

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2008-2133
	:	2008-2228
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Montgomery County
	:	Court of Appeals,
RICHARD L. UNDERWOOD, JR.,	:	Second Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals
	:	Case No. 22454

**MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO**

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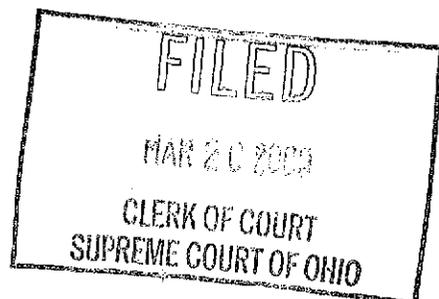


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INTRODUCTION

Ohio law places a high premium on the finality of a sentence to which a defendant knowingly and voluntarily agrees through a plea bargain. Therefore, as is well settled under R.C. 2953.08(D)(1), a sentence imposed on a defendant pursuant to a plea agreement is not appealable if the sentence is “authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.”

Contrary to every other Ohio appellate district that has interpreted R.C. 2953.08(D)(1), the Second District Court of Appeals in this case erroneously held that an agreed sentence is appealable, in spite of R.C. 2953.08(D)(1), where the sentence includes counts that are allied offenses of similar import. The Second District reasoned that because a different statute, R.C. 2941.25(A), precludes a conviction for allied offenses of similar import, Underwood’s sentence in this case was not “authorized by law” as R.C. 2953.08(D)(1) requires and was therefore appealable.

Every other Ohio appellate district that has interpreted R.C. 2953.08(D)(1)—the Third, Seventh, Eighth, Tenth, and Twelfth Districts—properly has held that a sentence that includes allied offenses of similar import is “authorized by law” where the defendant agreed to the sentence, and that 2953.08(D)(1) therefore bars the defendant from appealing. Those rulings reflect this Court’s recognition that “[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at ¶ 25.

Moreover, every other appellate district in Ohio has recognized that a sentence is “authorized by law” within the meaning of R.C. 2953.08(D)(1) so long as the sentence does not exceed the maximum term allowed for the offense. Here, as even the Second District acknowledged, Underwood’s sentence is the same—two years—*regardless of whether or not his*

sentence includes counts for allied offenses, and his two-year term does not exceed the maximum term allowed for the non-allied offenses. Accordingly, there was no basis for the Second District to conclude that Underwood's sentence was not "authorized by law," and no basis to turn R.C. 2953.08(D)(1) into an escape hatch from agreed-upon judgments.

Finally, an additional and independent bar to appeal exists here, because Underwood failed to object to the allied offenses at the trial level. This Court has already held that the failure to raise the issue of allied offenses at the trial level waives the claimed error for purposes of appeal, absent a showing of plain error. But plain error exists only if the trial court outcome clearly would have been different but for the error. There is no question that plain error is lacking here, since—as the Second District conceded—the trial court imposed *concurrent* sentences on Underwood, such that his sentence would be two years regardless of whether or not the sentence includes the allied offenses.

This Court should therefore reverse the Second District's decision and reinstate the judgment of conviction and sentence imposed by the trial court.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General acts as Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring that Ohio's criminal laws are properly applied and that they are applied in a manner that protects the finality of judgments, particularly judgments entered through knowing and voluntary plea agreements. By construing R.C. 2953.08(D)(1) to permit the appeal of an agreed-to judgment that includes allied offenses of similar import, and where the defendant failed to object to the allied offenses at the time of trial, the Second District has seriously undermined both the finality of judgments entered into by plea agreements as well as this Court's well-settled rule that claims not raised at the trial level are waived, absent plain error.

STATEMENT OF THE CASE AND FACTS

For brevity, the Ohio Attorney General adopts the Second District's statement of the case and the statement of the case and facts presented in the brief of Appellant, the State of Ohio. We emphasize here only the following:

Richard L. Underwood, Jr. committed a number of thefts, exceeding \$100,000, in his capacity as a housing contractor. On August 13, 2007, Underwood pled no contest to four felony counts. The four counts consisted of two counts of aggravated theft in violation of R.C. 2913.02(A)(2) as well as two counts of theft in violation of R.C. 2913.02(A)(2).

Through the plea agreement, Underwood and the State agreed that Underwood would plead guilty to all four counts in exchange for the following deal: If he paid \$40,000 in restitution prior to August 29, 2007 (which is significantly less than the \$100,000 he actually stole), Underwood would be sentenced only to community control with local incarceration; but if he failed to timely pay that amount, he would be sentenced to a term of two years in state prison.

When Underwood failed to make restitution by the required date, the trial court, consistent with the plea agreement, sentenced him to two years in prison by ordering the following sentences to be served concurrently:

- One year for aggravated theft for Count 1;
- Six months for theft for Count 2;
- Six months for theft for Count 3; and
- Two years for aggravated theft for Count 4.

Underwood never objected in the trial court that the two counts of aggravated theft (Counts 1 and 4) were allied offenses of similar import, or that the two counts of theft (Counts 2 and 3)

were allied offenses of similar import, or that he could be sentenced on only one count of each under R.C. 2941.25.

The Second District Court of Appeals raised the allied offenses issue *sua sponte*, after Underwood's counsel had filed an *Anders* brief. The appeals court concluded that because R.C. 2941.25(A) precludes a defendant from being convicted for allied offenses of similar import, Underwood's sentence was not "authorized by law" and was therefore not subject to the appellate bar contained in R.C. 2953.08(D)(1). Specifically, the Second District held that the trial court erred in failing to merge the convictions of aggravated theft and theft. The court therefore vacated Underwood's convictions for aggravated theft under Count 1 and for theft under Count 3. The court noted, however, that Underwood's sentence would remain unchanged, since he was still subject to two years in prison for the aggravated theft charge in Count 4. As the Second District stated: "[C]orrection of this error will not shorten the amount of prison time that Underwood must serve because Underwood received a two-year sentence for aggravated theft under R.C. 2913.02(A)(2) and all sentences were ordered to be served concurrently." *State v. Underwood*, 2d Dist. No. 22454, 2008-Ohio-4748, at ¶ 27.

ARGUMENT

The Second District's decision should be reversed for two independent reasons. First, a sentence that includes allied offenses of similar import, but that would remain the same even if the sentence did *not* include the allied offenses, is "authorized by law," and is therefore unappealable pursuant to R.C. 2953.08(D)(1), where the sentence (a) was agreed to by the defendant and (b) does not exceed the statutory maximum for the non-allied offenses. Second, where, as here, a defendant failed to object to the allied offenses at the time of sentencing, and where the sentence imposed would remain the same even excluding the allied offenses, the error is waived and therefore not appealable.

Amicus Curiae Attorney General's Proposition of Law No. 1:

An agreed-upon sentence is “authorized by law,” and is therefore unappealable pursuant to R.C. 2953.08(D)(1), where it includes allied offenses of similar import, but where the sentence would remain the same even if the sentence did not include the allied offenses and where the sentence does not exceed the statutory maximum for the non-allied offenses.

R.C. 2953.08(D)(1) prohibits a defendant from appealing an agreed sentence where the sentence is “authorized by law, has been recommended jointly by the defendant and the prosecution in this case, and is imposed by a sentencing judge.” A different statute, R.C. 2941.25(A), precludes a defendant from being convicted for “allied offenses of similar import.” At issue here is whether the latter statute automatically means that Underwood’s sentence was not “authorized by law” and is therefore reviewable despite R.C. 2953.08(D)(1).

With only one exception—the Second District’s decision here—all of Ohio’s other intermediate appellate courts have held that a sentence is “authorized by law” within the meaning of R.C. 2953.08(D)(1), and is therefore unappealable, so long as the sentence falls within the statutorily set range of available sentences—in other words, so long as the sentence does not exceed the maximum term prescribed by statute for the offense. See *State v. Royles*, 1st Dist. Nos. C-060875 & C-060876, 2007-Ohio-5348, ¶ 8; *State v. Giesey*, 3rd Dist. No. 5-06-31, 2006-Ohio-6851, at ¶ 9; *State v. Duran*, 4th Dist. No. 06CA2919, 2007-Ohio-2743, at ¶ 11; *State v. Starner*, 5th Dist. No. CT2006-0038, 2007-Ohio-1219, at ¶¶ 9-13; *State v. Eskridge*, 6th Dist. No. L-06-1013, 2007-Ohio-4712, at ¶ 15; *State v. Smith*, 7th Dist. No. 06-BE-64, 2007-Ohio-5244, at ¶ 43; *State v. Montgomery*, 8th Dist. No. 83914, 2008-Ohio-443, at ¶ 8; *State v. Mangus*, 9th Dist. No. 23666, 2007-Ohio-5033, at ¶ 10; *State v. Billups*, 10th Dist. Case No. 06AP-853, 2007-Ohio-1298, at ¶ 6; *State v. Owens*, 11th Dist. No. 06 JE 50, 2008-Ohio-3071, at ¶ 7; *State v. Miniard*, 12th Dist. No. CA2006-03-074, 2007-Ohio-458, at ¶ 10.

There is no dispute here—indeed, the Second District conceded—that Underwood’s sentence would remain the same *even if the allied offenses were excluded*. As the Second District noted: “[C]orrection of this error will not shorten the amount of prison time that Underwood must serve because Underwood received a two-year sentence for aggravated theft under R.C. 2913.02(A)(2) and all sentences were ordered to be served concurrently.” *State v. Underwood*, 2d Dist. No. 22454, 2008-Ohio-4748, at ¶ 27. In other words, regardless of whether Underwood’s sentence was based on all four counts, or only on Counts 2 and 4, the fact that he agreed to a two-year sentence for Count 4 (aggravated theft) meant that his concurrent sentence under either scenario would amount to two years. Because the maximum sentence for aggravated theft, a third degree felony, is five years, Underwood’s two-year sentence is unquestionably “authorized by law” within the meaning of R.C. 2953.08(D)(1), and is therefore not appealable.

The Second District’s unprecedented opinion drastically expands the universe of sentences that might not be “authorized by law,” and it upends the well-settled principle that a criminal defendant can waive many types of statutory and constitutional rights through a plea agreement. As this Court has recognized, “[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at ¶ 25.

For all of these reasons, this Court should hold that Underwood’s sentence is “authorized by law” and that R.C. 2953.08(D)(1) therefore barred his appeal.

Amicus Curiae Attorney General's Proposition of Law No. 2:

A defendant who fails to object in the trial court to a conviction that includes allied offenses of similar import waives any error and may not appeal the sentence without showing that the sentence would have been different but for the inclusion of the allied offenses.

Underwood failed to object at the trial level to the inclusion of allied offenses in his conviction. This constitutes an independent basis for overturning the Second District's decision and reinstating Underwood's conviction and sentence as imposed by the trial court.

This Court has repeatedly held that a defendant's failure to raise an issue at trial bars the defendant from raising that issue on appeal, absent plain error. *State v. Awan* (1986), 22 Ohio St.3d 120, 122; *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364, syl. ¶ 1, vacated in part on other grounds (1978), 438 U.S. 911. Indeed, this Court has held specifically as to R.C. 2941.25(A) that a defendant's failure to object at the trial level to allied offenses of similar import constitutes a waiver of the claimed error. *State v. Comen* (1990), 50 Ohio St.3d 206, 211, 553 N.E.2d 640. Accordingly, Underwood has waived any claimed error under R.C. 2941.25(A), unless he can show plain error to prevail on the claimed mistake.

But Underwood cannot demonstrate plain error here. Plain error exists "only if the outcome of the trial clearly would have been different absent the error." *State v. Lindsey*, 87 Ohio St.3d 479, 482, 2000 Ohio 465, 721 N.E.2d 995 (citation omitted). Moreover, a court may only exercise its power to reverse for plain error "in exceptional circumstances to avoid a miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 94-95, 372 N.E.2d 804. In this case, as the Second District acknowledged, Underwood's sentence is the same—two years—regardless of whether or not the allied offenses were part of his conviction. Therefore, the outcome of the trial would not have been different absent the claimed error and Underwood has not been prejudiced.

Nor in any other respect does the inclusion of allied offenses in Underwood's conviction constitute a miscarriage of justice. This Court has long recognized that the purpose of R.C. 2941.25 is to prevent cumulative punishments for allied offenses of similar import, but to permit cumulative punishments in certain other circumstances. See, e.g., *State v. Rance* (1999), 85 Ohio St.3d 632, 634-636, 710 N.E.2d 699. Underwood, however, was never subjected to cumulative punishments here. The trial court ordered that the sentences on the four counts run *concurrently*, and accordingly, Underwood's sentence is the same even if the allied offenses are excluded from his conviction. Underwood's claimed error with respect to R.C. 2941.25 has therefore been waived and is not appealable.

By using the "authorized by law" provision of R.C. 2953.08(D)(1) as an end-run around the appellate bar and this Court's well established waiver rule, the Second District has turned the principle respecting the finality of plea agreements on its head. That is, the Second District has created a scenario whereby the allied offenses issue, where not raised in the trial court, is now *more easily* appealed by those convicted through plea agreements than by defendants convicted after trial. Given the high premium placed on the finality of judgments entered through plea agreements, that surely is not the inverted state of affairs that Ohio law contemplates.

For all of these reasons, Underwood has waived any claimed error as to allied offenses under R.C. 2941.25, and the issue is therefore unappealable.

* * * * *

In overturning the Second District's decision and barring Underwood's appeal, this Court would not be cutting off appropriate remedies for properly aggrieved defendants. For instance, where a defendant's counsel fails to raise the issue of allied offenses at trial and where the

defendant's sentence improperly includes cumulative punishments based on the allied offenses, that defendant could assert a claim for ineffective assistance of counsel.

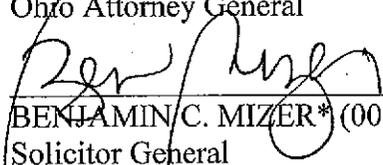
Of course, those are not the circumstances in this case (and, in any event, Underwood has not presented a claim for ineffective assistance of counsel to this Court). The point, however, is that the "authorized by law" provision of R.C. 2953.08(D)(1) not only *should not* be an end-run around the finality of negotiated sentences, but the statute *need not* be erroneously extended because defendants who have truly been prejudiced by a conviction for allied offenses of similar import have appropriate remedies elsewhere.

CONCLUSION

For the reasons above, this Court should reverse the judgment of the Second District.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 20th day of March, 2009, on the following counsel:

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