[Cite as *State v. Banks*, 2010-Ohio-3206.]

[Please see original opinion at 2010-Ohio-1762.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93880

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLTON BANKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-420197 and CR-421541

BEFORE: Stewart, J., Gallagher, A.J., and Dyke, J.

RELEASED: July 8, 2010
JOURNALIZED: July 8, 2010

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ON RECONSIDERATION[1]

MELODY J. STEWART, J.:

{¶ 1} This is the fourth appeal by defendant-appellant, Carlton Banks, from his 2002 convictions on drug charges and involuntary manslaughter. This appeal stems from a resentencing ordered due to the court's failure to advise Banks that he would be placed on postrelease control upon expiration of his sentence. Of the several arguments that Banks raises on appeal, he most strenuously argues that some of the offenses he pleaded guilty to were

[1]The original announcement of decision, *State v. Banks*, Cuyahoga App. No. 93880, 2010-Ohio-1762, released April 22, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

allied offenses of similar import that should have been merged for sentencing. We find no error and affirm.

I

{¶ 2} In 2002, Banks entered guilty pleas in two separate criminal cases: in CR-420197 he pleaded guilty to charges of drug possession and drug trafficking; and in CR-421541 he pleaded guilty to charges of involuntary manslaughter, failure to comply, and aggravated assault. The court imposed consecutive, one-year prison terms in CR-420197. In CR-421541, the court imposed a ten-year sentence for the manslaughter conviction; a two-year sentence for failure to comply; and a one-year sentence for aggravated vehicular assault. The sentences in CR-421541 were ordered to run consecutively, and then consecutively to the sentences imposed in CR-420197, for a total of 15 years.

{¶ 3} Banks appealed, complaining about the length of his sentences, the court's disregard of sentencing factors for failure to comply, the court's alleged bias in sentencing, that he was denied the effective assistance of counsel, and that his convictions for involuntary manslaughter and failure to comply should have merged for sentencing. We rejected all but one of those arguments: that under the sentencing regime existing at the time, the court failed to provide any reasons on the record that consecutive sentences were not disproportionate to the severity of conduct and the danger posed by the

defendant. See *State v. Banks*, 8th Dist. Nos. 81679 and 81680, 2003-Ohio-1171, at ¶20. We thus remanded for the sole purpose of resentencing.

{¶ 4} Prior to being resentenced, Banks filed a motion to withdraw his guilty plea. The court denied that motion and resentenced Banks to the same sentence. Banks appealed on a number of issues, including the court's refusal to permit a withdrawal of the guilty pleas, the length of sentence, and the failure to merge sentences. We rejected all of these arguments and affirmed. See *State v. Banks*, 8th Dist. Nos. 83782 and 83783, 2004-Ohio-4478.

{¶ 5} In 2008, Banks filed a motion to vacate his sentence on grounds that, upon resentencing, the court failed to impose a specific period of postrelease control. The court denied the motion even though the state conceded that Banks's sentence did not include postrelease control. On appeal, we found under authority of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, that the failure to order a term of postrelease control rendered Banks's sentence void and that he was entitled to a de novo sentencing hearing. See *State v. Banks*, 8th Dist. No. 92042, 2009-Ohio-3099, at ¶14.

{¶ 6} The court conducted a new sentencing hearing at which it once again reimposed the same 15-year sentence, including a five-year term of postrelease control.

II

{¶ 7} In this appeal, Banks first argues that he was denied due process of law because the indictment for involuntary manslaughter failed to state the culpable mental element as required by *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. We rejected this same proposition in *State v. Lawrence*, 180 Ohio App.3d 468, 2009-Ohio-33, 905 N.E.2d 1268, finding that a guilty plea waives any defect in the indictment occasioned by a failure to allege a culpable mental state. Id. at ¶30. See, also, *State v. Cochran*, 8th Dist. Nos. 91768, 91826, and 92171, 2009-Ohio-1693, at ¶40. Because Banks pleaded guilty to the involuntary manslaughter count, he waived the right to challenge any alleged deprivation of constitutional rights that occurred prior to the entry of his guilty plea.

III

{¶ 8} Banks next argues that his convictions for trafficking and drug possession in CR-420197 should have merged because they were allied offenses of similar import for purposes of R.C. 2941.25. He also maintains that the conduct charged in the involuntary manslaughter count (causing the death of another as a proximate result of committing a third degree felony)

encompassed the failure to comply count (operating his vehicle so as to wilfully elude police after receiving a signal to bring the vehicle to a stop, and in the process causing a substantial risk of serious physical harm to persons or property) such that the commission of one would necessarily result in the commission of the other.

A

{¶ 9} The "law of the case" doctrine states that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.

1

{¶ 10} In *State v. Banks*, 8th Dist. Nos. 81679 and 81680, we first addressed and rejected Banks's allied offenses argument:

{¶ 11} "Looking at the elements of defendant's offenses, we determine that involuntary manslaughter and failure to comply with an order of a police officer are not allied offenses of similar import. Involuntary manslaughter requires causing the death of another as a proximate result of committing or attempting to commit a felony. R.C. 2903.04. Failure to comply with the order of a police officer does not require that the victim be killed or even injured. Rather, violation of the particular code section with which defendant was charged requires only that the defendant's operation of the

motor vehicle cause a substantial risk of serious physical harm. R.C. 2921.331(C)(5)(a)(ii). Failure to comply is only one of the many felonies that may support a charge of involuntary manslaughter. Because each offense requires proof of an element that the other does not, they are not allied offenses of similar import. In sum, involuntary manslaughter and failure to comply are not allied offenses because the commission of one will not automatically result in commission of the other." Id. at ¶40.

{¶ 12} Banks renewed this same argument in *State v. Banks*, 8th Dist. Nos. 83782 and 83783. We again rejected it, stating: "Since this identical argument was rejected by this court in *State v. Banks*, Cuyahoga App. Nos. 81679, 81680, 2003-Ohio-1530, the law of the case dictates that this assignment of error is overruled. See *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410." Id. at ¶44. Having twice rejected Banks's arguments that involuntary manslaughter and failure to comply were allied offenses of similar import, that conclusion is certainly the law of the case that Banks can no longer challenge.

{¶ 13} We acknowledge that under similar facts, the First Appellate District reached a different conclusion regarding the application of the law of the case doctrine to allied offenses in cases where there has been a remand for a de novo resentencing due to the court's prior failure to advise an offender of postrelease control. In *State v. Klein*, 1st Dist. No. C-080471,

2009-Ohio-2886, the First District held that the consequence of a failure to inform an offender of postrelease control rendered a sentence void; therefore, "the issues and facts were not the same as in the prior appeal, and the law-of-the-case doctrine does not apply or prevent this court from deciding the issue." Id. at ¶19.

{¶ 14} We disagree with *Klein* because the remand in that case was, as in this case, on the issue of postrelease control — it was unrelated to any issue of allied offenses. While it is true that Klein's original sentence was void, that fact had no bearing on the First District's discussion and legal conclusions relating to an issue of allied offenses in Klein's first appeal — *State v. Klein* (Dec. 3, 1999), 1st Dist. No. C-990066. The First District held that the offenses of involuntary manslaughter and child endangerment were not allied offenses within the meaning of R.C. 2941.25. The order to resentence Klein on the unrelated issue of postrelease control did not give the trial court authority to countermand a prior ruling of law. That issue had been finally decided and established the law of the case, completely separate from the postrelease control issue. Although the First District remanded for a de novo sentencing, that remand did not allow the trial court to disregard definitive statements of law rendered by the court of appeals. If we were to extend the logic employed in *Klein* — that the sentence was void so nothing the appellate court said on appeal had to be applied — the trial court could

arguably have disregarded the mandate to advise Klein of postrelease control on grounds that the original sentence was void so the trial judge could take up the issue anew. That would be an absurd result.

{¶ 15} We have twice rejected Banks's arguments that involuntary manslaughter and failure to comply are allied offenses under R.C. 2941.25. Those rulings are the law of the case.

2

{¶ 16} Even if the allied offenses issue had not been settled by the law of the case, we would nonetheless find the convictions for involuntary manslaughter and failure to comply were not allied offenses of similar import.

{¶ 17} In *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, the supreme court stated:

{¶ 18} "A two-step analysis is required to determine whether two crimes are allied offenses of similar import. See, e.g., *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; [*State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, 710 N.E.2d 699]. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, we stated: 'In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of

the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.' Id. at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus." Id. at ¶31.

{¶ 19} As we stated in *State v. Banks*, 8th Dist. Nos. 81679 and 81680, the elements of involuntary manslaughter and failure to comply do not align because each offense requires proof of an element that the other does not.

{¶ 20} In the original opinion in this case, we cited to *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, for the proposition that even though the elements of two offenses do not align exactly, the offenses may still be allied if the offenses are so similar that the commission of one offense would result in the commission of the other offense. We concluded that if Banks's offenses were not merged, he would be found guilty of "causing a substantial risk of harm to a person while also convicted of causing the death of that same person, based on one single incident." *State v. Banks*, 8th Dist. No. 93880, at ¶32.

{¶ 21} On reconsideration, we find that analysis faulty. *Williams* involved a defendant who had been charged with attempted murder and felonious assault from the act of firing a single shot — although there were

two distinct offenses charged, those offenses arose from a single act with a single animus. Banks's failure to comply with an order of the police while operating a motor vehicle in a manner that caused a substantial risk of serious physical harm to others was a completely separate course of conduct from causing a death while committing a felony. The offense of failure to comply, even if committed in a manner that creates a substantial risk of serious harm to others, can be committed without causing the death of another. Indeed, during Banks's sentencing, the trial judge noted Banks had driven through a residential area at more than 50 miles per hour and that he ran a number of stop signs and traffic signals in the process. These acts independently supported Banks's guilty plea to failure to comply while causing a substantial risk of serious physical harm wholly apart from his causing the death of another while committing a felony. Involuntary manslaughter and failure to comply are not allied offenses.

B

{¶ 22} Banks also complains, for the first time on appeal, that his convictions in CR-420197 for drug trafficking and drug possession should have merged on authority of *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, which held that "[t]rafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under

R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second." Id. at paragraph two of the syllabus.

{¶ 23} Principles of res judicata state that "a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶ 24} In three prior appeals, Banks did not raise any allied offenses issues relating to the drug trafficking and drug possession counts. Those issues could have and should have been raised in the first appeal, so res judicata bars the assertion of those issues in any subsequent appeal. We also recognize that even though *Cabrales* modified the analysis relating to allied offenses, res judicata applies even if there has been a subsequent change in decisional law. See *Mosely v. Echols* (1991), 62 Ohio St.3d 75, 578 N.E.2d 454; *State ex rel. Sneed v. Anderson*, 114 Ohio St.3d 11, 2007-Ohio-2454, 866 N.E.2d 1084, at ¶9.

IV

{¶ 25} The fourth and fifth assignments of error raise issues relating to sentencing factors and complain that the court failed to consider the

applicable statutory factors for the offense of failure to comply and instead relied on factors not alleged in the indictment or admitted at the time of the plea.

{¶ 26} A violation of R.C. 2921.331(B) — failure to comply with an order of a police officer — can become a third degree felony upon consideration of the nonexclusive list of seriousness factors set forth in R.C. 2921.331(C)(5)(b). Among those factors are the duration of the pursuit, the distance of the pursuit, the driver's rate of speed, the number of traffic lights or stop signs that the driver violated, and any other factors the court deems relevant. There is no requirement, statutory or otherwise, for the court to state specific R.C. 2921.331(C)(5)(b) factors in the record or make any specific finding in relation thereto. *State v. Orr*, 8th Dist. No. 92005, 2009-Ohio-4038, at ¶4; *State v. Owen*, Cuyahoga App. No. 89948, 2008-Ohio-3555.

