[Cite as *State v. Dority*, 2011-Ohio-2438.]

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

State of Ohio — Court of Appeals No. E-09-027

Appellee — Trial Court No. 2008-CR-352

v.

Ronald J. Dority — **DECISION AND JUDGMENT**

Appellant — Decided: May 20, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

R. Brian Moriarty, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Erie County Court of Common Pleas, wherein, appellant, Ronald J. Dority, entered a plea of guilty to: (1) one count of kidnapping, in violation of R.C. 2905.01(A)(3), a felony of the first degree, (2) one count of felonious assault, in violation of R.C. 2911.03(A)(2), a felony of

the second degree, and (3) one count of a violation of temporary protection order in violation of R.C. 2919.27(A)(1), a felony of the third degree. The trial court sentenced appellant to five years in prison for the first degree felony, four years in prison for the second degree felony, and three years in prison for the third degree felony, to be served consecutively for a total of 12 years of imprisonment.

{¶ 2} The charges against appellant stemmed from an incident that occurred during the pendency of divorce proceedings instituted by appellant's wife, Beth. Appellant, who claimed that he had no job or place to live, discovered that Beth was dating a man that he considered to be a good friend. According to Dority, he decided to commit suicide but wanted to talk with his wife one last time. After consuming four or five beers, he went to the marital residence, entered the home, thereby violating a civil protection order, and found Beth lying in bed. In his statement made to the police, appellant admitted that he sat on top of his wife and tried to choke her. When she reached for her cell phone, appellant grabbed Beth and told her that they were "going for a ride."

{¶ 3} As they were leaving, appellant took the chain from his chainsaw and wrapped it around his wife's arms and hands. Then, using the chain, he dragged her across the street and into the woods. Appellant then put Beth in his vehicle and "drove around until he needed gas." At some point, appellant called the couple's son, Anthony, and told him that he and Beth had just passed two of Anthony's friends. Anthony telephoned those friends, who then followed appellant to the gas station. When Dority stopped his vehicle at the gas station, the friends "jumped" appellant, and a fight ensued.

The police were called. When the police officers arrived at the gas station, they found the loaded shotgun in appellant's vehicle. The officers arrested appellant. Beth was taken to the hospital by ambulance.

{¶ 4} On appeal, Dority contends that the following errors occurred in the proceedings below:

{¶ 5} "I. The trial court erred in running defendant-appellant's sentence consecutive for the charge of kidnapping and the violation of the temporary protection order.

{¶ 6} "II. Defendant-Appellant was denied effective assistance of counsel.

{¶ 7} "III. The trial court erred in failing to set forth the necessary facts in support of consecutive sentences."

{¶ 8} Appellant's first assignment of error maintains that under the doctrine of allied offenses of a similar import, the sentences imposed for kidnapping and for the violation of the temporary protection order were subject to merger. Thus, he argues that the trial court could not order consecutive sentences for these violations. In other words, appellant is asserting that under R.C. 2941.25 and recent case law, he could be found guilty of both offenses but that they must be merged for the purpose of sentencing.

{¶ 9} Prior to addressing the merits of this assignment of error, we find that because appellant failed to raise any objection in the trial court with respect to whether kidnapping and the violation of a temporary protection order are allied offenses of a similar import, appellant waived all but plain error. *State v. Long* (1978), 53 Ohio St.2d

91, 95; Crim.R. 52(B). In order to prevail under a plain error standard, an appellant must not only demonstrate that there was an obvious error in the proceedings, but also that, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 63.

{¶ 10} R.C. 2941.25 provides:

{¶ 11} "(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.

{¶ 12} "(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."

{¶ 13} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus, the Supreme Court of Ohio overruled *State v. Rance* (1999), 85 Ohio St.3d 632, and held that "[w]hen determining whether two offenses are allied offenses of a similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Under *Johnson*, a court must first decide, prior to sentencing, "whether it is possible to commit one offense and commit the other with the same conduct." Id. at ¶ 48. If the multiple offenses can be committed by the same conduct, the court must then determine if the offenses in question were committed with the same animus, specifically, the offenses

consisted of "'a single act, committed with a single state of mind.'" Id. at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50. Thus, if a court finds that the commission of one offense will never constitute the commission of the other, or if the offenses are committed with a separate animus for each offense, they are not subject to merger. Id. at ¶ 51. See, also, *State v. Irbey*, 6th Dist. No. L-10-1139, 2011-Ohio-2079 (applying *Johnson* to determine whether murder and aggravated robbery and felony murder were offenses of a similar import, and after finding that they were not, holding that the trial court did not err in imposing consecutive sentences).

{¶ 14} As pertinent to the case before us, R.C. 2905.01 defines "kidnapping" as follows:

{¶ 15} "(A) No person shall, by force, threat, or deception * * * remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

{¶ 16} "(1) * * *

{¶ 17} "(2) * * *

{¶ 18} "(3) To terrorize, or to inflict serious physical harm on the victim or another; * * *."

{¶ 19} As applicable to this cause, R.C. 2919.27 provides:

{¶ 20} "(A) No person shall recklessly violate the terms of any of the following:

{¶ 21} "(1) A protection order issued or consent agreement approved pursuant to 2927.26 or 3113.31 of the Revised Code;

{¶ 22} "(2) * * *

{¶ 23} "(3) * * *

{¶ 24} "(B) Whoever violates this section is guilty of violating a protection order.

{¶ 25} "(1) * * *

{¶ 26} "(2) * * *

{¶ 27} "(3) * * *

{¶ 28} "(4) If the offender violates a protection order or consent agreement while committing a felony offense, violating a protection order is a felony of the third degree."

{¶ 29} Appellant's conduct in going into the former marital residence, restraining Beth, removing her from her home, and terrorizing her, not only constituted kidnapping, but also violated the protection order. Nonetheless, each offense was performed with a separate animus. Appellant himself stated that he only went to see Beth because he believed that he had "nothing to live for" and decided that before he "took his life," he wanted to talk to his wife in order to determine why she hated him. Dority also indicated that the shotgun he had brought with him was to be used to kill himself. He left that shotgun outside when he went into his former home. In other words, appellant went into the marital residence in violation of the protection order with only the intent to talk to Beth. He claimed that he never meant to hurt her.

{¶ 30} It was only after he saw "some revealing" women's underwear on the dining room table and Beth tried to get her cell phone, that appellant grabbed her and told her that they were "going for a ride." Thus, it was only then that appellant's state of mind

changed. He subsequently wrapped a chain around Beth's hands/arms, and dragged her out of the house into the woods. In addition, Dority retrieved the shotgun before they went into that wood. Consequently, it is clear that despite the fact that appellant claimed he still only wanted to talk with Beth, it was at this point in time that Dority forced his victim out of the house to terrorize or cause serious physical harm to her. Accordingly, the two offenses were not committed with a single state of mind. Therefore, the court below did not err in imposing consecutive sentences for appellant's convictions on one count of kidnapping and one count of violating a protection order. Appellant's first assignment of error is found not well-taken.

{¶ 31} In his second assignment of error, appellant urges that he was deprived of effective assistance of trial counsel because counsel failed to argue that the sentences imposed for kidnapping and a violation of the temporary protection order must be merged, thereby forcing appellant to prove the higher burden of plain error on appeal.

{¶ 32} In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court set forth a two part test to determine ineffective assistance of counsel. Id. at 687. In order to demonstrate ineffective assistance of counsel, appellant must satisfy both prongs. Id. First, he must demonstrate that trial counsel's conduct fell below an objective standard of reasonableness. Id. at 688. Second, he must show that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. Id. The failure to prove either prong of the test makes it unnecessary for a court to consider the other prong. Id. at 697.

{¶ 33} Even assuming that Dority's trial counsel was ineffective in this regard, that failure did not prejudice appellant. Specifically, in appellant's first assignment of error, we applied a plain error standard and found that appellant did not commit the violation of the temporary protection order and the kidnapping with the same animus. As a result, the two violations were not subject to merger under R.C. 2941.25. Therefore, appellant's second assignment of error is without merit.

{¶ 34} In his third assignment of error, appellant contends that in *Oregon v. Ice* (2009), 555 U.S. 160, the Supreme Court of the United Stated abrogated the holdings in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Thus, he maintains the trial court was obligated to, under former R.C. 2929.14(E)(4) and 2929.41(A), engage in judicial fact-finding prior to imposing consecutive sentences. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, however, the Ohio Supreme Court addressed this argument and held that *Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, which were held unconstitutional in *Foster*. Id. at paragraph two of the syllabus. As a result, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that such findings be made. Id. at paragraph three of the syllabus. Appellant's third assignment of error is found not well-taken.

{¶ 35} Upon consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE