[Cite as *State v. McGeary*, 2009-Ohio-3175.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA3063
vs.	:	
SCOTT W. McGEARY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: David A. Sams, P.O. Box 40, West Jefferson, Ohio 43162

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney, and Richard W. Clagg, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45601.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-25-09

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Scott W. McGeary, defendant below and appellant herein, pled no contest to charges of (1) rape in violation of R.C. 2907.02; (2) kidnapping in violation of R.C. 2905.01; (3) grand theft in violation of R.C. 2913.02; and (4) having a weapon while under disability in violation of R.C. 2923.13.

{¶ 2} Appellant assigns the following error for review:

> "THE DEFENDANT-APPELLANT WAS TWICE PLACED IN JEOPARDY WHEN THE TRIAL COURT IMPOSED CONSECUTIVE SENTENCES FOR RAPE AND

KIDNAPPING."

{¶ 3} On September 16, 2007, appellant and Eugenia Corey ran some errands and when they returned home, appellant went inside as Corey stayed in the vehicle with her two-month old baby.[1] Appellant returned to the vehicle and asked Corey to assist him to find something to wrap up some guns. After Corey entered the residence, appellant grabbed her and tied her to a chair. Appellant then went outside to get the baby. When appellant returned, he untied Corey, told her to remove her clothing and raped her. After the sexual assault, appellant told Corey to drive him to Columbus. She refused. Appellant again tied Corey to a chair.

{¶ 4} The Ross County Grand Jury returned an indictment charging appellant with rape, kidnapping, grand theft and having a weapon while under disability. Appellant initially pled not guilty, but later changed his plea to "no contest." The trial court accepted his plea and found him guilty. At sentencing, the central issue was whether the rape offense and the kidnapping offense are allied offenses of similar import. After much discussion, the trial court concluded that a separate animus existed for each offense and that appellant could be sentenced on each count. The court then sentenced appellant to serve ten years in prison on the rape charge, ten years on the kidnapping charge, five years for having a weapon under disability and eighteen months for the grand theft. The court further ordered that the rape and kidnapping sentences to be served consecutively, that the grand theft and weapon sentences be served consecutively to each other but concurrent to the rape and kidnapping sentences for a total of twenty years imprisonment. This appeal followed.

---

[1] The record indicates Appellant is involved some kind of a relationship with Corey's mother.

{¶ 5} Appellant's assignment of error asserts that the rape and kidnapping offenses constitute allied offenses of similar import and that the trial court erred by sentencing appellant on both offenses. We disagree with appellant.

{¶ 6} Our analysis begins with the premise that "[w]here 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." R.C. 2941.25(A). Conversely, if "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." R.C. 2941.25(B).

{¶ 7} The Double Jeopardy Clause of the United States Constitution prohibits, inter alia, multiple punishments for the same offense. United States v. Halper (1989), 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487; Section 10, Article I of the Ohio Constitution. In State v. Brown 119 Ohio St.3d 447, 451, 2008-Ohio-4569 at paragraph 17-19, the court wrote:

> This court has recognized that R.C. 2941.25(B) demonstrates a clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of (1) offenses of dissimilar import and (2) offenses of similar import committed separately or with separate animus. Rance, 85 Ohio St.3d 636, 710 N.E.2d 699.

The court further refined the allied offense standard in State v. Cabrales 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at paragraph one of the syllabus:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses

> in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.

Additionally, courts must examine whether the Ohio General Assembly intended to serve the same societal interest in enacting the statutes and whether their violations were designed to be separately punishable. Brown.

{¶ 8} The pivotal issue in the case sub judice is whether the rape offense and the kidnaping offense are separate offenses, each with a separate animus, or whether, in the course of perpetrating rape, appellant also committed the kidnaping offense.[2] In State v. Logan (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, at the syllabus, the Ohio Supreme Court set forth the following test to make this determination with regard to kidnaping and any other felony offense:

> "In establishing whether kidnaping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
>
> "(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved

[2]The indictment alleged, inter alia, that appellant (1) engaged in sexual conduct with another and purposely compelled the victim to submit by force or threat of force in violation of R.C. 2907.02; and (2) did, by force, threat or deception restrain the victim's liberty with the purpose to engage in sexual activity against the victim's will and appellant did not release the victim unharmed in a safe place in violation of R.C. 2905.01.

> in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."

{¶ 9} Applying Logan to the case sub judice, we agree with the trial court's conclusion that the kidnaping offense was not incidental to the rape offense. Corey was restrained before the rape, so that she could not escape while appellant went to the vehicle to retrieve the baby. Corey was then untied during the rape. Additionally, Corey was again restrained after the rape. If the restraint of Corey was necessary to perpetrate the rape, then appellant would not have untied her to commit that offense, nor would he have again restrained her after he committed the rape. A separate animus existed with respect to both offenses, and the kidnaping offense was not "incidental" to the rape offense. Furthermore, the societal interests protected by the rape and kidnaping statutes differ, and the General Assembly intended to distinguish the offenses and allow separate punishments for the commission of the two crimes.

{¶ 10} Based upon the reasons stated above, we find no merit in appellant's assignment of error and it is hereby overruled. Thus, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Ross App. No. 08CA3063

Kline, P.J., concurring.

{¶ 11} I concur in judgment and opinion. I write separately to explain why I believe the rape and kidnapping offenses were committed separately under R.C. 2941.25(B).

{¶ 12} The Supreme Court of Ohio has found that a kidnapping is committed separately from a rape when the asportation was achieved through deceit or trickery. State v. Ware (1980), 63 Ohio St.2d 84. In Ware, the defendant tricked the victim into accompanying him to his home by offering to permit her to use his phone and then, once inside, laughed and said that he did not have a phone. After she did not consent to his advances, he forcibly carried her to an upstairs bedroom where he raped her. The Ware court held that "there was an act of asportation by deception which constituted kidnapping, and which was significantly independent from the asportation incidental to the rape itself." Id. at 87.

{¶ 13} Here, the facts are similar to the Ware facts. Appellant first deceived his victim. Appellant asked the victim to come inside the home to assist him in finding something to wrap up some guns. She agreed. However, once they were inside the home, appellant grabbed her and eventually raped her. Therefore, in my view, the asportation by deception, which constituted the kidnapping, was significantly independent from the asportation incidental to the rape itself. Consequently, I agree with the majority opinion that the kidnapping offense does not merge with the rape offense.

{¶ 14} Accordingly, I concur in judgment and opinion.

Harsha, J., Dissenting:

{¶ 15} I conclude that under the statutory provisions used in the indictment, the restraint or movement of the victim in this case was "merely incidental to a separate underlying crime", i.e., the rape. See *State v. Logan* (1979), 60 Ohio St.3d 126, at the syllabus. The indictment is based upon R.C. 2905.01(A)(4), which prohibits removing

another from the place where the victim is found or restraining the victim of liberty by force, threat or deception for the purpose of engaging in sexual activity against the victim's will. The initial deception and restraint in this case clearly was incidental to the plan to rape the victim. If the state wanted to punish the defendant for restraining the victim after the rape, it could have done so by using R.C. 2905.01(A)(2). That subsection prohibits kidnapping "to facilitate the commission of any felony or *flight thereafter*" (emphasis supplied). Because it did not do so, I conclude the crimes of kidnapping and rape merge under the *Cabrales* test cited by the majority. Thus, I respectfully dissent.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J,: Concurs in Judgment & Opinion with Opinion
Harsha, J.: Dissents with Dissenting Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.