

[Cite as *State v. Masters*, 2011-Ohio-937.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95120

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM MASTERS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527719

BEFORE: Cooney, P.J., Rocco, J., and Keough, J.

RELEASED AND JOURNALIZED: March 3, 2011

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COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, William Masters (“Masters”), appeals his sentence after pleading guilty to all charges in a multi-count indictment. We find merit to the appeal and reverse.

{¶ 2} Masters pled guilty to all charges in an indictment that charged him with 12 counts of aggravated robbery, 12 counts of kidnapping, and one count each of disrupting

public service and vandalism, all relating to his participation in the armed robbery of a “high stakes” poker game. The trial court sentenced Masters to five years on each count of aggravated robbery and kidnapping, three years on the attendant firearm specifications, and imposed the minimum sentence for disrupting public service and vandalism. The court ordered the five years for each of the aggravated robbery and kidnapping convictions to run concurrently. With the mandatory three years for the firearm specifications added to each base crime, Masters received a total eight-year prison term. He now appeals, raising two assignments of error.

Postrelease Control

{¶ 3} In his first assignment of error, Masters contends the trial court erred in failing to adequately advise him of postrelease control as required by R.C. 2929.19 and 2967.28(B)(1). The State concedes that the trial court failed to comply with R.C. 2929.19. The record reveals that, at the sentencing hearing, the trial court did not advise Masters of the sanctions that could be imposed for violation of postrelease control, and the sentencing entry suggests that postrelease control is discretionary rather than mandatory. These deficiencies violate the mandates set forth in R.C. 2967.28(B)(1). *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 4} Therefore, we sustain this assignment of error.

Allied Offenses

{¶ 5} In his second assignment of error, Masters argues the trial court erred in imposing separate sentences for his aggravated robbery and kidnapping convictions because they are allied offenses that should have merged.

{¶ 6} Masters failed to object to the court’s imposition of multiple sentences and has therefore waived all but plain error. Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

The Ohio Supreme Court has expressly held that the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶96-102.

{¶ 7} R.C. 2941.25, which governs allied offenses, provides:

“(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.

“(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.”

{¶ 8} The Ohio Supreme Court recently redefined the test for determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25 in *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314. The *Johnson* court expressly

overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, which required a “comparison of the statutory elements in the abstract” to determine whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other. The *Johnson* court held that rather than compare the elements of the crimes in the abstract, courts must consider the defendant’s conduct. *Johnson* at syllabus. “If 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.’” *Id.*, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶150, (Lanzinger, J., dissenting). Thus, a determination on allied offenses cannot be made without knowledge and consideration of the facts of the case and the defendant’s conduct.

{¶ 9} The State concedes that “unless a separate animus exists, Masters’s convictions for kidnapping and aggravated robbery are allied offenses.” However, there are insufficient facts in the record for this court to make such a determination in the instant case. In *Underwood*, the supreme court explained that the trial court’s duty to merge allied offenses “is mandatory, not discretionary.” *Underwood* at ¶26. Although Masters’s sentence was imposed prior to the *Johnson* decision, the trial court should have inquired into the facts when accepting Masters’s plea to all charges in order to determine whether any of the offenses were allied. The trial court’s failure to make the necessary inquiry constitutes plain error. As the

supreme court indicated in the analogous case of *Underwood*, when the plea agreement is silent on the issue of allied offenses, the trial court is obligated to determine whether the offenses are allied. *Id.* at ¶129.¹

{¶ 10} Accordingly, we sustain the second assignment of error and remand the case to the trial court for an allied-offense hearing and, if appropriate, allow the State to elect which allied offenses to pursue at resentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus. And pursuant to our discussion in the first assignment of error, the proper imposition of postrelease control should also be part of resentencing.

Judgment reversed, and case remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of said 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.

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

¹Underwood also pled to all counts of the indictment so there was no “plea bargain.”

COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
KATHLEEN ANN KEOUGH, J., CONCUR