[Cite as *State v. Jones*, 2010-Ohio-4455.]

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

STATE OF OHIO Appellee v. DARRELL H. JONES Appellant	C. A. No. 25032 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 06 07 2670 (A)

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

CARR, Judge.

{¶1} Appellant, Darrell Jones, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms, in part, and reverses, in part.

I.

{¶2} On August 3, 2006, the Summit County grand jury indicted Jones on the following counts: (1) possession of cocaine in violation of R.C. 2925.11(A), a felony of the first degree; (2) two counts of possession of heroin, one charged as a felony of the first degree and the other as a felony of the second degree, in violation of R.C. 2925.11(A); (3) trafficking in heroin in violation R.C. 2925.03(A)(2), a felony of the first degree; (4) illegal manufacture of drugs in violation of R.C. 2925.04(A), a felony of the first degree; (5) two counts of having weapons while under disability in violation of R.C. 2923.13(A)(1)/(A)(2)/(A)(3), felonies of the third degree; and (6) possession of criminal tools in violation of R.C. 2923.24, a felony of the fifth degree. The matter proceeded to a jury trial on August 6, 2007. The trial court granted Jones'

Crim.R. 29 motion as to the illegal manufacture of drugs count. On August 9, 2007, the jury found Jones guilty on all of the remaining counts in the indictment.

{¶3} On appeal, this Court affirmed Jones' convictions, but remanded his case to the trial court for re-sentencing because the trial court did not properly notify him of post-release control. *State v. Jones*, 9th Dist. No. 23875, 2008-Ohio-5443. On remand, the trial court sentenced Jones to a total of nine and one-half years in prison. Jones received consecutive sentences on the convictions for possession of cocaine, having weapons while under disability, possession of criminal tools, and possession of heroin charged as a felony of the second degree. The trial court also sentenced Jones on his convictions for trafficking in heroin and possession of heroin charged as a felony of the first degree, but ordered the sentences to run concurrently with his consecutive sentences.

{¶4} Jones again appealed to this Court, raising various challenges to his sentence. Again, this Court found that Jones' sentence was void as the trial court's sentencing entry did not properly notify Jones of a mandatory term of post-release control. *State v. Jones*, 9th Dist. No. 24520, 2009-Ohio-3360.

{¶5} The trial court again re-sentenced Jones on the morning of September 14, 2009. Due to an error made at the first hearing, the trial court held another sentencing hearing on the afternoon of September 14, 2009. On September 18, 2009, the trial court journalized its order.

{¶6} Jones appeals the trial court's judgment to this Court, raising six assignments of error. This Court has rearranged his assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT LACKED JURISDICTION TO IMPOSE SENTENCE UPON APPELLANT DUE TO ITS DELAY IN RESENTENCING APPELLANT."

{¶7} In his fifth assignment of error, Jones argues the trial court was without jurisdiction to re-sentence him. This Court disagrees.

{¶8} We address this assignment of error first as it pertains to the trial court's jurisdiction. In support of his argument that the trial court was without authority to impose a sentence, Jones notes that he was originally sentenced in August 2007. After two appeals to this Court, the trial court held a re-sentencing hearing on September 14, 2009, and journalized its sentencing entry on September 18, 2009. Jones argues that because trial court error resulted in more than two years elapsing between the time he was found guilty and the time the trial court journalized its sentencing entry in September 2009, the trial court lost jurisdiction to impose a sentence.

{¶9} Crim.R. 32(A) states that a sentence "shall be imposed without unnecessary delay." The Supreme Court of Ohio has recognized that delay for a reasonable time does not invalidate a sentence. *Neal v. Maxwell* (1963), 175 Ohio St. 201, 202. This Court has recently recognized that Crim.R. 32(A) does not apply in cases where an offender must be re-sentenced. *State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965, at ¶19, citing *State v. Huber*, 8th Dist. No. 85082, 2005-Ohio-2625, ¶8. "This logic, as it relates to Crim.R. 32(A), recognizes the distinction between a trial court refusing to sentence an offender and a trial court improperly sentencing an offender." *Spears* at ¶19. Furthermore, the Supreme Court of Ohio has held that a trial court retains continuing jurisdiction to correct a void sentence. *State ex rel. Cruzado v.*

Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶19, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶10} The trial court in this case has not refused to sentence Jones. On the contrary, the trial court has attempted to sentence Jones on three separate occasions. The delay which occurred between the date Jones was found guilty and the time he was re-sentenced on September 18, 2009, was a result of the need for Jones to utilize the appellate process. As a trial court retains continuing jurisdiction to correct a void sentence, there has not been an unreasonable delay in sentencing Jones which impacts the trial court's jurisdiction. See *Zaleski* at ¶19. The fifth assignment of error is overruled.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN SENTENCING & CONVICTING APPELLANT BASED UPON OFFENSES WHICH WERE BARRED BY THE ALLIED OFFENSE STATUTE[.]"

{¶11} In his first assignment of error, Jones argues that the trial court erred in sentencing and convicting him on allied offenses. This Court agrees.

{¶12} In support of his assignment of error, Jones argues that the charge of trafficking in a controlled substance under R.C. 2925.03(A)(2) and the charges of possession of heroin under R.C. 2925.11(A) are all allied offenses of a similar import. Jones argues that, at a minimum, the trial court erred in sentencing him for both trafficking and possessing the same controlled substance. In its merit brief, the State concedes that, while it is not error to find a defendant guilty of allied offenses, the trial court erred in sentencing Jones for both trafficking and possessing the same controlled substance. The State is unwilling to concede, however, that Jones cannot be convicted and sentenced on both possession of heroin charges.

{¶13} In *State v. Blankenship* (1988), 38 Ohio St.3d 116, the Supreme Court of Ohio set forth the following two-tiered test to determine whether two crimes with which a defendant is charged are allied offenses of similar import:

> "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." Id. at 117.

{¶14} With respect to whether an offender can be convicted for both possessing and trafficking the same controlled substance, R.C. 2941.25(A) provides, "[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." A conviction consists of a guilty verdict and the imposition of a sentence or penalty. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, at ¶135. The Supreme Court of Ohio has recently held that, "[b]ecause R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, paragraph three of the syllabus. The Supreme Court stated that, "[u]pon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." Id. at paragraph two of the syllabus.

{¶15} "Trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import

under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph two of the syllabus.

{¶16} In this case, Jones was found guilty of trafficking in heroin in violation R.C. 2925.03(A)(2), as well as two counts of possession of heroin in violation of R.C. 2925.11(A). At the sentencing hearing, defense counsel suggested that the two possession of heroin charges and the trafficking in heroin charge were all allied offenses for the purpose of sentencing and asked the trial court to set aside two of the convictions and sentence him on only one count. The trial court stated that the counts involved "different weights at different times, and I don't believe they should be either merged for purposes of sentencing or concurrent sentences." Jones was sentenced to a definite term of four years incarceration for the trafficking in heroin in an amount that equals or exceeds 100 unit doses but is less than 500 unit doses, charged as a felony of the first degree; a definite four-year term for possession of heroin in an amount that equals or exceeds 100 unit doses, but is less than 500 unit doses, charged as a felony of the second degree; and a definite term of three years on the possession of heroin in an amount that equals or exceeds 50 grams, but is less than 250 grams, charged as a felony of the first degree. The trial court ordered the sentences for trafficking in heroin and possession of heroin charged as a felony of the first degree to "be served CONCURRENTLY and not consecutively with each other and all other counts[.]"

{¶17} With respect to Jones' contention that the two possession of heroin charges were allied offenses of similar import, this Court must look at Jones's conduct to determine whether there was a separate animus in committing the crimes. See *Blankenship*, 38 Ohio St.3d at 117. Law enforcement found two separate quantities of heroin in this case. Detective Alan Jones

testified that after entering the home, he observed in plain view a plastic bag full of heroin. While Detective Jones did not remember the specific amount of heroin that he observed, he described the amount as "a lot of heroin *** I think like 60, 65 bindles." Detective Donny Williams testified that a second quantity of 100 doses of heroin was found in a box which was "stuffed inside [a] pool table." The separate quantities of heroin in this case were found in separate locations within the residence. The separate quantities were also stored in different types of containers. Furthermore, the amount of each quantity of heroin differed and one count of possession was charged as a felony of the first degree while the other count was charged as a felony of the second degree. Thus, the trial court did not err in finding that Jones had a separate animus in possessing each quantity of heroin.

{¶18} The State has conceded that, pursuant to the Supreme Court's ruling in *Whitfield*, the trial court erred by sentencing Jones to multiple terms of incarceration for both trafficking and possessing the same controlled substance, as the crimes are allied offenses of similar import. *Whitfield* at ¶10. Thus, as the Supreme Court stated in *Whitfield*, this Court "must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." Id. at paragraph two of the syllabus.

{¶19} Jones' first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN FAILING TO VACATE ONE OF APPELLANT'S CONVICTIONS FOR HAVING A WEAPON UNDER DISABILITY."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT'S SENTENCE WAS CONTRARY TO LAW."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN SENTENCING APPELLANT BY FAILING TO INCLUDE THE REQUIREMENTS OF R.C. 2929.19(B)(3)(f) IN THE JUDGMENT OF CONVICTION."

ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A FIFTH DEGREE FELONY FOR POSSESSION OF CRIMINAL TOOLS."

{¶20} In his second, third, fourth, and sixth assignments of error, Jones raises additional challenges to his sentence. Because this Court has determined that this case must be remanded for a new sentencing hearing, we decline to address Jones's remaining assignments of error as they are rendered moot. App.R. 12(A)(1)(c).

III.

{¶21} Jones' fifth assignment of error is overruled. Jones' first assignment of error is sustained. This Court declines to address Jones' remaining assignments of error as they are rendered moot. The judgment of the Summit County Court of Common Pleas is affirmed, in part, and reversed, in part, and the cause remanded for further proceedings consistent with this decision.

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.
DICKINSON, P. J.
CONCUR

APPEARANCES:

DEREK CEK, Attorney at Law, for Appellant.

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