

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 14 CAA 0069
MICHAEL R. SMITH II.	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Delaware County  
Court of Common Pleas, Case No. 14CR I  
05 0190 A

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 19, 2015

APPEARANCES:

For Plaintiff-Appellee

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*Gwin, P.J.*

{¶1} Appellant Michael R. Smith, II [“Smith”] appeals from the September 16, 2014 Judgment Entry of Prison Sentence of the Delaware County Court of Common Pleas. Appellee is the state of Ohio.

*Facts and Procedural History*

{¶2} A statement of the facts underlying Smith’s criminal conviction is not necessary to our resolution of this appeal.

{¶3} Smith and co-defendant Jessica Smith were charged by a single indictment.<sup>1</sup> Smith was charged with one count of felonious assault pursuant to R.C. 2903.11(A)(1), a felony of the second degree [Count I]; one count of child endangering pursuant to R.C. 2919.22(B)(1), a felony of the second degree [Count II]; a second count of endangering children pursuant to R.C. 2919.22 (A), a felony of the third degree [Count III] and one count of domestic violence pursuant to R.C. 2919.25(A), a misdemeanor of the first degree [Count IV].

{¶4} On July 29, 2014, Smith entered negotiated guilty pleas to the two Endangering Children counts, Count II and Count III in exchange for the state’s dismissal of the remaining charges.

{¶5} The Hon. Everett H. Krueger of the Delaware County Court of Common Pleas took the guilty plea. The trial court ordered Smith to report for a pre-sentence investigation and sentencing was ultimately scheduled for September 12, 2014. Both parties filed sentencing memoranda.

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<sup>1</sup> Jessica Smith was charged in Count III with one count of child endangering pursuant to R.C. 2919.22(A), a felony of the third degree, See, *State v. Jessica Smith*, 5th Dist. Delaware No. 14CAA100066, 2015-Ohio-1531.

{¶6} On September 10, 2014, a notice was filed that the Ohio Supreme Court assigned Judge Joseph Timothy Campbell to preside in the case from September 1, 2014 through September 29, 2014.

{¶7} On November 25, 2014, Smith was sentenced to 7 years of imprisonment on Count 2, a violation of Section 2919.22(B)(1), a felony of the second degree and a consecutive 24 month sentence on Count 3, a violation of Section 2919.22(A), a felony of the third degree.

*Assignments of Error*

{¶8} Smith raises two assignments of error,

{¶9} “I. THE TRIAL COURT ERRED BY FINDING THAT ONE COUNT OF ENDANGERING CHILDREN UNDER OHIO REVISED CODE 2919.22(B)(1) AND ONE COUNT OF ENDANGERING CHILDREN UNDER OHIO REVISED CODE 2919.22 (A) DID NOT MERGE FOR SENTENCING.

{¶10} “II. THE TRIAL COURT ERRED AND DENIED THE APPELLANT DUE PROCESS OF LAW BY PROCEEDING TO SENTENCING WITH AN ASSIGNED JUDGE THAT DID NOT PRESIDE OVER THE PLEA HEARING.”

I.

{¶11} In his first assignment of error, Smith contends that the trial court should have merged the two counts of child endangering because both offenses were committed with the same conduct and a single state of mind.

{¶12} Smith was charged in Count III with a violation of R.C. 2903.11(B)(1),

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(1) Abuse the child;

{¶13} The facts giving rise to this charge are that on Thursday April 17, 2014, after school, Smith, in his own words, "backhanded his stepson in the stomach" causing a rupture of the small intestine. (Change of Plea Hearing, July 29, 2014 at 9; Sentencing Hearing, September 12, 2014 at 50-51).

{¶14} Smith was charged in Count II with a violation of R.C. 2903.11(A)(1),

(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

{¶15} The violation of R.C. 2919.22(A), a violation of the duty of care to the 10-year-old victim, occurred when Smith and his wife, the victim's mother, failed to get medical care for the victim for 8 days causing sepsis to develop and requiring surgeons

at Nationwide Children's Hospital to remove 18 inches of his intestine. (Change of Plea Hearing, July 29, 2014 at 10).

{¶16} R.C. 2941.25, Multiple counts states:

(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.

(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.

{¶17} In *State v. Ruff*, — Ohio St.3d —, 2015–Ohio–995, —N.E.2d —, 2015 WL 1343062, the Ohio Supreme Court revised its allied-offense jurisprudence,

1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors-the conduct, the animus, and the import.

2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

*Ruff*, at syllabus. The Court further explained,

A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

*Ruff*, ¶25.

{¶18} Smith's violation of R.C. 2919.22(A) and his violation of R.C. 2919.22(B)(1) are, under the facts of this case, of dissimilar significance and have separate and identifiable harm. Smith's striking the child caused a perforated bowel in the child; Smith's failure to seek medical treatment for eight days resulted in the victim developing sepsis, substantially worsening his condition.

{¶19} Thus, Smith's failure to seek medical treatment for the child caused separate, identifiable harm, was committed separately and was committed with a separate motivation from his act of striking the child. Thus under *Ruff*, Smith's violation of R.C. 2921.22(A) was separate and distinct from his violation of R.C. 2921.22(B)(1).

{¶20} Smith's first assignment of error is overruled.

## II.

{¶21} In his second assignment of error, Smith argues he was denied due process because he was sentenced by a visiting judge instead of the judge who presided at his plea hearing. We disagree<sup>2</sup>.

{¶22} Ohio Crim. R. 25(B) states in pertinent part:

If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by \* \* \* the Chief Justice of the Supreme Court of Ohio, may perform those duties. \* \* \* .”

{¶23} In this case, a Certificate of Assignment signed by Chief Justice Maureen O'Connor of the Ohio Supreme Court was filed on July 24, 2014, appointing Judge Campbell to serve for the days of September 1 through September 29, 2014. Smith does not point to any evidence in the record that this appointment was procedurally improper.

{¶24} Smith cites *Beatty v. Alston*, 43 Ohio St.2d 126, 127–28, 330 N.E.2d 921 (1975) as authority for his argument that a judge who takes a defendant's plea must also impose sentence, but that case is factually distinguishable. In *Beatty*, the judge who took the plea was available and able to sentence the defendant but failed to do so due to procedural oversight. In this case, the appointment of an Acting Judge indicates some reason existed for the original judge's inability to sentence Smith and we cannot say the substitution of another judge was improper. See, *State v. Shine*, 2nd Dist.

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<sup>2</sup> The identical argument was raised in the co-defendant's case. *State v. Jessica Smith*, 5th Dist. Delaware No. 14CAA100066, 2015-Ohio-1531.

Montgomery No. 11092, 1988 WL 129177, \*2 (Dec. 1, 1988); *State v. Jessica Smith*, 5th Dist. Delaware No. 14CAA100066, 2015-Ohio-153, ¶22.

{¶25} We also note no objection was raised to the assignment of a visiting judge. Smith waived his right to challenge the authority of the sentencing court by his failure to make a timely objection prior to sentencing. *Shine, supra*, 1988 WL 129177 at \*3; *State v. Carosella*, 7th Dist. Mahoning No. 07CR313, 2008–Ohio–6370, ¶ 17; *State v. Jessica Smith*, 5th Dist. Delaware No. 14CAA100066, 2015-Ohio-153, ¶23; *see also, e.g., State v. Pecina*, 76 Ohio App.3d 775, 778, 603 N.E.2d 363 (6th Dist. 1992); *Brown v. Brown*, 15 Ohio App.3d 45, 47, 472 N.E.2d 361, 362 (2nd Dist.1984). Smith did not raise the issue prior to, during, or after sentencing:

[A]ny party objecting to a reassignment must raise that objection at the first opportunity to do so. If the party has knowledge of the transfer with sufficient time to object before the new judge takes any action, that party waives any objection to the transfer by failing to raise that issue on the record before the action is taken. If the party first learns about the transfer after action is taken by the new judge, the party waives any objection to the transfer by failing to raise that issue within a reasonable time thereafter.

*Berger v. Berger*, 3 Ohio App.3d 125, 131443 N.E.2d 1375 (8th Dist. 1981), *overruled on other grounds, Brickman & Sons, Inc. v. Natl. City Bank*, 106 Ohio St.3d 30, 2005–Ohio–3559, 830 N.E.2d 1151. *See State v. Ross (In re Cirigliano)*, 105 Ohio St.3d 1223, 2004–Ohio–7352, 826 N.E.2d 287, ¶25-26; *Yun v. Yun*, 5th Dist. Stark No. 2002CA00353, 2003-Ohio-2644, ¶41.



{¶26} The reassignment of the case for sentencing was not improper and Smith's second assignment of error is overruled.

{¶27} The judgment of the Delaware County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur