

[Cite as *State v. Alsup*, 2010-Ohio-4038.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23641
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-3309
v.	:	
	:	
KEVIN L. ALSUP	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 27<sup>th</sup> day of August, 2010.

.....  
MATHIAS H. HECK, JR., by R. LYNN NOTHSTINE, Atty. Reg. #0061560,  
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Attorney for Plaintiff-Appellee

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Ohio 45420  
Attorney for Defendant-Appellant  
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FAIN, J.

{¶ 1} This appeal poses the following question: When A strikes B in the head with a rock, killing B, may A be convicted of, and sentenced for, both Murder, in violation of R.C. 2903.02(B)(felony murder) and Felonious Assault, in violation of R.C. 2903.11(A)(2) (deadly weapon)? We answer this question in the negative. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded

for further proceedings, which shall include the State's election of which conviction shall be merged.

I

{¶ 2} One night in August, 2008, defendant-appellant Kevin Alsup, a homeless man, struck Floyd Drummond in the head with a rock multiple times, killing him. A third homeless man, Larry Hudson, Jr., observed the act. He later saw Alsup throw the rock into a river.

{¶ 3} Alsup was charged by indictment with two counts of Murder (purposeful murder and felony murder), two counts of Felonious Assault (deadly weapon and serious physical harm), and one count of Tampering with Evidence. Following a jury trial, Alsup was found guilty on all counts. The State elected to merge the purposeful Murder conviction into the felony Murder conviction, and the serious-physical-harm Felonious Assault conviction into the deadly-weapon Felonious Assault conviction.

{¶ 4} Alsup was sentenced to fifteen years to life for Murder, six years for Felonious Assault, and three years for Tampering with Evidence, all to be served consecutively, for a total of 24 years to life. From his conviction and sentence, Alsup appeals.

II

{¶ 5} Alsup's sole assignment of error is as follows:

{¶ 6} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT

CONVICTED AND SENTENCED DEFENDANT-APPELLANT ON BOTH MURDER, PROXIMATE RESULT OF OFFENDER'S COMMITTING AN OFFENCE OF VIOLENCE, TO WIT: FELONIOUS ASSAULT, AND FELONIOUS ASSAULT, DEADLY WEAPON, INSTEAD OF MERGING THE TWO CONVICTIONS.”

{¶ 7} The State argues that it is possible to commit felony Murder without committing a deadly-weapon Felonious Assault, citing the example of one who kills another with his bare hands. (One may ask, how can an offender commit felony Murder without also committing the predicate felony – in this case, Felonious Assault. But that conundrum becomes superfluous in view of the analysis that follows.)

{¶ 8} The State then acknowledges that after *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, the analysis does not stop with a determination that each of two offenses can be committed without committing the other. Even if the two offenses are distinct in that sense, one must go further and determine whether the societal interests protected by the two proscribing criminal statutes are distinct. Thus, the Rape and felony Murder statutes protect distinct societal interests – the Rape statute is intended to protect women against sexual assault, while the felony Murder statute is intended to protect human life. *Id.*, ¶ 35, citing Justice Rehnquist's dissent in *Whalen v. United States* (1980), 445 U.S. 684, 100 S.Ct 1432, 63 L.Ed.2d 715. The Theft and Aggravated Burglary statutes, despite involving “some common elements,” protect distinct societal interests – the Theft statute seeks to protect property, while the Aggravated Burglary statute seeks to minimize the risk of harm to persons. *State v. Brown*, *supra*, ¶ 36. The deadly-weapon Felonious Assault and the serious-physical-harm Felonious Assault statutes do not protect distinct societal

interests. Each serves the interest of preventing physical harm to persons. *Id.*, ¶ 39.

{¶ 9} The State argues that the two statutes involved in this case protect distinct societal interests. The State contends that the felony Murder statute protects human life, whereas the deadly-weapon Felonious Assault statute protects persons from physical harm. The State cites *State v. Love*, Hamilton App. Nos. C-070782, C-080078, 2009-Ohio-1079 in support of this proposition. We agree with the State that *State v. Love* stands for that proposition.<sup>1</sup> However, we find ourselves unpersuaded by the holding in *State v. Love*, *supra*.

{¶ 10} In our view, the protection of human life and the protection of persons from physical harm are not distinct societal interests. Death is a specific instance, indeed, the ultimate example, of physical harm. The Felonious Assault statutes protect individuals from all sorts of physical harm, including death, just as the Theft statutes protect individuals from all sorts of property losses, from the loss of property worth one dollar, to the loss of all of ones life savings.

{¶ 11} Of course, an offender may still be convicted of, and sentenced for, allied offenses of similar import if each offense involves a distinct animus. Here, both offenses were committed by hitting the victim in the head with a rock repeatedly. There is no indication that separate animi were involved here.

{¶ 12} Because we conclude that the two statutes at issue in this appeal do not advance separate and distinct societal interests, we conclude that the trial court

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<sup>1</sup>*State v. Love*, *supra*, involved the offense of Attempted Murder, not Murder, but we agree with the State that this distinction is immaterial.

erred by failing to merge the felony Murder and deadly-weapon Felonious Assault convictions. Alsup's sole assignment of error is sustained.

{¶ 13} Our judgment in this case would appear to be in conflict with the judgment of our sister court of appeals in *State v. Love*, supra. The State is free to file a motion to certify a conflict.

III

{¶ 14} Alsup's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for the State to make an election, for the trial court to merge the felony Murder and deadly-weapon Felonious Assault convictions accordingly, and for re-sentencing, consistent with this opinion.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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