{¶ 27} Despite there being no obligation for the court to address the factors set forth in R.C. 2921.331(C)(5)(b), a number of those factors were present in the record. In Banks's first appeal, we specifically addressed his complaint that the court failed to consider the factors set forth in R.C. 2921.331 and stated:

{¶ 28} "The court made reference to the high rate of speed during the pursuit, the fact that the pursuit occurred on highly traveled roads, and the great harm the pursuit caused other motorists, which are all relevant factors

under R.C. 2921.331(C)(5)(b)(i-ix) that indicate defendant's conduct was more serious than conduct normally constituting the offense. The court also made reference to the fact that defendant was awaiting trial and sentencing or under conditions of post-release [sic] control at the time he committed the offense and that defendant had a criminal record that indicates he has not responded favorably to community control sanctions imposed for previous convictions. These are all relevant factors that R.C. 2929.13(C) states shall be considered under R.C. 2929.12 and indicate that defendant is likely to commit future crimes." *Banks*, 8th Dist. No. 81697, at ¶31.

{¶ 29} While the court did not repeat these factors when it most recently resentenced Banks, those factors were manifest in the record from the first sentencing and were equally applicable to subsequent sentencing proceedings. At all events, the record supported the court's decision to find Banks guilty of a third degree felony.

{¶ 30} We reach the same conclusion regarding Banks's argument that the court ordered consecutive sentences without considering the purposes and principles of sentencing. R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the "overriding purposes of felony sentencing." Those purposes are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(B) provides that a felony sentence must be

reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶ 31} The court's sentencing entry stated that it "considered all of the required factors of the law." By itself, this statement, in conformity with a sentence within the applicable statutory range, would be sufficient under the statutes. See *State v. Lang*, 8th Dist. No. 92099, 2010-Ohio-433, at ¶20. But the court also mentioned on the record several other factors, including that Banks's action caused the death of an innocent bystander, that Banks ran numerous stop signs and traffic signals, and that Banks committed his offenses in a residential neighborhood while driving at speeds of 50 miles per hour. The recitation of these factors put the court in full compliance with its obligation to consider the purposes and factors guiding sentencing discretion.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS

ANN DYKE, J., DISSENTS WITH SEPARATE OPINION

ANN DYKE, J., DISSENTING:

{¶ 32} I respectfully dissent. I would conclude that defendant did not waive the argument that the offenses are allied offenses of similar import by entering a guilty plea to the two distinct offenses of involuntary manslaughter in violation of R.C. 2903.04(A) and failure to comply with an order of police in violation of R.C. 2921.331(B)(5)(a)(ii). I would additionally conclude that these offenses are allied offenses of similar import.

{¶ 33} With regard to the issue of whether defendant waived the argument that the offenses are allied offenses of similar import because he pled guilty to the two distinct offenses, the Ohio Supreme Court in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, has determined that a defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing.

{¶ 34} With regard to whether the convictions for involuntary manslaughter and failure to comply with an order of police are allied offenses, the Supreme Court of Ohio in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, determined that attempted murder in violation of R.C. 2903.02(A) and 2923.02 and felonious assault in violation of R.C. 2903.11(A)(2) are allied offenses of similar import. In so finding, the court explained that, although the elements of the two offenses do not align exactly, "when Williams attempted to cause harm by means of a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of the victim." Id. at ¶26.

{¶ 35} Here, the statute governing involuntary manslaughter, R.C. 2903.04(A), provides that "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." Additionally, an offender commits a third-degree felony charge of failure to comply with an order of police when he "operates a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop" and that by operating the motor vehicle, appellant "caused a substantial risk of serious physical harm to persons or property." R.C. 2921.331(B)(5)(a)(ii).

{¶ 36} Employing the same reasoning used in *Williams* to the case at hand, I find the offenses of involuntary manslaughter in violation of R.C. 2903.04(A) and failure to comply with an order of police in violation of R.C. 2921.331(B)(5)(a)(ii) are allied offenses of similar import. If these offenses were not merged,

appellant would be convicted of causing a substantial risk of harm to a person while also convicted of causing the death of that same person, based on one single incident. Thus, while the elements do not align exactly, the commission of one offense would necessarily result in the commission of the other. Accordingly, as the record is void of any indication that defendant committed two separate acts or committed the offenses with a separate animus, I would find the trial court erred in not merging these offenses.