

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 18AP-127
	:	(C.P.C. No. 90CR-3986)
Robert L. Moore,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 25, 2018

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

On brief: *Robert L. Moore*, pro se.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Robert L. Moore is appealing from the sentences imposed following his entering guilty pleas to two counts of aggravated murder and one count of aggravated robbery. The pleas were entered in 1991.

{¶ 2} The parties, including Moore and his counsel, agreed that the two aggravated murder charges would "merge" and that Moore would be sentenced to a term of 20 years to life for violating the aggravated murder statute. The parties further agreed that Moore would be sentenced to a term of 10 to 25 years for aggravated robbery, with that sentence to be served consecutively to the sentence for aggravated murder. Finally, the parties agreed that Moore would serve an additional term of three years of incarceration for a firearm specification.

{¶ 3} R.C. 2941.25(A), the multiple counts statute, reads:

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.

{¶ 4} The statute has led to 40 years of confusing and inaccurate language. The statute makes no mention of merger of offenses. The statute says a person can be convicted of only one of the allied offenses of similar import. Traditionally, the prosecution has been permitted to choose which of the offenses will result in a conviction and sentence. Prior to the enactment of the "new" criminal code in the 1970's statutes and case law discussed merger. Judges and attorneys did not rapidly adjust to the new language. Some have not adjusted yet.

{¶ 5} Moore entered his guilty pleas in front of a three judge panel. This procedure was routinely used in the early 1990s when the prosecution and defense were in agreement that the defendant should not be executed and did not want a jury proceeding in a mitigation hearing. The three judge panel who accepted the guilty pleas in Moore's case also accepted its agreed upon sentences, even though the sentences were technically in error. Moore could not be convicted of two counts of aggravated murder given the facts of the case.

{¶ 6} Over 26 years after entering his pleas, Moore filed a motion pointing out the legal flaw in the earlier proceedings. He entitled his motion "Allied Offenses of Similar Import – Multiple Counts O.R.C. 2941.25(A) Motion to Vacate/Set aside Sentence." The State of Ohio acknowledged the legal error and suggested the remedy was to issue a corrected judgment entry finding Moore guilty of only one of the two aggravated murder charges and imposing the mandatory sentence on that one aggravated murder conviction.

{¶ 7} Two of the three judges who accepted the guilty pleas are now no longer judges. The third judge will be done serving at the end of the year 2018. The judge who was assigned the case before the plea bargain was agreed upon is one of the two judges who have retired. His successor in office attempted to correct the legal problem created by the three judge panel by doing a nunc pro tunc entry striking the language which was in error.

{¶ 8} Moore has appealed from that nunc pro tunc entry.

{¶ 9} Moore has not really provided an assignment of error, but indicates that he wants to be sentenced on only one count of aggravated murder. However, the trial judge now handling the case did exactly that in her new entry. Moore has not been harmed by the new trial court judge.

{¶ 10} We find no error in the trial court's new entry. We, therefore, affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRUNNER and HORTON, JJ., concur.
