

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

Case No. **10-1698**

VS.

On Appeal from the Hamilton
County court of Appeals,
First Appellate District

ERRICH VON MINCY,
Defendant-Appellant.

Court of Appeals
Case No. C0800369

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ERRICH VON MINCY**

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230 East Ninth Street
Cincinnati, Ohio 45202
COUNSEL FOR PLAINTIFF-APPELLEE

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RECEIVED
SEP 29 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 29 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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(June 26, 2009)

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This case presents a critical question of whether the effect of R.C. 2941.25 is waived in the case of an agreed upon sentence.

Appellant is serving an aggregate term of 18 years incarceration after pleading guilty to one count of Aggravated Robbery in violation of R.C. 2911.10 (A) (1); two counts of Robbery in violation of 2911.02 (A) (2); two counts of Kidnapping in violation of R.C. 2905.01(A) (2); one count of Failure to Comply in violation of R.C. 2923.331 (B); and, one count of Having Weapons Under Disability in violation of R.C. 2923.13(A) (2).

Appellant appealed his conviction asserting that the court of appeals erred to his prejudice when it entered a judgment of conviction and sentence against him for allied offenses of similar import in violation of R.C. 2941.25 (A).

In its ruling, the court of appeals held that the R.C. 2953.08 (D) (1) "bars an appeal of an agreed sentence, even if the sentence includes counts that are allied offenses of similar import." It is Appellant's position that the court erred in its decision, and that this court must accept jurisdiction of this case and to rule on the critical issue of whether the prohibitions of R.C.2941.25 (A) applies in circumstances where a defendant pleads guilty to charges and agrees to the sentence imposed.

STATEMENT OF THE CASE AND FACTS

Appellant was indicted on two counts of Robbery, one count Aggravated Robbery, two counts Kidnapping, one count of possession of a Firearm Under Disability, one count of Fleeing or Eluding a Police Officer's Signal. Appellant entered pleas of guilty to the Aggravated Robbery counts, as well as the Kidnapping, Having Weapons Under Disability, and Fleeing or Eluding the Police Officer's Signal.

The trial court imposed and "agreed sentence" of then years on the Aggravated Robbery Count, eight years on each of the Robbery counts, to run concurrently with the other counts, but consecutively to the Aggravated Robbery sentence. Appellant was, as well, sentence to ten years on the Kidnapping count, four years on the Having Weapons Under Disability count, and one year on the Failure to Comply with the Police Officer's Signal count, all to run concurrently with the sentences imposed on the Robbery counts, with the result being an aggregate sentence of 18 years incarceration.

Appellant timely appealed his sentence to the court of appeals, first Appellate district. The court denied Appellant's relief in its decision and journal entry dated June 26, 2009 case no. B-0704358B.

Appellant then sent said appeal to the Supreme Court of Ohio on Aug. 10, 2009. The Supreme Court of Ohio reversed the judgment of the court of appeals on the authority of *State v. Underwood*, ___ Ohio St. 3d ___, 2010-Ohio-1, ___ N.E. 2d ___, and remanded to the court of appeals for further proceeding consistent with *State v. Underwood*, on Mar. 16, 2010.

On Aug. 18, 2010, the court of appeals affirmed the decision of the trial court.

Appellant now files his Notice of Appeal, and Memorandum in Support of jurisdiction, to this Honorable Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NUMBER ONE

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND DENIED HIM HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW WHEN IT ENTERED A JUDGEMENT OF CONVICTION AND SENTENCE ON APPELLANT FOR SEPERATE COUNTS OF THE INDICTMENT WHICH CONSTITUTED ALLIED OFFENSES OF SIMILAR IMPORT.

Issue Presented For Review And Argument

Whether R.C.2941.25 prohibits the imposition of sentence for multiple counts based upon conduct constituting two or more allied offenses of similar import, where the defendant has pled guilty to such counts and agreed to the sentence imposed?

**R.C.2941.25(A), in pertinent part, provides as follows:
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.**

Courts have held that aggravated robbery and robbery are allied offenses of similar import; and that sentencing for both aggravated robbery and robbery counts in an indictment violates R.C.2941.25. See *State v. Palmer*, 2008-Ohio-4604, (*Hamilton County*). As such, the trial court erred in sentencing Appellant to ten years on the aggravated robbery count, and eight years on the robbery count. Pursuant to R.C.2941.25, Appellant could have only been sentenced for either aggravated robbery, or robbery, but not both.

The question remains whether the effect of R.C.2941.25 is waived in the case of an “agreed sentence”? The courts attention is called to the case of *State v. Underwood*, 2008-Ohio-4748.

In *Underwood*, citing R.C.2953.08(D), the state asserted that Underwood had waived any claim of error with regard to allied offenses, and that his sentence was not subject to review on appeal.

R.C.2953.08(D)(1), in pertinent part, provides as follows:

A sentence imposed upon a defendant is not subject to review... 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.

The *Underwood* court held that sentences which violate R.C.2941.25 are “not authorized by law”, and therefore review of such sentence is not precluded by 2953.08(D)(1).

The Robbery and Kidnapping counts in this case constitutes allied offenses of similar import. In *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, this court held that “where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; 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 exist a separate animus as to each offense sufficient to support separate convictions.”

In the instant case, the record does not contain sufficient facts upon which a determination may be made as to whether the restraint or movement of the victim was not merely incidental to the separate underlying crime of robbery. As such, in respect to the Kidnapping count, must reverse and remand for the taking of evidence on the issue of the kidnapping count. See also *State v. Cabrales*, 114 Ohio St.3d 1408, 2007-Ohio-2632, 867 N.E.2d 842.

The Appellate Court denied Appellants assignment of error stating he was properly convicted of the aggravated-robbery and robbery offense, because he committed separate crimes against the two women and the restaurant. The Appellate Court then state's that the Kidnappings were committed with an animus separate from those for the aggravated robbery and the robberies.

This argument must fail because the mens rea of Appellant was to rob the restaurant and not the employees. Further, more it was an attempted robbery because nothing was taken, when the Appellant could not locate the manger of the restaurant. It is also a fact that appellant never forced the two women into the manger's office, because the manger's office was locked, as stated by P O Cheryl Baarlaer in her Affidavit. (See exhibit 2). Moreover, Kidnapping R.C. 2905.01 (C) (1) If the offender releases the victim in a safe place unharmed, Kidnapping is a felony of the second degree. Which would be Abduction R.C.2905.02 By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to victim or place the other person in Fear;

The offense where committed together and with the same animus, therefore, they are allied offenses of similar import.

CONCLUSION

Based on the foregoing, Appellant prays this Court will accept jurisdiction of his case and hold that the sentences imposed on him for aggravated robbery and robbery are invalid under R.C.2941.25, and reduce his sentence accordingly. As to the kidnapping count, Appellant prays this Court will reverse and remand the matter because the kidnapping count is an allied offense of similar import to the robbery counts and the aggravated robbery count.

Respectfully Submitted,

Errich Mincy

Errich Von Mincy

APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via regular U.S. Mail postage paid to the Hamilton County Prosecutions Office at 230 East Ninth Street, Cincinnati, Ohio 45202, on this 27, day of Sept, 2010.

Erich Mincy

Erich Von Mincy #576-587
Le.C.I. P.O. Box 56
Lebanon, Ohio 45036
APPELLANT-PRO SE

STATE OF OHIO

:

: SS: AFFIDAVIT OF Errich Von Mincy

COUNTY OF WARREN

:

AFFIDAVIT OF INDIGENCY

I, Errich Von Mincy having been duly sworn and cautioned upon my oath as required by law, under penalty of perjury do hereby depose and say that the following is both true and correct:

1. I am currently incarcerated at Lebanon Correctional Institution. I work at the prison but I receive only \$30.00 per month.
2. I have to buy personal hygiene products which is most of my State pay.
3. All Infirmary visits cost me \$3.00 per visit.
4. I have no financial help from any outside sources.

Pursuant to Rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio, I am requesting that the filing fee and security deposit, if applicable, be waived. Also, due to my indigency I ask this Honorable Court to allow me only one copy of my Notice of Appeal please.

Errich Mincy 576-587

Errich Von Mincy #576587
Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036-0056
DEFENDANT-APPELLANT, PRO SE

Sworn to, and subscribed in my presence on this 27 day of September, 2010.



Billy Dee Bailey
Notary Public

My commission expires 3/27/15

BILLY DEE BAILEY
NOTARY PUBLIC • STATE OF OHIO
Recorded in Butler County
My commission expires Mar. 27, 2015

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080369
	:	TRIAL NO. B-0704358
Plaintiff-Appellee,	:	
	:	
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
ERRICH VON MINCY,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

This case is before us pursuant to a remand from the Ohio Supreme Court following its decision in *State v. Underwood*.² Having permitted the parties to file supplemental briefs, we reconsider defendant-appellant Errich Von Mincy's sole assignment of error.

Von Mincy pleaded guilty to one count of aggravated robbery under R.C. 2911.01(A)(1), two counts of robbery under R.C. 2911.02(A)(2), two counts of kidnapping under R.C. 2905.01(A)(2), one count of failure to comply under R.C. 2921.331(B), and one count of having weapons under a disability under R.C. 2923.13(A)(2). The aggravated-robbery, robbery, and kidnapping counts carried

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See *State v. Von Mincy*, 124 Ohio St.3d 549, 2010-Ohio 924, 925 N.E.2d 128.

firearm specifications. Von Mincy agreed to an aggregate term of 18 years in prison, which the trial court imposed.

Von Mincy's sole assignment of error is that the trial court erred in imposing sentences for allied offenses of similar import under R.C. 2941.25. He first argues that he was improperly convicted and sentenced for both the aggravated-robbery and the robbery offenses because these crimes were allied offenses of similar import.

The Ohio Supreme Court has held that aggravated robbery and robbery, as defined either in R.C. 2911.01(A)(1) or in R.C. 2911.02(A)(2), are allied offenses of similar import for which a defendant cannot be separately convicted if they are not committed separately or with a separate animus.³ As alleged in the indictment in this case, the object of the aggravated robbery was a Burbanks restaurant, while the object of the robberies was two women. Because Von Mincy committed separate crimes against the two women and the restaurant, he was properly convicted of the aggravated-robbery and robbery offenses.

Von Mincy next argues that the kidnapping offenses were allied offenses of similar import with the aggravated-robbery and robbery offenses, because the restraint and movement of the two women were merely incidental to the underlying robberies. The Ohio Supreme Court has held that the commission of aggravated robbery and robbery necessarily results in the commission of a kidnapping, and that the crimes are, therefore, allied offenses of similar import for which a defendant cannot be separately convicted unless they are committed with a separate animus.⁴

³ *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, syllabus.

⁴ *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, syllabus and at ¶22.

OHIO FIRST DISTRICT COURT OF APPEALS

In determining whether kidnapping and another offense have been committed with a separate animus, courts must consider the guidelines set forth in *State v. Logan*.⁵

After applying the *Logan* guidelines in this case, we conclude that the kidnappings were committed with an animus separate from those for the aggravated robbery and the robberies. Von Mincy and a co-defendant forced the women back into the restaurant at gunpoint. Once in the restaurant, they forced them into the manager's office and then into a restroom. The asportation at gunpoint was prolonged and of independent significance because there was no need to force the women back into the restaurant to rob it. The women were then marched around the restaurant at gun-point to a much greater extent than was necessary to effectuate the aggravated robbery of the restaurant, and that increased the risk of physical harm to them. As a result, we conclude that Von Mincy was properly convicted of both counts of kidnapping in addition to the aggravated-robbery and robbery counts. We, therefore, overrule his sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 18, 2010
per order of the Court _____
Presiding Judge

⁵ (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, syllabus.



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*STATE OF OHIO
/CITY OF CINCINNATI/

CASE NO. _____
DATE _____

**AFFIDAVIT
HAMILTON COUNTY MUNICIPAL COURT**

Errich Von Mincy
1872 Hamilton Av B
Cincinnati, Ohio 45231

Before me personally came PO Cheryl Baarlaer who, being duly sworn according to law, states that
(Complainant)

on or about the 23rd day of May, 2007, at 11167 Dowlin Drive Cincinnati, Ohio,
(Location)

45241, did ** display a semi-automatic handgun to employees at Burbanks restaurant and attempt to commit a theft offense Mincy and accomplice Andre Harris entered closed business and approached employees and displayed handgun demanding to see the manager. Manager heard Mincy and accomplice enter business yelling at his employees to get down, at which time he fled and contacted the police Employees stated Mincy had a gun to their heads and continued to demand the manager and checked the manager's office, however, it was locked When Mincy and Harris could not locate the manager, they left the employees in the restroom and fled the scene

Location of offense 11167 Dowlin Drive Cincinnati, Ohio 45241 Burbanks

10900 Reading Road

Cincinnati, Ohio 45241

Sworn to and subscribed before me this

23rd day of May, 2007

**PACE OFFICER AUTHORIZED ADMINISTER
OATHS PURSUANT TO FC 2935-081
SHARONVILLE POLICE DEPARTMENT**
Notary Public/ Deputy Clerk

* cross out one

** State the offense you allege the defendant committed and the facts and evidence that leads you to believe that he did in fact commit the offense

Ex 2