

ORIGINAL

**IN THE SUPREME COURT OF OHIO
2010**

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

JEREMY S. DAMRON,

Defendant-Appellee.

Case No. 2010-937

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 09AP-807

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
Phone: (614) 462-3555
Fax: (614) 462-6103

and

JOHN H. COUSINS IV 0083498
(Counsel of Record)
Assistant Prosecuting Attorney
jhcousin@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLANT

KEITH O'KORN 0069834
Attorney at Law
440 Polaris Parkway, Suite 150
Westerville, OH 43082
Phone: (614) 318-7140

COUNSEL FOR DEFENDANT-APPELLEE

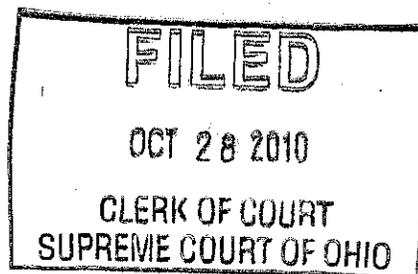


TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION..... 1

STATEMENT OF FACTS..... 3

ARGUMENT..... 7

Proposition of Law One: Even when the sentence falls within the permitted statutory range, the sentence is contrary to law if the court fails to consider the mandatory provisions in R.C. Chapter 2929, or if the court relies on an erroneous legal determination that removes a sentencing option from its consideration. 7

Proposition of Law Two: When a court imposes concurrent prison terms under the mistaken belief that it is merging two allied offenses of similar import, sentencing error occurs, and that error can be corrected on appeal. 7

I. Sentencing error can occur within the statutory range when the trial court erroneously removes consecutive prison terms from its consideration. 7

II. Because the trial court mistakenly believed that concurrent prison terms were required by R.C. 2941.25, the sentence in this case was contrary to law.. 10

A. Felonious assault and felony domestic violence are not allied offenses of similar import. 11

B. Allied offenses of similar import do not merge through the imposition of concurrent sentences. 15

C. The trial court’s doubly incorrect merger belief caused it to impose a sentence that was contrary to law. 16

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX..... A

8/25/2010 Case Announcements, 2010-Ohio-3855 A-1

Notice of Appeal (filed May 25, 2010)..... A-2

Tenth District Judgment (filed April 27, 2010) A-4

Tenth District Decision (rendered and filed April 27, 2010).....	A-5
Common Pleas Judgment (filed July 29, 2009).....	A-10
R.C. 2903.11	A-12
R.C. 2919.25	A-14
R.C. 2929.11	A-17
R.C. 2929.12	A-18
R.C. 2929.13	A-21
R.C. 2941.25	A-28
R.C. 2953.08	A-29

TABLE OF AUTHORITIES

Cases

<i>Kraly v. Vannewirk</i> (1994), 69 Ohio St.3d 627	11
<i>Portage Cty. Bd. of Commrs. v. Akron</i> , 109 Ohio St.3d 106, 2006-Ohio-954	16
<i>State ex rel. Van Dyke v. Pub. Emps. Retirement Bd.</i> , 99 Ohio St.3d 430, 2003-Ohio-4123	15
<i>State v. Bates</i> , 118 Ohio St.3d 174, 2008-Ohio-1983	16
<i>State v. Bosley</i> , 1st Dist. No. C-090330, 2010-Ohio-1570	13, 14
<i>State v. Bowyer</i> , 8th Dist. No. 88014, 2007-Ohio-719	13
<i>State v. Brown</i> , 119 Ohio St.3d 447, 2008-Ohio-4569	13, 14, 16
<i>State v. Cabrales</i> , 118 Ohio St.3d 54, 2008-Ohio-1625	12
<i>State v. Carswell</i> , 114 Ohio St.3d 210, 2007-Ohio-3723	14
<i>State v. Claycraft</i> , 12th Dist. Nos. CA2009-02-013, -014, 2010-Ohio-596	13
<i>State v. Damron</i> , 10th Dist. No. 09AP-807, 2010-Ohio-1821	6, 7, 16
<i>State v. Elmore</i> , 122 Ohio St.3d 472, 2009-Ohio-3478	1
<i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856	7, 9
<i>State v. Hairston</i> , 118 Ohio St.3d 289, 2008-Ohio-2338.....	8

<i>State v. Johnson</i> , 116 Ohio St.3d 541, 2008-Ohio-69	2, 9, 10, 15, 16, 17
<i>State v. Kalish</i> , 120 Ohio St.3d 23, 2008-Ohio-4912	8
<i>State v. Kepiro</i> , 10th Dist. No. 06AP-1302, 2007-Ohio-4593	10
<i>State v. Marshall</i> , 9th Dist. No. 22706, 2005-Ohio-5947	13
<i>State v. Mathis</i> , 109 Ohio St.3d 54, 2006-Ohio-855.....	7, 8
<i>State v. Mughni</i> (1987), 33 Ohio St.3d 65	12
<i>State v. Robinson</i> , 3rd Dist. No. 8-08-05, 2008-Ohio-4956	13
<i>State v. Sandridge</i> , 8th Dist. No. 87321, 2006-Ohio-5243	13
<i>State v. Saxon</i> , 109 Ohio St.3d 176, 2006-Ohio-1245	8, 9
<i>State v. Tolbert</i> , 9th Dist. No. 24958, 2010-Ohio-2864.....	13
<i>State v. Underwood</i> , 124 Ohio St.3d 365, 2010-Ohio-1	2, 9, 15
<i>State v. Warren</i> , 7th Dist. No. 05 MA 91, 2006-Ohio-1281	10
<i>State v. Whitfield</i> , 124 Ohio St.3d 319, 2010-Ohio-2	15
<i>State v. Williams</i> (1997), 79 Ohio St.3d 459.....	14

Statutes

R.C. 2903.11	13
R.C. 2919.25	13
R.C. 2929.11	6, 8, 9, 17, 18
R.C. 2929.12	6, 8, 9, 17, 18
R.C. 2929.13	9, 8, 18
R.C. 2929.14	9, 8, 18
R.C. 2941.25	2, 11, 12, 15, 16
R.C. 2953.08	6

Other Authorities

8/25/2010 Case Announcements, 2010-Ohio-3855	7
--	---

INTRODUCTION

This case asks whether a mistakenly imposed sentence is valid simply because it falls within the statutory range. Although the State requested consecutive prison terms and argued against merger, the trial court imposed concurrent sentences for domestic violence and felonious assault, believing that it was “merg[ing]” two allied offenses of similar import. This belief was wrong for two reasons: (1) felonious assault and domestic violence are not allied offenses of similar import, and (2) merger is not achieved by imposing concurrent sentences. But because concurrent sentences are authorized by law, the Tenth District refused to review the trial court’s doubly erroneous ruling on merger.

It did not matter that the trial court otherwise “would have” imposed *consecutive* sentences for what it called “the worst domestic violence/felonious assault I’ve seen since I’ve been on the bench.” Nor did it matter that the trial court abandoned its discretion, believing it had “no alternative but to run them concurrent.” The Tenth District reviewed the sentence in a vacuum, “notwithstanding” the trial court’s merger conclusion. Finding no error, the Tenth District held that even if the sentence were based on “faulty reasoning,” the trial court’s merger belief “resulted in a sentence authorized by the statutes governing sentencing.”

Contrary to the Tenth District’s holding, a “faulty” sentencing justification cannot serendipitously “result” in a valid sentence. Unlike appellate review of an evidentiary or suppression ruling, where the trial court’s erroneous legal reasoning can be ignored if the ruling was ultimately correct, the mandatory sentencing provisions in the Revised Code prohibit accidental sentences. “[S]entencing courts in this state must still consider all of the remaining sentencing factors contained in several sections of R.C. Chapter 2929.” *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶9. If the trial court mistakenly

abandons these considerations based on a mistaken legal belief, the sentence is invalid.

State v. Johnson, 116 Ohio St.3d 541, 2008-Ohio-69, ¶19.

Sentencing error is not limited to sentences falling outside the statutory range. Error can also occur within the permitted range when the trial court considers a factor it should not have, or, as in this case, when it takes a sentencing option off the table because of an express legal error. The trial court here took the consecutive-sentencing option off the table, and failed to exercise its discretion in that respect, because of its erroneous legal belief that merger was required. This error plainly prejudiced the State, as the trial court “would have” imposed consecutive prison terms but for its incorrect merger belief.

The State deserves meaningful appellate review of allied-offense-related errors. If it is plain error for a court to impose multiple sentences for two allied offenses of similar import, see *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶30, it is also reversible error for a court to purportedly merge two nonallied offenses of dissimilar import. In either scenario, the duty imposed by R.C. 2941.25 is “mandatory, not discretionary.” *Id.* at ¶26. It makes no difference whether the court attaches concurrent prison terms to its mistake. *Id.* Just as a defendant is prejudiced by receiving multiple convictions for allied offenses, the State is prejudiced by being deprived of consecutive prison terms. To hold otherwise would arbitrarily permit one-sided appellate relief.

For these reasons and those set forth below, the State respectfully asks this Court to reverse the Tenth District’s decision and hold that sentencing error can occur within the statutory range when the trial court imposes concurrent prison terms under the mistaken belief that it is merging felonious assault and domestic violence.

STATEMENT OF FACTS

On June 27, 2008, a Franklin County Grand Jury indicted defendant-appellee Jeremy S. Damron of one count of felonious assault, a second-degree felony; two counts of domestic violence, both third-degree felonies; and one count of rape, a first-degree felony. (R. 2) The domestic-violence counts alleged that defendant had a prior conviction for domestic violence and a prior conviction for negligent assault involving a family or household victim. (Id.) Defendant eventually pleaded guilty to the felonious-assault count and to one of the domestic-violence counts, understanding that he could receive maximum, consecutive sentences for his crimes. (R. 139)

The prosecutor recited the facts at the plea hearing, indicating that defendant had spent the day drinking before he came home and savagely beat his girlfriend M.H. in front of their two children, I.D. (age seven) and Z.D. (age six), and in front of M.H.'s other child L.B. (age eleven). (Tr. 5/5/09, p. 14-17) By the time deputies arrived, M.H. had already been transported to Grant Hospital. (Id. at 14) Defendant was still inside the house, naked, before deputies arrested him and secured him in the cruiser. (Id.)

The deputies said the bedroom was "in complete disarray." (Id. at 15) Blood spatter was everywhere—covering the walls, the bedspread, and the blinds. (Id.) A clump of hair was on the bed, and another hung from a nail on the doorframe. (Id.) Pooling blood soaked into the floor and pillows. (Id.) One of the windows had been smashed, and shards of glass were on the floor. (Id.) All but one blade from the ceiling fan had been snapped off; each was covered in blood. (Id.) A black chair was broken into pieces on the floor. (Id.)

I.D. and L.B. told detectives that they were forced to watch defendant beat their mother. (Id. at 16) I.D. jumped on defendant's back and begged him to stop, but

defendant threw him off and continued pounding M.H. (Id.) L.B. approached defendant with a knife but “didn’t have the guts to hurt him.” (Id.) Upon seeing this, defendant threw a fan at L.B. (Id.)

Because defendant broke every phone in the house, L.B. and Z.D. ran to a neighbor’s house for help. (Id.) I.D. was left inside the bedroom where he was forced to watch defendant continue beating his mother. (Id. at 14, 16) He repeatedly asked detectives why it took so long for them to arrive. (Id. at 16)

Defendant told detectives that he warned M.H. for three days to stop talking to him in an emasculating way. (Id. at 16-17) He said that M.H. would order him around and make him feel like “hired help.” (Id. at 17) When asked about the attack, defendant said that he did not remember much since he drank beer and Skyy Vodka all day. (Id. at 17) Although he “blacked out” earlier, defendant knew he beat M.H. (Id.) Scratches and bruises covered his fingers and knuckles. (Id.)

The doctors at Grant Hospital were initially unable to determine whether M.H. suffered a concussion because her eyes were completely swollen shut. (Id.) She could not speak or give detectives a statement. (Id.) Later, doctors concluded that M.H. suffered a nasal fracture and a concussion. (Id.)

The defense took no exception with the prosecutor’s factual recitation. (Id.)

At the sentencing hearing, the prosecutor requested consecutive prison terms and argued against merger of defendant’s felonious assault and domestic violence counts. (Tr. 7/27/09, p. 5-6, 8) Pointing to the seriousness of the offense and defendant’s high recidivism risk, outlined in its sentencing memorandum, the prosecutor requested consecutive sentences totaling 12 years: a seven-year prison term for the felonious-

assault count and a five-year prison term for the domestic-violence count. (Tr. 7/27/09, p. 8; R. 146) The prosecutor also argued that, under the test announced in *State v. Rance* (1999), 85 Ohio St.3d 632, felonious assault and felony domestic violence are not allied offenses of similar import. (Tr. 7/27/09, p. 5-6; R. 146)

The defense contended that the felonious-assault and domestic-violence convictions should merge. (Tr. 7/27/09, p. 9) Relying on *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, defense counsel argued that the two crimes were allied offenses of similar import under Ohio's multiple counts statute, R.C. 2941.25. (Id. at 9)

The trial court agreed with the prosecutor's belief that consecutive prison terms were appropriate; however, it stated that it had no choice but to impose concurrent prison terms under the doctrine of merger. Specifically, the trial court stated:

You were in complete rage. I mean, you're lucky she's alive. I mean, look at those strangulation marks. You could have snapped her neck. You're a young man who looks like he's fairly strong. She can't take a beating like that.

And I have to be real frank with you, Mr. Damron. This is probably the worst domestic violence/felonious assault I've seen since I've been on the bench; okay? I mean, nobody deserves that. If you love somebody, they don't deserve that. I know you're not justifying it. That rage, and there's, what, three other incidents where this has happened before. This is clearly the worst situation I've seen.

Based upon that, it will be an eight-year sentence on count one; a five-year sentence on count two.

I do agree with [defense counsel] in *State vs. Harris*, needs to merge. I would have found, if I did not think that *Harris* dictated that, that those would run consecutive to each other. By appeal, I feel I have no alternative but to run them concurrent. That's pursuant to the *State vs. Harris* 2009-Ohio-3323.

(Id. at 15) In its sentencing entry, the trial court reiterated its belief that *Harris* required concurrent prison terms:

The Court hereby imposes the following sentence: **EIGHT (8) YEARS as to Count One and FIVE (5) YEARS as to Count Three, to be served CONCURRENT to each other pursuant to *State v. Harris*, 2009-Ohio-3323 at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION.**

(R. 149)

The State timely appealed the sentence to the Tenth District, citing the “contrary to law” provision in R.C. 2953.08(B)(2). (App. Rec. 4) The State’s sole assignment of error challenged the “purported merger” of defendant’s felonious-assault and felony-domestic-violence counts. (App. Rec. 4, 14) Because felonious assault and domestic violence are not allied offenses and because allied offenses cannot be merged by concurrent sentences, the State argued that the trial court violated R.C. 2929.11, 2929.12, and 2941.25. (App. Rec. 19, p. 2)

The Tenth District found no error in the trial court’s sentence. *State v. Damron*, 10th Dist. No. 09AP-807, 2010-Ohio-1821. After acknowledging the trial court’s mistaken reliance on *Harris* and the trial court’s original intention to impose consecutive sentences, the Tenth District refused to review the trial court’s erroneous ruling on merger, stating: “notwithstanding [the trial court’s] conclusion that it was required to merge the two counts, it did not do so.” *Id.* at ¶10. “[B]ecause the court did not actually merge the two counts,” the Tenth District held that it could not review the underlying merger rationale. *Id.* at ¶11.

Rejecting the State’s argument that the trial court abandoned its sentencing discretion, the Tenth District stated: “Even if we were to conclude that the court’s decision to impose concurrent sentences had been based on faulty reasoning, the fact

remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing." Id. at ¶11.

The State timely appealed, and this Court accepted review. *8/25/2010 Case Announcements*, 2010-Ohio-3855.

ARGUMENT

Proposition of Law One: Even when the sentence falls within the permitted statutory range, the sentence is contrary to law if the court fails to consider the mandatory provisions in R.C. Chapter 2929, or if the court relies on an erroneous legal determination that removes a sentencing option from its consideration.

Proposition of Law Two: When a court imposes concurrent prison terms under the mistaken belief that it is merging two allied offenses of similar import, sentencing error occurs, and that error can be corrected on appeal.

By holding that a mistakenly imposed sentence is valid simply because it falls within the statutory range, the Tenth District has improperly crafted an exception to the mandatory sentencing provisions in the Revised Code. As explained below, sentencing error can occur within the permitted range when an express legal error causes the trial court to remove a valid sentencing option from its consideration. Because the trial court in this case erroneously removed consecutive sentences from its consideration, the resulting concurrent sentences were contrary to law.

I. Sentencing error can occur within the statutory range when the trial court erroneously removes consecutive prison terms from its consideration.

After *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court has full discretion to impose a sentence within the statutory range; however, "in exercising its discretion, the court must carefully consider the statutes that apply to every felony case."

State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38. "[C]ourts have not been

relieved of the obligation to consider the overriding purposes of felony sentencing, the seriousness and recidivism factors, or the other relevant considerations set forth in R.C. 2929.11, 2929.12, and 2929.13.” *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶25. “In addition, the sentencing court must be guided by statutes that are specific to the case itself.” *Mathis* at ¶38.

R.C. 2929.11 and 2929.12 require guided judicial discretion during the imposition of every felony sentence. R.C. 2929.11(A) states that the trial court “shall be guided by the overriding purposes of felony sentencing” and “shall consider” factors such as the need for incapacitating the offender and deterring the offender and others from future crime. R.C. 2929.11(B) further requires each felony sentence to be “reasonably calculated to achieve the two overriding purposes of felony sentencing * * * , commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.12 directs sentencing courts to “consider” various seriousness and recidivism factors when fashioning the appropriate sentence.

“Because the sentencing duties of a trial judge involve much more than merely selecting a prison term within a statutory range, a sentence may be challenged as ‘contrary to law’ even if it is within a statutory range.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶59 (Lanzinger, J., dissenting). “The legislature crafted the sentencing statutes in a manner that mandates individual consideration of each offense during sentencing and allows meaningful review of the sentence for each offense individually on appeal.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶20, citing R.C. 2929.11 through 2929.19; 2953.08(G)(2); *Mathis* at ¶¶23-24; 35-36; 38.

When the trial court erroneously believes that concurrent sentences are required by law, sentencing error occurs, and the erroneous belief is reviewable on appeal. Because such sentences are the product of mistake rather than discretion, they violate R.C. 2929.11 and 2929.12. The trial court necessarily failed to consider several factors, such as whether consecutive prison terms advanced the purposes of felony sentencing, or, conversely, the trial court did consider those factors but abandoned its consideration based on an express legal error. Either way, the trial court committed reversible sentencing error. See *Underwood* at ¶20 (“A trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions.”).

This Court has found reversible error in the opposite context, where the trial court mistakenly believed that R.C. 2929.13(F) required consecutive sentences. *Johnson* at ¶19-20. After holding that “R.C. 2929.13(F) does not require a sentencing court to impose consecutive sentences for multiple rape convictions,” this Court recognized that a trial court is permitted to “exercise its discretion to determine whether consecutive sentences are appropriate based upon the particular facts and circumstances of the case.” *Id.* at ¶17-18, citing *Saxon* at ¶9; *Foster* at ¶100.

Even though the consecutive sentences were otherwise permitted by law, this Court found reversible error because the trial court expressly refused to exercise its discretion in an area where discretion was required:

Here, the trial court imposed consecutive sentences for Johnson’s four rape convictions based upon its *mistaken belief* that R.C. 2929.13(F) required it to do so, as exemplified by its statement that ‘the Court is required by law to run each sentence consecutively.’ Thus, the court did not exercise its discretion to determine whether the facts and circumstances of this case warranted the imposition of consecutive prison terms.

Johnson at ¶19 (emphasis added). Then, after vacating Johnson’s sentence, this Court remanded the case for resentencing with instructions for the trial court to “exercise its discretion to determine whether the particular facts and circumstances of this case warrant the imposition of consecutive sentences.” *Id.* at ¶20.

In a similar context, several appellate districts—including the Tenth—have vacated sentences where the trial court erroneously believed that a prison term was mandatory rather than discretionary. See *State v. Warren*, 7th Dist. No. 05 MA 91, 2006-Ohio-1281, ¶68; *State v. Kepiro*, 10th Dist. No. 06AP-1302, 2007-Ohio-4593, ¶37. Although prison is a valid sentencing option, the defendant suffers prejudice “because the legal error appears to have prevented the trial court from considering whether community control sanctions could have been imposed.” *Warren* at ¶68.

These cases confirm that sentencing error is not limited to sentences falling outside the statutory range. If the trial court erroneously abandons its discretion and expressly refuses to consider a valid sentencing option, the resulting sentence is contrary to law. As explained below, the trial court in this case took the consecutive-sentencing option off the table, and failed to exercise its discretion in that respect, because of its erroneous legal belief that merger was required.

II. Because the trial court mistakenly believed that concurrent sentences were required by R.C. 2941.25, the sentence in this case was contrary to law.

When clear and convincing evidence establishes that the trial court’s sentence is contrary to law, the reviewing court may “increase, reduce, or otherwise modify” the sentence or it may “vacate the sentence and remand the matter to the sentencing court for resentencing.” R.C. 2953.08(G)(2); see, also, *Saxon* at ¶4. That standard continues to apply today, notwithstanding the splintered decision in *Kalish*. The three-justice *Kalish*

plurality lacks precedential weight because it “fail[ed] to receive the requisite support of four justices * * * in order to constitute controlling law.” *Kraly v. Vannewirk* (1994), 69 Ohio St.3d 627, 633. The three-justice dissent, limiting review to contrary-to-law review, is more persuasive, since it is consistent with the express statutory language in R.C. 2953.08(G)(2) that excludes abuse-of-discretion review.

The concurrent sentences imposed in this case were clearly and convincingly contrary to law. After expressly stating that it “would have” imposed *consecutive* prison terms for the worst felonious assault and domestic violence it had ever seen, the trial court abandoned this decision based on its belief that those two offenses merged via concurrent prison terms. As explained below, this merger belief was wrong for two reasons, both of which caused the court to remove a valid sentencing option—consecutive prison terms—from its consideration.

A. Felonious assault and felony domestic violence are not allied offenses of similar import.

Disagreeing with the State’s argument against merger, the trial court misinterpreted Ohio’s multiple counts statute, R.C. 2941.25, which 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.

In *State v. Rance*, 85 Ohio St.3d 632, 635, this Court set forth a two-part analysis for determining whether offenses will “merge” for sentencing purposes under R.C.

2941.25. First, under R.C. 2941.25(A), a court must determine whether the elements of the offenses correspond to such a degree that the commission of one offense will automatically result in the commission of the other offense. *Rance*, 85 Ohio St.3d at 636, 638, 639. In this step, the elements are compared in the *statutory* abstract, i.e., at the level of the statute as written, not at the level of how the indictment is worded. *Id.* at 637. If the offenses do not satisfy this test, then they have a dissimilar import, the “merger” inquiry ends, and multiple sentences are allowed. *Id.* at 636.

If the offenses have similar import under the first step, the analysis proceeds to a second step under R.C. 2941.25(B), where the court must determine whether the offenses were committed separately or with a separate animus. *Rance*, 85 Ohio St.3d at 636. If the offenses were committed separately or with a separate animus, the defendant may be punished for both. *Id.* If not, the court must merge the offenses of similar import. *Id.* The burden of persuasion is on the defendant to prove entitlement to merger. *State v. Mughni* (1987), 33 Ohio St.3d 65, 67.

This Court’s decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, did not change the *Rance* analysis. To be sure, in *Cabrales*, this Court criticized those lower courts that had purported to invoke *Rance* to impose a “strict textual comparison” test on the first prong of the allied-offenses analysis, but *Cabrales* said it was merely clarifying *Rance* and otherwise adhered to the *Rance* comparing-elements-in-abstract approach. See *Cabrales* at ¶28 (“Applying *Rance* in This Case”).

Under the first prong, felonious assault and felony domestic violence do not merge. The elements of the third-degree felony domestic-violence count are: (1) knowingly; (2) cause or attempt to cause; (3) physical harm; (4) to a family or household

member; (5) having had two or more prior convictions for domestic violence offenses.

R.C. 2919.25(A) and (D)(4). The elements of the felonious-assault count are: (1) knowingly; (2) cause; (3) serious physical harm; (4) to another—irrespective of the relationship to the victim. R.C. 2903.11(A)(1). When comparing the statutory elements in the abstract, the two offenses possess a dissimilar import and cannot be merged.

Felonious assault does not automatically or necessarily result in the commission of felony domestic violence, and, because felonious assault does not depend on the identity of the victim and does not require prior convictions, felony domestic violence does not automatically or necessarily result in felonious assault. Felony domestic violence requires only actual or attempted physical harm, a level of harm well short of the actual serious physical harm requirement for felonious assault. The commission of each offense often occurs without the commission of the other.

Several Ohio appellate courts agree. See *State v. Tolbert*, 9th Dist. No. 24958, 2010-Ohio-2864, ¶53; *State v. Bosley*, 1st Dist. No. C-090330, 2010-Ohio-1570, ¶23; *State v. Claycraft*, 12th Dist. Nos. CA2009-02-013, -014, 2010-Ohio-596, ¶104; *State v. Robinson*, 3rd Dist. No. 8-08-05, 2008-Ohio-4956, ¶26 (“Felonious assault requires a finding of serious physical harm committed against any person, whereas domestic violence only requires a lesser degree of harm, and requires the additional circumstance that the act be against a family or household member.”); *State v. Bowyer*, 8th Dist. No. 88014, 2007-Ohio-719, ¶24; *State v. Sandridge*, 8th Dist. No. 87321, 2006-Ohio-5243; *State v. Marshall*, 9th Dist. No. 22706, 2005-Ohio-5947; *State v. Yun* (2001), 5th Dist. No. 2000CA00276.

In *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, this Court applied the

abstract “elements” test as “set forth in *Rance* and clarified in *Cabrales*” and concluded that the two aggravated-assault offenses did not satisfy that test. *Id.* at ¶34. The *Brown* Court then superimposed over the *Rance-Cabrales* test a “same societal interest” test to address whether different interests underlay the two aggravated-assault offenses.

Brown defeats merger here, as the domestic-violence and felonious-assault statutes were designed to protect separate and distinct societal interests. “The General Assembly enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence. * * * In contrast to ‘stranger’ violence, domestic violence arises out of the *relationship* between the perpetrator and the victim.” *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, ¶30-31, quoting *State v. Williams* (1997), 79 Ohio St.3d 459, 462 (emphasis in *Williams*). “Domestic violence is an unusual outgrowth of an intimate relationship between a man and a woman. It has certain inherent characteristics which place the victim in a position of being extremely susceptible to violence at any given time and/or place.” *Williams*, 79 Ohio St.3d at 463 (citation omitted). As stated by the First District, “the legislature intended to protect a distinct societal interest in enacting the domestic-violence statute—to protect those who are intimately associated with the assailant—whereas the felonious-assault statute was intended to prevent physical harm to all persons.” *Bosley* at ¶31.

Under the two-step test in *Rance* or the “same societal interest” analysis in *Brown*, felonious assault and felony domestic violence are not allied offenses of similar import. An offender does not deserve a “merger” discount when the “family or household member” abuse escalates into a felonious assault. In such cases, the State has the right to multiple convictions and consecutive sentences.

B. Allied offenses of similar import do not merge through the imposition of concurrent sentences.

The trial court misapplied R.C. 2941.25 in another respect when it concluded that merger is accomplished via concurrent prison terms. At the sentencing hearing and in its entry, the trial court stated that concurrent sentences were required pursuant to *Harris*—an allied-offenses decision that actually *prohibits* concurrent sentences when merger is required. Even if felonious assault and felony domestic violence were allied offenses of similar import, “[a] defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses.” *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶17, citing *Brown* at ¶42. The trial court’s duty to correctly apply R.C. 2941.25 “is mandatory, not discretionary.” *Underwood* at ¶25.

Compliance with R.C. 2941.25 is a two-way street. If is plain error for a court to impose multiple sentences for two allied offenses, see *Underwood* at ¶30, it is also reversible error for a court to purportedly merge two nonallied offenses of dissimilar import. In either scenario, the duty imposed by R.C. 2941.25 is mandatory; it makes no difference whether a court attaches concurrent prison terms to its mistake. *Id.* Just as a defendant is prejudiced by receiving multiple convictions for allied offenses, the State is prejudiced by being deprived of consecutive prison terms.

To be sure, R.C. 2941.25 does not require concurrent sentences. “A court’s preeminent concern in construing a statute is the legislative intent in enacting a statute.” *Johnson* at ¶15, quoting *State ex rel. Van Dyke v. Pub. Emps. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, ¶27. “A court shall apply an unambiguous statute in a manner consistent with the plain meaning of the statutory language and may not add or delete words.” *Id.*, citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106,

2006-Ohio-954, ¶52. “By its enactment of R.C. 2941.25(A), the General Assembly has clearly expressed its intention to prohibit multiple punishments for allied offenses of similar import.” *Whitfield* at ¶8, citing *Rance*, 85 Ohio St.3d at 710. “By contrast, the General Assembly exercised its power to *permit* multiple punishments by enacting R.C. 2941.25(B).” *Id.* at ¶9 (emphasis added), citing *Brown* at ¶17; *Rance* at 635.

When the General Assembly intends for two or more sentences to be served concurrently, it specifically states that intention. See, e.g., *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶14 (recognizing that former R.C. 2929.41(A) imposed a presumption of concurrent sentences). The word “concurrent” is not contained anywhere in R.C. 2941.25. Thus, the trial court misapplied R.C. 2941.25 by finding “no alternative” but to impose concurrent sentences.

Here, the trial court defeated the purpose of R.C. 2941.25 by interpreting that statute as a prohibition of consecutive prison terms. But despite this concrete sentencing error, the Tenth District refused to review the trial court’s belief “because the trial court did not actually merge the two counts.” *Damron* at ¶11. The Tenth District awarded the trial court with immunity from appellate review simply because the trial court’s accidental sentence stumbled within the statutory range for the offenses.

C. The trial court’s doubly incorrect merger belief caused it to impose a sentence that was contrary to law.

Because its merger belief was wrong, the trial court wrongly removed consecutive prison terms from its consideration. Like the trial court in *Johnson*, the trial court here failed to apply its sentencing discretion based on an express legal error. Its mistaken belief that R.C. 2941.25 required concurrent sentences prevented it from exercising discretion to determine whether consecutive or concurrent prison terms were appropriate

based on the facts and circumstances of the case. See *Johnson* at ¶19. By refusing to exercise discretion in an area where discretion was required, the trial court violated R.C. 2929.11 and 2929.12.

If anything, the trial court had already decided that consecutive prison terms were appropriate based on the seriousness of the offense and defendant's high recidivism risk. Twice, the trial court called defendant's crimes the "worst" it had ever seen. (7/27/09, p. 15) The trial court said: "You were in a complete rage. I mean, you're lucky she's alive. I mean, look at those strangulation marks. You could have snapped her neck. You're a young man who looks like he's fairly strong. She can't take a beating like that." (Id. at 15) After referring to the prior domestic violence convictions listed in the indictment, the trial court reiterated: "This is clearly the worst situation I've seen." (Id. at 15) Thus, when the trial court said it had "no alternative but to run them concurrent," it refused to apply the mandatory considerations in R.C. 2929.11 and 2929.12.

This retreat from discretion plainly prejudiced the State. But for the erroneous merger conclusion, the trial court "would have" granted the State's request for consecutive prison terms. Consecutive prison terms, according to the trial court, would have best advanced the purposes of felony sentencing and would have been commensurate with the seriousness of the offense. Furthermore, consecutive prison terms exceeding ten years would have rendered defendant ineligible for judicial release. R.C. 2929.20(A)(1)(a) (" 'eligible offender' means any person serving a stated prison term of ten years or less * * * .").

Defendant may argue that the sentencing entry reveals that the trial court "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the

factors set forth in R.C. 2929.12”; however, this language does not change the fact that the trial court abandoned its discretion based on an express legal mistake. Again, the trial court *did* consider the seriousness of the offense and defendant’s high-recidivism risk, but it did so in determining that consecutive prison terms were appropriate. The transcript proves that the trial court retreated from this decision, stating: “I have no alternative but to run them concurrent.” (Tr. 7/27/09, p. 15) The sentencing entry also confirms that concurrent prison terms were imposed “pursuant to *State v. Harris*, 2009-Ohio-3323”—not pursuant to the trial court’s discretion.

Accordingly, the State’s first and second propositions of law should be sustained.

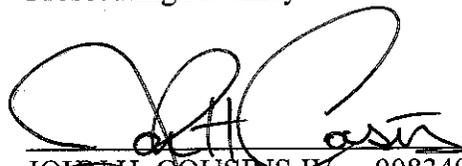
CONCLUSION

For the foregoing reasons, plaintiff-appellant State of Ohio respectfully requests that this Court hold that sentencing error can occur within the statutory range when the trial court imposes concurrent prison terms under the mistaken belief that it is merging felonious assault and domestic violence. The State asks that this Court reverse the judgment of the Tenth District Court of Appeals, vacate the trial court's sentence, and remand this case for resentencing. Because the record proves that the trial court "would have" imposed consecutive prison terms for defendant's felonious assault and domestic violence counts, this Court should instruct the trial court to impose consecutive prison terms for those counts. The length of each prison term, however, should be decided by the trial court pursuant to R.C. 2929.11, 2929.12, 2929.13, and 2929.14.

Alternatively, the State requests that this Court reverse the judgment of the Tenth District Court of Appeals and remand this case with instructions for the Tenth District to determine whether the trial court erred by concluding that R.C. 2941.25 required concurrent sentences.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

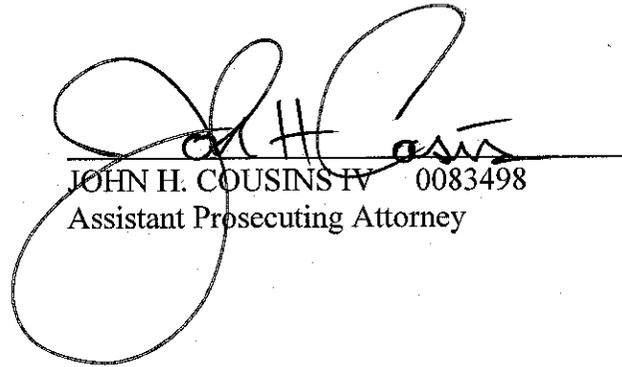


JOHN H. COUSINS IV 0083498
Assistant Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555
jhcousin@franklincountyohio.gov

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, October 28th, 2010, to Keith O’Korn, 440 Polaris Parkway, Suite 150, Westerville, OH 43082; Counsel for Defendant-Appellee.



JOHN H. COUSINS IV 0083498
Assistant Prosecuting Attorney

APPENDIX

8/25/2010 Case Announcements, 2010-Ohio-3855 A-1

Notice of Appeal (filed May 25, 2010)..... A-2

Tenth District Judgment (filed April 27, 2010) A-4

Tenth District Decision (rendered and filed April 27, 2010)..... A-5

Common Pleas Judgment (filed July 29, 2009)..... A-10

R.C. 2903.11 A-12

R.C. 2919.25 A-14

R.C. 2929.11 A-17

R.C. 2929.12 A-18

R.C. 2929.13 A-21

R.C. 2941.25 A-28

R.C. 2953.08 A-29

Westlaw

932 N.E.2d 338 (Table)
126 Ohio St.3d 1544, 932 N.E.2d 338 (Table), 2010 -Ohio- 3855
(Cite as: 126 Ohio St.3d 1544)

Page 1

H(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

Supreme Court of Ohio
State

v.

Damron
NO. 2010-0937

August 25, 2010

APPEALS ACCEPTED FOR REVIEW

Franklin App. No. 09AP-807, 2010-Ohio-1821. Discretionary appeal accepted on Proposition of Law Nos. I and II.

Brown, C.J., and Pfeifer and Lundberg Stratton, JJ., would also accept the appeal on Proposition of Law No. III.

O'Donnell, Lanzinger, and Cupp, JJ., dissent.

Ohio 2010.
State v. Damron
126 Ohio St.3d 1544, 932 N.E.2d 338 (Table), 2010 -Ohio- 3855

END OF DOCUMENT

ORIGINAL

IN THE SUPREME COURT OF OHIO
2010

10-0937

STATE OF OHIO,

Case No.

Plaintiff-Appellant,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

JEREMY S. DAMRON,

Court of Appeals
Case No. 09AP-807

Defendant-Appellee.

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
(614) 462-3555

and

JOHN H. COUSINS IV 0083498
(Counsel of Record)
Assistant Prosecuting Attorney
jhcousin@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLANT

KEITH O'KORN 0069834
Attorney at Law
440 Polaris Parkway, Ste. 150
Westerville, OH 43082
(614) 318-7140

COUNSEL FOR DEFENDANT-APPELLEE

FILED
MAY 25 2010
CLERK OF COURT
SUPREME COURT OF OHIO

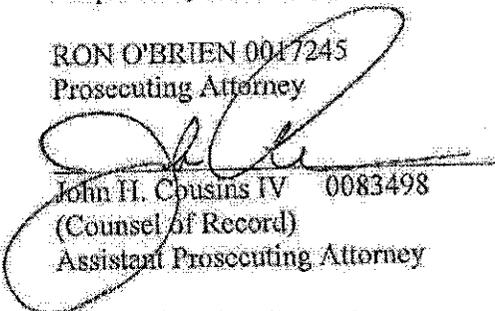
NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Dameron*, 10th Dist. No. 09AP-807, on April 27, 2010.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that this case presents questions of public or great general interest, and that this felony case warrants granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



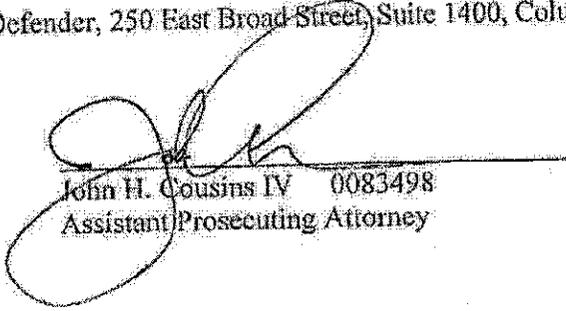
John H. Cousins IV 0083498
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, May 25, 2010, to KEITH O'KORN, 440 Polaris Parkway, Ste. 150, Westerville, OH 43082; Counsel for Defendant-Appellee.

Pursuant to S.Ct.Prac.R. XIV(2)(A), a copy was also sent by regular U.S. mail on this day, May 25, 2010, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



John H. Cousins IV 0083498
Assistant Prosecuting Attorney

Wx

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
APR 27 PM 12:18
CLEVELAND COURTS

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-807
v.	:	(C.P.C. No. 08CR05-4804)
	:	
Jeremy S. Damron,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 27, 2010, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

SADLER, J., TYACK, P.J., and McGRATH, J.

By 
Judge Lisa L. Sadler

7. ...

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

APR 27 2010
6

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-807
v.	:	(C.P.C. No. 08CR05-4804)
	:	
Jeremy S. Damron,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 27, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellant.

Keith O'Korn, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, state of Ohio ("state"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas imposing sentence on defendant-appellee, Jeremy S. Damron ("defendant"), after his convictions on one charge of felonious assault and one charge of domestic violence. For the reasons that follow, we affirm the trial court's judgment.

{¶2} On June 27, 2008, defendant was indicted by the Franklin County Grand Jury on one count of felonious assault, a second-degree felony; two counts of domestic violence, each a third-degree felony; and one count of rape, a first-degree felony. On

May 5, 2009, defendant entered pleas of guilty to the felonious assault count and to one of the domestic violence counts. Nolle prosequis were entered on the rape count and on the second count of domestic violence.

[¶3] On July 27, 2009, the trial court held a sentencing hearing. At the hearing, defendant's counsel argued that the felonious assault count and the domestic violence count were allied offenses of similar import, and therefore had to be merged for purposes of sentencing, citing the decision by the Supreme Court of Ohio in *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. The state argued that felonious assault and domestic violence are not allied offenses of similar import, and that the circumstances of the case made imposition of consecutive sentences on the two counts appropriate.

[¶4] After hearing argument from both sides on the issue of merger, the trial court stated:

And I have to be real frank with you. Mr. Damron. This is probably the worst domestic violence/felonious assault I've seen since I've been on the bench; okay? I mean, nobody deserves that. If you love somebody, they don't deserve that. I know you're not justifying it. That rage, and there's, what, three other incidents where this has happened before? This is clearly the worst situation I've seen.

Based upon that, it will be an eight-year sentence on count one; a five-year sentence on count two.¹

I do agree with [defense counsel] in *State vs. Harris*, needs to merge. I would have found, if I did not think that *Harris* dictated that, that those would run consecutive to each other. By appeal, I feel I have no alternative but to run them

¹ Although the trial court referred to the domestic violence charge set forth in count two of the indictment during the sentencing hearing, at the May 5, 2009 hearing, and in the court's judgment entry imposing sentence the domestic violence count to which defendant pleaded guilty was the one set forth in count three of the indictment, which alleged the same date of offense as the felonious assault count set forth in count one.

concurrent. That's pursuant to the State vs. Harris 2009-Ohio-3323.

(July 27, 2009 Tr., 15-16.)

{¶5} The state filed this appeal, and asserts a single assignment of error:

THE COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT AND DOMESTIC VIOLENCE.

{¶6} The statute governing multiple criminal counts, 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.

{¶7} Determining whether two offenses are allied offenses of similar import for purposes of R.C. 2941.25 requires a two-step process. In the first step, it is necessary to consider whether the elements of the offenses, compared in the abstract, correspond to such a degree that commission of one necessarily results in commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶¶14, 26; *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291. If the first step is satisfied, in the second step, it is necessary to consider the defendant's conduct in order to determine whether the two offenses were committed separately or with a separate animus. *Cabrales* at ¶¶14.

{¶8} For purposes of R.C. 2941.25, a conviction consists of both a finding of guilt and a sentence. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶12. Where a defendant has been found guilty of offenses that are allied offenses, R.C. 2941.25

prohibits the imposition of multiple sentences. *Id.* at ¶18. This requires the trial court to effect a merger of the offenses at sentencing. *State v. Gopen*, 104 Ohio St.3d 358, 2004-Ohio-6548. In effecting this merger, the trial court must give the prosecution the opportunity to identify which of the offenses to pursue at sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶43.

¶9 In this case, the state argues that the trial court erred by concluding that it was required to merge defendant's convictions in this case because felonious assault and domestic violence are allied offenses of similar import. The case upon which the trial court relied for its conclusion that the two offenses were allied offenses, *State v. Harris*, involved an application of the "elements" portion of the *Rance-Cabrales* test to felonious assault as set forth in two separate sections of R.C. 2903.11(A), and therefore does not control application of the "elements" test to felonious assault and domestic violence. In fact, there is some authority for the proposition that the elements of the offense of felonious assault and the offense of domestic violence are not so similar that commission of one necessarily results in commission of the other, and thus the two are not allied offenses. *State v. Craycraft*, 12th Dist. No. CA2009-02-013, 2010-Ohio-596; *State v. Bosley*, 1st Dist. No. C-090330, 2010-Ohio-1570.

