

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
	:	CASE NOS. CA2010-10-081
Plaintiff-Appellee,	:	CA2011-02-013
	:	
- vs -	:	<u>OPINION</u>
	:	9/26/2011
	:	
CHRISTOPHER CROSBY,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007 CR 0229

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Christine Y. Jones, 114 East 8th Street, Suite 400, Cincinnati, Ohio 45202, for defendant-appellant

PIPER, J.

{¶1} Defendant-appellant, Christopher Crosby, appeals his convictions in the Clermont County Court of Common Pleas for single counts of aggravated burglary, safecracking, and grand theft. We affirm the decision of the trial court.

{¶2} On September 11, 2006, Crosby forced his way through a basement window into the home of Ronald and Holly Alvarado. Once in the basement, Crosby pried open a gun safe and took various firearms. During the time of the theft offense, Holly and her three

children were in the home.

{¶3} Crosby was charged with 14 counts, including aggravated burglary, safecracking, grand theft, receiving stolen property and burglary. Crosby pled not guilty to all counts, but later entered into a plea bargain with the state whereby the state dismissed the aggravated burglary charge, nine of the grand theft charges, and the receiving stolen property charge in return for Crosby pleading guilty to safecracking, one count of grand theft, and burglary.

{¶4} Crosby was also facing charges for a separate theft offense, not related to this appeal. The court ordered a presentence investigation report, during which time Crosby was free on bond pending sentencing. When Crosby failed to appear for his sentencing, the trial court issued a bench warrant. Crosby was later apprehended on other non-related charges, and was held in jail. Crosby later filed a motion to withdraw his guilty plea, which was denied by the trial court.

{¶5} In November 2008, the trial court sentenced Crosby to a year in prison on the unrelated charge. The trial court also sentenced Crosby to one year on the safecracking charge, four years on the grand theft, and six years on the burglary charge, all to be served consecutive to one another, and consecutive to the one-year sentence already imposed.

{¶6} The state moved for bond forfeiture, and the trial court granted the state's motion. Crosby's mother, who was co-signer on the bond, requested that the forfeiture be set aside, and the trial court granted that motion. The state filed an appeal, and this court affirmed the trial court's decision in *State v. Crosby*, Clermont App. No. CA2009-01-001, 2009-Ohio-4936. However, Crosby did not appeal his convictions or sentence at that time. On October 1, 2010, Crosby filed a notice of appeal and motion for delayed appeal, which was denied by this court.

{¶7} Also in October 2010, the trial court filed a nunc pro tunc entry to correct its

previous judgment entry, which listed the mandatory period of postrelease control that Crosby faced as five years. During Crosby's original sentencing hearing, the trial court correctly stated that Crosby would face a three-year term, and later determined that it needed to issue a nunc pro tunc entry to correct its clerical error. The trial court held a resentencing hearing for the sole purpose of resentencing Crosby and notifying him of the conditions and period of his postrelease control. Crosby filed a notice of appeal from the nunc pro tunc entry, and now raises the following assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY IMPOSING A SENTENCE THAT WAS AN ABUSE OF DISCRETION."

{¶10} Crosby argues in his first assignment of error that the trial court erred in imposing its sentence.

{¶11} "The general rule is that a nunc pro tunc order does not operate to extend the period within which an appeal may be prosecuted. Exceptions exist in situations where the nunc pro tunc entry creates additional rights, denies an existing right, or the appeal stems from the nunc pro tunc entry, as distinguished from the original judgment entry." *State v. Senz*, Wayne App. No. 02CA0016, 2002-Ohio-6464, ¶19. (Internal citations omitted.)

{¶12} Crosby had the opportunity to appeal the trial court's decision regarding his original sentence. However, Crosby failed to timely perfect an appeal after the trial court entered judgment and instead now challenges his original sentence from the nunc pro tunc order. Crosby cannot extend the strict time limits of App.R. 4(A), (which permits a 30-day time period for filing an appeal), by filing an appeal from a nunc pro tunc order that neither created additional rights nor denied any of Crosby's existing rights. The nunc pro tunc entry simply corrected a clerical error by correcting the number of years Crosby would be subject to postrelease control. Crosby cannot now appeal his underlying sentence, especially because

Crosby's assignment of error stems from the trial court's original judgment entry and not from the nunc pro tunc order.

{¶13} We therefore overrule Crosby's first assignment of error, as he has attempted to challenge the original sentence against him, and not the nunc pro tunc entry.

{¶14} Assignment of Error No. 2:

{¶15} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN SENTENCING HIM ON COUNTS 2, 3, AND 14.

{¶16} In Crosby's second assignment of error, he claims that the trial court erred in failing to merge what he claims are allied offenses of similar import.

{¶17} "A sentence is authorized by law only if it comports with all mandatory sentencing provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶23.¹ When a trial court fails to merge allied offenses, it is within a reviewing court's discretion to sua sponte reverse that sentence because it is unauthorized by law. *State v. Blanda*, Butler App.No. CA2010-03-050, 2011-Ohio-411. See also *Underwood*.

{¶18} The Ohio Supreme Court has recently set forth a two-part test to determine if offenses are allied offenses of similar import under R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. *** If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other,

1. In *Underwood*, the Ohio Supreme Court held that a defendant can appeal a sentence after a plea and jointly-recommended sentence where the trial court fails to merge allied offenses because such a decision is not authorized by law, despite it being agreed to. The court held, "R.C. 2953.08(D)(1) does not bar appellate review of a sentence that has been jointly recommended by the parties and imposed by the court when the sentence includes multiple convictions for offenses that are allied offenses of similar import." 2010-Ohio-1 at ¶33.

then the offenses are of similar import." Id. at ¶48. (Emphasis in original.)

{¶19} The court went on to state, "if the multiple offenses can be committed by the same conduct, then 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.' If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Id. at ¶49-51. (Emphasis in original.)

{¶20} Applying the *Johnson* analysis to the case at bar, we must determine if Crosby committed safecracking, grand theft, and burglary with the same conduct and with the same animus. According to R.C. 2911.31(A), "no person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox." R.C. 2913.02 states, "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent. (4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft." R.C. 2911.12(A)(1) forbids a person by force, stealth, or deception from trespassing in an occupied structure "when another person other than an accomplice of the offender is present, with purpose to commit in the structure *** any criminal offense."

{¶21} We find that the offenses were committed separately and that Crosby had a separate animus for each offense. "A conviction for theft involves knowingly obtaining or exerting control over the property or services of another with the purpose to deprive the owner thereof. By contrast, a safecracking conviction involves an entry into a safe with the purpose to commit an offense. The issue of control is distinct and separate from the issue of

entry. A defendant may be convicted of safecracking without being guilty of a theft as long as the defendant has the 'purpose to commit an offense.' 'While theft may be the usual offense a safecracker has in mind, it need not be; one may violate R.C. 2911.31 with a purpose to spoliage or destroy the contents, or to affix a spring gun or booby trap, and so on.'" *State v. Metcalf* (Mar. 25, 1998), Highland App. No. 97-CA-937, 1998-WL-131517, *3, citing *State v. Humphrey* (Sept. 19, 1989), Franklin App. No. 87-AP-11637, quoting *State v. Snowden* (1976), 49 Ohio App.2d 7, 13-14.

{¶22} Similarly, Crosby committed burglary with different conduct and a separate animus from safecracking and grand theft because in order to violate R.C. 2911.12(A)(1), Crosby had to, by force, stealth, or deception, trespass in an occupied structure with the purpose to commit any criminal offense. While Crosby chose to carry out the theft offense, he could have entered the residence with any criminal purpose and abandoned it before actually completing the criminal act. For example, Crosby could have entered the Alvarado home with the purpose to steal something, but then fled when he saw that Alvarado and her children were present. Obviously, once Crosby was inside the home, he had an opportunity to commit various criminal offenses, without attempting to break into the safe or steal guns. Although he ultimately stole the guns, Crosby knowingly tampered with the safe, in an effort to enter it, and then took the guns without consent of the owner, and therefore had a separate animus for each crime he committed.

{¶23} Having found that the charges are not allied offenses of similar import, Crosby's second assignment of error is overruled.

{¶24} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur