[Cite as *State v. Puckett*, 2010-Ohio-6232.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 2010 CA 0029
	:	
	:	
HUBERT A. PUCKETT	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 09 CR 629
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 15, 2010

APPEARANCES:

For Plaintiff-Appellee

KENNETH OSWALT
Licking County Prosecutor
MARITSA FLAHERTY
Assistant Prosecutor
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For Defendant-Appellant

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Edwards, P.J.

{¶1} Defendant-appellant, Hubert Puckett, appeals his sentence from the Licking County Court of Common Pleas on three counts of felony non-support. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On December 4, 2009, the Licking County Grand Jury indicted appellant on three counts on felony non-support in violation of R.C. 2919.21(A)(2) and/or (B), felonies of the fourth degree. Count One of the indictment covered the period from December 3, 2007 through December 3, 2009, Count Two the period from December 3, 2005 through December 3, 2007 and Count Three the period from December 3, 2003 through December 3, 2005. At his arraignment on July 5, 2010, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, on February 17, 2010, appellant withdrew his former not guilty plea and entered a plea of guilty to all three counts. As memorialized in a Judgment Entry filed on February 17, 2010, appellant was sentenced to nine months in prison on each count. The trial court, in its Judgment Entry, ordered that the sentences run consecutively with each other and consecutively to another sentence that appellant was serving from Pickaway County. The trial court also ordered appellant to pay restitution.

{¶4} Appellant now raises the following assignment of error on appeal:

{¶5} "APPELLANT'S MULTIPLE CONVICTIONS FOR ALLIED OFFENSES OF SIMILAR IMPORT VIOLATE R.C. 2941.25 AND THE DOUBLE JEOPARDY

PROTECTIONS CONTAINED IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."[1]

I

{¶6} Appellant, in his sole assignment of error, argues that his three convictions for felony non-support are allied offenses of similar import and should have been merged at sentencing. We disagree.

{¶7} Appellant did not raise the issues of whether or not he could be convicted of three counts of felony non-support or whether the three counts were allied offenses of similar import before the trial court. Therefore, the matter is to be reviewed under a plain error standard. Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

{¶8} R.C. 2941.25 defines allied offenses of similar import: "(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.

{¶9} "(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

[1] Pursuant to a Judgment Entry filed on May 10, 2010, this Court granted appellant's Motion for delayed Appeal.

or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶10} In *State v. Rance,* 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, the Ohio Supreme Court held that offenses were 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.* at 636. The *Rance* court further held that courts should compare the statutory elements in the abstract, which would produce clear legal lines capable of application in particular cases. *Id.* at 636. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both only if the offenses were committed separately or with a separate animus. *Id.* at 638-39.

{¶11} However, in 2008 the court clarified *Rance,* because the test as set forth in *Rance* had produced inconsistent, unreasonable and, at times, absurd results. *State v. Cabrales,* 118 Ohio St.3d 54, 59, 2008-Ohio-1625, 886 N.E.2d 181. In *Cabrales,* the court held that, in determining whether offenses are of similar import pursuant to 2941.25(A), courts are required to compare the elements of the offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. *Id.* at syllabus 1. "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." *Id.* The court 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, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶12} As is stated above, appellant was convicted of felony non-support in violation of R.C. 2919.21(A)(2) and/or (B). R.C. 2919.21 states, in relevant part, as follows: "(A) No person shall abandon, or fail to provide adequate support to:…

{¶13} "(2) The person's child who is under age eighteen, or mentally or physically handicapped child who is under age twenty-one;…

{¶14} "(B) No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support….

{¶15} "(G)(1) Except as otherwise provided in this division, whoever violates division (A) or (B) of this section is guilty of nonsupport of dependents, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(2) or (B) of this section or if the offender has failed to provide support under division (A)(2) or (B) of this section for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, whether or not the twenty-six weeks were consecutive, then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree. If the offender previously has been convicted of or pleaded guilty to a felony violation of this section, a violation of division (A)(2) or (B) of this section is a felony of the fourth degree…."

{¶16} In *State v. Cook*, Union App. No. 14-04-36, 2005-Ohio-4448, the appellant was convicted of two counts of non-support and was sentenced to two consecutive six months sentences. On appeal, he argued that the two offenses were allied offenses of

similar import and that the trial court, therefore, erred in sentencing him on both counts. The Court of Appeals disagreed stating, in relevant part, as follows: “The evidence in the case sub judice demonstrates that the facts of Cook's failure to pay child support for his son were identical, except for the times at which the offenses charged were committed, i.e. two separate one hundred four week (two year) periods. Accordingly, we must conclude that the offenses were committed separately. Thus, under R.C. 2941.25(B), we find that Cook could lawfully be convicted of the two offenses charged, in that commission of one offense does not result in the commission of the other. See *State v. Schaub* (1984), 16 Ohio App.3d 317, 319, 475 N.E.2d 1313.

{¶17} “Finding that the two offenses are separate crimes, we do not find that it was error to convict and sentence Cook on two counts of non-support which occurred during two separate time periods.” Id at paragraphs 15-16.

{¶18} In the *Schaub* case, which was cited by the court in *Cook*, a complaint was filed charging the appellant with one count of non-support. The charge covered the period from September 14, 1979 to September 14, 1981. After the trial court found the appellant not guilty, a second complaint was filed charging appellant with nonsupport. This second complaint was identical in all respects to the earlier complaint with the exception that the second complaint covered the time period from January 21, 1982, to July 8, 1982. After he was convicted, the appellant appealed, arguing, in part, that his rights to protection against double jeopardy were violated. The Court of Appeals held that under R.C. 2941.25(B), appellant could lawfully stand trial and be convicted of the offense charged in each case “in that his conduct resulted in two offenses of nonsupport committed separately.” Id at 319.

{¶19} Based on the foregoing, we find that the three offenses of felony non-support, which covered three separate one hundred four week (two year) periods, were not allied offenses of similar import and that the trial court did not err in failing to merge the same.

{¶20} Appellant's sole assignment of error is, therefore, overruled.

{¶21} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES

JAE/d0823

[Cite as *State v. Puckett*, 2010-Ohio-6232.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
HUBERT A. PUCKETT	:	
Defendant-Appellant	:	CASE NO. 2010 CA 0029

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.

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES