

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-07-1375

Appellee

Trial Court No. CR-200503335

v.

Harold Harris, III

DECISION AND JUDGMENT

Appellant

Decided: August 14, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is a delayed appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of possession of crack cocaine and trafficking in cocaine and imposed concurrent prison terms of three years for each offense. For the reasons that follow, the judgment of the trial court is reversed and remanded for further proceedings consistent with this decision.

{¶ 2} On November 2, 2005, appellant was indicted on one count of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(e), and one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(f), felonies of the first degree. On January 5, 2006, appellant entered pleas of no contest to the lesser offenses of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(c), as well as trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(d), both felonies of the third degree. The trial court accepted appellant's pleas and found him guilty of both offenses.

{¶ 3} On January 31, 2006, the trial court sentenced appellant to three years imprisonment on each offense, to be served concurrently. On December 19, 2007, this court granted appellant's application for a delayed appeal.

{¶ 4} In the case before us, because appellant did not object to his sentence, our review of the alleged error is discretionary and limited to plain error only. Crim.R. 52(B) provides that "* * * plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the trial court." This court has held that "* * * In order to prevail on a claim governed by the plain error standard, appellant must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges." *State v. Jones*, 6th Dist. No. L-05-1101, 2006-Ohio-2351, ¶ 72. (Citations omitted.)

{¶ 5} Appellant sets forth a single assignment of error:

{¶ 6} "Assignment of Error no. 1

{¶ 7} "The trial court erred when it found Mr. Harris guilty of trafficking in cocaine, in violation of R.C. § 2925.03(A)(2), and possession of crack cocaine, in violation of R.C. 2925.11(A)."

{¶ 8} Appellant argues that possession of crack cocaine and trafficking in cocaine are allied offenses of similar import and that the trial court erred by finding him guilty of both offenses and sentencing him for each offense when he had in fact committed only one act. The state of Ohio agrees that the trial court committed plain error by imposing multiple sentences for allied offenses of similar import, even though the sentences were ordered to run concurrently.

{¶ 9} R.C. 2941.25(A) provides:

{¶ 10} "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."

{¶ 11} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶¶ 30, 31, the Supreme Court of Ohio held as follows:

{¶ 12} "In order to ship a controlled substance, deliver it, distribute it, or prepare it for shipping, etc., the offender must 'have control over' it. R.C. 2925.01(K) (defining 'possession'). Thus, 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.

{¶ 13} "Next we proceed to the second step of the analysis, in which we must determine whether Cabrales committed these offenses with a separate animus under R.C. 2941.25(B). Clearly, Cabrales trafficked in and possessed the marijuana with a single animus: to sell it. Therefore, he cannot be convicted of both offenses."

{¶ 14} Upon review of the record, it is clear that appellant committed the two offenses with the same animus. Therefore, based on the foregoing, this court finds that the trial court committed plain error. Because trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of the same controlled substance under R.C. 2925.11(A) are allied offenses of similar import, and appellant committed the offenses with a single animus, he should have been convicted of only one of the charged offenses and sentenced on only one count. Accordingly, appellant's sole assignment of error is well-taken.

{¶ 15} Upon consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This cause is remanded for the trial court to merge the two offenses so that appellant is convicted and sentenced on only one count. Costs of this appeal are assessed to appellee state of Ohio pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.