

[Cite as *State v. Flagg*, 2010-Ohio-4247.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93248 and 93279

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAKOTA FLAGG

DEFENDANT-APPELLANT

**JUDGMENT:
CONVICTIONS AFFIRMED; SENTENCES VACATED;
REMANDED FOR RESENTENCING**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-509831 and CR-509845

BEFORE: Kilbane, P.J., Celebrezze, J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 9, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Dakota Flagg (Flagg), appeals his bindover stemming from two juvenile court cases, Nos. 07111688 and 08121060, as well as his pleas to the indictments and sentences from the resulting two cases in the General Division of the Cuyahoga County Court of Common Pleas, Case Nos. CR-509831 and CR-509845.¹ After a careful review of the facts and law, we affirm his convictions, but vacate his sentences and remand these cases to the trial court for resentencing.

Statement of the Case and Facts

{¶ 2} On December 10, 2007, Flagg, age 15, robbed a Marathon gas station located at 5321 Lee Road, in Maple Heights, Ohio. While committing this robbery, he shot and killed the owner of the gas station, Mohammad Khan (Khan). Flagg was positively identified by a gas station employee, Mohammad Rahman (Rahman), who was present when Khan was killed.

¹Flagg argues that the juvenile court failed to consider the appropriate statutory factors or make the statutory findings to justify his bindover to the common pleas court, and that one of his convictions in CR-509831 must be vacated because the trial court failed to inform him about the fines attending that charge. Flagg further argues the following: the trial court failed to merge certain offenses that are allied offenses of similar import; his sentence constitutes cruel and unusual punishment; his sentence is disproportionate and contrary to law; and his sentence is inconsistent with the sentences of similarly situated offenders.

Additionally, Flagg's DNA was found on a live round of ammunition at the crime scene.

{¶ 3} On December 28, 2007, Flagg and an accomplice, Andre Dotson, robbed the Family Dollar Store located at 17000 Broadway Avenue, in Maple Heights, Ohio. Flagg was apprehended by Maple Heights police after a brief foot chase. When apprehended, Flagg was holding a loaded 9mm gun in one hand and a bullet in the other. An investigation and analysis of the gun by the Ohio Bureau of Criminal Investigation (BCI) revealed it was the same weapon used to kill Mohammad Khan on December 10, 2007. Based upon this forensic evidence and the subsequent DNA evidence implicating Flagg, he became the primary suspect in the gas station robbery and murder.

Juvenile Court Proceedings

{¶ 4} On January 24, 2008, the State filed delinquency proceedings against Flagg in the Cuyahoga County Juvenile Court, Case No. 07111688, stemming from the aggravated robbery of the Family Dollar Store.

{¶ 5} That same day, the State filed delinquency proceedings against Flagg, Case No. 08121060, for the aggravated robbery and aggravated murder of Khan.

{¶ 6} On February 14, 2008, the juvenile court conducted a joint probable cause hearing and found that probable cause existed to find Flagg delinquent in both cases. The court remanded Flagg to the juvenile detention

center and ordered the Court Psychiatric Clinic to conduct physical and mental examinations with social history to aid the court in its determination at the amenability hearing.

{¶ 7} On April 8, 2008, the juvenile court conducted a joint amenability hearing and found that Flagg was not amenable to rehabilitation or care in the juvenile justice system. That same day, the court issued an order binding Flagg over to the general division of the common pleas court for the aggravated murder of Kahn and aggravated robbery at the Marathon gas station.

{¶ 8} On April 9, 2008, the juvenile court issued an order binding Flagg over to the general division of the common pleas court to face kidnapping and aggravated robbery charges stemming from the Family Dollar Store incident.

Common Pleas Court Proceedings

{¶ 9} On April 23, 2008, a Cuyahoga County Grand Jury indicted Flagg in two separate cases. In CR-509831, Flagg was indicted on two counts of aggravated murder, unclassified felonies, in violation of R.C. 2903.01(A) and (B); four counts of aggravated robbery, first degree felonies, in violation of R.C. 2911.01(A)(1) and (A)(3); and one count of kidnapping, a first degree felony, in violation of R.C. 2905.01(A)(2) and/or (A)(3). Each count carried one- and three-year firearm specifications, in violation of R.C. 2941.141 and 2941.145, stemming from the December 10, 2007 Marathon gas station incident.

{¶ 10} In CR-509845, Flagg was charged with eight counts of aggravated robbery, in violation of R.C. 2911.01(A)(1) and 2911.01(A)(3), and four counts of kidnapping, in violation of R.C. 2905.01(A)(2) and/or (A)(3). Each count contained one- and three-year firearm specifications, in violation of R.C. 2941.141 and R.C. 2941.145, and a forfeiture specification, in violation of R.C. 2941.147. Flagg was also charged with one count of carrying a concealed weapon, a fourth degree felony, in violation of R.C. 2923.12(A)(2), stemming from the December 28, 2007 Family Dollar Store incident.

{¶ 11} On March 10, 2009, Flagg pled guilty to all charges in each indictment.

{¶ 12} On April 9, 2009, the trial court sentenced Flagg to life imprisonment with the possibility of parole after 42 years in CR-509831 and CR-509845.

Sentence in CR-509831

{¶ 13} In Counts 1 and 2, aggravated murder, which merged for sentencing, the trial court sentenced Flagg to 30 years to life. In Counts 3 and 4, aggravated robbery, the trial court sentenced Flagg to three years, to be served concurrently with Counts 1 and 2; on Counts 5 and 6, aggravated robbery, the trial court sentenced Flagg to three years, to be served consecutively to Counts 1 and 2. In Count 7, kidnapping, the trial court sentenced Flagg to three years, to be served concurrently with his sentence in

Counts 5 and 6. The trial court also sentenced Flagg to three years consecutive on the accompanying firearm specifications in the indictment, which merged for sentencing purposes. Thus, in CR-509831, Flagg received a term of incarceration of 30 years to life, plus three years consecutive for aggravated robbery and three years consecutive on the firearm specifications, totaling 36 years to life imprisonment.

Sentence in CR-509845

{¶ 14} The trial court imposed three-year concurrent terms of incarceration in Counts 1 through 8, aggravated robbery, and Counts 9 through 12, kidnapping. The trial court imposed a concurrent one-year term in Count 13, carrying a concealed weapon. Finally, the court imposed a three-year term for all the firearm specifications, which merged for sentencing, to be served consecutively with the concurrent aggravated robbery, kidnapping, and carrying a concealed weapon sentences, for six years of incarceration.

Total Term of Incarceration

{¶ 15} Flagg's total term of incarceration was 36 years to life in CR-509831 and 6 years in CR-509845; thus, he received 42 years to life imprisonment. At the conclusion of the sentencing hearing, the court imposed court costs but no fines and noted that Flagg was indigent for purposes of appeal, costs, and restitution. (Tr. 54.)

{¶ 16} This appeal followed, asserting eight assignments of error. We address some assignments of error jointly where appropriate. Flagg's first assignment of error states:

“The juvenile court did not make adequate findings to justify the bindover of Dakota Flagg.”

{¶ 17} We review the adequacy of juvenile bindover orders under an abuse of discretion standard. *State v. Douglas* (1985), 20 Ohio St.3d 34, 485 N.E.2d 711. An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 18} Flagg argues that the bindover orders in the two cases are defective because the juvenile court failed to state adequate factors under R.C. 2152.12 that would justify binding Flagg over. He argues that the trial court did not mention its consideration of each factor enumerated in the statute in either bindover order, thus invalidating the bindovers in both cases. Flagg concedes that this argument is directly opposed to the Supreme Court's holding in *Douglas*, which held, inter alia, that as long as sufficient, credible evidence on each of the five factors listed in Juv.R. 30(E) pertaining to amenability to treatment or rehabilitative processes exist in the record, the court's bindover order should not be reversed absent an abuse of discretion,

even where the journal entry does not specifically address any of the five factors listed in the juvenile rule. *Id.* at syllabus. Flagg argues that *Douglas* was wrongly decided. We disagree.

{¶ 19} The relevant factors for juvenile courts to consider when determining whether children should be tried as adults are found at R.C. 2152.12 (D) and (E), which state:

“In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, in favor of a transfer under that division:

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

(3) The child’s relationship with the victim facilitated the act charged.

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child’s person or under the child’s control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

*** * ***

(E) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that division:

(1) The victim induced or facilitated the act charged.

(2) The child acted under provocation in allegedly committing the act charged.

(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

(5) The child previously has not been adjudicated a delinquent child.

(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

(7) The child has a mental illness or is a mentally retarded person.

(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.”

{¶ 20} Under Juv.R. 30(G), orders supporting the transfer of juveniles to felony courts need not state an exhaustive rendition of all statutory requirements, but need only “state the reasons therefore.” Juv.R. 30(G). Finally, “as long as sufficient, credible evidence pertaining to each factor exists in the record before the court, the bind-over order should not be reversed in the absence of an abuse of discretion.” *Douglas* at 36.

{¶ 21} In the present case, the record shows that the juvenile court clearly considered the statutory factors found at R.C. 2152.12(D) and (E) in making its determination to bind Flagg over. Additionally, the orders in both juvenile cases found probable cause to bind Flagg over under Juv.R. 29 and R.C. 2152.12 because Flagg was 15 years old at the time of the offenses and used a firearm in the commission of his crimes. The bindover order in Case No. 08121060 also stated that the court considered Flagg’s juvenile record, family environment, the severity of the offenses, and the State’s prior

efforts to treat and rehabilitate Flagg. These factors comport with the statutory requirements of R.C. 2152.12(D) and (E) and Juv.R. 30.

{¶ 22} In determining whether Flagg was amenable to rehabilitative services in the juvenile justice system, the court explained its consideration of the factors contained in the R.C. 2152.12 and Juv.R. 30 on the record:

“One, Dakota has received significant services through his involvement with the Cuyahoga County Department of Children and Family Services. He has had significant residential placement, group home placement and foster care. He has typically shown very poor adjustment to these services. He has also exhibited significant running away and AWOL behaviors from his placements.

Two, Dakota has a lengthy history of heavy and problematic use of alcohol and marijuana. He has never sought treatment or assessment for such.

Three, Dakota has been minimally involved in a formal — in formal schooling over the past two years.

And four, the acts with which Dakota has been charged involve the use of a firearm. In one of the alleged instances, the victim was killed.

Now, additionally, the court looked at all the factors that we — that were mentioned in this [psychological] report, and under the code, the court also considered all the factors both for and against his staying in the juvenile justice system.

* * *

And then finally, for the record, the court in this particular case gave the most weight to the incidents at hand which he’s charged with. He’s charged and he is allegedly the shooter in a cold-blooded robbery/murder at

a gas station. He supposedly shot one of the attendants and killed the attendant.

In a second case, he allegedly had the gun and used it at gunpoint to rob a * * * Family Dollar Store. And he allegedly * * * was the gun handler.

Okay, so this court gave the most weight, in looking at all the factors, to those two alleged incidents. The court notes that there's no doubt there's many factors which would show that he never did have much of a chance growing up with his family history. But, at the same time, it's evident that he is of at least average intelligence, certainly knows the difference between right and wrong, and the factors that I mentioned weigh heavier than the unfortunate circumstances of his growing up.

So with all this considered, the court feels that he is not amenable to the juvenile justice system * * *." (Hearing of April 8, 2008, tr. 45-48.)

{¶ 23} We are cognizant, as was the juvenile court, that some factors also weighed against binding Flagg over to be tried as an adult, including his troubled childhood and the fact that he had only just turned 15 at the time of the offenses. Other factors the court considered in determining whether Flagg would be amendable to rehabilitation in the juvenile justice system included the fact that he had "minimal or no formal previous involvement with the criminal justice system." (Hearing of Apr. 8, 2008, tr. 43.) The court further noted that, according to the psychological examination, Flagg had charges of unruliness and telephone harassment pending against him at the time of the bindover hearing. Id.

{¶ 24} In reviewing the record, it is clear the juvenile court considered all the factors required by law in making its amenability determination, and it did not abuse its discretion. Sufficient credible evidence existed to bind Flagg over to the common pleas court, and the juvenile court articulated its consideration of that evidence thoroughly pursuant to Juv.R. 30 and R.C. 2152.12. Flagg's first assignment of error is overruled.

{¶ 25} Flagg's second assignment of error states:

“The juvenile court abused its discretion in binding Dakota Flagg over to the common please [sic] court general division because the juvenile court did not consider all of the enumerated statutory factors, as well as the availability of proceeding under the serious youth offender provision of the revised code.”

{¶ 26} We review a juvenile court's relinquishment of jurisdiction in discretionary bindover proceedings under an abuse of discretion standard. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629. Within this assignment of error, Flagg argues that although the trial court stated it had considered all appropriate statutory factors making its amenability determination, it failed to consider the statutory factors present at R.C. 2152.12(D) and (E), including whether Flagg should first be placed in a serious youth offender program before binding him over to common pleas court.

{¶ 27} Flagg's arguments assume that since the trial court did not explicitly state its consideration of each statutory factor in the record it must

not have considered them. We have already established that the mere fact that the trial court does not mention a specific statutory section in its bindover order, or in comments pursuant to that order, does not mean that it failed to consider that section. Juv.R. 30; *Douglas*.

{¶ 28} Additionally, R.C. 2152.12(B)(3) only requires that the record indicate the specific factors that the court “weighed”; it does not require a written or oral recitation of all statutory factors. The trial court noted on the record several of the key factors mentioned above, all weighing in favor of bindover. As stated above in Flagg’s first assigned error, the trial court thoroughly considered the statutory factors at R.C. 2152.12(D) and (E), as well as Juv.R. 30 and his psychological examination in making its bindover determination.

{¶ 29} Finally, we note that it is the State, not the court, that is required to initiate serious youth offender proceedings pursuant to R.C. 2152.13. Under R.C. 2152.12(E), the juvenile court is only required to make an amenability determination. Since the State never notified any party of its intent to seek such proceedings under R.C. 2152.12(A)(4)(b) in its complaints against Flagg, the juvenile court was not required to consider such a disposition in the amenability hearing. The trial court did not abuse its discretion in binding Flagg over to the general division.

{¶ 30} Flagg’s second assignment of error is overruled.

{¶ 31} Flagg’s third assignment of error pertains to his guilty plea in CR-509831 in the common pleas court. It states as follows:

“The plea to the counts of aggravated murder in CR 509831 must be vacated because Dakota Flagg was not advised about the fines attendant to these charges.”

{¶ 32} Crim.R. 11(C)(2) provides:

“In felony cases the court may refuse to accept a plea of guilty * * *, and shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.”

{¶ 33} This court has interpreted the oral dialogue implied in Crim.R. 11 to include the mention of any particular fines and costs associated with a guilty plea, so that a defendant may properly be advised of the maximum penalty involved in pleading guilty. *State v. Johnson*, 8th Dist. No. 91884, 2009-Ohio-2268. In *Johnson*, this court vacated a guilty plea on the grounds that the trial court did not substantially comply with Crim.R. 11 where it failed to mention the fine associated with pleading guilty to a single charge of rape. We find *Johnson* distinguishable from the instant case.

{¶ 34} First, in *Johnson*, the State conceded the trial court’s error, so we were constrained to vacate Johnson’s plea. Second, in *Johnson*, the financial

penalty where the defendant pled guilty to a single count of rape bore much more relevance to whether he made a knowing, intelligent, and voluntary plea than a case involving, as here, a guilty plea to two separate indictments involving multiple violent offenses, including aggravated murder, with tens of thousands of dollars in penalties each, and the potential for life imprisonment without parole. Last, the trial court in the instant case never imposed a fine at sentencing, so Flagg cannot demonstrate that he was prejudiced by pleading guilty.

{¶ 35} A guilty plea will be considered knowingly, intelligently, and voluntarily made if, before accepting the plea, the trial court, at the very least, substantially complied with the procedures set forth in Crim.R. 11 with respect to nonconstitutional notifications. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. “Substantial compliance means that, under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving.” *Id.*

{¶ 36} In the instant case, there is no question that a lengthy oral dialogue took place between Flagg, his counsel, and the court. Flagg argues that the trial court did not comply with Crim.R. 11 when accepting his guilty plea since it did not advise him of the potential fine he faced for pleading guilty to aggravated murder.

{¶ 37} The Ohio Supreme Court reiterated a trial court's duties in satisfying Crim.R. 11 during plea hearings and our responsibility in analyzing whether the trial court executed its duties under Crim.R. 11 in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, stating: "When the trial judge does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied, * * * the plea may be vacated only if the defendant demonstrates a prejudicial effect. * * * The test for prejudice is 'whether the plea would have otherwise been made.' * * *" Id., citing *Nero* at 108.

{¶ 38} When we apply the *Clark* analysis to the facts of this case, we cannot say that the plea would not have been made if Flagg was advised about this particular financial penalty. It is clear from the record that Flagg was not prejudiced in any way by the trial court's failure to mention the fine associated with pleading guilty to aggravated murder, because the trial court did not impose any fines and found him indigent for purposes of costs and penalties. (Tr. 49-54.) Additionally, Flagg was advised of the financial penalties associated with all other crimes he pled guilty to that day. Further, in accepting Flagg's guilty plea to aggravated murder, the trial court thoroughly explained all of Flagg's constitutional rights and repeatedly asked Flagg if he had any questions, if he had an opportunity to consult with his

counsel, his family members and anyone else, and if he was making the plea knowing that the possible sentence could be life in prison without parole. (Hearing of Mar. 10, 2009, tr. 17.) Flagg acknowledged knowing that life imprisonment without parole was one of the possible sentences he could receive. Thus, the trial court substantially complied with Crim.R. 11 in accepting Flagg's guilty pleas in this case. Flagg's third assignment of error is overruled.

{¶ 39} Since they are substantially interrelated, we address Flagg's fourth and fifth assignments of error together.

{¶ 40} Flagg's fourth assignment of error states:

“In CR 509831, the trial court failed to merge as allied the kidnapping count (7) into the aggravated robbery count.”

{¶ 41} Flagg's fifth assignment of error states:

“In CR 509845, the trial court failed to merge the kidnapping counts (9-12) into the corresponding aggravated robbery counts.”

{¶ 42} Within these assignments of error, Flagg relies exclusively on the Supreme Court's holding in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, in arguing that the trial court failed to properly merge Flagg's kidnapping and aggravated robbery offenses in each case at sentencing. The *Winn* court held that kidnapping and aggravated robbery are allied offenses of similar import and, therefore, merge at

sentencing. In so holding, it first examined the elements of the offenses in the abstract and then concluded that the commission of one necessarily results in the commission of the other:

“In essence, the elements to be compared in the abstract are the restraint, by force, threat, or deception, of the liberty of another to ‘facilitate the commission of any felony’ (kidnapping, R.C. 2905.01(A)(2)) and having ‘a deadly weapon on or about the offender’s person or under the offender’s control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or us[ing] it’ in attempting to commit or committing a theft offense (aggravated robbery, R.C. 2911.01(A)(1)). It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are ‘so similar that the commission of one offense will necessarily result in commission of the other.’ *Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.”

{¶ 43} Here, as in *Winn*, there is no question that kidnapping and aggravated robbery are allied offenses of similar import. The facts of this case resemble those of *Winn* since none of the kidnapping victims were removed from the place where they were kidnapped. Based upon the reasoning and factual similarities with *Winn*, the commission of the aggravated robberies as to each victim necessarily resulted in their kidnapping in this case as well. The kidnappings and robberies were conducted with a single animus for each victim. However, under *Winn*, the

kidnapping and aggravated robbery counts merged with respect to each victim.

{¶ 44} A review of the record in CR-509831 and CR-509845 indicates that the trial court sentenced Flagg separately for each of his aggravated robbery and kidnapping convictions. Under *Winn*, however, it is clear that Flagg's convictions for each aggravated robbery and kidnapping offense should have been merged.

{¶ 45} The State argues that the posture of *Winn* is fundamentally distinguishable from the present case since Winn was convicted by a jury, while Flagg pled guilty to all charges as indicted. The State also argues that as a result, Flagg has waived this argument on appeal, since he pled guilty instead of going to trial. In support of this, the State relies on *State v. Geddes*, 8th Dist. No. 91042, 2008-Ohio-6489, at ¶24, among other cases. *Geddes* held that a “[d]efendant who enters [a] guilty plea to two distinct offenses waives argument that [the] offenses are, in reality, allied offenses of similar import. * * * “[A] defendant waives his right to challenge any defects in an indictment by pleading guilty.” Id. (Internal citations omitted.) In light of recent developments in the Ohio Supreme Court, we find the State's arguments without merit.

{¶ 46} In January 2010, the Ohio Supreme Court ruled that a criminal defendant has the right to appeal the issue of allied offenses under R.C.

2941.25, even if the defendant entered into a plea bargain and even if the sentence was an agreed sentence under R.C. 2953.08(D). *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Thus, it makes no difference whether the defendant pled guilty to all offenses or was convicted by a jury; they cannot be waived by virtue of a plea. *Id.* The State's reliance on *Geddes* is therefore misplaced. *Underwood* also held that a trial court is prohibited from imposing individual sentences for "counts that constitute allied offenses of similar import." *Underwood* at ¶36.

{¶ 47} Most recently, in *State v. White*, 8th Dist. No. 92972, 2010-Ohio-2342, we held that even where it makes no difference in the term of incarceration, "a defendant is prejudiced by having more convictions than are authorized by law." *Id.* at 11, citing *Underwood* at ¶31. R.C. 2941.25(A) states that where the same conduct by defendant constitutes two or more allied offenses of similar import, "the defendant may be convicted of only one." See, also, *White* at ¶59. Therefore, Flagg cannot be convicted separately of both the kidnapping and the aggravated robbery of each victim.

{¶ 48} Pursuant to *Winn*, we find that the aggravated robberies and kidnappings in CR-509831 and the aggravated robberies and kidnappings in CR-509845 are allied offenses of similar import that were committed with the same animus with respect to each individual victim. We uphold Flagg's convictions, but vacate Flagg's sentences in CR-509831 and CR-509845 since

his convictions for aggravated robbery and kidnapping with respect to each victim constitute more convictions than are authorized by law. See R.C. 2941.25(A); *White; Underwood*.

{¶ 49} Under *White*, we remand CR-509831 and CR-509845 to the trial court for the limited purpose of resentencing, at which time the State has the right to elect which of the allied offenses to pursue in each case. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

{¶ 50} Accordingly, Flagg's convictions in CR-5097831 and CR-509845 are affirmed, his sentences in CR-509831 and CR-509845 are vacated, and we remand for resentencing.

{¶ 51} Based upon our vacation of Flagg's sentences in CR-509831 and CR-509845 in his fourth and fifth assignments of error, assignments of error six, seven, and eight, all of which deal with those same sentences, are moot.

{¶ 52} Flagg's convictions are affirmed, his sentences are vacated, and the cases are remanded to the trial court for resentencing.

It is ordered that appellant recover from appellee 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. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS
FRANK D. CELEBREZZE, JR., J., DISSENTS