ORIGINAL

NOs. 2013-1501 & 2013-1255

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NOs. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590

STATE OF OHIO,

Plaintiff-Appellant/Cross-Appellee

-vs-

FRANK M. ROGERS, JR.,

Defendant-Appellee/Cross-Appellant

APPELLANT/CROSS-APPELLEE'S REPLY AND RESPONSE TO APPELLEE/CROSS-APPELLANT'S ARGUMENT ("THIRD BRIEF")

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Crim. R. 52.....1

I. Summary of Appellant/Cross-Appellee's Reply and Response to Appellee/Cross-Appellant's Argument.

It is true a sentencing court cannot sentence a defendant for allied offenses of similar import. But, an appellate court cannot reverse and remand a case for resentencing when the record does not contain any evidence of an error occurring at sentencing. If a defendant does not object to his sentence at the trial court, an appellate court may only review for plain error. However, without a record to conduct such analysis on review an appellate court cannot simply reverse the sentence because an error might have occurred. It cannot speculate an error by the trial court. It needs an obvious and clear demonstration of such an error.

Receiving stolen property is a crime against the owner of the property. When an offender retains property from two different individuals the charged offenses for each separate retention will never be allied. The record is replete with information and evidence demonstrating on appellate review the Roger's retention of the different victims' property were not allied offenses of similar import. *Washington, infra.*

II. There Must Be A Record Of Obvious Error For An Appellate Court To Find Plain Error.

If at sentencing a trial court discussed on the record its allied offense analysis, improperly sentenced the defendant for allied offense without objection, and the defendant appealed an erroneous sentence for allied offenses of similar import, then a reviewing appellate court may find plain error. If no objection is made regarding allied offenses at sentencing and there is clear and obvious evidence in the record of the offense being allied, then a reviewing court may find plain error. But, if there is no

insufficient evidence within the record for an appellate court to conduct the required analysis under *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E. 2d 1061 and *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245 then the appellate court shall not reverse and remand for resentencing under the doctrine of plain error. Without a record it is not within the providence of an appellate court to take such action.

Rogers cites cases from the Second, Fourth, Seventh, and Eleventh appellate districts in what he calls the "majority view" that "once the first prong of the *Johnson* test is met, the case must be remanded to the trial court if the record does not establish that the offenses were committed separately or with separate animus." (Rogers's Br. at 15-16). However, in each one of his cited cases, the reviewing court merely speculated as to their being a possible error at sentencing regarding allied offenses of similar import. In each case, the appellate court concluded that either the record was limited for a *de novo* review on allied offenses or that, after reviewing the record in the entirety, it was unclear whether or not an error occurred. *State v. Cleveland*, 2nd Dist. Montgomery No. 24379, 2011-Ohio-4868, at ¶ 19; *State v. Miller*, 11th Dist. Portage No. 2009-P-0090, 2011-Ohio-1161, at ¶ 56; *State v. Williams*, 7th Dist. Mahoning No. 11 MA 131, 2012-Ohio-6277, at ¶ 76; *State v. Osman*, 4th Dist. Athens No. 09CA36, 2011-Ohio-4626, at ¶ 34-35 (held State did not show why offenses were not subject to merger).

Under Crim.R. 52(B), plain error requires an error that is plain and which effects substantial rights. *See Jones v. United States*, 527 U. S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45. In each of Roger's cited cases the lack of an obvious error in the record

does not make the error plain. As such, the cited appellate courts of appeals analysis are wrong to reverse and remand for a resentencing to establish a record because the holdings are based on a speculative notion that an error might have occurred when the record was devoid of evidence of an error for allied offenses. This is an unsound solution and violates the basic principles of appellate review requiring a record.

State v. Comen, 50 Ohio St.3d 26, 553 N.E.2d 640 (1990), is controlling in that the defendant's failure to object to a sentence for allied offenses waives or forfeits the issue on appeal. Rogers's attempt to distinguish *Comen* from *State v. Underwood,*124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, by concluding aggravated burglary and receiving stolen property could *never* be allied offense of similar import is misleading as the Fourth District Court of Appeals found it possible to commit the offenses of burglary, theft, and receiving stolen property with the same conduct when the defendant trespassed inside a home to steal a television, stole the television and retained the television. *State v. Blackburn,* 4th Dist. Pickaway No. 10CA46, 2011–Ohio–4624, ¶ 15–16. If burglary and receiving stolen property can be allied offense of similar import, it is unreasonable to say that aggravated burglary and receiving stolen property can never be allied.

Because *Comen* is controlling and the doctrine of plain error is clear that there must be some obvious error in the record to reverse, Rogers forfeited his right to raise anything but plain error in his appeal from his sentence in the "truck and tire case." Under any plausible application of the plain error rule, Rogers failed to show an error in the record, the existence of which an appellate court must recognize to prevent a miscarriage of justice. There is no evidence or information in the record, including the

indictment, to demonstrate Rogers did not commit separate and distinct conduct when retaining a truck, tires and rims, and possessing a jack and lug nut wrench. Nor, is there any information in the record that Rogers retained a stolen truck without tires and rims, retained the truck's tires and rims off of the truck, and possessed criminal tools to remove them. It defies logic for the State to indict for receiving stolen property in such a manner. If the tires and rims belonged to the truck, then under R.C. 2913.61(B) the State would simply aggregate the value and increase the felony level in the indictment. On that basis alone, a reviewing court should reject Rogers's argument that the trial court committed plain error by failing to merge for sentencing him to allied offenses of similar import and this Court should reverse the holding of the Eighth District Court of Appeals in the "truck and tire case." Under basic appellate principles, a reviewing court cannot simply reverse and remand because the trial court may have done something wrong without evidence in the record of such a wrong.

III. Separate Victims Always Demonstrate A Separate Animus.

When two different individuals are the victims of two different acts of receiving stolen property discovered at the same time, then those two offenses do not merge for the purposes of sentencing. This is consistent with the well settled law in Ohio that there is no violation of allied offense of similar import protections at sentencing. When statutorily identical offenses occur at the same time with a different victim attached to each count the offenses are not allied and do not merge at sentencing. *See Johnson, supra*, at fn. 2; *State v. Alcala*, 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318, at ¶ 38; *State v. Anderson,* 2012-Ohio-3347, at ¶ 63, 974 N.E.2d 1236 (1st Dist.); *see, also,*

State v. Franklin, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26; *State v. Jones*, 18 Ohio St.3d 116, 480 N.E.2d 408 (1985).

Unlike what Roger's contends, a plain reading of R.C. 2913.61(B) does not stand for the proposition that the value aggregation statute for theft offenses prohibits multiple sentences for receiving stolen property at the same time. (Rogers's Br. 25-26.) The statute simply allows for the State to add up the total of all property received by a defendant in a single count for receiving stolen property, or other theft offense, to elevate the felony level in a given case.

Here, in the "multiple victim case" the State indicted Rogers with two separate counts of receiving stolen property for his retention of property belonging to two different victims. This charging decision was made because evidence existed for the State to make such a determination. The State did not seek to aggregate the value of the property into one count to elevate the degree of felony.

At the sentencing hearing, the trial court heard information from the two different victims regarding the different stolen property in each count. This information included statements from the victims about Rogers obtaining the stolen property by burglarizing each of the individuals' homes. The trial court and Eighth District Court of Appeals were allowed to consider this information their determination that the two counts of receiving stolen property were not allied offense of similar import since it was a part of the record. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661.

Because there were multiple victims aggrieved by Rogers, this Court should affirm the holding of the Eighth District Court of Appeals and rule that different receiving

stolen property counts with different victims attached to each count are not allied offenses of similar import.

Respectfully submitted,

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IV. CERTIFICATE OF SERVICE

A copy of the foregoing Brief has been sent via U.S. regular mail this March 27, 2014, to Cullen Sweeney, 310 Lakeside Ave., 2nd Floor, Cleveland, Ohio 44113.

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RULE 52. Harmless Error and Plain Error

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

[Effective: July 1, 1973.]