

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012 TERM

STATE OF OHIO, : **12-1741**
Plaintiff-Appellee, : On Appeal from the
vs. : Franklin County
ARNALDO R. MIRANDA, : Court of Appeals,
Defendant-Appellant. : Tenth Appellate District
Court of Appeals
Case No. 11AP-788

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLANT ARNALDO R. MIRANDA**

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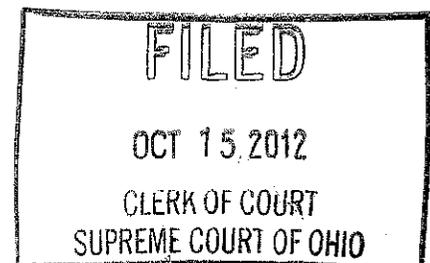


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Proposition of Law No. 1:

Ohio appellate courts are required to apply the new standard announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 when deciding whether the imposition of multiple convictions and sentences for the offense of engaging in a pattern of corrupt activity and one or more of its predicate felonies violates R.C. 2941.25 (the Allied Offenses Statute) and a defendant’s rights under the Double Jeopardy Clauses of Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. 5

Proposition of Law No. 2:

Ohio’s version of the “parsimony clause” found in R.C. 2929.11(A)(1) requires the trial court to use a minimum, concurrent prison term as its base line or starting point for purposes of determining the aggregate period of confinement necessary to protect the public from future crimes and to punish the defendant. 9

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED IN THIS FELONY CASE

Prior to this Court's seminal ruling in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, Ohio courts were required to compare statutory elements in the abstract for purposes of deciding whether related criminal offenses "merge" under the Allied Offenses Statute. The courts were foreclosed from considering the actual conduct of the defendant when making this assessment. The *Johnson* decision jettisoned this approach "to avoid the attendant absurd consequences," including the risk of "shotgun convictions." *Id.* at ¶¶17, 31. The new two-pronged standard announced in *Johnson* requires a court to ask "whether it is possible to commit one offense and commit the other with the same conduct" and "whether the offenses were committed by the same conduct." If both questions can be answered in the affirmative, "then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶¶48-50.

As a matter of simple logic, application of the *Johnson* standard should ordinarily result in a "predicate" offense being subsumed or "merged" into a "compound" offense. Indeed, *Johnson* involved precisely such a scenario. The defendant was found guilty of felony-murder based on the predicate felony of child endangering as well as a separate count of child endangering. This Court had little difficulty concluding that the defendant's conduct in beating his child to death, abhorrent as it was, would only support one conviction and one sentence. *Id.* at ¶57.

Ohio's so-called "RICO" statute requires the prosecution to prove that the accused conducted or participated in the affairs of an enterprise through a pattern of "two or more incidents of corrupt activity." R.C. 2923.31(E); R.C. 2923.32(A)(1). These "incidents" will typically consist of qualifying felony offenses enumerated in the statute. R.C. 2923.31(I)(2). When a defendant is charged with a "RICO" count, it is common practice for prosecutors to also indict him for additional counts separately charging the predicate felonies upon which the pattern of corrupt activity is based.

The new standard in *Johnson* should, in most instances, foreclose “shotgun convictions” for the compound “RICO” count and one or more of its predicate offenses. Defendant-Appellant Arnaldo R. Miranda (“Miranda”) raised this argument in his appeal to the Tenth District Court of Appeals from his separate convictions and consecutive sentences for engaging in a pattern of corrupt activity and the underlying offense of trafficking in marijuana. Unfortunately for him, the court of appeals disregarded the new standard adopted in *Johnson* and instead relied on a 1997 opinion of this Court to affirm the judgment of the trial court. The 1997 ruling, however, addressed an issue regarding the culpable mental state for a “RICO” violation and had absolutely nothing to do with the Allied Offenses Statute. Acceptance of Miranda’s appeal will provide this Court with the appropriate vehicle for deciding whether *Johnson* applies to all criminal prosecutions in this State, including those brought under the engaging in a pattern of corrupt activity statute.

Miranda’s sentencing appeal also presented the court of appeals with an alternative argument regarding the proper interpretation and application of Ohio’s version of the “parsimony clause.” This provision of the Ohio Felony Sentencing Act requires the trial court to impose the “minimum sanction” necessary to accomplish the dual objective of adequately punishing the offender and protecting the public without placing an undue burden on governmental resources.

The trial prosecutor in this case convinced the sentencing judge that Miranda was working for the “Mexican cartel” when he was engaged in marijuana trafficking in the Columbus area. He offered no factual basis for this assertion. Nevertheless, the trial judge apparently was so incensed by this information that he felt a maximum consecutive prison term of sixteen years (eight years for the corrupt activity count and eight years for the trafficking count) was the appropriate baseline or starting point for determining the appropriate punishment in Miranda’s case. He reduced this baseline by two years to account for Miranda’s “acceptance of responsibility.”

Miranda argued that the trial judge's methodology of starting with a baseline of a maximum consecutive sentence and placing the burden on the defendant to try to work his way down from there is inconsistent with Ohio's version of the "parsimony clause." If the Court accepts jurisdiction with respect to the allied offenses issue raised by Miranda, he urges it to also consider accepting jurisdiction over his alternative propositions of law in the interest of affording him full and final relief.

STATEMENT OF THE CASE AND FACTS

The Franklin County grand jury indicted Miranda for one count of engaging in a pattern of corrupt activity between October 2010 and January 2011. The indictment included six felony counts of trafficking and possession of marijuana. The marijuana counts are also listed in the "RICO" count as the predicate offenses comprising the pattern of corrupt activity. The charges arose from a marijuana distribution enterprise in the Columbus, Ohio area. The State described Miranda's role in the enterprise as the "money man."

Miranda struck a deal with the State to plead guilty to the corrupt activity count (as a second-degree felony) and one of the trafficking in marijuana counts. At sentencing, the State insinuated that the "Mexican cartel" was behind the local Columbus marijuana operation. It did not offer any evidence to back up this assertion. If the prosecutor's intention was to inflame the passions of the trial judge, his tactic had the desired effect. The court sentenced Miranda to an aggregate fourteen-year prison term. The court of appeals affirmed Miranda's convictions and sentence.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

Ohio appellate courts are required to apply the new standard announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 when deciding whether the imposition of multiple convictions and sentences for the offense of engaging in a pattern of corrupt activity and one or more of its predicate felonies violates R.C. 2941.25 (the Allied Offenses Statute) and a defendant's rights under the Double Jeopardy Clauses of Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Miranda's first assignment of error in the court of appeals challenged the trial court's imposition of separate convictions and sentences for engaging in a pattern of corrupt activity and the predicate felony of trafficking in marijuana. He urged the appellate court to apply the new standard announced by this Court in *Johnson* case for purposes of deciding whether the imposition of multiple convictions and sentences for a "RICO" violation and one of its predicate felonies violated R.C. 2941.25 (the Allied Offenses Statute) and his rights under the Double Jeopardy Clauses of Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

The court of appeals *sub silentio* declined to apply *Johnson*. Instead, it cited this Court's 1997 opinion in *State v. Schlosser*, 79 Ohio St.3d 329, 1998-Ohio-716, 681 N.E.2d 911 as controlling authority for the proposition that a trial court may impose "cumulative punishment" for a corrupt activity count and one or more of its predicate felonies. Opinion, at ¶12. Miranda respectfully disagrees and asks this Court to make clear that *Johnson* provides the appropriate standard in all Ohio multiple count prosecutions, even those brought under the Ohio "RICO" statute.

It is well settled that the Double Jeopardy Clause of the Fifth Amendment precludes the sentencing court from imposing consecutive prison terms unless authorized by the legislature. *Whalen v. United States*, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980). Article

I, Section 10 of the Ohio Constitution contains the same protections. In Ohio, R.C. 2941.25 “is a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions.” *Johnson*, at ¶45.

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.

This statute represents an effort by the General Assembly to codify the “judicial doctrine sometimes referred to as 'merger'.” *State v. Botta*, 27 Ohio St.2d 196, 201, 271 N.E.2d 776, 780 (1971). The merger doctrine is premised on “the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.” *Id.*

This Court first addressed the question of whether a predicate offense should merge into a compound offense in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. In that case, the defendant contended that the test adopted by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), foreclosed separate convictions and sentences for the offense of involuntary manslaughter and the predicate offense of aggravated robbery.

The *Rance* Court noted that under *Blockburger*, two offenses do not constitute the “same offense” for double jeopardy purposes if each offense requires proof of an element that the other does

not. *Id.* 85 Ohio St.3d at 634, 710 N.E.2d at 702. It recognized that the typical compound offense, such as involuntary manslaughter, can be committed by means of several different predicate offenses. Quoting Justice Rehnquist's dissenting opinion in *Whalen*, the Court acknowledged that the question of whether any particular predicate offense should be merged with a compound offense depends on whether the offenses are examined in the abstract or in light of the particular facts of the case:

If one applies the test in the abstract by looking solely to the wording of [the statutes], *Blockburger* would always permit imposition of cumulative sentences * * *. If, on the other hand, one looks to the facts alleged in a particular indictment brought under [the statute], then *Blockburger* would bar cumulative punishments for violating [the compound offense] and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.

Id. 85 Ohio St.3d at 637, 710 N.E.2d at 703-704, quoting *Whalen*, 445 U.S. at 709-711, 100 S.Ct. at 1447-1448 (Rehnquist, J., dissenting).

The *Rance* Court ultimately adopted Justice Rehnquist's view that "that if it is necessary to compare criminal elements in order to resolve a case, those elements should be compared in the statutory abstract." *Id.* 85 Ohio St.3d at 637, 710 N.E.2d at 704. Because "aggravated robbery is only one of the many felonies that may support a charge of involuntary manslaughter[.]" it is possible to commit involuntary manslaughter without also committing aggravated robbery. Therefore, said the Court, the offenses are not allied offenses of similar import under R.C. 2941.25 even though in the particular case before it, the killing of the victim occurred as a proximate result of aggravated robbery. *Id.* 85 Ohio St.3d at 639, 710 N.E.2d at 705. The Court upheld *Rance*'s convictions and consecutive sentences for both crimes.

In *Johnson*, this Court revisited the question of whether multiple convictions and sentences are permissible when the defendant is found guilty of a compound and a predicate offense. In overruling *Rance*, the Court expressly rejected its essential holding that the elements of the offenses

must be compared in the abstract. The *Johnson* majority stated the sentencing judge should instead determine “whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other.” *Id.* at ¶48 (internal citation omitted). If both crimes can be committed by the same conduct, the court must next determine whether the offenses were in fact committed by the same conduct. *Id.* at ¶49. “If the answer to both questions is yes, the offenses are allied offenses of similar import and must be merged.” *Id.* at ¶50.

After announcing this new test, the *Johnson* Court had little difficulty finding that the defendant’s conviction for child endangering merged with his conviction for aggravated murder. It explained that “Johnson’s beating of [the child victim] constituted child abuse under [the child endangering statute]. That child abuse formed the predicate offense for the felony murder under [the aggravated murder statute]. The conduct that qualified as child abuse resulted in [the victim’s] death, thereby qualifying as the commission of felony murder.” *Id.* at ¶57.

The Tenth District’s reliance on *Schlosser* as its authority for not applying *Johnson* in a corrupt activity case is misplaced. The precise issue decided by *Schlosser* was whether a culpable mental state is required for a violation of R.C. 2923.32(A)(1). The decision had nothing to do with the Allied Offenses Statute.

It is true the opinion in *Schlosser* contains the language that “[t]he intent of the statute is to impose additional liability for the pattern of corrupt activity involving the criminal enterprise.” *Id.* 79 Ohio St.3d at 335, 681 N.E.2d at 916. However, this statement was made in the context of resolving the culpable mental state question. Moreover, at the time *Schlosser* was decided, Division (D) of the former version of R.C. 2923.32 provided that “[c]riminal penalties under this section are not mutually exclusive, unless otherwise provided, and do not preclude the application of any other

criminal or civil remedy under this or any other section of the Revised Code.” *Id.* In 2007, the General Assembly deleted the entirety of the language of Division (D). *See* H.B. 241, Section 1, 151 Ohio Laws, Part V, 9092, 9133 (eff. 7/1/2007).

The deletion is significant. It is a settled rule of statutory construction that an amendment to a section of the Revised Code “is presumed to have been made to effect some purpose.” *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St.2d 163, 175, 283 N.E.2d 434, 441 (1972). This rule applies with equal force to amendments that remove language from a statute. *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725, at ¶29.

Application of the *Johnson* standard to Miranda’s case is relatively straight-forward. As to the first prong of *Johnson*, it is possible to commit the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana through the same conduct. As to the second prong, the indictment’s express incorporation of the Count 2 trafficking in marijuana offense as a predicate offense of the Count 1 “RICO” violation establishes as a matter of law that both offenses were committed by the same conduct. The State’s recitation of facts during Miranda’s guilty plea hearing confirmed that the corrupt activity count was based entirely on the trafficking activity.

Although Miranda did not raise an objection to his sentence, this Court has held that a trial court commits plain error when it imposes multiple sentences for allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31. Because Miranda’s convictions merge under the *Johnson* standard, the imposition of multiple sentences is cognizable as plain error. The error violated his substantial rights under the allied offenses statute and the Double Jeopardy Clauses of the federal and state constitutions and resulted in an excessive punishment for his crime. For these reasons, Miranda asks the Court to accept his case for review of his first proposition of law.

Proposition of Law No. 2:

Ohio's version of the "parsimony clause" found in R.C. 2929.11(A)(1) requires the trial court to use a minimum, concurrent prison term as its base line or starting point for purposes of determining the aggregate period of confinement necessary to protect the public from future crimes and to punish the defendant.

Miranda's second assignment of error raised the alternative argument that the methodology used by the trial court to determine his sentence. The eight-year prison term imposed by the trial court with respect to Count 2, trafficking in marijuana, was mandatory. *See* R.C. 2925.03(C)(3)(g). Assuming *arguendo* that the offenses do not merge under the Allied Offense Statute, the trial court would have had the discretion to impose a concurrent or consecutive prison term within the range of two to eight years for Count 1, engaging in a pattern of corrupt activity.

Miranda's trial judge stated that he would use the maximum consecutive sixteen-year aggregate prison term as his benchmark or starting point before applying a two-year reduction for Miranda's acceptance of responsibility. He justified this action by explaining that "[t]his was a huge operation, commercially, that brought a lot of illegal drugs into our community, and the involvement with the Mexican cartels is probably inviting the most dangerous folks on the face of the planet, or just about, next to the Taliban, to have dealing with Columbus[.]"

A trial judge's felony sentencing discretion is not unfettered. Before imposing consecutive non-minimum prison terms, he must "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38.

R.C. 2929.11(A) directs the sentencing judge to be guided by the overriding purposes of felony sentencing. These purposes are "to protect the public from future crime by the offender and

others and to punish the offender using the *minimum sanctions* that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.”

Id. (emphasis supplied).

The requirement that the court impose a sentence no greater than the “minimum sanction” needed to accomplish the overriding purposes of felony sentencing is analogous to the so-called “parsimony clause” of the federal sentencing act. Section 3553(a), Title 18, of the United States Code instructs federal district judges to “impose a sentence sufficient, but not greater than necessary, to comply with” the statutory objectives of punishment, deterrence, incapacitation, and rehabilitation. *Rita v. United States*, 551 U.S. 338, 347-348, 127 S.Ct. 2456, 2463, 168 L.Ed.2d 203 (2007).

The methodology employed by Miranda’s judge was contrary to Ohio’s version of the “parsimony clause.” By starting with the presumption that a maximum consecutive prison term is the appropriate punishment in a corrupt activities case involving multiple counts, the judge unfairly placed the onus on Miranda to persuade him that he was deserving of a lower sentence. This methodology defeats the entire purpose behind the General Assembly’s directive that the court should always impose the “minimum sanction” necessary to protect the public and punish the offender without burdening governmental resources.

The court of appeals decision completely ignored Miranda’s “parsimony clause” argument. His statutory right to appeal a sentence on the ground it is “contrary to law” required the court of appeals to address it. *See* 2953.08(A)(4). For these reasons, Miranda asks the Court to accept his case for review of his second proposition of law.

Proposition of Law No. 3:

The use of inaccurate information to sentence a defendant is contrary to the Ohio Felony Sentencing Act and violates his rights under the Due Process Clause of the Fourteenth Amendment.

The sentencing record did not contain any evidence that Miranda was involved with the Mexican drug cartel or that he “invited” its members into the community of Columbus, Ohio. The trial judge presumably was relying on an assertion by the prosecutor that the marijuana “is, clearly, coming from Mexico, involving Mexican cartels[.]” The prosecutor even asserted that the trial judge should disregard Miranda’s concern about his children because he exposed them to the “risk of death” from the cartel.

Miranda’s second assignment of error also challenged the trial court’s reliance on this inaccurate information to sentence him. The court of appeals rejected this challenge, stating that “the Ohio Rules of Evidence do not apply to sentencing hearings. * * * Therefore, the trial court was not precluded from considering the prosecutor’s statement regarding the involvement of Mexican cartels.” Opinion, ¶17.

The court of appeals was mixing apples and oranges. Although the evidence rules do not control sentencing proceedings, a defendant still has a right under the Ohio Felony Sentencing Act to be sentenced on the basis of *accurate* information. *See State v. Sanchez-Martinez*, 6th Dist. No. E-08-033, 2009-Ohio-775, at 3-4. More importantly, he has the same right under the Due Process Clause. *Townsend v. Burke*, 334 U.S. 736, 740-741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).

An unsworn statement by an attorney for the State surely does not qualify as “information” upon which to justify a consecutive sentence. The trial court’s reliance on this statement violated Miranda’s due process rights and was contrary to the sentencing statutes.

Even assuming *arguendo* the existence of a factual basis for the prosecutor’s assertion that the marijuana was supplied by the Mexican cartel, it would not provide a lawful basis for an enhanced sentence. The federal opinion in *United States v. Aguilar-Pena*, 887 F.2d 347 (1st Cir. 1989) is instructive on this point.

In that case, the defendant was stopped by customs officials in the San Juan, Puerto Rico airport during a stopover on a flight from Columbia. He was found to be in possession of a quantity of cocaine. He pled guilty in federal district court to possession of undocumented cocaine. The probation officer computed a guideline range of 21 to 27 months imprisonment. The district judge departed upward and imposed a 48-month prison term. He justified the departure on the basis that “it is a well known fact in this community” that the San Juan airport “is being utilized by South American drug traffickers as a convenient stopover point for distribution of narcotics into the Continental United States” and that a departure “is warranted to discourage utilization of” the airport. He also expressed his belief that a sentence within the guideline range “would also be in violation of the Puerto Rico public sentiment, feelings and mores regarding this type of crime.”

The federal circuit court of appeals vacated the upward departure, explaining that “[t]he basic flaw in the district court’s reasoning is that it depends entirely upon the mere commission of the offense of conviction. The district court did not advert to, or rely upon, anything ‘different’ about this case; to the contrary, the court’s remarks would be equally applicable to any violation of [the statute] committed by any person, so long as it occurred in a Puerto Rican airport.” *Id.*, 887 F.2d at 351.

The origin of the marijuana in Miranda’s case, if it indeed came from the “Mexican cartel,” would have no bearing on the question of whether he personally is deserving of a consecutive sentence. In most trafficking cases, the supply of drugs originates from elsewhere. Whether or not the “Mexican cartel” is as dangerous or almost as dangerous as “The Taliban,” it is extremely unfair to impute the presumed dangerous propensities of the supplier to Miranda in the absence of evidence that he advocated or supported its policies. The investigation did not result in the seizure of firearms. The State never suggested that Miranda practiced or employed violence.

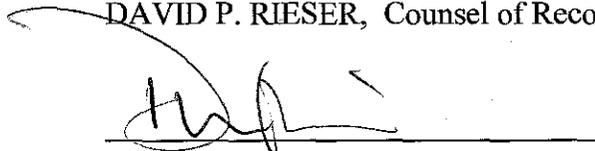
The errors committed by the trial judge were prejudicial. The record clearly and convincingly established that he subjected Miranda to an enhanced sentence based on a flawed methodology and inaccurate information. For these reasons, Miranda asks the Court to accept his case for review of his third proposition of law.

CONCLUSION

Wherefore, for all the foregoing reasons, Defendant prays that this Court will accept jurisdiction over this appeal and allow full briefing and oral arguments on the merits.

Respectfully submitted,

DAVID P. RIESER, Counsel of Record



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ATTORNEY FOR DEFENDANT-
APPELLANT ARNALDO R. MIRANDA

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal of Defendant-Appellant Arnaldo R. Miranda was served upon Ron O'Brien (0017245), Prosecuting Attorney, Franklin County, Ohio, and Seth Gilbert, Attorney for Plaintiff-Appellee State of Ohio, 373 South High Street, 13th Floor, Columbus, Ohio 43215-4554 by regular U.S. Mail this 15th day of October, 2012.



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FILED *7/30/12*
COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2012 AUG 30 PM 12:56
CLEAN UP COURTS

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-788
v.	:	(C.P.C. No. 11CR-02-688)
	:	
Arnaldo R. Miranda,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

David P. Rieser, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Arnaldo R. Miranda ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas imposing prison sentences pursuant to appellant's guilty plea. Because we conclude that the trial court did not err by sentencing appellant to separate consecutive sentences on the two charges to which he pled guilty, we affirm.

{¶ 2} In January 2011, appellant and several other men were arrested in connection with their involvement in a marijuana trafficking enterprise. After his arrest, appellant confessed to the police that he was the "money person" for the enterprise. Appellant was indicted on one count of engaging in a pattern of corrupt activity, a first-degree felony in violation of R.C. 2923.32; three counts of trafficking in marijuana,

second-degree felonies in violation of R.C. 2925.03; and three counts of possession of marijuana, second-degree felonies in violation of R.C. 2925.11. Appellant ultimately pled guilty to two counts: a second-degree felony charge of engaging in a pattern of corrupt activity and a second-degree felony charge of trafficking in marijuana. Following the guilty plea, the trial court sentenced appellant to six years' imprisonment on the charge of engaging in a pattern of corrupt activity and eight years' imprisonment on the charge of trafficking in marijuana, with the sentences to be served consecutively. The court also imposed a fine of \$15,000 on each count, required appellant to pay court costs, and notified appellant of a mandatory three-year term of post-release control.

{¶ 3} Appellant appeals from the trial court's judgment imposing the prison sentences, assigning two errors for this court's review:

Assignment of Error No. 1: The imposition of separate convictions and sentences for the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana violated R.C. 2941.25 (the allied offenses statute) and Defendant-Appellant's rights under the Double Jeopardy Clauses of [the] Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Assignment of Error No. 2: The methodology employed by the trial court to justify the imposition of consecutive sentences for the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana was contrary to R.C. 2929.11 and R.C. 2929.12, and also violated Defendant-Appellant's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. Defendant-Appellant requests the Court to grant him leave to appeal his consecutive sentences pursuant to R.C. 2953.08(C).

{¶ 4} Appellant argues that the sentences imposed by the trial court are contrary to law. Under R.C. 2953.08(A)(4), a criminal defendant who is convicted of or pleads guilty to a felony may appeal a sentence on the grounds that it is contrary to law. In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, this court explained the standard of review in felony sentencing decisions:

In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19, this court held that, pursuant to R.C. 2953.08(G),

we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶ 19.

After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 8. Additionally, since *Kalish*, this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶ 8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100.

Id. at ¶ 19-21.

{¶ 5} In this case, however, appellant raised no objections during the sentencing hearing. Therefore, he has waived all but plain error. See *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To find plain error, we must find that there was an error, that the error was plain, constituting an obvious defect in the trial proceedings, and that the error affected the appellant's substantial rights. *State v. Carter*, 10th Dist. No. 03AP-778, 2005-Ohio-291, ¶ 22. Moreover, notice of plain error is taken only in exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Sneed*, 63 Ohio St.3d 3, 10 (1992).

{¶ 6} In his first assignment of error, appellant claims that the trial court erred by imposing separate sentences for each of the counts to which he pled guilty. Appellant argues that the trial court was required to merge the convictions for the purposes of sentencing pursuant to R.C. 2941.25, Ohio's allied offenses statute. As noted above, appellant did not object to the lack of merger at the sentencing hearing; therefore, the plain-error standard applies. *See State v. Davic*, 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 13. "Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law." *Id.*

{¶ 7} Appellant argues that his convictions for engaging in a pattern of corrupt activity and trafficking in marijuana must be merged pursuant to the allied offenses statute because they were committed by the same conduct. Ohio's allied offenses statute provides that "[w]here 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." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B).

{¶ 8} However, as we have previously noted, "[a] person may be punished for multiple offenses arising from a single criminal act so long as the General Assembly intended cumulative punishment." *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, ¶ 19, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 25. The primary indication of the General Assembly's intent is R.C. 2941.25, but other more specific legislative statements may also be considered depending on the offenses involved. *Id.*

{¶ 9} Appellant pled guilty to engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, also known as Ohio's Racketeer Influenced and Corrupt Organizations ("RICO") statute. The Supreme Court of Ohio has previously held that "[t]he RICO statute was designed to impose *cumulative* liability for [a] criminal enterprise."

(Emphasis added.) *State v. Schlosser*, 79 Ohio St.3d 329, 335 (1997). Finding that Ohio's RICO statute was based on the federal RICO statute, the Supreme Court noted that Congress declared the intention of the federal law to be to " 'provid[e] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' " *Id.* at 332, quoting Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S. Code Cong. & Adm. News at 1073. Thus, merger of a conviction for engaging in a pattern of corrupt activity and a predicate offense is not required because the intent of Ohio's RICO statute "is to impose additional liability for the *pattern* of corrupt activity involving the criminal enterprise." (Emphasis sic.) *Id.* at 335.

{¶ 10} Appellant argues that a 2006 amendment to R.C. 2923.32 demonstrates that the General Assembly no longer intended to allow cumulative punishment in corrupt activity cases. Appellant cites to this court's decision in *State v. Burge*, 88 Ohio App.3d 91 (10th Dist.1993), in which we referred to division (D) of R.C. 2923.32 in concluding that a defendant could be convicted and sentenced on both a corrupt activity charge and on the predicate offense. *Id.* at 94. The first sentence of division (D) of R.C. 2923.32 provided that " '[c]riminal penalties under this section are not mutually exclusive, unless otherwise provided, and do not preclude the application of any other criminal or civil remedy under this or any other section of the Revised Code.' " *Burge* at 94, quoting R.C. 2923.32(D). In 2006, the General Assembly enacted Sub.H.B. No. 241, which deleted division (D) from R.C. 2923.32. Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9133. Appellant argues that, by deleting this provision, the General Assembly expressed its intent to allow the merger of a corrupt activity conviction with a predicate offense where such merger would otherwise be consistent with the allied offenses statute.

{¶ 11} We acknowledge that "[t]he General Assembly's amendment to a section of the Revised Code is presumed to have been made to effect some purpose." *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St.2d 163, 175 (1972). However, further examination of Sub.H.B. No. 241 indicates that the deletion of division (D) of R.C. 2923.32 was not intended to permit merger of a corrupt activity conviction with a predicate offense. Sub.H.B. No. 241 created a new chapter of the Revised Code, Chapter 2981, governing criminal and civil asset forfeitures. Sub.H.B. No. 241, 151 Ohio Laws,

Part V, 9092, 9217-43. In addition to creating new forfeiture provisions, the legislation deleted certain forfeiture provisions located in other parts of the Revised Code. The second sentence of former R.C. 2923.32(D) related to criminal forfeiture, providing that "[a] disposition of criminal forfeiture ordered pursuant to division (B)(3) of this section in relation to a child who was adjudicated delinquent by reason of a violation of this section does not preclude the application of any other order of disposition under Chapter 2152. of the Revised Code or any other civil remedy under this or any other section of the Revised Code." R.C. 2923.32(D), repealed in Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9133. In addition to deleting division (D) of R.C. 2923.32, Sub.H.B. No. 241 also deleted divisions (B)(4)-(6), (C), and (E)-(F) of the statute, each of which also addressed forfeiture. Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9131-34. Thus, the deletion of division (D) of the statute appears to have been part of the general revisions related to the creation of Chapter 2981. We find no evidence that the General Assembly intended to permit merger of corrupt activity convictions with predicate offenses by deleting the first sentence of the former division (D) of R.C. 2923.32.

{¶ 12} In *Schlosser*, the Supreme Court of Ohio did not rely on division (D) of R.C. 2923.32 in holding that the statute permitted cumulative punishment. Rather, as noted above, the court looked to the law's similarity to federal law and the clear statements that the federal law allowed cumulative punishment. *Schlosser* at 332-35. Further, since the deletion of division (D), two courts of appeals have concluded that R.C. 2923.32 permits cumulative punishment and does not require merger of a corrupt activity conviction with a predicate offense. *See State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222, ¶ 68; *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, ¶ 35-38. Consistent with these decisions and the reasoning set forth above, we conclude that the General Assembly intended to permit separate punishments for engaging in a pattern of corrupt activity and the underlying predicate crimes. Thus, even assuming for the purpose of analysis that appellant is correct that he committed the crimes of engaging in a pattern of corrupt activity and trafficking in marijuana through the same conduct, the trial court did not err by imposing separate sentences for the two convictions.

{¶ 13} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶ 14} In appellant's second assignment of error, he asserts that the trial court erred in the "methodology" used to impose consecutive sentences on appellant for the two convictions. Appellant concedes that the eight-year prison term for trafficking in marijuana was mandated by statute. However, appellant argues that the trial court erred by imposing a consecutive six-year prison term for engaging in a pattern of corrupt activity. Appellant argues that, in imposing a consecutive sentence, the trial court improperly relied on the prosecutor's statement that the marijuana trafficking enterprise involved Mexican drug cartels.

{¶ 15} Under Ohio law, "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). In imposing a sentence, the court has discretion to determine the most effective way to comply with these purposes; in the exercise of this discretion, the court must consider factors relating to the seriousness of the defendant's conduct, the likelihood of recidivism, and other relevant factors. R.C. 2929.12(A). The offender, the prosecutor, and the victim or victim's representative may present information relevant to the imposition of sentence. R.C. 2929.19(A).

{¶ 16} At the sentencing hearing, the prosecutor asserted that "[g]iven the size of this organization, this is, clearly, coming from Mexico, involving Mexican cartels, because of the amount of money involved as well as the information that the state has gotten from the investigation." (Sentencing Hearing Tr. at 14.) When the court pronounced appellant's six-year sentence on the charge of engaging in a pattern of corrupt activity, it referred to the involvement of Mexican cartels in the trafficking enterprise. Appellant asserts that the trial judge acted contrary to law in relying on the assertion that Mexican cartels were involved in the enterprise because there was no evidence in the record to support the assertion.

{¶ 17} The Ohio Rules of Evidence do not apply to sentencing hearings. Evid.R. 101(C)(3); *State v. Guzman*, 10th Dist. No. 02AP-1440, 2003-Ohio-4822, ¶ 25. We have previously held that "a trial court may even consider information during the sentencing hearing that may have been inadmissible at trial." *Id.* Moreover, R.C. 2929.19(A)

explicitly provides that, at a sentencing hearing, the offender, the prosecutor, and the victim may present *information* relevant to sentencing. The statute does not use the term "evidence" when referring to the matters that may be presented for the trial court's consideration. Therefore, the trial court was not precluded from considering the prosecutor's statement regarding the involvement of Mexican cartels.

{¶ 18} Appellant did not object to the prosecutor's statement during the sentencing hearing. Moreover, we note that appellant's own counsel alluded to the possible involvement of Mexican cartels before the prosecutor made any such assertion:

[Appellant] was found with a million dollars in cash. It's not his money. That money gets shipped back. It goes back to Arizona. From there, I don't know where it goes. Maybe it goes to Mexico. I guess we can only surmise.

(Sentencing Hearing Tr. at 6.)

{¶ 19} Finally, the transcript indicates that, contrary to appellant's assertion, the trial court did not refer to the involvement of Mexican cartels in the marijuana trafficking enterprise as the basis for imposing consecutive sentences. Rather, the trial court made this reference in explaining the length of the sentence imposed. The court acknowledged that appellant accepted responsibility for his role by pleading guilty but explained that the scope and scale of the marijuana trafficking enterprise reduced the mitigating effect of that factor:

This was a huge operation, commercially, that brought a lot of illegal drugs into our community, and the involvement with the Mexican cartels is probably inviting the most dangerous folks on the face of the planet, or just about, next to the Taliban, to have dealings with Columbus, and I can't give any more than two years less than the maximum for accepting responsibility on this thing.

(Sentencing Hearing Tr. at 24.)

{¶ 20} Under these circumstances, we conclude that the trial court did not commit plain error in imposing consecutive sentences on appellant.

{¶ 21} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 22} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.

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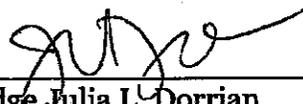
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-788
v.	:	(C P C No 11CR-02-688)
	:	
Arnaldo R. Miranda,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 30, 2012, appellant's two assignments of error are 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.

DORRIAN, SADLER & FRENCH, JJ.

BY 

Judge Julia L. Dorrian