[Cite as *State v. Wainwright*, 2015-Ohio-677.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101210

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCUS T. WAINWRIGHT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580078-A

BEFORE: Keough, J., Boyle, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: February 26, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant Marcus T. Wainwright ("Wainwright") appeals from the trial court's sentence imposed after his guilty plea. We affirm.

I. Background

{¶2} In November 2013, a Cuyahoga County grand jury indicted Wainwright on three counts. Count 1 charged breaking and entering in violation of R.C. 2911.13(B); Count 2 charged vandalism in violation of R.C. 2909.05(B)(1)(b); and Count 3 charged possessing criminal tools in violation of R.C. 2923.24(A). All counts were felonies of the fifth degree. The charges arose from Wainwright's trespass on the property of the Garden Valley Food Mart, and his use of a sledgehammer to gain entry into the store. Pursuant to a plea agreement, Wainwright subsequently pleaded guilty to Counts 1 and 2 — breaking and entering and vandalism — and the third count was nolled.

{¶3} At sentencing, the trial court sentenced Wainwright to 12 months incarceration on each count, to be served consecutively. The court also determined that Wainwright had violated the postrelease control imposed in Cuyahoga C.P. No. CR-08-510463. The court terminated Wainwright's postrelease control in that case pursuant to R.C. 2929.141(A)(1) and imposed a 12-month prison term to be served consecutive to the two counts in this case, for a total prison term of 36 months. This appeal followed.

II.

A. Allied Offenses

{¶4} The transcript of the sentencing hearing reflects that at sentencing, defense counsel argued that the court should merge the sentences for the breaking and entering and vandalism offenses because "one act occurred that evening." The trial court found, however, that the offenses involved "two separate" acts and thus that the offenses were not allied.

{¶5} In his first assignment of error, Wainwright contends that the trial court erred in imposing separate sentences for the breaking and entering and vandalism offenses because the offenses were allied.

{¶6} R.C. 2941.25 prohibits the imposition of multiple punishments for the same criminal conduct. An appellate court applies a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination. *State v. Cummings*, 8th Dist. Cuyahoga No. 100657, 2014-Ohio-3717, ¶ 27.

{¶7} In determining whether offenses merge, courts consider the defendant's conduct. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 44. The court must first determine if the multiple offenses can be committed by the same conduct. If so, then the court must determine whether the offenses were, in fact, committed by the same conduct, *i.e.*, whether they were a single act committed with a single state of mind. *Id.* at ¶ 49. If the court answers both questions affirmatively, the offenses are allied offenses of similar import and will be merged. *Id.* at ¶ 50.

{¶8} Wainwright contends that the offenses of breaking and entering and vandalism in this case can be committed by the same conduct because the use of force to trespass on another's property (an element of breaking and entering) may also be the source of physical harm to the property of another (an element of vandalism). He further contends that the offenses in this case were committed by the same conduct with a single state of mind, *i.e.*, the single act of using a sledgehammer to gain entry into Garden Valley Food Mart. He argues that because he never got into the store (the police arrived as he was trying to break in and he fled), using the sledgehammer to try to get into the store was both the force element of trespass in the breaking

and entering offense, and the cause of physical harm to the store in the vandalism offense. Therefore, he argues, the offenses should have merged. Wainwright's argument is without merit.

{¶9} Wainwright was convicted of vandalism in violation of R.C. 2909.05(B)(1)(b), which provides that "[n]o person shall knowingly cause physical harm to property that is owned or possessed by another, when * * * the property * * * is necessary in order for its owner * * * to engage in the owner's * * * business, trade, or occupation."

{¶10} He was also convicted of breaking and entering in violation of R.C. 2911.13(B), which provides that "[n]o person shall trespass on the land or premises of another, with purpose to commit a felony." "Trespass" is defined as knowingly entering or remaining on the land or premises of another, without privilege to do so. R.C. 2911.21(A)(1).

{¶11} Contrary to Wainwright's argument, breaking and entering under R.C. 2911.13(B) and vandalism under R.C. 2909.05(B)(1)(b) are not committed by the same conduct. Under R.C. 2911.13(B), a person is guilty of breaking and entering by simply trespassing on another's land or property with the intent to commit any felony thereon. There is no requirement that the trespass be accomplished through the use of force. Hence, in this case, Wainwright violated the breaking and entering statute by merely trespassing on Garden Valley Food Mart's land with the intent to steal. Using the sledgehammer to try to gain entry to the store was a separate act of vandalism. When one offense is completed before another offense occurs, the two offenses are committed separately for purposes of R.C. 2941.25(B), notwithstanding their proximity in time and that one was committed in order to commit the other. *State v. Ballard*, 8th Dist. Cuyahoga No. 98355, 2013-Ohio-373, ¶ 14, citing *State v. Sludder*, 3d Dist. Allen No. 1-11-69, 2012-Ohio-4014, ¶ 14.

{¶12} Wainwright's argument that the breaking and entering and vandalism offenses were allied would have merit if he had been convicted of breaking and entering in violation of R.C. 2911.13(A), which provides that "[n]o person *by force*, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense * * *." (Emphasis added.) In that event, Wainwright's use of the sledgehammer to gain entry to the store would have satisfied the force element of breaking and entering under R.C. 2911.13(A), and the physical harm element of vandalism under R.C. 2909.05(B)(1)(b).[1]

{¶13} However, because Wainwright pleaded guilty to violating R.C. 2911.13(B), which requires only that he trespass on the property of another with the intent to commit a felony, the same conduct did not underlie both convictions. Accordingly, the offenses are not allied, and the trial court did not err in imposing separate offenses for each conviction.

{¶14} The first assignment of error is overruled.

B. Postrelease control

{¶15} At sentencing, the trial court found that Wainwright had violated the conditions of postrelease control in Case No. CR-08-510463, terminated the postrelease control pursuant to R.C. 2929.141(A)(1), and imposed a 12-month prison term to be served consecutive to the other counts.

{¶16} In his second assignment of error, Wainwright contends that the trial court erred in imposing a prison sentence for a violation of postrelease control because he was not lawfully placed on postrelease control in Case No. CR-08-510463. Specifically, Wainwright contends that although the trial court's sentencing entry in Case No. CR-08-510463 advised him that he

[1]Wainwright's reliance on *Ballard*, *supra*, to support his argument that breaking and entering and vandalism may be committed by the same conduct is misplaced because the defendant in *Ballard* was charged with violating R.C. 2911.13(A).

would be subject to postrelease control for three years, it failed to state that an additional term of incarceration could be imposed if he violated the terms of postrelease control. Wainwright contends that the failure to include the consequences of violating postrelease control renders the imposition of postrelease control void, and that the trial court was therefore without authority to impose a sanction for a postrelease control violation.

{¶17} The sentencing entry in CR-08-510463 is not contained in the record on appeal, however. Although Wainwright attached a noncertified copy of the sentencing entry in CR-08-510463 to his brief on appeal, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal based on the new matter." *McAuley v. Smith*, 82 Ohio St.3d 393, 396, 696 N.E.2d 572 (1998); *BAC Home Loans Servicing L.P. v. Komorowski*, 8th Dist. Cuyahoga No. 96631, 2012-Ohio-1341, ¶ 20. Wainwright has not filed a motion for a delayed appeal in Case No. CR-08-510463, nor a motion to consolidate this appeal with an appeal in Case No. CR-08-510463. Accordingly, we are unable to consider Wainwright's argument about whether postrelease control was properly imposed in Case No. CR-08-510463. The second assignment of error is therefore overruled.

{¶18} Judgment affirmed.

It is ordered that appellant recover from 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P.J., CONCURS;
TIM McCORMACK, J., CONCURS IN PART
AND DISSENTS IN PART (SEE SEPARATE OPINION)

TIM McCORMACK, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶19} I agree with the majority in its disposition of the second assignment of error. However, I disagree with its conclusion regarding the first assignment of error. I believe appellant's offenses of breaking and entering and vandalism should have been merged pursuant to the allied-offenses analysis set forth by the Supreme Court of Ohio in *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

{¶20} Appellant was convicted of vandalism defined in R.C. 2909.05(B)(1)(b), which states: "No person shall knowingly cause physical harm to property that is owned or possessed by another, when * * * the property * * * is necessary in order for its owner * * * to engage in the owner's * * * business, trade, or occupation." He was also convicted of breaking and entering. There are two varieties of that offense. R.C. 2911.13 defines them in subsections (A) and (B), respectively:

> (A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.
>
> (B) No person shall trespass on the land or premises of another, with purpose to commit a felony.

{¶21} Appellant was charged with and pleaded guilty to breaking and entering as defined in subsection (B), which does not require the state to prove the use of force, stealth, or deception.

Trespass is, in turn, is defined in R.C. 2911.21 as "[k]nowingly enter or remain on the land or premises of another" "without privilege to do so."

{¶22} Pursuant to *Johnson*, when determining whether two offenses are allied offenses subject to merger under R.C. 2941.25, the conduct of the defendant must be considered. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at syllabus. First, the court must determine whether multiple offenses can be committed by the same conduct, and, if so, the court considers whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." When the answer to both inquires is affirmative, the offenses should be merged.

{¶23} Respectfully, I would find that the answer to both questions in this case is yes. Appellant came upon the store and used a sledgehammer to gain entry to it. He committed breaking and entering (trespassing with an intent to commit a felony) and vandalism with essentially contemporaneous conduct prompted by a singular purpose: to steal from the store. The two offenses can be committed by his conduct and were in fact committed by the same conduct with a single state of mind.

{¶24} I recognize appellant was charged with and pleaded guilty to the variety of breaking and entering defined in R.C. 2911.13(B), which does not require the state to prove the use of force. However, the fact that the state was not required to prove the use of force in convicting appellant of breaking and entering does not necessarily mean that appellant did not in fact commit breaking and entering by using force. Indeed, when appellant argues on appeal that his use of force to gain access to the store committed both breaking and entering and vandalism, the state readily concedes.

{¶25} Under the facts of this case, the state could have charged appellant under either subsection of R.C. 2911.13. Although appellant clearly used force in the incident, the state elected to charge him under the subsection which does not require the state to prove force. I do not believe the state's election to proceed under subsection (B) compels this court to dissect and compartmentalize appellant's conduct into independent criminal acts.

{¶26} Perhaps recognizing the inherent unfairness of the outcome, the state on appeal clearly expressed that, in consideration of the facts in the record, it too recommends that the two criminal offenses merge. The state's recommendation is derived from an office that is close to the nuances of the full record and the whole history of the charges. Under the particular circumstances of this case, I choose not to differ with the agreement between the two adversaries that fairness calls for merger in this case. It is especially encouraging to witness that too rare occasion when the prosecutor and the defense counsel work together in good faith for a just and reasonable outcome.

{¶27} For these reasons, I respectfully concur in part and dissent in part.