

[Cite as *State v. Carter*, 2015-Ohio-1834.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101810

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES CARTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576912-A

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

RELEASED AND JOURNALIZED: May 14, 2015

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

{¶1} Defendant-appellant Charles Carter appeals from the trial court's final judgment entry of conviction. He challenges his bindover from juvenile court to adult court, his plea and the consecutive sentences imposed by the trial court. We affirm the conviction, but remand for resentencing.

I. Procedural History

{¶2} In August 2013, Carter was bound over from juvenile court to adult court under R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) in connection with the robbery and murder of Nathan Brown. At the time of the crime, Carter was 16 years old, and at the time of the bindover he was 17 years old. He had a history of delinquencies as a juvenile; he also had another pending case, which had been bound over from juvenile court to adult court (*State v. Carter*, Cuyahoga C.P. No. CR-13-576911).

{¶3} In September 2013, the grand jury indicted Carter in this case, along with codefendants brothers Montell and Marcellus Smith. Carter was charged as follows: Counts 1 and 2, aggravated murder; Count 3, murder; Count 4, felonious assault; Count 5, aggravated burglary; Count 6, kidnapping; and Count 7, aggravated robbery. The charges against Carter all included one- and three-year firearm and forfeiture of a weapon specifications.

{¶4} After negotiations with the state, Carter pleaded guilty to an amended Count 3, involuntary manslaughter with the firearm specifications, and an amended Count 7, aggravated robbery, with deletion of the one- and three-year firearm specifications. The

remaining counts and specifications were dismissed. Carter and the state agreed on a recommended sentence in the range of 13 to 20 years.

{¶5} In August 2014, the trial court sentenced Carter to a 19-year prison term, which included consecutive sentences. The trial court incorrectly stated that it was sentencing Carter on Counts 1 and 5, rather than Counts 3 and 7. The court's sentencing judgment entry also incorrectly stated the counts. The court subsequently issued a nunc pro tunc order correcting the counts.

II. Facts

{¶6} This case was the city of Cleveland's first homicide for the year 2013. The crime occurred in the early morning hours of January 1, and the victim was Nathan Brown.

{¶7} The record shows that a day or two prior to his murder, Brown and a friend made contact with a person, previously unknown to them, and later identified as Carter, for the purpose of purchasing marijuana. Carter went to Brown's house to sell him the marijuana, and was accompanied by two other men, who stayed outside of the house on the porch while Carter went inside the house to complete the sale.

{¶8} On the morning of the murder, Carter, along with the Smith brothers,¹ returned to Brown's house; it was in the two a.m. hour. Around that time, an acquaintance of Carter's was outside on her porch near Brown's house, and saw Carter

¹The record suggests that the Smith brothers were not the same two men who went to Brown's house to buy the marijuana a day or two prior to the murder.

walking with two men. Carter was carrying a weapon she described as “long and black.” The acquaintance said something about “being good” to Carter, at which point Carter shot out the windshield of a parked minivan.

{¶9} Once at Brown’s house, Marcellus had the shotgun and his role was to act as the “muscle” to keep Brown under control while his house was being burglarized. Carter’s job was to go through the house and find items of value to steal. Montell’s job was to stand at the front door as the “lookout.”

{¶10} The defendants forcibly gained entry to Brown’s house. During the course of the incident, Brown, who was in his living room, became defensive, and a struggle ensued between him and Marcellus. Montell entered the fray to help Marcellus and punched or hit Brown a couple of times. During the struggle, the gun went off and Brown was struck. The evidence demonstrated that after being shot in his living room Brown went outside to his front porch, where he collapsed. A neighbor, having heard gunshots and then seen Brown on his front porch, called the police.

{¶11} When the police arrived, they found Brown deceased on the porch, with the shotgun near his body. A black and green fleece Nike glove was found in a pool of blood in the living room.

{¶12} At the time, there was fresh snow on the ground, and the police observed footprint trails in it. The trails led away from Brown’s house, in two different directions.

Blood droplets were detected in one of the trails, and shotgun shell casings were found in the other trail.

{¶13} The police traced one of the trails to a residence, where they found a number of shotgun shell casings in the front yard and driveway. They knocked on the door, and Aloha Spy, Carter's mother, responded. Carter often stayed at the home with his mother, but Spy told the police that she had not seen her son or the Smith brothers in "some period of time." The officers requested to come into her home to look around, and Spy consented. Inside the home, the police saw a "large" number of shotgun shell casings on top of a garbage can in the kitchen. Spy then asked the police to leave, which they did.

{¶14} Two days later, the police returned to Spy's home with a search warrant. During execution of the warrant, they recovered a black and green fleece Nike cap that appeared to be a match to the glove they had previously recovered from Brown's house.

{¶15} The shotgun shell casings recovered from Spy's home were determined to have been shot from the gun found at Brown's home near Brown's body.

{¶16} DNA analysis on the Nike glove that was found at the crime scene, as well as the Nike hat recovered during the search of Spy's home, matched Marcellus Smith's DNA.

{¶17} The blood droplets in the snow on the evening of the crime were analyzed and came back as a DNA match to Montell Smith. At the time of Montell's arrest a few weeks after the crime he was wearing boots that appeared to have blood stains on them. They were submitted for testing, which revealed that there were blood stains, and the blood was Brown's.

III. Assignments of Error

I. The trial court erred when it did not make the necessary findings prior to imposing consecutive sentences, and the record did not support that consecutive sentences were warranted.

II. The trial court erred when it sentenced Carter on charges for which he did not plead guilty. This sentencing error cannot be cured by nunc pro tunc entry and requires resentencing.

III. The trial court erred when it sentenced Carter on both involuntary manslaughter and aggravated robbery as they were allied offenses of similar import.

IV. The mandatory transfer of Carter's case to adult court pursuant to R.C. 2152.10(a)(1)(a) and 2152.12(a)(1)(a)(i) violated his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

V. The mandatory transfer of Carter's case to adult court pursuant to R.C. 2152.10(a)(1)(a) and 2152.12(a)(1)(a)(i) violated his right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

VI. The trial court did not comply with Criminal Rule 11 before accepting Carter's guilty plea and the plea of guilty was not knowingly, intelligently and voluntarily made.

IV. Law and Analysis

{¶18} For ease of discussion, some of the assignments of error are considered out of order.

Consecutive Sentences

{¶19} In his first assignment of error, Carter challenges the imposition of consecutive sentences, contending that the trial court did not make the statutorily mandated findings and that the record did not support that consecutive sentences were warranted. Carter also contends that the trial court erred by not incorporating its

findings into its judgment entry.

{¶20} R.C. 2929.14(C)(4) requires that a trial court engage in a three-step analysis in order to impose consecutive sentences. First, the trial court must find that “consecutive service is necessary to protect the public from future crime or to punish the offender.” *Id.* Second, the trial court must find that “consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” *Id.* Third, the trial court must find that at least one of the following applies:

(1) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, while under a sanction, or while under postrelease control for a prior offense;

(2) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct; [or]

(3) the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Id.

{¶21} In sentencing Carter to consecutive terms, the trial court stated the following:

I’m going to find that consecutive sentences are appropriate and that a single sentence would not adequately punish you or protect the community.

That based on your criminal history and all the facts of this case, that a consecutive sentence would not be disproportionate. And it’s clear that your separation from society is absolutely necessary to punish yourself and protect the community.

{¶22} The trial court was not required to use “talismanic words,” but, it must be clear from the record that it actually made the findings required by statute. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37; *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 14, 17 (8th Dist.). On this record, we find it clear that the trial court made the statutorily required findings.

{¶23} Further, we disagree with Carter’s contention, based on two factors, that the record did not support the imposition of consecutive sentences. Carter’s first contention is that his criminal history did not justify consecutive sentences because his prior history did not contain crimes of violence.

{¶24} But the consecutive sentence statute does not require that prior crimes be of a violent nature in order for a trial court to find that “the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.” Thus, the trial court’s finding — that consecutive sentences were warranted based on Carter’s criminal history — was supported by the record.²

{¶25} Carter’s second contention is that his conduct did not warrant consecutive sentences because he was not the shooter. However, as noted by the trial court and

²Further, at the time of sentencing, the trial court was aware that Carter was awaiting sentencing on Cuyahoga C.P. No. CR-13-576911 before another trial court judge for robbery (“[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another”), a violent offense. R.C. 2911.02(A)(3).

supported by the record, Carter was pivotal in setting up the crime. Carter, and seemingly not the Smith brothers, had been to Brown's house a day or two before the murder. Carter carried the shotgun as the trio made its way to Brown's house to commit the crime. And the forensic evidence shows that Carter's mother's house was an "escape" house. Thus, Carter had an active role in planning and committing this crime. The imposition of consecutive sentences is therefore supported by the record.

{¶26} Although the trial court made the required findings on the record, and the record supports the imposition of consecutive sentences, the trial court failed to incorporate its findings into the sentencing entry, as required under *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at syllabus. Carter's first assignment of error is therefore sustained only as it relates to the incorporation of the consecutive sentence findings into the judgment entry.

Merger

{¶27} For his third assigned error, Carter contends that involuntary manslaughter and aggravated robbery were allied offenses that should have merged at sentencing. The state contends that Carter waived the issue because he failed to raise it at that the trial court level. We disagree with that contention.

{¶28} In *State v. Johnson*, 128 Ohio St.3d 153, 2012-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court created a two-part test to determine if offenses should merge. The first prong requires that the court determine if the multiple offenses "were committed by the same conduct." *Id.* at ¶ 47. The second prong is whether "it is possible to

commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other.” *Id.* If both of these question are answered affirmatively then the offenses should be merged. “[I]f 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.

{¶29} Recently, the Ohio Supreme Court clarified that

[a]s a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when a defendant’s conduct supports multiple offenses:

(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

State v. Ruff, 2015-Ohio-995, ¶ 31.

{¶30} In *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist.), this court, en banc, held that the trial court has a duty to conduct an allied offense analysis when multiple charges facially present a question of merger under R.C. 2941.25. *Id.* at ¶ 27. This court further held that “[d]efense counsel’s failure to raise the merger issue does not relieve the trial court of its duty to determine the merger question when a facial question of merger presents itself.” *Id.* at ¶ 37. Thus, the issue of merger was not waived because defense counsel failed to raise it.

{¶31} The state also contends that because the parties agreed to a sentencing range

that could only be achieved by Carter being sentenced to consecutive terms on both counts, the merger issue is moot. But citing the Ohio Supreme Court's decision in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, this court held that the issue of allied offenses can be appealed even if the defendant received a jointly recommended sentence. *Rogers* at ¶ 40. Our analysis of this issue, therefore, does not end merely because the state and defense agreed to a sentencing range.

{¶32} Notwithstanding the above, *Rogers* also held that “not every case involving multiple convictions with a silent record [on merger] will require an allied-offense determination by the trial court.” *Id.* at ¶ 26. We find that this was such a case.

{¶33} Carter pleaded guilty to involuntary manslaughter under R.C. 2903.04(A), which provides that “[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony.” He also pleaded guilty to the predicate felony, aggravated robbery, as set forth in R.C. 2911.01(A)(3): “[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another.”

{¶34} This court recently addressed the merger issue relative to felony murder and the underlying felony on the same charges as here: involuntary manslaughter and aggravated robbery. *State v. Velez*, 8th Dist. Cuyahoga No. 101303, 2015-Ohio-105. In *Velez*, the defendant and his codefendant “deceptively secured their entry into the victim's place of business to rob him,” and stabbed the victim during the robbery; the

victim later died. *Id.* at ¶ 11. The defendant contended that the stabbing occurred because the victim resisted and, thus, was committed with a single state of mind: to rob the business.

{¶35} This court disagreed and held that “[n]ot only do we find that the stabbing was an additional act of such excessive force that it went beyond being the same conduct necessary to rob the victim, it was an act of harm that has a separate animus and was unnecessary to the commission of the robbery.” *Id.*

{¶36} The record here provides enough facts for us to review the merger issue. Similar to the circumstances in *Velez*, Carter and his codefendants went to Brown’s home to rob him. After they forcefully gained entrance into the home, Carter was to go through the house and get items to steal. Brown, just like the victim in *Velez*, was resistant, a struggle ensued and he was shot. The shooting was an “additional act of such excessive force that it went beyond being the same conduct necessary to rob” Brown. *Id.* The shooting, therefore, had a “separate animus and was unnecessary to the commission of the robbery.” *Id.*

{¶37} In light of the above, the third assignment of error is overruled.

Nunc Pro Tunc Entry

{¶38} For his second assigned error, Carter contends that the trial court sentenced him on charges that he did not plead guilty to and, therefore, the case needs to be remanded so that he can be resentenced. We agree.

{¶39} Carter pled guilty to Counts 3 and 7, but the court sentenced him on Counts

1 and 5.³ The trial court's August 7, 2014 sentencing judgment entry also stated the wrong counts. On September 23, 2014, the trial court issued a nunc pro tunc judgment to reflect that Carter had been sentenced on Counts 3 and 7.

{¶40} Trial courts are granted authority to correct errors in judgment entries so that the record speaks the truth through the use of nunc pro tunc entries. *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163-164, 656 N.E.2d 1288 (1995); Crim.R. 36. Thus, a nunc pro tunc entry merely serves as an accurate reflection of what the trial court actually decided; it cannot be used to reflect what the court might or should have decided, or intended to decide. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18.

{¶41} The trial court's nunc pro tunc entry did not reflect what actually occurred at sentencing and, therefore, was improper. Carter's second assignment of error is well taken.

{¶42} Thus, although we find no issue with merger or the imposition of consecutive sentences, we find that Carter must be resentenced on the correct counts. The case is therefore remanded for resentencing Carter to the 19-year term on the correct counts. The same findings made by the trial court for the imposition of consecutive sentences may be reiterated and thereafter incorporated into its sentencing judgment entry.

³Carter was sentenced at the same time as his codefendants, who had both pled guilty to an amended Count 1, involuntary manslaughter, and Count 5, aggravated burglary.

Plea

{¶43} We next consider Carter’s sixth assignment of error, in which he contends that his plea was not knowingly, intelligently, and voluntarily made. Specifically, Carter contends that the trial court failed to advise him that: (1) a jury would be informed that he had a right not to testify and that the jury could not draw any inferences from his silence or could not be used to infer his guilt, and (2) the “each and every element of the crimes charged would have to be proven beyond a reasonable doubt, and that any jury verdict would have to be unanimous.”

{¶44} Carter challenges the trial court’s advisement under Crim.R. 11(C)(2)(c) as to the above two constitutional rights. Literal compliance with Crim.R. 11(C)(2)(c), however, is not required. *State v. Ballard*, 66 Ohio St.2d 473, 480-482, 423 N.E.2d 115 (1981) . Rather, the record must show that the trial court explained the right “in a manner reasonably intelligible to that defendant.” *Id.* at 480.

{¶45} As to Carter’s right against self-incrimination, the trial court inquired of him as follows: “[d]o you also understand you have a right to remain silent and not testify, and no one could hold it against you that you didn’t testify nor could anyone make a comment about your silence to the jury?” Carter responded that he understood.

{¶46} In *State v. Burston*, 8th Dist. Cuyahoga No. 93645, 2010-Ohio-5120, this court found that the following inquiry satisfied the trial court’s obligation in advising a defendant about his right against self-incrimination: “[d]o you understand that you are giving up your right in each case to remain silent and not testify[?]” *Id.* at ¶ 7, quoting

the trial court. The court's advisement here went even further than the court's advisement in *Burston*.

{¶47} On this record, we find that the trial court explained to Carter in a reasonably intelligent manner his right against self-incrimination.

{¶48} In regard to the state's burden of proof, the trial court inquired of Carter whether he understood that he had "a right to have the state through its prosecuting attorney prove your guilt by evidence beyond a reasonable doubt, and your attorney would have the opportunity to confront and cross-examine each and every witness the state would bring forward?" Carter again indicated that he understood.

{¶49} This court has held that a trial court "does not need to inform the defendant that a jury verdict must be unanimous" in order to comply with advising a defendant of the state's burden of proof. *State v. Dawson*, 8th Dist. Cuyahoga No. 100901, 2014-Ohio-4382, ¶ 8. This court has also held that a trial court does not have to advise a defendant that the state is required to prove each and every element of crime beyond a reasonable doubt. *State v. Singleton*, 8th Dist. Cuyahoga No. 96853, 2012-Ohio-360, ¶ 7-10.

{¶50} In light of the above, the sixth assignment of error is overruled.

Mandatory Transfer from Juvenile Court to Adult Court

{¶51} In his fourth and fifth assignments of error, Carter contends that the mandatory transfer of his case from juvenile court to adult court violated his constitutional rights to due process and equal protection, respectively.

{¶52} Carter failed to raise the issue of the statutes mandating mandatory bindover, R.C. 2152.10 and 2152.12, at the trial court level. ““Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue.”” *State v. Mays*, 8th Dist. Cuyahoga No. 100265, 2014-Ohio-3815, ¶ 43, quoting *In re I.A.*, 2d Dist. Montgomery No. 25078, 2012-Ohio-4973, ¶ 4, quoting *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus.

{¶53} Notwithstanding Carter’s waiver of the issue, we find no merit to his contentions. A defendant who voluntarily, knowingly and intelligently enters a guilty plea with counsel’s assistance may not thereafter raise claims relating to violation of constitutional rights that occurred prior to the entry of the plea. *Mays* at ¶ 44, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 937, ¶ 78; *Tollet v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). As already discussed, Carter’s plea was voluntarily, knowingly, and intelligently made. He, therefore, may not now claim that his mandatory bindover was unconstitutional.

{¶54} Moreover, this court held in *Mays* that R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(i) do not violate due process and equal protection rights. *Id.* at ¶ 45. As stated in *Mays*, “[w]e will continue to follow the precedent on this issue unless otherwise advised by the Supreme Court of Ohio.” *Id.*

{¶55} In light of the above, the fourth and fifth assignments of error are overruled.

V. Conclusion

{¶56} Carter's conviction is affirmed. The involuntary manslaughter and aggravated robbery counts were not subject to merger. The trial court made the statutorily required findings for the imposition of consecutive sentences and the record supported the findings. However, because the court sentenced Carter on the wrong counts, the case is remanded for resentencing. In resentencing Carter, the court may rely on its prior findings in support of consecutive sentences, which it must then incorporate into its sentencing judgment entry.

{¶57} Affirmed in part; reversed in part; remanded for resentencing.

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.

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

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
PATRICIA ANN BLACKMON, J., CONCUR