[Cite as *State v. Konstantinov*, 2010-Ohio-3098.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
-vs-	:	Case No. 09 CAA 09 0075
MILAN KONSTANTINOV	:	<u>O P I N I O N</u>
Defendant-Appellant		

CHARACTER OF PROCEEDING: Criminal Appeal from Delaware County Court of Common Pleas Case No. 09 CR-I-06-0304A

JUDGMENT: Affirmed In Part and Reversed and Remanded In Part

DATE OF JUDGMENT ENTRY: June 29, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, Milan Konstantinov, appeals a judgment of the Delaware County Common Pleas Court convicting him of three counts of receiving stolen property (R.C. 2913.51(A)) and one count of robbery (R.C. 2911.02(A)(3))upon pleas of guilty and sentencing him to an aggregate term of incarceration of six years. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Following an alleged string of thefts from stores in and around the Polaris Mall, appellant, his wife, and his three adult daughters were indicted together on a charge of engaging in a pattern of corrupt activity (R.C. 2923.32(A)(1)) involving robbery (R.C. 2911.02(A)(3)), receiving stolen property (R.C. 2913.51(A)), and other related offenses. All five family members were further charged with possession of criminal tools (R.C. 2923.24(A)) and three counts of receiving stolen property valued at $500 or more but less than $5,000 (R.C. 2913.51(A)) from three different Polaris Mall stores.

{¶3} Additionally, when a security guard tried to stop them, appellant allegedly tried to run him over with their car. As a result, appellant was individually charged with robbery (R.C. 2911.02(A) (3)) and assault with a deadly weapon (R.C. 2903.11(A) (2)), namely a motor vehicle. Appellant's wife and daughters were charged with aiding and abetting the robbery (R.C. 2923.03(A) (2)).

{¶4} All of the members of the family accepted plea bargains. Appellant pleaded guilty to the three counts of receiving stolen property, all fifth degree felonies, and one count of robbery, in exchange for the prosecution dismissing the remaining counts.

{¶5} At the sentencing hearing, the prosecution argued that multiple or consecutive sentences were warranted because all three counts of receiving stolen property had a separate animus as the property was stolen from three different stores-Strasbourg Clothing, Williams Sonoma and Accent on Image. The parties acknowledged that the court had heard evidence at the sentencing hearing for appellant's wife, Maria Konstantinov, on this issue. This evidence included a security video which showed appellant's wife and daughters entering the mall together, walking around the mall, and entering and/or exiting some stores. The prosecution also presented photographs of a "tent" or "luggage" dress that was allegedly used to conceal stolen items and that was found in appellant's car at the time of the arrest. The prosecution argued that the evidence showed that all four of the Konstantinov women stole the property together, thereby committing separate acts of receiving stolen property because they were aware that the property came from different stores and different incidents of theft. Appellant's trial counsel argued that appellant was outside the shopping area the entire time, waiting in the car, and all of the stolen property was brought outside at one time and placed in the vehicle where he was waiting.

{¶6} The court also reviewed a pre-sentence investigation report, which indicated that appellant and his family had been involved in a long string of theft-related, shoplifting type of offenses in various states stretching back over numerous years.

{¶7} The trial court concluded in accordance with its prior decision in Maria Konstantinov's case that there was a separate animus as to each count because the property was received from separate businesses. Based on the evidence, the court sentenced appellant to the maximum term of 12 months on each count of receiving

stolen property, to be served concurrently, and five years incarceration for robbery, to be served consecutively to the sentences for receiving stolen property, for a total term of incarceration of 6 years. It is from this sentence appellant appeals, raising the following three assignments of error:

{¶8} "I. THE TRIAL COURT ERRED IN NOT MERGING COUNTS 5, 6, AND 7 FOR PURPOSES OF SENTENCING AS APPELLANT RECEIVED, RETAINED OR DISPOSED OF THE PROPERTY IN A SINGLE TRANSACTION OR OCCURRENCE.

{¶9} "II. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY RELYING UPON EVIDENCE, OTHER THAN PRIOR CONVICTIONS, PRODUCED BY THE STATE OF OHIO AT SENTENCING AS TO THE FACTS OF THE CASE TO INCREASE THE STATUTORY MAXIMUM SENTENCE THAT COULD BE IMPOSED UPON APPELLANT.

{¶10} "II. THE SIX YEAR PRISON SENTENCE IMPOSED ON APPELLANT IS UNREASONABLE AS IT HAS PLACED AN UNNECESSARY BURDEN ON STATE OR LOCAL GOVERNMENT RESOURCES."

I

{¶11} Appellant argues that the court erred in not merging the three counts of receiving stolen property because they were not committed as separate acts or with a separate animus. The state concedes this assignment of error in its brief:

{¶12} "Here, the Appellant entered a guilty plea to three separate and distinct counts of Receiving Stolen Property, in addition to a count of Robbery. However, the Court was barred from convicting the Appellant of more than one count of Receiving

Stolen Property under R.C. 2941.25(A) because any evidence of a separate animus as to each count applies to the other Konstantinov family members. Accordingly, while the outcome of the sentence is proper, the Appellee concedes this Assignment of Error." Brief of Appellee, December 11, 2009, page 2.

{¶13} In cases in which the imposition of multiple punishments is at issue, R.C. 2941.25(A)'s mandate that a defendant may only be "convicted" of one allied offense is a protection against multiple *sentences* rather than multiple *convictions.* See, e.g., *Ohio v. Johnson* (1984), 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425. A defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 42, citing *Geiger,* 45 Ohio St.2d at 244, 74 O.O.2d 380, 344 N.E.2d 133. Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. *State v. Whitfield* (Jan. 5, 2010), Ohio Sup. Ct. Case No. 2008-1669, 2010-Ohio-2 at ¶27. Thus, the trial court should not vacate or dismiss the guilt determination on each count. Id.

{¶14} Although appellant was sentenced concurrently on the three charges of receiving stolen property, and he may be found guilty on each of the three charges, he may not be sentenced on each of the three charges. The court erred in failing to require the state to elect just one of the three receiving stolen property charges on which it wished to proceed to sentencing.

{¶15} This Court has previously noted that pursuant to the following language in *Whitfield*, supra, we do not have the power to enter final judgment correcting the error in the judgment of conviction and sentence:

{¶16} "If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. On remand, trial courts must address any double jeopardy protections that benefit the defendant…" *State v. Bleigh*, Delaware App. No. 09-CAA-03-0031, 2010-Ohio-1182, ¶154-155, citing *Whitfield,* supra at ¶ 25.

{¶17} The first assignment of error is sustained.

II

{¶18} Appellant argues that in finding that the three counts of receiving stolen property arose from separate transactions or occurrences, the court improperly relied on evidence other than the facts which appellant admitted to, namely the surveillance video from Polaris place and statements made by his co-defendants. This assignment of error is rendered moot by our decision in the first assignment of error to reverse and remand this matter for resentencing because the trial court erred in finding that three counts of receiving stolen property were separate acts or transactions and appellant could be sentenced on each of the three counts.

III

{¶19} In his third assignment of error, appellant argues that the six-year sentence is unreasonable as it has placed an unnecessary burden on state or local government resources. He argues that the six-year term of imprisonment was longer

than necessary to incapacitate him and protect the public from him re-offending, as he is 65 years old and in poor health. He also argues that the cost of incarcerating him is unnecessarily high, due to his age and health problems.

{¶20} We sustained appellant's first assignment of error and appellant will be resentenced on a receiving stolen property conviction on remand, and this assignment of error is thereby premature as it relates to the conviction and sentence for receiving stolen property. However, we will address appellant's argument as it relates to the five year sentence for robbery.

{¶21} R.C. 2929.13(A) provides:

{¶22} "Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources."

{¶23} As we noted in *State v. Ferenbaugh* (February 26, 2004), Ashland App. No. 03COA038, 2004-Ohio-977, "[t]he very language of the cited statute grants trial courts discretion to impose sentences. Nowhere within the statute is there any guideline for what an 'unnecessary burden' is."

{¶24} While appellant argued in his sentencing memorandum and at his sentencing hearing that he was going to require gall bladder surgery in the near future and has a sleep disorder, diabetes, arthritis, and breathing problems, causing him to incur significant medical costs during the 89 days he was held in the Delaware County

Jail, he presented no evidence to the court to support his claims. Although he was 65 years old at the time of sentencing, the record reflects that he has a lengthy criminal history stretching over several states and had been out of prison less than two years before he committed the instant offenses. The trial court found that he showed no remorse and stealing is a way of life for appellant. Despite appellant's age, based on his long pattern of criminal activity the court did not err in rejecting his argument that his prison sentence was longer than necessary to incapacitate him and prevent recidivism and that incarceration placed an unnecessary burden on state resources.

{¶25} The third assignment of error is overruled.

{¶26} The judgment is affirmed in part and reversed in part. In accordance with the Ohio Supreme Court's decision in *Whitfield,* we remand this case to the trial court for further proceedings consistent with that opinion.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/r0508

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MILAN KONSTANTINOV	:	
Defendant-Appellant	:	CASE NO. 09 CAA 09 0075

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded to the trial court for resentencing on one of the three convictions for receiving stolen property as elected by the State. Costs assessed to appellant.

s/Julie A. Edwards___________________

s/Sheila G. Farmer__________________

s/Patricia A. Delaney_________________

JUDGES