

[Cite as *State v. Sawyer*, 2010-Ohio-1990.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080433
	:	TRIAL NO. B-0705309
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
TIFFANY SAWYER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated, and Cause Remanded

Date of Judgment Entry on Appeal: May 7, 2010

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Tanner McFall*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Michaela M. Stagnaro*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

**CUNNINGHAM, Judge.**

{¶1} Defendant-appellant Tiffany Sawyer was convicted on two counts of aggravated assault<sup>1</sup> upon guilty pleas. The trial court, without ordering a presentence-investigation report, imposed the maximum, consecutive terms of incarceration that Sawyer had agreed to as part of a plea bargain. On direct appeal, in three assignments of error, Sawyer challenged (1) the voluntariness of her pleas due to judicial participation in the plea process, (2) the legality of her sentence where the court refused to order a presentence investigation (“PSI”), and (3) the legality of separate sentences for what she contended were allied offenses of similar import.

{¶2} We held that Sawyer’s pleas were voluntary and, therefore, overruled the first assignment of error. We further held that R.C. 2953.08(D)(1) prevented our review of the second and third assignments of error. R.C. 2953.08(D)(1) provides an exception to the statutory right to appeal a sentence for a felony if “the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” We interpreted “authorized by law” to mean “within the statutory range of possible sentences” and not “exceed[ing] the maximum term authorized by statute for the offense.”<sup>2</sup>

{¶3} We noted that our narrow definition of the phrase “authorized by law” comported with decisions from several appellate districts, but conflicted with the Second Appellate District’s holding in *State v. Underwood*<sup>3</sup> that a sentence was not “authorized by law” within the meaning of R.C. 2953.08(D)(1), even though it was within the statutory range, when the trial court failed to merge allied offenses of

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<sup>1</sup> R.C. 2903.12(A)(1) and 2903.12(A)(2).

<sup>2</sup> *State v. Sawyer*, 183 Ohio App.3d 65, 2009-Ohio-3097, 915 N.E.2d 715, at ¶86, citing *State v. Royles*, 1st Dist. Nos. C-060875 and C-060876, 2007-Ohio-5348, at ¶8, and *State v. Simmons*, 1st Dist. No. C-050817, 2006-Ohio-5760, at ¶4.

<sup>3</sup> 2nd Dist. No. 22454, 2008-Ohio-4748.

similar import.<sup>4</sup> And we recognized that the Ohio Supreme Court had agreed to resolve the conflict.<sup>5</sup>

{¶4} Sawyer appealed our judgment, and the supreme court accepted jurisdiction over the case as a discretionary appeal,<sup>6</sup> holding it for a decision in *State v. Underwood*. In resolving the conflict, the supreme court adopted a broad definition of “authorized by law” and affirmed the judgment of the Second Appellate District. Specifically, the court held that “[a] sentence is ‘authorized by law’ and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions.”<sup>7</sup> It went on to say that “[w]hen a sentence is imposed for multiple convictions on offenses that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D)(1) does not bar appellate review of that sentence even though it was jointly recommend by the parties and imposed by the court.”<sup>8</sup>

{¶5} On the authority of *Underwood*, the Ohio Supreme Court reversed that part of our judgment holding that we lacked authority to review Sawyer’s second and third assignments of error.<sup>9</sup> The court remanded the cause to this court for further proceedings consistent with its decision in *Underwood*. In accordance with this mandate, we now review the remaining assignments of error.

{¶6} In her second assignment of error, Sawyer argues that her sentence was not authorized by law because the trial court had refused to order a PSI before imposing

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<sup>4</sup> Id. at ¶71.

<sup>5</sup> Id.

<sup>6</sup> *State v. Sawyer*, 123 Ohio St.3d 1422, 2009-Ohio-5340, 914 N.E.2d 1063.

<sup>7</sup> *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, paragraph two of the syllabus.

<sup>8</sup> Id. at paragraph one of the syllabus.

<sup>9</sup> *State v. Sawyer* (Mar. 16, 2010), 2010-Ohio-923.

sentence. Defense counsel had requested a PSI, but the trial court refused the request and proceeded to sentence Sawyer to a cumulative term of three years' incarceration.

{¶7} At issue is Crim.R. 32.2. This rule provides that “[i]n felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report **before imposing community control sanctions** \* \* \*.”<sup>10</sup> On its face, the statute does not require the court to order a PSI in felony cases unless community control is granted.<sup>11</sup>

{¶8} This reading is consistent with the wording of related laws, including R.C. 2929.19 and 2951.03. The first statute requires the court, before imposing sentence, to consider the PSI, “if one was prepared”;<sup>12</sup> the second forbids the imposition of a community-control sanction until a written PSI report has been considered by the court, but omits this requirement for defendants committed to institutions, who may be subject to a “background investigation and report” if a PSI is not completed.<sup>13</sup>

{¶9} To support her argument, Sawyer relies on dicta in a footnote in the Ohio Supreme Court’s decision in *State v. Campbell*,<sup>14</sup> which appears to mandate a PSI in all felony cases. But we are not bound by dicta, especially when our adherence to the dicta would contravene the language of a criminal rule.

{¶10} Crim.R. 32.2 does not mandate a PSI in all felony cases; one must be prepared only where the sentencing court imposes a community-control sanction. In this case, the sentencing court imposed a prison term, not community control, and thus the court was not required to order a PSI. Because the court was not required to order a

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<sup>10</sup> Crim.R. 32.2 (emphasis added).

<sup>11</sup> See *State v. Cyrus* (1992), 63 Ohio St.3d 164, 586 N.E.2d 94, syllabus (interpreting former Crim.R.32.2[A], which is worded similarly).

<sup>12</sup> R.C. 2929.19(B)(1).

<sup>13</sup> R.C. 2951.03(A)(1) and (A)(2).

<sup>14</sup> 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339, fn. 3.

PSI, and Sawyer later agreed to the sentence, we find no error and overrule the second assignment of error.

{¶11} In her third assignment of error, Sawyer argues that her sentence was not authorized by law because the court punished her twice for the same offense—the aggravated assault on Camella Harris with a box cutter.

{¶12} Before the trial court, Sawyer did not object to her sentence on the ground that the offenses were allied offenses of similar import committed with the same animus. Therefore, we review the assignment of error under a plain-error standard.<sup>15</sup>

{¶13} In this case, Sawyer was charged initially under both the (A)(1) and the (A)(2) sections of the felonious-assault statute for attacking her victim with a box cutter and inflicting several wounds on May 21, 2007. After negotiations, she entered a guilty plea to two counts of the lesser-included offense of aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2).

{¶14} The offense of aggravated assault is set forth in R.C. 2903.12. Division (A) of that statute sets forth the mitigating factor of provocation and the requisite mens rea for the offense. Further, “subdivisions (1) and (2) set forth two means of committing the offense—causing serious physical harm to another, or causing or attempting to cause physical harm by means of a deadly weapon or dangerous ordnance. These subdivisions set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest—preventing physical harm to persons.”<sup>16</sup> Thus, the General Assembly did not intend aggravated assault in violation of R.C. 2903.12(A)(1) and aggravated assault in violation of R.C. 2903.12(A)(2) to be separately

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<sup>15</sup> Crim.R. 52(B).

<sup>16</sup> *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶39.

punishable when the offenses result from one act with a single animus against one victim.<sup>17</sup>

{¶15} In this case, Sawyer pleaded guilty to attacking one victim with a box cutter, wounding her several times. The state charged that this one attack, though provoked, violated both subdivisions (A)(1) and (A)(2) of the aggravated-assault statute. The state and Sawyer did not stipulate that Sawyer had committed the offenses with a separate animus or at separate times. Where Sawyer committed the offenses at the same time, with the same animus, against the same victim, she could not have been convicted of both offenses.<sup>18</sup>

{¶16} The imposition of multiple sentences for allied offenses of similar import is plain error.<sup>19</sup> Because Sawyer's convictions arose from the same assault committed with the same animus against the same victim, the offenses had to merge into a single conviction.<sup>20</sup> Accordingly, we sustain the second assignment of error. Thus, we vacate Sawyer's sentences for aggravated assault, and we remand the case to the trial court for resentencing, where the prosecutor must elect which offense to pursue for a conviction—the violation of R.C. 2903.12(A)(1) or the violation of R.C. 2903.12(A)(2).<sup>21</sup>

Judgment accordingly.

**HENDON, P.J., and SUNDERMANN, J., concur.**

*Please Note:*

The court has recorded its own entry this date.

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<sup>17</sup> Id. at ¶40.

<sup>18</sup> R.C. 2941.25; see *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, at ¶18-20, citing *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959.

<sup>19</sup> *Underwood*, 2010-Ohio-1, at ¶31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶96-102.

<sup>20</sup> *Brown*, 2008-Ohio-4569, at ¶40.

<sup>21</sup> Id. at ¶43; see, also, *Harris*, supra, at ¶21-23.