¶10 However, we need not reach the issue of whether the trial court erred by concluding that it was required to merge the counts of felonious assault and domestic violence because, notwithstanding its conclusion that it was required to merge the two counts, it did not do so. In order to effect a proper merger, the trial court would have to have given the state the opportunity to elect which offense it would pursue sentencing for, and then impose a sentence only on the offense selected by the state. *Brown*. Instead,

the court imposed separate sentences on each of the two counts, but ordered the sentences to be served concurrently. Imposition of concurrent sentences is not the equivalent of merging allied offenses of similar import. *State v. Carter*, 8th Dist. No. 90504, 2009-Ohio-5961.²

{¶11} In this case, because the trial court did not actually merge the two counts, the only error the state can allege is that the trial court imposed concurrent sentences after having stated during the sentencing hearing that it would have imposed consecutive sentences if it were legally authorized to do so. Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing.

{¶12} Accordingly, the state's assignment of error is overruled. Having overruled the single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH, J., concurs.
TYACK, P.J., concurring separately.

TYACK, P.J., concurring separately.

{¶1} I reach the same result in this case, but for slightly different reasons. I, therefore, concur separately.

² If we were to conclude that the trial court was correct that felonious assault and domestic violence are allied offenses, the court would have erred in its subsequent sentencing, and the imposition of concurrent sentences would not have rendered this error harmless. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶30 ("[E]ven when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.").

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2009 JUL 29 AM 9:20
CLERK OF COURTS

STATE OF OHIO, : Termination No. 13 by LL
 :
 Plaintiff, :
 :
 v. : Case No. 08CR-06-4804
 :
 JEREMY S. DAMRON, : Judge HOLBROOK
 :
 Defendant. :

JUDGMENT ENTRY
(Prison Imposed)

TERMINATION NO.
<i>[Signature]</i>

On May 5, 2009, the State of Ohio was represented by Assistant Prosecuting Attorney Megan Jewett and the Defendant was represented by attorney, Isabella Dixon Thomas. The Defendant, after being advised of his rights entered a plea of guilty to **Count One** of the Indictment, to wit: **FELONIOUS ASSAULT**, in violation of **Section 2903.11** of the Ohio Revised Code, being a **Felony of the Second Degree** and guilty to **Count Three** of the Indictment, to wit: **DOMESTIC VIOLENCE**, in violation of **Section 2919.25** of the Revised Code, a **Felony of the Third Degree**. Upon application of the Assistant Prosecuting Attorney, and for good cause shown, it is hereby **ORDERED** that a nolle prosequi be entered for **COUNTS TWO and FOUR with specifications** of the Indictment.

The Court found the Defendant guilty of the charge to which the plea was entered and ordered a pre-sentence investigation.

On July 27, 2009, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorney Megan Jewett and the Defendant was represented by attorney Isabella Dixon-Thomas. The Assistant Prosecuting Attorney and the Defendant's attorney **did not** recommend a sentence.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: **EIGHT (8) YEARS** as to Count One and **FIVE (5) YEARS** as to Count Three, to be served **CONCURRENT** to each other pursuant to *State v. Harris*, 2009-Ohio-3323 at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION.

After imposing sentence, the Court stated its reasons as required by R.C. 2929.19 and consistent with *State v. Foster*, 2006-Ohio-856.

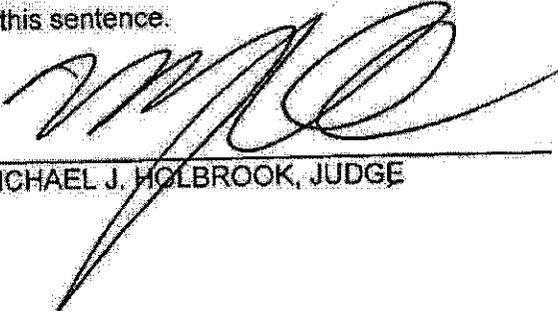
The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **Defendant shall pay court costs in an amount to be determined. No fine imposed.**

The total fine and financial sanction judgment is **\$0 plus costs.**

The Court notified the Defendant pursuant to R.C. 2929.19(B)(3) that the applicable period of post-release control is three (3) years optional.

The Defendant was notified of the Ohio Department of Rehabilitation and Correction's Shock Incarceration Programs and Post Release Control in writing and orally.

The Court finds that the Defendant has **four hundred and two (402) days** of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.



MICHAEL J. HOLBROOK, JUDGE

cc: Assistant Prosecuting Attorney
Defendant's Attorney



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2903. Homicide and Assault

Assault

→ 2903.11 Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

CREDIT(S)

(2008 H 280, eff. 4-7-09; 2006 H 461, eff. 4-4-07; 2006 H 347, eff. 3-14-07; 2006 H 95, eff. 8-3-06; 1999 H 100, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, S 199; 1972 H 511)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.

© 2010 Thomson Reuters

END OF DOCUMENT



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2919. Offenses Against the Family (Refs & Annos)

Domestic Violence

→ 2919.25 Domestic violence (later effective date)

<Note: See also version(s) of this section with earlier effective date(s).>

- (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
- (B) No person shall recklessly cause serious physical harm to a family or household member.
- (C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.
- (D)(1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.
- (2) Except as otherwise provided in divisions (D)(3) to (5) of this section, a violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree.
- (3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to domestic violence, a violation of section 2903.14, 2909.06, 2909.07, 2911.12, 2911.211, or 2919.22 of the Revised Code if the victim of the violation was a family or household member at the time of the violation, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to any of those sections if the victim of the violation was a family or household member at the time of the commission of the violation, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the second degree.
- (4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.
- (5) Except as otherwise provided in division (D)(3) or (4) of this section, if the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) or (B) of this section is a felony of the

fifth degree, and the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (D)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:

(a) If the violation of division (A) or (B) of this section is a felony of the fourth or fifth degree, except as otherwise provided in division (D)(6)(b) or (c) of this section, the court shall impose a mandatory prison term on the offender of at least six months.

(b) If the violation of division (A) or (B) of this section is a felony of the fifth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of twelve months.

(c) If the violation of division (A) or (B) of this section is a felony of the fourth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of at least twelve months.

(d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (D)(6)(e) of this section and notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(e) If the violation of division (A) or (B) of this section is a felony of the third degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of one year or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(E) Notwithstanding any provision of law to the contrary, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of charges against a person alleging that the person violated this section or a municipal ordinance substantially similar to this section or in connection with the prosecution of any charges so filed.

(F) As used in this section and sections 2919.251 and 2919.26 of the Revised Code:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

(3) "Pregnant woman's unborn" has the same meaning as "such other person's unborn," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

(4) "Termination of the pregnant woman's pregnancy" has the same meaning as "unlawful termination of another's pregnancy," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

CREDIT(S)

(2010 S 58, eff. 9-17-10; 2010 H 10, eff. 6-17-10; 2008 H 280, eff. 4-7-09; 2003 S 50, eff. 1-8-04; 2002 H 548, eff. 3-31-03; 2002 H 327, eff. 7-8-02; 1997 H 238, eff. 11-5-97; 1997 S 1, eff. 10-21-97; 1995 S 2, eff. 7-1-96; 1994 H 335, eff. 12-9-94; 1992 H 536, eff. 11-5-92; 1990 S 3; 1988 H 172; 1987 S 6; 1984 H 587; 1980 H 920; 1978 H 835)

Current through 2010 File 54 of the 128th GA. (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.

© 2010 Thomson Reuters

END OF DOCUMENT

CBaldwin's Ohio Revised Code Annotated CurrentnessTitle XXIX. Crimes--Procedure (Refs & Annos)Chapter 2929. Penalties and Sentencing (Refs & Annos)

Felony Sentencing

→ 2929.11 Overriding purposes of felony sentencing

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

CREDIT(S)

(1995 S.2, eff. 7-1-96)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.

© 2010 Thomson Reuters

END-OF DOCUMENT



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Felony Sentencing

→ 2929.12 Factors to consider in felony sentencing

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

- (1) The victim induced or facilitated the offense.
- (2) In committing the offense, the offender acted under strong provocation.
- (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
- (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

- (1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.
- (2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.
- (3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.
- (4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.
- (5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

- (1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.
- (2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.
- (3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.
- (4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

~~CREDIT(S)~~

~~(2002 H 327, eff. 7-8-02; 2000 S 179, § 3, eff. 1-1-02; 1999 S 107, eff. 3-23-00; 1999 S 9, eff. 3-8-00; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)~~

~~Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.~~

~~© 2010 Thomson Reuters~~

~~END OF DOCUMENT~~



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

■ Chapter 2929. Penalties and Sentencing (Refs & Annos)

■ Felony Sentencing

→ 2929.13 Sentencing guidelines for various specific offenses and degrees of offenses (later effective date)

<Note: See also version(s) of this section with earlier effective date(s)>

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also shall impose any financial sanction pursuant to section 2929.18 of the Revised Code that is required for the offense and may impose any other financial sanction pursuant to that section but may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (D)(4) of section 2929.14 of the Revised Code or a community control sanction as described in division (G)(2) of this section.

(B)(1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.

(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(2)(a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

(C) Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925, of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

(D)(1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption estab-

lished under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(E)(1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or (C) of this section in determining whether to impose a prison term for the offense shall be determined as specified in section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code, whichever is applicable regarding the violation.

(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

(3) A court that sentences an offender for a drug abuse offense that is a felony of the third, fourth, or fifth degree may require that the offender be assessed by a properly credentialed professional within a specified period of time. The court shall require the professional to file a written assessment of the offender with the court. If the offender is eligible for a community control sanction and after considering the written assessment, the court may impose a community control sanction that includes treatment and recovery support services authorized by section 3793.02 of the Revised Code. If the court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after considering the assessment and recommendation of treatment and recovery support services providers.

(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and except as spe-

cifically provided in section 2929.20 or 2967.191 of the Revised Code or when parole is authorized for the offense under section 2967.13 of the Revised Code shall not reduce the term or terms pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967, or Chapter 5120, of the Revised Code for any of the following offenses:

- (1) Aggravated murder when death is not imposed or murder;
- (2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been guilty of a violation of division (A)(1)(b) of section 2907.02 of the Revised Code and would be sentenced under section 2971.03 of the Revised Code;
- (3) Gross sexual imposition or sexual battery, if the victim is less than thirteen years of age and if any of the following applies:
 - (a) Regarding gross sexual imposition, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age;
 - (b) Regarding gross sexual imposition, the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation.
 - (c) Regarding sexual battery, either of the following applies:
 - (i) The offense was committed prior to August 3, 2006, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.
 - (ii) The offense was committed on or after August 3, 2006.
- (4) A felony violation of section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, or 2907.07 of the Revised Code if the section requires the imposition of a prison term;
- (5) A first, second, or third degree felony drug offense for which section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99, or 4729.99 of the Revised Code, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;
- (6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;
- (7) Any offense that is a third degree felony and either is a violation of section 2903.04 of the Revised Code or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:
 - (a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under section 2907.12 of the Revised Code prior to September 3, 1996, a felony of the first or second degree that resulted

in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of section 2923.12 of the Revised Code, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (D)(1)(a) of section 2929.14 of the Revised Code for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of section 2929.14 of the Revised Code for wearing or carrying the body armor;

(10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of section 2921.36 of the Revised Code, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction;

(13) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, with respect to the portion of the sentence imposed pursuant to division (D)(5) of section 2929.14 of the Revised Code;

(14) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (D)(6) of section 2929.14 of the Revised Code;

(15) Kidnapping, in the circumstances specified in section 2971.03 of the Revised Code and when no other provision of division (F) of this section applies;

(16) Kidnapping, abduction, compelling prostitution, promoting prostitution, engaging in a pattern of corrupt activity, illegal use of a minor in a nudity-oriented material or performance in violation of division (A)(1) or (2) of section 2907.323 of the Revised Code, or endangering children in violation of division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code, if the offender is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense;

(17) A felony violation of division (A) or (B) of section 2919.25 of the Revised Code if division (D)(3), (4), or (5) of that section, and division (D)(6) of that section, require the imposition of a prison term;

(18) A felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code, if the victim of the offense was a woman that the offender knew was pregnant at the time of the violation, with respect to a portion of the sentence imposed pursuant to division (D)(8) of section 2929.14 of the Revised Code.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in section 2941.1413 of the Revised Code, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of section 4511.19 of the Revised Code. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is not subject to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of section 4511.19 of the Revised Code. In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to section 5120.033 of the Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to section 5120.033 of the Revised Code that is privately operated and managed by a contractor pursuant to a contract entered into under section 9.06 of the Revised Code, both of the following apply:

(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to section 5120.033 of the Revised Code other than the privately operated and

managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child-victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to section 2901.07 of the Revised Code.

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that section, or, if required under division (A)(6) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that division.

(J)(1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of section 2923.02 of the Revised Code, the sentencing court shall consider the factors applicable to the felony category of the violation of section 2923.02 of the Revised Code instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost of compliance shall be paid by the crime victims reparations fund.

CREDIT(S)

(2010 S 58, eff. 9-17-10; 2008 H 130, eff. 4-7-09; 2008 H 280, eff. 4-7-09; 2008 S 183, eff. 9-11-08; 2007 S 10, eff. 1-1-08; 2006 S 281, eff. 4-5-07; 2006 H 461, eff. 4-4-07; 2006 S 260, eff. 1-2-07; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2004 H 163, eff. 9-23-04; 2004 H 52, eff. 6-1-04; 2003 S 5, § 3, eff. 1-1-04; 2003 S 5, § 1, eff. 7-31-03; 2002 S 123, eff. 1-1-04; 2002 H 485, eff. 6-13-02; 2002 H 327, eff. 7-8-02; 2000 S 222, eff. 3-22-01; 2000 H 528, eff. 2-13-01; 1999 S 22, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1998 H 122, eff. 7-29-98; 1998 H 293, eff. 3-17-98; 1997 S 111, eff. 3-17-98; 1997 H 32, eff. 3-10-98; 1996 H 180, eff. 1-1-97; 1996 S 166, eff. 10-17-96; 1996 S 269, eff. 7-1-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.

© 2010 Thomson Reuters

C
Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
 Chapter 2941. Indictment
 Pleading, Averments, and Allegations
 → 2941.25 Multiple counts

(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.

CREDIT(S)

(1972 H 511, eff. 1-1-74)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.

© 2010 Thomson Reuters

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

Supreme Court

→ 2953.08 Appeals based on felony sentencing guidelines

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the sentence was not imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925, or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925, of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of section 2929.14 of the Revised Code.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925, of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)(1) A sentence imposed upon a defendant is not subject to review under this section 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.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(I)(1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county

court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (1)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (1)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of section 181.25 of the Revised Code. Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence

appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of section 2953.21 of the Revised Code or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that have been so appropriated specifically for the purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

CREDIT(S)

(2008 H 130, eff. 4-7-09; 2006 H 461, eff. 4-4-07; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2000 H 331, eff. 10-10-00; 1999 S 107, eff. 3-23-00; 1997 H 151, eff. 9-16-97; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/20/10 and filed with the Secretary of State by 10/20/10.

© 2010 Thomson Reuters

END OF DOCUMENT