[Cite as *State v. Sands*, 2010-Ohio-5461.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JOSEPH A. SANDS Appellant	C.A. No. 25051 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 08 2672

DECISION AND JOURNAL ENTRY

Dated: November 10, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Joseph A. Sands apologized in open court for robbing a gas station and leading police on a high-speed chase while he was high on crack cocaine. He pleaded guilty to robbery, which is a second-degree felony, plus failure to comply with an order or signal of a police officer, and operating a vehicle while under the influence of alcohol or drugs. The trial court imposed a seven-year prison sentence for robbery and three years for failure to comply, to be served consecutively. It also imposed a six-month sentence for operating under the influence, to be served concurrently with the sentences imposed for the first two counts. At the sentencing hearing, the court notified Mr. Sands that he would be subject to a mandatory three-year term of post-release control, but failed to tell him what might happen if he were to violate the conditions of post-release control. This Court granted Mr. Sands' motion for delayed appeal. He has argued that the trial court made several sentencing errors. Although the trial court correctly applied the

allied offenses statute and correctly sentenced Mr. Sands under Section 2929.14 of the Ohio Revised Code, this Court reverses and remands for application of the remedial procedures set forth in Section 2929.19.1 because the trial court failed to notify Mr. Sands that, if he violates the conditions of post-release control, he may be sentenced to an additional prison term of up to one-half of his original sentence.

ALLIED OFFENSES OF SIMILAR IMPORT

{¶2} Mr. Sands' first assignment of error is that the trial court committed plain error by imposing separate sentences for robbery and failure to comply with the order or signal of a police officer without holding a hearing to determine whether each offense was committed with a separate animus. Mr. Sands has acknowledged that he did not raise the issue of allied offenses in the trial court and, therefore, has asked this Court to review for plain error. See Crim. R. 52(B). The Ohio Supreme Court has held that it is plain error to impose individual sentences for multiple counts that constitute allied offenses of similar import even following a plea agreement. *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1, at ¶31. The State has argued that the two offenses are not sufficiently similar to require an evaluation of the circumstances under which they were committed.

{¶3} Under Section 2941.25(A) of the Ohio Revised Code, "[w]here 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." The statute requires a two-step analysis. *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, at ¶14. In the first step, the court must compare the elements of the two crimes in the abstract, without reference to the evidence in the particular case. *Id.* at ¶27. "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." *Id.* at ¶14 (quoting *State v. Blankenship*, 38 Ohio St. 3d 116, 117 (1988)). "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." *Id.* (quoting *Blankenship*, 38 Ohio St. 3d at 117).

{¶4} Mr. Sands pleaded guilty to and was convicted of robbery under Section 2911.02(A)(2) of the Ohio Revised Code and failure to comply with an order or signal of a police officer under Section 2921.33.1(B). To be guilty of robbery under Section 2911.02(A)(2), the offender must "[i]nflict, attempt to inflict, or threaten to inflict physical harm on another" while "attempting or committing a theft offense or in fleeing immediately after the attempt or offense . . . ." To be guilty of failure to comply with an order or signal of a police officer under Section 2921.33.1(B), the offender must "operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop."

{¶5} The first step in the statutory analysis under Section 2941.25(A) is to align the elements of the two offenses in the abstract without regard to the evidence in the case. A comparison of the elements of these two offenses reveals that they are not allied offenses of similar import. One could threaten to injure someone during an attempted theft offense and flee without ever encountering police and without using a motor vehicle. Similarly, one could operate a motor vehicle so as to willfully elude police after receiving a signal to stop without having attempted to commit a theft offense. As the commission of one crime will not necessarily result in the commission of the other, the two are not allied offenses of similar import. *State v.*

Cabrales, 118 Ohio St. 3d 54, 2008-Ohio-1625, at ¶29. Therefore, there is no need to consider whether, in this instance, each crime was committed with a separate animus. See *id.* at ¶14 (quoting *State v. Blankenship*, 38 Ohio St. 3d 116, 117 (1988)). Mr. Sands' first assignment of error is overruled.

EXCEEDING THE SENTENCING GUIDELINES

{¶6} As part of his second assignment of error, Mr. Sands has challenged the length of his prison sentence, claiming that it violates applicable sentencing guidelines. Mr. Sands' argument seems to be that any additional prison time that could be imposed as sanctions for future violations of post-release control should be added to his actual prison sentence for the two felonies in this case, converting his aggregate ten-year prison term to a fifteen-year term. According to Mr. Sands, that would give him a sentence that is two years longer than the maximum allowable prison term for one second-degree felony plus one third-degree felony under Section 2929.14. Mr. Sands has not cited any authority for the proposition that prison time that could potentially be imposed a decade in the future as a sanction for a violation of post-release control that may never happen should be considered by a trial court in determining the appropriate length of the initial prison term for crimes that have already been completed.

{¶7} Under Section 2929.14(A)(2), "if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following: . . . [f]or a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years." The parole board is empowered to impose additional prison time as sanctions for violations of the conditions of post-release control. R.C. 2967.28(F)(3). The board is limited to imposing a maximum cumulative prison term for all violations of up to one-half of the original sentence. *Id.*

Mr. Sands has not challenged the constitutionality of either statute. He has simply suggested a novel interpretation of them.

{¶8} Mr. Sands' interpretation, however, defies the plain language of Section 2929.14(A)(2). That section provides that a trial court may choose to impose "two, three, four, five, six, seven, or eight years" of incarceration for a second-degree felony. R.C. 2929.14(A)(2). According to Mr. Sands, a trial court could never impose more than five years of incarceration for such an offense, leaving the parole board the option of adding up to one-half of that sentence at a later date, thereby keeping the entire potential imprisonment under the eight year "cap" noted in the statute.

{¶9} That is not a reasonable interpretation of the language of Section 2929.14. The statute provides that, for a second-degree felony, a trial court may choose from among the options listed in Section 2929.14(A)(2). The trial court must then add three years of post-release control to the sentence. R.C. 2929.14(F)(1). There is nothing in Section 2929.14 that places any limit on the allowable prison sentences based on the parole authority's power to impose additional prison time at a later date if the offender violates the terms of post-release control. Three years of post-release control is a mandatory part of Mr. Sands' sentence under Section 2929.14 and its imposition does not affect the statutory range of prison terms available to the sentencing judge under the same statute. To the extent that it addressed the length of his prison sentence, Mr. Sands' second assignment of error is overruled.

POST-RELEASE CONTROL NOTIFICATION

{¶10} The other part of Mr. Sands' second assignment of error is that this case should be remanded for resentencing because the trial court failed at sentencing to warn him of the consequences of violating the terms of post-release control. The State has conceded that the trial

court failed to warn Mr. Sands of the consequences of violating the terms of post-release control, and Ohio Supreme Court precedent requires a remand for the trial court to hold a hearing and issue a corrected judgment entry in accordance with Section 2929.19.1.

{¶11} Under Section 2967.28(B)(2) of the Ohio Revised Code, a trial court imposing a prison term for a second-degree felony offense that is not a felony-sex offense must include a mandatory three-year term of post-release control. In addition to notifying the defendant at the sentencing hearing that he will be supervised under Section 2967.28 after leaving prison, the trial court must also notify the defendant that, if he violates the conditions of post-release control, "the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed . . . ." R.C. 2929.19(B)(3)(e).

{¶12} The Ohio Supreme Court has held that the General Assembly's remedial procedure, codified at Section 2929.19.1 of the Ohio Revised Code, applies to correct post-release control errors in criminal sentences imposed on or after July 11, 2006, the effective date of the statute. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, paragraph two of the syllabus. Section 2929.19.1(B)(1) provides that a trial court that has failed to properly notify the defendant of "the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction . . . ." The Ohio Supreme Court has held that trial courts that have failed to properly impose post-release control "shall apply the procedures set forth in R.C. 2929.19.1." *Singleton*, 2009-Ohio-6434, paragraph two of the syllabus.

{¶13} In this case, the trial court properly notified Mr. Sands at his sentencing hearing that he would be subject to a mandatory three-year term of post-release control following his release from prison and imposed the term in the judgment entry. The trial court did not, however, notify Mr. Sands that he could receive additional prison time as a consequence for violations of the conditions of post-release control and the judgment entry did not refer to any additional prison time. The trial court imposed a prison sentence on Mr. Sands on February 12, 2009, after the effective date of Section 2929.19.1. The part of Mr. Sands' second assignment of error that deals with the trial court's failure to refer to potential additional prison time is sustained.

CONCLUSION

{¶14} Mr. Sands' first assignment of error is overruled because robbery and failure to comply with an order or signal of a police officer are not allied offenses of similar import. Part of his second assignment of error is overruled because the trial court properly imposed a seven-year prison sentence, as permitted by Section 2929.14(A)(2) of the Ohio Revised Code for the charge of second-degree-felony robbery. Part of Mr. Sands' second assignment of error is sustained because the trial court failed to notify him of the consequences of violating post-release control. Under *Singleton*, this Court remands this case for the trial court to follow the remedial procedure described in Section 2929.19.1.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

THOMAS W. KOSTOFF, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.