[Cite as *State v. Nickel*, 2012-Ohio-6067.]

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

State of Ohio	Court of Appeals No. OT-11-037
Appellee	Trial Court No. 07 CR 157
v.	
Lesley L. Nickel	**DECISION AND JUDGMENT**
Appellant	Decided: December 21, 2012

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Jeffrey P. Nunnari, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Ottawa County Court of Common Pleas sentencing appellant, Lesley Nickel, to a ten-year term of imprisonment pursuant to his conviction for rape in violation of R.C. 2907.02(A)(2). For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} Nickel was indicted, tried by the bench, and found guilty on one count of rape in violation of R.C. 2907.02(A)(2), and one count of sexual battery in violation of R.C. 2907.03(A)(5). However, prior to sentencing, Nickel successfully moved to dismiss the rape charge based on the state's failure to include a mens rea in the indictment. Accordingly, the trial court sentenced Nickel to a prison term of five years on the sexual battery charge.

{¶ 3} An appeal to this court followed, in which the state argued that the trial court erred when it dismissed the rape charge. *State v. Nickel*, 6th Dist. No. OT-09-001, 2009-Ohio-5996, ¶ 28 ("*Nickel I*"). In addition, Nickel cross-appealed arguing that the trial court erred by failing to dismiss the sexual battery charge. *Id.* at ¶ 30. We reversed the trial court's dismissal of the rape charge and affirmed the trial court's ruling with respect to the sexual battery charge. *Id.* at ¶ 57.

{¶ 4} On remand, the trial court resentenced Nickel to a prison term of five years for the sexual battery charge and a term of ten years for the rape charge, to be served consecutively. Once again, Nickel appealed to this court. This time, Nickel argued that the trial court erred by failing to merge the two offenses under R.C. 2941.25. *State v. Nickel*, 6th Dist. No. OT-10-004, 2010-Ohio-5510, ¶ 6 ("*Nickel II*"). Upon application of the two-step analysis from *State v. Blankenship*, 38 Ohio St.3d 116, 526 N.E.2d 816 (1988), we affirmed.

{¶ 5} However, the Ohio Supreme Court accepted Nickel's discretionary appeal and vacated our judgment. *State v. Nickel,* 128 Ohio St.3d 353, 2011-Ohio-739, 944 N.E.2d 234, ¶ 2 ("*Nickel III*"). In its opinion, the Ohio Supreme Court remanded the case to this court and instructed us to apply its recent decision in *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

{¶ 6} Applying *Johnson* on remand, we determined that the crimes of rape and sexual battery were allied offenses and should have been merged by the trial court in this case. *State v. Nickel*, 6th Dist. No. OT-10-004, 2011-Ohio-1550, ¶ 7 ("*Nickel IV*"). Thus, we reversed the trial court's judgment and remanded the case "for further proceedings." *Id.* at ¶ 8.

{¶ 7} At the trial court, Nickel filed an "Objection to Sentencing on Grounds of Double Jeopardy." The trial court overruled that objection and allowed the state to choose whether to sentence Nickel for sexual battery or rape. The state chose to sentence Nickel for the rape charge. Accordingly, on October 27, 2011, the trial court sentenced Nickel to a prison term of ten years. Nickel now appeals the trial court's judgment.

B. Assignment of Error

{¶ 8} Nickel asserts the following assignment of error:

> The sentence imposed on October 27, 2011 constitutes double jeopardy, or is otherwise contrary to law in that it essentially re-opened a prior final conviction.

II. Analysis

{¶ 9} In his sole assignment of error, Nickel argues that the trial court's October 27, 2011 sentence constituted double jeopardy in violation of the U.S. Constitution and the Ohio Constitution.

{¶ 10} The Fifth Amendment to the U.S. Constitution provides: "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb * * *." The Ohio Constitution, Article I, Section 10, provides a similar prohibition: "No person shall be twice put in jeopardy for the same offense." The federal and state constitutional protections are coextensive. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 14. In addition, Ohio has codified these constitutional protections in R.C. 2941.25, which states:

> (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.
>
> (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} Nickel admits that the state may ordinarily elect to sentence a defendant for whichever allied offense it chooses. Nevertheless, Nickel argues that the "procedural posture" of this case is unique, in that the October 27, 2011 sentence required the reopening of a final conviction on the sexual battery count. Nickel contends that the sexual battery conviction became final on November 13, 2009, the date *Nickel I* was decided. However, Nickel's contention is belied by our explanation of a final conviction in *State v. Greene*, 6th Dist. No. S-03-045, 2004-Ohio-3456. In *Greene*, we stated that a conviction becomes final when the defendant has exhausted his appellate rights. *Id.* at ¶ 10. While *Greene* addresses a different issue (i.e., retroactive application of case law), our explanation of what constitutes a final conviction remains applicable to this case.

{¶ 12} Contrary to Nickel's argument, the sexual battery conviction has not yet become "final" for double jeopardy purposes. In his brief, Nickel argues that the sexual battery conviction was not at issue in *Nickel II*, *Nickel III*, and *Nickel IV*. However, he goes on to state: "Admittedly, Mr. Nickel did in fact urge reversal and remand, both in this court in *Nickel II*, and in the Supreme Court in *Nickel III*, for purposes of resentencing under a traditional allied offenses rubric."

{¶ 13} Nickel has consistently sought a determination from this court and the Supreme Court that the trial court erred in failing to merge the sexual battery count and the rape count as allied offenses. In order to address that issue, we must examine both the rape count and the sexual battery count, and any relief granted from those appeals will necessarily affect both counts. We cannot determine whether the two offenses are allied

offenses without considering them both. Since both counts remain subject to review by this court, Nickel's appellate rights have not been exhausted. Accordingly, Nickel's sexual battery conviction has not become final for double jeopardy purposes.

{¶ 14} Additionally, we recently noted that double jeopardy does not apply "when a judgment is set aside on appeal prosecuted by the defendant." *State v. Caston*, 6th Dist. No. E-11-077, 2012-Ohio-5260, ¶ 18.

{¶ 15} Here, Nickel seeks relief from the sentence imposed by the trial court pursuant to his successful appeal. In *Nickel II*, Nickel's assignment of error was that "[t]he trial court erred in convicting Mr. Nickel of both rape and sexual battery, as those offenses are allied offenses of similar import, and were committed with a single animus and must merge under R.C. 2941.25." *Nickel II*, 6th Dist. No. OT-10-004, 2010-Ohio-5510, at ¶ 6. After unsuccessfully appealing to this court in *Nickel II*, Nickel appealed to the Ohio Supreme Court, which vacated our decision and remanded the matter back to us for application of its decision in *Johnson*. *Nickel III*, 128 Ohio St.3d 353, 2011-Ohio-739, 944 N.E.2d 234, at ¶ 2. On remand, we determined that the rape offense and sexual battery offense were allied offenses and should have merged. *Nickel IV*, 6th Dist. No. OT-10-004, 2011-Ohio-1550, at ¶ 7.

{¶ 16} In accordance with our decision in *Caston*, we conclude that double jeopardy does not apply to this case. Essentially, Nickel sought to have the sexual battery count and rape count merged. Having received that relief, Nickel cannot now claim that

his rights regarding double jeopardy preclude him from being resentenced on the rape charge. Accordingly, Nickel's assignment is found not well-taken.

III. Conclusion

{¶ 17} The judgment of the Ottawa County Court of Common Pleas is hereby affirmed. Costs are hereby assessed to the appellant in accordance with 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE