[Cite as *State v. Tyler*, 2010-Ohio-1368.]

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

State of Ohio — Court of Appeals No. L-06-1326

Appellee — Trial Court No. CR05-1983

v.

Kelvin Tyler — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Kelvin Tyler, appeals an October 10, 2006, judgment of the Lucas County Court of Common Pleas. The judgment convicted him of aggravated

murder,[1] with two specifications under R.C. 2929.04(A)(7),[2] aggravated burglary,[3] and aggravated robbery.[4] The convictions are a result of jury verdicts at the close of a jury trial in September 2006. The judgment also imposed sentence.

{¶ 2} In the penalty phase, the trial jury unanimously found the appellant should be sentenced to imprisonment for life without the possibility of parole for thirty years on the aggravated murder conviction. The trial court sentenced appellant to the recommended sentence for the offense. For aggravated burglary, the trial court sentenced appellant to serve an additional 10 year prison term. For aggravated robbery, it sentenced appellant to serve an additional 10 year term.

{¶ 3} Prior to trial, Tyler filed a motion to suppress evidence of statements made by him to police after his indictment and arraignment without the presence or knowledge

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[1]The aggravated murder charge was for a violation of R.C. 2903.01(B) & (F), an unclassified felony.

[2]Specification One to the aggravated murder count, charged "the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery * * *." Specification Two to the aggravated murder count charged "the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary * * *."

[3]The aggravated burglary charge was for a violation of R.C. 2911.11(A)(1), a first degree felony.

[4]The aggravated robbery charge was for a violation of R.C. 2911.01(A)(3), a first degree felony.

of his attorneys. The trial court overruled the motion to suppress in a judgment filed on September 12, 2006.

{¶ 4} On appeal, Tyler claims two errors:

"Assignment of Error No. 1:

{¶ 5} "The admission of statements made to the police by Mr. Tyler at a post-indictment interrogation violated his 6th Amendment guarantee to the Assistance of Counsel and his 5th Amendment guarantee to Due Process.

{¶ 6} "Assignment of Error No. 2:

{¶ 7} "Mr. Tyler's convictions and sentences for aggravated murder and aggravated robbery, and his convictions and sentences for aggravated murder and aggravated burglary violate the Double Jeopardy Clauses of the 5th Amendment to the United States Constitution and Article I § 10 of the Ohio Constitution."

Motion to Suppress

{¶ 8} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8 the Ohio Supreme Court outlined the nature of appellate review of trial court decisions denying motions to suppress:

{¶ 9} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 356, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are

supported by competent credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539."

{¶ 10} Under Assignment of Error No. 1, appellant argues the police violated his Sixth Amendment right to counsel by interrogating him on June 27, 2006 without counsel. He argues that under *Michigan v. Jackson* (1986), 475 U.S. 625, overruled in *Montejo v. Louisiana* (2009), __U.S.__, 129 S.Ct. 2079, he was entitled to attendance of an attorney at any post arraignment interrogation.[5] In *Michigan v. Jackson*, the United States Supreme Court outlined a criminal defendant's right to an attorney at interrogations undertaken after criminal charges have been brought:

{¶ 11} "The question is not whether respondents had a right to counsel at their post arraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards* [*v. Arizona*], 451 U.S., at 482, 101 S.Ct., at 1883; *Miranda v. Arizona*, 384 U.S. 436, 470, 86 S.Ct. 1602, 1625, 16 L.Ed.2d 694 (1966). The Sixth Amendment guarantee of the assistance of counsel also

[5]In *Montejo v. Louisiana*, the United States Supreme Court overruled *Michigan v. Jackson* by holding that neither a defendant's request for counsel at arraignment nor the appointment of counsel creates a presumption that a subsequent waiver of the right to counsel by the defendant, which is procured during subsequent police initiated interrogation, is invalid. *Montejo v. Louisiana*, 129 S.Ct. at 2085-2090.

provides the right to counsel at post arraignment interrogations. The arraignment signals 'the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment, *United States v. Gouveia*, 467 U.S. 180, 187,188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984); * * * thereafter, government efforts to elicit information from the accused, including interrogation, represent 'critical stages' at which the Sixth Amendment applies. * * *." (Footnote and citations omitted.)

{¶ 12} Appellant contends that if it were found that the police initiated contact, the taking of his statement violated his right to counsel. Alternatively, if he initiated contact, he argues the police did not simply listen to his voluntary statement, but engaged in a custodial interrogation without securing his waiver of the right to counsel. The state counters that appellant initiated contact, appellant made a voluntary statement without interrogation, and, even if the court determined interrogation occurred, appellant waived his right to counsel.

{¶ 13} Evidence at the hearing on the motion to suppress demonstrated that for a period of over a year (using letters, telephone calls, and a third party) appellant persistently pursued a meeting with police. Detective Muszynski testified appellant repeatedly left messages on her answering machine seeking a meeting. She spoke to appellant by telephone once. When they talked, Muszynski told him she would not speak with him. Muszynski testified appellant called her six or seven times in total requesting they meet and discuss the case.

{¶ 14} Sergeant Noble testified appellant made repeated telephone calls and voice mail messages and sent letters for over a year and one-half period requesting to speak to police concerning the investigation. Exhibits at the suppression hearing included five letters dated March 28, 2006, May 13, 2006, June 11, 2006, June 19, 2006 (2 letters), and June 26, 2006 from appellant to Muszynski, Noble, and other police detectives. Each letter was signed by appellant. In the letters, appellant indicated he had determined who committed the crime and he wanted to clear his name. He wanted to speak to someone "face to face" concerning the investigation.

{¶ 15} Appellant claimed that what he had to say would "get me out and bring the real killer to justice." In a June 19, 2006 letter to Sergeant Noble, appellant recounted how he had written letters with this request to Denise Muszynski, the judge, and a few more detectives and tried to contact them. He requested that someone "come hear me out."

{¶ 16} The trial court found the meeting with police was a defendant-initiated contact. The evidence in the record compels that conclusion. Appellant's argument based upon the claim that the police initiated contact is without merit. Furthermore, under *Montejo v. Louisiana,* valid waivers of the right to counsel in post arraignment interrogations are no longer limited to instances where the defendant initiated contact. *Montejo v. Louisiana*, 129 S.Ct. at 2085-2091. Although appellant was previously interrogated by police, appellant has not contended the prior interrogation was terminated by his asserting a demand for counsel. See *Edwards v. Arizona,* 451 U.S. 477, 484-85.

Voluntary Statement or Custodial Interrogation

{¶ 17} The state denies police interrogated appellant at the meeting on June 27, 2006. Appellant claims his voluntary statement became an interrogation when Sergeant Noble first challenged his version of events at the meeting.

{¶ 18} Voluntary statements initiated by an accused to police in a custodial setting without counsel can transform into interrogations. In *Edwards v. Arizona*, the United States Supreme Court held that when such a transformation occurs, the state must secure a voluntary, knowing and intelligent waiver of the right to remain silent and right to counsel in order to proceed:

{¶ 19} "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Edwards v. Arizona*, 451 U.S. at 486, fn. 9. See *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 1044-1046; *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶ 52.

{¶ 20} In *State v. Knuckles* (1992), 65 Ohio St.3d 494, paragraph two of the syllabus, the Ohio Supreme Court defined the word interrogation:

{¶ 21} "When a statement, question or remark by a police officer is reasonably likely to elicit an incriminating response from a suspect, it is an interrogation. (*Rhode Island v. Innis* [1980], 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297.)"

{¶ 22} The meeting between appellant and police on June 27, 2006 was videotaped. Early in the meeting Sergeant Roberts directly sought an admission from appellant: "You told me yesterday that you were there at the scene." The "scene" was the apartment of the crime victim, Rubie Petterson. Petterson was found unconscious and battered in the apartment during the afternoon of April 20, 2005.

{¶ 23} Appellant stated he entered the apartment through an opening for an air conditioner for the purpose of stealing Petterson's television. He stated he found Petterson on the floor when he entered. Appellant stated that he did not harm Petterson. He looked about the apartment. Appellant also used the meeting to request police to investigate a specific third party for the killing of Petterson and claimed that the third party's statement to police was false.

{¶ 24} The police questioned appellant during the meeting. Sergeant Roberts asked: "Were you at the scene when she was murdered? Were you there when she was murdered?" Later Roberts questioned appellant why he had told police that he had never been in the apartment before.

{¶ 25} Detective Denise Muszynski asked appellant where he saw the victim lying on the floor of the apartment. Roberts also questioned: "Did you check to see if she were alive? Maybe you could have helped her?" Later, Roberts questioned why appellant

"didn't do shit to help her." Appellant responded to the question by stating the apartment telephone was pulled out of the wall—demonstrating that he knew Petterson was alive, in need of help, and that he failed to take reasonable steps to secure help for her.

{¶ 26} This admission was used by the state at trial. In closing argument, the state claimed that appellant's failure to render aid to Rubie Petterson demonstrated that it was appellant who killed her and that appellant's admission was inconsistent with his claims that he was friendly towards Petterson:

{¶ 27} "Why in the name of common sense, if that's the case and he's in that room and she's laying under a sofa unconscious, struggling for her own life, what does he do? He doesn't call 9-1-1. He doesn't go out the door, down the hall pounding on doors saying Ms. Rubie's in trouble, she needs help. What's he do? I went to the bedroom, and I looked and I went over here in the closet, and I looked (indicating.)

"For what? Her property."

{¶ 28} As the June 27, 2006 meeting with police was videotaped, there is no dispute of fact as to what was said during the meeting. We find as a matter of law that the repeated questioning by the police during the statement constituted police interrogation of appellant, without counsel, while appellant was held in custody. The questioning was clearly designed to procure and did procure incriminating evidence against appellant. We conclude competent credible evidence to support the trial court's conclusion that no police interrogation occurred is lacking in the record. The state's

argument that no waiver of Sixth Amendment rights was necessary because there was no interrogation is without merit.

Waiver

{¶ 29} Appellant was provided *Miranda* warnings earlier in the case. Police provided *Miranda* warnings when they questioned appellant on April 23 and April 27, 2005. At the interrogation of April 23, 2005, appellant also signed a *Miranda* waiver form. Tyler refused to sign a *Miranda* waiver form at the April 27, 2005 interrogation. Nevertheless, he talked with police after he was read his rights.

{¶ 30} Appellant came to the meeting with a pad of paper, notes, and prepared to talk. He quickly thanked Noble. He also expressed a concern on whether "anything I say would be used against me?" Roberts replied: "Sure. Sure. You know we can reread you your rights if you want." Tyler went on to state "you know, I did do something. Will it be used against me?" Roberts again responded: "Sure it would." Appellant has limited his argument under Assignment of Error No. 1 to a claimed denial of the right to counsel. He has not claimed a denial of his right against self-incrimination.

{¶ 31} Roberts and Muszynski did not inform appellant of his right to counsel on June 27, 2006, and did not ask him to waive that right or to execute any waiver form.

{¶ 32} In *Montejo v. Louisiana* the United States Supreme Court considered the issue of waiver of the Sixth Amendment right to counsel in post arraignment police interrogations. The Supreme Court held a defendant can waive his Sixth Amendment

right to counsel after arraignment, and the decision to waive the right to counsel need not itself be counseled:

{¶ 33} "Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Patterson v. Illinois*, 487 U.S. 285, 292, n.4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. *Michigan v. Harvey*, 494 U.S. 344, 352-353, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)." *Montejo v. Louisiana*, 129 S.Ct. at 2085.

{¶ 34} In the context presented here, we must determine whether appellant waived the right to counsel "under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Edwards v. Arizona*, 451 U.S. at 486, fn. 9; *Oregon v. Bradshaw*, 462 U.S. at 1044-1046; *State v. Gapen*, at ¶ 52.

{¶ 35} The trial court concluded appellant knew he had counsel because he had just attended a pretrial hearing in the case 11 days before he met with police. Given the months involved in his persistent requests to meet with police, the trial court concluded appellant not only knew of the right to counsel, but that he also knew he had the ability to have counsel present:

{¶ 36} "* * * [T]he defense would argue that State certainly knows he has counsel and should have been contacting them. However, I believe – the court believes that the converse is actually more germane to the issue, and that is clearly Mr. Tyler knew he had counsel and had the ability to have counsel yet nonetheless he went out of his way to initiate multiple contacts with the State through letter, through telephone, and through a third-party * * *."

{¶ 37} The trial court also concluded that the waiver was voluntary: "[I]t's clear to the court that is exactly what Mr. Tyler desired was to sit down with the detectives and tell his side of the facts without his counsel. And therefore the court finds all of this action to be voluntary and clearly initiated by the defendant, and therefore it's all admissible."

{¶ 38} The meeting on June 27, 2006, was less than 35 minutes in length. The videotape demonstrates it occurred without coercion. Sergeant Noble offered to reread appellant his *Miranda* rights. The trial court concluded:

{¶ 39} "I agree here, as many parties to this litigation might agree, that in the facts and circumstances of this case had Mr. Tyler been given his rights in all likelihood based on fact that he had multiple phone calls, multiple letters and even a third party contacting police, in all likelihood he would have gone ahead and spoke anyways and it would have been a nice precaution."

{¶ 40} In our view, there is competent credible evidence in the record supporting the trial court's findings. Based upon the record and the findings of the trial court, we

find as a matter of law that appellant voluntarily, knowingly, and intelligently waived the right to counsel when he spoke to police on June 27, 2006. Appellant's Assignment of Error No. 1 is not well-taken.

Double Jeopardy

{¶ 41} Under Assignment of Error No. 2, appellant asserts his sentences for aggravated murder under R.C. 2903.01(B) (felony-murder) and for the underlying felonies of aggravated robbery and aggravated burglary violate constitutional prohibitions against double jeopardy. He claims he has received multiple punishments for the same offense.

{¶ 42} The Ohio Supreme Court has declared R.C. 2941.25 key to determining whether double jeopardy prohibits cumulative punishments for multiple offenses stemming from the same conduct:

{¶ 43} "As the court discussed in *State v. Rance* (1999), 85 Ohio St.3d 632, 635, 710 N.E.2d 699, whether cumulative punishments for two separate offenses stemming from the same conduct violate the Double Jeopardy Clause is determined by the legislative intent found in R.C. 2941.25, Ohio's multiple-count statute." *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶ 6.

{¶ 44} R.C. 2941.25 provides:

{¶ 45} "(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.

{¶ 46} "(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."

{¶ 47} The Ohio Supreme Court has established a two-step test to apply R.C. 2941.25: "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. 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.) *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, quoted with approval in *State v. Winn*, ¶ 10; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 14; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 19.

{¶ 48} R.C. 2903.01(B) is the felony-murder statute for the offense of aggravated murder. As explained by the Ohio Supreme Court with respect to felony-murder under R.C. 2903.02(B) for the lesser offense of murder, the statute "does not contain a mens rea component. * * * Rather, a person commits felony-murder pursuant to R.C. 2903.02(B) by proximately causing another's death while possessing the mens rea set forth in the

underlying felony offense." *State v. Fry*, Slip Opinion No. 2010-Ohio-1017, ¶ 43, citing, *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, ¶ 31-33. Those principles apply equally here, where the felony-murder charge is for aggravated murder under R.C. 2903.01(B) rather than for murder under R.C. 2903.02(B).

{¶ 49} Aggravated murder, as defined in R.C. 2903.01(B), involves causing the death of another "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit" any of nine felonies listed in the statute. Two of those felonies are aggravated robbery and aggravated burglary.

{¶ 50} In contrast, aggravated robbery under R.C. 2911.01(A)(3) requires proof the offender "in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense" recklessly[6] inflicted or attempted to inflict "serious physical harm on another." Aggravated robbery involves the infliction or attempt to inflict "serious physical harm." Aggravated murder does not require as an element the attempt to commit or the commission of a theft offense.

{¶ 51} Aggravated burglary as defined in R.C. 2911.11(A)(1) involves a trespass "by force, stealth, or deception" on an occupied structure "when another person other than an accomplice of the offender is present, with purpose to commit * * * any criminal offense if * * * [t]he offender inflicts, or attempts or threatens to inflict physical harm on another." Aggravated burglary requires proof that the offender trespassed in an occupied

[6]*State v. Alvarez*, 3d Dist. No. 4-08-02, 2008-Ohio-5189, ¶ 20; *State v. Williams*, 8th Dist. No. 9136, 2009-Ohio-2251, ¶ 24.

structure with purpose to commit a criminal offense and inflicts, or attempts or threatens to inflict physical harm. Aggravated murder does not require a showing of trespass. Aggravated burglary does not involve causing the death of another.

{¶ 52} Both aggravated robbery and aggravate burglary can be committed without committing aggravated murder.

{¶ 53} We conclude that the elements of aggravated murder and those of the crimes of aggravated robbery and aggravated burglary are different such that the commission of one does not result in the commission of the other. Under the analysis mandated by the Ohio Supreme Court, aggravated murder is not an allied offense to either aggravated robbery or aggravated burglary within the meaning of R.C. 2941.25. Therefore, we conclude that separate cumulative sentences for the offenses of aggravated murder, aggravated robbery, and aggravated burglary in this case do not violate R.C. 2941.25 or double jeopardy.

{¶ 54} Applying the mandated two-step analysis to R.C. 2941.25, other Ohio appellate courts have also concluded aggravated robbery is not an allied offense to aggravated murder under R.C. 2903.01(B). *State v. Green*, 2d Dist. No. 2007 CA 2, 2009-Ohio-5529, ¶ 222; *State v. Humphrey*, 8th Dist. No. 89476, 2008-Ohio-685, ¶ 40-41.

{¶ 55} Our results in this case are also consistent with prior decisions of the Ohio Supreme Court on the issue. The Ohio Supreme Court has consistently ruled the offense of aggravated murder under the felony-murder provisions of R.C. 2903.01(B) is not an

allied offense to the underlying felonies listed in the statute and the prohibitions against double jeopardy do not prohibit punishment both for aggravated murder under R.C. 2903.01(B) and for the underlying felonies. See *State v. Coley*, 93 Ohio St.3d 253, 264-265, 2001-Ohio-1340 (aggravated murder, aggravated robbery and kidnapping); *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, at the syllabus (aggravated murder and aggravated robbery); *State v. Keene* (1998), 81 Ohio St.3d 646, 264-265 (multiple counts of not only aggravated murder but also of aggravated robbery and aggravated burglary); *State v. Moss* (1982), 69 Ohio St.2d 515, paragraph two of the syllabus (aggravated murder and aggravated burglary).

{¶ 56} Appellant's Assignment of Error No. 2 is not well-taken.

{¶ 57} We conclude justice has been done to the party complaining and appellant has not been denied a fair trial. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs 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.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

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JUDGE