[Cite as *State v. Miranda*, 2012-Ohio-3971.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-788 (C.P.C. No. 11CR-02-688)
Arnaldo R. Miranda,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

David P. Rieser, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Arnaldo R. Miranda ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas imposing prison sentences pursuant to appellant's guilty plea. Because we conclude that the trial court did not err by sentencing appellant to separate consecutive sentences on the two charges to which he pled guilty, we affirm.

{¶ 2} In January 2011, appellant and several other men were arrested in connection with their involvement in a marijuana trafficking enterprise. After his arrest, appellant confessed to the police that he was the "money person" for the enterprise. Appellant was indicted on one count of engaging in a pattern of corrupt activity, a first-degree felony in violation of R.C. 2923.32; three counts of trafficking in marijuana,

second-degree felonies in violation of R.C. 2925.03; and three counts of possession of marijuana, second-degree felonies in violation of R.C. 2925.11. Appellant ultimately pled guilty to two counts: a second-degree felony charge of engaging in a pattern of corrupt activity and a second-degree felony charge of trafficking in marijuana. Following the guilty plea, the trial court sentenced appellant to six years' imprisonment on the charge of engaging in a pattern of corrupt activity and eight years' imprisonment on the charge of trafficking in marijuana, with the sentences to be served consecutively. The court also imposed a fine of $15,000 on each count, required appellant to pay court costs, and notified appellant of a mandatory three-year term of post-release control.

{¶ 3} Appellant appeals from the trial court's judgment imposing the prison sentences, assigning two errors for this court's review:

> Assignment of Error No. 1: The imposition of separate convictions and sentences for the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana violated R.C. 2941.25 (the allied offenses statute) and Defendant-Appellant's rights under the Double Jeopardy Clauses of [the] Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
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> Assignment of Error No. 2: The methodology employed by the trial court to justify the imposition of consecutive sentences for the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana was contrary to R.C. 2929.11 and R.C. 2929.12, and also violated Defendant-Appellant's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. Defendant-Appellant requests the Court to grant him leave to appeal his consecutive sentences pursuant to R.C. 2953.08(C).

{¶ 4} Appellant argues that the sentences imposed by the trial court are contrary to law. Under R.C. 2953.08(A)(4), a criminal defendant who is convicted of or pleads guilty to a felony may appeal a sentence on the grounds that it is contrary to law. In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, this court explained the standard of review in felony sentencing decisions:

> In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19, this court held that, pursuant to R.C. 2953.08(G),

> we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶ 19.
>
> After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id*. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.
>
> As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 8. Additionally, since *Kalish*, this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶ 8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100.

Id. at ¶ 19-21.

{¶ 5} In this case, however, appellant raised no objections during the sentencing hearing. Therefore, he has waived all but plain error. *See State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To find plain error, we must find that there was an error, that the error was plain, constituting an obvious defect in the trial proceedings, and that the error affected the appellant's substantial rights. *State v. Carter*, 10th Dist. No. 03AP-778, 2005-Ohio-291, ¶ 22. Moreover, notice of plain error is taken only in exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Sneed*, 63 Ohio St.3d 3, 10 (1992).

{¶ 6} In his first assignment of error, appellant claims that the trial court erred by imposing separate sentences for each of the counts to which he pled guilty. Appellant argues that the trial court was required to merge the convictions for the purposes of sentencing pursuant to R.C. 2941.25, Ohio's allied offenses statute. As noted above, appellant did not object to the lack of merger at the sentencing hearing; therefore, the plain-error standard applies. *See State v. Davic,* 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 13. "Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law." *Id.*

{¶ 7} Appellant argues that his convictions for engaging in a pattern of corrupt activity and trafficking in marijuana must be merged pursuant to the allied offenses statute because they were committed by the same conduct. Ohio's allied offenses statute provides that "[w]here 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." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B).

{¶ 8} However, as we have previously noted, "[a] person may be punished for multiple offenses arising from a single criminal act so long as the General Assembly intended cumulative punishment." *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, ¶ 19, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 25. The primary indication of the General Assembly's intent is R.C. 2941.25, but other more specific legislative statements may also be considered depending on the offenses involved. *Id*.

