[Cite as *State v. Edwards*, 2013-Ohio-519.]

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

State of Ohio	Court of Appeals No. WD-11-078
Appellee	Trial Court No. 11 CR 145
v.	
Richard Edwards	**DECISION AND JUDGMENT**
Appellant	Decided: February 15, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Heather Baker and Jacqueline M. Kirian, Assistant
Prosecuting Attorneys, for appellee.

Lorin J. Zaner and Jill M. Varnes-Richardson, for appellant.

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YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas, finding appellant, Richard Edwards, guilty of two counts of gross sexual imposition, and sentencing him to two consecutive 54-month prison terms.

A. Facts and Procedural Background

{¶ 2} On March 17, 2011, Edwards was indicted by the Wood County Grand Jury on one count of attempted rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b), 2923.02(A), and 2923.02(E)(1). In addition, Edwards was indicted on two counts of gross sexual imposition, both felonies of the third degree, one in violation of R.C. 2907.05(B), and the other in violation of 2907.05(A)(4).

{¶ 3} Edwards initially entered a plea of not guilty to all counts. However, on October 17, 2011, he withdrew his original plea and entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.E.2d 162 (1970), as to the two counts of gross sexual imposition. At the state's request, the attempted rape charge was dismissed. Prior to accepting his *Alford* plea, the trial court asked the state to recite the facts supporting the charges.

{¶ 4} In its recitation of the facts, the state indicated that, had the case gone to trial, the nine-year-old victim would have testified. The victim would have allegedly stated that, on February 16, 2011, Edwards babysat her while her mother was at a doctor's appointment. While babysitting the victim, Edwards approached her, pulled a fake penis out of a bag he was carrying, and began to "put that fake penis near her private parts over her clothes." Feeling uncomfortable, the victim got up and went to the bathroom. When she returned to the couch, Edwards pulled out another fake penis, "moved her underwear, and * * * put the fake penis on her bare genitalia." Edwards

proceeded to "put gel on the fake penis and [move] it toward her vagina." Finally, Edwards pulled down his pants and showed his penis to the victim.

{¶ 5} At the conclusion of the *Alford* plea hearing, the trial court found that the state had recited sufficient facts from which to find Edwards guilty of the charged offenses. Accordingly, the trial court accepted Edwards' *Alford* plea, found him guilty, and ordered the preparation of a presentence investigation report. At sentencing, the court imposed a 54-month prison term on each count of gross sexual imposition, ordering them to be served consecutively. This appeal followed.

B. Assignments of Error

{¶ 6} Edwards assigns the following errors for our review:

> 1. The Appellant states that the trial court sentenced the Defendant consecutively as to two offenses in violation of R.C. 2941.25, as both offenses were allied offenses of similar import and the Defendant should have been only convicted of one.
>
> 2. The Appellant further states that the trial court sentenced the Defendant to a term of months instead of a term of years and impermissibly applied R.C. 2929.14(A) retroactively.

II. Analysis

A. Allied Offenses

{¶ 7} In his first assignment of error, Edwards argues that the trial court erroneously sentenced him to consecutive sentences for allied offenses of similar import.

During the sentencing hearing, the state argued that the trial court would be justified in imposing consecutive sentences because "[t]here [were] clearly two separate acts that occurred," with a period of time between the two—namely, the time that elapsed while the victim was using the bathroom. Responding to the state's argument, Edwards argued that the entire chain of events represented one course of conduct, and could not be broken into two separate events merely because the victim chose to use the bathroom during the incident.

{¶ 8} R.C. 2941.25 provides:

> (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.

{¶ 9} As set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the test for whether offenses are allied offenses of similar import under R.C. 2941.25 is two-fold. First, the court must determine "whether it is possible to commit one offense and commit the other with the same conduct." *Id*. at ¶ 48. Second,

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.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id*. at ¶ 50.

{¶ 10} Here, Edwards was consecutively sentenced on two counts of gross sexual imposition. These offenses are, by definition, able to be committed by the same conduct, as they are multiple counts of the same statutory offense containing identical elements. *State v. Stoffer*, 7th Dist. No. 09-CO-1, 2011-Ohio-5133, ¶ 182. Since the offenses satisfy the first prong, Edwards may be convicted of all of them only if they were committed separately or with a separate animus as to each. *Johnson* at ¶ 51; R.C. 2941.25(B). We hold that they were.

{¶ 11} First, Edwards pulled out a fake penis and began to rub the victim's "private parts" over her clothes. Then, after the victim returned from the bathroom, Edwards moved the victim's underwear, placing the fake penis on her bare genitalia, and pulled his pants down in order to expose himself. The use of the fake penis over the clothes was a different, distinct sexual activity from the activity that took place after the victim returned from the bathroom. Thus, merger does not apply. *Stoffer* at ¶ 182.

{¶ 12} The facts of this case are similar to those in *State v. Grant*, 2d Dist. No. 19824, 2003-Ohio-7240, ¶ 58. Edwards and the defendant in *Grant* each engaged in multiple offenses near the same time, involving the same victim. In *Grant*, the defendant

was charged with, inter alia, three counts of gross sexual imposition stemming from an encounter he had with a minor named T.M. *Grant* at ¶ 7. Explaining that encounter, the Second District Court of Appeals stated:

> Sometime during March or April 2001, while T.M. was taking a swimming lesson from Defendant, he approached her from behind in the deep end of the pool and pulled her bathing suit to one side. T.M. felt Defendant's penis touch her buttocks, and his penis then move in and out between the cheeks of her buttocks. Defendant then went underwater and, with T.M.'s bathing suit still pulled aside, he blew air bubbles on T.M.'s vagina. T.M. felt Defendant's beard touch her skin during this incident.
>
> Defendant next attempted vaginal intercourse with T.M. but could penetrate only the lips of T.M.'s vagina, moving his penis in and out. Defendant then placed T.M.'s hand on his penis and forced her to move her hand back and forth while he touched T.M.'s vagina with his hand. *Id*. at ¶ 3-4.

{¶ 13} In its analysis of the merger doctrine, the court noted that "[o]ffenses involving distinct, different sexual activity each constitute a separate crime with a separate animus, and are not allied offenses of similar import, *even when they are committed in the course of the same encounter*." (Emphasis added.) *Id.* at ¶ 59, citing *State v. Nicholas*, 66 Ohio St.3d 431, 613 N.E.2d 225 (1993). The court summarized the defendant's actions by breaking them into the following three parts: "(1) Defendant put

his face and mouth on her vagina, (2) Defendant then put T.M.'s hand on his penis and made her move it back and forth, and (3) Defendant next put his hand on T.M.'s vagina." *Id.* Construing these three actions, the court concluded that the defendant had a separate animus as to each action. *Id.* Thus, the court refused to merge the offenses, and stated that Grant could be consecutively sentenced on each of the three counts of gross sexual imposition.

{¶ 14} Although *Grant* was decided prior to the Supreme Court's decision in *Johnson*, its analysis rested on the proposition that allied offenses do not merge when they are committed with a separate animus. That proposition was reaffirmed by the court in *Johnson*.

{¶ 15} Further, subsequent decisions applying *Johnson* have arrived at the same result as the court in *Grant*. For example, in *Stoffer*, the defendant was convicted on two counts of gross sexual imposition. The evidence showed that the defendant had engaged in two acts relevant to the gross sexual imposition counts: (1) touching the breasts of a minor child; and (2) touching the child's pubic region. *Stoffer*, 7th Dist. No. 09-CO-1, 2011-Ohio-5133 at ¶ 183. Applying *Johnson*, the Seventh District Court of Appeals determined that those actions constituted "two distinct acts of sexual misconduct." *Id.* Thus, the court held that "each offense charged constitutes a separate offense of gross sexual imposition, and the crimes do not constitute allied offenses of similar import which must be merged for conviction." *Id.*

{¶ 16} Because the offenses for which Edwards was convicted were committed separately and with a separate animus, merger does not apply. Therefore, the trial court did not err when it ordered Edwards to serve consecutive sentences on the gross sexual imposition counts. Accordingly, Edwards' first assignment of error is not well-taken.

B. Retroactive Application of R.C. 2929.14(A)

{¶ 17} In his second assignment of error, Edwards argues that the trial court erroneously sentenced him to a term of months instead of a term of years, as a result of its impermissible retroactive application of R.C. 2929.14(A).

{¶ 18} In 2011, R.C. 2929.14(A) was amended by H.B. No. 86. Section 4 of H.B. No. 86 provides that it "appl[ies] to a person who commits an offense * * * *on or after the effective date of this section* and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable." (Emphasis added.) R.C. 1.58(B) states: "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended."

{¶ 19} Here, there is no dispute that the offense was committed prior to the effective date of amended R.C. 2929.14(A). Thus, the trial court's application of the amended version of R.C. 2929.14(A) to Edwards was erroneous absent a showing that the penalty, forfeiture, or punishment was reduced by its application pursuant to R.C. 1.58(B).

{¶ 20} The state attempts to justify the trial court's retroactive application of R.C. 2929.14(A) by arguing that its application "reduced the potential penalty faced by Edwards," and was therefore required by R.C. 1.58(B). However, Edwards argues that the application of the amended statute did not benefit him, and, in fact, resulted in a six-month longer prison term. Edwards reasons that the trial court's intent was to sentence him to a less-than-maximum sentence. In order to do so, the trial court would have had to sentence Edwards to four years under the old statute. Instead, he was sentenced to 54 months under the amended statute.

{¶ 21} We agree that the court erred when it applied the amended version of R.C. 2929.14(A). Contrary to the state's argument, we conclude that the amended statute in no way reduces the potential penalty, forfeiture, or punishment that Edwards faced.

{¶ 22} The prior version of R.C. 2929.14(A) provided, in relevant part: "(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years." As amended, R.C. 2929.14(A) now states: "(3)(a) For a felony of the third degree * * *, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months." In addition, the amended version resurrects the judicial fact-finding requirement for consecutive sentences that was severed from the prior version by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 270. Thus, the amended statute makes two changes that are relevant here: (1) the expansion of prison-term options; and (2) the requirement of judicial fact-finding as a prerequisite to imposing consecutive sentences.

{¶ 23} Regarding the prison term changes, we note that, under both the prior and amended versions of R.C. 2929.14(A), the permissible prison term for a felony of the third degree ranges from one to five years. Although it is true that the amended statute delineates the prison terms in six-month increments rather than in the one-year increments outlined in the prior version, we disagree with the state's argument that such a change amounts to a reduction in the penalty, forfeiture, or punishment for the offenses. The same is true with respect to the resurrection of the judicial fact-finding requirement. It is true that judicial fact-finding affords a criminal defendant an additional procedural safeguard against consecutive sentences. However, R.C. 1.58(B) requires more than a procedural benefit. Rather, it requires an actual reduction in the penalty, forfeiture, or punishment for a particular offense. Here, Edwards is subject to the same potential punishment under both statutory editions. While the trial court is now required to engage in judicial fact-finding prior to imposing consecutive sentences, the fact remains that, under either version of R.C. 2929.14(A), the trial court is permitted to impose a prison-term of up to five years.

{¶ 24} Additionally, we note that this case is distinguishable from those cases in which a statute is amended after the commission of the offense but before sentencing, where the amendment fundamentally changes the nature of the offense. *See e.g., State v. Collier*, 22 Ohio App.3d 25, 488 N.E.2d 887 (3d Dist.1984) (applying R.C. 1.58(B) to reduce defendant's sentence for a theft conviction from a felony to a misdemeanor). Ultimately, since the amendments did not reduce the penalty, forfeiture, or punishment

for gross sexual imposition, we conclude that R.C. 1.58(B) is inapplicable. Therefore, we agree with Edwards that the trial court improperly applied the amended version of R.C. 2929.14(A).

{¶ 25} Accordingly, Edwards' second assignment of error is well-taken.

III. Conclusion

{¶ 26} Based on the foregoing, the judgment of the Wood County Court of Common Pleas is hereby reversed. This case is remanded to the trial court for resentencing in accordance with the prior version of R.C. 2929.14(A). Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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