[Cite as *State v. Norris*, 2015-Ohio-2857.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102104

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERRIC D. NORRIS, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584455-A

BEFORE: Kilbane, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: July 16, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Erric Norris, Jr. ("Norris"), appeals from his sentence for murder and other offenses. For the reasons set forth below, we affirm in part, reverse in part, and remand for resentencing.

{¶2} On April 23, 2014, Norris was indicted in Cuyahoga C.P. No. CR-14-584455-A in connection with the shooting death of Diveen Martin ("Martin") at the home of Carlotta Perkins Martin ("Perkins Martin"). The 11-count indictment charged Norris with aggravated murder, murder, and two counts of felonious assault upon Martin, the attempted murder of Perkins Martin, having weapons while under disability, two counts of failure to comply with the order of an officer, tampering with evidence, obstructing official business, and inducing panic. The indictment also contained one- and three-year firearm specifications, notice of prior conviction, and repeat violent offender specifications. Also on April 23, 2014, Norris was indicted on three counts of escape in Cuyahoga C.P. No. CR-14-584497.

{¶3} On August 28, 2014, the state reached a plea agreement with Norris for both pending cases. In Case No. CR-14-584455, Norris pled guilty to the following: the murder of Martin, in violation of R.C. 2903.02(B), with a three-year firearm specification (Count 2); felonious assault upon Martin, in violation of R.C. 2903.11(A)(2), with a three-year firearm specification, repeat violent offender

specification, and notice of prior conviction specification (Count 5); having a weapon while under disability (Count 6); two counts of failure to comply (Counts 7 and 8); tampering with evidence, with a firearm specification (Count 9); obstructing official business (Count 10); and inducing panic (Count 11). The remaining charges and specifications were dismissed. In CR-14-584497, Norris pled guilty to escape, in violation of R.C. 2921.34, a fifth-degree felony.

{¶4} The matter proceeded to sentencing on September 22, 2014. At this hearing, the prosecuting attorney argued that the offenses were not allied and should not merge because they were separated by a break in time in which Norris cleared a jam from his gun. In opposition, the defense counsel argued that the offenses had the same animus and were part of the same transaction. The trial court determined that the offenses would not merge. The court also determined that consecutive sentences were appropriate and imposed the following sentence:

> 3-year gun spec to be served prior to and consecutive with 15 years to life on count 2; 3-year gun spec to be served prior to and consecutive with 7 years on the base charge on count 5; 2 years on counts 6, 7 and 8; 1 year on gun spec to be served prior to and consecutive with 9 months on the base charge on count 9; counts 10 and 11 merge * * * 9 months on count 11. 1-year gun spec on count 9 merges with 3-year gun spec on counts 2 and 5, but gun specs on counts 2 and 5 are consecutive to each other, for a total of 6 years on gun specs.

{¶5} Norris now appeals and assigns the following errors for our review:

Assignment Of Error No. One

> The court erred by sentencing Erric Norris separately for murder and for felonious assault.

Assignment Of Error No. Two

> It was error to sentence Erric Norris to consecutive sentences.

Allied Offenses

{¶6} In his first assignment of error, Norris asserts that the trial court erred in failing to merge the offenses of murder and felonious assault. In opposition, the state maintains that the offenses are not allied because the gun jammed when Norris first fired the weapon at Martin in the street outside of Perkins Martin's home, and he then cleared the jam and chased Martin through backyards before fatally shooting him.

{¶7} Our review of an allied offense question is de novo. *State v. Webb*, 8th Dist. Cuyahoga No. 98628, 2013-Ohio-699, ¶ 4.

{¶8} R.C. 2941.25 governs allied offenses and 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.

R.C. 2941.25

{¶9} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus, the Ohio Supreme Court held that "when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct. If the offenses correspond to such a degree that the conduct of the defendant can constitute the commission of both of the offenses, then the offenses are of similar import. *Id*. at ¶ 48. If the offenses are of similar import, the court must then determine if they were in fact committed by the same conduct — a single act, committed with a single state of mind. *Id*. at ¶ 49. Conversely, if the commission of one offense could not 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*.

{¶10} Recently, in *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, the Ohio Supreme Court clarified the test that a trial court and a reviewing court must employ in determining whether offenses are allied offenses that merge into a single conviction, stating:

> When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses (1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm; (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.
>
> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

Id. at ¶ 24-26.

{¶11} As to the first part of the analysis, whether the conduct of the defendant can constitute the commission of both of the offenses, we note that in *State v. Reid*, 2d Dist. Montgomery No. 23409, 2010-Ohio-1686, ¶ 41, the court held that "when they involve the same conduct, R.C. 2903.11(A)(2) is an allied offense of R.C. 2903.02(B) because commission of one offense will necessarily result in commission of the other offense."

{¶12} As to the second part of the analysis, whether the offenses were in fact committed by the same conduct — a single act, committed with a single state of mind, the defendant's precise conduct must be reviewed, and only if the crimes were committed

separately or there was a separate animus for each crime (or they are of dissimilar import under the first prong) can the defendant be sentenced for both. *See State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 33.

{¶13} In *State v. Gandy*, 1st Dist. Hamilton No. C-070152, 2010-Ohio-2873, the defendant rapidly discharged three bullets into the victim in quick succession, and the trial court concluded that the offenses of felonious assault and attempted murder were committed with the same animus. Similarly, in *State v. Lanier*, 192 Ohio App.3d 762, 2011-Ohio-898, 950 N.E.2d 600, ¶ 4 (1st Dist.), the court concluded that where the defendant had fired multiple shots in rapid succession at the victim in the same location, and stopped shooting only after the gun had jammed, his convictions for attempted murder and felonious assault merged. *Accord State v. Minifee*, 8th Dist. Cuyahoga No. 91017, 2009-Ohio-3089. In that case, defendant's convictions for felony murder and felonious assault were merged where the offenses were the result of a shooting that occurred in front of the victim's house just as the victim was dropped off. *See also State v. Johnson*, 195 Ohio App.3d 59, 2011-Ohio-3143, 958 N.E.2d 977 (1st Dist.) (where the defendant fired multiple shots at the victim in rapid succession, the offenses of felony murder under R.C. 2903.02(B), for causing the death of victim, and felonious assault under R.C. 2903.11(A)(1), for causing or attempting to cause physical harm were merged).

{¶14} In *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, the Ohio Supreme Court considered a case where the defendant got in an argument with

the victim and "pulled a gun and fired two shots, [then as the victim] ran, a bullet struck him from behind, fractured his fifth thoracic vertebra, and instantly paralyzed him." *Id.* at ¶ 4. In that case, the defendant was indicted for two counts of attempted murder and two counts of felonious assault, all arising from two gunshots that missed the victim and two gunshots that struck him. The Ohio Supreme Court held that the offenses related to two gunshots that struck the victim, one count of attempted murder and one count of felonious assault were committed with a single act and animus. *Id.* at ¶ 24. The Ohio Supreme Court also held that the offenses related to the gunshots that missed, one count of attempted murder and one count of felonious assault were committed with a single act and animus. *Id.* at ¶ 27. The Ohio Supreme Court specifically rejected the conclusion that all of the offenses had to merge into a single conviction, however. *Id.* at ¶ 28.

{¶15} Following *Williams*, "even gunshots separated by a very brief interval can be attributed to a separate animus for purposes of establishing distinct offenses and precluding application of the merger doctrine." *State v. White*, 10th Dist. Franklin No. 10AP-34, 2011-Ohio-2364, ¶ 67, citing *Williams*, at ¶ 24.

{¶16} The First District Court of Appeals has observed, however, in *State v. Jackson*, 1st Dist. Hamilton No. C-090414, 2010-Ohio-4312, ¶ 25, that

> [t]he murder or assault of a single victim by a single perpetrator who fires multiple gunshots often results in only a single punishment. The perpetrator's discharge of gunshots in rapid succession either constitutes a single, continuous act or is evidence of a single animus to harm the victim

> with some of the attacker's shots achieving his purpose and some striking wide of the mark.

Id., citing *Gandy*, 1st Dist. Hamilton No. C-070152, 2010-Ohio-2873, at ¶ 11, and *Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 27.

{¶17} The *Jackson* court then carefully examined the defendant's actions and noted that

> [a]fter wounding Champion with his first shot, Jackson fled from the hallway, descended a staircase, and headed toward the building exit. But instead of leaving the seriously injured Champion in the hallway, Jackson returned, saw that Champion had struggled to his feet, and shot him in the back, inflicting a mortal wound.
>
> * * *
>
> The first shot had occurred while Jackson was engaged in a fistfight with Champion. The second fatal shot came after Jackson had fled downstairs and then had returned to finish Champion off. Reviewing Jackson's conduct, we are persuaded that the evidence supports the conclusion that he had knowingly caused serious physical harm to Champion with the first shot but that he had a more malevolent goal for the second shot.

{¶18} The *Jackson* court took particular note of the fact that the defendant first shot the victim during a fistfight, then fled, but returned again to fire the fatal shot. In light of this conduct, the *Jackson* court held that

> the temporal separation, however slight, between Jackson's two acts of shooting indicates that, as in [*State v*.] *Thomas*, [1st Dist. Hamilton No. C-920135, 1993 Ohio App. LEXIS 2580 (May 19, 1993)], Jackson had committed two separate acts resulting in two distinct offenses.

Id. at ¶ 24. In *Thomas*, the defendant fought with his wife and wrestled a firearm from her hands, then shot her in the back as she ran away. The defendant started to flee, "then turned and shot her one or two more times, inflicting wounds in her neck and hand." The court held that this conduct demonstrated that Thomas had committed two separate acts.

{¶19} In this matter, the prosecuting attorney set forth the following statement in the record:

> Your Honor, on April 3, 2014 this defendant was engaged in conversation with Ms. Nelson and that conversation was an unwelcomed one. She did not want to speak with him. He * * * made passes at her and she told him to leave her alone. At this occasion he was talking to her. She was upstairs on the second floor of her house and he was on the street level, on the street. He was talking ill of her boyfriend, [Martin]. [Martin] heard this conversation and came downstairs to confront the defendant. They were outside on the street, the defendant and the victim talking to each other, the defendant telling — calling the victim a bitch and he's nothing. The victim's out there. The victim has several friends come there as well. They're engaged in this argument in the middle of the street to which at one point Mr. Norris decides to pull a weapon out, a gun, and aim it at [Martin]. Not only did he pull the gun out and aim it at [Martin], he pulled the trigger. When he pulled that trigger, the gun did not go off; it jammed.
>
> At this point in time, your Honor, [Martin] decided to run. You know what? This guy's got a gun. I'm not going to deal with this. He ran. [Norris] decided to clear his weapon to get rid of whatever was in his gun that stopped it from firing — and on the scene we located a live bullet which was most likely jammed inside the weapon — chased [Martin] through the backyards and shot him in his back, lower back buttock area, severing his femoral artery. [Martin] ran a couple blocks and fell and bled to death. [Norris] turned around and went back to his car and sped away.
>
> * * *

> Our argument is that felonious assault was the first gun up and pulling of the trigger where the gun does not go off. That's a different offense. He could have stopped right then and there. He aimed the weapon at [Martin] and pulled the trigger but by the grace of God the gun didn't go off and it gave him a chance to change his mind and he didn't.

{¶20} In opposition, the defense noted that when projectiles are fired in a series of shots, the animus is the same, whether the shots strike the target or miss. The trial court did not merge the sentences for murder and felonious assault and stated:

> The discussion that you've had about the felonious assault and whether or not it merges is an interesting question, but the distinction that I see is this. [Norris] had the opportunity to stop the behavior. There's actually time when the gun jams. I'm not talking about immediate successive shots, although I would argue there's still a mental component. People have [a] decision to continue to pull a trigger. But in this case there is an absolute break in time. There is a break between the time the gun gets jammed and the first bullet goes. He takes the time to make sure the gun is clear and shoots again as [Martin is] running away. Because of that, I do believe there's a separate animus and I do believe there was adequate time for [Norris] to stop his behavior. Had he stopped at that moment perhaps today we would be discussing a felonious assault instead of both a felonious assault and a murder, so I do not believe that those merge.

{¶21} Considering all of the foregoing, we note the record indicates that Norris first fired the weapon at Martin outside of Perkins Martin's home. The weapon did not fire, and Norris then cleared the jam in the gun and then pursued Martin. Norris fired at Martin as he fled and fatally struck him. This case, therefore, does not involve the quick firing of all of the gunshots at the same location in an unbroken succession. Rather, Norris unsuccessfully shot at Martin in front of the home. There is, therefore, a break in which Norris cleared the jam from the gun. Norris then pursued Martin to a new location and fatally shot him there. Bearing in mind that our focus must be the precise

conduct of the defendant, we conclude that there is a distinct separation between the offenses, both in time and in location. We therefore find that Norris engaged in two separate and distinct actions that support two separate and non-allied offenses.

Firearm Specifications

{¶22} R.C. 2929.14(B)(1)(b) states in part: "[A] court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction." R.C. 2929.14(B)(1)(g), however, provides:

> If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶23} In this matter, Norris was convicted of murder and felonious assault, so the trial court was required by R.C. 2929.14(B)(1)(g) to sentence him to the firearm

specifications that accompanied those felony convictions. "[R]egardless of whether [a defendant's] crimes were a single transaction, when a defendant is sentenced to more than one felony, including murder and felonious assault, the sentencing court 'shall impose' the two most serious gun specifications." *State v. Isreal*, 12th Dist. Warren No. CA2011-11-115, 2012-Ohio-4876, ¶ 71. *See also State v. Ayers*, 12th Dist. Warren No. CA2011-11-123, 2013-Ohio-2641, ¶ 20-25; *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 32-34. We therefore find that the trial court did not err in concluding that the firearm specifications accompanying the murder and felonious assault convictions were not subject to merger pursuant to R.C. 2929.14(B).

{¶24} The first assignment of error is without merit.

Consecutive Sentences

{¶25} In his second assignment of error, Norris asserts that the trial court erred in imposing consecutive sentences. He complains that R.C. 2929.14 was not met, that the sentence is excessive, and that the journal entry does not meet the requirements of *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

{¶26} R.C. 2929.14(C)(4) requires that a trial court engage in a three-step analysis prior to imposing 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*. Next, 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.* Finally, 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.*

{¶27} In order to impose consecutive terms of imprisonment, a trial court must both (1) make the statutory findings mandated for consecutive sentences under R.C. 2929.14(C)(4) at the sentencing hearing and (2) incorporate those findings into its sentencing entry. *Bonnell* at syllabus.

{¶28} In this case, the trial court stated:

> So now let's talk about 584455. First let's talk about your record. Mr. Norris, you have a very extensive record. It goes back to 1999 and it includes such things as attempted intimidation of crime victim, a prior weapons under disability, a prior felonious assault, multiple RSPs, multiple grand theft or attempted grand theft motor vehicle and a prior failure to comply. Certainly your record is such that the Court believes consecutive sentences in at least some of these counts are necessary to protect the public from future crime by the offender, and I also feel that during this case at least two or more of the offenses were committed as part of one or more courses of conduct, and the harm caused by two or more was so great or unusual that a single prison term would not adequately reflect the seriousness of your conduct, nor would it adequately protect the public.

{¶29} From the foregoing, the trial court clearly concluded that consecutive sentences are necessary to protect the public from future crime, and the offender committed at least two offenses that were committed as part of one or more courses of conduct. The court also concluded that the harm caused by the offenses was so great or unusual that no single prison term for any of the offenses within the courses of conduct adequately reflects the seriousness of the offender's conduct. In addition, the court determined that the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. On this record, however, we cannot say that the trial court concluded that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the

offender poses to the public." We are aware that the law does not require the trial court to have a "word-for-word recitation of the language of the statute," but there still remains the requirement of a finding based upon the sentence and its disproportionality with the defendant's conduct and the danger the defendant poses to the public. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29. Here, however, the finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public has not been made. Accordingly, we reverse the decision of the trial court imposing consecutive sentences and remand to the trial court for the limited purpose of considering whether consecutive sentences are appropriate and, if so, to make the statutorily required findings on the record.

{¶30} Insofar as Norris complains that his overall sentence is too long and "seems punitive and out of bounds," we note that in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus, the Ohio Supreme Court held that "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

{¶31} Insofar as Norris challenges the trial court's sentencing entry, we note that the failure to include the findings is a clerical mistake and does not render the sentence contrary to law. *Bonnell* at ¶ 30, citing *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718. In light of the fact that we have reversed the

consecutive sentences and remanded, however, this claim is now moot. App.R. 12(A)(1)(c).

{¶32} The second assignment of error is well taken.

{¶33} The judgment is affirmed in part, the sentence is reversed, and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR