

IN THE SUPREME COURT OF OHIO
Case No. 2007-0184

STATE OF OHIO :
Appellant/ Cross Appellee :
-vs- :
JAKEENA BROWN :
Appellee/ Cross Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 87651

APPELLEE /CROSS-APPELLANT'S MERIT BRIEF

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: DAVID KING, ESQ. (COUNSEL OF RECORD)
#0056205
JOHN T. MARTIN, ESQ.
#0020606
Assistant Public Defenders
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX

COUNSEL FOR APPELLEE / CROSS APPELLANT JAKEENA BROWN,

WILLIAM MASON, ESQ.
Cuyahoga County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

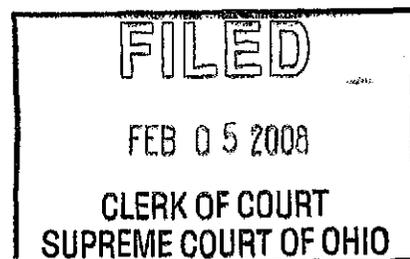


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INTRODUCTION

The issue of when a defendant can be punished for multiple criminal offenses arising from a single animus has been the subject of much litigation in this State. At the heart of this issue is R.C. 2941.25, which prohibits multiple punishment when “the same conduct can be construed to constitute two or more allied offenses of similar import.”

In *State v. Rance* (1999), 85 Ohio St.3d 632, this Court attempted to put to rest dissension among lower courts about how to interpret R.C. 2941.25. *Rance* established an elemental analysis whereby two offenses are only allied if, taken in the abstract, the elements of the crimes correspond so closely that one cannot be committed without the other. *Id.*, at 638.

The question presented here is whether *Rance* should really apply so literally to allow two convictions where the offenses of conviction are:

For the same statutory offense (here, aggravated assault)

Committed via a single action (here, one stab)

Against a single victim,

All because the statute provides for two different ways of committing the crime (here, causing physical harm with a deadly weapon as well as causing serious physical harm).

Simply put, did the General Assembly, in enacting R.C. 2941.25 really envision that a person could be convicted of two crimes of aggravated assault for one thrust of a knife that caused a single injury to a single person?

If the answer to this question is “yes,” then the implications go far beyond the isolated offense of aggravated assault. There are myriad crimes prohibited under the Revised Code that can be committed in more than one way via one act where the two manners of commission do not technically satisfy the *Rance* elemental analysis. For example, a person can violate R.C.

4511.19 (driving under the influence of alcohol or drugs) by driving in an impaired fashion with a blood alcohol content exceeding 0.08. Under a strict reading of *Rance*, this constitutes the commission of two crimes for which multiple punishments can be imposed: the first for driving under the influence of alcohol, regardless of the blood-alcohol content (BAC), in violation R.C. 4511.19(A)(1)(a); and the second for driving with a BAC in excess of 0.08 in violation of R.C. 4511.19(A)(1)(b). Similarly, a person who is caught snorting a line of cocaine is subject to up to two years of imprisonment – one year for the fifth degree felony of possessing the cocaine and one year for the fifth degree felony of using the cocaine, each in violation of R.C. 2925.11.¹

¹ While Ms. Brown's convictions both fall under the same Code section, the application of *Rance* far more frequently occurs in evaluating convictions under multiple Code sections. It is in this context that other courts have voiced dissatisfaction with *Rance*. See, e.g., *State v. Foster*, Hamilton App. No. C-050378, 2006-Ohio-1567 (applying *Rance* and affirming convictions for transporting drugs and possessing the same drugs); see also, *id.* (Painter, J. concurring) (criticizing *Rance* as "wrongly decided"). See also, *Palmer v. Haviland* (S.D., Ohio 2005), 2005 U.S. Dist. LEXIS 41864 (criticizing *Rance* but, following its dictates, finding no constitutional violation where defendant convicted of aggravated robbery and robbery), *State v. Norman* (1999), 137 Ohio App.3d 184, 203 (same).

Respectfully, this Court's post-*Rance* jurisprudence has also struggled with strict adherence to the *Rance* elemental analysis in circumstances where multiple convictions have arisen under multiple Code sections. Thus, in the context of the offense of kidnapping, this Court has, since *Rance*, held that the offense of kidnapping must merge with another offense where the restraint of the victim was merely that necessary to commit the other offense. *State v. Fears* (1999), 86 Ohio St.3d 329 (kidnapping and robbery are allied); *State v. Adams*, 103 Ohio St.3d 508, 526, 2004-Ohio-5845 (kidnapping and rape), *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006 (same). These decisions are inconsistent with a pure application of *Rance* – taken in the abstract, the elements of the two offenses do not fit hand in glove. This has caused the Fifth District Court of Appeals to recently comment that this Court has been inconsistent in its application of *Rance*. *State v. Smith*, Morrow App. No. 05-CA-0007, 2006-Ohio-5276, n.2 (citing concurring opinion in *Foster*, *supra*). The fluidity of post-*Rance* precedent in both this Court and the lower courts has resulted in inconsistency in the interpretation of R.C. 2941.25. See also, *McKitrick v. Jeffries* (N.D. Ohio), 2006 U.S. Dist. LEXIS 29472 at 24-30 (collecting cases).

SUMMARY OF ARGUMENT

While Ms. Brown does not quarrel with the State's right to bring charges under multiple theories, she contends that, for R.C. 2941.25 to be meaningful, it must prevent "two convictions for the price of one" in situations where only one statute has been violated.

In this case, the application of R.C. 2941.25, as interpreted by *Rance*, is narrowed by the circumstance that both of Ms. Brown's offenses arise under a single Revised Code section. This is significant because the legislative history relating to felonious assault and thus to aggravated assault, contemplates but one conviction in such a circumstance. Thus, this Court need not overrule *Rance* in order for Ms. Brown to prevail. Rather, this Court can, and at a minimum should, adopt the following proposition as its syllabus law:

When, with a single animus, a person violates a single Revised Code section, in multiple ways, only one conviction may be imposed.

Put a different way:

Multiple violations of the same Revised Code section that arise from a single animus are, as a matter of law, to be merged into a single offense of conviction. The elemental analysis of *State v. Rance* is not to be applied in such circumstances.

STATEMENT OF THE CASE AND FACTS

On October 17, 2005, a jury found Defendant-Appellant, Jakeena Brown, guilty of two counts of aggravated assault, felonies of the fourth degree. Count One involved the infliction of serious physical harm upon the victim at a time when Ms. Brown was under sudden passion or a sudden fit of rage brought upon by the victim's serious provocation. Count Two involved the infliction of physical harm with a deadly weapon, under the same provocation. The jury also found Ms. Brown guilty of one count of domestic violence, a misdemeanor of the first degree.

The evidence at trial, insofar as it relates to the propositions before this Court, is not in controversy. Accordingly, for purposes of this appeal, Ms. Brown does not take issue with the State of Ohio's factual statement. There is no question that the victim was cut but once and that Ms. Brown did not make multiple attempts to hurt the victim. (T. 104, 125-28).

The Eighth District held that Ms. Brown's conviction for both counts of aggravated assault were improper as both resulted from a single act. The court declared that as there was only one aggravated assault, Ms. Brown's conviction on both counts was a violation of Double Jeopardy and remanded the matter with an order to vacate the finding of guilt and sentence in one of the aggravated assault convictions. *State v. Brown*, Cuyahoga App. No. 87651, 2006 Ohio 6267 ("Opinion Below") at ¶ 50-51. The Court also found that Ms. Brown's conviction under Ohio's domestic violence statute, 29219.25, did not violate the Ohio Constitution Section 11, Article XV. Opinion Below at ¶ 47.

ARGUMENT

In Response to Propositions of Law I and II (as posited by the State of Ohio)

Convictions for aggravated assault under both theories must stand when the convictions arise from a single act.

The two counts of aggravated assault should merge.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits the imposition of multiple punishments for the same offense. *Costo v. United States* (C.A. 6, 1990), 904 F.2d 344. In this context, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter* (1983), 459 U.S. 359, 365. The Double Jeopardy Clause presumes that a State legislature does not intend to authorize multiple punishments for a single offense.

Blockburger v. United States (1932), 284 U.S. 299, 366. That presumption can only be rebutted by “a clear indication of legislative intent” to the contrary. *Id.*

Here, Ms. Brown could not be convicted of two counts of aggravated assault for a single act of stabbing the victim. R.C. 2941.25 prohibits multiple convictions for “two or more allied offenses of similar import:”

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.

Id.

This court has recognized that the provisions of R.C. 2941.25 are an apparent attempt by the General Assembly to codify the judicial doctrine of merger. The statute prohibits cumulative punishment of a defendant for the same criminal act where his conduct can be construed to constitute two statutory offenses, when, in substance and effect, only one offense has been committed. This is not a new legal principle.

State v. Roberts (1980), 62 Ohio St.2d 170, 172-73.

This section provides that when an accused’s conduct can be construed to amount to two or more offenses of similar import, he may be charged with all such offenses but may be convicted of only one. If his conduct constitutes two or more dissimilar offenses, or two or more offenses of the *same or similar kind* but committed at different times or with a separate “ill will” as to each, then he may be charged with and convicted of all such offenses.

1974 Committee Comment to H.B. 511 (legislative history of R.C. 2941.25) (emphasis added).

Here, *Roberts* dictates that “in substance and effect, only one offense has been committed.” *Id.* Ms. Brown inflicted one instance of harm via one action upon one victim.

That the General Assembly did not contemplate multiple convictions in such a case is further evidenced by the statutory structure relating to the offense of aggravated assault, as well as the greater offense of felonious assault from which Ms. Brown’s aggravated assault offenses

derive. R.C. 2903.11, and R.C. 2903.12 each define a single offense that can be committed in one or more manners. Regardless of which manner of commission is utilized, the offense is that of “felonious assault,” or “aggravated assault.” By placing these various forms of the commission of an offense into a single code section with a single name describing the type of offense, the General Assembly evidenced its belief that these acts, “in substance and effect,” constituted but one offense.

This conclusion is further buttressed by the 1974 Committee Comment to H.B. 511 that sets forth the legislative history of R.C. 2903.11. The Committee noted that the 1974 enactment of R.C. 2903.11 was a legislative attempt to consolidate a number of special assault offenses which were previously codified in separate Code sections. More importantly, in discussing how felonious assault could be a lesser included offense of attempted murder where “an offender shoots and wounds another,” the Committee concluded that such an offender would be guilty of “*an* offense under this section.” (emphasis added). If the Committee believed that more than a single offense of conviction could arise in such a situation, it would have noted that shooting and wounding another (just like Ms. Brown’s stabbing and wounding another) could result in one or more offenses under R.C. 2903.11.

The Eighth District in this case thus properly concluded that Ms. Brown could be convicted of but one offense. The Eighth District reached this conclusion by reasoning that but one offense had been convicted and that *Rance* thus had no applicability. The court indicated that an allied offense analysis is implicated only in a situation where the conduct by the defendant could be construed to constitute two or more offenses. Opinion below, at ¶ 50.

Whether this Court views the two guilty verdicts of aggravated assault returned against Ms. Brown as constituting two forms of commission of the same offense (as did the Eighth

District) or whether it analyzes them as two offenses that are allied and of similar import under R.C. 2941.25 is really of no moment so long as this Court's ultimate conclusion is that Ms. Brown, and others similarly situated, can only be convicted of one offense.

At the very least, *Rance* must be limited to those situations where the General Assembly has not demonstrated its clear belief that various criminal actions are related by their inclusion in a single Code section. This would be consistent not only with the legislative scheme discussed *supra*, but with the fact that *Rance* did not even address *Roberts* and thus implicitly recognized its continued validity.

Finally, the State argues that the appellate court should have applied merger as the proper remedy as opposed to dismissing one of the two convictions. Respectfully, the State is attempting to make a distinction that does not exist. When two counts are merged, there is but one conviction. R.C. 2941.25; accord, *Roberts*. When one count is dismissed, there is but one conviction.

Proposition of Law VI:

By virtue of Article XV, Section 11 of the Ohio Constitution, R.C. 2919.25, prohibiting domestic violence, does not apply to unmarried cohabitants without children.

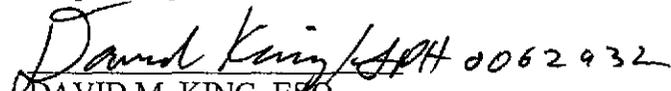
This Court recently decided this issue in *State v. Carswell*, 114 Ohio St.3d 210, 2007 Ohio 3723. Without waiving its position that this proposition of law should be adopted by this Court, Ms. Brown understands that this Proposition of Law will be rejected if this Court follows its recent precedent.

CONCLUSION

Where multiple charges of assault are brought when one act resulted in one injury against one victim, the *Rance* analysis of comparing the elements of the charges in the abstract to determine if the charges are allied offenses is inappropriate. At the heart of Double Jeopardy protection is the concept that an accused not be punished multiple times for one crime.

In Ms. Brown's case the State was free to charge her with committing felonious assault in two different manners, and the jury was free to return two guilty verdicts. But the trial court was not free to enter two convictions. The Eighth District properly held that Ms. Brown committed a single offense of assault.

Respectfully submitted,


DAVID M. KING, ESQ.

JOHN T. MARTIN
Assistant Public Defenders

CERTIFICATE OF SERVICE

A copy of the foregoing Merits Brief was sent via U.S. mail to William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 5th day of February, 2008.


DAVID M. KING, ESQ.
Assistant Public Defenders