

[Cite as *State v. Carter*, 2009-Ohio-5961.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90504

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCUS CARTER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497663

BEFORE: Blackmon, J., Gallagher, P.J., and McMonagle, J.

RELEASED: November 12, 2009

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} This cause is before us on remand from the Ohio Supreme Court for further review of our decision released August 14, 2008. The Supreme Court specifically ordered as follows:

“On consideration thereof, the judgment of the court of appeals is reversed on the authority of *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, and this cause is remanded to the court of appeals for further consideration of the animus analysis consistent with *State v. Harris*.”

{¶ 2} Based on our review of the case as directed by the Ohio Supreme Court, we sustain Carter’s second assigned error. The facts relevant to the discussion of Carter’s allied offense argument are as follow.¹

{¶ 3} On the evening of May 2, 2007, the victim was standing near a bus stop located at Superior Avenue and Coventry Road. He was talking with a friend when Carter approached and asked him for money. The victim told him he did not have any money. Carter then lunged at him and slapped the victim’s pockets. The victim responded by punching Carter in the face.

¹On direct appeal, we also considered whether the convictions were against the manifest weight of the evidence. We concluded they were not, and the Supreme Court has not remanded this portion of the prior appeal.

{¶ 4} The victim claimed that Carter then rushed at him with a pair of scissors. The two wrestled; the victim sustained a serious cut to his left arm and side, with several minor cuts to his right arm.

{¶ 5} The trial court dismissed two counts of aggravated burglary, but found Carter guilty of the two counts of felonious assault. The trial court sentenced him to three years on each count to be served concurrently.

Allied Offenses

{¶ 6} Carter contends in his second assigned error that the trial court erred by convicting him of two counts of felonious assault because they arose out of one act of violence and because the charges are allied offenses. We agree.

{¶ 7} The two felonious assault counts charged Carter with different forms of that offense. Count 1 charged, pursuant to R.C. 2903.11(A)(1), that Carter did knowingly cause physical harm to the victim, while Count 2 charged, pursuant to R.C. 2903.11(A)(2), that Carter did cause or attempt to cause physical harm to the victim by means of a deadly weapon.

{¶ 8} The Ohio Supreme Court in *State v. Harris*² held that felonious assault charges, pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), are allied offenses of similar import if the State is unable to show that there was

a separate animus for each count of felonious assault. Therefore, because of the holding in *Harris*, we need not consider whether the elements align to such an extent as to result in the offenses being allied offenses. However, we must determine if the offenses were committed with a separate animus.

{¶ 9} We conclude in the instant case that the two felonious assault counts were committed with the same animus. The fact that there were several wounds does not automatically mean that a separate animus attaches to each injury. In determining whether a separate animus exists, courts have examined case-specific factors such as whether the defendant at some point broke “a temporal continuum started by his initial act”;³ whether, at some point, the defendant created a “substantial independent risk of harm”;⁴ whether facts appear in the record that “distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed”;⁵ and whether a “significant

²*Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323.

³ *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, appeal allowed by *State v. Williams*, 120 Ohio St.3d 1504, 2009-Ohio-361.

⁴*Id.*

⁵*State v. Hines*, Cuyahoga App. No. 90125, 2008-Ohio-4236, at ¶48.

amount of time passed between the beginning of the felonious assault and the end of the attack.”⁶

{¶ 10} In *Harris*, the victim was shot twice, as a result of Harris firing his gun several times in quick succession. Harris was charged with two counts of felonious assault. The Ohio Supreme Court concluded both felonious assault counts were committed with the same animus due to the fact the act was continuous. Likewise, the Supreme Court in *State v. Cotton*,⁷ concluded that both of the felonious assault counts were committed with one animus even though there were three stab wounds to the same victim. Recently, this court in *State v. Ortiz*,⁸ relying on *Harris* concluded that two felonious assault counts were allied offenses even though the victim was stabbed several times, with some wounds more severe than others. In that case, we found there was no break in the time continuum.

{¶ 11} The stabbing injuries in the instant case occurred while the men wrestled on the ground. There was no break in the time continuum between the injuries. Therefore, although there were several knife wounds, because

⁶*State v. Chaney*, 5th Dist. No. 2007CA00332, 2008-Ohio-5559, at ¶33.

⁷120 Ohio St.3d 321, 2008-Ohio-6249.

⁸Cuyahoga App. No. 91819, 2009-Ohio-4982.

the stabbings occurred close together in time, we conclude they were committed with a single animus. Accordingly, the trial court should have merged the felonious assault counts for sentencing. Although the court ran the sentences concurrently, running counts concurrent is not the equivalent of merging them.⁹ Carter's second assigned error is sustained.

Judgment reversed and case remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR

⁹ *State v. Baker*, 119 Ohio St.3d 1441, 2008-Ohio-4487; *State v. Reid*, Cuyahoga App. No. 89006, 2007-Ohio-5858, at ¶8; *State v. Hines*, 2005-Ohio-4421, at ¶20; *State v. Underwood*, 2nd Dist. No. 22454, 2008-Ohio-4748, at ¶27-28 ("The failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences.")

