

[Cite as *State v. Mitchell*, 2015-Ohio-1146.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101542

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVONTE MITCHELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-13-579641-A and CR-13-580620-D

BEFORE: McCormack, J., Jones, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: March 26, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Devonte Mitchell, appeals his sentence imposed on May 19, 2014, in Cuyahoga C.P. Nos. CR-13-580620-A and CR-13-579641-D. For the reasons that follow, we affirm and remand.

Procedural History

{¶2} Mitchell was indicted separately for crimes that occurred on or about October 14, 2013. On November 26, 2013, Mitchell was charged with one count of receiving stolen property in violation of R.C. 2913.51(A), a felony of the fifth degree, in CR-579641. On December 4, 2013, in CR-580620, Mitchell was charged in a multiple count indictment along with multiple codefendants as follows: Count 2 — aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree; Count 3 — grand theft in violation of R.C. 2913.02(A)(1), a felony of the third degree; and Count 4 — theft in violation of R.C. 2913.02(A)(1), a felony of the fifth degree. Count 2, aggravated burglary, included a one-year firearm specification under R.C. 2941.141(A).

{¶3} On April 9, 2014, Mitchell withdrew his previously entered not guilty pleas and pleaded guilty to an amended indictment. On May 19, 2014, the trial court sentenced Mitchell in CR-580620 to two years in prison on amended Count 2, burglary, and six months imprisonment on Count 4, theft, to be served concurrently. In CR-579641, the court imposed two years of community control for the sole charge of receiving stolen property. Mitchell now appeals his sentence, raising three assignments of error.

Assignments of Error

- I. The trial court erred in failing to correct its journal entries to accurately reflect what occurred at the plea and sentencing hearings, thereby depriving appellant of his constitutional rights to due process.

- II. The trial court erred when it sentenced appellant to a prison term and then ran an additional consecutive term of community control sanctions, confinement, and a jail term for a misdemeanor guilty plea that was accepted in the felony proceedings.
- III. The trial court committed plain error at the sentencing hearing when it failed to inquire whether the convictions in these cases constituted allied offenses pursuant to R.C. 2945.21(A).

Law and Analysis

A. Journal Entry

{¶4} In his first assignment of error, Mitchell claims that the trial court erred when it failed to correct the court's mistaken sentencing entry in CR-580620. The state concedes the error, and we substantiate the error.

{¶5} The record demonstrates that the trial court held a plea hearing on April 9, 2014. The transcript of the hearing reveals that in CR-580620, the prosecutor offered to amend Count 2, "amended by making it a burglary, felony of the second degree, by deleting the one-year firearm specification." Thereafter, the trial court inquired of Mitchell, "[W]ith regard to 580620, amended count 2, burglary without the firearm specification, felony in the second degree, how do you plead?" Mitchell responded, "Guilty." Mitchell also pleaded guilty to Count 4, theft, and the remaining charges were nolle. In CR-579641, Mitchell pleaded guilty to an amended count of receiving stolen property, a misdemeanor of the first degree, indicating an amount of the stolen property at less than \$1,000.

{¶6} The court's journal entries in CR-580620, dated April 9, 2014, and May 23, 2014, however, incorrectly state that Mitchell entered a plea of guilty to burglary with a firearm specification. During sentencing, the trial court noted the discrepancy and allowed the prosecutor and defense counsel to clarify the charges:

Court: Is [victim, Shelly Casto] a victim in the 580620 case where we have burglary with a one-year firearm specification and aggravated theft?

Prosecutor: Your Honor, she is the victim in that case. But I don't believe he pled to the one-year firearm specification; he pled to simply burglary.

Court: Well, I have in the plea journal entry amended to burglary, an F2 with one-year firearm specification. Let me check that. Enters a plea of guilty with regard to F2 burglary with one-year firearm specification, as amended. Is that your understanding?

Defense counsel: No, that's not correct, Judge. Does not have a firearm specification.

Prosecutor: * * * I don't believe that's the plea that the state had worked out with this defendant either. The State's intention was to plead guilty to Count [sic], a felony two, no specification.

Court: I see how it was read on this. So it is burglary in the second degree as amended with no firearm specification subject to two to eight [years] with the presumption of going to prison; is that correct?

Prosecutor: Yes, your Honor.

Following this exchange, the court sentenced Mitchell on the burglary, as amended, with no firearm specification.

{¶7} Additionally, while not raised by either party, this court notes a discrepancy between the court's journal entry in CR-579641, dated May 23, 2014, and the record of proceedings.

During sentencing, the trial court stated as follows:

Now, with regard to 579641, receiving stolen property, a misdemeanor in the first degree, I can put you in the county jail for up to 180 days or put you on community controlled sanctions, probation. I'm going to put you on probation for that period of time.

The journal entry regarding the charge of receiving stolen property, however, states that “[i]t is therefore ordered that the defendant is sentenced to 2 year(s) of community control * * *.”

{¶8} Although a court speaks through its journal entries, clerical errors may be corrected at any time in order to conform to the transcript of the proceedings. *State v. Steinke*, 8th Dist. Cuyahoga No. 81785, 2003-Ohio-3527, ¶47; Crim.R. 36. Trial courts retain continuing jurisdiction to correct clerical errors in judgments by nunc pro tunc entry to reflect what the court actually decided. *In re D.P.*, 8th Dist. Cuyahoga No. 100597, 2014-Ohio-3324, ¶10, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19.

{¶9} Here, the record clearly reflects that Mitchell pleaded guilty to an amended Count 2 in CR-580620, which was burglary without the one-year firearm specification, a felony of the second degree. Further, the record reflects that the trial court sentenced Mitchell to a period of 180 days community control on the charge of receiving stolen property in CR-579641. The court’s plea and sentencing entries referenced above were clerical errors. We therefore remand the case for the trial court to correct the journal entries, nunc pro tunc, to accurately reflect the trial record and the intentions of the parties.

B. Consecutive Sentence of a Misdemeanor

{¶10} In his second assignment of error, Mitchell claims that the trial court erred when it ordered his sentence for the misdemeanor offense to be served consecutively to his felony prison sentence.

{¶11} On May 19, 2014, the trial court sentenced Mitchell in both cases. In CR-580620, the court sentenced Mitchell to two years imprisonment for Count 2, burglary, and six months imprisonment for Count 4, theft. The court ordered the sentences to be served concurrently and

allowed Mitchell to apply for judicial release after six months. In CR-579641, the court sentenced Mitchell to two years community control sanctions to be served in the CBCF program on the sole count of receiving stolen property, a misdemeanor of the first degree.¹ It purportedly ordered the sentence in CR-579641 to be served consecutively with CR-580620, stating that Mitchell will be confined in the CBCF program “when your prison time is up.” The sentencing entry also reflects the court’s intention, indicating that Mitchell “[is] to be returned to county jail when prison term [in CR-580620] is completed in order to start CBCF program ordered in case number CR 579641.”

{¶12} R.C. 2929.41, which governs multiple sentences, provides as follows:

(A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

(B) (1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.

{¶13} Mitchell argues that R.C. 2929.41(A) mandates that a sentence for a misdemeanor offense must be served concurrently with a felony prison sentence, thus urging us to follow the Sixth District in *State v. Polus*, 6th Dist. Lucas No. L-13-1119-20, 2014-Ohio-2321 (finding an ambiguity in R.C. 2929.41(A) and (B), construing the ambiguity against the state, and therefore

¹See our discussion in Mitchell’s first assignment of error.

requiring the trial court to order the defendant's felony and misdemeanor sentences to be served concurrently).

{¶14} This court, however, relying upon the language in R.C. 2929.41(B), has previously determined that the trial courts have discretion to order a misdemeanor sentence consecutive to a felony sentence.² *State v. Barker*, 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038, ¶ 22. In *Barker*, we affirmed the sentence imposed by the trial court, wherein the trial court sentenced the defendant to “time served” rather than crediting the days he had already spent in jail against his felony sentences, thereby effectively ordering the misdemeanor sentence to be served consecutive to his felony sentences. *Id.* at ¶ 18-22.

{¶15} Therefore, in accordance with the law in this district, we find that the trial court did not err when it ordered Mitchell's misdemeanor sentence to be served consecutive to his felony sentence.

{¶16} Mitchell's second assignment of error is overruled.

C. Allied Offenses

{¶17} In his third assignment of error, Mitchell claims that the prosecutor's statement at sentencing that the second case “was indicted separately for some reason for different counts, but it's essentially the same course of conduct” should have alerted the trial court to inquire further whether the charges were allied offenses. He argues that the trial court's failure to inquire was

²We note that the issue of “[w]hether a trial court may impose consecutive sentences for felony and misdemeanor convictions under R.C. 2929.41(B)(1)” is currently before the Ohio Supreme Court in *State v. Polus*, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882, noting a conflict among the districts. Until such time as the Ohio Supreme Court has ruled on the issue, we will continue to follow the precedent of this district.

plain error. The state “concedes that [Mitchell’s] argument has merit,” providing that both charges “focused on jewelry and video game equipment.”

{¶18} Our review of an allied offenses question is de novo. *State v. Webb*, 8th Dist. Cuyahoga No. 98628, 2013-Ohio-699, ¶ 4, citing *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

{¶19} R.C. 2941.25(A) provides that when the defendant’s conduct can be construed to constitute two or more allied offenses, he may be indicted for all such offenses but may be convicted of only one. On the other hand, if the defendant’s conduct was separately committed or committed with a separate animus as to each act, then the defendant may be convicted of all the offenses. R.C. 2941.25(B). This statute protects the constitutional right against double jeopardy, thus prohibiting multiple punishments for the same offense. *State v. Robinson*, 8th Dist. Cuyahoga No. 99917, 2014-Ohio-2973, ¶ 53, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23.

{¶20} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court of Ohio clarified that when considering whether two offenses are allied offenses, the conduct of the accused must be considered. First, the court must determine whether it is possible to commit one offense and commit the other with the same conduct. *Johnson* at ¶ 48. If that is possible, then the court must determine whether the offenses were, in fact, committed by the same conduct — a single act, committed with a single state of mind. *Id.* at ¶ 49; *State v. Eaton*, 8th Dist. Cuyahoga No. 100147, 2015-Ohio-170, ¶ 9. “If the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.” *Id.* at ¶ 51.

{¶21} This court has held that a trial court has a duty to inquire and determine whether multiple charges are allied offenses of similar import under R.C. 2941.25 where a facial question presents itself. *Eaton* at ¶ 10, citing *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499, ¶ 63 (8th Dist.), *conflict certified*, 136 Ohio St.3d 1508, 2013-Ohio-4657, 995 N.E.2d 1212. Where the trial court fails to do so, it commits plain error. *Id.*

{¶22} On review, if the trial court record lacks sufficient factual detail to determine whether the offenses are allied offenses, “a remand is necessary to establish the underlying facts of the defendant’s conduct” in order for the trial court to make the proper determination. *State v. Black*, 8th Dist. Cuyahoga No. 99421, 2013-Ohio-4908, ¶ 14. However, if the record contains sufficient facts from which to determine if the offenses are allied, this court’s de novo review may allow such determination. *Id.* “[C]ases that assert a claim that the allied-offense issue was not addressed in a silent record may nevertheless fail where the indictment shows the offenses were committed on separate dates or involved separate victims or involve statutes that would require completely separate conduct.” *Rogers* at ¶ 26. Therefore, where the record demonstrates that the multiple offenses at issue are not allied offenses, a remand is not required. *State v. Thomas*, 8th Dist. Cuyahoga No. 101067, 2014-Ohio-4929, ¶ 25.

{¶23} Here, Mitchell pleaded guilty to one count of theft in violation of R.C. 2913.02(A)(1) in CR-580620 (in addition to burglary) and one count of receiving stolen property in violation of R.C. 2913.51(A) in CR-579641. R.C. 2913.02(A)(1) provides that

[n]o person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property * * * [w]ithout the consent of the owner or person authorized to give consent.” R.C. 2913.51(A), receiving stolen property, provides that “[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

{¶24} Receiving stolen property and theft of the same property are generally allied offenses of similar import that are committed with an identical animus during a single transaction. *See State v. Austin*, 8th Dist. Cuyahoga No. 84142, 2004-Ohio-5736, ¶ 37. “Obviously, at the same time a thief steals property, the thief is generally in receipt of that property and knows that it was stolen.” *Id.*

{¶25} In this matter, however, the record indicates that there were two separate transactions, or different conduct, during which the offenses were committed separately and with a separate animus. Count 4 of the indictment in CR-580620, theft, indicates that Mitchell deprived the owner of “recordings, jewelry, camcorder, cell phone, money, PS3 system, multiple video consoles and Xbox or services” that occurred “on or about 10/14/2013.” On the other hand, the arrest warrant contained in the record in CR-579641, receiving stolen property, stated that “on October 14, 2013, defendant used his Ohio Driver[‘s] License to sell items that had just been stolen in a burglary earlier that day.” The indictment in that case referenced certain jewelry and personal items that were purportedly “receive[d], retain[ed], or dispose[d] of.” Further, during the sentencing hearing, the victim confirmed that various items stolen from her home were placed for sale in a pawn shop.

{¶26} In light of the above, we can discern that the theft of the property was a distinct act, occurring in a different time (earlier in the day) and a different place (at the victim’s home), from the disposing of the same or similar property (at the pawn shop, later that day) that is associated with the charge of receiving stolen property. Likewise, Mitchell’s animus, or intention, in depriving the victim of the property is distinguishable from his intention in selling the items. *See State v. Green*, 11th Dist. Lake No. 2011-L-037, 2012-Ohio-2355, ¶ 68. Although the theft

and receiving stolen property convictions arguably involved identical property, the offenses were committed in separate transactions, consisting of a different animus for each offense.

{¶27} Accordingly, because the record contains sufficient facts from which we can determine that Mitchell's two offenses are not allied offenses of similar import, a remand is not warranted. Mitchell's third assignment of error is overruled.

{¶28} Judgment affirmed. This case is remanded for the trial court to correct its journal entries in CR-580620, nunc pro tunc, to reflect the amended Count 2, burglary, with no firearm specification and to correct the journal entry in CR-579641 to reflect the sentence that was imposed in open court of 180 days of community control sanctions.

It is ordered that appellee recover of 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.

TIM McCORMACK, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR