

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1171

Appellee

Trial Court No. CR0201001195

v.

Gabrielle Harris

DECISION AND JUDGMENT

Appellant

Decided: September 23, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Defendant-appellant, Gabrielle Harris, appeals her conviction and sentence on one count of involuntary manslaughter and one count of kidnapping. She contends that her sentence was imposed contrary to law, that an aggregate sentence of 18 years was unreasonable in this case, and that the trial court erred in failing to merge her convictions

as allied offenses of similar import. Finding no merit to these contentions, we affirm the judgment of the Lucas County Court of Common Pleas.

{¶ 2} In the early morning of January 26, 2010, appellant exited the Meijer store in Oregon, Ohio with stolen merchandise. Pursued by Meijer employees, appellant ran from the store to a vehicle parked in a handicap area near the front door. The vehicle was occupied by Tonya Smith, a friend of appellant who had driven her to the Meijer store. Smith, who was handicapped and seated behind the steering wheel, began yelling at appellant to return the stolen merchandise. Smith attempted to exit the vehicle, but appellant pushed Smith back into the vehicle and ran around to the passenger's side. Operating the vehicle from the passenger's seat, appellant then drove away from the parking lot in erratic fashion.

{¶ 3} The incident was reported to the Oregon Police Department. A responding officer spotted the Smith vehicle in the area of Brown Road and South Wheeling Street with its headlights off and the driver's door open. The vehicle stopped briefly and the officer turned on his overhead lights and approached the vehicle. The officer intended to turn around and stop behind the Smith vehicle. As he drove past, the officer observed that Smith was attempting to exit and calling for help. The Smith vehicle sped off with appellant in control. The officer pursued with his lights and siren activated, and he could see the driver's door of Smith's vehicle continually opening and closing. Due to the dangerous speeds involved, the officer slowed to the posted speed and briefly lost sight of the vehicle. Ultimately, the vehicle struck a utility pole and both passengers were

ejected. Ms. Smith was pronounced dead at the scene. Appellant was found hiding and taken into custody.

{¶ 4} On February 3, 2010, appellant was indicted on one count of involuntary manslaughter in violation of R.C. 2903.04(A), a felony of the first degree (Count 1), one count of kidnapping in violation of R.C. 2905.01(A)(2) and (C), a felony of the first degree (Count 2), and one count of failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B) and (C)(5)(a)(i) ("fleeing and eluding"), a felony of the third degree (Count 3). On April 23, 2010, appellant withdrew her original plea of not guilty and entered a plea of no contest to all three counts. In exchange, the state recommended a sentencing cap of 15 years.

{¶ 5} A sentencing hearing was held on May 19, 2010. Addressing appellant's motion for an allied-offenses determination, the trial court merged the count for fleeing and eluding with the count for involuntary manslaughter, but found that the kidnapping was committed with a separate animus. The court then rejected the state's recommendation for a cap of 15 years imprisonment, finding that "I intend to exceed it because of the seriousness of the events that transpired and the failure of any prior sanctions imposed by the criminal justice system to have any impact on Miss Harris." The court sentenced appellant to a term of nine years in prison for involuntary manslaughter and nine years for kidnapping, and ordered that the sentences be served consecutively.

{¶ 6} Appellant raises three assignments of error:

{¶ 7} "A. The Trial Court imposed a sentence contrary to law.

{¶ 8} "B. The Trial Court unreasonably sentenced Appellant to near maximum, consecutive sentences.

{¶ 9} "C. The Trial Court erred when it ruled that Count One and Count Two were not allied offenses."

{¶ 10} We will consider the assignments of error in their logical order under the analytical framework provided by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Under that approach, an appellate court must first "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. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.* at ¶ 26.

{¶ 11} In her first assignment of error, appellant asserts that her sentence is contrary to law because the trial court failed to comply with former R.C. 2929.19(B)(2) and 2929.14(E)(4), which required trial courts to make findings of fact before imposing consecutive sentences. Appellant acknowledges that those statutes were declared unconstitutional and severed from the sentencing code in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant argues that the decision by the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160, has effectively overruled *Foster* and revived the statutory judicial fact-finding provisions. Nine days after appellant filed her initial

appellate brief in this case, however, the Supreme Court of Ohio rejected this argument in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, certiorari denied, *Hodge v. Ohio* (2011), 131 S.Ct. 3063. Thus, R.C. 2929.19(B)(2) and 2929.14(E)(4) are not applicable in this case, and the trial court's failure to comply with those provisions does not render the sentence contrary to law.

{¶ 12} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 13} In her third assignment of error, appellant maintains that her convictions for kidnapping and involuntary manslaughter should have been merged at sentencing as allied offenses of similar import. Appellant argues that she committed these offenses by "one continuous action without a separate animus." Specifically, appellant posits that she "committed her actions all with one immediate motive: flight." According to appellant, her "only motive was to run away from the authorities, whether they were employees of Meijer's or the Oregon Police Department."

{¶ 14} R.C. 2941.25 provides:

{¶ 15} "(A) Where 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.

{¶ 16} "(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 the same or 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."

{¶ 17} The trial court's duty to merge multiple allied counts at sentencing is mandatory, not discretionary. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26. Thus, "[a] sentence that contains an allied-offenses error is contrary to law." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 14.

{¶ 18} The Supreme Court of Ohio recently redefined the test for determining whether multiple offenses should be merged as allied offenses of similar import under R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44, the court overruled its prior decision in *State v. Rance* (1999), 85 Ohio St.3d 632, "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." Pursuant to *Johnson*, the conduct of the accused must be considered in determining whether two offenses should be merged as allied offenses of similar import under R.C. 2941.25. *Id.*, at the syllabus. The determinative inquiry is two-fold: (1) "whether it is possible to commit one offense *and* commit the other with the same conduct," and (2) "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" (Emphasis sic.) *Id.* at ¶ 48-49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶ 50 (Lanzinger, J., dissenting). Thus, if the multiple offenses can be committed by the same conduct, the determinative inquiry is whether "the offenses are committed separately, or if the defendant has separate animus for each offense." *Id.* at ¶ 51.

{¶ 19} The facts of this case clearly indicate that appellant committed the offenses of kidnapping and involuntary manslaughter separately, and with a separate animus. The predicate offense for the involuntary manslaughter in this case is fleeing and eluding a police officer, not kidnapping. The offense of kidnapping was completed before appellant left the Meijer's parking lot. When appellant subsequently encountered a police officer near Brown Road and South Wheeling Street and received a signal from the officer to bring her vehicle to a stop, she made a separate decision to flee that officer. This was a separate act from the kidnapping of Ms. Smith, and it was committed with a separate wrongful purpose.

{¶ 20} Accordingly, appellant's third assignment of error is not well-taken.

{¶ 21} In her second assignment of error, appellant contends that the trial court abused its discretion in sentencing her to near-maximum, consecutive prison terms. Appellant argues that the record does not support the imposition of such a sentence. She maintains that although her conduct may have been egregious, her offenses "were the result of one, singular action."

{¶ 22} We have already determined that appellant committed separate acts with separate animus. In addition, there is ample support in the record for the trial court's decision to exceed the recommended sentencing cap and select an 18-year aggregate prison term. The trial court gave careful and substantial deliberation to the relevant considerations under R.C. 2929.11 and 2929.12. The court considered "the seriousness of the events that transpired and the failure of any prior sanctions imposed by the

criminal justice system to have any impact on Miss Harris." Appellant has quite a lengthy criminal history. In fact, she had just been released from prison four days prior to committing the present offenses. We find nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Kalish*, 2008-Ohio-4912, ¶ 19-20.

{¶ 23} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 24} The judgment of the Lucas County Court of Common Pleas is affirmed.

Costs are assessed against appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.