{¶ 9} Appellant pled guilty to engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, also known as Ohio's Racketeer Influenced and Corrupt Organizations ("RICO") statute. The Supreme Court of Ohio has previously held that "[t]he RICO statute was designed to impose *cumulative* liability for [a] criminal enterprise."

(Emphasis added.) *State v. Schlosser*, 79 Ohio St.3d 329, 335 (1997). Finding that Ohio's RICO statute was based on the federal RICO statute, the Supreme Court noted that Congress declared the intention of the federal law to be to " 'provid[e] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' " *Id.* at 332, quoting Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S. Code Cong. & Adm. News at 1073. Thus, merger of a conviction for engaging in a pattern of corrupt activity and a predicate offense is not required because the intent of Ohio's RICO statute "is to impose additional liability for the *pattern* of corrupt activity involving the criminal enterprise." (Emphasis sic.) *Id*. at 335.

{¶ 10} Appellant argues that a 2006 amendment to R.C. 2923.32 demonstrates that the General Assembly no longer intended to allow cumulative punishment in corrupt activity cases. Appellant cites to this court's decision in *State v. Burge*, 88 Ohio App.3d 91 (10th Dist.1993), in which we referred to division (D) of R.C. 2923.32 in concluding that a defendant could be convicted and sentenced on both a corrupt activity charge and on the predicate offense. *Id.* at 94. The first sentence of division (D) of R.C. 2923.32 provided that " '[c]riminal penalties under this section are not mutually exclusive, unless otherwise provided, and do not preclude the application of any other criminal or civil remedy under this or any other section of the Revised Code.' " *Burge* at 94, quoting R.C. 2923.32(D). In 2006, the General Assembly enacted Sub.H.B. No. 241, which deleted division (D) from R.C. 2923.32. Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9133. Appellant argues that, by deleting this provision, the General Assembly expressed its intent to allow the merger of a corrupt activity conviction with a predicate offense where such merger would otherwise be consistent with the allied offenses statute.

{¶ 11} We acknowledge that "[t]he General Assembly's amendment to a section of the Revised Code is presumed to have been made to effect some purpose." *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St.2d 163, 175 (1972). However, further examination of Sub.H.B. No. 241 indicates that the deletion of division (D) of R.C. 2923.32 was not intended to permit merger of a corrupt activity conviction with a predicate offense. Sub.H.B. No. 241 created a new chapter of the Revised Code, Chapter 2981, governing criminal and civil asset forfeitures. Sub.H.B. No. 241, 151 Ohio Laws,

Part V, 9092, 9217-43. In addition to creating new forfeiture provisions, the legislation deleted certain forfeiture provisions located in other parts of the Revised Code. The second sentence of former R.C. 2923.32(D) related to criminal forfeiture, providing that "[a] disposition of criminal forfeiture ordered pursuant to division (B)(3) of this section in relation to a child who was adjudicated delinquent by reason of a violation of this section does not preclude the application of any other order of disposition under Chapter 2152. of the Revised Code or any other civil remedy under this or any other section of the Revised Code." R.C. 2923.32(D), repealed in Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9133. In addition to deleting division (D) of R.C. 2923.32, Sub.H.B. No. 241 also deleted divisions (B)(4)-(6), (C), and (E)-(F) of the statute, each of which also addressed forfeiture. Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9131-34. Thus, the deletion of division (D) of the statute appears to have been part of the general revisions related to the creation of Chapter 2981. We find no evidence that the General Assembly intended to permit merger of corrupt activity convictions with predicate offenses by deleting the first sentence of the former division (D) of R.C. 2923.32.

{¶ 12} In *Schlosser*, the Supreme Court of Ohio did not rely on division (D) of R.C. 2923.32 in holding that the statute permitted cumulative punishment. Rather, as noted above, the court looked to the law's similarity to federal law and the clear statements that the federal law allowed cumulative punishment. *Schlosser* at 332-35. Further, since the deletion of division (D), two courts of appeals have concluded that R.C. 2923.32 permits cumulative punishment and does not require merger of a corrupt activity conviction with a predicate offense. *See State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222, ¶ 68; *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, ¶ 35-38. Consistent with these decisions and the reasoning set forth above, we conclude that the General Assembly intended to permit separate punishments for engaging in a pattern of corrupt activity and the underlying predicate crimes. Thus, even assuming for the purpose of analysis that appellant is correct that he committed the crimes of engaging in a pattern of corrupt activity and trafficking in marijuana through the same conduct, the trial court did not err by imposing separate sentences for the two convictions.

{¶ 13} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶ 14} In appellant's second assignment of error, he asserts that the trial court erred in the "methodology" used to impose consecutive sentences on appellant for the two convictions. Appellant concedes that the eight-year prison term for trafficking in marijuana was mandated by statute. However, appellant argues that the trial court erred by imposing a consecutive six-year prison term for engaging in a pattern of corrupt activity. Appellant argues that, in imposing a consecutive sentence, the trial court improperly relied on the prosecutor's statement that the marijuana trafficking enterprise involved Mexican drug cartels.

{¶ 15} Under Ohio law, "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). In imposing a sentence, the court has discretion to determine the most effective way to comply with these purposes; in the exercise of this discretion, the court must consider factors relating to the seriousness of the defendant's conduct, the likelihood of recidivism, and other relevant factors. R.C. 2929.12(A). The offender, the prosecutor, and the victim or victim's representative may present information relevant to the imposition of sentence. R.C. 2929.19(A).

{¶ 16} At the sentencing hearing, the prosecutor asserted that "[g]iven the size of this organization, this is, clearly, coming from Mexico, involving Mexican cartels, because of the amount of money involved as well as the information that the state has gotten from the investigation." (Sentencing Hearing Tr. at 14.) When the court pronounced appellant's six-year sentence on the charge of engaging in a pattern of corrupt activity, it referred to the involvement of Mexican cartels in the trafficking enterprise. Appellant asserts that the trial judge acted contrary to law in relying on the assertion that Mexican cartels were involved in the enterprise because there was no evidence in the record to support the assertion.

{¶ 17} The Ohio Rules of Evidence do not apply to sentencing hearings. Evid.R. 101(C)(3); *State v. Guzman*, 10th Dist. No. 02AP-1440, 2003-Ohio-4822, ¶ 25. We have previously held that "a trial court may even consider information during the sentencing hearing that may have been inadmissible at trial." *Id.* Moreover, R.C. 2929.19(A)

explicitly provides that, at a sentencing hearing, the offender, the prosecutor, and the victim may present *information* relevant to sentencing. The statute does not use the term "evidence" when referring to the matters that may be presented for the trial court's consideration. Therefore, the trial court was not precluded from considering the prosecutor's statement regarding the involvement of Mexican cartels.

{¶ 18} Appellant did not object to the prosecutor's statement during the sentencing hearing. Moreover, we note that appellant's own counsel alluded to the possible involvement of Mexican cartels before the prosecutor made any such assertion:

> [Appellant] was found with a million dollars in cash. It's not his money. That money gets shipped back. It goes back to Arizona. From there, I don't know where it goes. Maybe it goes to Mexico. I guess we can only surmise.

(Sentencing Hearing Tr. at 6.)

{¶ 19} Finally, the transcript indicates that, contrary to appellant's assertion, the trial court did not refer to the involvement of Mexican cartels in the marijuana trafficking enterprise as the basis for imposing consecutive sentences. Rather, the trial court made this reference in explaining the length of the sentence imposed. The court acknowledged that appellant accepted responsibility for his role by pleading guilty but explained that the scope and scale of the marijuana trafficking enterprise reduced the mitigating effect of that factor:

> This was a huge operation, commercially, that brought a lot of illegal drugs into our community, and the involvement with the Mexican cartels is probably inviting the most dangerous folks on the face of the planet, or just about, next to the Taliban, to have dealings with Columbus, and I can't give any more than two years less than the maximum for accepting responsibility on this thing.

(Sentencing Hearing Tr. at 24.)

{¶ 20} Under these circumstances, we conclude that the trial court did not commit plain error in imposing consecutive sentences on appellant.

{¶ 21} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 22} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
