

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

STATE OF OHIO,	:	APPEAL NO. C-110415
	:	TRIAL NO. B-0308606
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DERRICK BENNING,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Defendant-appellant Derrick Benning was originally convicted of one count of murder under R.C. 2903.02(B) and two counts of felonious assault under R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), with accompanying specifications. A federal court later ordered that he be resentenced. Subsequently, the trial court sentenced him to 15 years to life in prison on the murder count, eight years on each of the counts of felonious assault to be served consecutively, and an additional three years' imprisonment for a firearm specification.

He appealed that sentence to this court. We specifically rejected his argument that the trial court erred in imposing separate sentences for murder and felonious assault because they were allied offenses of similar import. *State v. Benning*, 1st Dist. No. C-100526 (Apr. 29, 2011).

Benning also argued that the trial court had erred in imposing a total aggregate sentence of 36 years to life imprisonment when the separate sentences totaled 34 years. We agreed that the trial court had made a mathematical error. We

also held sua sponte that the trial court had erred in failing to inform Benning about postrelease control. *Id.*

Consequently, we remanded the case to the trial court “to inform Benning of the appropriate terms of postrelease control, to include such terms in its judgment entry, and to correct the error in the computation of his sentence.” We affirmed the trial court’s judgment in all other respects. *Id.*

On remand, the trial court refused to consider Benning’s argument that consecutive sentences were improper because the offenses were allied offenses of similar import. It informed Benning about postrelease control, put appropriate language about postrelease control in the judgment entry, and corrected the mathematical error. This appeal followed.

In his sole assignment of error, Benning contends that the trial court erred in failing to hold a de novo sentencing hearing. But the Ohio Supreme Court has held that although the doctrine of res judicata does not preclude review of a void sentence, it still applies to the lawful aspects of the sentence. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph three of the syllabus; *State v. Buckner*, 1st Dist. No. C-100666, 2011-Ohio-4358, ¶ 6. Thus, when an appellate court holds that a sentence is void in part, only the void portion may be vacated or otherwise amended. *Buckner, supra*, at ¶ 6; *State v. Hall*, 1st Dist. No. C-100097, 2011-Ohio-2527, ¶ 8.

In this case, the trial court did not err in failing to hold a de novo sentencing hearing. The scope of the hearing was limited to the portions of the sentence that we had remanded for the court to correct – the failure to inform Benning about postrelease control and the mathematical error. The court complied with our mandate, as it was required to do. A trial court “may not vary the mandate of an

appellate court, but is bound by that mandate on the questions of law decided by the reviewing court.” *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 323, 649 N.E.2d 1229 (1995); *Dater v. PNC Bank, N.A.*, 166 Ohio App.3d 839, 2006-Ohio-2479, 853 N.E.2d 699, ¶ 13, (1st Dist.). Consequently, we overrule Benning’s assignment of error and affirm the trial court’s judgment.

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

SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the clerk:

Enter upon the journal of the court on January 20, 2012
per order of the court _____.

Presiding Judge