IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2013-1441
Plaintiff-Appellant,	:	
vs.	:	On Appeal from the Hamilton County Court of Appeals, First Appellate
KENNETH RUFF	:	District
Defendant-Appellee.	:	Court of Appeals
	:	Case Number C120533

MERIT BRIEF OF DEFENDANT-APPELLEE

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	:	

STATEMENT OF THE CASE AND FACTS

a) Procedural Posture:

On May 30, 2012, Appellee was convicted in four counts of Aggravated Burglary, in three counts of Rape, in two counts of Attempt (Rape), in one count of Sexual Battery, and in one count for Unlawful Sexual Conduct with a Minor. On July 26, 2013, the First District Court of Appeals for Hamilton County, Ohio vacated the sentences for the Aggravated Burglary and Rape counts and remanded the matter so the State could elect which allied offense it would pursue for purposes of sentence and conviction.

b) Statement of the Facts:

Appellant was indicted in four counts for a violation of RC 2911.11 (A)(1), Aggravated Burglary, first degree felonies, in three counts for a violation of RC 2907.02 (A)(2), Rape, first degree felonies, in two counts for violation of RC 2923.02 (A), Attempt (Rape), second degree felonies, in one count for a violation of RC 2907.03

(A)(2), Sexual Battery, a third degree felony, and in one count for a violation of RC 2907.04 (A), Unlawful Sexual Conduct with a Minor, a third degree felony.

At trial, Sherry Rachel (fna Woods) testified that on May 27, 2009, she resided at 2686 Montana Avenue. (Tp. Vol. 2, pgs. 255, 256) Ms. Rachel testified that on that night, she woke up to a noise and saw Appellant standing there. Ms. Rachel testified Appellant pushed her on the bed. She fought him, but he "got inside [her] a little bit." (Tp. Vol. 2, pgs. 270, 271, 272, 275, 278)

Karen Browning testified that on January 9 , 2009, she resided at 2624 Harrison Avenue in a group home. (Tp. Vol. 2, pg. 283) Ms. Browning testified she woke up in the middle of the night with a man having sex with her. She began to cry and scream so he told her to "shut up or [he would] kill [her]." (Tp. Vol. 2, pgs. 287, 288, 289)

Detective Hall testified he investigated Patricia Fieger's alleged rape which occurred in her home. He testified he observed bruises on her arms, and the perpetrator allegedly hit her several times in the head with a phone. (Tp. Vol. 4, pgs. 594, 606)

On July 25, 2012, the trial court imposed sentences on the Aggravated Burglary counts, but ran the sentences concurrent to the corresponding Rape counts.

A timely notice of appeal was filed by appointed appellate counsel to the First District Court of Appeals on August 1, 2012. In his Brief, Appellant cited as an error the sentence he received. Specifically, he argued the aggravated burglary counts and the corresponding rape counts were allied offenses of similar import and should have merged for sentencing purposes. On July 26, 2013, the First District issued a decision vacating

the sentences for the aggravated burglary and rape counts and remanding the matter so the State could elect which allied offense it wished to pursue for purposes of conviction and sentence.

On December 24, 2013, this Court accepted the State's Proposition of Law I for plenary consideration. Appellee's Merit Brief now follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The import of the offenses of rape and aggravated burglary are not inherently different and, as a result, these crimes may merge under RC 2941.25.

The State of Ohio is requesting this Court make a determination that the offenses of rape and aggravated burglary should NEVER merge as allied offenses because they are of dissimilar import. However, that argument completely undermines this Court's holding in *State v. Johnson*, 128 O.St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, and its progeny. In *Johnson*, this Court explicitly abandoned the rigid framework of an allied offense analysis based upon an exact alignment of the elements of a criminal offense. *Id.* at 159. Yet, the State is now asking this Court to completely reverse its holding in *Johnson* and do exactly that.

RC 2941.25 (A) is the controlling statute regarding the merger of offenses. It provides that where the same conduct by a 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. There has been considerable case law, over the past thirty or so years, construing this statute. In 2010, though, this Court clarified how courts are to apply this statute. *See, State v. Johnson*, 128 O.St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. This Court held that a trial court must employ a two-step process to determine whether offenses are allied. First, the trial court must determine whether it is possible to commit one offense and commit the other with the same conduct. In other words, if the "offenses correspond to

such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." If the offenses are allied, the next step is to determine whether the crimes were committed by the same conduct, ie, with a single animus or single state of mind. If so, then the offenses are truly allied and must be merged. The conduct of the accused must be considered in making this determination. *Johnson*, 128 O.St.3d at 163, *citing*, *State v. Brown*, 119 O.St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

Regarding the first prong, which appears to be at issue here, this Court has held that the purpose of RC 2941.25 is to prevent shotgun convictions, ie, multiple findings of guilt and corresponding punishments, *for closely related offenses*, arising from the same occurrence. *Johnson*, 128 O.St.3d at 161, *citing, Maumee v. Geiger* (1976), 45 O.St.2d 238, 344 N.E.2d 133. Academically, if the elements correspond to such a degree that commission of one offense may result in the commission of the other, then they share similar import. *See, State v. Washington*, 137 O.St.3d 427, 431, 2013-Ohio-4982, 999 N.E.2d 661, *citing, State v. Logan* (1979), 60 O.St.2d 126, 131, 397 N.E.2d 345. "In practice, allied offenses of similar import are simply multiple offenses that arise out of the same conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm." *State v. Miranda*, 138 O.St.3d 184, 191, 2014-Ohio-451, ___ N.E.2d ____, *citing, Johnson*, 128 O.St.3d at 165 (O'Connor, J., concurring in judgment) As succinctly stated by the Twelfth District Court of Appeals, the trial court should not ask whether committing one offense would *always* result in the

commission of the other, but whether committing one offense *could* result in the commission of the other. *State v. Schleehauf*, 12th Dist. No. CA2012-11-079, 2013-Ohio-3204, *citing, Johnson*, 128 O.St.3d at 162.

The State would have this Court issue a bright line rule that a "property" crime could never be of similar import as a crime against a person. However, the State completely overlooks the situations where one offense is not complete without the other offense as is the case here. Although the State wants this Court to focus the first prong of the *Johnson* test solely on the elements of the crime, this Court's dicta in *Miranda* seems to suggest that the trial court is required to consider the conduct of a defendant in making that determination as well. The First District determined that the aggravated burglary and rape offenses were of similar import because aggravated burglary, under the (A)(1) subsection, is not complete until the offender inflicts, attempts or threatens physical harm to another. RC 2911.11 (A)(1) The First District found that the conduct relied upon by the State to establish rape, ie, sex compelled by force, was the same as the conduct relied upon by the State to establish the "physical harm" component of aggravated burglary. *See, State v. Ruff*, Hamilton App. No. C120533, C120534, 2013-Ohio-3234.

Other Ohio appellate districts have held similarly. The Fourth, Ninth and Tenth Districts found it was possible to commit rape and aggravated burglary with the same conduct, therefore, they were of similar import. *State v. Nguyen,* 4th Dist. No. 12CA14, 2013-Ohio-3170; *State v. Owens*, 9th Dist. No. CA No. 26837, 2014-Ohio-1394; *State v. Bryant*, 10th Dist. No. 12AP-703, 2013-Ohio-5105. The Fourth District found it was

possible to commit felonious assault and aggravated burglary with the same conduct. *State v. Jacobs*, 4th Dist. No. 11CA26, 2013-Ohio-1502. The Tenth District found The Twelfth District found it is possible to commit kidnapping and aggravated burglary with the same conduct. *State v. Ozevin*, 12th Dist. No. CA2012-06-044, 2013-Ohio-1386. Each of these cases establish that it is *possible* to commit rape (or another offense of violence) and aggravated burglary with the same conduct, thus satisfying the first prong of *Johnson*.

The State is concerned that the First District has set a dangerous precedent, ie, that somehow the holding in this case transforms burglary from an offense against the sanctity of the dwelling into an offense against the person. However, the Ohio Legislature has already contemplated this in distinguishing a burglary from an aggravated burglary. The Legislature considered the offense of aggravated burglary as the worst form of burglary because of the potential of a person being present who could be subject to harm. See, RC 2911.11 (A)(1) The concern, in that instance, is for the person and potential harm to the person, not necessarily the property. Regardless, the holding in this case is limited to those situations where the offenses are of similar import and where there is evidence that there was no separate animus which falls squarely within this Court's holdings in *Johnson* and its progeny. In fact, the First District noted that had Appellee been convicted of simple burglary under RC 2911.12, which does not require physical harm, then the burglary conviction would not have merged with the rape offense.

Despite the argument over the first prong, Appellee believes the State's argument seems to be more about whether these offenses were committed with the same animus rather than whether they are of similar import. If this Court finds the offenses share similar import, then the second prong requires a determination of whether the offenses were committed separately or with a separate animus. If so, they are not allied; otherwise, they are not. *Washington*, 137 O.St.3d at 432, *citing, State v. Mitchell* (1983), 6 O.St.3d 416, 418, 453 N.E.2d 593. Animus has been defined as "purpose, or more properly, immediate motive." *Logan*, 60 O.St.2d at 131. This Court held, in *Johnson*, that RC 2941.25 instructs courts to examine the defendant's conduct when evaluating whether there was a separate animus. This Court also stated it is acceptable to have varying results in different cases because the statute instructs the courts to look at a defendant's conduct in each case which is inherently subjective. *Johnson*, 128 O.St.3d at 161, 163; *see also*, *Washington*, 137 O.St.3d at 432. Since this is true, the State's proposition that these offenses can never be allied must fail.

In this particular case, the State relied upon the same conduct of Appellee to prove the rape as it did to prove the aggravated burglary. It is clear from the testimony that the sole purpose (or animus) that Appellee went into the victims' homes was to commit the act of rape; it was not to trespass. There was also no temporal or spatial separateness to the offenses which further supports the First District's holding. *See, State v. Jackson*, Hamilton App. No. C09414, 2010-Ohio-4312. Since there was no separate animus to commit the rape and aggravated burglary, based upon Appellee's conduct, then the offenses were truly allied.

CONCLUSION

For all the above stated reasons, Appellee submits that the offenses of aggravated burglary and rape, in this case, were of similar import and committed with the same animus, therefore, they were allied offenses and should merge for sentencing purposes. As a result, Appellee requests that this Court uphold the First District's ruling and dismiss Appellant's appeal.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Defendant-Appellee was served upon Joseph T. Deters, Prosecuting Attorney for Hamilton County, Ohio, by and through his Assistant Prosecuting Attorney, Rachel Lipman Curran, Esq., 230 East Ninth Street, Cincinnati, OH 45202, and upon Timothy J. McGinty, Prosecuting Attorney for Cuyahoga County, Ohio, by and through his Assistant Prosecuting Attorneys, Daniel T. Van and Joseph J. Ricotta, and upon Defendant-Appellee, by regular U.S. Mail, this 23rd day of May, 2014.

Michaela M. Stagnaro #0059479

APPENDIX

Archive

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2907. SEX OFFENSES

Current through April 21, 2014

§ 2907.02. Rape

(A)

(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section **3719.41** of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section **2929.14** of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstanding sections **2929.11** to **2929.14** of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section **2971.03** of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section **2971.03** of the Revised Code, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section **2971.03** of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section **2971.03** of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

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(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section **2945.59** of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

Cite as R.C. § 2907.02

History. Effective Date: 06-13-2002; 01-02-2007; 2007 SB10 01-01-2008

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Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING

Current through April 21, 2014

§ 2911.11. Aggravated burglary

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in section **2909.01** of the Revised Code.

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

Cite as R.C. § 2911.11

History. Effective Date: 07-01-1996

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Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2941. INDICTMENT

Current through April 21, 2014

§ 2941.25. Allied offenses of similar import - 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.

Cite as R.C. § 2941.25

History. Effective Date: 01-01-1974

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