[Cite as *State v. Turner*, 2015-Ohio-685.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101506

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMONT TURNER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-581904-A

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

RELEASED AND JOURNALIZED: February 26, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant, Lamont Turner, pleaded no contest to child endangering and domestic violence. On appeal, he asserts that the court erred in failing to merge the two offenses under R.C. 2941.25, the allied offenses statute. We agree and reverse the decision of the trial court.

{¶2} The charges in this case arose out of an incident whereby Turner's 18-month-old daughter sustained serious burns while in Turner's care. On the evening of January 18, 2014, the child's mother dropped her off to Turner for visitation. Turner then took the child to his sister's house. While there, he proceeded to draw his daughter a bath, place her in the tub, and then leave her there for a period of time. When he returned, his daughter was badly burned on her lower abdomen, buttocks, vaginal area, and feet. The burns were so severe that most of the skin in the affected areas had detached from her body and was floating in the tub around her. Turner immediately sent pictures of the burns to the mother via cell phone messaging and explained to her that he did not know how the daughter sustained the injuries. Turner denied placing the daughter in hot water and told the mother that the bath he drew was more cold than hot. Turner then took his daughter to the hospital for treatment.

{¶3} Turner was later arrested and charged with third-degree felony child endangering, in violation of R.C. 2919.22(A),[1] and domestic violence in violation of R.C. 2919.25(B). On April 10, 2014, Turner pleaded no contest to the charges. At the plea and sentencing hearings, Turner's attorney asked the court to merge the charges under R.C. 2941.25, the allied offenses statute. The

[1] The child endangering count was elevated to a third-degree felony charge because the charge contained a furthermore specification which alleged that the victim sustained serious physical harm as a result of the Turner's reckless actions. *See* R.C. 2919.22(E)(1)(c) (stating, "If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, [it is] a felony of the third degree.").

court declined the request and sentenced Turner to a nine-month prison term on the child endangering charge and a concurrent, six-month prison term on the domestic violence charge.

{¶4} In his sole assignment of error, Turner argues that the offenses of third-degree felony child endangering and domestic violence are allied offenses of similar import that should have merged under R.C. 2941.25, and that the court violated his double jeopardy rights by failing to merge the offenses.

{¶5} The Double Jeopardy clause of the Fifth Amendment to the United States Constitution states that no person "shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." The clause, among other things, "'protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984). Like the United States Constitution, the Ohio Constitution also provides the same double jeopardy protections. Article I, Section 10; *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181 (1982). Ohio has codified those protections in R.C. 2941.25, which prohibits multiple punishments for allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. The general understanding is that the defendant is not placed in jeopardy twice for the same offense so long as courts properly apply R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 26.

{¶6} R.C. 2941.25 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.

{¶7} R.C. 2941.25 requires courts to merge offenses when the offenses are closely related and arise out of the same occurrence. *Johnson* at ¶ 43. 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 *Ohio 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.

{¶8} "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.'" *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., concurring). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶ 50.

{¶9} Based on the Ohio Supreme Court's holding in J*ohnson*, we must examine whether it is possible to commit the offenses of third-degree felony child endangering, R.C. 2919.22(A), and domestic violence, R.C. 2919.25(B), with the same conduct. Domestic violence under R.C. 2919.25(B) requires proof that the defendant recklessly caused serious physical harm to a family or household member. Third-degree felony child endangering under R.C.2919.22(A) requires proof that a parent, or other actor listed in the statute, recklessly created a substantial risk to the

health or safety of a minor child by violating a duty of care, protection, or support, resulting in serious physical harm.

{¶10} In cases where the criminal actor is a parent, and the victim is his or her minor child, the parent may simultaneously commit the offense of domestic violence and child endangering if the parent recklessly creates a substantial risk to the health or safety of the child, which causes serious physical harm to the child. In that situation, the parent-child relationship serves to satisfy both the duty element of the child endangering charge and the familial relationship required of the domestic violence charge. Further, it is clear from the language of these offenses, that the legislature intended to prevent those in a close relationship to the victim from recklessly causing the victim serious physical harm. Therefore, we find that an offender can commit the offenses of third-degree child endangering under R.C. 2919.22(A) and domestic violence under R.C. 2919.25(B) with the same conduct. *Accord State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, 953 N.E.2d 337, ¶ 15 (12th Dist.).

{¶11} Having determined that the offenses can be committed with the same conduct, we must next determine whether the offenses were committed with the same conduct — that is, "a single act committed with a single state of mind." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 49.

{¶12} The record before us demonstrates that at the sentencing hearing, the state asked the court not to merge the offenses because each charge applied to separate and distinct conduct. At sentencing, the prosecutor explained to the court that there were multiple children in Turner's care at the home on the day of the incident, aside from the child burn victim, and that they were also

endangered by Turner's actions.[2] The prosecutor stated that there were a number of different things taking place in the home that would constitute the criminal acts of child endangering and domestic violence, including keeping children in deplorable, unsanitary conditions, keeping drug paraphernalia easily within reach of the children, and housing a red-nosed bit bull on the premises.[3] The prosecutor then presented the judge with photographs of the home's interior that were taken at the time of Turner's arrest. The photos showed what appeared to be a makeshift bong with drug residue on the bottom, trash strewn about the home and spilling out of trash bags, and also what appeared to be feces in the bathroom sink. Based on these photos, the prosecutor argued that the unsanitary condition of the home and the fact that the home contained obvious drug paraphernalia easily within reach of children, created a substantial risk to the health and safety of the children that amounted to the offense of child endangering, separate and distinct from the bathtub injury, which served as the impetus for the domestic violence charge.

{¶13} We first note that, although Turner apparently had multiple children in his care that day, both counts of the indictment only indicate one victim in this case: Jane Doe DOB 07-14-2012, Turner's 18-month-old daughter. Therefore, we will not consider the state's argument against merger based on a multiple-victim theory.

{¶14} Additionally, although we agree that Turner could have been charged with child endangering based on having his child in such dangerous and deplorable conditions, it appears that those conditions were not considered by the grand jury when it charged Turner. While the

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[2] It is unclear from the record how many of the five or six children found in the home were Turner's, but it appears that at least one other child is Turner's, in addition to the victim.

[3] Both Turner and the child's mother contend that Turner did not reside at the address where the incident occurred. However, according to the prosecutor, Turner stayed at the residence quite often, felt comfortable giving his child a bath at the home, and the prosecutor understood that Turner planned to stay at the home for the night with the children.

child endangering charge alleged that Turner "recklessly created a substantial risk to the health and safety of Jane Doe, by violating a duty of care, protection, or support" — a charge that could be satisfied by the conditions of the home — a furthermore specification to the count alleged that "the violation resulted in serious physical harm to Jane Doe DOB 07-14-2012," thus making it a third-degree felony child endangering charge. The domestic violence charge alleged that Turner recklessly caused serious physical harm to Jane Doe DOB 07-14-2012, a family or household member.

{¶15} It is undisputed that the only serious physical harm that befell Turner's daughter resulted from the burns that she sustained while in the bath, not from any harmful conditions that the house might have posed. Therefore, the serious physical harm component contained in the furthermore specification on the child endangering count, like the serious physical harm component of the domestic violence charge, must necessarily refer to the child's burn injuries. Since the record demonstrates that Turner's placement of his daughter in the bath was a single act, committed with a single animus, we find that the offenses merge under R.C. 2941.25.

{¶16} Judgment reversed and remanded to the trial court for resentencing where the state can elect which of Turner's charges it chooses to proceed on for sentencing. *See Maumee v. Geiger*, 45 Ohio St.2d 238, 244, 344 N.E.2d 133 (1976) (explaining that under Ohio's merger doctrine an accused can be tried on both allied offenses, but may be convicted and sentenced on only one).

It is ordered that appellant recover of said 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.

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

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MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., P.J., CONCUR;
EILEEN A. GALLAGHER, J., CONCURS (WITH SEPARATE OPINION)

EILEEN A. GALLAGHER, J., CONCURRING WITH SEPARATE OPINION:

{¶17} Although I concur with the judgment of my colleagues, I write separately to express my concern that it was the position of the state of Ohio at sentencing that the condition of the home dictated the charges of child endangering.

{¶18} Specifically, the prosecuting attorney stated:

> Now, as it relates to endangering the children * * * there were five children in the home. The children appeared to be starving but not malnourished, sharing one bag of potato chips to the point where the officer took out his own personal lunch and began to feed the children and they were kind of fighting to get to the food. He had additional officers bring McNugget meals from McDonald's along with something for the children to drink later because they were starving. Also in the home was a red-nosed pitbull that was barking and being held behind a door. As it relates to endangering the children, which states that it created a substantial risk of harm, the state would submit to the court that the environment in which the children were in created a substantial risk of harm.

{¶19} The assistant prosecuting attorney presented to the court photographs which depict "a makeshift smoking bong" which she indicated was for drug abuse and a second photo of one of the sinks in the home in which there were human feces.

{¶20} I am incredulous, therefore, as to why there were not multiple charges of endangering children filed against Turner.

{¶21} Regardless of whether the children were his issue, Turner on the day in question, was in loco parentis of the minors. As the prosecuting attorney stated, " * * * the environment in which the children were in created a substantial risk of harm."