[Cite as *State v. Cogar*, 2017-Ohio-1470.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
DAVID E. COGAR	:	Case No. 16-COA-039
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 15-CRI-198
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	April 17, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHRISTOPHER E. BALLARD 110 Cottage Street Third Floor Ashland, OH 44805	RUTH R. FISCHBEIN-COHEN 3552 SEVERN ROAD Suite 613 Cleveland, OH 44118

Wise, Earle, J.

{¶ 1} Defendant-Appellant, David Cogar, appeals his September 21, 2016 sentence of the Court of Common Pleas of Ashland County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On January 14, 2016, the Ashland County Grand Jury indicted appellant on two counts of breaking and entering in violation of R.C. 2911.13, one count of safecracking in violation of R.C. 2911.31, one count of grand theft in violation of R.C. 2913.02, and one count of possessing criminal tools in violation of R.C. 2923.24. Said charges arose from the breaking and entering of a bar and a separate maintenance building of the Rolling Acres Golf Course on December 1, 2015, and the theft of various items, including a safe.

{¶ 3} On March 8, 2016, appellant pled guilty to the charges. At the time, he was represented by attorney R.J. Budway. Thereafter, appellant retained new counsel, attorney Michael Sullivan.

{¶ 4} On July 11, 2016, appellant filed a motion to withdraw his guilty pleas, claiming Attorney Budway "did not communicate a negotiated plea offer to him prior to the plea deadline." A hearing was held on August 29, 2016. At the conclusion of the hearing, the trial court denied the motion, finding the plea offer was properly tendered to appellant prior to the plea deadline and appellant rejected the plea offer. This decision was memorialized in the record by judgment entry filed August 30, 2016.

{¶ 5} A sentencing hearing was held on September 19, 2016. By judgment entry filed September 21, 2016, the trial court sentenced appellant to nine months on

each of the breaking and entering counts, twelve months on the safecracking count, twelve months on the grand theft count, and six months on the criminal tools count, all to be served consecutively, for a total term of forty-eight months in prison.

{¶ 6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 7} "THE COURT ERRED IN NOT MERGING THE WITHIN FIVE COUNTS AT SENTENCING, SINCE THEY WERE SUBJECT TO THE LAW OF ALLIED OFFENSES OF SIMILAR IMPORT UNDER O.R.C. 2941.25."

II

{¶ 8} "THE COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES."

III

{¶ 9} "DAVID COGAR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL TO HIS DETRIMENT."

I

{¶ 10} In his first assignment of error, appellant claims the trial court erred in not merging the five counts for sentencing purposes thereby violating R.C. 2941.25. We disagree.

{¶ 11} R.C. 2941.25 governs multiple counts and states the following:

> (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.

(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.

{¶ 12} In *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, syllabus, the Supreme Court of Ohio held the following:

1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import.

2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

3. Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3)

the conduct shows that the offenses were committed with separate animus.

{¶ 13} The *Ruff* court explained at ¶ 26:

> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

{¶ 14} In the case sub judice, appellant pled guilty to two counts of breaking and entering in violation of R.C. 2911.13(A), one count of safecracking in violation of R.C. 2911.31(A), one count of grand theft in violation of R.C. 2913.02(A)(1), and one count of

possessing criminal tools in violation of R.C. 2923.24(A), which state the following, respectively:

> (A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.
>
> (A) No person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox.
>
> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent;
>
> (A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally.

{¶ 15} On December 1, 2015, appellant gained entry to the bar at the golf course by prying open a door (first breaking and entering). December 14, 2015 T. at 12. He walked around looking at things, located a safe, and left the building. *Id.* at 13. He then broke into the golf course's separate maintenance building and stole tools, including a torch (second breaking and entering). *Id.* He returned to the bar area and attempted to open the safe with the torch (safecracking) (possession of criminal tools). *Id.* He was unsuccessful. *Id.* at 14. He then pried the safe from the floor and rolled it out of the

building into a front-end loader. *Id.* Appellant stole candy, chips, peanuts, beer, a television, tools, and the safe containing $12,000 to $15,000 in cash (grand theft). *Id.* at 15-16. Appellant damaged doors, railing on a deck, and gaming machines. *Id.* at 16. Appellant did not have consent or authorization to remove the items from the premises. *Id.* at 16-17.

{¶ 16} Appellant argues the five offenses should have been merged because all of the counts occurred on the same date, involved one victim, and all shared the ultimate goal of stealing. Appellant's Brief at 7.

{¶ 17} The two counts of breaking and entering were committed on two separate, distinct buildings belonging to the golf course: the bar and the separate maintenance building. Appellant trespassed into each unoccupied structure with the purpose to commit a theft offense in each building. We find they are not allied offenses. Nor are they allied offenses with safecracking. The acts of prying open the doors to gain entry into the bar and the maintenance building were separate and distinct from his acts of trying to break into the safe. The breaking and entering was complete once appellant pried open the doors and went inside with the intent to commit a theft offense. *State v. Stevens,* 12th Dist. Fayette No. CA2015-09-020, 2017-Ohio-498. The safecracking was complete once appellant knowingly used the torch on the safe with the intent to steal its contents. *Id.* at ¶ 13 ("Thus, the initial offense of breaking and entering was complete before the separate conduct supporting the safecracking offense was undertaken").

{¶ 18} After committing the separate offenses of breaking and entering and safecracking, appellant knowingly exerted control over various items by removing them from the premises without the owner's consent or authorization, thus purposely

depriving the owner of the items. He committed all of the offenses by having under his control tools, with purpose to use them criminally. We find all of the offenses were committed separately and are of dissimilar import because the harm that resulted from each offense is separate and identifiable.

{¶ 19} Upon review, we find the trial court did not err in not merging the five counts for purposes of sentencing.

{¶ 20} Assignment of Error I is denied.

II

{¶ 21} In his second assignment of error, appellant claims the trial court erred in imposing consecutive sentences. We disagree.

{¶ 22} R.C. 2953.08 governs appeals based on felony sentencing guidelines. Subsection (G)(2) sets forth this court's standard of review as follows:

> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

{¶ 23} "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 24} R.C. 2929.14(C)(4) governs consecutive sentences and states the following:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 25} In its September 21, 2016 judgment entry on sentencing, the trial court stated the following: "The Court finds that consecutive sentences are necessary to protect the public from future crime, that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and that due to the defendant's history of criminal conduct consecutive sentences are necessary to protect the public."

{¶ 26} During the sentencing hearing held on September 19, 2016, the trial court noted appellant's presentence investigation report contained "a high ORAS score, indicating a high likelihood of reoffending. We have got a pretty significant felony history, including multiple prison sentences served over a number of years***." September 9, 2016 T. at 8-9. A review of the sealed report supports this finding.

Appellant's extensive criminal record dates back to 1987. Presentence Investigation Report at 10-15.

{¶ 27} Upon review, we find the trial court properly considered the mandates of R.C. 2929.14(C)(4) and did not err in imposing consecutive sentences.

{¶ 28} Assignment of Error II is denied.

III

{¶ 29} In his third assignment of error, appellant claims he was denied the effective assistance of counsel. We disagree.

{¶ 30} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶ 31} Appellant argues his first counsel, Attorney Budway, failed to inform him of the state's offer to plead guilty to one of the breaking and entering counts and the grand theft count and the remaining three counts would be dismissed. Appellant's Brief at 12. Instead, appellant pled guilty to all five counts.

{¶ 32} On August 29, 2016, the trial court held a hearing to review appellant's motion to withdraw his guilty plea and the circumstances of the plea offer.

{¶ 33} The parties stipulated that a plea offer was made on February 1, 2016. August 29, 2016 T. at 5. The plea offer was for appellant to plead guilty to one breaking and entering count and the grand theft count, and the remaining counts would be dismissed. *Id.* There was no agreement as to sentencing. *Id.*

{¶ 34} Appellant's retained counsel at the time, Attorney Budway, testified at the hearing. He stated he conveyed the plea offer to appellant. *Id.* at 8, 12. However, he did not recall the date; he stated he would have conveyed the offer prior to the plea deadline three weeks before trial "because it's my duty to do it as his counsel." *Id.* at 8. Attorney Budway explained appellant declined the offer "because he believes that he was innocent of these charges or in the alternative, they could not prove the charges." *Id.* at 9-10.

{¶ 35} After a recess so Attorney Budway could review his personal file and notes, Attorney Budway confirmed he met with appellant in jail on February 1, 2016, to convey the plea offer. *Id.* at 21. The meeting occurred after the pretrial wherein the offer was made. *Id.* at 22. No further witnesses were called to testify. No evidence was presented to refute Attorney Budway's testimony.

{¶ 36} Upon review, we do not find any ineffective assistance of counsel.

{¶ 37} Assignment of Error III is denied.

{¶ 38} The judgment of the Court of Common Pleas of Ashland County, Ohio is hereby affirmed.

By Wise, Earle, J.

Gwin, P.J. and

Baldwin, J. concur.

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