[Cite as *State v. Slager*, 2010-Ohio-1797.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL W. SLAGER

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 08 CAA 11 0067

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 07 CR I 09 0539
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	April 21, 2010

APPEARANCES:

For Plaintiff-Appellee

DAVID A. YOST
PROSECUTING ATTORNEY
MARIANNE T. HEMMETER
ASSISTANT PROSECUTOR
140 North Sandusky Street
Delaware, Ohio 43015

For Defendant-Appellant

JOHN CORNELY
94 Chatham Lane
Suite 201
Columbus, Ohio 43221

Wise, J.

{¶1} Appellant Michael Slager appeals from his multi-count theft and receiving stolen property conviction in the Delaware County Court of Common Pleas. The relevant facts leading to this appeal are as follows.

{¶2} On September 28, 2007, the Delaware County Grand Jury indicted appellant on one count of breaking and entering (in violation of R.C. 2911.13(A)), seven counts of breaking and entering (in violation of R.C. 2911.13(B)), nine counts of theft (R.C. 2913.02(A)(1)), four counts of receiving stolen property (R.C. 2913.51(A)), and one count of engaging in a pattern of corrupt activity (R.C. 2932.23(A)(1)).

{¶3} Appellant was thereafter arrested, and on October 29, 2007 he entered pleas of not guilty to all charges. On May 29, 2008, appellant entered a plea of no contest to Count 2 (theft), and pleas of guilty to Counts 3 (receiving stolen property), 6 (receiving stolen property), 9 (receiving stolen property), and 12 (theft).

{¶4} The court thereupon sentenced appellant to seventeen months in prison on Count 3, seventeen months on Count 6, and seventeen months on Count 9, to be served consecutively, for a total of fifty-one months. Appellant was also sentenced to community control on Counts Two and Twelve.

{¶5} On November 14, 2008, appellant filed a notice of appeal, with leave to file on a delayed basis. He herein raises the following two Assignments of Error:

{¶6} "I. APPELLANT'S SENTENCE IS CONTRARY TO LAW AS HE WAS SENTENCED FOR THEFT AND RECEIVING STOLEN PROPERTY WHERE THEY WERE ALLIED OFFENSES OF SIMILAR IMPORT.

{¶7} "II. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW WHEN IT FAILED TO CREDIT HIM WITH THE JAIL TIME CREDIT REQUESTED AT SENTENCING."

I.

{¶8} In his First Assignment of Error, appellant challenges his sentence on the basis that the charge for theft of a John Deere lawnmower (Count 2) was an allied offense of similar import to the charge of receiving stolen property concerning the same mower (Counts 3). We agree.

{¶9} R.C. 2941.25 reads as follows:

{¶10} "(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.

{¶11} "(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."

{¶12} In *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract. Id.

{¶13} In further clarifying *Rance*, the Court, in *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, syllabus, instructed as follows:

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

{¶15} According to *Cabrales*, the sentencing court, if it has initially determined that two crimes are allied offenses of similar import, then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. Id. at 57, 886 N.E.2d 181, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶16} This court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney*, Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23. Recently, in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2 and *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, the Ohio Supreme Court upheld its *Cabrales* rationale in this arena.

{¶17} Appellant's theft conviction in question was based on R.C. 2913.02(A)(1), which states: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** [w]ithout the consent of the owner or person authorized to give consent."

{¶18} Appellant's possession for receiving stolen property was based on R.C. 2913.51(A), which states: “No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.”

{¶19} As appellant points out, in *State v. Farley* (Jan. 3, 1986), Knox App.No. 85CA14, 1986 WL 797, this Court held: “A defendant may not be convicted of both theft (R.C. 2913.02) and receiving the property which he stole (R.C. 2913.51). Theft and receiving stolen property are considered allied offenses of similar import.” Id., citing *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 344 N.E.2d 133; *State v. Botta* (1971), 27 Ohio St.2d 196, 271 N.E.2d 776. We also note that in a post-*Rance*, pre-*Cabrales* decision, the Ohio Supreme Court concluded that “receiving stolen property and theft of the same property are clearly allied offenses of similar import.” *State v. Yarbrough*, 104 Ohio St.3d 1, 817 N.E.2d 845, 2004-Ohio-6087, ¶ 99.

{¶20} Under a *Cabrales* analysis, we find a defendant who steals an item will, however briefly, also receive and retain the item, and may likely eventually dispose of it as well. Whether the defendant keeps the item or not, his or her actions stem from the original intent to benefit from taking another’s property. The issue is thus resolvable under a fundamental comparison of the statutory elements and the second question of separate commission or “separate animus” under *Cabrales.* Having reviewed the recent case law developments from the Ohio Supreme Court in the realm of allied offenses, we find *Yarbrough* and *Farley* remain good law on the issue before us. Accordingly, we hold appellant’s conviction for theft of the lawnmower was an allied offense of similar import to the conviction for receiving stolen property concerning the same mower.

{¶21} Appellant's First Assignment of Error is therefore sustained, and the matter will be remanded for the trial court to review merger of the offenses for sentencing regarding Counts 2 and 3, as provided by the Ohio Supreme Court in *Whitfield*, supra.

II.

{¶22} In his Second Assignment of Error, appellant contends the trial court erroneously failed to credit him with jail time credit as he requested at his sentencing hearing.

{¶23} Under R.C. 2967.191 requires the ODRC to "reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term."

{¶24} Appellant maintains that he is entitled to two-hundred and forty-nine (249) days of credit. The State of Ohio concedes on appeal that appellant is entitled to two-hundred and forty-four (244) days of credit. See Appellee's Brief at 5. The State correctly posits that the credit should only be applied once to appellant's total sentence.

{¶25} Appellant's Second Assignment of Error is sustained for purposes of recalculation of jail time credit by the trial court.

{¶26} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 0325

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL W. SLAGER	:	
Defendant-Appellant	:	Case No. 08 CAA 11 0067

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to appellee.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES