

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-10-004

Appellee

Trial Court No. 07-CR-157

v.

Lesley L. Nickel

DECISION AND JUDGMENT

Appellant

Decided: March 31, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
For appellee.

Timothy Young, Ohio State Public Defender, and Terrence K. Scott,
Assistant State Public Defender, for appellant.

* * * * *

YARBROUGH, J.

{¶1} This matter is before the court upon remand from the Supreme Court of Ohio. *State v. Nickel*, __ Ohio St.3d __, 2011-Ohio-739.

{¶2} The background facts are set forth in our original decision, *State v. Nickel*, 6th Dist. No. OT-10-004, 2010-Ohio-5510, ¶ 2-3. As relevant here, defendant-appellant, Lesley L. Nickel, was indicted, convicted, and sentenced to consecutive prison terms on one count of rape in violation of R.C. 2907.02(A)(2) and one count of sexual battery in violation of R.C. 2907.03(A)(5). In his appeal, Nickel assigned as error that "those offenses are allied offenses of similar import * * * and must merge under R.C. 2941.25." Specifically, Nickel argued that he "could not have committed the offense of sexual battery under R.C. 2907.03(A)(5), without also committing the offense of rape under R.C. 2907.02(A)(2)."

{¶3} On November 12, 2010, we held that "rape as defined in R.C. 2907.02(A)(2) and sexual battery as defined in R.C. 2907.03(A)(5) are not allied offenses of similar import pursuant to R.C. 2941.25 and, therefore, a defendant may be convicted of both offenses without a finding that they were committed separately or with a separate animus." *Id.* at ¶ 28. In so holding, we relied on *State v. Rance* (1999), 85 Ohio St.3d 632, which required us to compare the statutory elements of each offense in the abstract, rather than consider the conduct of the particular defendant, in determining whether multiple offenses are allied offenses of similar import. Thus, even though appellant's convictions in this case arose from the same sexual conduct with a single victim, we held the aforementioned offenses to be allied because, under *Rance's* abstract-comparison test, it is possible for a person to commit each offense without committing the other.

{¶4} Accordingly, we affirmed the judgment of the trial court. We also certified a conflict on the issue for review and final determination by the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution.

{¶5} On December 29, 2010, however, the Supreme Court of Ohio issued its decision in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, which overruled its prior decision in *Rance*. Pursuant to *Johnson*, the new test for determining whether offenses are allied offenses of similar import subject to merger under R.C. 2921.25 is two-fold. First, the court must determine whether the offenses are allied and of similar import. In so doing, the pertinent question is "whether it is possible to commit one offense *and* commit the other offense with the same conduct, not whether it is possible to commit one *without* committing the other." (Emphasis sic.) *Id.* at ¶ 48. Second, "the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., concurring in judgment). If both questions are answered in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Johnson*, at ¶ 50.

{¶6} On February 16, 2011, the Ohio Supreme Court determined that in view of its decision in *State v. Johnson*, no conflict exists in this case with regard to the certified issue. On February 22, 2011, the court accepted a discretionary appeal in this case,

vacated this court's decision of November 12, 2010, and remanded the cause to this court for application of its decision in *State v. Johnson*.

{¶7} In light of *Johnson*, we now find that in this case, the crimes of rape under R.C. 2907.02(A)(2) and sexual battery under R.C. 2907.03(A)(5) are allied offenses of similar import and should have been merged by the trial court. There is no dispute that it is possible to commit both offenses with the same conduct and that appellant's convictions for both offenses were based on a single act, committed with a single state of mind. Indeed, as we noted in our prior decision, "the state is not contending that the subject rape and sexual battery were committed separately or with a separate animus, and concedes that [appellant's] convictions for these offenses 'arose from the same sexual conduct with the same victim.'" 2010-Ohio-5510, ¶ 13.

{¶8} Accordingly, appellant's sole assignment of error is well-taken. The judgment of the Ottawa County Court of Common Pleas is reversed, and the cause is remanded to that court for further proceedings. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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