[Cite as *State v. Banks*, 2010-Ohio-1762.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93880

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLTON BANKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Criminal Appeal from the

Cuyahoga County Court of Common Pleas
Case Nos. CR-420197 and CR-421541

BEFORE: Dyke, J., Gallagher, A.J., and Stewart, J.

RELEASED: April 22, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Paul Mancino, Jr., Esq.
75 Public Square, Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Thorin Freeman, Esq.
Assistant County Prosecutor
1200 Ontario Street, Eighth Floor
Cleveland, Ohio 44113

brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Carlton Banks ("appellant"), appeals his convictions and sentences for drug possession, drug trafficking, failure to comply with an order of police, involuntary manslaughter, and aggravated vehicular assault. For the reasons that follow, we affirm in part, reverse in part and remand for resentencing.

{¶ 2} On July 8, 2002, in Cuyahoga County Court of Common Pleas Case No. CR-420197, appellant pled guilty to drug possession in violation of R.C. 2925.11(A) and drug trafficking in violation R.C. 2925.03(A)(2). On that same date, appellant pled guilty to involuntary manslaughter in violation of R.C. 2903.04(A), failure to comply in violation of R.C. 2921.331(B)(5)(a)(ii), and aggravated vehicular assault in violation of R.C. 2903.08 in Cuyahoga County Court of Common Pleas Case No. CR-421541.

{¶ 3} On July 25, 2002, the trial court sentenced appellant to consecutive one-year prison terms for each count in Case No. CR-420197. Additionally, the court sentenced him in Case No. CR-421541 to a ten-year prison sentence for the manslaughter conviction, a two-year sentence for failure to comply, and one year for the aggravated vehicular assault conviction. The court ordered all sentences to run consecutive to each other and consecutive to the sentence imposed in Case No. CR-420197, for a total prison term of 15 years.

{¶ 4} On August 23, 2002, appellant appealed and in an opinion released on March 13, 2003, we remanded the case to the trial court for resentencing. *State v. Banks* (Mar. 13, 2003), Cuyahoga App. Nos. 81679 and 81681, 2003-Ohio-1171 (*"Banks I"*). Following remand, on October 22, 2003, the trial court imposed the same sentence previously issued, but only after following the directives of this court in *Banks I.* Prior to the resentencing, the trial court also overruled appellant's motion to withdraw his guilty pleas.

{¶ 5} Appellant appealed the resentencing, as well as the trial court's denial of his motion to withdraw on November 14, 2003 in *State v. Banks*, Cuyahoga App. Nos. 83782 and 83783, 2004-Ohio-4478 ("*Banks II*"). On appeal, we upheld the judgment and sentence. He appealed that decision to the Supreme Court of Ohio, which declined to hear the appeal on February 2, 2005. *State v. Banks*, 105 Ohio St.3d 1407, 2005-Ohio-279, 821 N.E.2d 1027, reconsideration denied, 105 Ohio St.3d 1473, 2005-Ohio-1186, 824 N.E.2d 542.

{¶ 6} Three years later, on June 13, 2008, appellant filed a motion to vacate his sentence arguing that it was void because the trial court failed to impose any definite period of postrelease control. The trial court overruled the motion and appellant again appealed to this court. On July 6, 2009, we reversed the trial court's judgment and remanded the matter for resentencing. *State v. Banks*, Cuyahoga App. No. 92042, 2009-Ohio-3099 ("*Banks III*").

{¶ 7} On August 11, 2009, the trial court resentenced appellant and imposed the 15 year sentence it had levied on two prior occasions. Additionally,

the court imposed five years of postrelease control.

{¶ 8} Appellant now appeals and presents six assignments of error for our review. His first provides:

{¶ 9} "Defendant was denied due process of law when he was convicted and sentenced for involuntary manslaughter, which indictment failed [sic] allege a culpable mental state."

{¶ 10} Here, appellant challenges his conviction for involuntary manslaughter, arguing that the indictment was defective for failing to allege a culpable mental state. Because we find that appellant waived this argument when he pled guilty, we overrule this assignment.

{¶ 11} In *State v. Lawrence*, 180 Ohio App.3d 468, 2009-Ohio-33, 905 N.E.2d 1268, we rejected the defendant's claim that under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ("*Colon I*"), his aggravated-vehicular assault and involuntary manslaughter convictions should be vacated because the indictment failed to mention the mental state for those offenses. We disagreed with this argument after extensively reviewing the *Colon I* case and the Supreme Court's subsequent case in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749. Id. at ¶¶21-28, 893 N.E.2d 169. Rather, we followed our own precedent in *State v. Hayden*, Cuyahoga App. No. 90474, 2008-Ohio-6279 and that of the Third Appellate District in *State v. Gant*, Allen App. No. 1-08-22, 2008-Ohio-5406. Those courts "declined to extend Colon to cases in which the defendant pleaded guilty to the indictment." *Lawrence*, supra at ¶29. In reaching

this conclusion, the *Gant* court reasoned that the defendant in *Colon* did not plead guilty but rather was convicted by a jury. *Gant*, supra at ¶13. Next, the court explained that because a guilty plea is a complete admission of guilt, by entering the plea, "'the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.'" Id., quoting *State v. Kitzler*, 3d Dist. No. 16-02-06, 2002-Ohio-5253, ¶12. Accordingly, a criminal defendant who pleads guilty may not, on appeal, "'raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" Id., quoting *State v. Woods*, 3d Dist. No. 1-05-82, 2006-Ohio-2368, ¶14.

{¶ 12} Keeping in line with this court's precedent, we find that, by pleading guilty to involuntary manslaughter, appellant in this case has waived any arguments concerning defects in the indictment. Accordingly, his first assignment of error is overruled.

{¶ 13} Next, in the interests of convenience, we consider the merits of appellant's second and third assignments of error together. His second assignment of error states:

{¶ 14} "Defendant was denied due process of law and subjected to unconstitutional multiple punishments when the court failed to merge the involuntary manslaughter with the underlying felony. (Tr. 14)"

{¶ 15} His third assignment provides:

{¶ 16} "Defendant was denied due process of law and subjected to

unconstitutional multiple punishments when the court failed to merge sentences in Case No. CR-420197. (Tr. 19, 20)"

{¶ 17} First, appellant argues that the trial court erred in failing to merge his convictions for involuntary manslaughter and failure to comply with an order of police as these offenses constitute allied offenses of similar import. Likewise, in his third assignment of error, appellant maintains that his convictions for drug trafficking and drug possession should have been merged for the same reason. Finding merit to these arguments, we reverse and remand for proceedings consistent with this opinion.

{¶ 18} First, we address the state's contention in its brief that appellant has waived the argument that the offenses are allied offenses of similar import because he pled guilty to the two distinct offenses. Recently, the Ohio Supreme Court in *State v. Underwood*, 124 Ohio St.3d 365, 922 N.E.2d 923, 2010-Ohio-1, rejected this position. Rather, the court held that "we conclude that when a sentence is imposed on multiple counts that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D) does not bar appellate review of that sentence even though it was jointly recommended by the parties and imposed by the court." Id. at ¶25. In reaching this conclusion, the court reasoned that:

{¶ 19} "R.C. 2941.25(A) clearly provides that there may be only *one conviction* for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense. This court has previously said that allied offenses of similar

import are to be merged at sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶43; *State v. McGuire* (1997), 80 Ohio St.3d 390, 399, 686 N.E.2d 1112. Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." Id. (Emphasis sic.)

{¶ 20} Therefore, we disagree with the state's contention that appellant waived any argument regarding allied offenses by pleading guilty. We, therefore, proceed to consider whether his convictions for involuntary manslaughter and failure to comply with an order of police are allied offenses, and thus, should have been merged.

{¶ 21} R.C. 2941.25 provides:

{¶ 22} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 23} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 24} The Ohio Supreme Court in *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶¶10-13, explained the two tier analysis used in determining whether two offenses are allied offenses of similar import. The court provided:

{¶ 25} "This court has interpreted R.C. 2941.25 to involve a two-step analysis. 'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.) *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816."

{¶ 26} "In *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, paragraph one of the syllabus, we held that '[u]nder an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*.' (Emphasis sic.) We determined that, as opposed to considering elements within the context of the facts of each case, comparing the elements in the abstract 'is the more functional test, producing "clear legal lines capable of application in particular cases."' Id. at 636, 710 N.E.2d 699, quoting *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 148, 119 S.Ct. 1167,

143 L.Ed.2d 238."

{¶ 27} "However, some courts interpreted *Rance* to require a strict textual comparison of the elements of the compared offenses under R.C. 2941.25(A). *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶21. We concluded that that interpretation 'conflicts with legislative intent and causes inconsistent and absurd results.' Id. at ¶27. Thus, in *Cabrales* we clarified *Rance* and held that 'in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), *Rance* requires courts to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of elements.' Id."

{¶ 28} As is applicable in the case at hand, the Supreme Court of Ohio in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶¶25-26, applied the two tier analysis explained above and determined that attempted murder in violation of R.C. 2903.02(A) and 2923.02 and felonious assault in violation of R.C. 2903.11(A)(2) are allied offenses of similar import. In so finding, the court explained that, although the elements of the two offenses do not align exactly, "when Williams attempted to cause harm by means of a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of the victim." Id. at ¶26.

{¶ 29} Likewise, in *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶113, we employed the two-tiered analysis and determined that felony murder and the predicate offense of felonious assault are allied offenses of

similar import. We found the offenses so alike that the commission of one would result in the commission of the other. We reasoned that:

{¶ 30} "If the convictions for felony murder and felonious assault are not merged here, Minifee would be convicted of causing serious physical harm to–which is death of the victim in this case–and killing the victim based on a single incident. This is exactly the type of result the *Cabrales* court sought to avoid in the future by clarifying *Rance*." Id.

{¶ 31} Here, the statute governing involuntary manslaughter, R.C. 2903.04(A), provides that "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." Additionally, an offender commits a third-degree felony charge of failure to comply with an order of police when he "operates a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop" and that by operating the motor vehicle, appellant "caused a substantial risk of serious physical harm to persons or property." R.C. 2921.331(B)(5)(a)(ii).

{¶ 32} Employing the same reasoning used in *Williams* and *Minifee* to the case at hand, we find the offenses of involuntary manslaughter in violation of R.C. 2903.04(A) and failure to comply with an order of police in violation of R.C. 2921.331(B)(5)(a)(ii) are allied offenses of similar import. If these offenses were not merged, appellant would be convicted of causing a substantial risk of harm to a person while also convicted of causing the death of that same person, based on

one single incident. Thus, while the elements do not align exactly, the commission of the one offense would necessary result in the other. Accordingly, as the record if void of any indication that appellant committed two separate acts or committed the offenses with a separate animus, we find the trial court erred in not merging these allied offenses of similar import. The matter is therefore remanded to trial court for resentencing in this regard.

{¶ 33} In finding these two offenses allied, we note that our decision in this case does not apply in all situations in which involuntary manslaughter and failure to comply are being compared. There are other failure to comply provisions that do not contain the "serious physical harm" element, and thus, do not invoke the allied offense statute. See R.C. 2921.331.

{¶ 34} With regard to appellant's convictions for drug trafficking in violation of R.C. 2925.03(A)(2) and drug possession in violation of R.C. 2925.11(A), the Supreme Court of Ohio in *State v. Cabrales*, supra, specifically held that "trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense necessarily results in commission of the second." Id. at ¶30. As appellant's convictions for drug trafficking and drug possession were for the same controlled substance, crack cocaine, we find them allied offenses of similar import. Moreover, these offenses were committed with one animus — selling the drug. Therefore, defendant cannot be convicted of both offenses. We also remand this matter to the trial

court to vacate appellant's sentences for drug possession and drug trafficking and for the prosecution to elect which allied offense it will pursue in this regard at the resentencing hearing.

{¶ 35} In light of our decision in appellant's second and third assignments of error, we find his fourth, fifth and sixth assignments of error[1] moot, and thus, decline to address the merits pursuant to App.R. 12(A).

Judgment affirmed in part, reversed in part, and remanded for resentencing.

It is ordered that appellant and appellee split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR
KEY WORDS:
93880

[1] IV. "Defendant was denied due process of law when the court imposed a sentence for failure to comply without considering the statutory criteria. (Tr. 17-18)"
V. "Defendant was denied due process of law when the court sentenced the defendant to consecutive sentences without considering the purposes and principles fo [sic] sentencing. (Tr. 12-13, 17-18)"
VI. "Defendant was denied due process of law when the court proceeded to sentence defendant based on facts not alleged in the indictment nor admitted at the time of the plea. (Tr. 14-18)"