

[Cite as *In re T.P.-A.*, 2019-Ohio-2038.]

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

IN RE: T.P.-A.

:
:
:
:
:
:
:
:
:
:
:

Appellate Case No. 28196

Trial Court Case No. 2018-2564

(Appeal from Common Pleas Court –
Juvenile Division)

.....

OPINION

Rendered on the 24th day of May, 2019.

.....

MATHIAS H. HECK, JR., by MICHAEL J. SCARPELLI, Atty. Reg. No. 0093662, Assistant Prosecuting Attorney, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, 301 West Third Street, 5th Floor, Dayton, Ohio 45422

Attorney for Appellee

LAUREN HAMMERSMITH, Atty. Reg. No. 0096671, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215

Attorney for Appellant

.....

DONOVAN, J.

{¶ 1} Defendant-appellant T.P.-A. appeals his adjudications of delinquency for one count of felonious assault, in violation of 2903.11(A)(2), a felony of the second degree if committed by an adult; and one count of discharge of a firearm on or near a prohibited premises, in violation of R.C. 2923.162(A)(3), a felony of the first degree if committed by an adult. Both counts were also accompanied by firearm specifications. The juvenile court also designated T.P.-A. as “serious youthful offender” (“SYO”). T.P.-A. filed a timely notice of appeal on October 30, 2018.

{¶ 2} The incident which formed the basis for adjudication occurred during the early morning hours of May 22, 2018, when three individuals, L.M., D.M.M., and J.R. were driving around looking to purchase marijuana. In order to accomplish that goal, J.R. began texting with a female acquaintance, J.B., about purchasing some marijuana. J.B. directed the group to an address located on Timberlodge Trail in Washington Township. J.R. indicated to L.M. and D.M.M. that he had in his possession several counterfeit \$100 bills and that he intended to use the fake bills to purchase the marijuana from J.B.

{¶ 3} When the group arrived at the Washington Township address, J.B.’s boyfriend, appellant T.P.-A., walked out to their vehicle. J.R. handed two of the counterfeit bills to T.P.-A., and T.P.-A. handed J.R. a baggie containing marijuana. At some point during the transaction, T.P.-A. became aware that the bills were counterfeit, and he confronted the individuals. According to T.P.-A., one of the individuals in the vehicle responded, “That’s what you get,” as they attempted to drive away from the scene. At that point, T.P.-A. took out a handgun and fired one shot at the fleeing vehicle. The bullet passed through the rear windshield of the vehicle and struck L.M. in the back. Several hours later, L.M. went to a hospital where he was treated for the wound.

{¶ 4} On May 24, 2018, T.P.-A., age 16, was charged by way of complaint with one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony the second degree if committed by an adult, accompanied by a three-year firearm specification. On May 31, 2018, the State filed an amended complaint in which it added two new counts of felonious assault (deadly weapon), each count accompanied by a three-year firearm specification. On the same day, the State also filed a motion to transfer T.P.-A.'s case from juvenile court to the General Division of the Montgomery County Court of Common Pleas.

{¶ 5} On June 28, 2018, the State filed a second amended complaint in which it added the following counts: one count of discharging a firearm on or near prohibited premises (serious physical harm), in violation of R.C. 2923.162(A)(3), a felony of the first degree if committed by an adult, accompanied by three-year firearm specification; and one count of possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(a), a felony of the fifth degree if committed by an adult. On the same day, the State filed an amended motion to transfer.

{¶ 6} On August 28, 2018, the juvenile court held an amenability hearing wherein it overruled the State's motion to transfer, finding T.P.-A. amenable to treatment in juvenile court. On the same day, the State filed notice of its intent to seek an SYO specification for T.P.-A. On September 20, 2018, the State filed a bill of information against T.P.-A. in the Montgomery County Court of Common Pleas General Division; the bill of information charged him with three counts of felonious assault and one count of illegal discharge of a firearm, and all counts were accompanied by firearm and SYO specifications. T.P.-A. consented to being charged by bill of information instead of

indictment.

{¶ 7} On September 25, 2018, T.P.-A. pled guilty to one count of felonious assault (deadly weapon) and one count of illegal discharge of a firearm, in addition to the accompanying firearm and SYO specifications. In return for T.P.-A.'s guilty pleas, the State dismissed the remaining counts. The juvenile court designated T.P.-A. as an SYO, “find[ing] it necessary to impose a sentence as if the youth were an adult pursuant to O.R.C. §2152.13 and §2929.” The juvenile court convicted T.P.-A. of felonious assault and illegal discharge of a firearm with accompanying specifications.¹ The juvenile court committed T.P.- A. to the Department of Youth Services for a minimum period of one year and a maximum period not to exceed his attainment of age 21.² It is from this judgment that T.P.-A. now appeals.

{¶ 8} T.P.-A.'s first assignment of error is as follows:

THE JUVENILE COURT ERRED WHEN IT FAILED TO MERGE FOR SENTENCING OFFENSES THAT HAD A SIMILAR IMPORT, AROSE FROM THE SAME CONDUCT, AND WERE NOT COMMITTED SEPARATELY OR WITH A SEPARATE ANIMUS, IN VIOLATION OF T.P.- A.'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 10, OHIO CONSTITUTION; AND *IN RE A.G.*, 148 OHIO ST.3D

¹ The juvenile court merged the two remaining firearm specifications for the purposes of sentencing.

² Pursuant to T.P.-A.'s SYO designation, the juvenile court also imposed an adult sentence, but stayed that sentence “pending the successful completion of the traditional juvenile disposition” it imposed.

118, 2016-OHIO-3306, 69 N.E.3D 646, ¶ 9.

{¶ 9} In his first assignment, T.P.-A. contends that the trial court erred when it failed to merge his adjudications for felonious assault and illegal discharge of a firearm.

{¶ 10} R.C. 2941.25, Ohio's allied offense statute, provides that:

(A) Where 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.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 11} The Ohio Supreme Court clarified the applicable standard when determining whether offenses merge as allied offenses of similar import in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892:

Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant's conduct to determine whether one or more convictions may result, because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.

As a practical matter, when determining whether offenses are allied

offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

Id. at ¶ 30-31.

{¶ 12} In *State v. Wood*, 2d Dist. Montgomery No. 26134, 2016-Ohio-143, we stated the following:

[T]he Ohio Supreme Court addressed the allied-offense issue again in *State v. Earley*, [145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266]. There the majority characterized the analysis in its earlier [*State v. Johnson*], 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061] lead opinion as “largely obsolete.” *Id.* at ¶ 11. The *Earley* court instead embraced *Ruff*, which, as noted above, considers a defendant's conduct, his animus, and the import or significance of his offenses. Applying *Ruff*, the *Earley* court concluded that misdemeanor OVI and felony aggravated vehicular assault “are offenses of dissimilar import and significance that are to be punished cumulatively.” *Earley* at ¶ 20. For purposes of our analysis here, we note that a defendant bears the burden of establishing entitlement to merger, and we review a trial court's ruling on the issue de novo. *State v. LeGrant*, 2d Dist. Miami No. 2013-CA-44, 2014-Ohio-5803, ¶ 15.

* * *

We reach the same conclusion under the *Ruff* standard, which the Ohio Supreme Court applied in *Earley*. We see nothing in *Ruff* that alters or undermines the foregoing analysis about [the defendant's] commission of murder and aggravated robbery involving the same conduct committed with the same animus. For the reasons set forth above, we conclude that the two offenses were not committed separately and were not committed with a separate animus or motivation. These findings remain pertinent under *Ruff*, which, as noted above, provides that offenses do not merge if “(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation.” *Ruff* at ¶ 25 [and] ¶ 30-31.

Id. at ¶ 54, quoting *State v. McGail*, 2015-Ohio-5384, 55 N.E.3d 513, ¶ 51, 60 (2d Dist.).

{¶ 13} An appellate court applies a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. “The defendant bears the burden of establishing his entitlement to the protection provided by R.C. 2941.25 against multiple punishments for a single criminal act.” *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18.

{¶ 14} Initially, we note that T.P.-A. did not raise an allied-offense argument below. “An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the

outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice.” *State v. Rogers*, 143 Ohio St. 3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. “Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court’s failure to inquire whether the convictions merge for purposes of sentencing was plain error.” *Id.*

{¶ 15} The instant case is similar to *State v. Williams*, 2d Dist. Montgomery No. 27663, 2018-Ohio-1647. The defendant in that case fired multiple shots in rapid succession across the road with the singular motivation of killing a targeted victim. Thereafter, the defendant was convicted of murder and discharging a firearm on or near prohibited premises. On appeal, the defendant argued that these offenses should have been merged because the two offenses caused the same harm, namely, the life of the victim, and they constituted one action and were committed with the same animus. We found the two offenses to be of dissimilar import, citing the Eighth District Court of Appeals’ opinion in *State v. James*, 2015-Ohio-4987, 53 N.E.3d 770, ¶ 33 (8th Dist.) (the offense of discharging a firearm on a public road or highway is a strict liability offense and the victim is the public). We concluded that the trial court did not commit plain error when it failed to merge Williams’s convictions for discharge of a firearm on or near prohibited premises with felony murder and/or felonious assault. We reasoned that the defendant’s act of firing a gun across the roadway placed numerous people at risk and harmed the public at large, while his murder conviction involved harm to a particular victim; therefore, the offenses differed in significance and the nature of the harm caused. *Id.* at ¶ 23-24.

{¶ 16} In *Williams*, we stated the following:

Williams was convicted and sentenced on one count of murder for causing Terion Dixon's death as a proximate result of committing felonious assault. He also was convicted and sentenced on one count of discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3), which provides: "No person shall do any of the following: * * * Discharge a firearm upon or over a public road or highway." Notably, "[t]he victim of the offense of discharging a firearm upon or over a public road or highway is the public. This is because it is the act itself that is prohibited. The offense can be completed with no one remotely near the location where the firearm is discharged upon or over the public road or highway. R.C. 2923.162(A)(3) is a statute intended to benefit the public good[.]" *State v. James*, 2015-Ohio-4987, 53 N.E.3d 770 (8th Dist.), ¶ 33; see also *State v. Carzelle*, 8th Dist. Cuyahoga No. 105425, 2018-Ohio-92 (applying *James*). Although Williams actually shot and killed Dixon, his act of firing a handgun across the roadway itself violated the statute, placed numerous people at risk, and harmed the public at large. Conversely, his murder conviction required harm to a particular victim and differed in the significance and the nature of the harm it addressed. At a minimum, we believe the offenses at issue are dissimilar enough to preclude a finding of plain error. * * *

Id. at ¶ 24. Relying on our holding in *Williams*, we recently held in *State v. Shoecraft*, 2d Dist. Montgomery No. 27860, 2018-Ohio-3920, ¶ 58, that the victim of improper discharge of a firearm on a roadway is the public at large.

{¶ 17} In the instant case, T.P.-A. attempts to distinguish our holding in *Williams* by arguing the following: 1) he only fired a single shot at the fleeing vehicle, thereby constituting both offenses; and 2) “unlike in *Williams*, the harm that was being prevented by each statute was exactly the same,” because both offenses contained the element of physical harm to a person. T.P.-A. mischaracterizes our holding in *Williams*. Specifically, the defendant in *Williams* was convicted of an enhanced improper discharge offense requiring the State to prove that his conduct resulted in serious physical harm to another person. *Williams* at ¶ 24. Additionally, we note that, like the defendant in *Shoecraft*, the defendant’s convictions for felony murder and discharge of a firearm over a roadway were both based upon a single bullet striking and killing the victim.

{¶ 18} Based upon our holdings in *Williams* and *Shoecraft*, we find that L.M. was the victim of the felonious assault, and the public at large was the victim of the improper discharge offense. Furthermore, similar to the defendants in both *Williams* and *Shoecraft*, T.P.-A.’s conduct placed other people at risk besides the individual actually hit by the bullet. The evidence adduced in the instant case established that T.P.-A.’s “act of firing a handgun across the roadway itself violated the statute, placed numerous people at risk, and harmed the public at large.” *Williams* at ¶ 24. Accordingly, we find that the trial court did not err in failing to merge the two offenses for the purposes of sentencing. “At a minimum, we believe the offenses at issue [were] dissimilar enough to preclude a finding of plain error.” *Id.* Thus, the juvenile court did not err, plainly or otherwise, when it failed to merge T.P.-A.’s adjudications for felonious assault and discharge of a firearm on or near a prohibited premises.

{¶ 19} T.P.-A.’s first assignment of error is overruled.

{¶ 20} T.P.-A.'s second assignment of error is as follows:

T.P.-A. WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; AND ARTICLE I, SECTION 10, OHIO CONSTITUTION.

{¶ 21} In his second assignment, T.P.-A. argues that he received ineffective assistance when his counsel failed to object to the trial court's failure to merge his adjudications for felonious assault and discharge of a firearm on or near a prohibited premises. As we discussed above, however, the trial court did not err in failing to merge these counts. Thus, counsel was not ineffective in failing to raise this argument.

{¶ 22} T.P.-A.'s second assignment of error is overruled.

{¶ 23} Both of T.P.-A.'s assignments of error having been overruled, the judgment of the trial court is affirmed.

.....

WELBAUM, P.J. and HALL, J., concur.

Copies sent to:

Mathias H. Heck, Jr.
Michael J. Scarpelli
Lauren Hammersmith
Hon. Anthony Capizzi