[Cite as *State v. Smith*, 2011-Ohio-138.]

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

State of Ohio	Court of Appeals No. OT-10-001
Appellee	Trial Court No. 06-CR-012
v.	
Stephen E. Smith	**DECISION AND JUDGMENT**
Appellant	Decided: January 14, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellee.

Robert E. Searfoss, III, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Stephen E. Smith, appeals from his convictions and sentence entered by the Ottawa County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm in part, and reverse in part, the judgment of the trial court.

{¶ 2} The Ottawa County Grand Jury issued an indictment against appellant, charging him with 12 counts of criminal nonsupport for his failure to provide support of his twin daughters. Counts 1, 2, 5, 6, 9, and 10 charged that appellant failed to provide adequate support, in violation of R.C. 2919.21(A)(2). Counts 3, 4, 7, 8, 11, and 12 charged that appellant failed to provide court ordered support, in violation of R.C. 2919.21(B). Counts 1 through 4 involved allegations that appellant failed to provide child support between February 1, 2000, and January 31, 2002. Counts 5 through 8 involved allegations that appellant failed to provide child support between February 1, 2002, and January 31, 2004. Counts 9 through 12 alleged a failure to provide child support between February 1, 2004, and January 31, 2006.

{¶ 3} The matter was tried before a jury on November 16, 2009. At trial, evidence of the following facts was adduced. Appellant is the father of twin girls, born in 1991. During all relevant time periods, appellant was under a court order to pay $100 per month, plus a two percent processing fee, for the support of his children. Between February 1, 2000, and January 31, 2002, appellant made a total of three $57.08 payments. Appellant made no payments between February 1, 2002, and January 31, 2004, and no payments between February 1, 2004, and January 31, 2006.

{¶ 4} Appellant, who acknowledges that the state established all of the essential elements of the offenses charged, asserted the following in support of his affirmative defense. Appellant has severe and uncontrolled diabetes, which has caused him to suffer blackouts and other symptoms since the age of 13. As a sophomore in college in the

early 1990's, appellant became sick and was unable to continue playing college basketball. Appellant has had limited use of his swollen and numb right hand since he came home from school. He also has difficulty walking, due to neuropathy.

{¶ 5} Appellant struggled for years with employment. His last job, which he held for just 11 weeks, began in late 2000 and ended in early 2001. During that period, appellant earned approximately $2,500, and made a total of just three payments of $57.08 toward his child support obligations. At that last job, appellant passed out on a tractor, passed out on the premises and was unable to take care of himself while working. He also passed out on a ladder and was eventually fired for his inability to perform.

{¶ 6} Even prior to his last job in 2001, appellant was seeking and obtaining accommodations from employers, such as reduced work hours and extended breaks.

{¶ 7} Appellant introduced into evidence a variety of doctor's notes. Two of the earliest notes, dated 2002, indicate that appellant could work for three to four hours without restrictions. Another note, dated 2003, indicates that appellant could not work more than three hours per day. Later notes, dated 2004, all indicate that appellant was unable to work due to his medical condition.

{¶ 8} Appellant testified that he is currently unable to perform basic life functions, such as washing his hair, trimming his nails, grocery shopping, wearing shoes, going outside, and preparing his own meals. According to both appellant and his longtime girlfriend, Vanessa Mattox, the three years preceding the November 2009 trial had been the worst and, according to Mattox, marked the point at which appellant could

no longer physically cope. An administrative law judge found that appellant became disabled on November 2, 2004.

{¶ 9} Appellant introduced evidence that he spent time with his twins, providing them with gifts and companionship. Mattox testified to frequent interaction between appellant and his kids, including overnight and weekend visits. Appellant stated that his girls know him "fully" and that they "stayed with" him. Appellant's mother, Oretta Smith, corroborated these facts.

{¶ 10} After the jury concluded its deliberations, appellant was found guilty on Counts 1 through 8, and found not guilty on Counts 9 through 12. The trial court sentenced appellant to serve twelve months in prison on each of Counts 1 through 8, and ordered each sentence to be served concurrently.

{¶ 11} Appellant timely filed an appeal from his conviction, raising the following assignments of error:

{¶ 12} I. "Convictions for Counts 1 through 8 are against the manifest weight of the evidence, and Appellant should have been acquitted thereof."

{¶ 13} II. "The trial court erred as a matter of law entering judgments of conviction on Counts 3, 4, 7 and 8 for criminal non-support pursuant to R.C. § 2919.21(B) because they are allied offenses of similar import to judgments of conviction on Counts 1, 2, 5 and 6, respectively, for criminal non-support pursuant to R.C. 2919.21(A)(2), none committed separately or with a separate animus."

{¶ 14} Appellant argues in his first assignment of error that his convictions were against the weight of the evidence. The "weight of the evidence" involves the jury's resolution of conflicting testimony. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "'* * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 15} Here, it was for the jury to determine whether they believed that appellant was unable to provide adequate support or the established support, but did provide support that was within his ability and means. See R.C. 2919.21(D) (setting forth the affirmative defense for charges of failure to support under R.C. 2919.21(A)(2) and (B)).

{¶ 16} As indicated above, aside from three payments of $57.08 in 2001, appellant paid *nothing* in child support during the relevant time periods charged in Counts 1 through 12. Consistent with the jury's verdicts, there is ample evidence that appellant worked in 2000 and 2001, that he was capable of working three to four hours in 2002 and 2003, and that he was not declared disabled until November 2004. In apparently accepting appellant's affirmative defense as to Counts 9 through 12 (covering the period from February 1, 2004, through January 31, 2006), the jury, likewise, did not act unreasonably.

{¶ 17} Upon our review of the record, we cannot say that the jury clearly lost its way or created such a manifest miscarriage of justice that appellant's convictions should be reversed. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 18} Appellant argues in his second assignment of error that his judgments of conviction pursuant to R.C. 2919(B) and R.C. 2919.21(A)(2) are allied offenses of similar import and, therefore, should have been merged.

{¶ 19} Ohio's multiple-count statute, set forth at R.C. 2941.25, provides as follows:

{¶ 20} "(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.

{¶ 21} "(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."

{¶ 22} "[T]he purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence." *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, ¶ 43. To apply the statute, the Supreme Court of Ohio has established the following analysis:

{¶ 23} "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

{¶ 24} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. [Citation omitted. Emphasis in original.] If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶ 25} "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" [Citation omitted.]

{¶ 26} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶ 27} "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has a separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Id., at ¶ 47-51. (Emphasis in original.)

{¶ 28} In this case, the state concedes, and this court agrees, that the charges against appellant pursuant to R.C. 2919.21(B) and 2919.21(A)(2) are allied offenses of similar import.

{¶ 29} R.C. 2919.21 provides in pertinent part:

{¶ 30} "(A) No person shall abandon, or fail to provide adequate support to:

{¶ 31} "* * *

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

{¶ 33} "* * *

{¶ 34} "(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."

{¶ 35} R.C. 2919.21(A)(2) criminalizes a person's failure to provide "adequate support" to a person's child under age 18. R.C. 2919.21(B) criminalizes a person's failure 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."

{¶ 36} Here, appellant's conduct in failing to provide support to his children was sufficient to establish offenses under both R.C. 2919.21(A)(2) and 2919.21(B). Thus, the offenses are of similar import. See id. at ¶ 48. In addition, the offenses were committed by the same conduct. Because the offenses are of similar import and were committed by

the same conduct, they are allied offenses of similar import and will be merged. See id. at ¶ 49-50.

{¶ 37} The state argues that because the trial court imposed concurrent sentences in this case, any error in failing to merge the convictions against appellant amounts to nothing more than harmless error. We disagree.

{¶ 38} "[I]t is plain error to impose multiple sentences for allied offenses of similar import, even if the sentences are run concurrently." *State v. Sullivan*, supra, ¶ 40, citing *State v. Crowley* (2002), 151 Ohio App.3d 249, 255, citing *State v. Jones*, 10th Dist. No. 98-AP-129; *State v. Lang* (1995), 102 Ohio App.3d 243. Therefore, the trial court should have merged the convictions for the two offenses, rather than imposing concurrent sentences. Accordingly, appellant's second assignment of error is found well-taken.

{¶ 39} For all of the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed in part and reversed in part. The case is ordered remanded to the trial court for the limited purpose of merging appellant's convictions. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

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

Arlene Singer, J.
CONCUR.

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JUDGE