[Cite as *State v. Sarkozy*, 2009-Ohio-4550.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91809

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL SARKOZY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-461940

BEFORE: McMonagle, J., Cooney, A.J., and Blackmon, J.

RELEASED: September 3, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B)and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Michael Sarkozy, appeals from his convictions, entered after a guilty plea, for attempted murder, aggravated burglary, and kidnapping. Sarkozy contends that his plea was not knowingly, intelligently, and voluntarily made because prior to accepting his plea, the trial court did not advise him that he had the right to testify at trial on his own behalf. He also contends that the trial court erred in sentencing him on both aggravated robbery and kidnapping as they are allied offenses of similar import.

I

{¶ 2} In February 2005, Sarkozy was indicted on ten counts, including one count of attempted murder, two counts of aggravated burglary, two counts of aggravated robbery, two counts of kidnapping, and two counts of felonious assault. Each of these counts also included one- and three-year firearm specifications, a notice of prior conviction specification, and a repeat violent offender specification. Sarkozy was also indicted on one count of having a weapon while under a disability.

{¶ 3} After initially entering a plea of not guilty, Sarkozy withdrew his plea and entered a plea of guilty to one count of attempted murder, with all specifications, one count of aggravated robbery, and one count of kidnapping. The remaining counts were nolled pursuant to the plea agreement.

{¶ 4} This court affirmed Sarkozy's convictions but remanded the cause for resentencing in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Sarkozy*, 8th Dist. No. 86952, 2006-Ohio-3977. The Supreme Court of Ohio subsequently vacated Sarkozy's plea and remanded for retrial because the trial court did not advise Sarkozy at the plea hearing that he would be subject to postrelease control. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509.

{¶ 5} Upon remand, Sarkozy again pled guilty to attempted murder, aggravated burglary, and kidnapping, with all specifications. The other counts were nolled pursuant to the plea agreement.

{¶ 6} That same day, the trial court sentenced Sarkozy to serve a term of ten years incarceration for attempted murder, ten years for aggravated burglary, and four years for kidnapping. The court ordered all terms to be served consecutively to each other and consecutive to a merged three-year firearm specification, for an aggregate term of 27 years.

II

{¶ 7} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179.

{¶ 8} Crim.R.11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest. Under Crim.R. 11(C)(2), when a court accepts a guilty plea in a felony matter, it must address the defendant personally and (1) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty; (2) inform the defendant of and determine that the defendant understands the effect of the plea, and that the court may proceed with judgment after accepting the plea; and (3) inform the defendant and determine that the defendant understands that he is waiving his constitutional rights to a jury trial, to confront the witnesses against him, to call witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial where the defendant cannot be forced to testify against himself.

{¶ 9} The trial court must strictly comply with the dictates of Crim.R. 11(C)(2) regarding the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶18. Although strict compliance does not require rote recitation of the exact language of Crim.R. 11(C)(2)(c), the trial court must actually inform the defendant of the constitutional rights he is waiving and make sure the defendant understands them. *Veney* at ¶27; *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph two of the syllabus; *State v. Parks*, 8th Dist. No. 86312, 2006-Ohio-1352, ¶6.

{¶ 10} With respect to the other requirements of Crim.R. 11(C)(2) involving nonconstitutional rights, reviewing courts consider whether the trial court substantially complied with Crim.R. 11(C)(2) and whether the defendant subjectively understood the implications of his plea and the nature of the rights he was waiving. *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *State v. Stewart* (1977), 51 Ohio St.2d 86, 93. A defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue. *Veney* at ¶17.

{¶ 11} Sarkozy argues that his plea was not knowingly, intelligently, or voluntarily made because the trial court did not advise him prior to accepting his plea that he was waiving the right to testify on his own behalf at trial, a nonconstitutional right. Sarkozy's argument has no merit.

{¶ 12} First, this court has repeatedly considered and rejected the same argument. In *State v. Wangul*, 8th Dist. No. 84698, 2005-Ohio-1175, for example, the defendant argued that the trial court erred in denying his post-sentence motion to withdraw his plea because the court had failed to advise him that he could testify on his own behalf. This court specifically rejected this argument, noting that the advisement was not necessary for an effective plea. *Wangul* at ¶12. See, also, *State v. Exline*, 8th Dist. No. 87945, 2007-Ohio-272, ¶17-20; *State v. Ip*, 8th Dist. No. 86243, 2006-Ohio-2303, ¶30-31; and *State v. Anderson*, 8th Dist. No. 87309, 2006-Ohio-5431, ¶16-18.

{¶ 13} Moreover, the record reflects that Sarkozy understood the implications of his plea and the nature of the rights he was waiving. The trial court carefully explained each constitutional right that Sarkozy was waiving and, upon questioning, Sarkozy stated that he understood those rights. The court also explained the charges against Sarkozy and the possible penalties, and Sarkozy again stated that he understood. Further, the court asked Sarkozy if he had "any questions about this case or that you would like to have answered," and Sarkozy responded negatively. Upon this record, it is apparent that Sarkozy's plea was made knowingly, intelligently, and voluntarily.

{¶ 14} Finally, Sarkozy makes no claim that he would not have pled guilty but for the trial court's failure to tell him that he could testify on his own behalf. Accordingly, he has failed to demonstrate any prejudice.

{¶ 15} Appellant's first assignment of error is overruled.

III

{¶ 16} In his second assignment of error, Sarkozy argues that the trial court erred in not merging the kidnapping and aggravated robbery offenses because they are allied offenses of similar import. He contends that the kidnapping and aggravated robbery of the victim in this case were all part of the same transaction and committed with the same animus, so the trial court should have merged the offenses for sentencing.

{¶ 17} The determination of whether there are allied offenses of similar import with a single animus, justifying a conviction for only one offense, is a legal issue for the court to determine. *State v. Kent*, 68 Ohio App.2d 151, 154. When a defendant pleads guilty to multiple offenses, such a determination is made after the defendant enters his guilty pleas. "A defendant may enter pleas of guilty to multiple offenses of similar import. After the court accepts the plea of guilty to all of the offenses, a determination will then be made as to whether they were allied offenses of a similar import with a single animus." Id.

{¶ 18} R.C. 2941.25, Ohio's multi-count statute, states:

{¶ 19} "(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.

{¶ 20} "(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[1] of all of them."

{¶ 21} In applying R.C. 2941.25, the court must first compare the elements of the offenses in the abstract, without considering the evidence in the case. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus. If the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, the offenses are allied offenses of similar import. Id. The court must then consider the defendant's conduct. Id. at ¶14. "If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 22} Sarkozy raised the issue of allied offenses at sentencing and requested that his guilty plea to kidnapping be merged with his plea to aggravated robbery, but the trial court denied his request, reasoning that the elements of the crimes did not correspond to such a degree that the commission of one crime would result in the commission of the other. But, as

[1]This court has recognized that a judgment of conviction has been defined as a plea or verdict of guilty and the sentence imposed. *Kent*, 68 Ohio App.2d at 154, citing Crim.R. 32(B) and *State v. Henderson* (1979), 58 Ohio St.2d 171. "Thus, the sentence imposed completes the judgment of conviction. When we speak of the allied offense doctrine, we are speaking of offenses for which an individual may be sentenced. In reality, the allied offense statute is a sentencing vehicle." Id.

the Ohio Supreme Court made clear in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198, fn. 29, "implicit within every robbery (and aggravated robbery) is a kidnapping." "[W]hen a person commits the crime of robbery, he must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery." *State v. Logan* (1979), 60 Ohio St.2d 126, 131. Thus, kidnapping and aggravated robbery may be allied offenses of similar import, and Sarkozy may be convicted of both only if he committed the crimes separately or with a separate animus for each crime.

{¶ 23} At the sentencing hearing, apropos to the allegation that there were allied offenses of similar import, the prosecutor outlined the facts as follows:

{¶ 24} "He dragged her throughout that home, he tied her up with a phone cord, stabbed her, slit her throat. I have the photos here again, Your Honor, to review the photos, to review what happened.

{¶ 25} "Although three years have gone by since that time, she's obviously still effected [sic]. Thank God she's still here and strong. But when he was doing that, dragging her through that home, beating her, stabbing her repeatedly in the chest, face, slitting her throat, he was threatening her children. He was stating that if she told, he was going to come back and kill those children."

{¶ 26} While the prosecutor did not directly reference the aggravated robbery in her recital of the facts, it is clear to this court that there is sufficient evidence of a separate animus to the kidnapping, and hence the trial court was correct in holding that the aggravated robbery and kidnapping were not allied offenses of similar import, but rather separate and distinct offenses, each deserving separate punishment. Accordingly, appellant's second assignment of error is overruled, and the conviction is affirmed.

It is ordered that appellant pay the costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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CHRISTINE T. McMONAGLE, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., CONCURS
WITH SEPARATE CONCURRING OPINION

COLLEEN CONWAY COONEY, A.J., CONCURRING:

{¶ 27} I concur with the majority opinion and write separately only to add an important observation. Sarkozy negotiated his plea agreement in 2005 and again in 2008. He, his counsel, and the prosecuting attorney selected three of the ten charges to which he would plead guilty. In return for Sarkozy's guilty plea, the State nolled the remaining charges.

{¶ 28} As the Ohio Supreme Court recently stated, under R.C. 2941.25, a thief may be charged with both theft and receiving stolen property but he may be convicted of only one, "and the prosecution sooner or later must elect as to which offense it wishes to pursue." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶23, quoting *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 242.

{¶ 29} In the instant case, the prosecution elected three of the ten charges and Sarkozy agreed to this election. Sarkozy entered into a plea bargain in which he agreed to plead guilty to three separate crimes. A guilty plea waives all appealable errors except for a challenge to the knowing, intelligent, and voluntary nature of the plea. *State v. Hooper*, Columbiana App. No. 03 CO 30, 2005-Ohio-7084, citing *State v. Spates* (1992), 64 Ohio St.3d 269, 272-273.

{¶ 30} This court recently rejected the allied offense challenge in the context of a negotiated plea in *State v. Antenori*, Cuyahoga App. No. 90580, 2008-Ohio-5987, ¶5-6, discretionary appeal accepted, No. 2009-0290. This holding was followed in *State v. Geddes*, Cuyahoga App. No. 91042, 2008-Ohio-6489, ¶24.