**[Cite as *State v. Irbey*, 2011-Ohio-2079.]**

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

State of Ohio — Court of Appeals No. L-10-1139

Appellee — Trial Court No. CR0200902945

v.

Chad Irbey — **DECISION AND JUDGMENT**

Appellant — Decided: April 29, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

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PIETRYKOWSKI, J.

**{¶ 1}** Defendant-appellant, Chad Irbey, appeals the April 23, 2010 judgment of the Lucas County Court of Common Pleas which, following a guilty plea pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, sentenced him to 23 years to life in prison for murder and aggravated robbery. For the reasons set forth herein, we affirm.

**{¶ 2}** On October 9, 2009, appellant, and his co-defendant Samantha Stewart, were indicted on one count of aggravated murder, R.C. 2903.01(A) and (F), one count of murder, R.C. 2903.02(B) and R.C. 2929.02, and one count of aggravated robbery, R.C. 2911.01(A)(1). The counts contained firearms specifications under R.C. 2941.145. The charges stemmed from the September 24, 2009 murder and robbery of Kevin Dunklin. Appellant entered a not guilty plea.

**{¶ 3}** On November 12, 2009, appellant filed a motion to suppress his videotaped statement to police. Appellant argued that his statements were constitutionally invalid because he did not understand his right to counsel. Following a hearing, the motion was denied.

**{¶ 4}** On March 2, 2010, appellant withdrew his not guilty plea and entered an *Alford* plea to one count of murder and one count of aggravated robbery. At the plea hearing, appellant was informed that he was facing a 28 year maximum prison sentence. On April 23, 2010, the court sentenced appellant to a 15 year to life prison sentence for murder, three years of imprisonment for the firearm specification, and five years of imprisonment for aggravated robbery. The terms were ordered to be served consecutively for a total prison term of 23 years to life. This appeal followed.

**{¶ 5}** Appellant now raises two assignments of error for our review:

**{¶ 6}** "I. Defendant's consecutive sentences are plain error as they are allied offenses.

**{¶ 7}** "II. Defendant failed to receive the benefit of the bargain for which he bargained for with the state."

**{¶ 8}** In appellant's first assignment of error he argues that it was plain error for the trial court to order the murder and aggravated robbery sentences to be served consecutively as they are allied offenses. Conversely, the state asserts that the offenses were committed with a separate animus and, accordingly, consecutive sentences were proper.

**{¶ 9}** The allied offense statute, R.C. 2941.25, provides:

**{¶ 10}** "(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.

**{¶ 11}** "(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."

**{¶ 12}** Recently, the Supreme Court of Ohio provided a new standard to aid in determining whether two offenses are allied and should be merged: 1) "whether it is possible to commit one offense *and* commit the other with the same conduct," 2) if so, then it must be determined "whether the offenses were committed by the same conduct." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 48-49. "If the answer to both

questions is yes, then the offenses are allied offenses of similar import and will be merged." Id. at ¶ 50. The court stated that "the 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." Id. at ¶ 43.

**{¶ 13}** *Johnson* overruled *State v. Rance* (1999), 85 Ohio St.3d 632, which required that sentencing court review statutory elements in the abstract. The court further stated, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.

**{¶ 14}** "* * *

**{¶ 15}** "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 separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Internal citations omitted.) Id. at ¶ 44 and 51.

**{¶ 16}** Appellant was convicted of murder and aggravated robbery. Felony murder pursuant to R.C. 2903.02(B) provides:

**{¶ 17}** "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

**{¶ 18}** Aggravated robbery pursuant to R.C. 2911.01(A)(1) provides:

**{¶ 19}** "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

**{¶ 20}** "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * *."

**{¶ 21}** As to the first prong of the *Johnson* test, it is possible to commit aggravated robbery and felony murder with the same conduct. Aggravated robbery requires the possession and/or use of a deadly weapon during a theft offense. Certainly, the use of a deadly weapon can result in a murder being committed. Accordingly, we must look to the specific facts of the case in order to determine whether the offenses were committed with a separate animus.

**{¶ 22}** At the April 15, 2010 sentencing hearing of appellant and his co-defendant, the trial court indicated its reason for sentencing appellant to a consecutive term. The court reviewed the videotaped statements of both parties and stated:

**{¶ 23}** "Ms. Stewart originally wanted to rob the victim in his motel room. This is, again, based upon the statements of the two defendants gave to the police. This defendant insisted the [victim] be lured into the alley where he would be killed. This defendant is the one who actually shot the victim seven times, twice in the head. I think his culpability is the greatest, and for that reason it requires a longer sentence."

**{¶ 24}** The court further stated that it was Stewart who admitted that appellant had planned to kill Dunklin. Appellant maintained that he acted in self-defense, which the court stated was belied by the evidence. The court then determined that the crimes were committed with a separate animus and were not allied offenses.

**{¶ 25}** This court has reviewed the entire record in this case, including the lengthy statements of appellant and Stewart. Stewart indicated that appellant planned that he was going to "let loose" on Dunklin. In other words, Stewart stated that she knew that appellant was going to kill Dunklin. Appellant shot Dunklin seven times at close range. After the murder, they planned to steal his car and gain access to his motel room where they believed he kept a large amount of money. Based on the foregoing, we find that the offenses were not allied and that it was not plain error to impose consecutive sentences. Appellant's first assignment of error is not well-taken.

**{¶ 26}** In his second assignment of error, appellant argues that he did not receive the benefit of the plea bargain because the court imposed consecutive sentences. Along this vein, appellant contends that the state breached its contract by arguing at the plea and sentencing hearings that appellant committed aggravated murder. Appellant further argues that the state breached its agreement by arguing at sentencing that felony murder and aggravated robbery were not allied offenses.

**{¶ 27}** A plea entered pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, is considered a qualified guilty plea and allows a defendant to enter a guilty plea yet maintain his innocence. Such a plea is often entered where "a defendant intelligently

concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." Id. at 37.

**{¶ 28}** Prior to accepting an *Alford* plea:

**{¶ 29}** "The trial judge must ascertain that notwithstanding the defendant's protestations of innocence, he has made a rational calculation that it is in his best interest to accept the plea bargain. This requires, the court to 1) question the defendant as to his reasons for deciding to plead guilty and 2) inquire into the state's evidence in order to determine that the likelihood of a conviction on offenses of equal or greater magnitude than the offenses to which the defendant entered a plea is great enough to warrant such a decision." (Citations omitted.) *State v. Nicely* (June 30, 2000), 6th Dist. No. F-99-014.

**{¶ 30}** Reviewing the plea hearing, we cannot say that the trial court breached its agreement with appellant by demonstrating what it would have proven had the matter proceeded to trial – the court was required to consider this before accepting appellant's plea. Further, as to the state's position that the murder and robbery offenses were not allied, a recommendation of concurrent sentences was not part of the plea agreement. Finally, appellant was informed at the plea hearing that he faced a maximum sentence of 28 years to life. Appellant indicated that he understood. Appellant was sentenced to 23 years to life, less than the maximum. The plea agreement with the state removed the possible penalties for aggravated murder, including life imprisonment. See R.C. 2929.03(A).

**{¶ 31}** Based on the foregoing, we find that the state did not breach its agreement with appellant and that he did, in fact, receive a benefit from the agreement. Appellant's second assignment of error is not well-taken.

**{¶ 32}** On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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, P.J. _____
CONCUR.
JUDGE