[Cite as *State v. Hunt*, 2019-Ohio-4053.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107125
v.	:	
RASHAN J. HUNT,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: September 30, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-618512-A
Application for Reopening
Motion No. 530394

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellant*.

Rashan J. Hunt, *pro se*.

ANITA LASTER MAYS, J.:

{¶ 1} Applicant, Rashan J. Hunt, seeks to reopen his appeal, *State v. Hunt*, 8th Dist. Cuyahoga No. 107125, 2019-Ohio-1643, claiming that appellate counsel

was ineffective for failing to argue that a portion of Hunt's plea was invalid and that he was improperly sentenced for allied offenses. The application is denied.

I. Factual and Procedural Background

{¶ 2} Hunt was charged with various crimes as a result of an incident that occurred after he killed a person who Hunt alleged was attempting to rob him. Hunt eventually pleaded guilty to various offenses, including voluntary manslaughter, tampering with evidence, and gross abuse of a corpse. A repeat violent offender ("RVO") specification was attached to the voluntary manslaughter charge. Hunt received an aggregate 23-year prison sentence.

{¶ 3} He appealed, raising three assignments of error. He claimed that his sentences were contrary to law, the record did not support consecutive sentences, and he received ineffective assistance of counsel. *Hunt* at ¶ 7. This court, on May 2, 2019, overruled these assignments of error and affirmed his convictions and sentence. *Id*. at ¶ 55.

{¶ 4} On July 19, 2019, Hunt filed a timely application for reopening. The state timely filed a brief in opposition. In his application, Hunt sets forth two proposed assignments of error:

> I. The trial court breached Hunt's plea agreement by sentencing him for a repeat violent offender specification (RVO) to which he did not plead guilty.
>
> II. Hunt's constitutional protection against Double Jeopardy was violated when the trial court failed to merge Count 3 tampering with evidence and Count 4 gross abuse of a corpse as allied offenses of similar import.

II. Law and Analysis

A. Ineffective Assistance of Appellate Counsel Standard

{¶ 5} App.R. 26(B) provides a limited means to reopen a direct criminal appeal based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). App.R. 26(B)(5) states that "[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal."

{¶ 6} To prevail, Hunt must set forth a "colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Sanders*, 75 Ohio St.3d 607, 665 N.E.2d 199 (1996). Under *Strickland*, Hunt must demonstrate: (1) Counsel was deficient in failing to raise the issues Hunt now presents; and (2) Hunt had a reasonable probability of success if the issue had been presented on appeal. *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

B. Repeat Violent Offender Specification

{¶ 7} Hunt's first proposed assignment of error takes issue with the RVO specification in his case. Hunt initially couches his argument as a breach of the plea agreement by the trial court when the court sentenced Hunt for the RVO specification. However, the specification was a part of the plea agreement, so there can be no breach. He goes on to assert that he never pleaded guilty to the specification, and therefore, he could not be sentenced to an enhanced prison term as a result of the specification.

{¶ 8} Hunt did not raise this issue before the trial court, therefore he has forfeited all but plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "A forfeited error is not reversible error unless it affected the outcome of the proceedings and reversal is necessary to correct a manifest miscarriage of justice." *State v. Thomas,* 2018-Ohio-1081, 109 N.E.3d 616, ¶ 50 (8th Dist.).

{¶ 9} Generally, a separate charge, plea, and conviction for a specification that enhances a sentence is required. *State v. Moore*, 8th Dist. Cuyahoga No. 101658, 2015-Ohio-1026, ¶ 10, citing *State v. Davis*, 8th Dist. Cuyahoga No. 76085, 2000 Ohio App. LEXIS 4044 (Sept. 7, 2000). However, this issue is usually raised in the context of whether a plea was entered knowingly, intelligently, and voluntarily, which is subject to review for substantial compliance. *Id*. *See also State v. Cammon*, 8th Dist. Cuyahoga No. 105124, 2017-Ohio-5587. "[S]ubstantial compliance occurs if it appears from the record, despite the trial court's error, that the defendant understood the effect of his plea and the waiver of his rights." *State v. Hair*, 8th Dist. Cuyahoga No. 107964, 2019-Ohio-3572, ¶ 9, citing *State v. Tutt*, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 15 (8th Dist.). That is, whether Hunt subjectively understood that his plea to voluntary manslaughter included the RVO specification.

{¶ 10} During the plea colloquy, Hunt had questions about the RVO specification. The trial court explained the implication of the specification, its applicability to Hunt, and the fact that the plea agreement with the state required Hunt to plead guilty to voluntary manslaughter with the RVO specification. The

state placed the plea agreement on the record, which included the RVO specification, and the trial court's explanation of the consequences of the plea and the maximum penalties also explained the RVO specification. At one point, Hunt refused to plead guilty when the RVO specification was part of the plea deal.

{¶ 11} After the initial explanation of the terms of the plea agreement, the following colloquy took place.

> THE COURT: Without getting into client confidences, is it your belief that Mr. Hunt is concerned about the application of an RVO specification in this case?
>
> [DEFENSE COUNSEL]: He is concerned about an application, yes, Your Honor.
>
> THE COURT: On that basis I think it's worthy of some discussion in Court today, Mr. Hunt, so that we can have an understanding of that. Mr. McNair, can you give me a little history with regard to the reasons why you believe this RVO specification was placed in the indictment as it applies to Mr. Hunt.
>
> * * *
>
> [THE PROSECUTOR]: Yes, Your Honor. In this instance, because this is the first time that Mr. Hunt has been charged with an RVO specification, it is on there as an option for the Court to exercise sentencing in discretion and impose some or all of that time, but it is not mandatory. So, for example, if this were his third time being charged with an RVO specification, then in that circumstance it would be mandatory that he be maxed out both on the base offense and on the RVO, but because this is only his first time being charged with an RVO specification, it is not mandatory that the Court impose any of that RVO time.
>
> * * *
>
> THE COURT: Now, Mr. Hunt, did you understand what I said? So let's assume that you plead guilty or you go to trial, either before me as the judge without a jury, or all the jury is in, all the evidence is presented, and they come back with a guilty verdict. Then we'll get some papers

together about your background and history. We'll get all that information. We'll hold a sentencing hearing, usually 30 days later, and I listen to all of the information about sentencing both from your side and the prosecutor's side, and then it's time for me to decide.

As it stands now, with your situation presently in this indictment, if I were to impose the maximum amount, eleven years, and only if I apply or decided that eleven years was appropriate, at that time I can then decide to consider the RVO statute, the repeat violent offender. It's not mandatory that I impose it, but if I choose to impose it, I can do so by adding an additional time period up to ten years. So the eleven years can be twenty-one, it can be twelve, it can be thirteen. It can be all the way up to twenty-one.

If I decide to impose a sentence less than eleven but within the range of three to eleven, let's just pick eight as a number, then I cannot apply the RVO statute. So I have to get to eleven first. That's the first decision.

Second is do I apply the RVO or not. If the answer is yes because of the circumstances of this situation, then how many additional years will it be in addition to eleven? Will it be one or all the way up to ten, which would be twenty-one.

Now, that's different for others who have repeat violent offender specifications on other cases or other indictments before them, and if you were coming before me with three RVO specifications in prior cases, then we're talking about a different situation.

Does that help you?

THE DEFENDANT: Yes, sir.

(Tr. 17-20.) After this discussion, Hunt indicated he did not wish to plead guilty.

{¶ 12} Proceedings reconvened several days later, and Hunt again said he did not wish to plead guilty to the RVO specification. The following discussion was had:

THE DEFENDANT: My understanding of the * * * [plea] today, Mr. Michael Jackson, sir, was that I was * * * [pleading] to the felony one.

THE COURT: Only the felony one?

[DEFENSE COUNSEL]: Yes, sir. And the three to 11 voluntary manslaughter, your Honor.

THE COURT: Where are we on the notice of prior conviction and repeat violent offender spec? Is that part of the plea?

[THE PROSECUTOR]: Those are still on there, your Honor. Yes.

* * *

THE DEFENDANT: I'm not copping to an RVO. I was not aware of that. Your Honor, I'm not willing to cop to a repeat violent offender, your Honor. I'm not willing to do that.

(Tr. 28.)

{¶ 13} After a lengthy discussion, Hunt changed his mind and agreed to accept the plea agreement as set forth on the record by the state. (Tr. 35-36.)

{¶ 14} The trial court then engaged Hunt in a thorough plea colloquy and explained,

Count 1 is the one we've begun discussing, voluntary manslaughter, a felony in the third degree with two furthermores as discussed, a notice of prior conviction and a repeat violent offender specification.

A felony in the first degree, as I mentioned, under these circumstances means three to 11 years in prison, and each year thereafter until 11. And under this situation it's mandatory. And as I've described, if I order the maximum 11 years, then I have to decide and I have the option to impose on the repeat violent offender specification an additional time period of one year and any year thereafter until ten, so one, two, three, up to ten.

And as I mentioned, all of that will be decided at sentencing based upon the evidence and information provided.

* * *

So, Mr. Hunt, how do you plead to Count 1, voluntary manslaughter, a felony in the first degree?

THE DEFENDANT: I plead no contest. No contest.

(Tr. 40-41, 44.)

{¶ 15} The state and the trial court then explained that the plea agreement required Hunt to plead guilty. After further discussion, Hunt agreed to plead guilty and the court accepted the plea.

> THE COURT: So in light of all of that you're changing your initial view of no contest to Count 1 to pleading guilty to voluntary manslaughter, a felony in the first degree. Is that correct?
>
> THE DEFENDANT: Yes.

(Tr. 46-47.)

{¶ 16} In *Moore*, this court analyzed a similar situation regarding firearm specifications and found substantial compliance:

> [T]he transcript of Moore's plea hearing in this case demonstrates the trial court stated that Moore would be pleading guilty to "the underlying crime of attempted felonious assault" and, in addition, the "three-year firearm specification," which meant that Moore "must serve that time in prison" and "before any sentence on the amended Count 2." The court told Moore that, "after serving the 3 years, which must be done prior to and consecutive to the Felony 3," Moore would then be required to serve the sentence for attempted felonious assault. Under these circumstances, Moore cannot support a claim on this basis that his guilty pleas were not knowingly, voluntarily, and intelligently made.

Moore, 8th Dist. Cuyahoga No. 101658, 2015-Ohio-1026, at ¶ 11.

{¶ 17} In *Hair*, this court found that a defendant did not knowingly, intelligently, and voluntarily enter a guilty plea to an RVO specification and underlying offense. *Hair*, 8th Dist. Cuyahoga No. 107964, 2019-Ohio-3572. There, during the plea colloquy, the trial judge relayed incorrect information to the

defendant regarding the RVO specification. The judge, when explaining the charges, indicated that a count of the indictment did not include an RVO specification. *Id.* at ¶ 13. When accepting the defendant's guilty plea to this court, the court also indicated that the count did not include any specifications, and the defendant pled guilty to the count as indicated by the trial court. *Id.* at ¶ 14. However, when the court imposed sentence, it sentenced the defendant to an additional period of incarceration for an RVO specification attached to this count. *Id.* at ¶ 15. This court reversed, finding that the trial court did not substantially comply with Crim.R. 11(C)(2)(a) because the information relayed by the trial court during the plea colloquy was incorrect. *Id.* at ¶ 19. The *Hair* court classified the trial court's level of compliance as partial, but found that the lack of accurate information conveyed by the trial court during the plea colloquy prejudiced the defendant. *Id.*

{¶ 18} The present case is distinguishable from *Hair* and is similar to *Moore*. Here, the trial court explained the application of the RVO specification to the underlying offense and at all times indicated that it was a required part of the plea agreement. No inaccurate information was relayed. Further, it is clear from the record that Hunt was aware of the RVO specification, its applicability to him, and the penalty that he faced by accepting the plea deal and pleading guilty.

{¶ 19} It was not plain error for the trial court to impose sentence on the RVO specification that Hunt understood was a part of his plea agreement and his guilty plea to voluntary manslaughter. This does not constitute a manifest injustice. Further, this does not set forth a colorable claim of ineffective assistance of appellate

counsel. Appellate counsel was not ineffective for failing to raise this issue in Hunt's direct appeal.

C. Allied Offenses

{¶ 20} In his second proposed assignment of error, Hunt alleges that appellate counsel was ineffective for not arguing that his convictions for tampering with evidence and gross abuse of a corpse were allied offenses that should have merged.

{¶ 21} Again, this alleged error was not raised before the trial court when it could have been timely considered. Therefore, Hunt has forfeited all but plain error regarding this issue. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3, 21 (a defendant who fails to raise an allied offense issue in the trial court forfeits all but plain error). When not raised below, "the burden is solely on that defendant, not on the state or the trial court, to 'demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus.'" *State v. Locke*, 8th Dist. Cuyahoga No. 102371, 2015-Ohio-3349, ¶ 20, quoting *Rogers* at ¶ 3.

{¶ 22} R.C. 2941.25, which codifies protections consistent with the Double Jeopardy provisions of the federal and state constitutions, provides,

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment 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.

The test set forth by this statutory provision asks, "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation?" *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶ 23} The offense of tampering with evidence provides "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any * * * thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." R.C. 2921.12(A)(1). The offense of gross abuse of a corpse provides "[n]o person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities." R.C. 2927.01(B).

{¶ 24} Hunt pleaded guilty to these offenses and failed to raise the issue of allied offenses below. There was a discussion of allied offenses in the transcript, but only with respect to Count 1, voluntary manslaughter, and Count 2, felonious assault. The state conceded that these counts would merge. Hunt did not assert that any other offenses were allied. Hunt failed to raise any issue with regard to the offenses of tampering with evidence and gross abuse of a corpse, and fails to point to anything in the record that would indicate that these offenses should have merged.

{¶ 25} Hunt's failure to apply any of the aspects of allied offense analysis to his case is fatal to his claim. Hunt does not address whether these crimes were committed with a separate animus, by separate acts, or dissimilar import. *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at paragraph one of the syllabus. His citations to *State v. Crisp*, 4th Dist. Scioto No. 10CA3404, 2012-Ohio-1730, and *State v. Shears*, 1st Dist. Hamilton No. C-120212, 2013-Ohio-1196, are unavailing.

{¶ 26} The *Crisp* and *Shears* courts relied on *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, for their allied offense analysis, but that case has been modified by *Ruff*. Further, Hunt ignores the differences in procedural posture between those cases and his own. Those other cases were not reviewed for plain error, and were decided before the *Rogers* court squarely placed the burden on defendants to demonstrate a reasonable probability that offenses are allied. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 3, 21.

{¶ 27} There are instances where these two offenses would not merge. For instance, the Tenth District has found that the offenses of tampering with evidence and gross abuse of a corpse were not allied when committed with separate conduct. *State v. Flood*, 10th Dist. Franklin Nos. 18AP-206 and 18AP-738, 2019-Ohio-2524. Hunt has not pointed to anything in the record that would demonstrate that these two offenses should merge beyond a mere recitation of the statutory elements of each. This is insufficient to carry his burden of showing that there is a reasonable probability that the offenses are allied offenses of similar import.

{¶ 28} Hunt has not shown that appellate counsel was ineffective in failing to assert either of the instant proposed assignments of error in his appeal. Accordingly, his application for reopening is denied.

{¶ 29} Application denied.

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ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR