

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0003
SETH DEAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 98 CR 0110.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Aaron T. Baker, 2000 The Illuminating Building, 55 Public Square, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Seth Dean, appeals from the Judgment Entry of the Portage County Court of Common Pleas, resentencing him to a seven-year term of imprisonment for the merged charges of Aggravated Robbery and Felonious Assault and to an additional term of seven years for the charge of Kidnapping. These seven-year terms were to be served consecutively.

{¶2} For the following reasons, we affirm the decision of the lower court.

{¶3} On April 9, 1998, Joseph Schossler was at a laundromat in Kent, Ohio, and began speaking with Dean. Dean informed Schossler of a party that was occurring and invited Schossler to attend. Upon Dean's request, Schossler drove Dean to a bar in Lake Milton and picked up Dean's friend, Matthew Chapman. The three men then drove to a residence to pick up another one of Dean's friends. At this residence, the three men exited the car. Outside of the car, Dean and Chapman began beating Schossler with objects described as either barbells or pipes. Dean and Chapman then left Schossler lying on the ground, took Schossler's car, and drove away. Schossler sustained serious injuries, including losing several teeth and having a severed finger.

{¶4} On April 16, 1998, Dean was indicted by a Portage County Grand Jury on one count of Aggravated Robbery, in violation of R.C. 2911.01(A)(3); one count of Felonious Assault, in violation of R.C. 2903.11(A)(1) and/or (2); and one count of Kidnapping, in violation of R.C. 2905.01(A)(2) and/or (3).

{¶5} After Dean's counsel entered into Crim.R. 11(F) negotiations with the state, Dean agreed to plead guilty to all three charges. He also agreed to testify against Chapman. On June 8, 1998, a plea hearing was held and Dean entered a plea of guilty, which the trial court accepted.

{¶6} Dean was sentenced on September 8, 1998. The court found that the Aggravated Robbery and Felonious Assault charges were allied offenses of similar import, merged them, and sentenced Dean to seven years imprisonment for Aggravated Robbery. The Kidnapping charge was not merged with the Aggravated Robbery charge and Dean was sentenced to seven years of imprisonment for Kidnapping, to run

consecutive with the Aggravated Robbery sentence. The court did not include in its Judgment Entry any discussion of mandatory postrelease control.

{¶7} Dean did not appeal his sentence. On December 30, 2008, Dean filed a pro se motion for resentencing, which was denied by the trial court.

{¶8} On January 30, 2009, Dean's attorney, Aaron Baker, filed a motion for resentencing, based upon the premise that the Kidnapping charge should have merged with the Aggravated Robbery charge. On March 10, 2009, the court reimposed the original sentence of seven years imprisonment for Aggravated Robbery and seven years imprisonment for Kidnapping, to run concurrently.

{¶9} Dean filed an appeal with this court on April 9, 2009, appealing the resentencing. He argued that Aggravated Robbery and Kidnapping are allied offenses and should have merged for the purpose of sentencing. This court, in *State v. Dean*, 11th Dist. No. 2009-P-0023, 2009-Ohio-5900, found that the trial court failed to comport with the requirements of R.C. 2929.191. This court stated that “[w]hen resentencing a defendant for failure to include notice of mandatory postrelease control at the original sentencing hearing and in the original judgment entry of sentence, a trial court must include notice of the length of that term.” *Id.* at ¶14. As the trial court failed to do so, Dean's sentence was held to be void another resentencing was ordered. Since the sentence was void on other grounds, this court did not address Dean's assignment of error, which alleged that the trial court erred in failing to merge the Aggravated Robbery and Kidnapping charges.

{¶10} The trial court held a second resentencing hearing on December 7, 2009. The court again merged the charges of Aggravated Robbery and Felonious Assault, but

found that the Aggravated Robbery and Kidnapping charges should not merge. Dean was again sentenced to two consecutive seven-year sentences. At this hearing, the court informed Dean of the mandatory five years postrelease control.

{¶11} Dean timely appeals and raises the following assignment of error:

{¶12} “The trial court erred and violated appellant’s Fifth Amendment right to be free from Double Jeopardy when it ordered separate and consecutive sentences for allied offenses of similar import, and thus, the sentence imposed by the trial court is contrary to law, illegal, and is an abuse of discretion.”

{¶13} “[A]ppellate courts must apply a two-step approach when reviewing a felony sentence. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.” *State v. Lemons*, 11th Dist. No. 2009-T-0032, 2010-Ohio-3807, at ¶67, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4. An abuse of discretion is “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶14} Dean argues that the trial court incorrectly applied R.C. 2941.25 by failing to find that the Aggravated Robbery and Kidnapping charges are allied offenses. He also contends that the crimes were not committed with a separate animus and constituted “one fluid action.” Therefore, Dean argues that the court improperly failed to

merge the Aggravated Robbery and Kidnapping charges and he should not have been given two consecutive seven-year sentences.

{¶15} The State asserts that the Robbery and Kidnapping were two distinct acts, each with its own separate animus. Therefore, the State contends that the court did not err in its resentencing of Dean.

{¶16} Following the *Kalish* two-step test for reviewing sentencing, we must first consider whether the trial court's resentencing was "clearly and convincingly contrary to law." In its December 9, 2010 Judgment Entry, the court stated that it considered the appropriate evidence and informed Dean of the required five years of postrelease control. Additionally, Dean's sentence was within the permissible range for the crimes of Aggravated Robbery and Kidnapping. The court did not make any clear errors in resentencing Dean. Therefore, we cannot conclude that the trial court's sentence was clearly and convincingly contrary to law.

{¶17} We must next consider the second prong of *Kalish*, whether the trial court abused its discretion in imposing its sentence on Dean. In doing so, we must determine whether the court acted properly when not merging the Aggravated Robbery and Kidnapping charges for the purpose of sentencing.

{¶18} "The double jeopardy clauses of both the United States and Ohio Constitutions protect 'an individual against successive punishments as well as successive prosecutions for the same offense.' *State v. Moore* (1996), 110 Ohio App.3d 649, 652 (citations omitted). 'Ohio's allied offenses statute, R.C. 2941.25, protects against multiple punishments for the same criminal conduct in violation of the

Double Jeopardy Clauses of the United States and Ohio Constitutions.’ *Id.* at 653.”
State v. Lowery, 11th Dist. No. 2007-T-0085, 2008-Ohio-1896, at ¶11.

{¶19} R.C. 2941.25 provides:

{¶20} “(A) 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.

“(B) Where 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.”

{¶21} The Ohio Supreme Court “has long followed a two-tiered test to determine whether two offenses constitute allied offenses of similar import.” *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶18, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶14. “In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant’s *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.” *Cabrales*, 2008-Ohio-1625, at ¶14 (emphasis sic.), quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶22} “In determining whether offenses are allied offenses of similar import ***, 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.” *State v. Love*, 11th Dist. No. 2009-L-040, 2009-Ohio-5216, at ¶30, quoting *Cabrales*, 2008-Ohio-1625, at paragraph one of the syllabus.

{¶23} Aggravated Robbery and Kidnapping are “so similar that the commission of one offense will necessarily result in the commission of the other.” *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, at ¶21, quoting *Cabrales*, 2008-Ohio-1625, at paragraph one of the syllabus. Displaying or using a deadly weapon during a Theft offense, as required by R.C. 2911.01(A)(1) for the commission of Aggravated Robbery, necessarily causes the restraint of the liberty of another, and therefore, constitutes Kidnapping, as the victim would not feel able to leave. *Id.* Aggravated Robbery and Kidnapping “meet the test for allied offenses as it was refined by *Cabrales*.” *Id.* See *State v. Fears* (1999), 86 Ohio St.3d 329, 344 (holding that Aggravated Robbery and Kidnapping are allied offenses); *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶202, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198, fn.29 (“kidnapping is implicit within every aggravated robbery”).

{¶24} It is important to note that the *Winn* Court compared Aggravated Robbery with Kidnapping under R.C. 2905.01(A)(2), while Dean pleaded guilty to Kidnapping under R.C. 2905.01(A)(2) and/or (3). Therefore, although the *Winn* Court’s analysis is

relevant to determining whether the offenses are allied, we must also consider and compare the elements of this crime to determine if Aggravated Robbery and Kidnapping in this case are allied offenses. See *Winn*, 2009-Ohio-1059, at ¶11.

{¶25} Regarding the offense of Kidnapping, R.C. 2905.01 provides, in pertinent part: “(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: *** (2) To facilitate the commission of any felony or flight thereafter; (3) To terrorize, or to inflict serious physical harm on the victim or another.”

{¶26} R.C. 2911.01 defines Aggravated Robbery as follows: “(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: *** (3) Inflict, or attempt to inflict, serious physical harm on another.”

{¶27} Here, the elements to compare are, for Kidnapping, restraining another’s liberty by force, threat or deception to either facilitate a felony or to terrorize or inflict serious physical harm, and for Aggravated Robbery, inflicting serious physical harm while committing a Theft offense. The elements of these offenses are similar and the commission of one of these crimes involves the commission of the other. To commit a Theft offense while inflicting serious physical harm on another involves restraint and the potential infliction of serious physical harm, as noted by the *Winn* Court.

{¶28} Therefore, Kidnapping under R.C. 2905.01(A)(2) or (3) and Aggravated Robbery under R.C. 2911.01(A)(3) are allied offenses of similar import, pursuant to R.C. 2941.25(A).

{¶29} Although the offenses are allied offenses of similar import, we must still determine whether the offenses have a separate animus, pursuant to R.C. 2941.25(B). If two offenses are allied and of similar import pursuant to section (A), but were committed separately with a separate animus under section (B), then the crimes do not merge and the trial court did not err in its resentencing. *Cabrales*, 2008-Ohio-1625, at ¶14; *State v. Yodice*, 11th Dist. No. 2001-L-155, 2002-Ohio-7344, at ¶24.

{¶30} The Ohio Supreme Court has adopted guidelines to determine whether Kidnapping and an allied offense of similar import are committed with a separate animus, pursuant to R.C. 2941.25(B):

{¶31} “(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;

{¶32} “(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.” *State v. Logan* (1979), 60 Ohio St.2d 126, at the syllabus; *State v. Town*, 11th Dist. No. 2007-T-0120, 2008-Ohio-6878, at ¶55.

{¶33} The Ohio Supreme Court has “generally not found the presence or absence of any specific factors to be dispositive on the issue of whether crimes were committed separately or with a separate animus. *** Instead, [its] approach has been

to analyze the particular facts of each case *** to determine whether the acts or animus were separate.” *State v. Jones*, 78 Ohio St.3d 12, 14, 1997-Ohio-38.

{¶34} “As the *Logan* court recognized, the critical consideration ‘is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.’” *Jenkins*, 15 Ohio St.3d at 198, quoting *Logan*, 60 Ohio St.2d at 135.

{¶35} Here, there is evidence that a Kidnapping occurred independently from, and not incidental to, the Aggravated Robbery and was separate from any restraint of liberty that may have been caused by that Robbery. Kidnapping as provided in R.C. 2905.01(A)(2) is restraint of liberty or removal of a person “[t]o facilitate the commission of any felony or flight thereafter.” There are facts in the record, including an admission by Dean, indicating that a Kidnapping pursuant to R.C. 2905.01(A)(2) occurred, as Schossler was deceived into attending a party that did not exist, to facilitate the Aggravated Robbery.

{¶36} Kidnapping has been found to have been committed with separate animus from an allied offense when the movement of the victim was achieved through deceit or trickery. See *State v. Lawson*, 64 Ohio St.3d 336, 349, 1992-Ohio-47 (The record indicated prolonged restraint and significant movement when the victim was deceived into believing he was being transported to a marijuana field while defendants actually planned to commit an assault on the victim once arriving at the location. As the victim “was transported for several hours over a great distance involving three counties,” prolonged restraint and significant movement occurred.); *State v. Lundgren* (Sept. 1, 1993), 11th Dist. Nos. 90-L-15-140, 91-L-036, 1993 Ohio App. LEXIS 4394, at *73

("[A]ppellant deceived the [victims] into thinking they were going into the wilderness in order to get them to the farmhouse on the night that he intended to murder them," and was guilty of Kidnapping by deception.)

{¶37} Here, Dean used deception to remove Schossler from the laundromat and into his car, to take Dean to a party. Thereafter, Schossler drove Dean from Kent to Lake Milton, a distance of over 25 miles, to pick up a friend. He also drove to other homes, and was in the car for an extended period of time. There was substantial movement between the original location and the final destination where Schossler was attacked. Additionally, Schossler drove this distance with the impression that he would be attending a party with these individuals. Schossler was deceived about the reason for traveling this distance and would not have gone had he known Dean's intent. As Schossler was deceived about Dean's purpose to commit a Robbery upon arrival at the final destination, a Kidnapping occurred under R.C. 2905.01(A)(2), to facilitate the commission of a felony thereafter. Schossler was tricked into going to the location so that the felony of Aggravated Robbery could be carried out. These actions also constituted a prolonged restraint and substantial movement, and the offenses have a separate animus.

{¶38} Therefore, it appears that two separate Kidnappings occurred, including the second Kidnapping, which occurred incident to the Aggravated Robbery. Dean pleaded guilty to Kidnapping pursuant to R.C. 2905.01(A)(2) *and/or* (3). The first Kidnapping, occurring while Schossler was driving from Kent to Lake Milton and to the destination where he was ultimately attacked, was not incidental to the crime of Aggravated Robbery and involved a prolonged restraint and substantial movement.

Therefore, the Kidnapping under 2905.01(A)(2) had a separate animus from the Aggravated Robbery.

{¶39} As Dean pleaded guilty to Kidnapping and his admission provides sufficient evidence to show that the Kidnapping under R.C. 2905.01(A)(2) had a separate animus than the Aggravated Robbery, the trial court did not abuse its discretion when determining that the crimes of Kidnapping and Aggravated Robbery should not merge. Although the lower court does not specifically state whether Dean was indicted and sentenced on the Kidnapping under R.C. 2905.01(A)(2), we cannot presume that he was instead indicted only for the Kidnapping that occurred incident to the Robbery. It is logical that the state indicted and pursued the Kidnapping that occurred during the drive and prior to the Robbery, as this would not merge with the Robbery charge during sentencing.

{¶40} As the Kidnapping and Aggravated Robbery each had a separate animus, the trial court did not abuse its discretion in failing to merge them for sentencing. The court properly sentenced Dean to a separate, consecutive term of seven years for Kidnapping, apart from the seven years for Aggravated Robbery.

{¶41} Accordingly, the sole assignment of error is without merit.

{¶42} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, resentencing Dean to seven years imprisonment for Aggravated Robbery and seven years imprisonment for Kidnapping, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶43} I concur thoroughly with the majority's lucid analysis of whether the kidnappings and aggravated robbery committed in this case were allied offenses of similar import, and whether they were committed with a separate animus. I depart from its analysis only in the remedy. I respectfully decline to presume the state only indicted and pursued the kidnapping that occurred prior to the aggravated robbery (which would not merge for sentencing purposes). It is a general principle that criminal laws must be construed against the state, and in favor of the individual. The state, through its indictment, created the ambiguity regarding whether Mr. Dean was pleading guilty to the kidnapping which occurred prior to the aggravated robbery, that which occurred during the aggravated robbery – or both. Accordingly, I would find the counts should have merged, and that the assignment of error has merit.

{¶44} I respectfully dissent.