[Cite as *State v. McCullough*, 2011-Ohio-992.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-04-006 CA2010-04-008
- vs -	:	O P I N I O N
	:	3/7/2011
MATTHEW McCULLOUGH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 00CRI0085

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YOUNG, P.J.

{¶1} Defendant-appellant, Matthew McCullough, appeals a decision of the Fayette County Court of Common Pleas resentencing him after his sentence was reversed and the case was remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶2} On the evening of June 28-29, 2000, Precious Canter was working as a pizza delivery driver for a pizza parlor in Washington Court House in Fayette County, Ohio. Shortly after midnight, Canter delivered two pizzas to a residence. At approximately 4:30 a.m. that same morning, her lifeless body was found in the parking lot of a middle school, two blocks away from the residence where she had delivered pizza earlier that night. A police investigation identified four individuals involved in Canter's death: Drew Potter, 16; Jamaal Robinson, 17; Kevin Terry, 18; and appellant, 19.

{¶3} In the fall of 2003, appellant was tried by a jury on one count each of aggravated murder with prior calculation and design, aggravated robbery, kidnapping, and attempted rape, and three counts of aggravated murder while committing or attempting to commit aggravated robbery, kidnapping, and rape. On October 6, 2003, the jury acquitted appellant of aggravated murder with prior calculation and design but found him guilty of the lesser included offense of murder. The jury also found him guilty on three counts of aggravated murder and one count each of aggravated robbery, kidnapping, and attempted rape.

{¶4} The trial court sentenced appellant to life imprisonment without the possibility of parole for 30 years for aggravated murder. The trial court also sentenced appellant to ten years in prison each for aggravated robbery and kidnapping and eight years in prison for attempted rape. The sentences were ordered to be served consecutively, resulting in an aggregate prison term of life imprisonment without the possibility of parole for 58 years.

{¶5} Appellant appealed his convictions and sentences to this court. In

State v. McCullough, Fayette App. Nos. CA2003-11-012 and CA2007-04-014, 2008-Ohio-6384, we upheld all of appellant's convictions. However, we reversed his sentences for aggravated robbery, kidnapping, and attempted rape on the basis of *Foster*, and remanded the case to the trial court for resentencing. On remand, the trial court was to decide whether appellant should serve his sentences for his various convictions, including his sentence for aggravated murder, concurrently or consecutively.

{¶6} On remand, appellant argued he should not be sentenced for both kidnapping and aggravated robbery as the offenses were allied offenses of similar import. On March 31, 2010, the trial court found that under the facts and circumstances of the case, there was a separate animus for each crime. Thus, appellant would be sentenced on both the aggravated robbery and kidnapping convictions. The trial court subsequently sentenced appellant to ten years in prison each for aggravated robbery and kidnapping and eight years in prison for attempted rape. The sentences were ordered to be served consecutively with one another and with appellant's sentence for aggravated murder, again resulting in an aggregate prison term of life imprisonment without the possibility of parole for 58 years.

{¶7} Appellant appeals, raising three assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN CONVICTING AND SENTENCING APPELLANT FOR BOTH KIDNAPPING AND AGGRAVATED ROBBERY IN VIOLATION OF OHIO REVISED CODE SECTION 2941.25."

{¶10} Appellant argues the trial court erred in sentencing him on both

aggravated robbery and kidnapping because the offenses are allied offenses of similar import under R.C. 2941.25.

{¶11} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. *State v. Craycraft,* Clermont App. Nos. CA2009-02-013 and CA2009-02-014, 2011-Ohio-413, ¶8. The statute provides that:

{¶12} "(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.

{¶13} "(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."

{¶14} The Ohio Supreme Court recently decided *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, in which it established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 (thereby overruling *State v. Rance,* 85 Ohio St.3d 632, 1999-Ohio-291).[1] The first inquiry focuses on "whether it is possible to commit one offense *and* commit the other with the same conduct." Id. at ¶48. (Emphasis sic.) It is not necessary that

1. The trial court's decision resentencing appellant for both aggravated robbery and kidnapping and appellant's appellate brief were both filed prior to the supreme court's December 29, 2010 ruling in *Johnson*.

the commission of one offense will *always* result in the commission of the other. Id. Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct. Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119. Conversely, if the commission of one offense will *never* result in the commission of the other, the offenses will not merge. *Johnson* at ¶51; *Craycraft*, 2011-Ohio-413 at ¶11.

{¶15} If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind. *Johnson* at ¶49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50 (Lanzinger, J., concurring in judgment only). If so, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. Id. at ¶51; *Craycraft* at ¶12.

{¶16} Applying the *Johnson* analysis, we first determine whether it is possible for aggravated robbery and kidnapping to be committed with the same conduct.

{¶17} "Many Ohio courts have merged kidnapping and aggravated robbery based on fact patterns where the assailant restrains his victim while robbing him." *State v. Burton*, Cuyahoga App. No. 94449, 2011-Ohio-198, ¶29. As the Ohio Supreme Court made clear in *State v. Jenkins* (1984), 15 Ohio St.3d 164, "to constitute kidnapping under R.C. 2905.01, no movement is required. Rather, restraint by force, threat, or deception is all that need be demonstrated. Thus, implicit within every robbery (and aggravated robbery) is a kidnapping." Id. at 198, fn. 29. "[W]hen a person commits the crime of robbery, he must, by the very nature of the

crime, restrain the victim for a sufficient amount of time to complete the robbery. Under our statutes, he simultaneously commits the offense of kidnapping (R.C. 2905.01[A][2]) by forcibly restraining the victim to facilitate the commission of a felony." *State v. Logan* (1979), 60 Ohio St.2d 126, 131-132.

{¶18} We therefore conclude it is possible to commit kidnapping and aggravated robbery with the same conduct. See *Burton*, 2011-Ohio-198 (finding that kidnapping in violation of R.C. 2905.01(A)(2) and aggravated robbery in violation of R.C. 2911.01(A)(1) and (3) can be committed by the same conduct under *Johnson*).

{¶19} We next determine whether appellant in fact committed both offenses by way of a single act, performed with a single state of mind, or whether he had separate animus for each offense. *Johnson*, 2010-Ohio-6314 at ¶49, 51; R.C. 2941.25(B). In *Logan*, in establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus, the Ohio Supreme Court adopted the following guidelines:

{¶20} "Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there [is] no separate animus ***; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense[.]" *Logan*, 60 Ohio St.2d 126, syllabus. Further, "[w]here the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense[.]" Id. The foregoing guidelines appear to remain valid in the wake of *Johnson*.

{¶21} At trial, the state presented evidence that appellant and the other three juveniles were driving Potter's car when they saw Canter's pizza delivery car. According to Robinson, appellant stated something "about to hit a lick" before telling Robinson to pull over. According to Potter, at appellant's request, Robinson pulled over and appellant got out, telling the others, "I'm going to get this money. I'll be right back." Appellant took a shirt with him to wrap around his face.

{¶22} While the three teenagers were waiting for appellant, Canter's car drove by them "real fast." Several minutes later, appellant came running back to Potter's car from the direction of the middle school. Appellant had blood on his pants and shoes; he also had a black silky baggie full of money. Appellant told them "I think I killed that bitch." Appellant and the others briefly went to the middle school so that appellant could retrieve the shirt he had taken for the robbery, which he had left behind. The four teenagers then went back to Potter's residence where appellant changed clothes. When they were alone, appellant told Robinson he had to hit Canter "to shut her up" because she was screaming and he did not want anyone to come outside. Canter's lifeless body and her pizza delivery car were found on the parking lot of the middle school later that night.

{¶23} Whether the aggravated robbery was completed in the residential street where he confronted Canter or in the parking lot of the middle school, we find that appellant committed the aggravated robbery and the kidnapping with a separate animus as to each offense. In ruling that appellant could be sentenced for both aggravated robbery and kidnapping, the trial court found that in an attempt to avoid a noisy confrontation in the middle of the residential street, appellant took Canter and

her car and drove several blocks to the middle school parking lot where he robbed her. Another possible scenario is that appellant took Canter's money bag in the residential street, and thus robbed her there, but drove her to the middle school parking lot because she was screaming and his risk of detection was greater in the residential street. Under either scenario, appellant's restraint of the victim was not merely incidental to the aggravated robbery. Appellant's restraint of Canter was prolonged, the confinement was secretive, and the movement was substantial. Furthermore, appellant's restraint of Canter and his transporting her a few blocks away to a more secluded area substantially increased the terror and risk of harm to Canter (evidence at trial indicates she was severely beaten in the parking lot which resulted in her death).

{¶24} We therefore find that the trial court properly sentenced appellant for both aggravated robbery and kidnapping under *Johnson*, 2010-Ohio-6314, and R.C. 2941.25. Appellant's first assignment of error is overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN CONVICTING AND SENTENCING HIM FOR BOTH MURDER AND AGGRAVATED MURDER."

{¶27} Appellant asserts he has four convictions for murder and aggravated murder in violation of R.C. 2941.25(A). Appellant's assertion is based on the fact the trial court's 2003 judgment entry of conviction "contains no statement that the murder and additional aggravated murder convictions were ever merged." Further, the trial court's 2010 judgment entry of resentence improperly states that the sentences for

aggravated robbery, kidnapping, and attempted rape "shall be served consecutively with each other and consecutive to the sentences imposed *for the convictions of aggravated murder and murder*." Appellant's argument has no merit.

{¶28} "R.C. 2941.25(A)'s mandate that a defendant may be 'convicted' of only one allied offense is a protection against multiple sentences rather than multiple convictions." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶18. "[F]or purposes of R.C. 2941.25, a 'conviction' consists of a guilty verdict *and* the imposition of a sentence or penalty." Id. at ¶12. (Emphasis sic.)

{¶29} In its 2003 judgment entry, the trial court stated that appellant was found guilty of murder and aggravated murder but only sentenced him for aggravated murder. On remand, the trial court clearly stated in its 2010 judgment entry that "[t]he matter was remanded to the Court for resentencing on convictions for one count of aggravated robbery ***, one count of kidnapping ***, and one count of attempted rape[.] *The remaining convictions and sentences were affirmed and not included in the remand*." (Emphasis added.) The trial court then sentenced appellant for aggravated robbery, kidnapping, and attempted rape, and ordered that these sentences be served consecutively with each other and to "the sentences imposed *for the convictions of aggravated murder and murder*."

{¶30} Notwithstanding the trial court's foregoing surplusage language, it is clear that on remand for resentencing, the court did not find appellant guilty of murder and aggravated murder, did not sentence him for murder, and did not resentence him for aggravated murder. As already stated, appellant was only sentenced for aggravated murder in 2003. Accordingly, appellant does *not* have four convictions

for murder and aggravated murder, and there is no violation of R.C. 2941.25(A). See *Whitfield*.

{¶31} Appellant's second assignment of error is overruled.

{¶32} Assignment of Error No. 3:

{¶33} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS IN VIOLATION OF HIS DUE PROCESS RIGHTS AS GUARANTEED BY THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION."

{¶34} Appellant argues the trial court erred in imposing consecutive sentences without first making findings under R.C. 2929.14(E)(4) and 2929.41(A). Appellant asserts that the Ohio Supreme Court's ruling in *Foster*, 2006-Ohio-856, that those statutes were unconstitutional is no longer valid in light of the recent United States Supreme Court ruling in *Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711. The statutes are, therefore, revived as they have never been specifically repealed by the General Assembly.

{¶35} Appellant's argument[2] was recently rejected by the Ohio Supreme Court in *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320: "the decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*. Because the statutory provisions are not revived, trial judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation

2. Appellant filed his appellate brief prior to the supreme court's December 29, 2010 ruling in *Hodge*.

requiring that findings be made." Id. at ¶39. See, also, *State v. Torres*, Cuyahoga App. No. 95646, 2011-Ohio-350.

{¶36} The trial court, therefore, did not err in imposing consecutive sentences without applying R.C. 2929.14(E)(4) and 2929.41(A). Appellant's third assignment of error is overruled.

{¶37} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.