**[Cite as *State v. Steward*, 2009-Ohio-2990.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | No. 08AP-974<br>(C.P.C. No. 99CR-04-1914) |
| v. | : | (REGULAR CALENDAR) |
| Michael A. Steward, | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on June 23, 2009

*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Yeura R. Venters*, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

**{¶1}** Michael A. Steward, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court resentenced him for involuntary manslaughter with specification, in violation of R.C. 2903.04, which is a first-degree felony; and aggravated robbery with specification, in violation of R.C. 2911.01, which is a first-degree felony.

**{¶2}** On May 26, 1999, appellant was indicted on three counts of aggravated murder with firearm specification, with one count predicated upon the commission of

aggravated robbery, one count based upon the commission of aggravated burglary, and one count alleging that appellant killed Johnny "Little Black" Simmons with prior calculation and design; one count of aggravated robbery with firearm specification; and one count of aggravated burglary with firearm specification. All charges arose from a single incident in which appellant approached Simmons with the intent to rob him and then shot and killed him after a struggle.

**{¶3}** On August 1, 2000, the case proceeded to a bench trial. The State of Ohio, plaintiff-appellee, requested and was granted dismissal of the murder counts predicated upon the aggravated burglary and prior calculation and design, and the count for aggravated burglary. On August 4, 2000, the court found appellant guilty of the lesser-included offense of involuntary manslaughter and aggravated robbery, as well as the firearm specifications charged in those counts. The underlying predicate offense in the involuntary manslaughter offense was the same aggravated robbery offense that was the subject of the aggravated robbery conviction. The court imposed a sentence of nine years on the involuntary manslaughter count and six years on the aggravated robbery count, to be served consecutively. The court also imposed an additional three-year term of incarceration for use of a firearm.

**{¶4}** Appellant appealed to this court. In *State v. Steward* (May 24, 2001), 10th Dist. No. 00AP-984 ("*Steward I*"), this court reversed the trial court's sentence based upon its failure to make the necessary findings to impose consecutive sentences, but affirmed the judgment in all other respects. We remanded the matter for resentencing.

**{¶5}** On October 29, 2001, the trial court held a resentencing hearing, at the conclusion of which the trial court orally pronounced that the sentence would be the same as the original sentence. No resentencing judgment was filed.

**{¶6}** On September 3, 2008, appellant filed a motion requesting that the court file a resentencing entry journalizing the October 29, 2001 oral pronouncement. The state agreed with appellant's motion. On October 22, 2008, the trial court filed a resentencing entry. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] The trial court erred, in violation of Ohio's allied offense statute as set forth in R.C. 2941.25, in imposing consecutive terms of incarceration for the offenses of involuntary manslaughter and aggravated robbery, the predicate offense for the manslaughter charge.
>
> [II.] Appellant was denied effective assistance of counsel under the Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when his counsel failed to object to the imposition of consecutive sentences for allied offenses of similar import.
>
> [III.] Appellant is entitled to discharge pursuant to Crim.R. 32 and the Sixth Amendment to the United State Constitution following a seven-year delay between remand from this Court for the imposition of a new sentence and the journalization of that sentence.

**{¶7}** Appellant argues in his first assignment of error that the trial court erred when it imposed consecutive sentences on his aggravated robbery and involuntary manslaughter convictions. Specifically, appellant contends that the consecutive terms should have merged for purposes of sentencing because they are allied offenses of similar import, involving the same conduct and the same animus. R.C. 2903.04, the involuntary manslaughter statute, provides:

> (A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.

R.C. 2911.01, the aggravated robbery statute, provides, in pertinent part:

> (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> * * *
>
> (3) Inflict, or attempt to inflict, serious physical harm on another.

R.C. 2941.25, the multiple offense statute, provides:

> (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.
>
> (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.

**{¶8}** Here, we must review the merger issue under the plain error standard because appellant did not raise it at trial. See *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶74. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

*State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order to find plain error under Crim.R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. Id., paragraph two of the syllabus.

**{¶9}** It is undisputed that the Supreme Court of Ohio addressed the precise issue raised under appellant's first assignment of error in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. In *Rance*, the court found that "[i]nvoluntary manslaughter and aggravated robbery are not allied offenses of similar import." Id., paragraph two of the syllabus. In doing so, the court indicated that the applicable test for deciding whether two offenses are allied offenses of similar import is, if the elements of the crimes 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. Id. at 636. The court further explained that, in contrasting the statutory elements, a court should compare the statutory elements in the abstract. Id. If the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus. Id. at 638-39. Aligning the elements of the defendant's offenses in *Rance*, the court determined that involuntary manslaughter and aggravated robbery are not allied offenses of similar import. Id.

**{¶10}** However, appellant in the present case argues that, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the Supreme Court of Ohio broadened the test in *Rance* so that he could not be convicted of both the involuntary manslaughter charge and the predicate felony aggravated robbery offense because proof of aggravated robbery was a necessary element of the manslaughter charge. So the question before us now is did the decision in *Cabrales* change the test in *Rance* to such a degree that the

conclusion in *Rance*, that involuntary manslaughter and aggravated robbery are not allied offenses of similar import, is no longer valid? We answer this in the negative.

**{¶11}** In *Cabrales*, the court found that trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under R.C. 2941.25(A) because commission of the first offense necessarily results in commission of the second. In doing so, the court analyzed the test for allied offenses of similar import set forth in *Rance*. The court found that courts have struggled applying the abstract elements comparison test in *Rance*, resulting in confusion and unreasonable results. Id. at ¶16. The court then cited several appellate cases to demonstrate that "*Rance* has produced inconsistent, unreasonable, and, at times, absurd results." Id. at ¶20. The court also found that some courts of appeals have misinterpreted *Rance*, incorrectly concluding that *Rance* requires a strict textual comparison of elements and that only where the offenses exactly overlap are they allied offenses of similar import. Id. at ¶21. The court noted this interpretation of *Rance* was overly narrow, as only identical offenses have elements that align exactly. Id. at ¶22.

**{¶12}** The court in *Cabrales* set forth the test for determining whether two offenses were allied offenses of similar import as the following:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied

> offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, clarified.)

Id., paragraph one of the syllabus.

**{¶13}** Nowhere in *Cabrales* did the court indicate that the conclusion reached in *Rance* was incorrect. The court indicated only that other courts have struggled to apply the test in *Rance.* Nowhere in *Cabrales* did the court indicate that the court itself misapplied the test in deciding *Rance*. The clearest statement of the court's view of *Rance* can be found in paragraph one of the syllabus, quoted above. In the parenthetical appending paragraph one of the syllabus, the court indicated that it was merely clarifying *Rance*. The court did not overrule *Rance*.

**{¶14}** That the court desired to only clarify the legal test enunciated in *Rance*, but not overrule the court's ultimate conclusions, is clear by the text of the decision as well. The court began its analysis by stating that "[c]ourts have struggled applying *Rance*'s abstract elements-comparison test," citing five appellate cases. *Cabrales* at ¶16. The court then found that appellate courts have also "misinterpreted" the test in *Rance*. Id. at ¶21. The court in *Cabrales* then looked at how its own court had interpreted the test in *Rance*, citing several cases in which it has applied *Rance*. The court indicated that "[i]n these cases, we did not overrule or modify *Rance*." Id. at ¶25. The court concludes its analysis of appellate courts' applications of the test in *Rance* by stating, "we clarify that in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), *Rance* requires courts to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of elements." Id. at ¶27. Furthermore, in the concurring opinion, Judge Fain interprets the

majority's decision as only a clarification of *Rance*, stating, "therefore, I do not find clarification of *State v. Rance* to be necessary." Id. at ¶40.

**{¶15}** Therefore, despite appellant's arguments to the contrary, there is nothing in *Cabrales* to suggest the court meant to change or broaden the test in *Rance* or meant to overrule the ultimate conclusion reached in *Rance*. Notably, the court in *Cabrales* did not indicate that the court itself in *Rance* had misapplied or misinterpreted the test in analyzing the relevant statutes in that case. It is clear from *Cabrales* that the court was merely clarifying the test enunciated in *Rance*, and the court's conclusion in *Rance*, based upon its application of the test, remains valid. See also *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶35 (the two-tiered test for allied offenses of similar import set forth in *Rance* were "clarified" in *Cabrales*). As the court in *Rance* concluded that involuntary manslaughter and aggravated robbery are not offenses of similar import, we conclude the same.

**{¶16}** Since *Cabrales* was decided, at least one other appellate court has addressed whether involuntary manslaughter and aggravated robbery are allied offenses of similar import. In *State v. Garrett*, 8th Dist. No. 90428, 2008-Ohio-3549, the defendant presented the same argument as appellant in the present case, asserting that the trial court erred in imposing separate sentences for involuntary manslaughter and aggravated robbery, as they are allied offenses. The Eighth District Court of Appeals found that it had already addressed that same issue in the defendant's prior appeal, and again relied upon *Rance* to reiterate that involuntary manslaughter and aggravated robbery are not allied offenses because the commission of one will not automatically result in commission of the other. Id. at ¶15 -16.

**{¶17}** Accordingly, applying the analysis in *Rance* to the present case, involuntary manslaughter and aggravated robbery are not allied offenses of similar import. As the court in *Rance* found, involuntary manslaughter requires causing the death of another as a proximate result of committing or attempting to commit a felony. *Rance* at 639. Aggravated robbery does not require that the victim be killed or even injured. Id. Violation of the code sections with which appellant was charged requires only that the defendant have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it or use it, pursuant to R.C. 2911.01(A)(1), or inflict or attempt to inflict serious physical harm pursuant to R.C. 2911.01(A)(3). Aggravated robbery requires a theft offense or an attempt to commit one; involuntary manslaughter does not, as aggravated robbery is only one of the many felonies that may support a charge of involuntary manslaughter. *Rance* at 639. Because each offense requires proof of an element that the other does not, they are not allied offenses of similar import. Id. Therefore, reviewed in the abstract, involuntary manslaughter and aggravated robbery are not allied offenses because the commission of one will not automatically result in commission of the other. Id. The subsequent clarification in *Cabrales*, that the elements need not exactly align, does not change this result.

**{¶18}** Therefore, we find the trial court did not violate the allied offense statute, as set forth in R.C. 2941.25, in imposing consecutive terms of incarceration for the offenses of involuntary manslaughter and aggravated robbery, as those offenses are not offenses of similar import. Appellant's first assignment of error is overruled.

**{¶19}** Appellant argues in his second assignment of error that he was denied effective assistance of counsel when his counsel failed to object to the imposition of consecutive sentences for allied offenses of similar import. Given our determination under appellant's first assignment of error that involuntary manslaughter and aggravated robbery are not allied offenses of similar import, appellant was not denied effective assistance of counsel when his counsel failed to object to the imposition of consecutive sentences on this basis. Appellant's second assignment of error is overruled.

**{¶20}** Appellant argues in his third assignment of error that he is entitled to discharge based upon the seven-year delay between remand from this court for imposition of a new sentence and the journalization of that resentencing. This court issued its decision remanding the matter for resentencing on May 24, 2001. The trial court held a resentencing hearing on October 29, 2001, at which the trial court orally pronounced the sentence. On September 3, 2008, appellant filed a motion requesting that the court file a resentencing entry journalizing the October 29, 2001 oral pronouncement, which the court did on October 22, 2008.

**{¶21}** Appellant first argues that he is entitled to be discharged from prison based upon Crim.R. 32(A). Specifically, appellant contends the seven-year delay between the oral pronouncement of his sentence and the journalization of his sentence was a violation of the "without unnecessary delay" provision in Crim.R. 32(A). Crim.R. 32 provides:

> **(A) Imposition of sentence**
>
> Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

> (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.
>
> (2) Afford the prosecuting attorney an opportunity to speak;
>
> (3) Afford the victim the rights provided by law;
>
> (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

**{¶22}** We first note that there exists some disagreement as to whether Crim.R. 32(A) applies to resentencing, as acknowledged by appellant in his brief. See, e.g., *State v. Corrigan*, 8th Dist. No. 83088, 2004-Ohio-4346, ¶18, citing *State v. Taylor* (Oct. 29, 1992), 8th Dist. No. 63295 (Crim.R. 32(A) does not apply to resentencing); *State v. Crosier* (May 31, 1988), 5th Dist. No. 87 AP 12-0098, (remand for resentencing violated Crim.R. 32(A)). However, even assuming arguendo that Crim.R. 32(A) does apply to resentencing, appellant cites no authority for the proposition that the "without unnecessary delay" provision in Crim.R. 32(A) applies to the journalization of the sentence rather then merely to the oral imposition of the sentence. A plain reading of Crim.R. 32(A) suggests that the provision that "[s]entence shall be imposed without unnecessary delay" in that section relates to the sentencing hearing. By its title, Crim.R. 32(A) addresses "imposition of sentence" and provides that, "[a]t the time of imposing sentence," the court must afford counsel and defendant an opportunity to speak, afford the prosecutor an opportunity to speak, afford the victim rights provided by law, and state statutory findings and give reasons for those findings, where necessary. Clearly, these four requirements relate to the oral sentencing hearing and not to the journalization of the judgment for such sentence. Because Crim.R. 32(A) applies to the oral pronouncement at

the sentencing hearing, the provision that the "[s]entence shall be imposed without unnecessary delay" does not address whether the judgment journalizing the sentence must be completed without unnecessary delay. Therefore, even if Crim.R. 32(A) applies to resentencing, Crim.R. 32(A) does not apply to the present circumstances because an oral sentencing hearing was held within a timely manner.

**{¶23}** Appellant also argues that the seven-year lag between the oral pronouncement of the sentence and the judgment journalizing the sentence was a violation of the Sixth Amendment right to a speedy trial. We first note that some courts have found the Sixth Amendment right to a speedy trial does not extend to proceedings subsequent to trial. See, e.g., *State v. James*, 179 Ohio App.3d 633, 2008-Ohio-6139, ¶10, citing *State v. Lovell*, 12th Dist. No. CA2006-07-158, 2007-Ohio-4352, citing *State v. Patton* (1996), 117 Ohio App.3d 86, 88; *State v. Christian*, 7th Dist. No. 05-MA-89, 2006-Ohio-3567, ¶48, citing *State v. Keeble*, 2d Dist. No. 03CA84, 2004-Ohio-3785, ¶16 (as a general rule, the right to a speedy trial applies to the trial of pending criminal charges, not sentencing). Notwithstanding, appellant fails to cite any authority that the Sixth Amendment right to a speedy trial also guarantees a right to a speedy journalization of an oral sentence.

**{¶24}** Appellant counters that, because a court speaks only through its journal entries, the oral pronouncement was irrelevant and could not satisfy the speedy-trial requirement. However, even if it were true that speedy-trial rights extend to proceedings subsequent to trial, and even if it were true that a court must consider the date the sentencing judgment is rendered rather than the oral pronouncement of the sentence, in order to determine whether there has been a speedy-trial violation, a court must consider

the following four factors, as set forth in *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. See *Corrigan* at ¶18 (because Crim.R. 32 does not apply to resentencing, the court must proceed to analyze the delay in resentencing pursuant to the Sixth Amendment and the criteria set forth in *Barker*).

**{¶25}** Here, although the length of the delay, seven years, weighs in favor of a speedy-trial violation, the other three factors in *Barker* together overwhelmingly favor a finding that appellant's speedy-trial rights were not violated. With regard to the reason for the delay, the delay was inadvertent error on behalf of the trial court to file a judgment entry. The trial court held the sentencing hearing in a timely manner after remand, and it did not act purposefully or with ill intent in failing to file a judgment entry. When the trial court was informed that no judgment entry had ever been filed, the court acted promptly to rectify the error. The fact that the inadvertence here was a delay in the filing of the journal entry and not a delay in the scheduling of the sentencing hearing or execution of the sentence also lessens the significance of the inadvertent delay.

**{¶26}** Further, as to appellant's assertion of his right to a speedy trial, appellant waited seven years to file his motion requesting that the court file a resentencing entry journalizing the October 29, 2001 oral pronouncement. When appellant eventually discovered the error seven years later, the trial court filed the entry, granting appellant the precise remedy he requested in his motion. Appellant filed no other motions requesting a discharge or other relief due to the delay.

**{¶27}** More importantly, appellant has suffered no prejudice from the delay between the oral pronouncement and the entry journalizing the sentence. In *Barker*, the court pointed out that defendants have an interest in obtaining a speedy trial to prevent oppressive pre-trial incarceration, to minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired. *Barker* at 532. Here, appellant had none of the interests identified in *Barker* compromised by the delay. After the remand, appellant stood convicted of the same charges, and the trial court eventually sentenced appellant to the same term of incarceration. That appellant waited seven years to check the status of the sentencing entry also strongly suggests that he experienced no prejudicial effect from the delay. Furthermore, the resentencing after remand occurred only 15 months after the original sentencing.

**{¶28}** In addition, appellant remained imprisoned for the entire length of the delay. Because appellant was sentenced to an 18-year prison sentence, the seven-year delay did not extend his sentence or alter it in any way. See, e.g., *Corrigan* at ¶20 (because defendant was in jail for a 24-year sentence, the 31-month delay in resentencing did not result in prejudice). As the state points out, even had appellant been successful in getting his involuntary manslaughter and aggravated robbery sentences merged, appellant would have been serving a 12-year sentence and still be incarcerated. Therefore, we find the seven-year delay did not violate appellant's Sixth Amendment right to a speedy trial. As appellant was not entitled to a discharge from his sentence because of the seven-year delay, pursuant to either Crim.R. 32(A) or the Sixth Amendment, appellant's third assignment of error is overruled.

**{¶29}** Accordingly, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed*.

BRYANT and SADLER, JJ., concur.

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