[Cite as *State v. Manus*, 2011-Ohio-603.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94631

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARQUES MANUS

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AND SENTENCES REVERSED; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529473

BEFORE: Rocco, J., Kilbane, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 10, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} After entering guilty pleas to one count of abduction and two counts of gross sexual imposition, defendant-appellant Marques Manus appeals his convictions, his sentence, and his classification as a sexual offender under Ohio's version of the Adam Walsh Act (the "AWA").

{¶ 2} Manus presents seven assignments of error. He argues: the trial court committed plain error in failing to require the state to elect between his convictions because they were "allied offenses"; defense counsel provided ineffective assistance; the trial court abused its discretion in denying his pre-sentence motion to withdraw his guilty pleas and in finding his guilty pleas were knowingly, voluntarily, and intelligently made; and the AWA is unconstitutional because it offends double jeopardy proscriptions, is cruel and unusual punishment, and violates due process of law.

{¶ 3} On the record of this case, this court finds the trial court acted improperly in accepting Manus's guilty pleas to charges that constituted allied offenses, and in convicting and sentencing Manus on all three charges. Manus's remaining assignments of error, therefore, are moot.

{¶ 4} Consequently, Manus's convictions and sentences are reversed, and this case is remanded for further proceedings consistent with this opinion.

{¶ 5} The record reflects Manus's convictions result from an incident that occurred at his home on September 29, 2009. Manus, who has been diagnosed with mental illnesses that include bipolar disorder, went into a "manic" state, and attacked his father's girlfriend. During the episode, he forced the woman to the ground and, while he was on top of her, "grabbed her about the breasts and buttocks." The family dog jumped on him; the woman

took advantage of the distraction to flee. She ran to her car with Manus in pursuit, locked the doors, and, although Manus managed to break off a piece of the driver's side handle, drove away. Upon the arrival of the police, they found Manus in the home holding a knife, threatening to "slice himself."

{¶ 6} On October 14, 2009, Manus was indicted on three counts, charged with kidnapping with a sexual motivation specification and two counts of gross sexual imposition. He pleaded not guilty and received assigned counsel, who filed motions for discovery on October 26, 2009.

{¶ 7} At a pretrial hearing conducted on October 29, 2009, the court set the case for trial on December 14, 2009. However, at the final pretrial hearing, defense counsel requested the court to reschedule the proceeding for January 5, 2010 because he was "not available on the scheduled trial date." The court granted the request.

{¶ 8} On January 5, 2010, Manus filed a pro se motion to dismiss his case for failure to comply with the speedy trial requirements set forth in R.C. 2945.71. The court called the matter for a hearing on January 8, 2010. After the court discussed the issue with the attorneys, it determined that statutory speedy trial time had not expired.

{¶ 9} At that point, the prosecutor informed the court that the state had "made a plea offer" to Manus, i.e., in exchange for his guilty pleas, the state would amend Count 1 to a

charge of abduction without the specification. The trial court told Manus the potential penalties involved with respect to the case as indicted, and contrasted them to those that could be imposed if he accepted the plea offer. The court then permitted Manus 15 minutes to discuss the matter with defense counsel.

{¶ 10} However, when the recess was over, Manus told the trial court that he still could not "think right now"; he was not able to "focus." The transcript indicates Manus became somewhat agitated, since the court asked him to "calm" himself, then repeated the information concerning the potential penalties if he should be found guilty of the indictment as charged, versus the potential penalties involved for the plea agreement. Once again, the trial court took a five-minute recess for Manus to consider his choice.

{¶ 11} Defense counsel subsequently stated to the court that Manus decided to accept the state's offer. The trial court addressed Manus and asked him if he understood everything, and Manus answered, "Yeah."

{¶ 12} During the ensuing colloquy, Manus informed the trial court that he used two medications for his mental illness, but replied, "Yeah," when the court asked if he "understood what we're doing here today * * * ?" Manus thereafter responded in an appropriate manner when the trial court explained his constitutional rights and the potential penalties involved. When the court asked him how he pleaded to each charge, Manus answered, "Guilty."

{¶ 13} The court accepted Manus's pleas and ordered him referred for a presentence report. The court then commented, "I think I'll also do a referral for recommendations on disposition." Defense counsel stated that he was "going to request" a psychological report, and the trial court responded, "I think a full report would be best also." The court set a sentencing date of January 29, 2010.

{¶ 14} On January 22, 2010, Manus filed a pro se motion to withdraw his guilty pleas. Manus also filed a memorandum in support of his motion, in which he asserted, among other things, that he had not understood that his pleas were to "allied offenses," and that the court's referral of him for a psychological evaluation placed his competency to enter his pleas into question.

{¶ 15} When Manus's case was called for sentencing, the trial court noted that Manus had filed a pro se motion to withdraw his plea, and told him that it had already determined that he "voluntarily, intelligently, and knowingly [gave] up [his] rights and enter[ed his] plea * * * ." The court further stated that it did not know "what [he was] talking about" with respect to "allied offenses," and asked the prosecutor, "Is there anything that merges here?" The prosecutor answered that she did not "believe so." When the court turned to defense counsel for his perspective, counsel merely stated that he had no opinion. The trial court denied Manus's motion.

{¶ 16} At that point, the trial court requested the prosecutor to "articulate the fact pattern" upon which Manus's guilty pleas were based. The court thereafter stated it would "proceed to sentence."

{¶ 17} After the trial court heard from the victim, defense counsel, a social worker, and Manus, it told Manus he was sentenced to five years of community control. The court outlined the conditions and informed him that if he did not successfully complete them, he was sentenced to concurrent prison terms of five years on Count 1, and 18 months each on Counts 2 and 3. Finally, the trial court informed Manus that, pursuant to his pleas to Counts 2 and 3, he was classified as a "Tier I sex offender," with its attendant duties.

{¶ 18} Manus subsequently filed his timely appeal; he presents the following assignments of error for review.

{¶ 19} "I. Manus's convictions for abduction and gross sexual imposition should have been merged into a single conviction on only one of the offenses to be selected by the State. The court's failure to do so violated Ohio merger law, Manus's right to due process, and his double jeopardy right against cumulative punishments for the same offense.

{¶ 20} "II. Trial counsel was ineffective for not objecting to the trial court's failure to merge the felony offenses into a single conviction on only one of the offenses to be selected by the State.

{¶ 21} **"III. The trial court abused its discretion in refusing to allow Manus to withdraw his guilty plea prior to sentencing.**

{¶ 22} **"IV. Manus's guilty plea was not made knowingly, voluntarily and intelligently, and, as a result, the Court's acceptance of that plea was in violation of Manus's constitutional rights and Criminal Rule 11.**

{¶ 23} **"V. Senate Bill 10 violates the Double Jeopardy Clause of the United States Constitution and Section 10, Article I of the Ohio Constitution.**

{¶ 24} **"VI. Senate Bill 10, as applied to appellant, violates the United States and Ohio Constitution's [sic] prohibition against cruel and unusual punishment.**

{¶ 25} **"VII. Senate Bill 10's residency restrictions violate the Due Process Clauses of the United States and Ohio Constitutions."**

{¶ 26} In Manus's first, third, and fourth assignments of error, he argues that the trial court acted improperly in accepting his pleas, denying his presentence motion to withdraw his pleas, and in imposing sentence on him without fully considering whether, on the facts of his case, the offenses of abduction and gross sexual imposition were allied offenses pursuant to R.C. 2941.25(A). Based upon the circumstances presented herein, these arguments have merit.

{¶ 27} Manus entered guilty pleas to one count of abduction and two counts of gross sexual imposition. Abduction is a lesser included offense to the crime of kidnapping, the crime for which Manus originally was indicted in Count 1. *State v. Cole*, Pickaway App. No. 09CA16, 2010-Ohio-4774, ¶2. This court previously also has stated that gross sexual imposition is a lesser included offense of the crime of rape. *State v. Ferrell*, Cuyahoga App. No. 92573, 2010-Ohio-1201. In addressing the application of R.C. 2941.25 to the crimes of kidnapping and rape, this court has observed as follows:

{¶ 28} "The offenses of rape and kidnapping may be allied offenses of similar import. *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772. In *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, the Supreme Court of Ohio established guidelines to determine whether kidnapping and rape are committed with a separate animus so as to permit separate 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. at paragraph (a) of the syllabus. Conversely, the *Logan* court recognized that where the asportation or restraint 'subjects the victim to a substantial

increase in risk of harm separate and apart from * * * the underlying crime, there exists a separate animus.' Id. at paragraph (b) of the syllabus.

{¶ 29} "In the instant matter, the record reflects that the restraint of the victim was not prolonged. The victim testified that she was held in the living room for approximately five minutes and then held in the bedroom for an additional five minutes. * * * [T]he movement of the victim * * * along with the restraint of the victim, was incidental to [appellant]'s attempted rape of the victim.

{¶ 30} "We find that upon this record the evidence does not demonstrate that the offenses were significantly independent of each other or that there was a separate animus as to each offense. The evidence reveals that the kidnapping and rape arose out of the same conduct, were committed simultaneously, and were committed with the same animus. Thus, the rape and kidnapping were allied offenses of similar import for which, pursuant to R.C. 2941.25(A), [appellant] may be convicted of only one. Therefore, this court finds that the trial court erred in sentencing [appellant] on both the kidnapping and rape charges." *State v. Miner*, Cuyahoga App. No. 85746, 2005-Ohio-5445, ¶16-18. See, also, *State v. Gibson*, Cuyahoga App. No. 92275, 2009-Ohio-4984, ¶32-34; *State v. Dudley*, Montgomery App. No. 22931, 2010-Ohio-3240, ¶50.

{¶ 31} In like manner, this court has "assumed" the lesser included offenses to kidnapping and rape, viz., abduction and gross sexual imposition, to be allied offenses with respect to an alignment of the elements, and thus, to require an assessment of the defendant's animus in committing the crimes prior to imposing sentence. *State v. Jackson*, Cuyahoga App. Nos. 90282 and 90283, 2008-Ohio-3535, ¶17-18. That assumption is supported by the Ohio Supreme Court's recent decision in *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314. However, the record in this case reflects that the trial court made no such assessment.

{¶ 32} In *Johnson*, the supreme court has mandated that "the conduct of the accused must be considered" in determining whether offenses are subject to merger. It is apparent from the prosecutor's recitation of the facts in this case, facts that were not set forth until the sentencing hearing, that Manus had no separate animus in committing the abduction and the gross sexual impositions upon the victim.

{¶ 33} As stated in *State v. Underwood*, Montgomery App. No. 22454, 2008-Ohio-4748, ¶22-23:

{¶ 34} "R.C. 2941.25 implements the protections of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution. The Double Jeopardy Clauses prohibit a second punishment for the same offense. *State v. Lovejoy* (1997), 79 Ohio St.3d 440. To avoid that result, when two or

more allied offenses of similar import are charged and guilty verdicts for two or more are returned, R.C. 2941.25 mandates that 'the defendant may be convicted of only one.'

{¶ 35} "R.C. 2941.25 requires a merger of multiple guilty verdicts into a single judgment of conviction, not a merger of sentences upon multiple judgments of conviction. Because *the required merger of convictions must precede any sentence the court imposes upon a conviction*, Defendant's *agreement to the multiple sentences the court imposed could not waive his right* to the *prior* merger that R.C. 2941.25 requires. *Neither could his no contest pleas waive his right to challenge his multiple convictions on double jeopardy grounds. Menna v. New York* (1975), 423 U.S 61, 96 S.Ct. 241, 46 L.Ed.2d 195." (Emphasis added.)

{¶ 36} The foregoing assessment was affirmed by the supreme court. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. See, also, *Johnson*, at ¶47.

{¶ 37} Moreover, the facts of this case are similar to those faced by the Fourth Appellate District in *State v. Taylor*, Washington App. No. 07CA29, 2008-Ohio-484. Taylor's indictment in that case for kidnapping with specifications and gross sexual imposition were based upon a single incident.

{¶ 38} According to the Fourth District' s opinion, Taylor pushed the victim, who had been walking in the park, to the ground, got on top of her, bit her breast area, and grabbed her vaginal area, but the victim "got away." In exchange for Taylor's guilty pleas, the state

agreed to amend the indictment to delete the specifications. The trial court found Taylor guilty on both counts.

{¶ 39} Prior to sentencing, Taylor raised the issue of whether the offenses were allied, but the trial court did not "respond" to the argument before imposing concurrent sentences. The Fourth District in *Taylor* found that the trial court erred in concluding the offenses were not allied offenses of similar import without considering appellant's animus, in accepting the plea, and in imposing the sentence.

{¶ 40} As in *Taylor*, in this case, Manus raised the issue in his motion to withdraw his plea. Since the issue of whether Manus's offenses in this case, i.e., abduction and two counts of gross sexual imposition, constituted allied offenses pursuant to R.C. 2941.25(A) had not been resolved during the plea hearing, the trial court erred in accepting Manus's pleas, in denying his presentence motion to withdraw his pleas, and in imposing sentence.[1]

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[1]R.C. 2941.25 has been called primarily a "sentencing statute." *State v. Kent* (1980), 68 Ohio App.2d 151, 428 N.E.2d 453, paragraph one of the syllabus. Pursuant to Crim.R.11(C)(2), the total sentence that can be imposed for offenses that are allied would constitute part of the "maximum penalty involved" in entering the plea; the defendant must be aware of that *before* the trial court can determine whether the plea is valid. See, e.g., *Johnson*, at ¶47; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224; *Taylor*; cf. *Kent*, at 156; *State v. Smith* (Dec.10, 1992), Cuyahoga App. No. 61464.

{¶ 41} Based upon the foregoing, Manus's first, third, and fourth assignments of error are sustained. This renders his remaining assignments of error moot. App.R. 12(A)(1)(c).[2]

{¶ 42} Convictions and sentences reversed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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. Case remanded to the trial court for further proceedings.

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

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KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
MARY J. BOYLE, J., CONCUR

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[2]Manus claims in his second assignment of error that his trial counsel rendered ineffective assistance, but, in light of this court's disposition of Manus's appeal, this claim need not be addressed. Manus argues in his fifth, sixth, and seventh assignments of error that the application of Ohio's version of the Adam Walsh Act in this case is unconstitutional. These assignments of error, however, are not ripe for review since Manus's pleas and convictions must be reversed; this court cannot presume Manus will either enter a plea to a sexual offense or be convicted of one.