

[Cite as *State v. Priest*, 2018-Ohio-5355.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106947

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TARRIS PRIEST

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-618547-A

BEFORE: Kilbane, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 27, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Tarris Priest (“Priest”), appeals his abduction and domestic violence sentence. For the reasons set forth below, we vacate his sentence on these counts and remand for a resentencing hearing.

{¶2} In June 2017, Priest was charged in an 11-count indictment. Count 1 charged him with aggravated burglary. Count 2 charged him with aggravated robbery. Counts 3-4 charged him with robbery. Count 5 charged him with felonious assault. Count 6 charged him with kidnapping. Count 7 charged him with domestic violence and contained a furthermore clause of prior convictions.¹ Counts 8-11 charged him with child endangering.² The charges arose from an incident that took place on June 18, 2017.

{¶3} On that day, Priest went to V.P.’s home to discuss their marriage. Priest and V.P. had a tumultuous relationship. Priest and V.P. began to argue, and V.P. asked Priest to leave.

¹The indictment states that Priest has been previously convicted of three domestic violence offenses, each involving the same victim as in the instant case.

²Counts 1-7 each carried one- and three-year firearm specifications.

Priest refused, and their verbal argument turned into a physical one. V.P.'s four children were present at this time, one of whom called the police.³ Priest began to punch V.P. Their encounter continued as V.P. walked into the adjacent room and retrieved her handgun. At that point, Priest began choking V.P. on the couch. Priest attempted to take the gun from her and during their struggle the gun discharged, shooting Priest.

{¶4} Prior to the commencement of trial on January 22, 2018, Priest pled guilty to amended counts of abduction (Count 6), domestic violence (Count 7) with the furthermore clause, and child endangering. Pursuant to the plea agreement, the firearm specifications were deleted, and the remaining counts were nolle. The court referred Priest to the probation department for a presentence investigation report (“PSI”) prior to sentencing.

{¶5} In February 2018, the trial court held a sentencing hearing. The court heard from defense counsel, Priest, V.P., V.P.'s daughter, and the state. It appears from the record, there may have been an off-the-record discussion between defense counsel and the state about the merger of the domestic violence and abduction charges. At sentencing, however, defense counsel did not raise the issue and did not object to the state's position that the offenses do not merge. The state argued that the charges should not merge for purposes of sentencing because they were separate incidents. The prosecutor stated:

Your Honor, if you are clear about the police report and the description of the encounter between the two, there was an incident that occurred while they were standing. Then there was a separate incident that occurred on the couch. So there's some punching and hitting while they are standing, and then there's a separate encounter. It is continuous with a break in time where [V.P.] ends up on the couch and [Priest's] choking her.

As mentioned, I listened to those 9-1-1 calls. You hear [V.P.'s] daughter describing to the dispatcher that he's hitting my mom. You hear about the little

³Priest is the father of two of V.P.'s children.

boy going down the stairs and she, the daughter, going to retrieve him, because she didn't want that to be seen.

She then describes her mother being choked on the couch. So I do argue that I think that those are different incidents, that they have a different animus and that they are separate offenses.

{¶6} The trial court found that the offenses do not merge and sentenced Priest to 36 months in prison on the domestic violence charge (Count 7), 12 months in prison on the abduction charge (Count 6), and 180 days on the endangering children count. The court ordered the sentences for domestic violence and abduction be served consecutive to each other and concurrent to the child endangering count for a total of 48 months in prison.

{¶7} Priest now appeals, raising the following four assignments of error, which shall be discussed together where appropriate.

Assignment of Error One

The trial court erred in failing to merge [Priest's] abduction and domestic violence convictions as allied offenses of similar import.

Assignment of Error Two

The trial court's imposition of consecutive sentences is clearly and convincingly not supported by the record and is therefore contrary to law.

Assignment of Error Three

The trial court's imposition of the maximum sentence for [Priest's] domestic violence conviction is clearly and convincingly not supported by the record and is therefore contrary to law.

Assignment of Error Four

[Priest] was denied the effective assistance of counsel when trial counsel failed to clearly object on the record to the trial court's findings that [Priest's] domestic violence and abduction offenses were not allied offenses of similar import.

Merger and Ineffective Assistance of Counsel

{¶8} In the first and fourth assignments of error, Priest argues the trial court erred when it failed to merge the abduction and domestic violence counts because they are allied offenses of similar import, and defense counsel was ineffective for failing to argue that these counts should have merged for purposes of sentencing.

{¶9} In order to establish a claim of ineffective assistance of counsel, Priest must establish that the performance of his counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶10} In *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, the Ohio Supreme Court held that

[a]n accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice.

Id. at ¶ 3. The court further explained that an

accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; and, absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

Id.

{¶11} Under R.C. 2941.25(A), when the defendant's conduct constitutes two or more allied offenses of similar import, the defendant may be convicted of only one offense. A defendant charged with multiple offenses may be convicted of all the offenses if (1) the defendant's conduct constitutes offenses of dissimilar import, i.e., each offense caused separate identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d

114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 13. Therefore, to determine whether offenses are allied, courts must consider the defendant's conduct, the animus, and the import. *Id.* at paragraph one of the syllabus. The *Ruff* court clarified the test a trial court and a reviewing court must employ in determining whether offenses are allied offenses that merge into a single conviction, stating:

When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).

A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

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.

Id. at ¶ 24-26.

{¶12} In determining if two or more offenses were committed with a separate animus this court in *State v. Bailey*, 8th Dist. Cuyahoga No. 100993, 2014-Ohio-4684, stated:

[T]he issue of whether two offenses are allied depends not only on whether the two crimes were committed in the same act, but also with a single state of mind.

The Ohio Supreme Court has defined the term “animus” to mean “purpose or, more properly, immediate motive.” *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Because animus is often difficult to prove directly, it may be inferred from the surrounding circumstances. When “an individual’s immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.” *Id.*

Thus, when determining whether two offenses were committed with a separate animus, the court must consider (1) whether the first offense was merely incidental to the second offense or whether the defendant’s conduct in the first offense demonstrated a significance independent of the second, and (2) whether the defendant’s conduct in the first offense subjected the victim to a substantial increase in the risk of harm apart from that involved in the second offense. *State v. Shields*, 1st Dist. Hamilton No. C-100362, 2011-Ohio-1912, ¶ 17.

Id. at ¶ 34-35.

{¶13} In *Logan*, the Ohio Supreme Court provided the following guidelines for determining whether kidnapping and another offense are allied offenses that should merge prior to sentencing. The court stated:

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

Id. at syllabus.

{¶14} Applying these guidelines, the *Logan* court held that the offender’s conduct in forcing the victim into an alley before raping her at knife point was committed without a separate

animus. The court found that the movement was slight, the detention brief and the victim was released immediately after the commission of the underlying crime, compelling the conclusion that the kidnapping was incidental to the rape. *Id.* at 135.

{¶15} Here, the verbal argument between Priest and V.P. turned into a physical one when Priest began to punch V.P. Their encounter continued as V.P. walked into the adjacent room and retrieved her handgun. At that point, Priest began choking V.P. on the couch. It appears from the record that this incident occurred immediately following the first incident. Indeed, the prosecutor states the encounter “was continuous with a break in time where [V.P.] ends up on the couch and [Priest] is choking her.”

{¶16} The record does not demonstrate that Priest forced V.P. into the adjacent room when she went to get her gun. From the record, the restraint of V.P. on the couch was merely incidental to the choking, which was a continuation of the domestic violence. Thus, there is no evidence of a separate animus for the abduction in Count 6 from the domestic violence in Count 7. The abduction did not result in separate, identifiable harm and it was not committed separately from the domestic violence. As a result, these counts constitute allied offenses and should merge for purposes of sentencing.

{¶17} Based on the foregoing, defense court counsel was deficient in this instance for failing to seek the merger of the domestic violence and abduction counts and this deficiency prejudiced Priest because the record establishes that the offenses are allied offenses.

{¶18} Accordingly, the first and fourth assignments of error are sustained.

{¶19} In the second assignment of error, Priest argues the trial court erred when it imposed a consecutive sentence. In the third assignment of error, Priest argues the trial court erred by sentencing him to the maximum of 36 months in prison on his domestic violence

conviction. Our disposition of the first and fourth assignments of error, however, render these assignments of error moot. App.R. 12(A)(1)(c).

{¶20} Judgment is vacated with regard to Count 6 (abduction) and Count 7 (domestic violence). The matter is remanded to the trial court for the state to be provided the opportunity to elect which count it wishes for Priest to be resentenced following the merger of the abduction and domestic violence counts.

It is ordered that appellant recover of 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR