

[Cite as *State v. Workman*, 2010-Ohio-4891.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93998

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES WORKMAN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515449

BEFORE: Rocco, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: October 7, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant James M. Workman appeals from his convictions after a jury found him guilty of felonious assault and kidnapping, his trial counsel requested “merger” of the convictions pursuant to R.C. 2941.25(A),¹ the state stipulated to their merger, the state elected to proceed on his conviction for kidnapping, and the trial court imposed sentence for that conviction.

¹R.C. 2941.25(A) provides: “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.”

{¶ 2} Workman presents one assignment of error. He now asserts that, on the facts of this case, the trial court should not have permitted the state to elect the more serious offense for the purposes of merger.

{¶ 3} This court disagrees. Consequently, Workman's convictions and sentence are affirmed.

{¶ 4} According to the testimony presented at Workman's trial, the victim lived at an apartment building in Parma Heights, Ohio. In the early morning of September 7, 2008, after spending most of the evening at a wedding reception and then a bar, she received an invitation from neighbor Lisa Gross and Workman to go to another woman's apartment "to have a beer."

{¶ 5} The victim accepted; she accompanied Gross and Workman down the hall. While the victim was there, she talked with Workman. During the conversation, she offered to lend him forty dollars, believing he needed it for his children. The victim told Workman to follow her back to her apartment.

{¶ 6} After she handed Workman the cash, the victim went to her bathroom. Upon emerging, she heard Workman making a telephone call; he seemed to be "buy[ing] more crack cocaine." The victim became irritated, informing him that she did not "lend him that money for that." She demanded he return her loan.

{¶ 7} Workman ignored the victim and returned to Gross's apartment. The victim followed him. When she tugged at his sleeve to gain his attention,

Workman “picked [her] up and threw [her] down” onto the floor, then began to “punch” her “time after time after time” in the face.

{¶ 8} The victim indicated that Workman straddled her with his legs as he beat her. Despite her efforts to defend herself, he managed to “yank[] her pantyhose down,” and told her “he could do whatever he wanted * * *.” She stated she “was bleeding everywhere,” her left eye “was so badly hit that it was immediately swollen shut,” her mouth filled with blood, and Workman broke her nose.

{¶ 9} The victim noticed that Gross’s three children were observing this from the couch; they seemed “frozen” in horror at the scene unfolding. The victim pleaded for help until Gross’s six-year old son “picked up a kitchen chair and threw it at” Workman. At this, Workman turned on the child. The victim managed to rise and struck at Workman “so that he would let the little boy go.”

{¶ 10} Eventually, her neighbor ran into the apartment to see the victim “laying on the floor,” bloodied, with Workman “standing there.” Workman then “took off out of the front door.” The neighbor called 911.

{¶ 11} After the police arrived, the victim was transported to the hospital, where she was treated for her injuries. Hospital personnel also took photographs of her injuries.

{¶ 12} Workman subsequently was indicted in this case on four counts, charged with attempted rape, felonious assault, kidnapping, and burglary. After

hearing the evidence, the jury acquitted Workman of two of the charges, but found him guilty of felonious assault and kidnapping.

{¶ 13} The record reflects that Workman's defense counsel filed a motion to "merge" the two convictions for purposes of sentencing. When the trial court called the case for sentencing, the prosecutor agreed merger was appropriate "based on the evidence that was introduced at trial." The trial court entered a "stipulation" to that effect. Defense counsel then indicated as follows:

{¶ 14} "I would only ask the prosecutor to state on the record which charge he wishes to proceed on in this case. That's the option of the prosecutor whether he wants it to be the felonious assault or the kidnapping."

{¶ 15} The prosecutor informed the trial court that, "while incorporat[ing] the facts from the felonious assault," the state would "proceed on the kidnapping." The trial court eventually sentenced Workman to a four-year prison term for his convictions.

{¶ 16} Workman presents one assignment of error as follows:

"I. The trial court erred in offering [sic] the prosecution an election and in failing to vacate the kidnapping charge as an allied offense of similar import."

{¶ 17} Workman argues that, despite his trial counsel's concession that the state retained the prerogative to elect which of his convictions to pursue at sentencing, the trial court had the option to override that election. He asserts the

facts of this case warranted such an action, and that his conviction for felonious assault was the appropriate choice.²

{¶ 18} This court disagrees. At paragraph one of the syllabus, the Ohio Supreme Court held in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182 that, “The state retains the right to elect which allied offense to pursue on sentencing * * *.” The supreme court provided the additional admonishment that the court’s only role in the matter is to effectuate the provisions of R.C. 2941.25(A).

{¶ 19} In pertinent part, the *Whitfield* court stated:

{¶ 20} “A defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. (Citations omitted). In fact, our precedent, including cumulative-punishment cases that predate the 1972 enactment of R.C. 2941.25(A), makes clear that a defendant may be found guilty of allied offenses but not sentenced on them. * * *

{¶ 21} “In cases in which the imposition of multiple punishments is at issue, R.C. 2941.25(A)’s mandate that a defendant may be ‘convicted’ of only one allied

² In presenting his argument with respect to his assignment of error, Workman fails to address either whether his trial counsel waived the issue for purposes of appeal, or whether plain error occurred in the trial court. Under these circumstances, this court does not find it appropriate to determine whether the elements of the crimes of felonious assault and kidnapping always “align” for purposes of R.C. 2941.25, as Workman urges this court to do in his appellate brief. But, see, *State v. Wilson*, Cuyahoga App. No. 91971, 2010-Ohio-1196, ¶94-96; cf., *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342.

offense is a protection against multiple sentences rather than multiple convictions. * * * Thus, to ensure that there are not improper cumulative punishments for allied offenses, courts must be cognizant that R.C. 2941.25(A) requires that ‘the trial court *effects* the merger at sentencing.’ (Citations omitted).

{¶ 22} “In this case, the court of appeals properly corrected the trial court’s error in sentencing Whitfield for the allied offenses of drug possession and drug trafficking. But the court of appeals erred in ordering that this case be ‘remanded to the trial court with instructions to vacate the conviction and sentence for drug possession only.’ * * *

{¶ 23} “The General Assembly has made clear that it is the *state* that chooses which of the allied offenses to pursue at sentencing, and it may choose *any* of the allied offenses. (Citations omitted). In conferring that right on the state, the legislature did not specify when the state must make that election. The Legislative Service summary states that ‘the prosecution *sooner or later* must elect as to which offense it wishes to pursue’ [emphasis sic] * * *, thereby implying that the state has latitude in determining when to decide which offense to pursue at sentencing.

{¶ 24} “In light of the legislative history, we concluded previously that the statute does not require the state to make its election prior to trial. [Citations omitted.] The state therefore retains the right to elect which allied offense to pursue on sentencing * * *.

{¶ 25} “The court of appeals *impermissibly intruded on the state’s right to elect* by directing the trial court to vacate the drug-possession conviction. We reverse that portion of the court of appeals’ decision in this case and remand the cause to the trial court for a new sentencing hearing, at which the state must elect the offense for which Whitfield should be punished.

{¶ 26} “When confronted with allied offenses, courts must be guided by *two* principles: that R.C. 2941.25(A) prohibits ‘convictions’ for allied offenses and that *the state controls which* of the two allied offenses the defendant will be sentenced on.

{¶ 27} “When the state elects which of the two allied offenses to seek sentencing for, *the court must accept the state’s choice* and merge the crimes into a single conviction for sentencing, [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 41, and impose a sentence that is appropriate for the merged offense. * * * ” (Emphasis added.) *Whitfield*, at ¶17-24.

{¶ 28} Based upon the foregoing, this court cannot intrude upon the decision and the order of sentence made in this case, and must overrule Workman’s assignment of error.

{¶ 29} Workman’s convictions and sentence, accordingly, are affirmed.

It is ordered that appellee recover from appellant 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 conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR