

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

STATE OF OHIO :
Appellee/ Cross Appellant :
-vs- :
DAVON WINN :
Appellant/ Cross Appellee :

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate
District Court of Appeals
Case No. 21710

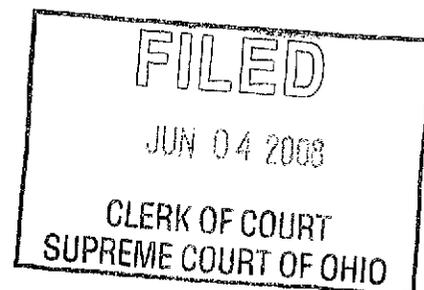
BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER

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 Neither Ohio's multiple count statute nor the Double Jeopardy Clause of the United States Constitution offer protection from cumulative punishments for aggravated robbery and kidnapping because they are not allied offenses of similar import. (<i>State v. Logan</i> (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1245, overruled to the extent that it found inherent in every robbery is a kidnapping.)	
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INTEREST OF AMICUS CURIAE

The Office of the Cuyahoga County Public Defender (“your amicus”) is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such the Office is the largest single source of legal representation of criminal defendants in Ohio’s largest county. The instant case is of great importance to your amicus as well as to the people of the State of Ohio. This Court’s ruling on the issues presented will directly affect the sentences to be imposed in numerous cases. The Cuyahoga County Public Defender’s Office has represented hundreds, if not thousands, of Ohioans who have been or will be sentenced to multiple offenses and where R.C. 2941.25 may or may not apply, depending upon how that statute is interpreted.

STATEMENT OF THE CASE AND FACTS

Your amicus defers to the Statement set forth in Appellee’s Merit Brief.

ARGUMENT

In Response to the Propositions of Law posited by the Appellant, State of Ohio:

Any inquiry into the appropriateness of cumulative punishment imposed for multiple offenses under Ohio’s multiple count statute must end when the statutory elements of the offenses, compared in the abstract, do not correspond to such a degree that the commission of one offense will necessarily result in the commission of the other.

Neither Ohio’s multiple count statute nor the Double Jeopardy Clause of the United States Constitution offer protection from cumulative punishments for aggravated robbery and kidnapping because they are not allied offenses of similar import. (*State v. Logan* (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1245, overruled to the extent that it found inherent in every robbery is a kidnapping.)

The State of Ohio is seeking to restrict R.C. 2941.25 to those situations where two offenses of conviction share elements in such a manner that “commission of one offense will necessarily result in the commission of the other.” State’s Proposition of Law I. This is entirely

too narrow a view of R.C. 2941.25. The State's position is contrary to the language of the statute, its legislative history and this Court's established precedent interpreting the statute.

The Double Jeopardy Clause

The State's second proposition raises the federal double jeopardy implications of respective punishments for multiple offenses. The Double Jeopardy Clause's prohibition on multiple punishments provides a floor that prohibits double punishment for greater and lesser-included offenses unless there is a State legislative intent to the contrary. *Blockburger v. United States* (1932), 284 U.S. 299.

Under *Blockburger*, the Double Jeopardy Clause thus provides the States with the ability to grant either greater or lesser protections against multiple punishments than does the United States Constitution. If a State so desires, it can prohibit multiple punishments even where offenses are not nested one in the other as greater and lesser-included offenses. On the other hand, if a State so desires, it can expand multiple punishments to even include the administration of multiple punishment for both the greater offense and the lesser-included offense. See, *State v. Rance* (1999), 85 Ohio St.3d 632.

What *Blockburger* does, however, is to establish a default standard – where a State is silent as to its intention, the *Blockburger* test applies and multiple punishments are limited to those offenses are included within one another as greater and lesser offenses. *Rance*.

R.C. 2941.25

In light of *Blockburger*, an analysis of the issue of multiple punishment within a State must turn to the laws of that State. In Ohio, the General Assembly has chosen not to simply rely upon the *Blockburger* default standard of only prohibiting punishment for greater and lesser-

included offenses. *Rance*. Rather, the General Assembly has specifically addressed the issue of multiple punishments via the enactment of R.C. 2941.25:

(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.

The Purpose of R.C. 2941.25: To Reject *Blockburger* and Establish a Broader Protection from Multiple Punishments in Ohio

The General Assembly's purpose in enacting R.C. 2941.25 was to ensure that the *Blockburger* test not be applied in Ohio with respect to multiple punishment. *State v. Baer* (1981), 67 Ohio St.2d 220, 226:

If the General Assembly, by the enactment of R.C. 2941.25, had not intended to prohibit more than one conviction and sentence in cases other than where the offenses are the same for purposes of double jeopardy, there could be no purpose in the enactment of the statute. Clearly, the General Assembly intended to extend the prohibition against multiple convictions and sentences beyond the concept of double jeopardy, by providing in R.C. 2941.25(A) that: "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." (Emphasis added.) We construe the word "may" as used in R.C. 2941.25(A) to have the meaning of "shall," thus giving it the interpretation most favorable to the defendant.

Accord, *State v. Cabrales*, Slip Opinion No. 2008-Ohio-1625 at par. 22 (no requirement that "elements of compared offenses must exactly align in order to be allied offenses of similar import under R.C. 2941.25(A).").

This intention to expand the protection against multiple punishment was evinced in the legislative history of R.C. 2941.25:

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.

109th General Assembly, Ohio Legislative Service Commission, Summary of Am. Sub. H.B. 511 at 69 (emphasis added).

In the Technical Committee's opinion, where the same conduct by the defendant technically amounts to two or more related offenses, he should be guilty of only one offense.

Ohio Legislative Service Commission, Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedure, March 1971, at 308.

The Criteria of R.C. 2941.25

That the General Assembly intended to limit the application of multiple convictions for multiple offenses in Ohio only begins this Court's inquiry. The natural question that then arises is "*How* does R.C. 2941.25 limit multiple punishment?" The statute does so via a multi-part test. First, in part (A), the statute requires a trial court to examine the two offenses and determine if they are allied offenses of similar or dissimilar import; by the express terms of the statute, only allied offenses of similar import fall under R.C. 2941.25(A). Second, the statute requires the trial court to determine whether the offenses were committed separately. R.C. 2941.25(B). Third, the statute requires the trial court to determine whether the offenses were committed with a separate animus. *Id.* Only allied offenses of similar import that were not committed separately and were not committed with separate animi are covered by the statute.

The First Criterion: Are the Offenses Allied and of Similar Import?

The first criterion under the statute, encompassed by R.C. 2941.25(A), is the criterion at issue in this case. A review of the statute, its legislative history, and its history of interpretation by this Court reveals that the offenses of kidnapping and aggravated robbery are allied and of similar import.

The key to legislative intent from use of the words "allied offenses of similar import" in R.C. 2941.25(A) and "offenses of dissimilar import," in R.C. 2941.25(B), arises in great part from the word "import," which by dictionary definition would have reference to "allied offenses" of similar importance, consequence and signification intended from use of the word "import."

Baer, 67 Ohio St.2d at 226.

The legislative history made clear that not all offenses were of similar import merely because they were committed in the same transaction.¹ For example, robbery and murder were considered by the Legislative Service Commission to be "dissimilar offenses." 109th General Assembly, Ohio Legislative Service Commission, Summary of Am. Sub. H.B. 511 at 69. This Court's caselaw has also recognized that certain offenses present disparate risks that cause them not to be of "similar import." *State v. Mitchell* (1983), 6 Ohio St.3d 416, 419 ("General Assembly intended to distinguish between aggravated burglary and theft and make them separately punishable.").²

¹ Rather, the concurrence in the same transaction is what causes the offenses to be "allied" – otherwise, the term "allied" would be mere surplusage.

² Prior to *Mitchell*, burglary offenses had been distinguished from the crime that was the object of the burglary by virtue of their having been "separate" under R.C. 2941.25(B), because the burglary was complete upon entry into the structure, and the object crime was not committed until after entry had been accomplished. See generally, *State v. Frazier* (1979), 58 Ohio St.2d 253 (assuming, arguendo, that offenses are of similar import, aggravated burglary was

On the other hand, the legislative history indicated that the determination of what offenses were and were not of similar import was not based on a strict elemental analysis, but on a common-sense evaluation of the types of offenses involved. Theft and receiving stolen property were considered the prototypical example of merged offenses. 109th General Assembly, Ohio Legislative Service Commission, Summary of Am. Sub. H.B. 511 at 69. But other offenses were also considered of similar import.

For example, obtaining title to an automobile by deception can technically constitute an offense under proposed section 2913.41 (Fraud) [hiring a motor vehicle with purpose to defraud] or proposed section 2913.43 (Securing writings by deception). Under division (A) of proposed section 2941.25, the offender could be indicted for both but convicted of only one.

Ohio Legislative Service Commission, Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedure, March 1971, at 308.

This is not to say that the abstract elemental analysis of *Rance* is completely wrong. Rather, it is to reinforce what *Cabrales* recently recognized: That *Rance* was not to be so scrupulously interpreted as has been done by a myriad of lower courts.

Significantly, both before and after *Rance*, this Court consistently recognized that kidnapping was an allied offense of similar import under R.C. 2941.25(A) to other crimes. While *State v. Logan* (1979), 60 Ohio St.2d 126 is the object of the State's criticism in this regard, *Logan* was merely a continuation of the rule set forth in *State v. Donald* (1979), 57 Ohio St.2d 73 (kidnapping allied with rape). Moreover, post-*Rance* decisions of this Court are unwavering in finding that kidnapping is of similar import to other crimes. *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).

nonetheless completed by virtue of entry into home, before aggravated robbery was committed

Why *Rance* Has Been Misinterpreted: The Flaw in the State's Application of *Rance*.

That *Rance* has been the subject of misinterpretation by other courts is clear. *Cabrales*. The fluidity of post-*Rance* precedent in the lower courts has resulted in inconsistency in the interpretation of R.C. 2941.25. See *McKitrick v. Jeffries* (N.D. Ohio), 2006 U.S. Dist. LEXIS 29472 at 24-30 (collecting cases). But trying to explain what went wrong is not as simple a task. And while this Court's decision in *Cabrales* has provided meaningful insight into what *Rance* did *not* intend, the question still arises as to how to apply *Rance* in the future.

Your amicus submits that the answer lies in recognizing that the convictions that are being compared in the abstract under R.C. 2941.25(A) must be examined in the context of their *having both been committed*. This merely recognizes what the jury has already determined – both offenses were committed. When this becomes the starting point, the analysis under R.C. 2941.25(A) becomes in keeping with the legislative intent and this Court's earlier precedent.

Thus, the analysis under R.C. 2941.25(A) asks not “whether one can commit aggravated robbery without also committing kidnapping.” This question, which is at the core of the State's analysis and thus spurs the State to engage in hypotheticals as to how one offense could possibly be committed without the other, results in the type of absurd answers condemned in *Cabrales* as well as by the myriad of pre-*Cabrales* cases that have criticized *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

once inside the home).

violation where defendant convicted of aggravated robbery and robbery), *State v. Norman* (1999), 137 Ohio App.3d 184, 203 (same).

Rather, the question that needs to be asked is “Now that the jury has told us that both offenses were committed, are they so related – via their elements and not by examining the facts – that the commission of one implicates the commission of the other?” This latter question directs the trial court to still examine the elements of the crime without delving into the facts of the case. But this latter question also avoids the angels-dancing-on-the-head-of-a-pin hypothetical analysis that the State continues to urge upon this Court.

Under the analysis proposed herein, aggravated robbery and kidnapping are allied and of similar import under R.C. 2941.25(A): When robbery and kidnapping have been committed in the same transaction, then the kidnapping was necessarily incidental to the robbery, just as it would be incidental to the rape when both offenses have been committed. *Logan*. It is also consistent with the results reached by this Court in pre-*Rance* cases such as *Baer* and *State v. Roberts* (1980), 62 Ohio St.2d 170, 172-73. Perhaps more persuasively, it is inconsistent with the results reached in the host of lower-court opinions criticized by *Cabrales*.

CONCLUSION

Wherefore, the decision of the court of appeals should be affirmed.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Merits Brief was sent via U.S. mail to Jeremy Masters, Counsel for Mr. Winn, 8 East Long Street, Columbus, Ohio 43215, and Jill Sink, Assistant County Prosecutor, Counsel for the State of Ohio, P.O. Box 972, 391 West Third Street, 5th Floor, Dayton, Ohio 45422, and Todd Nist, Assistant Solicitor, State of Ohio, 30 East Broad Street, Columbus, Ohio 43215 this 5th day of June, 2008.


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