he was charged with a first degree felony. *Id.* In addition, the jury verdict indicated *Townsend* was found guilty of a first-degree felony, and the trial court orally confirmed the same prior to issuing the sentence. *Id.* We held that "[t]his information, of which [defendant]

was aware before he signed the 'Prison Imposed' notice form, when combined with [the] explanatory note on the same form, notified [defendant] of the length and mandatory nature of his postrelease control term." *Id.* Moreover, the transcript of the sentencing hearing revealed that the trial court also orally advised defendant that "once you're released from prison, you're going to be subject to five years of supervision by the Adult Parole Authority of Ohio." *Id.* Ultimately, based on the "trial court's oral notification, along with the 'Prison Imposed' notice, and his prior knowledge of the bill of indictment and jury verdict," we concluded the trial court properly complied with the statutory requirements governing the imposition of post-release control. *Id.*

{¶25} In the noted precedent, "our court has applied a 'totality of the circumstances' test to determine whether or not the defendant was properly notified of post-release control." *State v. Williams*, 10th Dist. No. 10AP-1135, 2011-Ohio-6231, ¶ 23, citing *State v. Franks*, 10th Dist. No. 04AP-362, 2005-Ohio-462, ¶ 15; and *State v. Williams*, 10th Dist. No. 10AP-922, 2011-Ohio-4923, ¶ 18. *See also Strong v. Ohio State Adult Parole Auth.*, 10th Dist. No. 11AP-52, 2011-Ohio-5615, ¶ 27 (stating that "[a]lthough the judgment entries in *Mays*, *Chandler*, and *Addison* alone may have been insufficient to properly impose postrelease control, other documents in the record, as well as the sentencing hearing transcript, provided this court with the basis on which to determine the trial court properly included the mandatory term of postrelease control in the defendant's original sentence"); *State v. Cunningham*, 10th Dist. No. 10AP-452, 2011-Ohio-2045; *State v. Quintanilla*, 10th Dist. No. 10AP-703, 2011-Ohio-4593; and *State v. Klausman*, 10th Dist. No. 10AP-794, 2011-Ohio-4980.

D. Precedent Applied to Defendant's Sentence

{¶26} Here, the language in the trial court's sentencing entry, as well as the language used in the "Prison Imposed" notice, is substantially similar to that in *Mays*, *Addison*, and *Townsend*. As in *Townsend*, the trial court did not select the "will" or "may" option on the "Prison Imposed" notice or fill in the portion of the form indicating the length of post-release control, but a note at the bottom of the page states that second-degree felonies carry a mandatory three-year term of post-release control. In addition, the indictment filed against defendant charged defendant with four counts of felonious assault as second-degree felonies. Finally, in issuing defendant's sentence, the trial court

orally informed defendant that a felonious assault conviction is a second-degree felony. Pursuant to our rationale in *Townsend*, the trial court's statement before defendant signed the "Prison Imposed" notice, combined with the explanatory note on the notice, notified defendant of the length and mandatory nature of his post-release control term.

{¶27} Despite defendant's argument to the contrary, the "Prison Imposed" notice adequately advised defendant of the potential sanctions for violating post-release control. See *Townsend* at ¶ 12; *State v. Easley*, 10th Dist. No. 10AP-505, 2011-Ohio-2412, ¶ 17, 20 (concluding the notice to be "sufficient to satisfy the requirement that [a defendant] be 'notified' at the hearing of the imposition of post-release control and of the sanctions for violating post-release control," even where the trial court "failed to orally advise [defendant] of post-release control" at the hearing). Moreover, the sentencing hearing transcript reveals the trial court explained the nature of post-release control, detailed the consequences of violating the terms of post-release control, and told defendant that he was subject to post-release control pursuant to convictions for four second-degree felonies.

{¶28} In doing so, the court mistakenly stated the term was "up to five years" instead of the applicable mandatory three years, but the mistake did not render the sentence void. In *Williams*, the defendant was subject to "an 'optional' three-year period of post-release control" arising from his conviction for a third-degree felony without harm. *Id.* at 2011-Ohio-6231, ¶ 19. Although the "advisements contained in the sentencing entry, the post-release control notice, and the entry of guilty plea" accurately reflected the discretionary three-year term, the trial court advised Williams at the sentencing hearing that he would be subject to a mandatory post-release control period of five years. *Id.* at ¶ 18.

{¶29} Invoking our holding in *Strong*, we applied the principle " 'that a technical deficiency in a sentencing entry imposing postrelease control does not render the entry void where the record as a whole reveals the trial court satisfied all of the statutorily mandated terms for imposing postrelease control.' " *Williams* at 2011-Ohio-6231, ¶ 21, citing *Strong* at ¶ 21. As this court explained, "we cannot say that a potential overstatement of the sanction that could be imposed creates prejudice or causes [defendant's] sentence to be void." *Williams* at 2011-Ohio-6231, ¶ 27, citing *State v.*

Young, 4th Dist. No. 06CA10, 2007-Ohio-5232 (determining the trial court's overstatement of the sanction by three months did not create prejudice and did not warrant reversal of his conviction) and *State v. Carnicom*, 2d Dist. No. 2003-CA-4, 2003-Ohio-4711 (deciding defendant was not entitled to have his guilty plea vacated where the trial court overstated the potential length of a post-release control sanction, since no prejudice could be demonstrated). We concluded that even though "the trial judge erred in orally advising [defendant] during the sentencing hearing that his period of post-release control would be five years," the record as a whole and all of the circumstances indicated "[defendant] was properly advised of post-release control with respect to the length of the post-release control term." *Williams* at 2011-Ohio-6231, ¶ 21.

{¶30} Similarly here, even though the phrase "up to" has "discretionary" connotations, mistaken use of such language does not render defendant's post-release control notification void. *Id.* at ¶ 23. Thus, a sentencing entry incorporating post-release control as part of the sentence, but mistakenly including "up to" language, is "non-jurisdictional" defect and concerns, "at most, voidable error that should be raised on direct appeal." *Surella v. Ohio Adult Parole Auth.*, 11AP-499, 2011-Ohio-6833, ¶ 23, citing *Strong* at ¶ 27 (concluding "up to" language in a sentencing entry did not, by itself, render the post-release control portion of the sentence void); *Williams* at 2011-Ohio-4923, ¶ 24 (concluding the trial court properly imposed a mandatory three-year post-release control term despite "orally informing defendant that he would have a period of postrelease control 'up to' three years" and failing to use the term "mandatory"); *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-6147.

{¶31} Comparison to a recent decision concluding the trial court did not properly impose post-release control demonstrates the non-jurisdictional nature of the defects in the sentence at issue. See *State v. Williams*, 195 Ohio App.3d 505, 2011-Ohio-4653 (10th Dist.). As in this case and those discussed above, the original sentencing entry in *Williams* stated that "'[a]fter the imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).'" *Id.* at ¶ 2. During the sentencing hearing, the trial court orally advised the defendant of a mandatory period of post-release control but did not tell him the length of that period or of the potential sanctions for violating post-release

control. *Id.* Moreover, the record did not indicate the defendant received the standard "Prison Imposed" notice advising him of the imposition of post-release control and the sanctions for violating it. *Id.*

{¶32} The trial court subsequently held a resentencing hearing but again did not orally advise the defendant about post-release control, and again nothing in the record suggests the defendant signed the "Prison Imposed" notice form at the resentencing hearing. *Id.* at ¶ 4. After reviewing the record, we concluded the trial court did not properly impose post-release control at either the original sentencing or the resentencing, and we remanded the case for resentencing that, under *Fischer*, was limited to properly imposing post-release control.

{¶33} Unlike *Williams*, the trial court here orally notified defendant of the possibility of sanctions for violating post-release control. Additionally, the court provided defendant with a copy of the "Prison Imposed" notice. Although the notice had gaps in information, the information contained within it, when combined with defendant's prior knowledge of the indictment and the trial court's oral notification regarding post-release control at the sentencing hearing, was sufficient to notify defendant of his post-release control term and the potential sanctions for violating post-release control.

{¶34} Under the totality of the circumstances and this court's decisions in *Mays*, *Addison*, and *Townsend*, the trial court's sentence is sufficient, at least to the point the sentence was not void. As a result, to the extent defendant contends the trial court erred in originally sentencing him, the appropriate remedy was to challenge his sentence on direct appeal. Although defendant appealed his conviction, he did not raise any issues of sentencing and thus *res judicata* precludes him from so doing at this time. Because defendant predicates his first and second assignments of error upon this court's concluding that his original sentence was void, both assigned errors are overruled.

IV. Third Assignment of Error - Merger

{¶35} Defendant's third assignment of error contends the "four underlying counts of 'felonious assault' must merge as allied offenses of similar import" pursuant to the Supreme Court's holding in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. (Appellant's brief, at 7.)

{¶36} Defendant did not raise this issue before the trial court. A party cannot raise new issues for the first time on appeal. *In re M.D.*, 38 Ohio St.3d 149, 151 (1988). Generally, reviewing courts do not consider questions the defendant failed to present to the court whose judgment the appealing party seeks to reverse. *Id.*

{¶37} Additionally, the doctrine of res judicata applies to defendant's third assignment of error because defendant could have raised his merger argument at the time of sentencing or on direct appeal. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479; *State v. McCauley*, 8th Dist. No. 86671, 2006-Ohio-2875 (determining res judicata barred the defendant's allied offenses argument because the argument was not raised on direct appeal).

{¶38} Lastly, were we to consider defendant's argument, it would be unpersuasive. Although the Supreme Court in *Johnson* overruled the prior test for allied offenses from *State v. Rance*, 85 Ohio St.3d 632 (1999), *Johnson* offers no basis for a different result in defendant's case. A new judicial ruling generally applies only to cases that are pending on the announcement date, not to a conviction where the accused has exhausted all of his appellate remedies. *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592. Defendant exhausted his appellate remedies with respect to his convictions in his prior direct appeal, decided in 1998. *Johnson* was decided 12 years later, in 2010. Defendant is not entitled to the benefit of any new case law after the disposition of his direct appeal. *State v. Hill*, 5th Dist. No. CT11-0020, 2011-Ohio-3644.

{¶39} Insofar as defendant argues that he is entitled to a different result because his original sentence is void, his argument is without merit pursuant to our adjudication of his first and second assignments of error. Accordingly, defendant's third assignment of error is overruled.

V. Disposition

{¶40} Having overruled defendant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas denying defendant's motion for "sentencing."

Judgment affirmed.

KLATT and TYACK, JJ., concur.
