[Cite as *State v. Overton*, 2013-Ohio-3291.]

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

State of Ohio

Appellee

v.

Deangelo Overton

Appellant

Court of Appeals Nos. L-12-1137
L-12-1138

Trial Court Nos. CR0201102917
CR0201102855

DECISION AND JUDGMENT

Decided: July 26, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Deangelo Overton, appeals from two May 15, 2012 judgments of the Lucas County Court of Common Pleas. For the reasons which follow, we affirm.

{¶ 2} In case No. CR0201102855, the court convicted appellant following the acceptance of a no contest plea to charges of attempting to commit aggravated burglary,

R.C. 2923.02 and 2911.11(A)(2), two counts of felonious assault, R.C. 2903.11(A)(2), two counts of improperly discharging a firearm at or into a habitation, R.C. 2923.161(A)(1), aggravated burglary, R.C. 2911.11(A)(2), and aggravated robbery, R.C. 2911.01(A)(1). At the time of sentencing, the trial court merged the charges of improperly discharging a firearm into the charges of felonious assault.

{¶ 3} In case No. CR0201102917, the court convicted appellant following the acceptance of a no contest plea to charges of three counts of felonious assault, R.C. 2903.11(A)(2).

{¶ 4} In both cases, every count carried a firearm specification under R.C. 2941.145, but the gun specifications were merged into three separate specifications. The remaining counts against appellant in both cases were dismissed.

{¶ 5} The trial court sentenced appellant in case No. CR0201102855 to serve six years for attempting to commit aggravated burglary, seven years for the two counts of felonious assault, and ten years each for aggravated burglary and aggravated robbery. The court also ordered the sentences to be served consecutively to each other and to the sentence in case No. CR0201102917. The trial court sentenced appellant in case No. CR0201102917 to seven years on each of three counts and ordered these sentences to be served consecutively. The court also imposed three separate mandatory and consecutive three-year terms of imprisonment for the three merged firearm specifications. In total, appellant was ordered to serve 70 consecutive years in prison.

{¶ 6} On appeal, appellant asserts the following assignments of error:

1) The Trial Court erred by incorrectly applying the test for allied offenses laid out in *State v. Johnson*, to the prejudice of Appellant.

2) The Trial Court abused its discretion in sentencing Appellant to a prison term of seventy years.

{¶ 7} The charges in this case arose out of three separate incidents. The first two incidents relate to case No. CR0201102855. On October 28, 2011, appellant attempted to burglarize a residence by breaking a window and when the residents looked out the window, appellant fired two shots toward the residence. On October 31, 2011, appellant forced his way into another residence to burglarize the home when the homeowner returned. Appellant held the homeowner at gunpoint while he walked her through the property to locate more items to steal. Appellant forced the homeowner to tell him the PIN number to an ATM card and was seen on videotape using the card at an ATM. Case No. CR0201101917 involved an incident on November 4, 2011, when appellant attempted to purchase drugs in a parking lot and attempted to rob the seller. As the seller fled, appellant fired at the seller, and the bullets hit a woman and her three-year-old child inside an apartment.

{¶ 8} In his first assignment of error, appellant asserts that the trial court incorrectly applied the test of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, to determine whether the offenses of aggravated burglary with a weapon, R.C. 2911.11(A)(2), and aggravated robbery with a weapon, R.C. 2911.01(A)(1), should

have been merged. He argues the court questioned whether it was possible to *commit one without committing the other*, rather than by questioning whether it was possible to *commit one offense and commit the other with the same conduct*. This assignment of error relates to case No. CR0201102855 and the offense of October 31, 2011, where appellant forced his way into a residence to burglarize the home and, after the homeowner returned, held the homeowner at gunpoint while he located more items to steal.

{¶ 9} Appellant also argues that we should reconsider our holding in *State v. Hakim*, 6th Dist. Lucas No. L-10-1153, 2011-Ohio-5525, ¶ 43 and find these two offenses are allied offenses as the Eleventh Appellate District held in *State v. Jarvi*, 11th Dist. Ashtabula No. 2011-A-0063, 2012-Ohio-5590, ¶ 24. Appellant argues that other appellate districts have inferred the same holding as the *Jarvi* case, citing *State v. Tapscott*, 7th Dist. Mahoning No. 11 MA 26, 2012-Ohio-4213, ¶ 47; *State v. Linde*, 9th Dist. Summit No. 26209, 2012-Ohio-2885, and *State v. Jackson*, 2d Dist. Montgomery No. 24430, 2012-Ohio-2335, ¶ 137, fn. 7.

{¶ 10} R.C. 2941.25 prohibits the imposition of multiple punishments for allied offenses of similar import. The test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 is: first, can both offenses be committed by the same conduct; and second, if it is possible to commit both offenses with the same conduct, were the offenses "committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 47-49, *overruling at* ¶ 45 *State v. Rance*, 85

Ohio St.3d 632, 637-638, 710 N.E.2d 699 (1999). A "yes" to both questions means the offenses are allied offenses of similar import and must be merged. The Ohio Supreme Court later emphasized that the trial court should not make an "abstract analysis, but instead should consider the statutory elements of each offense in the context of the defendant's conduct." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 20. Nonetheless, the Ohio Supreme Court did not limit the *Johnson* test to only the second part of the test.

{¶ 11} The elements of aggravated burglary are: 1) by force, stealth, or deception, 2) trespass in an occupied structure, 3) when another person other than an accomplice of the offender is present, 4) with purpose to commit in the structure any criminal offense, and 5) while having a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control. R.C. 2911.11. The elements of aggravated robbery are: 1) in attempting or committing a theft offense or in fleeing immediately after the attempt or offense and 2) had a deadly weapon and either displayed or brandished it to indicate the offender had a weapon or would use it. R.C. 2911.01(A)(1).

{¶ 12} In *Hakim*, 6th Dist. Lucas No. L-10-1153, 2011-Ohio-5525, after considering only the first part of the Johnson test as applied to the same offenses present in this case, we held "it is not possible to commit aggravated burglary and aggravated robbery with the same conduct." *Id.* at ¶ 43. We found the commission of the aggravated burglary is complete once the perpetrator enters the residence with a weapon and with the intent to commit a crime therein. The aggravated robbery occurs after entry into the

home when the perpetrator encounters the victim inside the home and steals something from him by force or threat of force with a deadly weapon. *Id*., citing *State v. Smith*, 8th Dist. Cuyahoga No. 95243, 2011-Ohio-3051, ¶ 80, and *State v. O'Neil*, 11th Dist. Portage No. 2010-P-0041, 2011-Ohio-2202, ¶ 47-49. *Accord State v. Fears*, 86 Ohio St.3d 329, 344, 715 N.E.2d 136 (1999), citing *State v. Frazier*, 58 Ohio St.2d 253, 255, 389 N.E.2d 1118 (1979); *State v. Slagle*, 65 Ohio St.3d 597, 611, 605 N.E.2d 916 (1992); *State v. DeWitt*, 2d Dist. Montgomery No. 24437, 2012-Ohio-635, ¶ 33; *State v. Turner*, 2d Dist. Montgomery No. 24421, 2011-Ohio-6714, ¶ 23; and *State v. England*, 6th Dist. Lucas No. L-91-065, 1992 WL 37766, *3 (Feb. 28, 1992).

{¶ 13} Appellant argues that there should never be a bright-line rule after *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Instead, the court should only consider whether the two offenses were committed by means of the separate conduct of the defendant.

{¶ 14} We find appellant's reliance upon other cases to support his position is erroneous. In *State v. Jarvi*, 11th Dist. Ashtabula No. 2011-A-0063, 2012-Ohio-5590, appellant pled guilty to charges of committing physical harm aggravated burglary, R.C. 2911.11(A)(1) and physical harm aggravated robbery, R.C. 2911.01(A)(3). At sentencing, appellant sought to merge the two offenses for sentencing purposes. The court held that it was possible under the facts of that case to commit both offenses with the same conduct and the crimes were not committed separately or with a separate

animus. *Id*. at ¶ 24. Because the *Jarvi* case concerns different statutes, the holding in that case is not applicable here.

{¶ 15} Appellant argues that other appellate districts have inferred that merger is proper. However, in *State v. Tapscott,* 7th Dist. Mahoning No. 11 MA 26, 2012-Ohio-4213, the issue of merging the same convictions involved in the case before us was never raised nor addressed by the trial court. The appellate court merely noted only that the state had conceded that the trial court could merge the convictions and, therefore, separate sentences could not be imposed even if they were ordered to be served consecutively. *Id*. at ¶ 47, fn. 1. We disagree with appellant that the *Tapscott* court found it was possible to merge these two offenses; the court did not make a finding on this issue. It merely accepted the fact that the state had agreed to allow the merger.

{¶ 16} In *State v. Linde*, 9th Dist. Summit No. 26209, 2012-Ohio-2885, ¶ 4, the appellate court did nothing more than remand the case to the lower court for a mandatory hearing on the issue of whether his convictions for aggravated robbery and aggravated burglary should have been subject to merger as allied offenses of similar import. The court held that the trial court had failed to consider R.C. 2941.25 and the *Johnson* holding because the issue had never been raised at the time of sentencing.

{¶ 17} Finally, in *State v. Jackson,* 2d Dist. Montgomery No. 24430, 2012-Ohio-2335, ¶ 137, fn. 7, the defendant sought to have all of the counts of the indictment merged into a single murder count on the ground that all of his actions were part of a single course of conduct. The court denied the motion noting that since *Johnson* was

decided, the Second District had "held that aggravated robbery and aggravated burglary often are *not* allied offenses of similar import, and therefore do *not* merge for sentencing, because the a [sic] burglary is complete upon entry into the victim's home, and a robbery subsequently committed inside the home constitutes a new, separate offense." *Id*. at ¶ 137 (emphasis added and citations omitted). While the *Jackson* court implied that there could be a situation where the aggravated burglary and aggravated robbery convictions could be committed with the same conduct, this was not the holding of the case.

{¶ 18} Upon further consideration of the issue, we find that the *Johnson* test does allow for a bright-line rule whenever it is clear from the statutory provisions that one crime could never be committed by the same conduct. Nonetheless, even if we also consider the conduct of appellant in this case, we find that his conduct of breaking into the victim's home (burglary) was a separate action from leading her around her home in search of items to steal (robbery). Therefore, the two offenses were committed separately and with a separate animus and should not be merged for sentencing purposes.

{¶ 19} Applying the established precedent from this and other courts, we find appellant's first assignment of error not well-taken.

{¶ 20} In his second assignment of error, appellant argues that the trial court abused its discretion by sentencing appellant to eight consecutive prison terms totaling 70 years. Appellant acknowledges that the nine mandatory years of incarceration due to the firearm specifications was proper. However, appellant argues that the remaining 61 years of incarceration was not reasonably calculated to achieve the overriding principals of

felony sentencing in light of the fact that appellant was 18 years old at the time of sentencing and had a limited prior record of one juvenile felony conviction and one adult misdemeanor conviction for disorderly conduct.

{¶ 21} When reviewing a felony sentence, the appellate court must first examine the trial court's sentence to determine if it is clearly and convincingly contrary to law pursuant to R.C. 2953.08(G). *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 9, and *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 14-17. If the appellate court finds that the trial court complied with all applicable rules and statutes, it then determines whether the trial court abused its discretion by imposing the sentence. *Id.* The abuse of discretion standard requires that we find the trial court's sentence was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 22} R.C. 2929.11(A) provides that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender." Furthermore, the sentence must be (1) "reasonably calculated to achieve the overriding purposes of felony sentencing"; (2) "commensurate with and not demeaning to the seriousness of the defendant's conduct and its impact upon the victim"; and (3) "consistent with sentences imposed for similar crimes committed by similar defendants." R.C. 2929.11(B). In determining the seriousness of the offense and the likelihood that the defendant will commit other crimes, the trial court should have considered in this case: appellant's conduct, the victims involved, the harm caused to

victims, defendant's record, his level of genuine remorse, and any mitigating factors. R.C. 2929.12. While concurrent sentences are presumed to be appropriate under R.C. 2929.41(A), consecutive sentences may be imposed at the court's discretion. *State v. Elmore* at paragraph two of the syllabus.

{¶ 23} Appellant's attorney explained to the court that he had explained the seriousness of the crimes to appellant and the attorney believed that appellant was remorseful and realized that he needed to be punished, but that appellant lacked the communication ability to project his feelings to others. His attorney also explained that appellant had good family support. The victim of the October 31, 2011 offense testified as to the violent nature of the robbery, her fear for her life, and the negative impact the offense has had on her life. The other victims of the October 28, 2011 offense had moved away by the time of trial. The victims of the November 4, 2011 offense, a juvenile and his mother, did not wish to make an oral statement at the time of sentencing.

{¶ 24} The trial court judge stated that he would not impose a lesser sentence simply because of the number of offenses involved. The court did not believe there was any remorse shown by appellant and found in the probation report disturbing and troubling comments made by appellant that he would have killed the victim for $10 because she was rich and lived in a big house. The trial court concluded that appellant operated on a system of only his wants and how to satisfy those wants. The court determined that consecutive sentences were necessary due to the harm caused and the need to protect the public.

{¶ 25} Upon a review of the record, we find that the sentence in this case was not unreasonable, arbitrary, or unconscionable. The trial court carefully considered the facts of this case and imposed a sentence which would accomplish the goals of felony sentencing.

{¶ 26} Appellant's second assignment of error is not well-taken.

{¶ 27} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE