

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

STATE OF OHIO,	:	APPEAL NO. C-070152
	:	TRIAL NO. B-0502447
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION ON</i>
	:	<i>RECONSIDERATION.</i>
JESSE DARRYL GANDY,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Sentences Vacated and Cause Remanded

Date of Judgment Entry on Appeal: June 25, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Jesse Darryl Gandy, pro se.

Please note: we have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Jesse Darryl Gandy appeals from the Hamilton County Common Pleas Court's judgment convicting him of one count of attempted murder and two counts of felonious assault. Gandy presents on appeal two assignments of error. Upon our determination that the trial court violated R.C. 2941.25 when it sentenced Gandy on all three counts, we vacate the sentences and remand to the trial court for resentencing.

I. On Reconsideration

{¶2} Gandy was convicted in August 2005. He appealed, and in December 2006, we vacated his sentences and remanded for resentencing consistent with *State v. Foster*.¹

{¶3} In February 2007, the trial court resentenced Gandy, and he again appealed. In the second assignment of error presented in his second appeal, Gandy challenged under R.C. 2941.25 the trial court's imposition of separate sentences for attempted murder and the two felonious-assault charges. In our December 2007 judgment entry, we overruled the assignment of error on the authority of decisions from this and other appellate districts, which had, in turn, relied on the Ohio Supreme Court's decision in *State v. Rance*.² We held that R.C. 2941.25 permitted the trial court to sentence Gandy on all three counts because the offenses were not allied offenses of similar import.³ The Ohio Supreme Court declined to accept Gandy's appeal for review.⁴

¹ See *State v. Gandy*, 1st Dist. No. C-050804, 2006-Ohio-6282 (reversed on the authority of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470).

² 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

³ See *State v. Gandy* (Dec. 12, 2007), 1st Dist. No. C-070152 (citing *State v. Payne*, 1st Dist. No. C-060437, 2007-Ohio-3310, ¶11, *State v. Coach* [May 5, 2000], 1st Dist. No. C-990349, *State v. Thompkins*, 10th Dist. No. 06-AP-310, 2006-Ohio-6148, and *State v. Nicholson*, 8th Dist. No. 85635, 2005-Ohio-5687).

⁴ *State v. Gandy*, 117 Ohio St.3d 1479, 2008-Ohio-1841, 884 N.E.2d 1110.

{¶4} Nine months before our December 2007 decision in Gandy’s case, this court had decided *State v. Cabrales*.⁵ In *Cabrales*, we held that, although the elements of drug possession under R.C. 2925.11(A) do not exactly align with the elements of drug trafficking under R.C. 2925.03(A)(2), the offenses are allied offenses of similar import, and that a defendant found guilty of possessing and trafficking in the same controlled substance could not, consistent with R.C. 2941.25, be sentenced for both offenses.⁶

{¶5} In April 2008, five months after our decision in Gandy’s case, the Ohio Supreme Court affirmed our judgment in *Cabrales*.⁷ In so doing, the court rejected as “overly narrow” the “view of numerous Ohio appellate districts” that *Rance*’s allied-offenses analysis “ ‘requires a strict textual comparison’ of elements under R.C. 2941.25(A).”⁸ And the court singled out for disapproval our 2002 decision in *State v. Palmer*, in which we had applied *Rance* to hold that aggravated robbery and robbery are not allied offenses of similar import.⁹

{¶6} In the wake of the supreme court’s decision in *Cabrales*, we reconsidered *Palmer*.¹⁰ And in *State v. Smith*, we held that felonious assault under R.C. 2903.11(A)(1) and felonious assault under R.C. 2903.11(A)(2) are allied offenses of similar import.¹¹

{¶7} Subsequently, in *State v. Harris*, the supreme court confirmed that R.C. 2903.11(A)(1) felonious assault and R.C. 2903.11(A)(2) felonious assault are allied offenses.¹² And in *State v. Williams*, the supreme court held that R.C. 2903.11(A)(1)

⁵ 1st Dist. No. C-050682, 2007-Ohio-857.

⁶ See id. at ¶36.

⁷ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

⁸ Id. at ¶21.

⁹ Id. (citing *State v. Palmer* [2002], 148 Ohio App.3d 246, 772 N.E.2d 726, ¶8-10).

¹⁰ *State v. Palmer*, 178 Ohio App.3d 192, 2008-Ohio-4604, 897 N.E.2d 224, ¶3-7, 15.

¹¹ 1st Dist. No. C-070216, 2008-Ohio-2469, ¶40, discretionary appeal not allowed, 115 Ohio St.3d 1474, 2007-Ohio-5735, 875 N.E.2d 628.

¹² 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, paragraph two of the syllabus.

felonious assault and attempted murder in violation of R.C. 2903.02(B) and 2923.02 are allied offenses, and that R.C. 2903.11(A)(2) felonious assault and attempted murder in violation of R.C. 2903.02(A) and 2923.02 are allied offenses.¹³

{¶8} In August 2009, citing the supreme court's decisions in *Cabrales* and *Williams* and our decisions in *Palmer* and *Smith*, Gandy applied under App.R. 26(A) for reconsideration of our 2007 decision in his case. We have granted Gandy's application for reconsideration because the supreme court's decisions in *Cabrales*, *Harris*, and *Williams* make apparent our error in overruling Gandy's second assignment of error.¹⁴ And we have granted Gandy's motion to enlarge the time for filing his App.R. 26(A) application because those decisions demonstrate extraordinary circumstances that warrant enlarging the time.¹⁵ Accordingly, we reconsider, and substitute this decision for, our 2007 decision.

II. The Assignments of Error

{¶9} We address first Gandy's second assignment of error, in which he asserts that the trial court could not, consistent with R.C. 2941.25, have imposed separate sentences for attempted murder and each of the two felonious-assault charges. We agree.

{¶10} Gandy was convicted upon jury verdicts finding him guilty of R.C. 2903.11(A)(1) felonious assault, R.C. 2903.11(A)(2) felonious assault, and attempted murder in violation of R.C. 2903.02(A) and 2923.02. The charges arose in connection with the shooting of Terry Douglas. Douglas testified at trial that, as he stood on a

¹³ 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraphs one and two of the syllabus; accord *State v. Love*, ___Ohio St.3d ___, 2010-Ohio-1421, 925 N.E.2d 137 (applying *Williams* to reverse this court's holding that R.C. 2903.11[A][2] felonious assault and attempted murder under R.C. 2903.02[A] and 2923.02 are not allied offenses); see, also, *State v. Reid*, 2nd Dist. No. 23409, 2010-Ohio-1686 (applying *Cabrales* in the wake of *Williams* to hold that R.C. 2903.11[A][2] felonious assault and murder under R.C. 2903.02[B] are allied offenses).

¹⁴ See App.R. 26(A); *State v. Black* (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171.

¹⁵ See App.R. 14(B).

street corner talking with a friend, Gandy had approached him, had demanded that he “strip,” and, before he could respond, had shot him three times. Two eyewitnesses also testified at trial. They substantially confirmed Douglas’s version of the events. The “discrepancies” between their testimony and Douglas’s testimony concerned the shooter’s identity, not the sequence of events, and were, in our view, attributable to the fact that “the shooting [had] happened quickly.”¹⁶

{¶11} Under R.C. 2941.25, a defendant may, in a single proceeding, be found guilty of and sentenced for two offenses, having as their genesis the same criminal conduct or transaction, only if the offenses (1) are not allied offenses of similar import, (2) were committed separately, or (3) were committed with a separate animus as to each offense.¹⁷ R.C. 2903.11(A)(1) felonious assault and R.C. 2903.11(A)(2) felonious assault are allied offenses,¹⁸ as are R.C. 2903.11(A)(2) felonious assault and attempted murder in violation of R.C. 2903.02(A) and 2923.02.¹⁹ And because the shooting involved Gandy’s discharge of three bullets into a single victim in rapid succession, the offenses cannot be said to have been committed separately or with a separate animus as to each.²⁰ Therefore, the trial court erred in sentencing Gandy for each offense. Accordingly, we sustain the second assignment of error.

{¶12} Our disposition of Gandy’s second assignment of error renders moot the challenge in his first assignment of error to his “excessive” sentences. We, therefore, do not reach the merits of the first assignment of error.

¹⁶ *Gandy*, 1st Dist. No. C-050804, at ¶19.

¹⁷ See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 461 N.E.2d 892.

¹⁸ See *Harris*, 122 Ohio St.3d 373, paragraph two of the syllabus, and at ¶18-20 (citing *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959); *Smith*, supra, at ¶40.

¹⁹ See *Williams*, 124 Ohio St.3d 381, paragraph two of the syllabus

²⁰ See R.C. 2941.25(B); *Harris*, 122 Ohio St.3d 373, at ¶26 (holding that two felonious-assault offenses were committed with the same animus, when defendant inflicted two gunshot wounds on a single victim); *Reid*, supra, at ¶40 (applying *Williams* to hold that the allied offenses of felonious assault and murder were not committed separately or with a separate animus, even though defendant had shot the victim three times, with only one shot proving fatal).

III. Conclusion

{¶13} We vacate the sentences imposed for attempted murder and for both felonious-assault counts and remand the case for resentencing. In all other respects, we affirm the judgment of the court below.

Sentences vacated and cause remanded.

HENDON, P.J., SUNDERMANN and DINKELACKER, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.