[Cite as *State v. Widner*, 2011-Ohio-1364.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95147

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DENNIE WIDNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528930

BEFORE: Keough, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 24, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Dennie Widner, appeals from the trial court's judgment sentencing him in two cases to 40 years incarceration. He contends that his kidnapping convictions are allied offenses and, therefore, the trial court erred in not merging them for purposes of sentencing. He further contends that the trial court erred in imposing consecutive sentences without making the findings required by R.C. 2929.14(E)(4). For the reasons that follow, we affirm.

I. Procedural History

{¶ 2} In Case No. CR-528930, Widner was charged in a multi-count indictment on charges of disseminating matter harmful to minors, kidnapping, gross sexual imposition of a child under the age of 13, forcible rape of a child under the age of 13, and felonious assault. Various specifications were attached to the counts. In Case No. CR-530665, Widner was charged with forcible rape, kidnapping, and endangering children.

{¶ 3} Pursuant to a plea agreement, Widner pled guilty in Case No. CR-528930 to two counts of disseminating matter harmful to minors, two counts of rape as amended to delete the age of the victim and the specifications, and two counts of kidnapping as amended to delete the specifications. The State nolled the remaining counts. In Case No. CR-530665, Widner pled guilty to amended counts of sexual battery and abduction. The State nolled the child endangering charge.

{¶ 4} At sentencing, the trial court sentenced Widner in Case No. CR-528930 to nine and ten years respectively on the rape counts and eight years each on the kidnapping counts, all to be served consecutively. The trial court sentenced him to six months incarceration on each of the misdemeanor counts of disseminating matter harmful to minors, to run concurrent to the other sentences, for a total of 35 years incarceration.

{¶ 5} In Case No. CR-530665, the trial court determined that the sexual battery and abduction counts were allied offenses, and the State

elected to proceed to sentencing on the sexual battery count. The trial court sentenced Widner to five years incarceration, to run consecutive to the 35-year sentence imposed in Case No. CR-528930, for a total prison term of 40 years.

II. Allied Offenses

{¶ 6} The events leading to the rape and kidnapping offenses to which Widner pleaded guilty in CR-528930 occurred over two days. Unbeknownst to the 11-year-old victim's father, Widner, who knew the victim, offered to take him to a carnival and treat him to unlimited rides. After a few rides, Widner suggested they go out to eat and shopping for video games before returning to the carnival. Widner and the victim left the carnival in Widner's van and went out to eat. After dinner, they went shopping at several stores, but instead of buying video games, Widner purchased a tote bag.

{¶ 7} When they returned to the van after shopping, Widner told the boy he had a gun and then, after forcing him to undress, tied his limbs together with duct tape. Widner then drove the victim to his apartment, forced him to get into the tote bag, and then left him in the van while he got a dolly. When he returned to the van, Widner put the tote bag, with the child inside, onto the dolly and took the child into his apartment. Once inside the apartment, Widner removed the duct tape and raped the boy.

{¶ 8} At his apartment, Widner threatened the victim with a knife and forced him to stay there overnight. In the morning, he raped the boy again. Widner then ordered the victim back into the tote bag and took him back to his van on the dolly. Widner drove the victim around and finally dropped him off in his neighborhood, where he eventually found his way back home.

{¶ 9} In his first assignment of error, Widner contends that the trial court erred in failing to merge the kidnapping counts in CR-528930. He concedes that the rapes and kidnappings were not allied offenses subject to merger, but contends that the kidnapping convictions should have merged.

{¶ 10} The record reflects that Widner never raised the issue of merger in the trial court and therefore he has waived all but plain error on appeal. *State v. Russell* (Sept. 23, 2004), 8th Dist. No. 83699, citing *State v. Smith*, 80 Ohio St.3d 89, 118, 1997-Ohio-355, 684 N.E.2d 668; *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364.

{¶ 11} Plain error is an obvious error or defect in the trial court proceeding that affects a substantial right. *State v. Gray*, 8th Dist. No. 92303, 2010-Ohio-240, ¶17, citing *State v. Long* (1978), 53 Ohio St.2d 91, 94, 372 N.E.2d 804; see, also, Crim.R. 52(B). The failure to merge allied offenses of similar import constitutes plain error. *State v. Storey*, 8th Dist. No. 92946, 2010-Ohio-1664, ¶19, citing *State v. Underwood*, 2d Dist. No. 22454, 2008-Ohio-4748, ¶27-28. We find no error, either plain or preserved.

{¶ 12} The General Assembly has expressed its intent to permit multiple punishments for the same conduct under certain circumstances. Under R.C. 2941.25:

{¶ 13} "(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.

{¶ 14} "(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."

{¶ 15} Recently, in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, __ N.E.2d __, the Ohio Supreme Court overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, which required a comparison of statutory elements solely in the abstract under R.C. 2941.25, and held that the court must consider the defendant's conduct when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. *Johnson* at ¶44.

{¶ 16} Thus, "a defendant can be convicted and sentenced on more than one offense if the evidence shows that the defendant's conduct satisfies the

elements of two or more disparate offenses. But if the conduct satisfies elements of offenses of similar import, then a defendant can be convicted and sentenced on only one, unless they were committed with separate intent." *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶36 (Lanzinger, J., concurring in part and dissenting in part).

{¶ 17} In other words, "[i]f the multiple offenses can be committed by the same conduct, then 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.' If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶49-50, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶50 (Lanzinger, J., dissenting).

{¶ 18} Widner contends that only one kidnapping occurred in this case; specifically, that his act of transporting the victim to his apartment, holding him overnight, and then taking him to a place to release him in the neighborhood was a single continuous course of conduct. We disagree because we find independent kidnappings based on separate conduct, consistent with Widner's plea and the trial court's sentence.

{¶ 19} On the authority of *State v. Ware* (1980), 63 Ohio St.2d 84, 406 N.E.2d 1112, we find that the initial kidnapping occurred when Widner lured the victim away from the carnival under false pretenses. In *Ware*, the victim

was unable to find a telephone to call for a ride home. The defendant offered her the use of the telephone in his apartment. When they arrived there, the defendant laughed, told the victim that he did not have a telephone, and began making advances toward her. When she resisted, he picked her up, carried her to an upstairs bedroom, and under threats of death, forced her to engage in intercourse. The Ohio Supreme Court concluded that although the defendant's actions in carrying the victim upstairs were merely incidental to the rape and thus did not constitute a separate kidnapping, the defendant's actions in luring the victim to his apartment under false pretenses "was an act of asporatation by deception which constituted kidnapping, and which was significantly independent from the asportation incidental to the rape itself." Id. at 87.

{¶ 20} Likewise, in *State v. Higgins* (July 11, 1985), 10th Dist. No. 84AP-703, the court held that the defendants' conduct in telling two girls that they would give them a ride to one of the defendant's homes, where they raped them, was kidnapping by deception that was separate from the subsequent kidnapping by force to facilitate the rapes. See, also, *State v. DePina* (1984), 21 Ohio App.3d 91, 486 N.E.2d 1155 (Defendant lured the victim out of a bar by deception, then forcibly removed her to a secluded area where he raped her. Court found asportation by deception that was

independent of asportation incidental to the rape and held that defendant could therefore be convicted of both kidnapping and rape).

{¶ 21} In this case, as in *Ware*, *Higgins,* and *DePina*, the initial kidnapping was committed by deception and involved conduct independent of the subsequent kidnappings by force to facilitate the rapes. Furthermore, as explained below, the subsequent kidnappings were neither allied offenses of the rapes nor of the initial kidnapping by deception and, hence, the trial court properly did not merge them for purposes of sentencing.

{¶ 22} In *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, the Ohio Supreme Court established guidelines for determining whether kidnapping and rape are committed with a separate animus so as to permit punishment under R.C. 2941.25(B). The court held that "where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions." Id., paragraph (a) of the syllabus. The *Logan* court also recognized that where the asportation or restraint "subjects the victim to a substantially increased risk of harm

separate and apart from * * * the underlying crime, there exists a separate animus." Id., paragraph (b) of the syllabus.

{¶ 23} Here, Widner tied the victim up with duct tape, forced him into a tote bag, snuck him into his apartment, threatened him with a knife, raped him, forced him to remain in the apartment overnight, and then, after raping him again, drove him around the next morning before releasing him in his neighborhood. It is apparent that the movement was substantial, the confinement was secretive, and the restraint was prolonged. It is also apparent that Widner's actions subjected the victim to an increased risk of harm, separate from the underlying rapes. Hence, under *Logan*, and as Widner conceded, these kidnappings (when Widner threatened the victim with a gun, forced him to undress, and then tied him up with duct tape; when Widner forced the victim into the tote bag, snuck him into his apartment, forced him to stay there overnight; when he drove the victim around the next morning) were not allied offenses of the rapes and did not merge with the rape convictions.

{¶ 24} Nor were these subsequent kidnappings allied offenses of the initial kidnapping. The initial kidnapping involved asportation by deception; the subsequent kidnappings involved asportation by force. Widner's conduct in luring the victim away from the carnival was different than that involved in subsequently restraining and confining him by force. *Ware*,

Higgins, supra. Thus, the kidnapping counts did not involve the same conduct.

{¶ 25} The protection of R.C. 2941.25 can be invoked only when allied offenses arise out of the "same conduct." *Logan* at 128. Because we find multiple kidnappings based on separate conduct, we hold that the trial court properly sentenced Widner on both counts. Appellant's first assignment of error is therefore overruled.

III. Consecutive Sentences

{¶ 26} In his second assignment of error, Widner contends that the trial court erred in imposing consecutive sentences without making the findings required by R.C. 2929.14(E)(4). He argues that the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, which found that various provisions of the sentencing statutes were unconstitutional, is no longer valid in light of *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, and, accordingly, the trial court was required to make certain findings before imposing consecutive sentences.

{¶ 27} The Ohio Supreme Court recently rejected this argument in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768. It held that *Ice* "does not revive Ohio's former consecutive sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in

Foster. * * * Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Hodge*, at paragraphs two and three of the syllabus.

{¶ 28} Widner's second assignment of error is therefore overruled.

Affirmed.

It is ordered that appellee recover from appellant 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. 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.

KATHLEEN ANN KEOUGH, JUDGE

PATRICIA A. BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR