

[Cite as *State v. Bias*, 2010-Ohio-1977.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93053

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY BIAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513972

BEFORE: Celebrezze, J., Gallagher, A.J., and McMonagle, J.

RELEASED: May 6, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Robert A. Dixon
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Matthew Meyer
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Gregory Bias, attacks the validity of his sentence after pleading guilty to one count of sexual battery and one count of abduction. Appellant claims that his sentence is invalid because the convictions are allied offenses and the registration and reporting requirements under the Adam Walsh Act (“AWA”) are unconstitutional. After a thorough review of the record, and for the following reasons, we affirm in part and remand this case to the trial court to make a determination on whether the offenses should merge.

{¶ 2} Appellant was indicted on August 4, 2008 on charges of rape and kidnapping stemming from the sexual mistreatment of a juvenile family member who had once before been the victim of sexual abuse at the hands of another family member. Appellant cooperated with the investigation and eventually agreed to plead guilty to sexual battery in violation of R.C. 2907.03 and abduction in violation of R.C. 2905.02, both felonies of the third degree.

{¶ 3} On February 24, 2009, appellant was sentenced to one year of incarceration on each count, to run consecutively, as well as a period of postrelease control. Appellant was also classified as a Tier III sex offender under R.C. 2950, et seq., and informed of the reporting and registration requirements pursuant to such a classification.

{¶ 4} Appellant objects to the imposition of these reporting and registration requirements based on an argument that they are unconstitutional. He also objects to consecutive prison terms on each conviction based on an argument that they are allied offenses that should have merged for purposes of sentencing.

Law and Analysis

Constitutionality of the AWA

{¶ 5} In his second assignment of error, appellant argues that “Senate Bill 10, the Adam Walsh Law, is unconstitutional as it imposes an additional punishment in violation of the Double Jeopardy Clause of the Ohio and United States Constitutions as well as the prohibition against cruel and unusual punishment as guaranteed by the Eighth Amendment.”

{¶ 6} The Ohio Supreme Court has previously addressed the constitutionality of sexual offender classification and registration laws under House Bill 180, Megan’s Law, and subsequent amendments. Beginning with *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570, through *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, the Court has not only upheld sex offender registration laws, but supported their retroactive application.¹ The United States Supreme Court has also found

¹ The question of whether the AWA applies retroactively is currently pending before the Ohio Supreme Court in *State v. Bodyke*, Ohio Supreme Court Case No. 2008-2502.

that these laws serve an important governmental interest and do not violate constitutional rights. *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164. Appellant argues that the changes to R.C. 2950 that took effect with the passage of the AWA changed the nature of the law from civil and remedial to punitive. That argument has been addressed by this court and rejected. See *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031, ¶26-33. Appellant claims that the AWA requirements constitute multiple punishments for one offense. The U.S. Supreme Court as well as the Ohio Supreme Court have found sex offender registration laws to be civil, remedial measures, not punitive. *Smith*, supra, at 105-106, 123 S.Ct. 1140; *Ferguson*, supra, at ¶32-33. Therefore, double jeopardy is not implicated in this case.

{¶ 7} Appellant also argues that the registration and reporting requirements constitute cruel and unusual punishment. Again, this court found that the AWA does not impose punishment, but is a civil, remedial measure enacted to protect the public. *Gildersleeve* at ¶26-33. See, also, *Spangler v. State*, Lake App. No. 2008-L-062, 2009-Ohio-3178, ¶64-67; *State v. Acoff*, Cuyahoga App. No. 92342, 2009-Ohio-6633, ¶24 (finding that “the prospective application of the AWA does not violate due process, double jeopardy, or constitute cruel and unusual punishment”).

{¶ 8} Based on prior precedent, appellant's challenge of the AWA is overruled.

Allied Offenses

{¶ 9} Appellant's first assignment of error states, "[t]he lower court erred and denied the appellant equal protection and due process of law when it sentenced him to consecutive sentences without findings required under Ohio law." Appellant bases this argument on allegations that the crimes against the juvenile were committed as one act without a separate animus.

{¶ 10} At the sentencing hearing, the trial court imposed consecutive one-year terms of imprisonment. Toward the close of this hearing, appellant's counsel made an oral motion to reconsider the imposition of consecutive terms. He asked the court for concurrent sentences, arguing the crimes were committed as "a single act without a separate animus." The court denied this motion without a hearing and without a stated reason.

{¶ 11} The state argues that this issue was not properly preserved for review on appeal; however, we find appellant has properly preserved the issue for appeal. At the sentencing hearing, the trial court, however briefly, considered the issue of whether the two charges should have merged for purposes of sentencing. Appellant's oral motion for reconsideration based on a theory of allied offenses properly brought this issue before the trial court, contrary to the state's arguments. It should also be noted that an agreement

to plead to multiple charges or failure to raise the issue of allied offenses at trial does not obviate this court's duty to ensure that a given sentence complies with R.C. 2941.25, Ohio's allied offenses statute. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶23-30. This statute states that "[w]here 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} In an equivalent case, *State v. Banks*, Cuyahoga App. No. 81191, 2002-Ohio-6331, this court was faced with a guilty plea that resulted in convictions for rape and kidnapping. "On the [day of sentencing,] Banks filed a motion to reconsider the sentence, claiming that the kidnapping and rape counts were allied offenses of similar import and he could not be convicted and sentenced for both. * * * [T]he judge denied the motion without holding a hearing." (Internal citations omitted.) *Id.* at ¶2. This court remanded the case for a hearing on the issue finding that "kidnapping and rape are considered abstractly allied, and thus the judge must determine whether the offenses were committed with a single animus." (Internal citations omitted.) *Id.* at ¶4. The *Banks* court declined to determine the issue because the record before it was insufficient for such an analysis. *Id.* at ¶5.

{¶ 13} Similarly, the record before this court is bereft of information regarding the offense. The journal entry and record also fail to instruct this court under which subsections of the revised code appellant pled guilty; therefore, we cannot make a determination as to whether the offenses are allied. This case must be remanded to the trial court to determine whether the offenses of abduction and sexual battery are allied offenses in this case.

Conclusion

{¶ 14} Appellant argues that the registration and reporting requirements embodied in R.C. 2950, et seq., are unconstitutional. The courts of this state have continued to uphold these provisions with limited exception. The imposition of these requirements do not violate the principles of double jeopardy and do not constitute cruel and unusual punishment.

{¶ 15} Appellant pled guilty to sexual battery and abduction. This court is prevented from determining if these offenses are allied offenses that should merge for sentencing; therefore, the case must be remanded so the trial court may conduct a hearing to make that determination.

{¶ 16} This cause is affirmed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds 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.

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

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR