

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO :
Plaintiff : **CASE NO. 2003 CR 00319**
vs. : **Judge McBride**
JAMES MATTHEW CARR : **DECISION/ENTRY**
Defendant :

David Henry Hoffmann, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

James M. Carr, #A459-931, *pro se* defendant, London Correctional Institution, P.O. Box 69, London, Ohio 43140-0069.

This cause is before the court for consideration of a motion for relief from judgment filed by the defendant James Matthew Carr. The parties have submitted written memoranda on the motion for relief pursuant to this court's briefing order.

The defendant seeks to set aside the judgment of his sentencing pursuant to Civ.R. 60(B) on the basis that this court failed to merge his two offenses for the purposes of sentencing pursuant to the Ohio Supreme Court's holdings in *State v.*

Johnson (2010), 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314 and *State v. Cabrales* (2008), 118 Ohio St.3d 54, 886 N.E.2d 181.

The court first finds that Civ.R. 60(B) is not the proper method for collaterally attacking the defendant's conviction and sentencing. Pursuant to Criminal Rule 57(B), "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

While some Ohio "courts have held that Crim.R. 57 provides for the application of Civ.R. 60(B) in criminal cases in some circumstances[,]”¹ the post-conviction relief statutes are said to “provide ‘the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case.’ ”² If the criminal rules address an issue, the civil rules do not apply in criminal matters.³ The court finds that the criminal statutes pertaining to motions for post-conviction relief provide the defendant with an applicable remedy of law to raise the legal issues set forth in the defendant's petition. As a result, the civil rules are not applicable.

Furthermore, “[i]t is well-settled that a party may not use a Civ.R. 60(B) motion as a substitute for appeal.”⁴ A Civ.R. 60(B) motion cannot be used to raise alleged errors made by the trial court judge.⁵

The defendant could have raised the issue of merger of allied offenses of similar import on direct appeal. The Ohio Supreme Court has held that “[u]nder the doctrine of

¹ *State v. Harrison* (Aug. 12, 2005), 11th Dist. No. 2004-P-0068, 2005-Ohio-4212, ¶ 11.

² *State v. Ingles* (June 17, 2011), 1st Dist. No. C-100297, 2011-Ohio-2901, ¶ 3, quoting R.C. 2953.21(J).

³ *Harrison* at ¶ 11.

⁴ *State v. Major* (June 5, 2008), 6th Dist. No. E-08-030, 2008-Ohio-2734, ¶ 9. See, also, *State v. Rojas* (July 1, 2004), 5th Dist. No. 2004-AP-03-0018, 2004-Ohio-3642, ¶ 11.

⁵ *Id.*

res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel 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, which resulted in that judgment of conviction, or on an appeal from that judgment.”⁶ As such, the doctrine of *res judicata* operates to bar the defendant from raising the issue of merger now.⁷ The doctrine of *res judicata* also bars the defendant from attempting to utilize the holdings and modified analysis set forth in *State v. Cabrales* and *State v. Johnson*.⁸

Additionally, the defendant’s attempts to apply *State v. Johnson* retroactively to his case must also fail. Many Ohio courts have held that the new test set forth in *State v. Johnson* for determining whether offenses are allied offenses of similar import is not to be applied retroactively to a conviction that has become final.⁹

For all of the reasons discussed above, the defendant’s motion for relief from judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

⁶ *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

⁷ *State v. Hughes* (Sept. 28, 2012), 10th Dist. No. 12AP-165, 2012-Ohio-4513, ¶ 15.

⁸ Id. at ¶ 16, citing *State v. Banks* (July 8, 2010), 8th Dist. No. 93880, 2010-Ohio-3206, ¶ 24.

⁹ See, e.g., *State v. Hickman* (May 11, 2012), 5th Dist. No. 11-CA-134, 2012-Ohio-3050, at ¶ 17; *Hughes* at ¶ 16; *State v. Champion* (June 8, 2012), 2nd Dist. No. 24782, 2012-Ohio-2537, ¶ 6; and *State v. Dukes* (June 29, 2012), 11th Dist. Nos. 2011-P-0098 and 2011-P-0099, 2012-Ohio-3033, ¶ 11.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 29th day of October 2012 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride