

[Cite as *State v. Rothe*, 2010-Ohio-2498.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KRISTOPHER ROTHE

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00060

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Common
Pleas Court, Case No. 2008-CR-0002

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 1, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JULIA B. DILLON
Assistant Prosecuting Attorney
Fairfield County, Ohio
201 South Broad Street
Suite 400
Lancaster, Ohio 43130

ANDREW T. SANDERSON
Burkett & Sanderson, Inc.
21 West Church Street
Suite 201
Newark, Ohio 43055

Hoffman, P.J.

{¶1} Defendant-appellant Kristopher Rothe appeals his sentence in the Fairfield County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On January 4, 2008, the Fairfield County Grand Jury returned a 12-count indictment against Appellant, charging him with two counts of aggravated burglary (R.C. 2911.11(A)(1) & (2)), three counts of felonious assault (R.C. 2903.11(A)(1) & (2)), assault of a peace officer (R.C. 2903.13(C)(3)), obstructing official business (R.C. 2921.31), domestic violence (R.C. 2919.25(A)), two counts of assault (R.C. 2903.13(A)), and two counts of criminal damaging (R.C. 2909.06(A)(1)).

{¶3} The case proceeded to jury trial in the Fairfield County Court of Common Pleas. Appellant was convicted of two counts of aggravated burglary, one count of felonious assault, and one count of assault. He was also convicted of domestic violence and two counts of criminal damaging. The jury found him not guilty of obstructing official business as charged in the indictment, but guilty of the lesser included offense of resisting arrest. The trial court's sentencing entry states, "The jury was hung as to Count Six of the indictment and the Court declared a mistrial as to Count Six only." Nunc pro tunc Judgment Entry of Sentence, June 2, 2008. Appellant was found not guilty on the remaining charges.

{¶4} The court merged the two counts of aggravated burglary, and sentenced appellant to four years incarceration on Count One of aggravated burglary. The court sentenced Appellant to three years incarceration for felonious assault, to be served consecutive to Count One. The court sentenced Appellant to 90 days in the county jail

for resisting arrest, 180 days for domestic violence, 180 days for assault, and 90 days for each count of criminal damaging, all to be served concurrent to the sentences imposed for aggravated burglary and felonious assault.¹

{¶15} Appellant now appeals, assigning as error:

{¶16} “I. THE SENTENCING OF THE DEFENDANT-APPELLANT WAS UNCONSTITUTIONAL.”

{¶17} “II. THE IMPOSITION OF CONSECUTIVE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT WAS IMPROPER.”

I.

{¶18} When reviewing the constitutionality of a felony sentence, an appellate court must determine first whether the defendant has shown by clear and convincing evidence the sentence is contrary to law, and second whether the court committed an abuse of discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. A trial court's sentence would be contrary to law if, for example, it were outside the statutory range, in contravention of a statute, or decided pursuant to an unconstitutional statute. *Kalish* at ¶ 36, 896 N.E.2d 124; *State v. Thomas*, 7th Dist. No. 06 MA 185, 2008-Ohio-1176. An abuse of discretion is more than a mere error of law or judgment; it constitutes an unreasonable, arbitrary or unconscionable use of discretion. *Kalish* at ¶ 19.

{¶19} Appellant argues the trial court improperly engaged in judicial fact-finding when imposing more than the minimum and consecutive sentences against him, in

¹ Appellant filed an appeal from his conviction and sentence with this Court in *State v. Rothe*, Fairfield App. No. 2008CA00044. Via Judgment Entry of April 10, 2009, this Court dismissed the appeal for lack of a final appealable order. The trial court later dismissed the sixth count and Appellant proceeded with the instant appeal.

violation of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶10} In *Foster*, supra, the Ohio Supreme Court held trial courts have full discretion to impose a prison sentence within the statutory guidelines and are no longer required to make findings or give their reasons for imposing maximum, consecutive or more than the minimum sentence.

{¶11} Appellant maintains the trial court continued to conduct improper judicial fact-finding to support its sentencing decision, and thus thwarted the previous directives of this Court and the decisions of *Foster* and *Blakely*. However, the Ohio Supreme Court has explained that *Foster* eliminated statutorily mandated judicial fact-finding pursuant to certain unconstitutional statute sections, but did not prohibit the trial court from making such findings of fact. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306; *State v. Dillard* 2010-Ohio-1407. See, also, *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517 (holding that the Sixth Amendment does not prohibit judicial fact-finding for the imposition of consecutive sentences).

{¶12} The trial court's sentencing decision was within the statutory range provided for Appellant's convictions. The trial court's judgment entry of sentence indicated the trial court considered the purposes and principles of sentencing pursuant to R.C. 2929.11 and balanced the seriousness and recidivism factors pursuant to R.C. 2929.12. The trial court did not indicate that it was bound to follow any of the sentencing statutes now found to be unconstitutional. Upon review of the record and the judgment entry of sentence, there is nothing to suggest the trial court's sentencing decision was unreasonable, arbitrary or unconscionable.

{¶13} Appellant's first assignment of error is overruled.

II.

{¶14} In the second assignment of error, Appellant asserts the trial court's imposition of consecutive sentences for aggravated burglary and felonious assault was improper as the charges were allied offenses of similar import.

{¶15} Ohio Revised Code Section 2941.25 governs allied offenses of similar import:

{¶16} "(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.

{¶17} "(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."

{¶18} Recently, the Ohio Supreme Court addressed the issue of allied offenses of similar import in *State v. Brown*, 2008-Ohio-4569:

{¶19} "The Double Jeopardy Clause of the United States Constitution prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. These double-jeopardy protections apply to the states through the

Fourteenth Amendment. *Benton v. Maryland* (1969), 395 U.S. 784, 786, 89 S.Ct. 2056, 23 L.Ed.2d 707; *State v. Tolbert* (1991), 60 Ohio St.3d 89, 90, 573 N.E.2d 617. Additionally, Section 10, Article I of the Ohio Constitution provides, 'No person shall be twice put in jeopardy for the same offense.'

{¶20} "The facts of this case involve the third double-jeopardy prohibition-the prohibition against multiple punishments for the same offense. However, the Double Jeopardy Clause only prevents a sentencing court from prescribing greater punishment than the legislature intended. *Rance*, 85 Ohio St.3d at 635, 710 N.E.2d 699, quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, 433 N.E.2d 181.

{¶21} "The United States Supreme Court has held that the test for determining whether two offenses are the same for double-jeopardy purposes is 'whether each offense requires proof of an element that the other does not.' *Rance*, 85 Ohio St.3d at 634-635, 710 N.E.2d 699, citing *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. In *Rance*, we found that the two-step test set forth in R.C. 2941.25, Ohio's multiple-count statute, answered both the constitutional and state statutory inquiries regarding the General Assembly's intent to permit cumulative punishments for the same conduct. *Id.* at 639, 710 N.E.2d 699.

{¶22} ****

{¶23} "This court has recognized that R.C. 2941.25(B) demonstrates a clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of (1) offenses of dissimilar import and (2) offenses of similar import

committed separately or with separate animus. *Rance*, 85 Ohio St.3d at 636, 710 N.E.2d 699.

{¶24} “In applying the multiple-count statute, this court has long followed a two-tiered test to determine whether two offenses constitute allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶ 14, citing *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 549 N.E.2d 520, syllabus. See also *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; *State v. Mughni* (1987), 33 Ohio St.3d 65, 67, 514 N.E.2d 870; *State v. Talley* (1985), 18 Ohio St.3d 152, 153-154, 18 OBR 210, 480 N.E.2d 439; *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418, 6 OBR 463, 453 N.E.2d 593; *State v. Logan* (1979), 60 Ohio St.2d 126, 128, 14 O.O.3d 373, 397 N.E.2d 1345.

{¶25} “ ‘In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant’s *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.’ (Emphasis sic.) *Cabrales* at ¶ 14, quoting *Blankenship*, 38 Ohio St.3d at 117, 526 N.E.2d 816.

{¶26} “In *Rance*, we clarified the two-tiered test for allied offenses of similar import, specifying that courts should assess the elements of the offenses in the statutory abstract in accordance with Justice Rehnquist’s dissent in *Whalen v. United*

States (1980), 445 U.S. 684, 709-711, 100 S.Ct. 1432, 63 L.Ed.2d 715. *Rance*, 85 Ohio St.3d at 637, 710 N.E.2d 699. In *Whalen*, Justice Rehnquist favored a comparison of the statutes in the abstract over a comparison of the crimes as charged: '[B]ecause the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment.' *Whalen* at 711, 100 S.Ct. 1432, 63 L.Ed.2d 715 (Rehnquist, J., dissenting).

{¶27} ****

{¶28} "While our two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the legislature's intent is clear from the language of the statute. A cardinal rule of statutory interpretation is that '[a] court must look to the language and purpose of the statute in order to determine legislative intent.' *State v. Cook* (1998), 83 Ohio St.3d 404, 416, 700 N.E.2d 570. '[W]hen the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.' *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus.

{¶29} Here, Appellant was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1), which reads:

{¶30} "(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:

{¶31} “(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;”

{¶32} Appellant was also convicted and sentenced on felonious assault in violation of R.C. 2903.11(A)(1), which reads:

{¶33} “(A) No person shall knowingly do either of the following:

{¶34} “(1) Cause serious physical harm to another or to another's unborn;”

{¶35} Comparing the statutory definitions of the two crimes, we find the elements do not so closely align as to be allied. *State v. Johnson* (Sept. 26, 2006), Delaware App. No. 06 CAA 070050. Aggravated burglary and felonious assault are not allied offenses of similar import in the case at hand as the statutory elements of aggravated burglary do not require serious physical harm to actually be caused as is required for felonious assault; rather, the offense can be committed with an attempt or threat to inflict physical harm. For a similar result see *State v. Nieves*, 9th Dist. 2009-Ohio-6374; *State v. Barker*, 2nd Dist. 2009-Ohio-3511; *State v. Feathers*, 11th Dist. 2007-Ohio-3024.

{¶36} The second assignment of error is overruled.

{¶37} Appellant's sentence in the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

s/ William B. Hoffman _____
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer _____
HON. SHEILA G. FARMER

s/ John W. Wise _____
HON. JOHN W. WISE

