[Cite as *State v. Giles*, 2015-Ohio-2132.]

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

STATE OF OHIO Appellee v. BRYAN GILES Appellant	C.A. No. 27339 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013 02 0477

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant, Bryan Giles, appeals the judgment of the Summit County Court of Common Pleas convicting him of a variety of offenses, including aggravated murder, aggravated burglary, and aggravated robbery, and sentencing him to a total prison term of 62 and one-half years to life. On appeal, Giles challenges the trial court's decision to not merge his aggravated burglary and aggravated robbery convictions for the purposes of sentencing, its imposition of consecutive sentences, and its order that he repay court costs. For the reasons that follow, we affirm in part and reverse in part.

I

{¶2} The Summit County Grand Jury indicted Giles with the following seven criminal offenses: (1) aggravated murder; (2) attempted murder; (3) aggravated burglary: (4) aggravated robbery; (5) felonious assault; (6) tampering with evidence; and (7) receiving stolen property. The first five charges also included a firearm specification. These charges arose from a February

2013 incident that left Jarrell Cunningham dead from a gunshot to the head and his brother, Terrell Patterson, severely wounded from two gunshots to his jaw and skull. During the same incident, money and marijuana were taken from the victims. The incident occurred at Cunningham's and Patterson's house on Madison Avenue in Akron, Ohio. Giles is the victims' cousin and he essentially lived at the house with Cunningham and Patterson for extended periods of time since their childhoods. After originally investigating Giles' brother, the police soon turned their attention to Giles.

{¶3} The investigating officers determined that Giles entered the Madison Avenue house from a front window. He then shot Cunningham in the first floor kitchen. Giles then proceeded up the stairs, took money and marijuana from Patterson's dresser in his bedroom, and then shot Patterson while he was in another upstairs bedroom. After this, Giles jumped out of the second floor bathroom into the backyard and then went to his girlfriend's car, which was parked on the street over from Madison Avenue. The police later discovered that the firearm used during the incident was stolen.

{¶4} Giles eventually gave a confession to the investigating officers in which he admitted shooting Cunningham and Patterson. During the course of his confession, Giles stated that he had planned to steal $50,000 from an individual named Wes Tucker. Giles told Patterson about his plan, and then heard that Cunningham learned of it and relayed it to Tucker himself. Since Tucker now knew of the plan, Giles thought that there was a "hit" put out for him, which led him to go over to the Madison Avenue house and shoot both Cunningham and Patterson.

{¶5} The jury convicted Giles of all counts. Since the original indictment included a death penalty specification, the matter then proceeded to the sentencing phase of the trial. However, after hearing the evidence, the jury did not return a death sentence recommendation.

After the lack of a death sentence recommendation, the trial court merged Giles' aggravated burglary conviction into his aggravated murder conviction. It also merged the felonious assault and attempted murder convictions. The trial court then ordered that Giles serve sentences as follows for each count: (1) 30 years to life for aggravated murder; (2) 11 years for attempted murder; (3) 11 years for aggravated robbery; (4) three years for tampering with evidence; and (5) 18 months for receiving stolen property. Three year consecutive sentences were added for the firearm specifications attached to the aggravated murder, attempted murder, and aggravated robbery convictions.

{¶6} The aggravated murder, attempted murder, aggravated robbery, and receiving stolen property sentences were all ordered to be served consecutively. However, the three years for tampering with evidence was ordered to run concurrently. The total prison term handed down by the trial court was 62 and one-half years to life.

{¶7} This timely appeal followed with Giles presenting three assignments of error for our review.

II

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN IMPOSING SEPARATE SENTENCES UPON BRYAN GILES, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶8} In his first assignment of error, Giles asserts that the trial court erred in failing to merge his aggravated burglary and aggravated robbery convictions for the purposes of sentencing. We disagree.

{¶9} We conduct de novo review when considering a trial court's decision regarding merger. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 1. "R.C. 2941.25 codifies the

protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 23. The statute provides as follows:

> (A) When 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 by 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 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.

R.C. 2941.25.

{¶10} The Ohio Supreme Court recently handed down its decision in *State v. Ruff*, -- Ohio St.3d -- , 2015-Ohio-995, which clarified the proper test that courts should apply when considering merger issues. There, the Court instructed courts to "evaluate three separate functions – the conduct, the animus, and the import." *Id*. at paragraph one of the syllabus. When conducting this evaluation, courts are permitted under R.C. 2941.25(B) to not merge offenses "if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import; (2) the conduct shows the offenses were committed separately; and (3) the conduct shows that the offenses were committed with separate animus." *Id*. at paragraph three of the syllabus. Moreover, the Supreme Court stated that offenses are of dissimilar import "if the harm that results from each offense is separate and identifiable." *Id*. at paragraph two of the syllabus.

{¶11} *State v. Linde*, 9th Dist. Summit No. 26714, 2013-Ohio-3503, is particularly instructive on the application of R.C. 2941.25 where the defendant was convicted of both aggravated robbery and aggravated burglary. There, we found that the defendant's convictions

were not for allied offenses of similar import and found that the trial court properly declined to merge the convictions for the purposes of sentencing. *Id*. at ¶ 19. We noted that "numerous courts have determined that aggravated robbery and aggravated burglary are not allied offenses of similar import because an aggravated burglary is complete upon an offender's forced entrance and an aggravated robbery requires additional conduct." *Id*. at ¶ 18 (collecting cases). We also recognized that the limited exception to this general rule, for "cases where the offender was convicted strictly under the physical harm subsections of both the aggravated burglary and aggravated robbery statutes," did not apply since the defendant "was convicted under alternative subsections of the both offenses." *Id*.; *see also State v. Santamaria*, 9th Dist. Summit No. 26963, 2014-Ohio-4787, ¶ 28 (finding that aggravated robbery and aggravated burglary convictions did not merge since the burglary occurred when the defendant broke into the house for the purposes of committing burglary and the robbery occurred later when the defendant attacked the victim after he came out of hiding during the course of the burglary).

{¶12} We follow the guidance of *Linde* and *Santamaria*[1] here and find that Giles' convictions for aggravated robbery and aggravated burglary are not allied offenses of similar import that must be merged for sentencing purposes. The record reflects that Giles entered the house for the purpose of killing Cunningham in retaliation for his disclosure of Giles' plan to steal money from Tucker. Giles' action of entering the house to harm Cunningham demonstrates

[1] Although *Linde* and *Santamaria* predate *Ruff* and applied the test outlined in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, we do not find either case to be of reduced precedential value. Although *Ruff* clarifies and expounds upon the *Johnson* test, it does not overrule or call into question its validity. *See, e.g., Kilby v. Court of Common Pleas of Montgomery County, Juvenile Division*, S.D.Ohio No. 3:14-cv-317, 2015 WL 1729881, * 6 (Apr. 13, 2015) (referring to *Ruff* as an "elaboration on the *Johnson* test"); *State ex rel. Walker v. State*, - - Ohio St.3d - - , 2015-Ohio-1481, ¶ 4, fn. 1 (noting that *Ruff* "clarified" *Johnson*); *State v. Muzic*, 9th Dist. Summit No. 27117, 2015-Ohio-1521, ¶ 20 (same as *Walker*).

a separate, identifiable harm that gives rise to his aggravated burglary conviction. After entering the house and killing Cunningham, Giles then developed a separate animus to steal money from Patterson and Cunningham by the use of his firearm and by inflicting serious physical harm on Patterson. This conduct and separate animus produced the aggravated robbery conviction. Consequently, after considering "the conduct, the animus, and the import," we find that Giles' convictions for aggravated burglary and aggravated robbery were offenses of dissimilar import, committed separately, and committed with a separate animus. *Ruff* at paragraphs one and three of the syllabus. The fact that the convictions implicated two victims further bolsters our conclusion here. *See State v. McDaniel*, 9th Dist. Summit No. 26997, 2014-Ohio-183, ¶ 19 ("[The defendant's] crimes * * * involved harm to two separate victims and were of dissimilar import."), citing *State v. Jackson*, 9th Dist. Summit No. 26757, 2013-Ohio-5557, ¶ 29 ("[W]here one criminal act has been committed which results in harm to multiple victims, the Ohio Supreme Court has found such offenses to constitute crimes of dissimilar import.").

{¶13} Accordingly, we find that the trial court did not err in declining to merge Giles' aggravated burglary and aggravated robbery convictions for sentencing purposes and overrule his first assignment of error.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES UPON BRYAN GILES, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶14} In his second assignment of error, Giles argues that the trial court erred in failing to sufficiently state and journalize the necessary statutory findings for the imposition of consecutive sentences. We disagree with Giles' contention that the trial court failed to properly address the statutory findings at his sentencing hearing. However, as conceded by the State, we

agree that the trial court's sentencing entry fails to incorporate those findings. Consequently, we affirm the trial court's imposition of consecutive sentences but remand this matter for the limited purpose of issuing a nunc pro tunc sentencing entry that incorporates the trial court's statutory findings for consecutive sentences.

{¶15} "A plurality of the Supreme Court of Ohio has held that appellate courts should implement a two-step process when reviewing a felony sentence." *State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 43, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. "First, [we] examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 26. The standard of review in the first step is de novo. *Id*. If the sentence is not contrary to law, we review a trial court's decision in imposing a term of imprisonment for an abuse of discretion. *Id*. An abuse of discretion implies the court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶16} R.C. 2929.14(C)(4) states as follows:

> If the multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the course of conduct adequately reflects the seriousness of the offender's conduct.
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Based on the plain terms of the statute, we have previously recognized that trial courts must make three findings before imposing consecutive sentences:

> (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender;
> (2) that consecutive sentences are not disproportionate to the seriousness of the offender conduct and to the danger the offender poses to the public; and
> (3) that one of the particular findings set forth in R.C. 2929.14(C)(4)(a)-(c) applies.

Linde, 2013-Ohio-3503, at ¶ 25.

{¶17} The Supreme Court of Ohio has specifically required trial courts to not only make the necessary R.C. 2929.14(C)(4) findings at the sentencing hearing, but also "incorporate its findings into its sentencing entry[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus. Although the statutory findings must be stated at the sentencing hearing, the trial court need not provide a "word-for-word recitation" of the statutory language, *id*. at ¶ 29, or state any "magic or talismanic words" when imposing sentence, *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶ 17. Rather, "[a]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29.

{¶18} The failure to properly engage in the necessary analysis under R.C. 2929.14(C)(4) and to sufficiently state the necessary findings at the sentencing hearing results in the vacating of a sentence and a remand for resentencing. *E.g.*, *State v. Brooks*, 9th Dist. Summit Nos. 26437,

26352, 2013-Ohio-2169, ¶ 15. However, when a court does engage in the proper analysis and adequately states the statutory findings, the sentence is proper even if the sentencing entry does not journalize the findings. *See Bonnell* at ¶ 29 ("A trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law[.]"). Rather, the proper disposition of such a factual scenario is to affirm the imposition of consecutive sentences and remand the matter for the trial court "to issue a new sentencing entry, nunc pro tunc, to incorporate its consecutive sentence findings." *State v. Sandridge*, 8th Dist. Cuyahoga No. 101653, 2015-Ohio-1541, ¶ 45; *see also Bonnell* at ¶ 29 ("[S]uch a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court.").

{¶19} At the sentencing hearing, the trial court stated as follows regarding the imposition of consecutive sentences:

> The Court heard the evidence in this trial and the Court feels it's very important that there be consecutive sentences issued in this case because the Court feels that it would otherwise demean the seriousness of this offense not to. It's important to protect the public and deter you from any future crime.
>
> * * *
>
> As to the attempted murder charge, as I said already, I find it to be the most serious form of the offense, and in order to adequately protect the public, I must run that consecutive.
>
> * * *
>
> As to the aggravated robbery charge, in addition, that involves separate actions on your part, moving to a separate room, separately stealing items. They weren't in the same room with [Cunningham], they weren't on [Cunningham]'s person, they weren't in the same room with [Patterson]. They were in a separate room. It was a separate animus and it was separate acts.

> And but for your choice to climb over the dead body of your cousin to go upstairs, you have this separate animus to kill [Cunningham] and steal from them. I find that is the most serious form of the offense.
>
> * * *
>
> As to the receiving stolen property charge, you used a stolen gun, which I believe you knew was stolen, to commit this heinous murder, and so I will run that consecutive.

We find that these statements at the sentencing hearing were sufficient to show that the trial court engaged in the proper analysis and made the necessary statutory findings before imposing consecutive sentences. The trial court noted that Giles' conduct was among the most serious ever before the trial judge and it noted the need to protect the public from future crime. These statements satisfy the first two required prongs for the imposition of consecutive sentences since they reflect that the consecutive sentences are needed to punish the offender and protect the public and they are not disproportionate to the seriousness of the crimes committed. Moreover, by discussing the separate animi for the aggravated robbery and the aggravated murder, the trial court sufficiently stated its finding under R.C. 2929.14(C)(4)(b). Consequently, we find no error in the imposition of consecutive sentences and overrule the second assignment of error.

{¶20} Nevertheless, the trial court failed to properly incorporate those findings into its sentencing entry. The entry states as follows regarding the imposition of consecutive sentences:

> The Court finds that consecutive sentences are necessary to protect the public from future crime or to punish the offender and is not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Further, the offender's relationship with the victims and lack of remorse demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

As the State concedes, this language fails to memorialize the trial court's finding that one of the provisions of R.C. 2929.14(C)(4)(a)-(c) is satisfied. Accordingly, this matter is remanded to issue a corrected sentencing entry that incorporates this necessary finding.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED IN IMPOSING COSTS WITHOUT ALLOWING A REQUEST FOR WAIVER OF COSTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶21} In his third assignment of error, Giles contends that the trial court erred in ordering him to pay court costs without addressing the issue at the sentencing hearing. The State concedes this point.

{¶22} R.C. 2947.23(A)(1) pertinently states that "[i]n all criminal cases, * * * the judge * * * shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the revised Code, and render a judgment against the defendant for such costs." In issuing a judgment for costs under the statute, a trial court must orally state at the sentencing hearing that it is imposing costs, *see State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, ¶ 1 ("[A] trial court errs in imposing court costs without so informing a defendant in court[.]"), and it must give the defendant an opportunity to request a waiver of costs if he is indigent, *see id*. at ¶ 11 ("Despite the fact that [the statute] requires a judge to assess costs against all convicted criminal defendants, this court has held that 'waiver of costs is permitted – but not required – if the defendant is indigent.' "), quoting *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶ 14; *see also State v. Williams*, 9th Dist. Summit No. 26014, 2012-Ohio-5873, ¶ 23 (stating that the trial court must "notify the defendant at the time of sentencing that costs will be assessed so that he has an opportunity to seek a waiver"). The failure to comply with this requirement constitutes reversible error, and the proper remedy is to remand merely for the imposition of costs in compliance with the dictates of R.C. 2947.23(A). *State v. DeBruce*, 9th Dist. Summit No. 25574, 2012-Ohio-454, ¶ 37-38.

{¶23} Here, the trial court never notified Giles that it was imposing court costs. Nevertheless, the judgment entry of conviction and sentence imposed the costs. As conceded by the State, this imposition of costs was in error and we must remand this matter for the limited purpose of addressing the costs judgment and giving Giles an opportunity to seek a waiver since he is indigent. *See State v. Weese*, 9th Dist. Wayne No. 12CA0047, 2013-Ohio-5789, ¶ 7.

{¶24} Accordingly, we sustain Giles' third assignment of error.

III

{¶25} Since we overruled Giles' first and second assignments of error, we affirm the Summit County Court of Common Pleas' judgment insofar as it imposes consecutive sentences and imposes a total prison term of 62 and one-half years to life. However, we remand this matter to the trial court so that it can issue a nunc pro tunc entry containing the R.C. 2929.14(C)(4) findings that were made at the sentencing hearing. Also, since we sustained Giles' third assignment of error, we reverse the Summit County Court of Common Pleas' judgment only as it relates to the imposition of court costs and we remand this matter so that the trial court can properly notify Giles of its decision to impose court costs in open court and give him an opportunity to seek a waiver. Accordingly, we affirm in part, reverse in part, and remand this matter 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(C). 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 equally to both parties.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

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