

[Cite as *State v. Marcelis*, 2016-Ohio-5413.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DUANE MARCELIS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-587635-C

BEFORE: Jones, A.J., Keough, J., and Boyle, J.

RELEASED AND JOURNALIZED: August 18, 2016

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

{¶1} Defendant-appellant Duane Marcelis (“Marcelis”) appeals his convictions for attempted robbery and attempted theft. The state, pursuant to Loc.App.R. 16(B), concedes the error.¹ We reverse and remand for resentencing.

{¶2} In 2014, Marcelis was charged with aggravated robbery and grand theft of a motor vehicle. As part of a plea agreement with the state, Marcelis agreed to plead guilty to attempted robbery, a felony of the fourth degree, and attempted theft, a felony of the fifth degree. During the plea colloquy, the state agreed that the offenses were allied offense of similar import and Marcelis would only be sentenced for one offense. At that time, the state indicated that it elected that Marcelis be sentenced on the attempted robbery count.

{¶3} At the sentencing hearing, however, the trial court sentenced Marcelis to 18 months in prison for attempted robbery and 12 months in prison for attempted theft and further ordered that the sentences run consecutive to each other. The court also imposed a fine of \$7,500.

¹Loc.App.R. 16(B) provides:

Notice of Conceded Error. When a party concedes an error that is dispositive of the entire appeal, the party conceding the error shall file a separate notice of conceded error either in lieu of or in addition to their responsive brief. Once all briefing is completed, the appeal will be randomly assigned to a merit panel for review. The appeal will be considered submitted on the briefs unless the assigned panel sets an oral argument date.

{¶4} Marcelis appealed, raising five assignments of error for our review:

I. Mr. Marcelis was improperly sentenced on two counts when he was assured as part of his plea agreement that he would only be sentenced on amended count one.

II. Mr. Marcelis received ineffective assistance of counsel when his defense counsel did not bring to the trial court's attention that it had already decided the offenses were allied and that sentencing would only proceed on amended count one.

III. Mr. Marcelis received ineffective assistance of counsel when his defense counsel did not bring to the trial court's attention that he was incapable of paying the fine imposed.

IV. The trial court committed error in imposing excessive fines.

V. The trial court erred in imposing consecutive sentences.

{¶5} The first and fifth assignments of error are dispositive of this appeal. Ohio's multiple-count or "allied offenses" statute, R.C. 2941.25, provides the following:

(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.

{¶6} In this case, Marcelis was advised at his plea hearing that his offenses were allied offenses under R.C. 2941.25. The state concedes on appeal that Marcelis was advised that he would be sentenced for only one count, the attempted robbery.

{¶7} Pursuant to R.C. 2953.08(G)(2), an appellate court may vacate a sentence and

remand for a new sentencing hearing if the sentence is contrary to law. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 14, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 4. A sentence that contains an allied-offenses error is contrary to law. *Wilson* at *id.*, citing R.C. 2953.08(A)(4). Because the trial court erred in sentencing Marcelis on two allied offenses, the trial court also erred in imposing consecutive sentences.

{¶8} Thus, Marcelis's sentence is vacated and remanded for resentencing where the state once again can elect which offense to pursue for sentencing.

{¶9} The first and fifth assignments of error are sustained.

{¶10} The second, third, and fourth assignments of error, which challenged the effectiveness of trial counsel and the fines imposed upon Marcelis are moot. *See* App.R. 12(A)(1)(c).

It is ordered that appellant recover of 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. Case remanded to the trial court for resentencing.

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

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
MARY J. BOYLE, J., CONCUR