

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-150467
Plaintiff-Appellee,	:	TRIAL NO. B-1300716
vs.	:	<i>JUDGMENT ENTRY.</i>
ROBERT COOK,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Robert Cook appeals the Hamilton County Common Pleas Court’s judgment overruling his postconviction “Motion to Correct Sentence.” We affirm the court’s judgment as modified.

Cook was convicted in 2013 upon guilty pleas to two counts of rape. He did not perfect a timely direct appeal of his convictions to this court, but instead, in 2015, filed with the common pleas court a “Motion to Correct Sentence.” In his motion, Cook asserted that the constitutional protections against double jeopardy required the “merger” of his sentences, and that without the requisite sentencing findings, due process required the statutory minimum sentence.

In this appeal from the common pleas court’s judgment overruling that motion, Cook advances two assignments of error. In his first assignment of error, he contends that his guilty pleas were the unknowing, involuntary, and unintelligent product of his

trial counsel's ineffectiveness in investigating his case and in representing him at his plea hearing. In his second assignment of error, he contends that the trial court erred in failing to merge his sentences and in failing to notify him at sentencing concerning postrelease control and that he may be ordered to perform community service if he does not pay the costs of his prosecution. We read the assignments of error to challenge the common pleas court's failure to "correct" his sentences on those grounds. And we overrule the assignments of error.

We have no jurisdiction to entertain Cook's challenges on appeal to the common pleas court's failure to grant him relief based on trial counsel's alleged ineffectiveness or the lack of postrelease-control or community-service notification. This court has jurisdiction to review only the judgment from which Cook appeals. In that judgment, the common pleas court overruled Cook's 2015 motion seeking merger and a minimum sentence. In overruling that motion, the court did not rule upon, because Cook had not asserted in his motion, his ineffective-counsel, postrelease-control-notification and community-service-notification claims. *See State v. Gipson*, 1st Dist. Hamilton Nos. C-960867 and C-960881, 1997 WL 598397 (Sept. 26, 1997). Thus, we do not reach the merits of his challenges on appeal to the common pleas court's failure to grant relief on those grounds.

We have jurisdiction to entertain Cook's challenge on appeal to the common pleas court's failure to grant him relief in the form of merger. But the common pleas court had no jurisdiction to grant relief on that ground. Cook's 2015 motion was reviewable by the common pleas court under the standards provided by the postconviction statutes, because it sought merger based on an alleged constitutional violation in the proceedings leading to his convictions. *See R.C. 2953.21(A)(1)* (permitting postconviction relief based on proof of a constitutional violation during the proceedings resulting in the

conviction); *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 and syllabus (holding that a court is free to “recast” a postconviction motion “into whatever category necessary to identify and establish the criteria by which the motion should be judged”). But the motion was filed well after the time prescribed by R.C. 2953.21(A)(2) had expired. And Cook failed to satisfy the jurisdictional requirements for entertaining a late postconviction claim, when the record does not, as it could not, demonstrate that, but for the claimed sentencing error, “no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted.” See R.C. 2953.23(A)(1)(b). Therefore, the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain Cook’s late merger claim.

Nor was Cook’s judgment of conviction subject to correction under the jurisdiction to correct a void judgment. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. Cook’s merger, ineffective-counsel, and community-service-notification challenges, even if demonstrated, would not have rendered his convictions void. See *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3 (holding that a merger challenge may be forfeited); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989) (holding that a conviction may be reversed on the ground of ineffective assistance of counsel only upon proof of an outcome-determinative deficiency in counsel’s performance); *State v. Wurzelbacher*, 1st Dist. Hamilton No. C-130011, 2013-Ohio-4009, ¶ 11 (holding that failing to provide community-service notification does not render a sentence void).

When postrelease control is not properly imposed, however, that part of the sentence is void and subject to review and correction at any time, whether on direct appeal or in a collateral challenge. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238,

OHIO FIRST DISTRICT COURT OF APPEALS

942 N.E.2d 332, paragraph one of the syllabus and ¶ 27. But the record does not demonstrate a deficiency in Cook’s postrelease-control notification. The transcript of the docket shows that the trial court properly incorporated into Cook’s judgment of conviction the statutorily mandated period of postrelease control. *See* R.C. 2929.14(D), 2929.19(B)(2)(c) through (e), and 2967.28(B). And the record cannot be said to demonstrate a deficiency in the postrelease-control notification mandated at Cook’s sentencing hearing, because the record does not include a certified transcript of the proceedings at sentencing when Cook did not appeal his convictions or request that a transcript be prepared for the common pleas court’s decision on his postconviction motion. *See State ex rel. Partee v. McMahon*, 175 Ohio St. 243, 248, 193 N.E.2d 266 (1963); *State v. Hawkins*, 1st Dist. Hamilton No. C-74425, 1975 WL 181869 (July 7, 1975) (holding that an offender is entitled to a transcript of the proceedings leading to his conviction if he has pending either a direct appeal or a postconviction proceeding).

Because the common pleas court had no jurisdiction to entertain Cook’s motion, the motion was subject to dismissal. *See* R.C. 2953.21(C) and 2953.23(A). Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect the dismissal of the motion. And we affirm the judgment as modified.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., CUNNINGHAM and ZAYAS, JJ.

To the clerk:

Enter upon the journal of the court on March 8, 2017
per order of the court_____.

Presiding Judge