

IN THE SUPREME COURT OF OHIO

13-0670

STATE OF OHIO,

:

Plaintiff-Appellant,

:

On Appeal from the Clermont County  
Court Of Appeals, Twelfth District

vs.

:

ERDEL OZEVIN,

:

Court of Appeals Case No. CA2012-  
06-044 (2013-Ohio-1386)

Defendant-Appellee.

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT STATE OF OHIO

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## **II. EXPLANATION OF JURISDICTION**

### **THIS CASE INVOLVES A FELONY AND IS ONE OF PUBLIC INTEREST.**

This case involves the crimes of aggravated burglary and kidnapping, both felony offenses. Courts across Ohio are struggling with the holding in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314 (2010) and the required analysis in determining merger. The Supreme Court's decision in this case could assist courts throughout Ohio in making this determination.

## **III. STATEMENT OF THE CASE AND FACTS**

Defendant-Appellee met victim Zuhul Sexton and desired a romantic relationship with her. (5/8/12 T.p. 24, 30). He thought that if she could see him as her protector, she would be more receptive to him. (5/18/12 T.p. 43). On December 9, 2011, he entered her home while she was not at home and hid in the utility room. (3/30/12 T.p. 22-23; 5/8/12 T.p. 22-26).

When the victim arrived home, Defendant-Appellee emerged from the utility room and approached her from behind, assaulting her and attempting to cause her physical harm. (5/8/12 T.p. 23-26). He put a bag over her head and attempted to duct tape her wrists when she would not comply. (5/8/12 T.p. 23-32). The two fell to the floor and a struggle ensued. He also attempted to bind her legs. (5/8/12 T.p. 32). Unable to subdue the victim, Defendant-Appellee left without revealing his identity, but leaving behind zip ties, a large canvas bag and a large black shroud. (5/8/12 T.p. 26). Defendant-Appellee was the victim's first visitor at the hospital after the attack. (5/8/12 T.p. 37). She did not know that he was her attacker at that time.

Defendant-Appellee was identified by the police and charged with five counts: aggravated burglary, attempted murder, kidnapping, felonious assault and possessing criminal tools. (T.d. 1). He entered guilty pleas to Counts 1, 3 and 5, Count 3 having been amended to a lesser offense. The trial court, finding that the offenses of aggravated burglary and kidnapping did not merge, sentenced Defendant-Appellee to seven years on the aggravated burglary and five years on the kidnapping, to run consecutively. (T.d. 34). Count 5 was merged.

The Twelfth District Court of Appeals, finding that the crimes should merge, reversed this case only to the extent the sentence is vacated, and remanded for resentencing. *State v. Ozevin*, 2013-Ohio-1386 (Ohio App. 12 Dist., April 8, 2013).

#### **IV. PROPOSITIONS OF LAW**

**First Proposition of Law:** The offenses of aggravated burglary and kidnapping are not allied offenses and do not merge for purposes of sentencing or conviction.

Merger of counts is mandated by R.C. 2941.25, which provides the following:

(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.

Offenses are allied offenses of similar import if it is possible to commit one offense and commit the other with the same conduct and if the offenses were actually committed by the

same conduct. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶48, 49. The same set of offenses can be allied offenses in one case and not in another. *Id.*, at ¶52. The question is determining whether offenses are allied offenses of similar import is whether *it is possible* to commit one offense and commit the other with the same conduct. If the multiple offenses *can* be committed by the same conduct, the court must determine whether the offenses *were* committed by the same conduct. *State v. Beverly*, 2013-Ohio-1365, ¶37-38 (Ohio App. 2 Dist., 2013). (Emphasis added). In *State v. Taylor*, 2013-Ohio-1362 (Ohio App. 6 Dist.), the Court found that aggravated burglary and felonious assault are not allied offenses of similar import. The “distinguishing element of conduct separating these offenses is that of trespass.” Aggravated burglary is predominantly an offense against another’s property, whereas assault, like kidnapping in the present case, is predominantly an offense against another’s person. *Id.*, at ¶11. The Court went on to hold that appellant’s conduct in breaking into the victim’s apartment prior to assaulting the victim constituted the offense of aggravated burglary, and found that the offenses were not allied offenses and separate sentencing was proper. Based on the *Taylor* case, burglary and kidnapping would not be allied offenses in the present case.

If it might be possible to commit the crimes burglary and kidnapping at the same time, the second test of *Johnson* would come into play. In this case, the trial court focused on the second test for merger, which is whether the two offenses were committed separately or with a separate animus. The trial court conducted a full evidentiary hearing to apply the *Johnson* test and found that the two crimes were not committed by the same conduct. “I don’t think it is the same act. I think the act of the aggravated burglary was complete when there was any harm caused.” (5/8/12 T.p. 17). Therefore, upon the initial blow to the victim, the aggravated

burglary offense was completed. The kidnapping occurred subsequently, as Defendant tried to bind the victim's hands and feet. "You go ahead and you do all the other things that he did, that's a separate act." *Id.* The court also found that these offenses each had a separate animus. *Id.*

The Supreme Court of Ohio set forth guidelines under R.C. 2941.25(B) to determine whether a kidnapping needs to be merged into another offense, i.e., whether it was committed separately or with a separate animus:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

*State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979). The trial court in the present case found that the risk of harm caused by the kidnapping was greater and separate and apart from the harm caused by the burglary. (5/8/12 T.p. 18). The court found that the aggravated burglary was complete when Defendant caused or attempted any harm to the victim. "That leaves a whole lot of conduct that is separate \* \* \*." *Id.* Using the language in *Logan*, the trial court said that "[t]he restraint of the victim subject[ed] the victim to a substantial increase and risk of harm separate and apart from the underlying crime." *Id.*

The Twelfth District addressed the issue of merger concerning the offenses of burglary and theft. The Court, applying the *Johnson* analysis, held that burglary and theft offenses do

not merge, because the crimes are committed with a separate animus. *State v. Crosby*, 2011-Ohio-4907, ¶21. The Court reasoned that because a burglary occurs when one, by force, stealth, or deception, trespassed in an occupied structure with the purpose to commit any criminal offense, that burglary is complete *as soon as the defendant enters the occupied structure with that purpose*. (Emphasis added). The fact that a defendant then may choose to actually carry out the crime of theft, or any other crime, does not mean the crimes of theft and burglary were committed with the same animus. *Id.*, at ¶22. Trial courts in Clermont County have relied on *Crosby* as the guide for merger in multiple offense cases.

Similarly, in *State v. Pope*, 1<sup>st</sup> Dist. No. C-090801 (June 30, 2010), the First District found that the defendant committed kidnapping and aggravated robbery with a separate animus because he restrained the victims, who were the bank employees, after he had already take the bank's money. In *State v. Edwards*, 2010-Ohio-2582 (Ohio App. 6 Dist., 2010), the Sixth District found that the defendant committed kidnapping and aggravated robbery with a separate animus because the victims were exposed to violence and intimidation that exceeded what was necessary to locate the money defendant sought.

In this case, Defendant-Appellee gained entry into the victim's home while she was out and laid in wait for her to return, in order to scare her. (5/8/12 T.p. 26-42). When the victim returned home, Defendant-Appellee attacked her, struck her and placed a plastic bag over her head, pulling it tight, restricting her breathing. Once Defendant-Appellant struck the victim, the crime of aggravated burglary was complete. R.C. 2911.11(A)(1). The victim fought to protect herself. Defendant-Appellee, then in a separate act and with a separate animus, tried to duct tape her hands and began to bind her legs to keep her under control, thus committing the

kidnapping. (T.p. 32, 23). The restraint of the victim continued after the burglary had been committed. Defendant-Appellee committed the kidnapping only after the burglary did not go as planned, because the victim fought back. Therefore, he committed the kidnapping with a separate animus. The kidnapping was not incidental to the burglary and should not merge.

In *State v. Champion*, 1999 WL 114973 (Ohio App. 2 Dist., 1999), a case involving aggravated robbery and kidnapping, the Court found in that case that the aggravated robbery offense did not require the use or threatened use of force. The Court held that “by taping [the] victims’ limbs and mouth, and leaving them in this helpless condition, [defendant] exposed them to a significantly greater risk of harm than was necessary for the accomplishment of the Aggravated Robbery offense. Accordingly, we conclude that the trial court did not err when it declined to merge the Aggravated Robbery and Kidnapping convictions.”

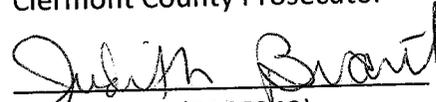
In this case, the kidnapping did not just facilitate the burglary offense, but increased the risk of harm to the victim when Defendant-Appellee attempted to bind her arms and legs. Had Defendant-Appellee succeeded in binding the victim’s legs and arms, she would have been at his mercy, exposing her to a greater risk. The trial court stated that “it obviously could have been a lot worse than it was.” (5/8/12 T.p. 44). Defendant-Appellee did not succeed because the victim fought him and he ran away. Regarding the two offenses, the court said “[i]t seems to me that again they’re two separate things.” (5/8/12 T.p. 46). The court found that “on these facts, to merge these offenses would be saying that there’s nothing more serious than if [Defendant-Appellee] had been in the house with permission, and then he committed a kidnapping inside the house. I think that’s clearly not the case.” (5/18/12 T.p. 17-18).

**V. CONCLUSION**

The State of Ohio requests this Court accept this discretionary appeal on a felony case, in an effort to provide the courts of Ohio with additional guidance as to the requirements in *State v. Johnson*.

Respectfully submitted,

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**VI. CERTIFICATE OF SERVICE**

I certify that the following person was served with a copy of this memorandum as well as a copy of the notice of appeal by regular U.S. Mail on this 29<sup>th</sup> day of April, 2013.

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IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO,

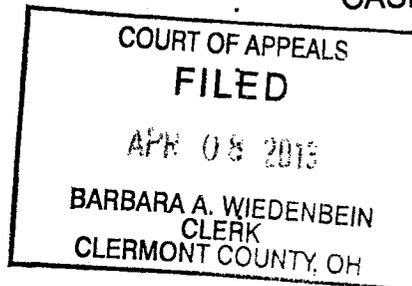
Plaintiff-Appellee,

CASE NO. CA2012-06-044

- vs -

ERDEL OZEVIN,

Defendant-Appellant.



JUDGMENT ENTRY

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed as to sentence only and this cause is remanded for the limited purpose of resentencing.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

A large, stylized handwritten signature in black ink, appearing to read "Robert A. Hendrickson".

Robert A. Hendrickson, Presiding Judge

A handwritten signature in black ink, appearing to read "Robin N. Piper".

Robin N. Piper, Judge

A handwritten signature in black ink, appearing to read "Michael E. Powell".

Michael E. Powell, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

ERDEL OZEVIN,

Defendant-Appellant.

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CASE NO. CA2012-06-044

COURT OF APPEALS <b>FILED</b> APR 08 2013 BARBARA A. WIEDENBEIN CLERK CLERMONT COUNTY, OH	<u>OPINION</u> 4/8/2013
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CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 2011CR01073

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**HENDRICKSON, P.J.**

{¶ 1} Defendant-appellant, Erdel Ozevin, was convicted of aggravated burglary and kidnapping in the Clermont County Court of Common Pleas. Appellant argues on appeal that these offenses should have been merged for sentencing. We agree. Under the facts and circumstances of this case, aggravated burglary and kidnapping are allied offenses of similar import that should have been merged under R.C. 2941.25. Consequently, we remand this

case for a new sentencing hearing after the state selects which allied offense to pursue.

{¶ 2} On December 21, 2011, appellant was indicted by a grand jury on five counts, including aggravated burglary, attempted murder, kidnapping, felonious assault, and possessing criminal tools. The counts regarding attempted murder and felonious assault were dismissed and appellant pled guilty to the remaining charges. The counts for aggravated burglary and possessing criminal tools merged. Consequently, appellant was only convicted of aggravated burglary in violation of R.C. 2911.11(A)(1) and kidnapping in violation of R.C. 2905.01(B)(2).

{¶ 3} Prior to sentencing, the trial court gave the state the opportunity to provide additional evidence through testimony of the victim. The state declined to do so. At the plea hearing, specific facts were read into the record. A summary of these specific facts follows, with any facts disputed by appellant omitted. Appellant stealthily entered the victim's home while she was away. As the victim entered the dark laundry room from her garage, appellant attacked the victim by placing a plastic bag over her head. A struggle ensued whereby appellant struck the victim in the face and body, and attempted to bind her legs with duct tape. In retaliation, the victim clawed at appellant's face, tried to fight him off, and bit him in the hand. Meeting such resistance, appellant fled the scene. Appellant left behind multiple zip ties, a large black canvas bag, a large black shroud, and other miscellaneous items.

{¶ 4} Appellant was sentenced to seven years in prison on the aggravated burglary charge. Additionally, appellant was sentenced to five years in prison for kidnapping. Both were to run consecutively for an aggregate 12-year prison term.

{¶ 5} Appellant now appeals and asserts one assignment of error for review.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED BY IMPOSING MULTIPLE, CONSECUTIVE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 8} Appellant argues that he should not have been convicted of both aggravated burglary and kidnapping because they were committed with the same act and the same animus. Appellant asserts that with the actions of entering the victim's home, attempting to restrain her, scaring her, and fleeing, he committed both aggravated burglary and kidnapping. We agree.

{¶ 9} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. *State v. Brown*, 12th Dist. No. CA2009-05-142, 2010-Ohio-324, ¶ 7. The statute 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.

{¶ 10} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *State v. Craycraft*, 12th Dist. Nos. CA2009-02-013 and CA2009-02-014, 2011-Ohio-413, ¶ 11. Courts must first determine whether it is possible to commit one offense and commit the other with the same conduct. *Johnson* at ¶ 48; *State v. McCullough*, 12th Dist. Nos. CA2010-04-006 and CA2010-04-008, 2011-Ohio-992, ¶ 14. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed by the same conduct. *Johnson* at ¶ 48; *Craycraft* at ¶ 11.

{¶ 11} If it is found that the offenses can be committed by the same conduct, the court

must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶ 50; *State v. Roy*, 12th Dist. No. CA2009-11-290, 2011-Ohio-1992, ¶ 11. However, if the commission of one offense will *never* result in the commission of the other, "or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶ 51; *Craycraft* at ¶ 11-12; *Roy* at ¶ 11.

{¶ 12} First, the state concedes, and we agree, that is possible to commit the offenses of aggravated burglary and kidnapping with the same conduct. In this case, aggravated burglary is trespassing by force, stealth, or deception in an occupied structure with the purpose to commit within the structure a criminal offense and inflicting, attempting to inflict, or threatening to inflict physical harm on another. See R.C. 2911.11(A)(1). Kidnapping is knowingly restraining another person's liberty by force, threat, or deception under circumstances that create a substantial risk of serious physical harm to the victim. See R.C. 2905.01(B)(2). Harm or attempting harm to a victim to complete an aggravated burglary can be caused by same conduct used to forcibly restrain another person. Accordingly, it is certainly possible to commit both aggravated burglary and kidnapping with the same conduct.

{¶ 13} Now we must determine whether appellant committed the offenses with the same conduct, i.e., a single act and a single state of mind. In *State v. Logan*, 60 Ohio St.2d 126 (1979), paragraph one of the syllabus, in establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus, the Ohio Supreme Court adopted the following guidelines:

Where the restraint or movement of the victim is merely

incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

These guidelines appear to remain valid in the wake of *Johnson*. *State v. McCullough*, 2011-Ohio-992 at ¶ 20. Additionally, the act of aggravated burglary in violation of R.C. 2911.11(A)(1) is not complete until the offender inflicts, attempts, or threatens physical harm to another. *State v. Seymore*, 12th Dist. Nos. CA2011-07-131 and CA2011-07-143, 2012-Ohio-3125, ¶ 24.

{¶ 14} In this case, the acts of placing a plastic bag over the victim's head, striking her, and attempting to bind her legs with duct tape completed the aggravated burglary and were also elements of the kidnapping. Any actual restraint of the victim must have occurred over a relatively short period of time because appellant's attempts to bind the victim's legs failed when she clawed at his face, tried to fight him off, and bit him in the hand, which caused him to flee. Accordingly, the victim was not subject to an additional substantial risk of harm due to the crime of kidnapping. The kidnapping posed no significance independent of the aggravated burglary. Consequently, in this particular instance, we find that the aggravated burglary and kidnapping were committed with the same animus.

{¶ 15} Under the facts and circumstances of this case, aggravated burglary and kidnapping are allied offenses of similar import as they can be committed with the same conduct and they were committed with the same animus. Accordingly, they must be merged

for sentencing.<sup>1</sup> Appellant's assignment of error is sustained.

{¶ 16} Insofar as the trial court failed to merge the offenses of aggravated burglary and kidnapping at sentencing, the judgment of the trial court is reversed and this matter remanded for further proceedings according to law and consistent with this opinion. Upon remand, the state can elect which allied offense to pursue, which the trial court must accept and merge the crimes for sentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 20, 24; *State v. Weathers*, 12th Dist. No. CA2011-01-013, 2011-Ohio-6793, ¶ 25.

{¶ 17} Reversed only to the extent the sentence is vacated, and the matter remanded for resentencing.

PIPER and M. POWELL, JJ., concur.

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1. Also under his first assignment of error appellant argues that the trial court abused its discretion by ordering him to serve an aggregate 12-year prison term. However, because we find the offenses of aggravated burglary and kidnapping allied offenses of similar import, appellant will only be sentenced as to one offense. Accordingly, we need not address this argument.