[Cite as *State v. White*, 2009-Ohio-4587.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-07-1196

Appellee — Trial Court No. CR-0200603651

v.

Derwin W. White — **DECISION AND JUDGMENT**

Appellant — Decided: September 4, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Derwin W. White, appeals from a decision of the Lucas County Court of Common Pleas wherein he was convicted of two counts of robbery and two counts of felonious assault. For the reasons that follow, we affirm.

{¶ 2} On April 23, 2007, appellant entered no contest pleas to two counts of robbery, violations of R.C. 2911.01(A)(2) and felonies of the second degree and, two counts of felonious assault, violations of R.C. 2903.11(A)(2) and felonies of the second

degree. He was sentenced to 32 years in prison. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The indictment in Mr. White's case alleging robbery suffers from structural error and is in violation of his right to notice and due process under the fifth, sixth, and fourteenth amendments.

{¶ 4} "II. The trial court erred to the prejudice of Mr. White by failing to merge the offenses of felonious assault and robbery for the reason that they are allied offenses of similar import in violation of his right to notice and due process under the fifth, sixth, and fourteenth amendments to the United States constitution and the Ohio constitution.

{¶ 5} "III. The trial court erred to the prejudice of Mr. White when it ordered him to pay unspecified costs, including court appointed fees, without first determining the ability to pay those costs."

{¶ 6} In his first assignment of error, appellant argues that the indictment is structurally defective under the decisions of the Ohio Supreme Court in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*") and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II* ") (on reconsideration). Specifically, he argues that the indictment failed to specify a mens rea. In *Colon I*, the Ohio Supreme Court held that an indictment for robbery in violation of R.C. 2911.02(A)(2) was defective because it failed to charge recklessness as the mens rea, which is an essential element of the crime. Id. ¶ 19. In *Colon II*, the court limited the holding of Colon I to "rare cases, * * * in which multiple errors at the trial follow the defective indictment." The instant case did not go to

trial; therefore, it can be distinguished from *Colon I*. Appellant's first assignment of error is found not well-taken.

{¶ 7} In his second assignment of error, appellant contends that the court erred in sentencing him for felonious assault and robbery as the two offenses are allied offenses of similar import.

{¶ 8} R.C. 2941.25, provides:

{¶ 9} "(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.

{¶ 10} "(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."

{¶ 11} The multiple-count statute exhibits a legislative intent that it is permissible for an offender to be punished for multiple offenses of dissimilar import, but not for allied offenses of similar import. "[I]f a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both pursuant to R.C. 2941.25(B)." *State v. Rance*, (1999), 85 Ohio St.3d 632, 636, citing *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14.

{¶ 12} The analysis for recognizing allied offenses is a two-step procedure. "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 commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, clarified.)" *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus. "'In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" (Emphasis sic.) *Cabrales* ¶ 14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 13} Appellant was convicted of robbery in violation of R.C. 2911.02(A)(2). The elements are as follows:

{¶ 14} "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 15} "* * *

{¶ 16} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another * * *."

{¶ 17} Appellant was also convicted of felonious assault in violation of R.C. 2903.11(A)(1). The elements are as follows:

{¶ 18} "No person shall knowingly do either of the following:

{¶ 19} "(1) Cause serious physical harm to another or to another's unborn; "

{¶ 20} Clearly, the elements of the two offenses do not align. Nor does the commission of one of these offenses necessarily result in the commission of the other. One can commit a robbery by merely threatening physical harm without actually causing physical harm whereas felonious assault is not possible without actual physical harm. Appellant's second assignment of error is found not well-taken.

{¶ 21} In his third assignment of error, appellant contends that the court erred in ordering him to pay costs without first determining his ability to pay. The sentencing judgment reads:

{¶ 22} "Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement , assignment counsel, and prosecution as authorized by law. Defendant ordered to reimburse the state of Ohio and Lucas County for such costs. * * * Defendant further ordered to pay the costs assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given."

{¶ 23} R.C. 2929.18(A)(5)(ii) provides that a sentencing court may impose as a financial sanction, "[a]ll or part of the costs of confinement * * * provided that the amount of reimbursement ordered under this division shall not exceed the total amount of

reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement * * *." However, "[b]efore imposing a financial sanction under [R.C. 2929.18], the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6). We have held that while a sentencing court is not required to hold a hearing when determining whether to impose a financial sanction under this provision, the record must contain some evidence that the court considered the offender's ability to pay such a sanction. *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, citing *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, ¶ 42. Although a court is neither required to hold a hearing to make this determination nor to indicate in its judgment entry that it considered a criminal defendant's ability to pay, there must be some evidence in the record to show that the court did consider this question. *Phillips*, supra, ¶ 18. An appellate court examines the totality of the record when deciding whether this requirement was satisfied. Id. A presentence investigation report may be sufficient to demonstrate that the trial court considered an offender's ability to pay a financial sanction. *State v. Felder*, 2d Dist. No. 21076, 2006-Ohio-2330, ¶ 64.

{¶ 24} The record in this case shows that appellant had previously been employed as a laborer for a heating and cooling company and that despite suffering from back pain, he was capable of doing odd jobs to, as he stated, "make an honest dollar." Accordingly, we find that there was some evidence in the record to demonstrate that the trial court could actually have considered appellant's ability to earn a living and whether he had the

present and future ability to pay any sanctions imposed pursuant to R.C. 2929.18. Appellant's third assignment of error is found not well-taken.

{¶ 25} On consideration whereof, this court finds that the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE