[Cite as *State v. Ulrich*, 2011-Ohio-758.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23737
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-5284
v.	:	
	:	
STEVEN M. ULRICH	:	(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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WAITE, J. (Sitting by Assignment)

{¶ 1} Appellant, Steven Ulrich, appeals the ten year sentence imposed by the Montgomery County Common Pleas Court at a resentencing hearing held on October 13, 2009. On January 4, 2007, Appellant was indicted on two counts of felonious assault for inflicting a single stab wound to the head of Thomas Morris. In count one, Appellant was charged with felonious assault in violation of R.C.

2903.11(A)(1) (causing serious physical harm to another), a felony of the second degree, and in count two he was charged with felonious assault in violation of R.C. 2903.11(A)(2) (causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance), a felony of the second degree.

{¶ 2} On February 23, 2007, Appellant was indicted on two counts of felonious assault for inflicting a single stab wound to the neck of Robert Limehouse. The second indictment mirrored the first indictment to the extent that he was charged with the same two counts of felonious assault, but these charges related to the attack on Limehouse. The maximum prison term for a second degree felony is eight years. R.C. 2929.14(A)(2).

{¶ 3} Appellant raises a single assignment of error on appeal. For the following reasons, while we find no merit to Appellant's argument on appeal, we must reverse and remand this matter on other grounds.

{¶ 4} According to the testimony at trial, Appellant and his girlfriend, Brenda Bond, had been living with Morris in a motel room intermittently for about three weeks. (Trial Tr., p. 430.) Limehouse was visiting Morris. (Trial Tr., p. 433.) The parties conceded that they had consumed alcohol and crack cocaine prior to the altercation. (Trial Tr., p. 431.)

{¶ 5} There are essentially two versions of the events that occurred that evening. According to Bond and Appellant, Morris was the aggressor. Bond testified Morris called her derogatory names and cursed at her that evening, and, at one point, threatened to punch her. (Trial Tr., p. 432.) She further testified that Morris asked Limehouse why he was not "taking [Appellant] out." (Trial Tr., p. 433.)

Bond was afraid of getting punched, so she walked down the hall to the beverage machine. (Trial Tr., p. 435.)

{¶ 6} Appellant testified that he was afraid of Morris, because Morris had blackened his eye approximately a week before the assault, and had told him stories about beating and killing other men. (Trial Tr., pp. 465-466, 470.) Appellant testified that he moved out of the motel room after Morris punched him, but returned a few days later. Appellant could not explain why he moved back to the motel and talked about getting an apartment with Morris, if he was afraid of him. (Trial Tr., pp. 472-473.) Appellant claimed that he stayed at the motel because he was trying to get Morris to stop using drugs. (Trial Tr., p. 477.)

{¶ 7} According to Appellant's testimony, Morris threatened to kill him after Bond left the motel room. He says Morris and Limehouse attacked him from behind when he was attempting to leave the motel. (Trial Tr., p. 469.) Appellant had no recollection at trial of picking up a knife, although he claimed in a videotaped statement that was recorded shortly after the incident that Morris had attacked him with the knife. (Trial Tr., p. 491.) Later in his testimony, he claimed that he grabbed the knife in self defense. (Trial Tr., p. 500.) Although Appellant testified that he was pinned to the floor and beaten by Morris and Limehouse, the only injuries he sustained were to the top of his head. (Trial Tr., pp. 484, 493.)

{¶ 8} According to Morris and Limehouse, Appellant was the aggressor. Limehouse testified that Morris told Appellant and Bond to leave the motel room, and that he saw Appellant pick up the knife as he was preparing to leave. (Trial Tr., pp. 162-163.) Limehouse stated that he was watching television after Bond left the

motel room when Morris and Appellant started an altercation. Morris told Appellant that Bond was a slut. (Trial Tr., p. 162.) According to Limehouse, Morris and Appellant typically became belligerent after all of the drugs were consumed. (Trial Tr., pp. 158-159.)

{¶ 9} Initially, Limehouse thought the men were playfully wrestling, until he saw Appellant jabbing the knife at Morris and blood pouring from Morris' neck. (Trial Tr., pp. 161, 166-167.) Limehouse testified that he intervened in an effort to save Morris, but Appellant cut Limehouse's face with the knife as he tried to subdue him. (Trial Tr., p. 168.) Limehouse testified that he threw Appellant into the motel door during the attack. (Trial Tr., p. 167.) According to Limehouse, he managed to get the knife away from Appellant, and then Appellant fled. (Trial Tr., p. 171.) Morris testified that the two men wrestled Appellant to the ground, and "[were] thinking about working on him," but decided against it, and let him go. (Trial Tr., p. 126.)

{¶ 10} Morris was hospitalized for three and a half days. (Trial Tr., p. 128.) Limehouse's head wound required four internal stitches, and seventeen external stitches. (Trial Tr., p. 177.) Based on the foregoing testimony, the jury convicted Appellant on all four of the felonious assault charges.

{¶ 11} At the original sentencing hearing, the trial court sentenced Appellant to concurrent six year prison terms on each of the two counts of felonious assault pertaining to the attack on Morris, and concurrent four years on each of the two counts of felonious assault for the attack on Limehouse. The concurrent four year prison terms were imposed consecutively to the concurrent six year sentences, resulting in an aggregate sentence of ten years.

{¶ 12} We affirmed Appellant's convictions and sentences on direct appeal. *State v. Ulrich*, Montgomery App. No. 22129, 2008-Ohio-3608. On December 2, 2008, we granted Appellant's App.R. 26(B) application to reopen his appeal on a claim of ineffective assistance of appellate counsel. Appellant claimed that his appellate counsel was ineffective for failing to argue that the trial court's failure to merge his multiple convictions for felonious assault as allied offenses of similar import pursuant to R.C. 2941.25 constituted reversible error.

{¶ 13} In *State v. Ulrich*, Montgomery App. No. 22129, 2009-Ohio-4610 ("*Ulrich II*"), this Court held that, "[t]he charges of felonious assault in violation of R.C. 2903.11(A)(1) and felonious assault in violation of R.C. 2903.11(A)(2) are, on this record, allied offenses of similar import, and the trial court committed reversible error in failing to merge the guilty verdicts for those two offenses into one conviction for each of the two victims in this case." Id at ¶15.

{¶ 14} At the hearing on remand, the trial court explained that it believed it had merged the convictions at the original sentencing hearing when it imposed concurrent sentences on the felonious assault charges in each of the indictments. The trial court then resentenced Appellant to six years on the "merged charged [sic] in the A indictment" and "four years on the B indictment on the merged charges," to be served consecutively, for an aggregate sentence of ten years. (10/8/09 Resentencing Tr., pp. 4, 6.) As a result, the resentencing entry read:

{¶ 15} "The defendant herein having been convicted of the offense of **2 COUNTS - FELONIOUS ASSAULT (deadly weapon) - 2903.11(A)(2) F2 AND 2 COUNTS - FELONIOUS ASSAULT (serious harm) - 2903.11(A)(1) F2** was on

October 8, 2009, brought before the Court;

{¶ 16} "The Court hereby merges Count 1 and 2 of the Indictment dated **January 4, 2007**. The Court separately merges Count 1 and 2 of the Indictment dated **February 23, 2007**.

{¶ 17} "WHEREFORE, it is the JUDGMENT and RE-SENTENCING of the Court that the defendant herein be delivered to the **CORRECTIONS RECEPTION CENTER** there to be imprisoned and confined for a term of **SIX(6) YEARS ON MERGED COUNTS 1 AND 2 ON INDICTMENT DATED JANUARY 4, 2007; FOUR(4) YEARS ON MERGED COUNTS 1 AND 2 ON INDICTMENT DATED FEBRUARY 23, 2007 TO BE SERVED CONSECUTIVELY TO EACH OTHER FOR A TOTAL TERM OF INCARCERATION OF TEN(10) YEARS**." (Re-Sentencing Termination Entry, p. 1.)

ASSIGNMENT OF ERROR

{¶ 18} "THE TRIAL COURT ERRED IN RE-SENTENCING MR. ULRICH WITH RESPECT TO THE OFFENSE AGAINST MR. MORRIS BECAUSE IT FAILED TO CONSIDER THE RECORD AND MITIGATING FACTORS IN R.C. 2929.11 AND 2929.12."

{¶ 19} Appellant contends that the ten-year sentence is contrary to law and that the trial court abused its discretion in imposing the sentence because it did not consider mitigating factors listed in R.C. 2929.12. He further argues that the six year sentence imposed for the assault on Morris is disproportionate with other sentences imposed for similar crimes in Ohio. Lastly, Appellant argues that the trial court

abused its discretion when it imposed consecutive sentences. Again, while Appellant's arguments have no merit, we must reverse and remand this matter on other grounds.

{¶ 20} As regards Appellant's issues on appeal, in *State v. Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶ 36-37, we stated:

{¶ 21} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, at ¶37.

{¶ 22} "When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. Id."

{¶ 23} Here, the trial court considered the presentence investigation report, the purposes and principles of felony sentencing, R.C. 2929.11, the seriousness and recidivism factors, R.C. 2929.12, and the statements by the parties at sentencing.

The court also informed Appellant about post-release control requirements. The trial court complied with all applicable rules and statutes in imposing its sentence. Furthermore, the sentences for the felonious assault charges were within the authorized range of available punishments. Based on Appellant's arguments, here, his sentence does not appear to be clearly and convincingly contrary to law.

{¶ 24} Next, Appellant claims that the trial court abused its discretion in failing to consider Appellant's testimony at trial regarding provocation and self defense. An abuse of discretion "'implies that the court's attitude is unreasonable, arbitrary, or unconscionable.'" *State v. Israel*, Miami App. No. 09-CA-47, 2010-Ohio-5044, ¶35, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. (Citations omitted.) Appellant concedes that he must demonstrate that the sentence is "strikingly inconsistent" with the statutory factors in order to demonstrate that the ten year sentence constitutes an abuse of discretion. *State v. Smith*, Montgomery App. No. 19419, 2003-Ohio-1854, ¶12.

{¶ 25} R.C. 2929.12(C) lists factors that the trial court must consider in order to determine whether the offender's conduct is less serious than conduct normally constituting the offense. R.C. 2929.12(C)(2) provides, "[i]n committing the offense, the offender acted under strong provocation," and pursuant to R.C. 2929.12(C)(4), "[t]here are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense."

{¶ 26} Appellant claims that he was "being severely beaten by two men, one of whom he testified as someone who had killed a person before and who had severely beaten many men. * * * The court should have taken this into account when

it sentenced [Appellant] to six years, as related to Mr. Morris, which is considerably close to the maximum possible sentence of eight years." (Appellant' s Brf., p. 5.) However, it is apparent from the verdict that the jury rejected Appellant's version of the events leading up to the assault on Morris and Limehouse. Appellant cannot rely on any portion of the record to demonstrate that the trial court acted arbitrarily or unreasonably in likewise rejecting Appellant's story.

{¶ 27} Moreover, two of the factors listed in R.C. 2929.12(D) are present in this case and demonstrate the likelihood that Appellant would continue to commit crimes in the future. The record reflects that Appellant has a long history of alcohol abuse, evidenced by numerous charges for driving while intoxicated, public intoxication, disorderly conduct, and a misdemeanor assault. See R.C. 2929.12(D)(2). Also, Appellant was on probation for the misdemeanor assault when he committed the felonious assaults in this case, and his probation officer reported that Appellant has a history of non-compliance. See R.C. 2929.12(D)(3) and (5). Consequently, the trial court may validly have relied on Appellant's prior criminal record in imposing the six year sentence.

{¶ 28} Nevertheless, Appellant argues that the six year sentence is disproportionate to other sentences resulting from similar conduct. Appellant did not object to the sentence on this basis in the trial court. "If a defendant intends to argue that the sentence imposed in a particular case is so inconsistent with sentences imposed for similar offenses committed by similar offenders as to be disproportionately harsh, he must object or otherwise raise that issue in the trial court, affording that court an opportunity to correct the error." *State v. Curran*, 166

Ohio App.3d 206, 2006-Ohio-773, ¶34, citing *State v. Johnson*, 164 Ohio App.3d 792, 2005-Ohio-6826, ¶53. Because he raises this argument for the first time on appeal, Appellant has waived all but plain error.

{¶ 29} A defendant who claims that his sentence is inconsistent with sentences given in other cases bears the burden of providing the court with sentences imposed for similar crimes by similar offenders that validate the claim of inconsistency. Id. at ¶35, citing *State v. Friesen*, Crawford App. No. 3-05-06, 2005-Ohio-5760. Appellant cites *Curran*, for the proposition that the six year sentence is disproportionately harsh.

{¶ 30} In *Curran*, the defendant was sentenced to a seven year prison term for stabbing his victim four times. The victim in *Curran* almost died. Appellant claims that, "the closeness of the sentence, as compared to the sentence related to Mr. Morris with respect to the sentence in *State v. Curran*, despite the extreme aggravating factors in *State v. Curran*, demonstrates that [Appellant's] sentence was not consistent with other cases." (Appellant's Brf., p. 6.)

{¶ 31} In response to Appellant's argument, the state cites *State v. Parker*, Washington App. No. 03CA43, 2004-Ohio-1739. In *Parker*, the defendant was convicted of felonious assault after hitting his girlfriend in the face several times. Parker received a five year sentence. The state argues that Appellant's sentence is only one year longer than the sentence in *Parker*, and that the defendant in *Parker* did not use a deadly weapon in the attack.

{¶ 32} The *Curran* and *Parker* cases demonstrate that Appellant's sentence is within the normal range of sentences for felonious assault, and that his six year

sentence is not strikingly inconsistent with sentences for similar crimes. Appellate courts have affirmed six year sentences for felonious assaults that did not involve the use of a deadly weapon. *State v. McIntyre*, Pickaway App. No. 09CA10, 2010-Ohio-3955, ¶17 (victim was kicked and punched causing nerve damage); *State v. Lucas*, Washington App. No. 08CA3038, 2010-Ohio-2575, ¶2 (severe beating); *State v. Lang*, Cuyahoga App. No. 92099, 2010-Ohio-433.

{¶ 33} Finally, Appellant contends that the trial court abused its discretion by imposing consecutive sentences. Appellant cites R.C. 2929.41(A), for the proposition that "Ohio recognizes a presumption in favor of utilizing concurrent sentences." (Appellant's Brf., p. 7.)

{¶ 34} The trial court's authority to impose consecutive sentences survived the Ohio Supreme Court's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Rigsbee*, 174 Ohio App.3d 12, 2007-Ohio-6267, ¶38. "Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶9, citing *Foster* at paragraph seven of the syllabus.

{¶ 35} The trial court is not required to discuss every statutory factor listed in R.C. 2929.12, or find a majority or any particular number of factors in order to impose a sentence greater than the minimum sentence. *Smith*, ¶12. The court must simply "demonstrate thoughtful consideration of the sentence, including pertinent statutory factors." *Curran*, ¶32. As stated earlier, there is nothing in the record that suggests that the trial court failed to consider the sentence or the statutory factors.

Therefore, Appellant's challenge to the consecutive sentences imposed in this case lacks merit.

{¶ 36} Accordingly, Appellant's sole assignment of error is overruled. However, our own review of the record reveals that Appellant's sentence must be vacated and the matter remanded for resentencing, based on errors at the resentencing hearing that were memorialized in the resentencing entry.

{¶ 37} Two allied offenses of similar import must be merged into a single conviction. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶42. In merging two allied offenses of similar import, the Ohio Supreme Court has instructed that "[a]n accused may be tried for both but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244. "The state [ ] retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after an appeal." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶21.

{¶ 38} The *Whitfield* Court held: "On remand, the trial court should fulfill its duty in merging the offenses for purposes of sentencing, but remain cognizant that R.C. 2941.25(A)'s mandate that a 'defendant may be convicted of only one' allied offense is a proscription against sentencing a defendant for more than one allied offense. Nothing in the plain language of the statute or in its legislative history suggests that the General Assembly intended to interfere with a determination by a jury or judge that a defendant is guilty of allied offenses. As the state asserts, by enacting R.C. 2941.25(A), the General Assembly condemned multiple sentences for

allied offenses, not the determinations that the defendant was guilty of allied offenses. Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. Thus, the trial court should not vacate or dismiss the guilt determination." Id., ¶26-27.

{¶ 39} There is no indication in the resentencing transcript that the state was aware of its responsibility to elect one of the merged allied offenses for sentencing purposes. Hence, Appellant's sentence must be vacated and the matter remanded for resentencing to permit the state to make this election at sentencing.

{¶ 40} We also note that a final judgment of conviction occurs when the judgment contains "(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus. In Ohio, "a 'conviction' consists of a guilty verdict *and* the imposition of a sentence or penalty." (Emphasis in original.) *Whitfield* at ¶12. Based on the resentencing termination entry in this case, it can be argued that the trial court again convicted Appellant of all four of the crimes, according to the first paragraph of the entry, or convicted him of no actual crimes at all, because the third paragraph of the entry appears to list only "MERGED COUNTS 1 AND 2" where the court is required to actually list a criminal charge. As a result, the resentencing entry fails to identify the means by which Ulrich was convicted (i.e., upon guilty pleas, jury verdicts, or findings of the court) in violation of the rule announced in *Baker*. See,

e.g., *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609.

{¶ 41} Based on our analysis, the sentence must be vacated and this matter is remanded for resentencing in order that the state may elect which felonious assault charges it will pursue for the purpose of conviction and sentencing.

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FROELICH, J., concurs.

GRADY, P.J., concurring:

{¶ 42} I agree that the trial court's merger of allied offenses is problematic. However, some of the difficulty in correctly merging allied offenses is a product of the holding in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2

{¶ 43} R.C. 2941.25(A) states that a defendant "may be convicted of only one" of multiple allied offenses of similar import. Crim.R. 32(C) provides: "A judgment of conviction shall set forth the plea, the verdict or findings, upon which each conviction is based, and the sentence."

{¶ 44} Notwithstanding the prohibition against multiple convictions in R.C. 2941.25(A), *Whitfield* holds that the prohibition "is a protection against multiple sentences rather than multiple convictions." *Id*., at ¶18, citing *Ohio v. Johnson* (1984), 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed. 425. The further question, after *Whitfield*, is how to separate the sentence for a merged offense from the "verdict or findings" of criminal liability, consistent with Crim.R. 32(C).

{¶ 45} The best course would seem to be a bifurcated judgment of conviction. Regarding the merged offense, the judgment should set forth the plea, the verdict or

findings, and that the sentence for the offense is merged with the sentence imposed for the surviving offense. The judgment should next set forth the plea, the verdict or findings, and the sentence imposed for the surviving offense.

a. . . . . .

(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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