[Cite as *State v. Bonner*, 2010-Ohio-2885.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93168 and 93176

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYRELL BONNER

DEFENDANT-APPELLANT

JUDGMENT:
APPEAL NO. 93168: APPEAL DISMISSED;
APPEAL NO. 93176: SENTENCE REVERSED
AND CASE REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-492588 and CR-511900

BEFORE: Rocco, P.J., Blackmon, J., and Stewart, J.
RELEASED: June 24, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting 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).

KENNETH A. ROCCO, P.J.:

{¶ 1} In these consolidated appeals, defendant-appellant Tyrell Bonner challenges (1) his convictions for aggravated robbery and drug possession following a jury trial (Appeal No. 93168), and (2) the sentences imposed based upon his plea of guilty to one count of aggravated robbery and one count of kidnapping, with firearm specifications attached to both counts (Appeal No. 93176). Although appellant has not assigned any error to the convictions and sentences imposed in the case underlying Appeal No. 93168, we must nevertheless dismiss that appeal for lack of a final appealable order. In Appeal No. 93176, we find the court erred by sentencing appellant on the firearm specifications attached to both charges. Therefore, we reverse the sentence imposed and remand for resentencing in accordance with the parties' plea agreement.

{¶ 2} These two appeals were consolidated for review, but we address them separately here for the sake of clarity.

Appeal No. 93168.

{¶ 3} Appellant was charged in three counts of a four-count indictment filed February 22, 2007. He was charged with aggravated burglary with a firearm specification, aggravated robbery with firearm specifications, and drug trafficking. The case was tried to a jury. At the close of the state's case, the court granted the appellant's motion to dismiss the aggravated

burglary charge and the firearm specifications attached to the aggravated robbery charge. The jury found the appellant guilty of aggravated robbery and of drug possession, a lesser included misdemeanor offense under the drug trafficking charge. At the sentencing hearing, however, the court orally sentenced the appellant as follows:

> "THE COURT: And the Court will, in 492588-B, as in boy, sentence Mr. Bonner on the aggravated robbery charge, 2911.01, that he was convicted of by a jury, to a term of incarceration of three – that one and three-year gun specifications do merge, three years on the gun specification to be served prior to and consecutive with the term of incarceration of three years on the predicate offense, for a total of six years on that docket. There is no jail time mandated for a minor [sic] misdemeanor. In light of the Defendant's indigency, the Court will not impose the mandatory fine in that docket."

{¶ 4} The judgment entry journalized by the court on October 10, 2008 likewise stated that the jury had found appellant guilty of aggravated robbery with firearm specifications and drug possession, and sentenced appellant to three years on the firearm specifications to be served prior and consecutive to the sentence on the aggravated robbery charge, for a total of six years' imprisonment. No sentence was entered on the misdemeanor drug possession charge. Appellant filed a notice of appeal from this judgment on November 7, 2008. However, this court dismissed the appeal, Appeal No. 92396, for lack of a final appealable order.

{¶ 5} Appellant filed a motion that asked the trial court to correct its judgment entry. The court entered the following judgment on March 31, 2009, "nunc pro tunc" as and for October 10, 2008:

> "On a former day, this court granted defendant's motion pursuant to Criminal Rule 29 to dismiss Count 1 charging burglary under R.C. 2911.12 and the firearm specifications, 1 year (2941.141) and 3 years (2941.145) as charged in Count 2 of the indictment.
> "The jury thereafter deliberated and returned a verdict of guilty of aggravated robbery 2911.01 fel-1 as charged in count 2 of the indictment.
> "The jury returned a verdict of not guilty with respect to drug trafficking under 2925.03. Following deliberations as to count 4, the jury returned a verdict of guilty of drug possession 2925.11 m-1 the lesser included offense under count 4 of the indictment.
> "* * *
> "The court imposes a prison sentence at the Lorain Correctional Institution of 3 years on the aggravated robbery charged in count 2.
> "Credit for time served.
> "Post-release control is part of this prison sentence for 5 years mandatory for the above felony(s) under 2967.28."

{¶ 6} Appellant filed his notice of appeal from this judgment entry on April 23, 2009.

{¶ 7} On November 13, 2009, this court sua sponte remanded the matter to the common pleas court "for correction pursuant to App.R. 9(E)," noting that the judgment entry "contains no disposition of the one year firearm specifications associated with counts one and two of the indictment." The trial court then entered the following order:

> "Pursuant to the order of the court of appeals dated 11-13-2009, the entry dated 10-10-2008 is corrected to read:

> On a former day of court, this court granted defendant's motion pursuant to Criminal Rule 29 to dismiss count 1 charging burglary under 2911.12, and the firearm specifications, 1 year (2941.141) as charged in count 1 and count 2 of the indictment, and 3 years (2941.145) as charged in count 2 of the indictment.
> "On a former day of court the jury returned a verdict of guilty of aggravated robbery 2911.01-f1 with firearm specification - 1 year (2941.141), firearm specification - 3 years (2941.145) as charged in count(s) 2 of the indictment.
> "On a former day of court, the jury returned a verdict of guilty of drug possession 2925.11 - m1 the lesser included offense under count(s) 4 of the indictment.
> "* * *
> "The court imposes a prison sentence at the Lorain Correctional Institution of 6 year(s). 3 years on the firearm spec to be served prior to and consecutive with 3 years on the base charge on count 2, for a total of 6 years.
> "Credit for time served.
> "Post release control is part of this prison sentence for 5 years mandatory for the above felony(s) under R.C. 2967.28.
> "* * *."

{¶ 8} Once again, we must dismiss this appeal for lack of a final appealable order. The trial court failed to enter any sentence with respect to the misdemeanor drug possession count. "[*State v.*] *Baker*[, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163] requires a full resolution of those counts for which there were convictions." *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 93814, 2010-Ohio-1066.

{¶ 9} Although not relevant to the disposition of this appeal, we also note that both the sentence the court orally imposed and the sentence imposed in the court's most recent entry on the aggravated robbery charge are inconsistent with the record, which indicates that the court dismissed the

firearms specifications attached to the aggravated robbery charge.

{¶ 10} Appeal dismissed.

Appeal No. 93176.

{¶ 11} Appellant was charged with one count of aggravated robbery and four counts of kidnapping in an indictment filed June 10, 2008. Each count carried one- and three-year firearm specifications. The state amended the first kidnapping count to list all four of the victims in a single count and agreed to dismiss the other three kidnapping charges. In exchange, appellant agreed to plead guilty to the aggravated robbery charge and the amended kidnapping charge. The parties further agreed that the offenses were not allied and would not merge, and agreed "that this must have a nine year minimum sentence served consecutive to any sentence in" the other case. The court accepted the appellant's plea.

{¶ 12} The court then sentenced appellant to three years' imprisonment on the firearm specification with respect to the aggravated robbery charge, to be served prior and consecutive to a three year sentence on the base offense. The court further sentenced appellant to a term of three years' imprisonment on the firearm specification regarding the kidnapping charge, to be served prior and consecutive to a three year term on the base offense. The court ordered that the sentences on the kidnapping and aggravated robbery charges should be served concurrently, resulting in a total sentence of nine

years' imprisonment.

{¶ 13} Appellant now argues that the court's imposition of consecutive sentences on the firearm specifications was contrary to law because the charges arose from a single incident. He does not take exception to the length of his total sentence or plea upon which it was based; he challenges only its structure.

{¶ 14} This challenge is based on R.C. 2929.14(D)(1)(b). Appellant asserts that, under this statute, the court may not impose more than one prison term on an offender for firearm specifications for felonies that were committed as part of the same "act or transaction."[1] The Supreme Court of Ohio has defined "transaction" as "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills* (1994), 69 Ohio St.3d 690, 691, 1994-Ohio-417, 635 N.E.2d 370.

{¶ 15} We note, moreover, that the question whether two offenses were committed as part of the same act or transaction is to be distinguished from

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[1]A significant exception to this general rule was enacted effective September 9, 2008, after the offense was committed and after the indictment was filed, but before sentence was imposed in this case. This exception now requires that, when a defendant is convicted of two or more felonies with firearm specifications, at least one of which was aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, the court must impose prison terms for each of the two most serious firearm specifications of which the defendant is convicted, and may impose sentences for any other remaining specifications. See R.C. 2929.14(D)(1)(g). If the amended statute applied here, the court would have been required to impose the sentence it imposed. The state, however, concedes that the appellant correctly states the law applicable in this case.

the question whether the two offenses are allied. "[C]ase law pertaining to allied offenses does not apply to specification issues. Firearm specifications are not in and of themselves offenses, they are specifications attached to various offenses that enhance the penalty. The single act or transaction analysis is the appropriate test for determining the merger of specifications." *State v. Mallet* (Aug. 17, 2000), Cuyahoga App. No. 76608, citing *State v. Inglesias-Rodriquez* (March 16, 2000), Cuyahoga App. No. 76028. The fact that the parties agreed that the aggravated robbery and kidnapping charges were not allied does not affect the question whether the offenses were committed as part of a single act or transaction.

{¶ 16} Appellant concedes that "[t]he record of this case's underlying facts is admittedly slim." However, the language of the amended indictment (to which appellant pleaded guilty) and the bill of particulars compels us to agree with him. Appellant pleaded guilty to the aggravated robbery of Bedford Town Beverage and/or R. Bains, and the kidnapping of R. Bains, Leonard Pappas, Terry Rekowski, and Grace Somody "for the purpose of facilitating the commission of a felony, to wit: Aggravated Robbery." The bill of particulars makes it clear that the kidnappings occurred "on the same date, at the same time, and at the same location" as the aggravated robbery, and in furtherance of the aggravated robbery. Indeed, the victim of the aggravated robbery is also one of the victims of the kidnapping charge.

These offenses were clearly part of a single transaction. Therefore, we must reverse the sentence imposed and remand for resentencing in accordance with the plea agreement.

{¶ 17} Sentence reversed and remanded for resentencing.

{¶ 18} Appeal No. 93168 is dismissed.

{¶ 19} With respect to Appeal No. 93176, the sentence is reversed and this cause is remanded for resentencing consistent with this opinion.

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.

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

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
MELODY J. STEWART, J., CONCUR