[Cite as *State v. Washington*, 2010-Ohio-3389.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JIMMIE L. WASHINGTON Appellant	C.A. No. 24997 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 03 0980(A)

DECISION AND JOURNAL ENTRY

Dated: July 21, 2010

CARR, Judge.

{¶1} Appellant, Jimmie Washington, appeals his conviction out of the Summit County Court of Common Pleas. This Court affirms, in part, and reverses, in part.

I.

{¶2} On April 21, 2009, Washington was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, along with a gun specification pursuant to R.C. 2941.145; one count of grand theft in violation of R.C. 2913.02(A)(1)/(4), a felony of the fourth degree; and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. He pleaded not guilty to the charges.

{¶3} On July 6, 2009, Washington filed a motion to dismiss the indictment based on alleged defects in the indictment and because he was denied a preliminary hearing within ten days of his arrest. The trial court heard the arguments of counsel prior to trial, and then denied the motion to dismiss the indictment.

{¶4} Immediately prior to trial, the State moved to dismiss the charge of having weapons while under disability and the court dismissed that count. The State further moved to amend the charge of grand theft, a felony of the fourth degree, to theft, a felony of the fifth degree. The trial court granted the amendment to count two of the indictment over Washington's objections.

{¶5} At the conclusion of trial, the jury found Washington guilty of aggravated robbery and theft. The trial court sentenced Washington to four years in prison for aggravated robbery and to twelve months incarceration for theft, with those sentences to be served concurrently. Washington appealed, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN THE COURT PERMITTED THE STATE TO AMEND THE INDICTMENT PRIOR TO THE START OF TRIAL."

{¶6} Washington argues that the trial court erred by allowing the State to amend the charge of grand theft, a felony of the fourth degree, to theft, a felony of the fifth degree. This Court disagrees.

{¶7} Washington was indicted on a charge of grand theft in violation of R.C. 2913.02(A)(1)/(4). The trial court allowed the State to amend the indictment to charge theft in violation of R.C. 2913.02, for which charge Washington was convicted. R.C. 2913.02(B)(1) and (2) provide, in relevant part:

> "Whoever violates this section is guilty of theft. *** If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars ***, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree."

{¶8} Crim.R. 7(D) allows a court to amend the indictment "at any time *** provided no change is made in the name or identity of the crime charged." In support of his argument, Washington relies on *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, which holds: "Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense." Id. at syllabus; see, also, *State v. Rohrbaugh*, Slip Opinion No. 2010-Ohio-3286 (citing *Davis*, distinguishing on the facts, and holding that "[a] defendant may plead guilty to an indictment that was amended to change the name or identity of the charged crime when the defendant is represented by counsel, has bargained for the amendment, and is not prejudiced by the change." Id. at syllabus. The certified question emphasized the context of the amendment to the indictment as an amended charge that was neither indicted, nor a lesser included offense of the indicted offense, the latter of which is applicable to the instant appeal.) *Davis* involved a situation where the trial court amended a charge of aggravated trafficking to increase the amount of the controlled substance involved, thereby raising the offense level from a felony of the fourth degree to a felony of the second degree. Id at ¶2-3.

{¶9} This Court recently stated that we read the high court's ruling in *Davis* "in concert with its rulings which have interpreted R.C. 2945.74 and Crim.R. 31(C)." *State v. Timofeev*, 9th Dist. No. 24222, 2009-Ohio-3007, at ¶13.

{¶10} R.C. 2945.74 states:

> "The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense."

{¶11} Crim.R 31(C) similarly states:

> "The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense."

{¶12} In interpreting R.C. 2945.74 and Crim.R. 31(C), the Ohio Supreme Court has held that "a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; (3) lesser included offenses." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph one of the syllabus. The instant situation is analogous to *Timofeev*. If R.C. 2945.74 and Crim.R. 31(C) permit the jury to reach a verdict on an inferior degree of an indicted offense, it follows that the State may amend the indictment to charge the defendant with an inferior degree of the originally indicted offense. See *Timofeev* at ¶16. Accordingly, this Court holds that an amendment to an indictment which charges the defendant with an inferior degree of the original, indicted offense does not violate Crim.R. 7(D). Washington's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN SENTENCING APPELLANT ON BOTH THE ROBBERY AND THEFT COUNTS AS THEY ARE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶13} Washington argues that the trial court erred by sentencing him for both aggravated robbery and theft. The State concedes error. This Court agrees.

{¶14} R.C. 2941.25(A) provides that "[w]here 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." The Ohio Supreme Court has established a two-part test to determine whether two crimes are allied offenses of similar import. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Emphasis omitted.) Id., citing *State v. Mughni* (1987), 33 Ohio St.3d 65, 67; *State v. Talley* (1985), 18 Ohio St.3d 152, 153-154; *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418; *State v. Logan* (1979), 60 Ohio St.2d 126, 128.

Moreover,

> "[i]n determining whether offenses are allied offenses of similar import under R.C. 2945.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar imports." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

{¶15} Washington was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), which states: "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]" R.C. 2913.01(K) defines "theft offense" to include any violation of R.C. 2913.02. Washington was convicted of theft in violation of R.C. 2913.02. Because the commission of aggravated robbery will necessarily result in the commission of theft by the plain language of the statute, they are allied offenses of similar import.

{¶16} Witness testimony establishes that the crimes were not committed separately or with a separate animus. The evidence demonstrates that Washington entered a convenience store with an accomplice and demanded money from the store clerk at gun point. Accordingly, the evidence establishes that the commission of the theft was subsumed within the commission of the aggravated robbery. Therefore, Washington could not have been convicted of both offenses, and the trial court erred by sentencing him on both counts. Washington's second assignment of error is sustained.

III.

{¶17} Washington's first assignment of error is overruled. His second assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is affirmed, in part, reversed, in part, and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed, in part,
reversed, in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

MARTHA HOM, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.