

[Cite as *State v. Kibble*, 2016-Ohio-8573.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104173

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**RODNEY KIBBLE**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-15-594053-A

**BEFORE:** Kilbane, P.J., Stewart, J., Celebrezze, J.

**RELEASED AND JOURNALIZED:** December 29, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Rodney Kibble (“Kibble”), appeals from his sentence for burglary and theft in Cuyahoga C.P. CR-15-594053-A. For the reasons set forth below, we affirm the convictions and sentence.

{¶2} On March 24, 2015, Kibble was indicted in the instant case, following a break-in. He was charged with burglary, with a repeat violent offender specification, theft, and criminal damaging. On June 10, 2015, Kibble and six other individuals were indicted in Cuyahoga C.P. No. CR-15-595318-D, for a total of 105 charges in connection with a string of armed robberies and kidnappings.

{¶3} On September 16, 2015, Kibble reached a plea agreement with the state on all of the pending charges. In the instant matter, he pled guilty to burglary, without the repeat violent offender specification, and pled guilty to theft. The criminal damaging charge was dismissed. The trial court sentenced Kibble to seven years for burglary, to be served concurrently with a one-year term for theft, “for a total of seven years,” imposed a three-year term of postrelease control, and ordered Kibble to pay \$1,800 in restitution to the victim. In CR-15-595318-D, Kibble pled guilty to a total of 50 charges, and the trial court sentenced him to a total of 30 years of imprisonment. The trial court stated that the sentence in this matter is to be served concurrently to the term imposed in CR-15-595318-D, but the three-year firearm specifications imposed in CR-15-595318-D would have to be served consecutively to the seven-year term imposed

in the instant case. Kibble now appeals from the sentence imposed for burglary and theft, assigning the following three errors for our review:<sup>1</sup>

#### Assignment of Error One

The trial court erred by imposing the concurrent sentence in this case consecutive to the time imposed on a firearm specification in another case and the sentence is contrary to law and not supported by the record.

#### Assignment of Error Two

The trial court erred by failing to merge all allied offenses of similar import.

#### Assignment of Error Three

The trial court erred by assessing costs against appellant when the court waived costs in open court.

#### Firearm Specifications

{¶4} In his first assignment of error, Kibble argues that since he was not convicted of any firearm specifications in this case, and the trial court ordered that the seven-year term imposed in this matter be served concurrently with the thirty-year term imposed in CR-15-595318-D, there is no authority to require him to serve the three-year firearm specifications in CR-15-595318-D consecutively to the sentence in the instant case.

{¶5} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2), rather than an abuse of discretion standard. *See*

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<sup>1</sup>Kibble appealed from the sentence imposed in CR-15-595318-D in a separate appeal. *See State v. Kibble*, 8th Dist. Cuyahoga No. 103822.

*State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it clearly and convincingly finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law. We do not review a trial court's sentence for an abuse of discretion. *Marcum* at ¶ 10.

{¶6} Kibble notes that under R.C. 2941.145(A), imposition of a three-year mandatory prison term for a firearm specification is precluded unless

the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

{¶7} However, R.C. 2929.14(C)(1)(a) provides the following:

[I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, \* \* \* the offender shall serve any mandatory prison term imposed under either division \* \* \* consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

{¶8} By operation of R.C. 2929.14(C)(1)(a), the firearm specifications imposed in CR-15-595318-D cannot be served concurrently to "any other prison term," and must be served consecutively to the instant case. See *State v. Owens*, 5th Dist. Richland No. 09CA128, 2010-Ohio-6004, ¶ 13, *State ex rel. Gilbert v. Gansheimer*, 11th Dist. Ashtabula No. 2011-A-0600, 2011-Ohio-5599, ¶ 12. Therefore, since the seven-year

term in the instant matter is to be served concurrently to CR-15-595318-D, the seven-year term begins after service of the firearm specifications in CR-15-595318-D.

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

#### Allied Offenses

{¶10} In his second assignment of error, Kibble argues that the trial court committed plain error in failing to merge his burglary and theft convictions as allied offenses of similar import. He maintains that both offenses were committed with the same animus, to deprive the victim of her property.

{¶11} Kibble did not object to the separate convictions below. Therefore, we review for plain error, Crim.R. 52, applying a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28; *State v. Broomfield*, 10th Dist. Franklin No. 12AP-469, 2013-Ohio-1676, ¶ 8.

{¶12} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of the syllabus, the Ohio Supreme court held as follows:

Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

{¶13} In *State v. Ongert*, 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, this court recently stated:

As is pertinent to this appeal, burglary is defined as trespassing in an occupied structure that is a permanent habitation of any person when any person other than an accomplice is present or likely to be present with the purpose to commit any criminal offense inside the habitation. R.C. 2911.12(A)(2). Therefore, it is the intent to commit any criminal offense while trespassing that constitutes the commission of the burglary crime. *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074, ¶ 64; *State v. Richardson*, 8th Dist. Cuyahoga No. 100115, 2014-Ohio-2055, ¶ 32. No criminal offense actually needs to be committed to support the burglary charge. *See State v. Fields*, 12th Dist. Clermont No. CA2014-03-025, 2015-Ohio-1345, ¶ 18 (the burglary was complete upon entering the premises with the intent to commit a crime). Even if the criminal offense is actually committed, the burglary was already completed and the subsequent crimes were then committed with separate conduct. *State v. Huhn*, 5th Dist. Perry No. 15-CA-00006, 2015-Ohio-4929, ¶ 22.

Accord *State v. Sadowski*, 8th Dist. Cuyahoga No. 100819, 2014-Ohio-4211; *State v. Smith*, 8th Dist. Cuyahoga No. 100641, 2014-Ohio-3420.

{¶14} In this matter, Kibble has not demonstrated plain error affecting a substantial right. He pled guilty to burglary, acknowledging that he trespassed into the victim's occupied structure when someone was likely to be present, with the purpose of committing a criminal offense. He also pled guilty to theft, acknowledging that he unlawfully obtained the victim's property with purpose to deprive her of her property, and that he would pay her \$1,800 in restitution. There is no indication in the record that the burglary and theft offenses are allied offenses of similar import to demonstrate plain error.

{¶15} The second assignment of error is overruled.

#### Costs

{¶16} In Kibble's third assignment of error, he argues that the trial court's sentencing entry erroneously states that he is to pay court costs because the trial court stated during sentencing that costs would be waived.

{¶17} The Ohio Supreme Court has held that despite language of R.C. 2947.23 mandating a defendant's sentence to include the costs of prosecution, a trial court may waive the payment of costs. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 11, citing *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, and *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 14. Further, when it does issue a judgment for costs under the statute, a trial court must orally notify the defendant at the sentencing hearing that it is imposing costs. *Joseph* at ¶ 1.



{¶18} In this matter, the trial court was permitted to waive Kibble’s payment of costs, and orally informed him at the sentencing hearing that costs were waived. In the sentencing entries for both the instant case and CR-15-595318-D, the trial court likewise provided that costs are waived, but \$1,800 restitution is to be paid to the victim. Therefore, we find that the trial court committed no error. However, the record reflects that on October 30, 2015, a notation appeared in the docket stating, “court costs assessed Rodney Kibble bill amount 110, paid amount 85, amount due 25.” Since costs have been waived by the trial court, it appears that the assessment of costs was done in error. Because the trial court committed no error, any assessment of costs must be corrected administratively or at the direction of the trial court.

{¶19} The third assignment of error is without merit.

{¶20} Accordingly, the convictions and sentence are affirmed.

It is ordered that appellee recover of 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. 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.

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MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR