[Cite as *State v. Savage*, 2009-Ohio-7011.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 MA 54
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DELANO SAVAGE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 07 CR 1199A
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Gabriel Wildman Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. Katherine Rudzik 26 Market Street, Suite 904 Youngstown, Ohio 44503

JUDGES:
Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 21, 2009

[Cite as *State v. Savage*, 2009-Ohio-7011.]
WAITE, J.

{¶1} Appellant, Delano Savage appeals his conviction on three counts of aggravated robbery, in violation of R.C. 2911.01(A)(1)(C), felonies of the first degree, four counts of kidnapping, in violation of R.C. 2905.01(A)(2)(C), felonies of the first degree, and two gun specifications, in violation of R.C. 2941.145(A). Appellant pleaded guilty to the foregoing charges and was sentenced to an agreed prison term of ten years.

{¶2} Appellant contends that his plea was not entered knowingly, willingly, or voluntarily, because he was not informed prior to entering this plea that the crimes to which he pleaded guilty might have been merged for the purpose of sentencing. He further argues that the trial court violated his Fifth Amendment right against double jeopardy.

{¶3} Because Appellant pleaded guilty to all of the crimes for which he was convicted in exchange for an agreed sentence and he did not raise the issue of allied offenses of similar import before the trial court, he has waived the issue on appeal. Moreover, he cannot demonstrate from the record on appeal that the crimes were not committed independently and with a separate animus. Accordingly, his assignments of error are overruled, and the judgment entry of the trial court is affirmed.

{¶4} On October 11, 2007, Appellant was indicted on four counts of aggravated robbery (counts one through four) and four counts of kidnapping (counts five through eight), with gun specifications for each count. Counts one and five charged Appellant with the aggravated robbery and kidnapping of Cindy Landers. Counts two and six charged Appellant with the aggravated robbery and kidnapping of

Greg Beight. Counts three and seven charged Appellant with the aggravated robbery and kidnapping of Steve Courtney. Counts four and eight charged Appellant with the aggravated robbery and kidnapping of John Porinchak.

{¶5} On March 10, 2008, the first day of trial, Appellant entered into a written plea agreement with the state that included an agreed prison term of ten years. In exchange for Appellant's plea, the state would dismiss count four of the indictment. On the same day, the state moved to dismiss the gun specifications relating to counts two, three, and six through eight because they would merge at sentencing.

{¶6} According to the plea, Appellant would be sentenced to a term of incarceration of four years for each of the aggravated robbery and kidnapping charges, to be served concurrently, and three years for each of the gun specification charges, to be served consecutively and prior to the concurrent sentences. At the plea hearing, counsel for Appellant stated:

{¶7} "Also, Your Honor, I've tried to explain this to him, his misunderstanding about the gun specifications, which specifically he could get 21 years on the gun specifications if they do not merge, and he could get 70 years on the rest of the counts if he's convicted on all counts and specifications, so he's looking at a hundred and – actually, 91 years." (3/10/08 Tr., p. 12.)

{¶8} The following day, March 11, 2008, Appellant was sentenced to a ten-year prison term in conformance with the plea agreement. This timely appeal followed.

ASSIGNMENTS OF ERROR

{¶9} **"**I. THE DEFENDANT'S PLEA IS INVALID AS IT WAS NOT KNOWINGLY, WILLINGLY, AND VOLUNTARY [SIC]."

{¶10} "II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT SENTENCED THE DEFENDANT FOR ALLIED OFFENSES IN VIOLATION OF HIS FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY."

{¶11} The Double Jeopardy Clause provides that no person shall be placed in jeopardy twice for the same offense. "The double jeopardy protections afforded by the federal and state Constitutions guard citizens against * * * cumulative punishments for the 'same offense.' " *State v. Rance* (1999), 85 Ohio St.3d 632, 634, 710 N.E.2d 699, quoting *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 533 N.E.2d 181.

{¶12} R.C. 2941.25 sets forth the conditions under which multiple punishments may be imposed for the same or similar offenses:

{¶13} "(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.

{¶14} "(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."

{¶15} To determine if two crimes are allied offenses of similar import, the court must align the elements of each crime in the abstract to determine whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶12. The Ohio Supreme Court has recently recognized that aggravated robbery and kidnapping are allied offenses. Id. at syllabus.

{¶16} If the elements do correspond, as in the case sub judice, the defendant may not be convicted of both crimes unless the court finds that the defendant committed the crimes separately or with a separate animus. Id. at ¶10. To determine whether the crimes were committed separately or with a separate animus, the facts and the defendant's conduct are considered. *State v. Cooper*, 104 Ohio St.3d 293, 296-297, 2004-Ohio-6553, 819 N.E.2d 657.

{¶17} "Where a defendant pleads to multiple offenses of similar import, and the trial court accepts the plea, the court must conduct a hearing and make a determination, before entering judgment, as to whether the offenses were of similar or dissimilar import and whether or not there was a separate animus with regard to each crime committed." *State v. Yeager,* 7th Dist. No. 03CA786, 2004-Ohio-3640, ¶60, quoting *State v. Gregory* (1993), 90 Ohio App.3d 124, 129, 628 N.E.2d 86.

{¶18} The plea agreement in this case included an agreed sentence. Appellate review of a negotiated felony sentence is governed by R.C. 2953.08(D), which states in part: "A sentence imposed upon a defendant is not subject to review

under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." A sentence is authorized by law if it is within the statutory range of available sentences. *State v. Gray*, 7th Dist. No. 02 BA 26, 2003-Ohio-805, ¶10.

{¶19} Since Appellant was sentenced according to a negotiated agreement under R.C. 2953.08(D), he concedes that his sentence may not be appealed. As a consequence, he challenges the knowing and voluntary nature of his plea in an effort to circumvent R.C. 2953.08(D).

{¶20} Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that they understand the plea they are entering and the rights being voluntarily waived. Crim.R. 11(C)(2). If the plea is not knowing and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, at ¶11.

{¶21} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives by entering the guilty plea. According to *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621:

{¶22} "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a

reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R.11(C)(2)(c), applied.)" Id. at syllabus.

{¶23} Crim.R. 11(C) also sets forth the nonconstitutional rights that a defendant must be informed of prior to the court accepting the plea, including the nature of the charges; the maximum penalty involved; that he is not eligible for probation or the imposition of community control sanctions, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott* (Dec. 14, 2000), 8th Dist. No. 74392.

{¶24} For nonconstitutional rights, the trial court need only substantially comply with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. Id. at 108, 564 N.E.2d 474.

{¶25} Appellant does not argue that the trial court violated Crim.R. 11, but, instead, that the trial court erred in failing to inform him during the plea colloquy that several of the charges to which he pleaded guilty may possibly constitute allied offenses. Based upon his failure to raise the issue before the trial court, he concedes that the issue is waived for purposes of appeal unless plain error is shown. *Yeager* at ¶60; *State v. Comen* (1990), 50 Ohio St.3d 206, 211, 553 N.E.2d 640; *State v. Stansell* (Apr. 20, 2000), 8th Dist. No. 75889; *State v. Burge* (1992), 82 Ohio App.3d 244, 249, 611 N.E.2d 866 ("appellant did not object at trial to his conviction and

sentence on the basis that the offenses with which he was charged were allied offenses of similar import, and so waives the argument on appeal.")

{¶26} Plain error consists of an obvious error or defect in the trial proceedings that affects a substantial right. Crim.R. 52(B). Under this standard, reversal is warranted only when the outcome of the proceedings below would have been different absent the error. *Stansell*, supra, citing *State v. Lindsey* (2000), 87 Ohio St.3d 479, 482, 721 N.E.2d 995. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶27} Contrary to Appellant's argument, the trial court is not required to inform a defendant of anything beyond what is required by Crim.R. 11 before accepting a guilty plea. *State v. Mavroudis*, 7th Dist. No. 02 CO 44, 2003-Ohio-3289, ¶25. "Claims of voluntariness are repeatedly rejected where the only alleged deficiency is that the defendant was not informed of a right or waiver not specified in Crim.R. 11." (Internal citations omitted.) Id.

{¶28} Furthermore, Ohio courts have upheld plea agreements that included an agreed sentence where a defendant argued on appeal that his plea included allied offenses. *State v. Stansell* (Apr. 20, 2000), 8th Dist. No. 75889; *State v. Henderson* (Sept. 27, 1999), 12th Dist. No. CA99-01-002; *State v. Coats* (March 30, 1999), 10th Dist. No. 98AP-927. The Tenth District Court of Appeals observed in *Coats*:

{¶29} "Although there is semantic tension in attempting to reconcile literal applications of the allied offenses statute and the R.C. 2953.08(D) bar to challenge

such sentences, practicality and reason dictate enforcement of a valid plea agreement such as that entered into in *Graham*. Since the ultimate purpose of the allied offenses statute is to prevent unfair, cumulative punishments for identical conduct, appellant's express agreement to such a sentence should withstand any attack claiming inequity or unlawfulness in the name of allied offenses." Id. at *4.

{¶30} Although we have never squarely addressed the effect of an allied offense challenge to a negotiated sentence, we have rejected a similar challenge based upon a plea agreement that did not contain an agreed sentence. In *State v. Hooper*, 7th Dist. No. 03 CO 03, 2005-Ohio-7084, the defendant pleaded guilty to rape and gross sexual imposition charges, and the trial court imposed maximum consecutive sentences for his crimes. On appeal, Hooper argued that the two crimes were allied offenses of similar import. We held that Hooper waived any error because he voluntarily entered into a plea agreement, and, as a consequence, he "actively solicited" any alleged error. Id.

{¶31} Finally, "[t]here is no statutory or constitutional prohibition against imposing separate punishments for allied offenses if they are committed independently or with a separate animus. R.C. §2941.25(B); *State v. Gopp*, 154 Ohio App.3d 385, 2003-Ohio-4908, 797 N.E.2d 531, ¶8." *Hooper* at ¶19. Like Hooper, Appellant pleaded guilty to committing two separate crimes against each of the three victims. We reasoned in *Hooper* that it is possible to commit two separate crimes, with separate factual circumstances and separate animus, against the same victim "on or about" the same day. Id. Here, Appellant cannot demonstrate that the

aggravated robbery and kidnapping crimes for which he was convicted were not committed with a separate animus, because there is no evidence on the record of the facts and circumstances surrounding his crimes.

{¶32} In summary, Appellant waived his allied offenses argument when he entered his guilty plea in exchange for an agreed sentence, and when failed to raise the argument before the trial court. Moreover, based upon the record before us, Appellant cannot demonstrate that the crimes for which he was convicted were not committed independently and with separate animus. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.