**[Cite as *State v. Gay*, 2015-Ohio-1832.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 101749**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## TIMOTHY GAY

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED AND REMANDED

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580276-B

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

**RELEASED AND JOURNALIZED:** May 14, 2015

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PATRICIA ANN BLACKMON, J.:

**{¶1}** Appellant Timothy Gay ("Gay") appeals his sentence and assigns the following two errors for our review:

> I. Appellant's sentence is contrary to law because the trial court failed to comply with the purposes and principles of sentencing as set forth in R.C. 2929.11 and R.C. 2929.12.
>
> II. The trial court erred by ordering convictions and a sentence for separate counts because the trial court failed to make a proper determination as to whether those offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14.

**{¶2}** Having reviewed the record and pertinent law, we affirm Gay's sentence but remand the matter to the trial court for clarification of the sentence. The apposite facts follow.

**{¶3}** Gay was indicted for two counts of aggravated robbery and two counts of felonious assault, all of which had firearm and repeat violent offender specifications and a notice of prior conviction. The charges arose from the beating and robbing of the victim by a group of men with sticks and rocks. As a result of the beating, the 26-year old victim suffered a severe concussion, lacerations to his head, a broken nose, and bruising over his entire body. As a result of his injuries, a metal plate had to be inserted in his head, and staples were necessary to close his head wounds. Gay and his two codefendants, Jeffrey Lewis ("Lewis") and Albert Carlisle ("Carlisle"), were positively identified as being involved in the attack based on video footage obtained from a nearby business.

**{¶4}** Gay entered a guilty plea, as did his codefendants. Gay's plea agreement required him to plead guilty to one count of aggravated robbery and one count of

felonious assault. In exchange, all of the remaining charges and specifications were nolled.

**{¶5}** At sentencing, in spite of the victim telling police he did not know his attackers, the defendants maintained that the victim had been at Lewis's house drinking with the group and that the victim had accused them of taking his cell phone that he had left unattended. The argument about the cell phone became intense, causing Lewis's mother to tell the group to leave. The group then walked about a half-mile away when the altercation occurred. According to the results of a polygraph test taken by Carlisle, his statement that he saw Gay hit the victim in the head and face with a hockey stick was truthful. Gay's attorney denied that Gay in fact did this.

**{¶6}** After concluding Gay's participation in the attack was greater then the others, and the fact he had prior convictions for similar offenses, the trial court sentenced Gay to five years on each count to be served concurrently.

**Findings Pursuant to R.C. 2929.11 and 2929.12**

**{¶7}** In his first assigned error, Gay argues the trial court erred by imposing his sentence without making specific findings in accordance with R.C. 2929.11 and 2929.12.

**{¶8}** A trial court "has the full discretion to impose any term of imprisonment within the statutory range, but it must consider the sentencing purposes in R.C. 2929.11, and the guidelines contained in R.C. 2929.12." *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7. The court is not required to engage in any factual findings under R.C. 2929.11 or 2929.12. *State v. Tate*, 8th Dist. Cuyahoga No. 97804, 2014-Ohio-5269, ¶ 58. Consideration of the appropriate factors set forth in R.C. 2929.11

and 2929.12 can be presumed unless the defendant affirmatively shows to the contrary. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

**{¶9}** There is no evidence that the trial court did not consider the factors in R.C. 2929.11 and 2929.12. In fact, prior to imposing the sentence, the trial court stated on the record that it had to consider the seriousness of the offenses and explained it would do so based on the facts and presentence investigation reports. The court further stated that it would also consider the "criminal background, if any, of each of the defendants and whether or not that background" indicates a likelihood of recidivism.

**{¶10}** In sentencing Gay, the trial court noted that Gay had "a more serious criminal record" and was also on postrelease control for similar types of charges when he committed the present offenses. The court also concluded that Gay's participation in the crimes was greater than his codefendants.

**{¶11}** Gay's counsel requested a three-year sentence. The court rejected the request stating that the three-year sentence would be one year short of what Gay was sentenced to in his prior felonious assault and aggravated robbery case. The court found the facts in the instant case were just as serious as those in the prior case and, in addition, the present offenses were committed while he was on postrelease control for the prior case. The court concluded that:

> [B]ased on the circumstances in this case and the nature of the charge and the impact on the victim and your level of conduct being greater than others, I'm imposing for the conduct in this case a period of five years, and that takes into account the fact that you were on PRC at the time this occurred, and it takes into account the seriousness of your prior conduct and the length of your criminal conduct and the nature of your criminal conduct before, and I think it's justifiable to increase the time period to five years.

> Quite frankly, there was a justification to increase it more than that, but I'm satisfied that five years is appropriate under these circumstances.

Tr. 124-125.

**{¶12}** Based on the record, the trial court considered the factors in R.C. 2929.11 and 2929.12 prior to imposing the sentence. Additionally, in its sentencing entry, the trial court stated that it "considered all required factors of law." Accordingly, Gay's first assigned error is overruled.

## Allied Offenses

**{¶13}** In his second assigned error, Gay argues the trial court erred by not merging the sentences because the aggravated robbery and felonious assault counts were committed as part of a single act with the same animus.

**{¶14}** The trial court concluded that the offenses did not merge, stating on the record as follows:

> I don't think merger applies in this situation. I think these are two separate sets of conduct or separate intent with regard to the events that took place at the same time. So, for the purposes of sentencing I'm going to sentence you on each one of them.

Tr. 113.

**{¶15}** R.C. 2941.25 requires courts to merge offenses when the offenses are closely related and arise out of the same occurrence. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 43, abrogated in part by *State v. Ruff*, Slip Opinion No. 2015-Ohio-995. In deciding whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question to determine is whether it is possible to

commit one offense and commit the other with the same conduct. *Id.* at ¶ 48, citing *State v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988). "If the offenses correspond to such a degree that the conduct constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Johnson* at ¶ 48.

**{¶16}** "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct that is 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶ 50.

**{¶17}** In the Ohio Supreme Court's recent decision in *Ruff*, the court added a third element to be considered in determining if the offenses are allied. The court held that along with determining whether the offenses were committed separately and with a separate animus, the court must also determine whether the offenses are of dissimilar import. The court held that crimes are of dissimilar import if the defendant's conduct involved separate victims or if the harm that resulted from each offense is separate and identifiable. *Ruff* at paragraph two of the syllabus. In the instant case because there was only one victim and the injuries were not separate and identifiable the offense are not of dissimilar import.

**{¶18}** Gay was convicted of aggravated robbery under R.C. 2911.01(A)(3), which required proof that while "committing or attempting a theft offense" he "inflicted or

attempted to inflict serious physical harm" on the victim. He was also convicted of felonious assault in violation of R.C. 2903.11(A)(2), which states that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon."

**{¶19}** Thus, it is imaginable that one could commit felonious assault as part of committing aggravated robbery. The single act of inflicting serious physical harm with a deadly weapon to effectuate a theft could constitute both offenses. *See State v. Pope*, 6th Dist. Lucas No. L-12-1168, 2013-Ohio-4091, ¶ 21.

**{¶20}** However, we conclude that the crimes were committed with a separate animus. This court in *State v. Bailey*, 8th Dist. Cuyahoga No. 100993, 2014-Ohio-4684 stated:

> However, the issue of whether two offenses are allied depends not only on whether the two crimes were committed in the same act, but also with a single state of mind. The Ohio Supreme Court has defined the term "animus" to mean "purpose or, more properly, immediate motive." *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Because animus is often difficult to prove directly, it may be inferred from the surrounding circumstances. When "an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime." *Id.*
>
> Thus, when determining whether two offenses were committed with a separate animus, the court must consider (1) whether the first offense was merely incidental to the second offense or whether the defendant's conduct in the first offense demonstrated a significance independent of the second, and (2) whether the defendant's conduct in the first offense subjected the victim to a substantial increase in the risk of harm apart from that involved in the second offense. *State v. Shields*, 1st Dist. Hamilton No. C-100362, 2011-Ohio-1912, ¶ 17.

*Id.* at ¶ 34 and 35.

**{¶21}** In the instant case, there was evidence that the group was angry with the victim for accusing them of stealing his cell phone. Therefore, the intent to assault him could have been because of the accusation. In fact, the group was told to leave the area where the accusation first occurred because the argument had become too intense. Subsequently, while beating the victim, the intent to search his pockets to rob him could have developed separately from the initial intent to harm him based on the theft accusation.

**{¶22}** Even if the victim did not accuse Gay of stealing his cell phone, this court has held that where the "defendant uses greater force than necessary to complete an aggravated robbery, he shows a separate animus." *Bailey* at ¶ 36, citing *State v. Lacavera*, 8th Dist. Cuyahoga No. 96242, 2012-Ohio-800, ¶ 19. In the instant case, the victim suffered a severe concussion and broken nose. He had to have a metal plate placed in his head, and staples were needed to close the lacerations to his head. Therefore, force in excess of that necessary to rob the victim was used. Accordingly, we conclude the trial court did not err by refusing to merge the offenses.

**{¶23}** Gay also argues that the prosecutor engaged in misconduct by promising at the plea hearing to not advocate against merger and then at sentencing arguing that the offense should not be merged. The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Hostacky*, 8th Dist. Cuyahoga No. 100003, 2014-Ohio-2975.

**{¶24}** All three defense attorneys objected at the sentencing hearing to the prosecutor's arguments against merger. The trial court stated that it did remember that the prosecutor stated it would not take a stance on merger, but then concluded "it's still my decision as to whether or not I think legally that's the result or not." In fact, the trial court informed the defendants at the plea hearing that regardless of the prosecutor's statement that it would not argue for or against merger, that the decision was still up to the court. The trial court then inquired whether that changed any of the defendants' decisions to enter a plea, and all of the them, including Gay, responded "no."

**{¶25}** Therefore, the prosecutor's argument either way regarding merger had no effect on the plea agreement because Gay was aware that the decision in the end was for the trial court to determine. Further at the sentencing hearing, prior to its determination that the offenses did not merge, the trial court noted that the prosecutor at the plea hearing had no objection to the merger. Accordingly, no prejudice occurred. Gay's second assigned error is overruled.

**{¶26}** Although, we find no error in the trial court's refusal to merge the sentences, our review of the sentencing transcript indicates that it is unclear at the hearing whether the trial court intended to impose a sentence of five years on each count. The court simply states that it's "imposing for the conduct in this case a period of five years," without stating the sentence for each count. The court does later state on the record that the sentence is concurrent.

**{¶27}** A court generally speaks through its journal entries, however, a defendant is entitled to know his sentence at the sentencing hearing. Crim.R. 43; *State v. Quinones*,

8th Dist. Cuyahoga No. 89221, 2007-Ohio-6077, ¶ 5*; State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068. Due to the ambiguity in the record, Gay contends he did not understand at the hearing whether the court intended to impose two terms of five years to be served concurrently or whether he received a lesser term on the felonious assault to be served concurrently with the five years for the aggravated robbery. We remand the matter for the trial court to conduct a hearing to clarify on the record the sentence imposed. Pursuant to Crim.R. 43(A), the defendant must be present for the clarification and imposition of the corrected sentence. *State v. R.W.*, 8th Dist. Cuyahoga No. 80631, 2003-Ohio-1142.

**{¶28}** Judgment affirmed and the matter remanded for proceedings consistent with this opinion.

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 be sent to 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 clarification of sentence as stated herein.

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

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PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and

KATHLEEN ANN KEOUGH, J., CONCUR