[Cite as *State v. Vitt*, 2011-Ohio-1448.]

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

STATE OF OHIO Appellee v. BRIAN R. VITT Appellant	C.A. No. 10CA0016-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 08-CR-0495

DECISION AND JOURNAL ENTRY

Dated: March 28, 2011

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Brian Vitt appeals from his sentence in the Medina County Court of Common Pleas. For the reasons set forth below, we reverse and remand the matter to the trial court for proceedings consistent with this opinion.

I.

{¶2} In November 2008, Mr. Vitt agreed to take his friends' five-year old daughter, A.A., on a ride in his semi-truck. Based upon incidents that took place during the time period A.A. was with Mr. Vitt, Mr. Vitt was indicted for two counts of rape of a victim less than ten years of age in violation of R.C. 2907.02(A)(1)(b) and one count of kidnapping in violation of R.C. 2905.01(A)(2), along with an accompanying sexual motivation specification.

{¶3} Subject to Mr. Vitt's plea, the indictment was amended to change the age of the victim listed in the rape counts from a victim less than ten years old, to a victim less than thirteen years old. Mr. Vitt pleaded guilty to the amended indictment. Thereafter, Mr. Vitt filed a

motion to merge the kidnapping conviction into the rape convictions. The trial court did not merge the convictions and sentenced Mr. Vitt to twenty-nine years in prison.

{¶4} Mr. Vitt appealed and this Court vacated his sentence due to an error in post-release control notification. Mr. Vitt raised the merger argument again at his resentencing hearing. Mr. Vitt was resentenced to the same prison term and has appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED BY DENYING DEFENDANT-APPELLANT'S MOTION TO MERGE THE KIDNAPPING COUNT INTO THE TWO RAPE COUNTS, PURSUANT TO R.C. 2941.25 AND THE RELEVANT CASE LAW, FOR PURPOSES OF SENTENCING DEFENDANT-APPELLANT AND BY SEPARATELY CONVICTING AND SENTENCING DEFENDANT-APPELLANT TO A PRISON TERM OF NINE YEARS AS TO THAT KIDNAPPING COUNT."

{¶5} Mr. Vitt contends in his first assignment of error that the trial court erred in sentencing him on the rape counts and the kidnapping count, as the kidnapping conviction should have merged with the rape convictions, as they were allied offenses of similar import.

{¶6} Recently, the Supreme Court of Ohio decided *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, and overruled *State v. Rance* (1999), 85 Ohio St.3d 632. Id. at syllabus. While a majority of the Court did not agree on the precise test to apply, the Court did agree that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id.

{¶7} The main opinion stated that "the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other." (Emphasis sic.) Id. at ¶48. "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, i.e., a single act, committed with a single state of mind." (Internal quotations and citation omitted.) Id. at ¶49. "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." Id. at ¶50.

{¶8} As *Johnson* was decided after the trial court resentenced Mr. Vitt, the trial court did not have the opportunity to consider *Johnson* in deciding whether the offenses at issue were allied. As we conclude that the trial court should make this determination in the first instance, we remand this issue to the trial court for further proceedings consistent with this opinion. See, e.g., *State v. Brown*, 9th Dist. No. 25287, 2011-Ohio-1041, at ¶50; *State v. Bobb*, 5th Dist. No. CT2007-0076, 2011-Ohio-534, at ¶18-19.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED BY IMPOSING MAXIMUM CONSECUTIVE PRISON TERMS CONTRARY TO R.C. 2929.14(B) AND (E)(4), WHERE DEFENDANT-APPELLANT HAD NO PRIOR FELONY RECORD, HAD NOT PREVIOUSLY SERVED A PRISON SENTENCE, COOPERATED WITH LAW ENFORCEMENT, AND EXPRESSED GENUINE REMORSE FOR THE OFFENSES."

ASSIGNMENT OF ERROR III

> "THE IMPOSITION OF MAXIMUM CONSECUTIVE PRISON SENTENCES AS TO THE STATUTORY RAPE COUNTS, PLUS A NEAR-MAXIMUM PRISON SENTENCE AS TO THE KIDNAPPING COUNT, TOTALING TWENTY-NINE YEARS, WAS DISPROPORTIONATE TO THE CRIMES COMMITTED—ESPECIALLY IN LIGHT OF SENTENCES IMPOSED ON OTHER SIMILAR OFFENDERS—AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS UNDER THE FACTUAL CIRCUMSTANCES OF THIS CASE."

{¶9} Mr. Vitt contends in his second assignment of error that the trial court erred in imposing maximum consecutive prison sentences on the rape counts and an additional nine-year consecutive prison sentence on the kidnapping count when Mr. Vitt had no prior felony record,

cooperated with police, pleaded guilty, and expressed remorse. Mr. Vitt argues in his third assignment of error that his twenty-nine year sentence constitutes cruel and unusual punishment. We conclude that these assignments of error are not ripe for our review.

{¶10} If upon remand the trial court concludes that some of the offenses that Mr. Vitt was convicted of constitute allied offenses of similar import, then a portion of Mr. Vitt's sentence is subject to merger. Until it is determined if Mr. Vitt should be sentenced on all counts, we decline to address Mr. Vitt's second and third assignments of error.

III.

{¶11} In light of the foregoing, this Court concludes that Mr. Vitt's second and third assignments of error are not ripe for review and therefore declines to address them. With respect to the first assignment of error, the judgment of the Medina County Court of Common Pleas is reversed, and the matter is remanded to the trial court for consideration of the issue in light of *Johnson*.

Judgment reversed
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 Medina, 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 Appellee.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and SCOTT SALISBURY and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorneys, for Appellee.