[Cite as *State v. Young*, 2011-Ohio-747.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23642
v.	:	T.C. NO. 2008CR4839
RODNEY T. YOUNG	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 18th day of February, 2011.

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OSOWIK, J. (by assignment)

{¶ 1} Rodney T. Young appeals from his conviction and sentence on numerous charges, including murder, felonious assault, carrying a concealed weapon, illegal possession of a firearm in a liquor-permit establishment, having a weapon while under disability, and related firearm specifications.

{¶ 2} Young advances two assignments of error on appeal. First, he contends the trial court erred in sentencing him separately for allied offenses of similar import. Second, he claims the trial court erred in sentencing him separately for a firearm specification accompanying a murder conviction and for six firearm specifications accompanying felonious assault convictions.

{¶ 3} The present appeal stems from a shooting that occurred inside a bar early on December 12, 2008. The State's evidence at trial established that Young got into an argument with another patron, David Watson. During the incident, Young pulled out a handgun and fired multiple shots inside the bar. One of the shots killed Watson. Other shots fired by Young wounded five more people, Laron Hubbard-Israel, Marlon Harrison, Carmella DeBrill, Keith Watson, and Michael Thomasson-Hogan. A jury found Young guilty on the following charges and specifications:

{¶ 4} **Count 1**: murder with a three-year firearm specification;

{¶ 5} **Count 2**: felonious assault (deadly weapon) with a three-year firearm specification;

{¶ 6} **Count 3**: felonious assault (serious physical harm) with a three-year firearm specification;

{¶ 7} **Count 4**:felonious assault (deadly weapon) with a three-year firearm specification;

{¶ 8} **Count 5**: felonious assault (deadly weapon) with a three-year firearm specification;

{¶ 9} **Count 6**: felonious assault (deadly weapon) with a three-year firearm specification;

{¶ 10} **Count 7**: felonious assault (deadly weapon) with a three-year firearm

specification;

{¶ 11} **Count 8**: felonious assault (deadly weapon) with a three-year firearm specification;

{¶ 12} **Count 9**: felonious assault (serious physical harm) with a three-year firearm specification;

{¶ 13} **Count 10**: felonious assault (serious physical harm) with a three-year firearm specification;

{¶ 14} **Count 11**: felonious assault (serious physical harm) with a three-year firearm specification;

{¶ 15} **Count 12**: felonious assault (serious physical harm) with a three-year firearm specification;

{¶ 16} **Count 13**: felonious assault (serious physical harm) with a three-year firearm specification;

{¶ 17} **Count 14**: carrying concealed weapons (loaded/ready at hand); and

{¶ 18} **Count 15**: illegal possession of a firearm in a liquor-permit establishment with a three-year firearm specification.

{¶ 19} The trial court also separately found Young guilty on the following charges:

{¶ 20} **Count 16**: having a weapon while under disability with a prior-offense-of-violence specification; and

{¶ 21} **Count 17**: having a weapon while under disability with a prior-drug-conviction specification.

{¶ 22} At the conclusion of Young's September 3, 2009 sentencing hearing, the trial

court orally imposed his sentence as follows:

{¶ 23} "* * * [W]ith regard to the six counts of felonious assault with a deadly weapon and the six counts of felonious assault with serious harm the Court is going to impose—the Court's actually going to run the terms for that imprisonment concurrent to each other, but I am going to impose the maximum of eight years per count on those. So that is eight times six is a total of 48 years for those six counts of felonious assault with a deadly weapon, which we will run concurrent with the six counts of felonious assault with serious harm for a total of 48 years on those.

{¶ 24} "Each of those counts also carries a firearm specification and the Court would impose six of those mandatory firearm specifications, and I believe the other six have to merge with the first six, because it's the same weapon being used for, in essence, the same offense. That yields a total for the firearm specifications of 66 years so far for the definite time.

{¶ 25} "Then, with regard to the carrying a concealed weapon, loaded ready at hand, a felony of the fourth degree, the Court would impose 18 months to be concurrent with the 66 years for the illegal possession of a firearm at a liquor permit premises, which also carries a three year firearm specification. The Court would impose the five years on that, but run it concurrent to the 66 years and the three years on a firearm specification, but also run that concurrent to the 66 years.

{¶ 26} "And for having weapons while under a disability, a felony of the third degree for which there are two of those, the Court would impose a sentence of five years per count with those five years to run concurrent to each other, but consecutive to the 66 years for a definite prison term of 71 years.

{¶ 27} "In addition to the definite prison sentence of 71 years the Court imposes upon you by law the required prison sentence for the murder, which is 15 years to life, plus the three year firearm specification for the murder charge, which would lead to 74 years of a definite prison term to be followed by the 15 to life for the murder charge." (Trial Tr. Vol. V, p. 1264-1265).

{¶ 28} Thereafter, the trial court filed a termination entry in which it memorialized the foregoing sentences and stated:

{¶ 29} "The sentence imposed in Count 1 is to be served CONSECUTIVE to the sentences imposed on all other counts for a total of 15 years to life;

{¶ 30} "The Court hereby merges Counts 2, 4, 5, 6, 7, [and] 8 with Counts 3, 9, 10, 11, 12, [and] 13[.] [E]ach Count is to be served CONSECUTIVE to each other and CONCURRENT with the sentences imposed in all other Counts except counts 16 and 17 which are concurrent with each other but consecutive to this 48 years for a total of 48 years;

{¶ 31} "The sentences imposed in Counts 14 and 15 shall be served CONCURRENT with each other and CONCURRENT with the sentences imposed in all other counts except counts 16 and 17 which are concurrent with each other but consecutive to all other counts;

{¶ 32} "The sentences imposed in Counts 16 and 17 shall be served CONCURRENT with each other but CONSECUTIVE to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, for a total of five years;

{¶ 33} "The Court hereby merges the firearm specifications in Counts 2, 4, 5, 6, 7, [and] 8 with Counts 3, 9, 10, 11, 12, [and] 13 into SIX three (3) year firearm specifications; the Court hereby merges the three (3) year firearm specifications in Count 1 and Count 15 into ONE three

(3) year firearm specification; FOR AN ADDITIONAL TERM OF THREE (3) YEARS ACTUAL INCARCERATION on EACH of the firearm specifications, for a total of TWENTY-ONE (21) YEARS which shall be served CONSECUTIVELY to and prior to the definite term of imprisonment;

{¶ 34} "TOTAL SENTENCE: MANDATORY 89 YEARS TO LIFE." (Doc. #80).

{¶ 35} On appeal, Young first contends the trial court erred in sentencing him separately for allied offenses of similar import. He insists that "all of his convicted offenses were the same conduct and with the same animus." Young's appellate counsel reasons: "Mr. Young was accused of firing a weapon at one man, David Watson, and he was convicted and sentenced on several counts of Felonious Assault, one count of Murder, several firearm specifications, and several counts related to possession of the firearm. Accepting the testimony presented at trial as true, Mr. Young was found to have possessed a firearm and to have shot that firearm at David Watson, killing him. Mr. Young's actions were committed with a single animus against a single victim."

{¶ 36} In *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, the Ohio Supreme Court recently revised its allied-offense jurisprudence. The *Johnson* court overruled *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Johnson*, at ¶44. Instead, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id.

{¶ 37} Under *Johnson*, "the intent of the General Assembly is controlling." Id. at ¶46. "We determine the General Assembly's intent by applying R.C. 2941.25, which expressly

instructs courts to consider the offenses at issue in light of the defendant's conduct." Id. "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger." Id. at ¶47 "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other." Id. at ¶48 (citation omitted). "If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." Id.

{¶ 38} "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" Id. at ¶49 (citation omitted). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." Id. at ¶50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Id. at ¶51.

{¶ 39} With the foregoing guidelines in mind, we reject Young's argument that all of his convictions were for allied offenses of similar import because his case involved "a single victim." As set forth above, he fired multiple gunshots inside a bar. The shots struck six people, killing one of them. Thus, the shooting resulted in six distinct victims. We have recognized that separate

convictions and sentences are permitted when a defendant's conduct results in multiple victims. See, e.g., *State v. Skaggs*, Clark App. No. 10-CA-26, 2010-Ohio-5390, ¶7, citing *State v. Jones* (1985), 18 Ohio St.3d 116, 117, and *State v. Buitrago*, Cuyahoga App. No. 93380, 2010-Ohio-1984, ¶5. Nothing in *Johnson* alters that conclusion. As a result, it was permissible for Young to be convicted and sentenced separately for the offenses he committed against each victim.

{¶ 40} An issue still remains, however, as to whether any of Young's crimes were allied offenses of similar import. We begin our analysis by considering the twelve felonious assault charges. As set forth above, a jury found him guilty on two counts of felonious assault for each of his six victims—one count for causing serious physical harm and one count for causing physical harm with a deadly weapon. Under *Johnson*, however, Young cannot be convicted and sentenced on two counts of felonious assault for shooting each victim one time.[1] Even under the old *Rance* test, the Ohio Supreme Court had recognized that the "serious physical harm" and "deadly weapon" statutory subdivisions merely "set forth two different forms of the same offense[.]" *State v. Brown*, 119 Ohio St.3d 447, 455, 2008-Ohio-4569, ¶39. We reach the same conclusion under *Johnson*. Young's conduct, shooting each victim, simultaneously caused serious physical harm and caused physical harm with a deadly weapon. Therefore, it plainly was possible for the same conduct to violate both subdivisions of the felonious assault statute.

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[1]The record actually reflects that Young shot five of his victims once. One of the victims, Marlin Harrison, was shot twice in the foot. (Trial Tr. Vol. II, p. 379). This potentially raises an issue as to whether Young could be convicted and sentenced on two counts of felonious assault for shooting Harrison twice. We note, however, that the trial court's termination entry merged the two felonious assault counts ("deadly weapon" and "serious physical harm") that involved Harrison. The State has not cross-appealed from that decision. Therefore, we need not decide whether Young could have been convicted and sentenced separately on two counts of felonious assault with regard to Harrison.

{¶ 41} Because Young's conduct involved a gunshot wound to each of his victims, the trial court's termination entry correctly recognized the need to merge six of the felonious assault convictions (and the accompanying firearm specifications) into the other six, resulting in Young being sentenced on only one count of felonious assault (and one firearm specification) for each victim. We note, however, that the trial court was required to allow the State to elect which of the two felonious assault offenses merged into the other with regard to each victim. Although the matter may be largely academic, the decision whether to proceed to sentencing on the "serious physical harm" charge or the "deadly weapon" charge was the State's to make. *Brown*, at ¶43.

{¶ 42} Our examination of the termination entry reveals a second problem as well. With regard to the victim who died, David Watson, the trial court sentenced Young separately for felonious assault and murder as a proximate result of committing felonious assault. Under *Johnson*, however, the murder and felonious assault charges were allied offenses of similar import. Murder and felonious assault plainly can be committed by the same conduct, i.e., shooting and killing a victim. That is what Young did when he fatally shot Watson. Moreover, Young did not commit the murder and felonious assault separately or with a separate animus. Therefore, with regard to the shooting of Watson, the State was required to elect whether to proceed to sentencing on felonious assault or murder. The trial court erred in convicting and sentencing Young separately for both offenses.

{¶ 43} The remaining issue concerns Young's firearm offenses. As set forth above, the trial court sentenced him separately for (1) carrying a concealed weapon, (2) illegal possession of a firearm in a liquor-permit establishment, (3) having a weapon while under disability with a prior-offense-of-violence specification, and (4) having a weapon while under disability with a

prior-drug-conviction specification.

{¶ 44} Upon review, we conclude that the trial court erred in sentencing Young separately on both counts of having a weapon while under disability. Young possessed one weapon, a handgun, while under disability. The same single act of possession supported both charges. Therefore, the State was required to choose the count on which it wanted to proceed with sentencing. The fact that the trial court imposed concurrent sentences on the two counts of having a weapon while under disability does not persuade us otherwise. "We have held that the failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences." *State v. McGhee*, Montgomery App. No. 23226, 2010-Ohio-977, ¶87 (citation omitted).

{¶ 45} We are unpersuaded, however, that the trial court was required to merge any of the other three firearm charges against Young. In *State v. Rice* (1982), 69 Ohio St.2d 422, the Ohio Supreme Court considered whether carrying a concealed weapon and having a weapon while under disability were allied offenses of similar import and whether they could be committed separately or with a separate animus. The court first determined that the two crimes were not allied offenses of similar import under R.C. 2941.25(A) because "the elements of proof of these two crimes indicate that they do not correspond to such a degree that commission of the one offense will result in the commission of the other." Id. at 426. As we recognized above, however, *Johnson* recently modified the allied-offense test. "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other." *Johnson*, at ¶48. Therefore, we do not base our ruling

on *Rice's* analysis of R.C. 2941.25(A).

{¶ 46} Instead, we find instructive *Rice's* analysis of R.C. 2941.25(B), which provides that merger is not required when allied offenses are committed separately or with a separate animus. In *Rice*, the Ohio Supreme Court reasoned that the defendant had committed two separate acts when he possessed a weapon while under disability and when he carried a concealed weapon. The court also concluded that the defendant had a separate animus for each of the two offenses. In that case, police had discovered a loaded handgun under the defendant's seat during a traffic stop. After determining that having a weapon while under disability and carrying a concealed weapon were not allied offenses under R.C. 2941.25(A), the *Rice* court proceeded to address R.C. 2941.25(B) as follows:

{¶ 47} "It may reasonably be concluded under the facts that the crimes were committed separately. It may reasonably be concluded that the gun involved here was that of the appellant, and it may be assumed that the appellant had procured the gun in question some time prior to the incident involved here when he concealed it from the view of Officer Vetter. For the purposes of R.C. 2923.13, the elements of proof for the violation of this statute were provided at the time the appellant, a person under disability, originally acquired this firearm. The violation of this statute took place some time prior to Officer Vetter coming on the scene. The conduct of the appellant in carrying a concealed handgun under the front seat of the automobile constituted a separate and distinct act from that of his previously acquiring and possessing such handgun. Therefore, we may conclude that there is present here the separateness of the offenses as alluded to in subsection (B) of R.C. 2941.25.

{¶ 48} "Further, the crimes committed here may be considered as having a separate

animus as to each. The intent, or animus, necessary to commit the crime of carrying a concealed weapon, is to carry or conceal, on the person or ready at hand, a deadly weapon or dangerous ordnance. The gist of the offense is concealment; *State v. Nieto* (1920), 101 Ohio St. 409, 413, 130 N.E. 663, decided under the prior statute, but still germane. The gravamen of the offense of having a weapon while under disability, is to 'knowingly * * * acquire, have, carry, or use,' a weapon while under a legal disability. It may be concluded that there is a difference in the mental state required for both crimes. It may also be concluded that the General Assembly intended that the crimes be treated differently by the courts." Id. at 426-427; see, also, *State v. Kole*, 92 Ohio St.3d 303, 2001-Ohio-191, fn.1 (citing *Rice* and recognizing that the crimes of carrying a concealed weapon and having a weapon while under disability "may be committed separately and with a separate animus").

{¶ 49} The logic of *Rice* is equally applicable here. Young, a person under disability, necessarily acquired a handgun sometime before concealing it on his person. Thus, the elements of proof for having a weapon while under disability were satisfied when Young acquired the firearm. His subsequent conduct of concealing the handgun constituted a separate and distinct act from initially acquiring the weapon. Similarly, Young acquired the handgun and concealed it on his person before entering a liquor-permit establishment. His subsequent conduct of bringing the weapon into a bar constituted a separate and distinct act from acquiring and concealing it. As a result, each of these offenses was committed separately under R.C. 2941.25(B). Therefore, even if the crimes were allied offenses under R.C. 2941.25(A), the trial court did not err in convicting and sentencing Young separately for carrying a concealed weapon, illegal possession of a firearm in a liquor-permit establishment, and having a weapon while under disability. Accordingly,

Young's first assignment of error is sustained in part and overruled in part.

{¶ 50} In his second assignment of error, Young claims the trial court erred in sentencing him separately for a firearm specification accompanying his murder conviction and for six firearm specifications accompanying the felonious assault convictions. Young asserts that he should have been sentenced on only one firearm specification on these charges.

{¶ 51} Young bases his argument on the premise that his murder conviction and all of his felonious assault convictions should have been merged into one. We rejected this argument above, finding that he could be convicted and sentenced separately on (1) one count of felonious assault for each victim he wounded and (2) one count of felonious assault or murder for the victim he killed.

{¶ 52} Under the allied-offense statute, the trial court was not required to merge each felonious assault conviction with its accompanying firearm specification even though each felonious assault charge involved the use of a firearm. Nor did the allied-offense statute require the trial court to merge all of the firearm specifications into one. This is so because "a firearm specification does not charge a separate criminal offense and R.C. 2941.25 does not apply." *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686. A firearm specification is merely a sentencing provision that requires an enhanced penalty. Id.

{¶ 53} Although the allied-offense statute does not apply, we nevertheless agree with Young that merger was required for the firearm specifications accompanying his felonious assault and murder convictions. In reaching this conclusion, we rely on R.C. 2929.14(D)(1)(b), which provides that a trial court shall not impose more than one prison term for multiple firearm specifications if the specifications involve the same "act

or transaction."

{¶ 54} "Same act or transaction does not have the same meaning as course of criminal conduct." *State v. Walker* (June 30, 2000), Montgomery App. No. 17678. "'Same act or transaction' for purposes of R.C. 2929.14(D)(1)(b) means a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." Id. (citation omitted). The "act or transaction" test is "a broader concept" than the test employed under the allied-offense statute. Id.

{¶ 55} In the present case, the multiple gunshots that resulted in Young's felonious assault and murder convictions were fired inside a bar in rapid succession. Although the incident resulted in multiple victims, the gunshots were part of a single transaction under R.C. 2929.14(D)(1)(b). See, e.g., *State v. French*, Hamilton App. No. C-050375, 2007-Ohio- 726, ¶26 ("In this case, the evidence established that French had fired rapidly into an after-hours club and struck and seriously injured four victims. The crimes occurred within seconds of each other and developed from one senseless criminal objective."); *State v. Russ*, Hamilton App. No. C-050797, 2006-Ohio-6824, ¶30 ("[I]n this case, all the offenses were part of a single criminal adventure, notwithstanding that they involved two victims. The offenses involved one continuous sequence of events; they were connected in time and space since all the shots were fired closely together and at the same car."). Accordingly, the trial court erred in imposing separate sentences for each firearm specification accompanying Young's felonious assault and murder convictions. His second assignment of error is sustained.

{¶ 56} The judgment of the Montgomery County Common Pleas Court is affirmed in part and reversed in part. The cause is remanded for further proceedings consistent

with this opinion.

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FAIN, J. and FROELICH, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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