**[Cite as *State v. Napier*, 2015-Ohio-1413.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

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| STATE OF OHIO, | : | |
| | | CASE NOS. CA2014-06-039 |
| Plaintiff-Appellee/ Cross-Appellant, | : | CA2014-06-046 |
| | : | O P I N I O N |
| | | 4/13/2015 |
| - vs - | : | |
| | : | |
| KENNY RAY NAPIER, | | |
| | : | |
| Defendant-Appellant/ Cross-Appellee. | : | |

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No.14CR00126

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee/cross-appellant

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**M. POWELL, J.**

**{¶ 1}** Defendant-appellant and cross-appellee, Kenny Ray Napier, appeals his conviction in the Clermont County Court of Common Pleas for two counts of illegal manufacture of drugs. Plaintiff-appellee and cross-appellant, the state of Ohio, appeals the decision of the trial court to merge Napier's two offenses for the purpose of sentencing.

**{¶ 2}** In February 2014, execution of a search warrant at Napier's residence in Clermont County led to the discovery of five separate "one-pot" methamphetamine labs. The following month, Napier was indicted for five counts of illegal manufacture of drugs, one count of illegal assembly or possession of chemicals for the manufacture of drugs, one count of aggravated possession of drugs, and one count of child endangerment. Among other things, the bill of particulars stated that Napier was in possession of more than 100 times the bulk amount of methamphetamine under the applicable statute, that a child under the age of ten was residing in a home connected to Napier's residence, and that Napier had previously been convicted of illegal manufacture of drugs.

**{¶ 3}** In April 2014, Napier entered guilty pleas to two counts of illegal manufacture of drugs pursuant to R.C. 2925.04(A), and the state dismissed the other charges. Prior to the plea colloquy, Napier's counsel made clear that he believed Napier's two offenses were allied offenses of similar import that should be merged for sentencing. During the ensuing plea colloquy, Napier admitted that his offenses involved the manufacture of methamphetamine, that he was convicted of the same offense in 2006, and that the present offenses were committed in the vicinity of a juvenile. Thereafter, the trial court accepted Napier's pleas, and a hearing was scheduled on the issue of merger of the two offenses.

**{¶ 4}** At the merger hearing in May 2014, the state presented the testimony of Agent Ken Mullis, a certified methamphetamine investigator with the Union Township Police Department and the Clermont County Narcotics Task Force who participated in the search of Napier's residence. Agent Mullis gave a general account of the one-pot manufacturing process, and explained three photographs of Napier's one-pots that the state subsequently admitted into evidence. Agent Mullis testified that the one-pot in the first photograph was "nearly complete," the one-pot in the second photograph was "further along in the process," and the one-pot in the third photograph was "totally completed." He also testified that of the

five one-pots discovered at Napier's residence, the "totally completed" one-pot was found in a cooler on Napier's back deck, while the other four one-pots were found together in a bag in one of the back rooms.

**{¶ 5}** On May 14, 2014, the trial court ruled that Napier's offenses were allied offenses of similar import that would be merged for sentencing. In so doing, the court stated,

> While [Napier] had different one-pot labs operating, the court finds that they were not so separated in time or space as to constitute separate acts. Furthermore, the court finds that the animus, meaning the defendant's immediate motive, was to manufacture an amount of methamphetamine represented by the yield expected from the five "one pot" [sic] labs and, as such, the court finds the animus for each offense to be the same.

Napier's sentencing hearing was held on May 15, 2014, and the trial court ordered that Napier serve a mandatory prison term of ten years.

**{¶ 6}** Napier now appeals, raising two assignments of error. On cross-appeal, the state raises one cross-assignment of error.

**{¶ 7}** Assignment of Error No. 1:

**{¶ 8}** APPELLANT WAS NOT AFFORDED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

**{¶ 9}** At the merger hearing, Napier's counsel objected several times during Agent Mullis' testimony, at some points on relevance grounds and at other points to argue that Agent Mullis was not a qualified expert for the purpose of explaining the methamphetamine manufacturing process. When, at the close of state's evidence, Napier's counsel was asked by the trial court whether he had any further objections, counsel responded as follows:

> Your Honor, I would object. And I apologize if I'm seeming like I'm a little disjointed. I'm not used to having a hearing on merger quite [in] this context. * * * So just for the record, I'm going to make a couple of objections.

One of counsel's objections was that during discovery the state failed to provide him with either the photographic exhibits that Agent Mullis discussed or an expert report by Agent Mullis. After he realized the photographs had, in fact, been submitted during discovery, Napier's counsel withdrew only the part of his objection related to the photographs.

**{¶ 10}** In addition to raising objections at the merger hearing, Napier's counsel also argued that Napier's offenses should be merged for sentencing because there was a single animus behind Napier's conduct: to produce an amount of methamphetamine equal to the yield of five one-pot labs.[1] Counsel proposed several analogies to support his argument. In one analogy, which counsel thought "might have been a little more humorous" than the others, counsel likened Napier's labs to cooking a pound of bacon in different skillets on a stove: the large quantity necessitated the use of several skillets, but the single purpose was to cook the pound of bacon.

**{¶ 11}** Napier now argues that the above conduct constituted the ineffective assistance of trial counsel. He notes that he received a ten-year mandatory prison term for his offenses, even though he could have received a mandatory prison term as short as five years. Napier attributes the relative severity of his sentence to trial counsel's admittedly "disjointed" presentation of objections at the merger hearing, and counsel's attempt at humor by analogizing Napier's case to cooking bacon. Napier asserts that these errors amount to representation so deficient that he was deprived of his Sixth Amendment right to counsel.

**{¶ 12}** To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test. *State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). He must establish both that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient

1. Counsel's full argument was presented in a memorandum filed prior to the merger hearing. His argument at the hearing merely summarized his memorandum.

performance prejudiced him to the point of depriving him of a fair trial. *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340, ¶ 58, citing *Strickland* at 687-688. A reviewing court may approach the ineffective assistance analysis starting with either prong of the test, and a defendant's failure to satisfy one prong obviates the court's need to review the other. *Strickland* at 697; *Bradley* at 143.

**{¶ 13}** We begin by examining whether the performance of Napier's trial counsel was deficient. We note, with respect to ineffective assistance of counsel claims, that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct." *Strickland* at 689. Consequently, a reviewing court's scrutiny of counsel's performance is highly deferential. *State v. Rodriguez*, 12th Dist. Preble No. CA2009-09-024, 2010-Ohio-1944, ¶ 40.

**{¶ 14}** In the present case, Napier's trial counsel was successful in arguing for the merger of Napier's offenses for sentencing. Although the trial court never referenced counsel's bacon analogy, the court nevertheless agreed with counsel's position that there was a single animus behind all of the labs discovered at Napier's residence. Furthermore, counsel's bacon analogy, humorous or not, was suitable in that it promoted an understanding of Napier's conduct by relating it to common everyday experience.

**{¶ 15}** Additionally, despite counsel's apology for "seeming like I'm a little disjointed," and despite counsel's retraction of one part of one of his objections, counsel nevertheless made several relevant objections during the merger hearing that demonstrated his diligence in representing Napier's interests. Such conduct does not fall below an objective standard of reasonableness. *See, e.g., State v. Scott*, 12th Dist. Warren No. CA2012-06-052, 2013-Ohio-2866, ¶ 24 (finding "no requirement of how well an objection must be articulated so long as trial counsel's conduct does not fall below an objective standard of reasonableness").

**{¶ 16}** Moreover, even if we were to find counsel's performance was deficient, Napier

has failed to meet his burden of proof with respect to prejudice. It is not enough for a defendant to show that errors by his trial counsel had some conceivable effect on the outcome of the proceeding. *Strickland*, 466 U.S. at 693. Rather, he must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley*, 42 Ohio St.3d at 143. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

**{¶ 17}** Trial counsel's conduct did not impact Napier's sentence in such a way as to undermine confidence in the outcome of the case. The trial court does not appear to have responded to counsel's bacon analogy at all, either positively or negatively. In addition, there is no suggestion in the record that counsel's objections during the merger hearing, or his "disjointedness," fomented any ill will from the court. On the contrary, although the court did not sustain any of counsel's objections, the court nevertheless allowed counsel to argue his position each time before the court made a ruling.

**{¶ 18}** Lastly, we note the record supports the relative severity of Napier's sentence. Indeed, both the transcript of the sentencing hearing and the sentencing entry indicate that it was the nature of Napier's offenses that led to his ten-year prison term. The trial court expressed its concern with several aspects of Napier's offenses: Napier's apparent disregard for the proximity of a juvenile and his family to the hazardous process of manufacturing methamphetamine, Napier's return to the illegal manufacture of methamphetamine just four years after he was released from prison for the same offense, the extent of Napier's manufacturing operation, and the large number of people that Napier involved in supplying him with the "raw materials" he needed for production. The trial court indicated that it was these factors that made the offenses more serious and Napier's recidivism more likely, and hence contributed to the length of Napier's prison term.

**{¶ 19}** Thus, Napier has not shown that counsel was ineffective. He has failed to demonstrate either that his trial counsel's performance was deficient or that there exists a reasonable probability that his sentence would have been different but for his counsel's conduct. As a result, Napier's first assignment of error is overruled.

**{¶ 20}** Assignment of Error No. 2:

**{¶ 21}** THE TRIAL COURT ABUSED ITS DISCRETION AND IMPOSED A SENTENCE THAT WAS CONTRARY TO LAW WHEN IT SENTENCED APPELLANT TO A MANDATORY STATED PRISON TERM OF TEN YEARS.

**{¶ 22}** At Napier's sentencing hearing, his daughter, Caitlin, implored the court for leniency. She informed the court that Napier had lived with her for a time after getting out of prison, that he babysat her young son while she was at work, and that her son – Napier's grandson – adored Napier. Caitlin concluded, "he is a really good guy. * * * I think he could change." Notwithstanding Caitlin's testimony, the trial court found that Napier's conduct was more serious than conduct normally constituting the offense. Additionally, the court found the likelihood of recidivism in Napier's case was high. Therefore, the court ordered that Napier serve a mandatory prison term of ten years.

**{¶ 23}** Napier now argues that the trial court's imposition of a mandatory prison term of ten years was an abuse of discretion. Napier observes that although the trial court considered his prior convictions and the proximity of a juvenile when fashioning his sentence, the court failed to take into account his daughter's plea for leniency and Napier's post-arrest efforts to get treatment for his drug addiction. He also asserts the trial court failed to take into consideration his cooperation with law enforcement, his stated remorse, and his specific apology to family, neighbors, and victims of his offenses. Thus, Napier contends the ten-year mandatory sentence constitutes an abuse of discretion.

**{¶ 24}** At the outset, we note that Napier has misstated the standard of review on this

issue. This court has made clear that the standard of review for felony sentences is no longer the two-step approach outlined in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Instead, this court reviews felony sentences under the standard set forth in R.C. 2953.08(G)(2). *See State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. While the second step of the *Kalish* approach involved an inquiry into whether the trial court abused its discretion, R.C. 2953.08(G)(2) explicitly states that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion."

**{¶ 25}** Rather, pursuant to R.C. 2953.08(G)(2), the appellate court may increase, reduce, or otherwise modify a sentence, or vacate a sentence and remand the matter for resentencing, *only if* the reviewing court clearly and convincingly finds either:

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; [or]
>
> (b) That the sentence is otherwise contrary to law.

Thus, R.C. 2953.08(G)(2) establishes an extremely deferential standard of review. *Crawford* at ¶ 8.

**{¶ 26}** The findings referenced in R.C. 2953.08(G)(2)(a) do not apply to the present case, so we focus our analysis on whether Napier's sentence is clearly and convincingly contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of felony sentencing in R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Crawford* at ¶ 9.

**{¶ 27}** We find Napier's sentence is not clearly and convincingly contrary to law. Although the trial court did not reference the specific code provisions at the sentencing hearing, the sentencing entry states that the court considered the principles and purposes of

sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12 in fashioning the sentence. This satisfied the court's duty with respect to the sentencing guidelines in R.C. 2929.11 and R.C. 2929.12. *See State v. Grundy*, 12th Dist. Warren No. CA2011-09-099, 2012-Ohio-3133, ¶ 52, fn. 1.

**{¶ 28}** In addition, Napier's sentence for a felony of the first degree was within the permissible statutory range, and he was properly notified of postrelease control. With respect to the permissible statutory sentencing range, Napier had previously been convicted of the same offense, so the court was required to "impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree that is not less than five years." R.C.2925.04(C)(3)(b). The maximum prison term permitted for a felony of the first degree under R.C. 2929.14(A)(1) is eleven years. Hence, the trial court's sentence of a mandatory prison term of ten years falls squarely within the permissible range of between five and eleven years for Napier's offenses. In addition, consistent with R.C. 2967.28(B)(1), the trial court notified Napier that upon his release from prison, he was subject to a mandatory five years of postrelease control.

**{¶ 29}** Accordingly, we find Napier's sentence was not contrary to law. Napier's second assignment of error is overruled.

**{¶ 30}** Cross-assignment of Error No. 1:

**{¶ 31}** THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE TWO COUNTS OF ILLEGAL MANUFACTURE OF DRUGS MERGED.

**{¶ 32}** The state challenges the trial court's ruling that Napier's two offenses were allied offenses of similar import, and therefore merged for sentencing. The state notes that the one-pots discovered at Napier's residence were all in different stages of the manufacturing process, and therefore that each of the one-pots commenced operation at a different time. The state also asserts that the one-pots were found at different locations

within the residence, and points out that numerous individuals were involved over a period of months to supply Napier with the ingredients necessary to operate the one-pots. Therefore, the state contends the trial court erred by merging Napier's offenses because the record shows the offenses were committed separately and with a separate animus.

**{¶ 33}** Appellate review of a trial court's R.C. 2941.25 merger ruling involves an application of the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple sentences for the offenses a defendant has been found to have committed. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 25. Therefore, appellate review of an R.C. 2941.25 merger ruling is de novo. *Id.* at ¶ 28.

**{¶ 34}** Ohio law guards against the imposition of multiple punishments for the same criminal conduct. *State v. Brown*, 186 Ohio App.3d 437, 2010-Ohio-324, ¶ 7 (12th Dist.). Specifically, R.C. 2941.25 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.

**{¶ 35}** A determination as to whether multiple offenses resulted from the same conduct under R.C. 2941.25(A) "has always required courts to determine whether the offenses were committed separately or with a separate animus." *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, ¶ 16. Additionally, the Ohio Supreme Court recently made clear that two or more offenses are of dissimilar import "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 23. Therefore,

offenses do not merge and a defendant may be convicted and sentenced for multiple offenses if *any* of the following are true: "(1) the offenses are dissimilar in import or significance * * *, (2) the offenses were committed separately, [or] (3) the offenses were committed with separate animus or motivation." *Ruff* at ¶ 25.

**{¶ 36}** This analysis "'may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct – an inherently subjective determination.'" *Ruff* at ¶ 32, quoting *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 52.

**{¶ 37}** To put the following analysis in the proper context, we note that Napier pled guilty to two counts of illegal manufacture of drugs pursuant to R.C. 2925.04(A), one count each for two separate one-pots discovered during the search of his residence. R.C. 2925.04(A) states that "[n]o person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." Whereas R.C. 2925.04(C)(5) provides that the penalty for the cultivation of marihuana is to be determined primarily by the amount of marihuana involved, R.C. 2925.04(C)(3) does not make any such provision with regard to methamphetamine. Instead, the determination as to whether the illegal manufacture of methamphetamine is punished as a felony of either the first or second degree depends upon the defendant's circumstances – for example, a prior conviction under R.C. 2925.04(A) – and not the extent of the defendant's production. Further, and perhaps more significant here, R.C. Chapter 2925 does not attach any particular legal significance to the "method" utilized in the manufacture of methamphetamine, whether it be the "one-pot" method utilized by Napier in this case or the more elaborate "anhydrous" method.

**{¶ 38}** Additionally, we note that the state's statement of facts at the plea hearing made clear that both of the one-pots constituting Napier's offenses "were active and were in

various stages of the manufacturing process." Consequently, in conducting the R.C. 2941.25 merger analysis we need not consider the one-pot that Agent Mullis identified at the merger hearing as "totally completed," and which he testified was found in a cooler on Napier's back deck. Rather, we may limit our analysis to the one-pots which, according to Agent Mullis' testimony, were found together in a single bag in a back room of Napier's residence. Among these one-pots were those pictured in the photographs admitted as State's Exhibits 1 and 2, which Agent Mullis described as "nearly complete" and "further along in the process," respectively.

**{¶ 39}** That said, we turn to the first inquiry of the merger analysis and find that Napier's offenses are not dissimilar in import or significance. Two or more offenses are dissimilar in import when the offenses involve separate victims, or when the harm that results from each offense is separate and identifiable. *Ruff*, 2015-Ohio-995 at ¶ 23. Although Napier admitted that a child under the age of ten lived in the residence connected to his residence, the record does not otherwise identify any "victims" of Napier's offenses. Therefore, Napier's offenses did not involve separate victims.

**{¶ 40}** Furthermore, in considering whether each of Napier's offenses resulted in separate harm, we are cognizant that the Ohio Supreme Court, in analyzing whether rape and kidnapping are allied offenses of similar import, has stated that a critical issue is whether there is a "substantial increase in the risk of harm separate from that involved in the underlying crime." *State v. Logan*, 60 Ohio St.2d 126, 135 (1979).[2] Here, however, while the overall risk of fire or explosion might increase as the number of one-pots increases, the harm is the same and no separate risk of harm may be identified as relating to any particular one-pot.

2. Although stated somewhat differently, this appears to be the same "separate and identifiable harm" standard set forth in *Ruff*.

**{¶ 41}** Next, we find that Napier's offenses were not committed separately. In examining whether offenses were committed by the same conduct, the presence or absence of any specific factors is not dispositive of the analysis; the determination is entirely dependent upon the particular facts of each case. *State v. Jones*, 78 Ohio St.3d 12, 14 (1997). Nevertheless, offenses are commonly found to have been committed separately where they are separated by significant intervening events, or have been performed at distinct times or in distinct places. *See, e.g., Jones* at 14 (oral and vaginal rape offenses were committed separately where, though proximate in time and location, the offenses were separated by "significant intervening acts"); *State v. Lane*, 12th Dist. Butler No. CA2013-05-074, 2014-Ohio-562, ¶ 16 (aggravated burglary and felonious assault offenses were committed separately where, although proximate in time, the burglary was completed before the assault occurred); *State v. Harshman*, 3d Dist. Seneca Nos. 13-12-02, 13-12-03, and 13-12-04, 2012-Ohio-3901, ¶ 9 (illegal manufacture of drugs offenses were committed separately where the manufacturing occurred at two separate places).

**{¶ 42}** In the present case, the record is clear that the two one-pots constituting Napier's offenses were discovered in an active stage of production at Napier's residence on the same day. In addition, Agent Mullis testified at the merger hearing that the entire one-pot lab manufacturing process takes just 45 minutes to one hour to complete. There was no evidence to suggest that Napier's operation of the one-pots was interrupted by an intervening event. Thus, the record indicates that the two one-pots constituting Napier's offenses were put into operation at the same place at approximately the same time (i.e., within 45 minutes to an hour of each other). That is, the record indicates the offenses were committed together, not separately.

**{¶ 43}** Lastly, we find that Napier's offenses were not committed with a separate animus. The Ohio Supreme Court has interpreted "animus" to mean "purpose," or, more

properly, "immediate motive." *Logan*, 60 Ohio St.2d at 131. Animus must be inferred from the surrounding circumstances because, like all mental states, it is difficult to prove directly. *Id*. Hence, if it can be inferred from the surrounding circumstances that the defendant acted with the same purpose, intent, or motive with respect to his offenses, then the animus is identical for all of the offenses. *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 13.

**{¶ 44}** For the same reasons that we concluded Napier's offenses were committed together, we conclude the single animus behind Napier's two illegal manufacture of drugs offenses was to produce an amount of methamphetamine represented by the aggregate yield expected from the multiple one-pots he was operating.[3]

**{¶ 45}** In summary, Napier was charged with separate offenses for producing, within a single hour of a single day, a single controlled substance at a single place, found in a single bag in a single room. Under these circumstances, the fact that the constraints or conveniences of Napier's chosen method of manufacture dictate separate "one-pot labs" does not render each one-pot a separate offense. We therefore conclude the trial court properly merged Napier's offenses for sentencing. Accordingly, the state's cross-assignment of error is overruled.

**{¶ 46}** Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.

3. The state's citation to *State v. Luong*, 12th Dist. Butler No. CA2011-06-110, 2012-Ohio-4520, in connection with Agent Mullis' testimony regarding the numerous suppliers of Napier's raw materials seems to indicate the state is asserting the numerous suppliers suggest a separate animus. Assuming that compiling the raw materials for the manufacture of methamphetamine is a "part of the production of a controlled substance" as set forth in the statute, there is insufficient information in the record for a consideration of this factor in our analysis.