[Cite as *State v. Jones*, 2010-Ohio-2243.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-95
JESSE M. JONES	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 09-CR-0060
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 13, 2010

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT
Licking County Prosecutor
20 S. Second St., 4th Fl.
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TRACY F. VAN WINKLE 0075572
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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P.O. Box 77466
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Delaney, J.

{¶1} Defendant-Appellant, Jesse Jones, appeals the judgment of the Licking County Court of Common Pleas. Appellant was convicted of two counts of Unlawful Sexual Conduct with a Minor and two counts of Sexual Imposition, classified as a Tier II sex offender, and sentenced to an aggregate of four years in prison.

{¶2} Between August 1, 2005, and November 30, 2005, Appellant resided with his aunt and uncle, D.L. and T.L. and their thirteen year-old daughter, R.L.

{¶3} While living with his family, Appellant engaged in sexual activity with R.L., including digital penetration, cunnilingus, touching R.L.'s genital area, and having R.L. touch his penis on multiple occasions. Specifically, while Appellant was in the basement of the house with R.L., he initiated a discussion about sex with R.L. and asked her about her sexual encounters with other males. He then kissed R.L. and asked her to go change her clothes. When she returned to the basement, Appellant began kissing her again. R.L. felt scared and did not think she could tell Appellant no.

{¶4} Appellant then placed his hand inside her shorts and her underwear by sliding his hand up the leg of her shorts. He then began "rubbing inside" her vagina for approximately three to four minutes. He then placed his mouth on her "private", which she identified as her vagina. She stated that this lasted approximately two to three minutes.

{¶5} Appellant also took his pants off and asked her to touch his penis, and ultimately forced her to touch his penis. Appellant asked her to keep their encounter a secret, but R.L. told her sister.

{¶6} On February 13, 2009, Appellant was indicted on two counts of Unlawful Sexual Conduct with a Minor, both felonies of the third degree, in violation of R.C. 2907.04(A) and (B)(3), respectively, and two counts of Sexual Imposition, both misdemeanors of the third degree, in violation of R.C. 2907.06(A)(4).

{¶7} On June 19, 2009, Appellant entered guilty pleas to all counts of the indictment. He was sentenced to two years in prison on each count of Unlawful Sexual Conduct with a Minor, with the sentences ordered to be served consecutively to each other. He was also sentenced to sixty days each on counts three and four and those sentences were ordered to be run concurrently with his felony sentences. Appellant was classified as a Tier II sexual offender.

{¶8} Appellant now challenges his sentence, raising two assignments of error:

{¶9} "I. THE MULTIPLE SENTENCES IMPOSED BY THE TRIAL COURT HERE VIOLATE THE DOUBLE JEOPARDY PROVISIONS BARRING MULTIPLE PUNISHMENTS FOR THE SAME CONDUCT (REFLECTED IN SENTENCING TRANSCRIPT, SENTENCING ENTRY, INDICTMENT, BILL OF PARTICULARS.)

{¶10} "II. APPELLANT'S CONVICTIONS WERE ALLIED OFFENSES OF SIMILAR IMPORT AND SHOULD HAVE MERGED FOR SENTENCING (REFERRING TO ASSIGNMENT OF ERROR #1)."

I & II

{¶11} In Appellant's assignments of error, he argues that the trial court erred in sentencing him to multiple, consecutive sentences, as the crimes that he pled guilty to were allied offenses of similar import, and therefore the multiple sentences violated the prohibition against Double Jeopardy. We disagree.

{¶12} R.C. 2941.25 provides as follows:

{¶13} "(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.

{¶14} "(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."

{¶15} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the Ohio Supreme Court recently stated: "[C]ourts 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 commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, paragraph one of the syllabus.

{¶16} In the present case, we must determine whether one act of digital penetration and one count of cunnilingus are distinct and separate sexual acts, even when the acts are committed in a short period of time. We find that they are distinct, separate acts. While the textual elements of the two counts are the same, an offender may comment Unlawful Sexual Conduct with a Minor by digital penetration without committing the same crime by cunnilingus.

{¶17} This court has previously held that different sexual acts occurring in the same encounter are not allied offenses of similar import. *State v. Waters*, 5th Dist. No. 03-COA-002, 2003-Ohio-4624 (finding that unlawful sexual conduct with a minor by vaginal intercourse and/or digital penetration and fellatio or cunnilingus were not allied offenses of similar import); see also *State v. Brown*, 3rd Dist. No. 9-09-15, 2009-Ohio-5428; and *State v. Ludwick*, 11th Dist. No. 2002-A-0024, 2004-Ohio-1152.

{¶18} Accordingly, we find that the trial court did not err in imposing separate sentences on the two counts of Unlawful Sexual Conduct with a Minor. Appellant's first and second assignments of error are overruled.

{¶19} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
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-vs-	:	JUDGMENT ENTRY
	:	
JESSE M. JONES	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-95
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. JOHN W. WISE