[Cite as *State v. Kouns,* 2012-Ohio-5331.]

`IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0105**
- vs -	:	
ALLEN B. KOUNS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage Court of Common Pleas, Case No. 2011 CR 0115.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

James E. MacDonald, 212 Casterton Avenue, Akron, OH 44303 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Allen B. Kouns appeals from a judgment entry of the Portage County Court of Common Pleas, which sentenced him to an aggregate 18 years in prison for attempted murder and kidnapping. In his appeal, Mr. Kouns raises issues related to the trial court's failure to merge his offenses, the state's failure to provide him with a bill of particulars, the ineffective assistance of his trial counsel, and the imposition of consecutive sentences.

{¶2} We find no error in the trial court's failure to merge the kidnapping and attempted murder charges, nor do we find that Mr. Kouns was prejudiced by the state's failure to provide him with a bill of particulars. Further, we are unable to find any instance of ineffective assistance by Mr. Kouns' trial counsel, nor an error by the trial court in running Mr. Kouns' sentences consecutively. Therefore, we affirm the judgment of the Portage County Court of Common Pleas.

Substantive Facts and Procedural History

{¶3} In February of 2011, Mr. Kouns was a guest in the home of Rhonda Walker. At some point in the evening, Mr. Kouns became violent, preventing Ms. Walker from leaving the apartment. He disconnected her phone line and held her at knife-point in the apartment for approximately eight hours. During those eight hours, Mr. Kouns stated, repeatedly, that he "had to kill" her. He inflicted severe knife wounds to her face, neck, wrists, and legs. When she did not appear to be bleeding out fast enough, he forced to her take a substantial quantity of prescription medication. Several times Ms. Walker attempted to escape her apartment, but Mr. Kouns forcibly prevented her from doing so each time. Finally, as Mr. Kouns lay sleeping, Ms. Walker was able to escape to a neighbor's apartment, where she contacted the police. The police found her naked, wrapped in a blanket, and covered in blood, with a swollen face.

{¶4} A Portage County Grand Jury indicted Mr. Kouns on two counts of attempted murder, in violation of R.C. 2923.02 and 2903.02(A) and (B), two counts of kidnapping in violation of R.C. 2905.01(A)(2) and (3), and one count of disrupting public service in violation of R.C. 2929.04(A)(1). Following plea negotiations, Mr. Kouns entered a written plea of guilty to count one (attempted murder) and count three

(kidnapping), and the state nolled the remaining counts. Mr. Kouns' plea was accepted by the trial court, and the matter was referred for a pre-sentence investigation report.

{¶5} A sentencing hearing was held in October 2011, at which the trial court sentenced Mr. Kouns to ten years of imprisonment on the attempted murder charge, and eight years on the kidnapping charge. The trial court ordered the terms to be served consecutively, for a cumulative sentence of 18 years. Mr. Kouns filed a timely notice of appeal, and now brings the following assignments of error:

{¶6} "[1.] The trial court committed plain error in failing to merge count one with count three of the indictment for sentencing purposes or at least in failing to conduct an allied offenses of similar import analysis prior to sentencing the defendant."

{¶7} "[2.] The trial court erred as a matter of law in not ordering the state to furnish Mr. Kouns with a bill of particulars, which results in his plea not being knowingly or intelligently made."

{¶8} "[3.] Trial counsel provided ineffective assistance of [counsel] thereby resulting in a plea that was not knowingly or intelligently made."

{¶9} "[4.] The trial court erred as a matter of law and to the prejudice of appellant and abused its discretion in sentencing Mr. Kouns for consecutive sentences without making the requisite findings under R.C. 2929.14."

Merger of Allied Offenses

{¶10} In his first assignment of error, Mr. Kouns argues that the two counts to which he pleaded guilty should have been merged at sentencing, as they were allied offenses of similar import. He argues, in the alternative, that the trial court should have, but failed to, engage in a merger analysis, and that he is entitled to such an exercise.

Because kidnapping and attempted murder are two distinct crimes that do not merge in this case, or most any other for that matter, we find no merit in Mr. Kouns' first assignment of error.

{¶11} "The concept of merger originates in the prohibition against cumulative punishments as established by the Double Jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution." *State v. Miller*, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161, ¶35, citing *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶12. The constitutional prohibition against multiple punishments for the same offense is codified in R.C. 2941.25, which states: "(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.

{¶12} "(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."

{¶13} As an initial matter, we note that merger is the process of combining multiple *offenses* for sentencing purposes. Allied offenses of similar import "must be merged for purposes of sentencing, and the defendant may be convicted of only one of the offenses, even though the defendant has been properly charged with and found guilty of both." *State v. Chaffer*, 1st Dist. No. C-090602, 2010-Ohio-4471, syllabus. For purposes of R.C. 2941.25, a "conviction" consists of a guilty verdict and the imposition

of a sentence or penalty. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶135, citing *State v. Poindexter*, 36 Ohio St.3d 1,5 (1988) ("[A] defendant may be charged with multiple counts based on the same conduct but may be convicted of only one, and the trial court effects the merger at sentencing."). "[A]llied offenses must be merged for purposes of sentencing following the state's election of which offense should survive." *State v. Jackson*, 1st Dist. No. C-090414, 2010-Ohio-4312, ¶20, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2.

{¶14} The Supreme Court of Ohio has struggled with the proper analysis of allied offenses of similar import since its landmark decision on this issue in *State v. Rance*, 85 Ohio St.3d 632 (1999). Recognizing that the law of allied offenses post *Rance* had become an unworkable and unpredictable quagmire of exceptions, the Supreme Court of Ohio revisited the allied offenses analysis yet again in 2010, and overruled *Rance* in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶15} In *Johnson*, the court remarked on the difficulties of the application of *Rance*: "Our cases currently (1) require that a trial court align the elements of the offenses in the abstract — but not too exactly [*State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625], (2) permit trial courts to make subjective determinations about the probability that two crimes will occur from the same conduct [*State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059], (3) instruct trial courts to determine preemptively the intent of the General Assembly outside the method provided by R.C. 2941.25 [*State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569], and (4) require that courts ignore the commonsense mandate of the statute to determine whether the same conduct of the defendant can be construed to constitute two or more offenses (*Rance*). The current

allied-offense standard is so subjective and divorced from the language of R.C. 2941.25 that it provides virtually no guidance to trial courts and requires constant ad hoc review by this court." *Johnson* at ¶40.

{¶16} Under the new analysis, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson* at the syllabus. The *Johnson* court provided the new analysis as follows: "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is 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. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting the commission of one offense constitutes [the] commission of the other, then the offenses are of similar import.

{¶17} "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' * * *

{¶18} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶19} "Conversely, if the court determines that 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 a separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶48-51.

{¶20} "In departing from the former test, the court developed a new, more context-based test for analyzing whether two offenses are allied thereby necessitating a merger. In doing so, the court focused upon the unambiguous language of R.C. 2941.25, requiring the allied-offense analysis to center upon the defendant's conduct, rather than the elements of the crimes which are charged as a result of the defendant's conduct." *Miller* at ¶47, citing *Johnson* at ¶48-52. "The [*Johnson*] court acknowledged the results of the above analysis will vary on a case-by-case basis. Hence, while two crimes in one case may merge, the same crimes in another may not. Given the statutory language, however, this is not a problem. The court observed that inconsistencies in outcome are both necessary and permissible '* * * given that the statute instructs courts to examine a defendant's conduct — an inherently subjective determination.'" *Miller* at ¶52, quoting *Johnson* at ¶52. *See also State v. May*, 11th Dist. No. 2010-L-131, 2011-Ohio-5233.

{¶21} Mr. Kouns pleaded guilty to kidnapping, in violation of R.C. 2905.01(A)(2), and attempted murder, in violation of R.C. 2923.02 and 2903.02(A).

{¶22} The elements of kidnapping are: (1) by force, threat, or deception, (2) removal of another person from the place the other person is found or restraining the liberty of another person, (3) with purpose to either hold for ransom or as a shield or hostage, facilitate commission of any felony or flight thereafter, terrorize or inflict serious physical harm on the victim or another, engage in sexual activity with the victim against his or her will, or hinder, impede, or obstruct a function of government. R.C. 2905.01.

{¶23} The elements of attempted murder are: (1) purposely or knowingly, (2) engaging in conduct that, if successful, would result in, (3) the death of another. R.C. 2923.02 and 2903.02(A).

{¶24} Each of Mr. Kouns' charges appears from the record to be the result of separate and distinct conduct by Mr. Kouns. From the sentencing hearing transcript, it is clear that Mr. Kouns was charged with kidnapping based on his holding of Ms. Walker at knife-point, making physical contact with her, and disconnecting her phone to prevent her from leaving the apartment or calling for help, all in an effort to terrorize her or further commit a crime. In order to successfully commit the act of kidnapping, Mr. Kouns did not need to attempt to end Ms. Walker's life.

{¶25} Mr. Kouns committed the act of attempted murder separately, when he purposely slashed Ms. Walker's wrists and neck, and waited for her to bleed to death. When she did not bleed out fast enough, Mr. Kouns then forced her to ingest large amounts of prescription drugs, all the while telling her he "had to kill" her. Mr. Kouns' commission of attempted murder was separate and distinct from his commission of kidnapping, and therefore, the two charges do not merge for purposes of sentencing in his case.

{¶26} The trial court may not have engaged in a lengthy analysis of allied offenses on the record, but the issue of merger was raised by the state when it clearly argued for consecutive maximum sentences and stated that "this kidnapping and attempted murder do not merge." At no point did Mr. Kouns raise the issue of merger before the trial court, and we find no prejudice under a plain error analysis to justify remand of this issue. From the record before us, it is apparent the trial court came to

the same conclusion we have here today: under the facts and circumstances of this case, the kidnapping and attempted murder charges to not merge for purposes of sentencing.[1] Assignment of error one is without merit.

Bill of Particulars

{¶27} In his second assignment of error, Mr. Kouns argues that because he was not provided with a bill of particulars, as requested, his plea was not knowing and voluntary. The state's failure to provide Mr. Kouns with a bill of particulars constitutes harmless error because he was aware of the facts alleged against him from other sources; thus the assignment of error is without merit.

{¶28} Crim.R. 7(E) governs bills of particulars and states that "[w]hen the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense." The law is clear that "[i]n a criminal prosecution the state must, in response to a request for a bill of particulars * * *, supply specific dates and times with regard to an alleged offense where it possesses such information." *State v. Sellards*, 17 Ohio St.3d 169 (1985), syllabus.

{¶29} However, failure to provide a bill of particulars upon request constitutes harmless error where the failure to provide does not prejudice the defendant. *See State*

1. We distinguish *State v. May*, where the sentencing hearing took place before the *Johnson* decision came out. In *May*, because the trial court never considered the merger issue applying the new standard announced in *Johnson*, we remanded the case for the trial court to do so. Here, *Johnson* was the law at the time Mr. Kouns was sentenced, and the state specifically argued against merger before the trial court. The trial court is presumed to have considered the issue pursuant to the law existing at the time. For this reason, *May* is distinguishable.

v. Chinn, 85 Ohio St.3d 548, 569 (1999). *See also State v. Donkers*, 170 Ohio App.3d 509, 2007-Ohio-1557, ¶140 (11th Dist.). This is because, the issue "ultimately turns on the question whether appellant's lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself" or, in this case, engage in the plea deal process in a knowing and voluntary manner. *Id.* at 569.

{¶30} A review of the trial court file reveals that Mr. Kouns was adequately put on notice of the time, place, nature, and substance of the harm he allegedly inflicted upon Ms. Walker, via the indictment. Furthermore, Mr. Kouns was informed, via a letter from the state to his attorney, that Portage County had an "open discovery" policy, and that he could arrange to review and copy the entire file. Mr. Kouns and his attorney were also provided with a copy of the psycho-diagnostic report, which had been compiled upon Mr. Kouns' plea of not guilty by reason of insanity. That report provided collateral accounts of the alleged crimes. Therefore, Mr. Kouns is unable to demonstrate prejudice as a result of the state's failure to provide a bill of particulars.

{¶31} Mr. Kouns was on notice of the particular allegations against him, and was able to engage in the plea process in a knowing and voluntary manner; no prejudice resulted from the state's failure. For that reason, the second assignment of error is without merit.

Ineffective Assistance of Counsel

{¶32} In his third assignment of error, Mr. Kouns alleges that he was provided ineffective assistance by his trial counsel because his counsel allowed him to enter a plea when he was not provided with a bill of particulars. He suggests that, without the

bill of particulars, he did not know the state was proceeding as if the two counts encompassed in the plea were not to be merged at sentencing, and, further, that trial counsel should have argued for merger but did not.

{¶33} To establish a claim a claim of ineffective assistance of counsel, an appellant must demonstrate that (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶34} A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent, and therefore a defendant bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). "Counsel's performance will not be deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Iacona*, 93 Ohio St.3d 83, 105 (2001). Furthermore, decisions on strategy and trial tactics are generally granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. Debatable trial tactics and strategies generally do not constitute ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995).

Whether Trial Counsel Was Deficient

{¶35} As noted above in our analysis of merger and the lack of a bill of particulars, Mr. Kouns' trial counsel was well aware of the facts and allegations of the case and the fact that his client's conduct could be separated into two distinct offenses. He did not need a bill of particulars to know that Mr. Kouns was accused of attempted murder for the acts of slitting Ms. Walker's wrists and neck and forcing her to ingest prescription drugs, and of kidnapping for the acts of holding her in the apartment at knife-point and repeatedly physically preventing her from leaving. Knowing that merger of these two offenses was not an option, trial counsel clearly opted to focus his strategy at sentencing on engaging the trial court's sense of mercy by elucidating Mr. Kouns' troubled childhood. There was no error in failing to argue for merger where no merger was possible.

{¶36} Because we find no deficiency in trial counsel's performance, the first prong of a *Strickland* analysis, we need not continue on to consider prejudice, and can definitively say Mr. Kouns was provided effective assistance by his trial counsel. Therefore, Mr. Kouns' third assignment of error is without merit.

Propriety of Consecutive Sentences

{¶37} In his fourth assignment of error, Mr. Kouns argues that the trial court erred in ordering his sentences to be served consecutively. He suggests that the trial court failed to find that consecutive sentences were not disproportionate to the seriousness of the crimes committed. Because evidence in the trial record demonstrates that the trial court specifically considered the proportionality of consecutive sentences to the crimes, we find no error; the final assignment of error is without merit.

Standard of Review

{¶38} The Supreme Court of Ohio, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, provided a two-step analysis for an appellate court to apply when reviewing felony sentences.

{¶39} First, the reviewing court must 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. If this first prong is satisfied, the appellate court then reviews the trial court's decision under an abuse-of-discretion standard. *Id*. at ¶4. The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." *Id*. at ¶14. The *Kalish* court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id*. at ¶17. As part of its analysis of whether the sentence is "clearly and convincing contrary to law," an appellate court must be satisfied that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶40} If the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id*. at ¶17. The *Kalish* court explained the effect of R.C. 2929.11 and 2929.12 as follows:

{¶41} "R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." (Footnote omitted.) *Id*. at ¶17.

No Error in Consecutive Sentences

{¶42} Mr. Kouns challenges the trial court's compliance with R.C. 2929.14(C)(4), which states that "[i]f multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶43} "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶44} "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses

committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶45} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶46} In the sentencing entry, the trial court specifically stated that "[t]he court finds that the consecutive sentence is necessary to protect the public from future crime or to punish the Defendant; that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the defendant poses to the public."

{¶47} "The Court also finds the following:

{¶48} "The defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant."

{¶49} The trial court made the findings specifically required by R.C. 2929.14 in order to impose consecutive sentences and we see no error in having imposed just such a sentence. The fourth and final assignment of error is without merit and the judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.