[Cite as *State v. Daniels*, 2015-Ohio-1346.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-05-010
	:	O P I N I O N
- vs -		4/6/2015
	:	
DERIAL R. DANIELS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 14 CRI 00068

Jess C. Weade, Fayette County Prosecuting Attorney, John M. Scott, Jr., 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Steven H. Eckstein, 1208 Bramble Avenue, Washington C.H., Ohio 43160, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Derial R. Daniels, appeals his sentence in the Fayette County Court of Common Pleas. For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} On March 28, 2014, appellant was indicted on six drug and weapon offenses: one count of trafficking in heroin in violation of R.C. 2925.03(A)(2), a fourth-degree felony;

one count of possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor; one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2), a fourth-degree felony; one count of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2), a third-degree felony; and two counts of having weapons while under disability in violation of R.C. 2923.13(A)(2), both third-degree felonies. Each of the trafficking counts included the specification that appellant knew or had reasonable cause to believe that the controlled substance was intended for sale or resale and the offense was committed in the vicinity of a juvenile or a school pursuant to R.C. 2925.03(C)(6)(b), (C)(4)(b), and (C)(1)(b).

{¶ 3} The charges arose out of an investigation by the Fayette County Sheriff's Office that determined drugs were being sold out of a Washington Court House motel room. Fayette County Sheriff's Office deputies obtained and executed a search warrant for the motel room and its occupants. Upon searching the motel room, deputies found appellant and another individual inside the room along with heroin, cocaine, methadone, drug paraphernalia, and a handgun.

{¶ 4} On May 5, 2014, appellant pled guilty to having weapons while under disability, trafficking in cocaine, trafficking in heroin, and aggravated trafficking in drugs. Appellant also admitted to the specifications associated with each drug trafficking charge. The state dismissed one count of having weapons while under disability and the possession of drug paraphernalia charge.

{¶ 5} The trial court held a sentencing hearing on May 13, 2014. After mitigation by appellant and appellant's counsel, the court sentenced appellant to a 12-month prison term on each of the trafficking counts and a 24-month prison term on the having weapons while under disability charge. The court ordered the sentences to be served consecutively for an aggregate prison sentence of 60 months. The court further stated that appellant will not be permitted to participate in an Intensive Prison Program (IPP). The court journalized

appellant's sentence in the judgment entry of sentence and conviction. The entry also stated appellant may not participate in IPP.

{¶ 6} Appellant now appeals, asserting two assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED BY NOT DETERMINING THE DRUG TRAFFICKING OFFENSES WERE ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 9} Appellant argues the trial court erred in sentencing him separately for trafficking in heroin, trafficking in cocaine, and aggravated trafficking in drugs. Appellant maintains that because the police discovered all of his trafficking offenses during the execution of a single search warrant, his drug trafficking convictions were committed by the same conduct and therefore are allied offenses of similar import.

{¶ 10} Appellant never raised the allied offenses issue before the trial court and as a result, we review his argument for plain error. *State v. Chamberlain*, 12th Dist. Brown No. CA2013-04-004, 2014-Ohio-4619, ¶ 67. Under Crim.R. 52(B), plain error exists only where there is an obvious deviation from a legal rule that affected the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). The imposition of multiple sentences for allied offenses of similar import amounts to plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31-33.

{¶ 11} Pursuant to R.C. 2941.25, Ohio's multiple-count statute, the imposition of multiple punishments for the same criminal conduct is prohibited. *State v. Brown*, 186 Ohio App.3d 437, 2010-Ohio-324, ¶ 7 (12th Dist.). Specifically, R.C. 2941.25 provides:

> (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.

{¶ 12} The Ohio Supreme Court has recently clarified the test a trial court and a reviewing court should employ in determining whether offenses are allied offenses that merge into a single conviction under R.C. 2941.25. *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 25. The Supreme Court noted that its decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, which emphasized a defendant's conduct in evaluating whether offenses are allied, was "incomplete." *Id.* at ¶ 16. Instead, when conducting an allied offenses determination, R.C. 2941.25(B) instructs courts not only to consider a defendant's conduct and animus but also whether the offenses are of dissimilar import. *Id.*

{¶ 13} Therefore, in determining whether offenses are allied under R.C. 2941.25, courts are instructed to consider three separate factors—the conduct, the animus, and the import. *Ruff* at paragraph one of the syllabus. Offenses do not merge and a defendant may be convicted and sentenced for multiple offenses if *any* of the following are true: "(1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." *Id.* at paragraph three of the syllabus. With respect to the first factor, "[t]wo or more offenses of dissimilar import exist * * * when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus.

{¶ 14} Appellant pled guilty to three counts of drug trafficking under R.C. 2925.03(A)(2). The statute provides,

> (A) No person shall knowingly do any of the following:
>
> * * *

> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

R.C. 2925.03(A)(2).

{¶ 15} Appellant's indictment alleged appellant had trafficked in three different types of drugs. Count one alleged that appellant had trafficked in heroin, a schedule I controlled substance. Count five alleged appellant had trafficked in cocaine, a schedule II controlled substance, in an amount less than one gram. Count six alleged appellant had committed aggravated trafficking of drugs by trafficking in Methadone, a schedule II controlled substance, in an amount less than bulk.

{¶ 16} Since the Ohio Supreme Court's decision in *Johnson*, this court has not addressed whether convictions for trafficking in different types of drugs are allied offenses of similar import. However, the First Appellate District has addressed this issue and found that when a defendant is convicted of trafficking in two different types of drugs, heroin and cocaine, the offenses are not allied. *State v. Haywood*, 1st Dist. Hamilton No. C-130525, 2014-Ohio-2801, ¶ 15. The First District reasoned that trafficking in heroin and trafficking in cocaine are not allied offenses of similar import because "[t]rafficking in heroin will never support a conviction for trafficking in cocaine. Nor will trafficking in cocaine support a conviction for trafficking in heroin. [The defendant] committed each offense with different conduct." *Id.* at ¶ 15. Similarly, the Sixth District has found that the simultaneous possession of cocaine and heroin are separately punishable offenses because "possession of either cocaine or heroin will never support a conviction for possession of the other * * *." *State v. Heflin*, 6th Dist. Lucas No. L-11-1173, 2012-Ohio-3988, ¶ 14. *See State v. Delfino*, 22 Ohio St.3d 270 (1986), syllabus.

{¶ 17} We find the rationale of First and Sixth Districts persuasive. Appellant was convicted of three trafficking offenses that involved three different types of drugs: heroin, cocaine, and methadone. Each trafficking offense required proof specific to that drug and could not be supported by trafficking in a different controlled substance. Therefore, appellant committed each offense with different conduct. Under R.C. 2941.25, the offenses were committed separately and with a separate animus and were not allied offenses of similar import.

{¶ 18} Appellant's first assignment of error is overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} THE TRIAL COURT ERRED BY NOT MAKING A FINDING THAT GIVES ITS REASONS FOR ITS DISAPPROVAL OF IPP.

{¶ 21} Appellant argues the trial court erred in disapproving his participation in IPP as part of his sentence. During the sentencing hearing, the trial court stated, "[n]o IPP, no transitional control will be permitted in this case." The sentencing entry also denied appellant's participation in IPP. Appellant contends the court erred in denying IPP without making findings to support its denial as required by R.C. 2929.19(D).

{¶ 22} We review felony sentences pursuant to the standard of review set forth in R.C. 2953.08(G)(2) to determine whether the imposition of those sentences is clearly and convincingly contrary to law. *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 9. A sentence is not clearly and convincingly contrary to law where the record supports the trial court's findings under R.C. 2929.14(C)(4) and where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Id.*

{¶ 23} IPP "includes institutions that have military-type regimen programs as described

in R.C. 5120.031 and institutions that focus on 'educational achievement, vocational training, alcohol and other drug abuse treatment, community service and conservation work, and other intensive regimens or combinations of intensive regimens.'" *State v. Tucker*, 12th Dist. Butler No. CA2011-04-067, 2012-Ohio-50, ¶ 14, quoting R.C. 5120.032.

{¶ 24} A sentencing court may recommend, disapprove, or make no recommendation regarding placement of an offender in IPP. R.C. 2929.19(D). There is "no requirement that the court address a defendant during the sentencing hearing in regard to its recommendation of approval or disapproval for either placement in a shock incarceration program or an [IPP]. Indeed, the court is not even required to make a recommendation at all." *Tucker* at ¶ 19, quoting *State v. Lowery*, 11th Dist. Trumbull No. 2007-T-0039, 2007-Ohio-6734, ¶ 10. *See* R.C. 2929.14(I)(1); R.C. 2929.19(D). However, "[i]f the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval." R.C. 2929.19(D).

{¶ 25} In determining whether the trial court gave sufficient reasons for disapproving or recommending IPP to comply with R.C. 2929.19(D), this court will look to the record as a whole. *Tucker* at ¶ 25. In *Tucker*, the trial court complied with the findings requirement of R.C. 2929.19(D) when the court requested a presentence investigation report (PSI) to evaluate placement in IPP. Then during sentencing, the court considered sentencing factors, reviewed the victim impact statement, the PSI, and the pretrial services progress report, and found that the defendant continued to struggle with drug addiction and has failed several drug screens. *Tucker* at ¶ 23-24. *See State v. Jackson*, 5th Dist. Knox Nos. 05CA46 and 05CA47, 2006-Ohio-3994, ¶ 14 (sufficient reasons when defendant served prior prison term, has criminal history, and shortest term not appropriate for offense); *Lowery* at ¶ 15-16 (adequate when court noted criminal history and probation violations).

{¶ 26} At the sentencing hearing, appellant's counsel requested appellant's sentence

include addiction treatment at a rehabilitation center or a similar program. In support, appellant's counsel stated appellant has struggled with drug addiction throughout his life and has been imprisoned but was never admitted into a treatment program during his incarceration. Appellant also informed the court he has battled heroin addiction for years and has attended "AA" and other drug treatment programs but is unable to remain sober. Appellant stated he is 57 years old and he has "been going in and out of prison for 34 years" because of convictions related to his drug addiction. In response, the state noted appellant's "extremely serious" criminal record and appellant's current convictions involved trafficking in drugs, not merely possession of drugs.

{¶ 27} After mitigation and the state's response, the trial court noted that it had reviewed appellant's "extensive history on the Ohio Court's Network" and incorporated this report into the record. The court noted the report showed that since 1981, appellant has been incarcerated five times with the Department of Rehabilitation and Corrections and the numerous convictions for these periods of imprisonment involved aggravated robbery, receiving stolen property, drug abuse, and drug trafficking. The court also found that appellant's conduct in this case was more serious as it was part of an organized criminal activity, the chance of recidivism is high based on appellant's extensive criminal record, and that appellant was on postrelease control during the commission of the offense.

{¶ 28} We find that the record as a whole provides sufficient reasons to support the trial court's denial of IPP. The court was made aware of appellant's request to be sentenced to a treatment facility and appellant's lengthy struggle with drug addiction. The trial court noted appellant's extensive criminal history, his lengthy drug addiction, and the fact that this offense involved drug trafficking and was part of organized criminal activity. Additionally, the court stated appellant committed the current offenses while on postrelease control. Therefore, the record contains multiple reasons to support the trial court's refusal to allow

appellant to participate in IPP to comply with the findings requirement of R.C. 2929.19(D). Appellant's second assignment of error is overruled.

{¶ 29} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.