



Ohio Prosecuting Attorneys Association

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Allied-Offenses Analysis After *Winn* and *Harris*

Knowing whether two offenses “merge” as “allied offenses of similar import” under R.C. 2941.25 can be extremely important. Merger issues can influence how the case should be indicted and/or plea bargained and can substantially affect the total amount of prison time faced by the defendant.

Under *State v. Rance* (1999), 85 Ohio St.3d 632, the Ohio Supreme Court set forth a two-part test for determining whether offenses will “merge” for sentencing purposes under R.C. 2941.25. Under the first step of the analysis pursuant to R.C. 2941.25(A), the test is whether the elements of the offenses correspond to such a degree that the commission of one offense will automatically or necessarily result in the commission of the other offense. *Rance*, 85 Ohio St.3d at 636, 638, 639. In the first step, the elements of the offenses are compared in the abstract. *Id.* at paragraph one of the syllabus. The comparison occurs in the statutory abstract, i.e., at the level of the statute as written, not at the level of how the indictment is worded. *Id.* at 637. If the offenses do not satisfy this test, then the offenses have a dissimilar import, the “merger” inquiry ends, and multiple sentences are allowed. *Id.* at 636.

If the offenses have similar import under the first step, the analysis proceeds to a second step under R.C. 2941.25(B), where the court must determine whether the offenses were committed separately or with a separate animus. *Rance*, 85 Ohio St.3d at 636. If the offenses were committed separately or with a separate animus, the defendant may be punished for both. *Id.* If not, the court must merge the offenses of similar import. *Id.* The burden of persuasion is on the defendant to prove entitlement to merger. *State v. Mughni* (1987), 33 Ohio St.3d 65, 67.

The decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, did not change the *Rance* analysis. To be sure, the *Cabrales* Court criticized those lower courts that had purported to invoke *Rance* to impose a “strict textual comparison” test on the first prong of the allied-offenses analysis, but *Cabrales* said it was merely clarifying *Rance* and otherwise adhered to the *Rance* comparing-elements-in-abstract approach.

The continuing validity of the *Rance* abstract “elements” test was confirmed by *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, which applied the abstract “elements” test as “set forth in *Rance* and clarified in *Cabrales*.” *Id.* at ¶ 34. The *Brown* Court then superimposed over the *Rance-Cabrales* test a “same societal interest” test to address multiple convictions occurring under the same criminal statute for a single criminal act.

Added to the mix this year have been *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, and *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059. These decisions can be read as having adhered to *Rance-Cabrales* abstract-element-comparison approach. *Winn* reiterated *Rance's* holding that "the first step * * * requires comparing the statutory elements in the abstract, rather than comparing the offenses as charged in a particular indictment." *Winn*, at ¶ 11. *Harris* reiterated that "*Rance* requires courts to compare the elements of offenses in the abstract * * *." *Harris*, at ¶ 12 (quoting *Cabrales*).

But *Winn* and *Harris* do change the analysis in one respect. In judging whether one offense (in the abstract) will necessarily result in the other (in the abstract), *Harris* and *Winn* support the view that implausible hypotheticals will not defeat a merger argument under the first step of the test. In the lesser-included-offense discussion in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, ¶¶ 24-25, the Court discussed *Winn* and characterized that decision as not allowing "implausible scenarios" to defeat a merger claim.

The dissenters in *Winn* believed that *Winn* was substantially lowering the bar, so that the first step of the analysis could be satisfied if it was merely probable that the commission of one offense would result in the commission of the other. However, the discussion in *Evans* supports the view that much more than a mere probability is required. Per *Evans*, an "implausible scenario" equates with a "remote possibility that one offense could conceivably be committed without the other also being committed." *Evans*, at ¶ 25.

In other words, *Winn* and *Harris* have tinkered with the "necessarily" part of the test so that it does not require 100% coincidence of the offenses, and "implausible scenarios" will not avoid merger. But the offenses still must coincide in the vast majority of cases. Thus in *Winn*, kidnapping and aggravated robbery will satisfy the first part of the test because, in the vast majority of aggravated robberies, there will also be a kidnapping, even though remotely-possible fact patterns can be conceived in which an aggravated robbery can occur without a kidnapping.

Prosecutors can argue that, even after *Winn*, defendants bear the burden of showing that the commission of one of the offenses will almost universally result in the commission of the other, keeping in mind that remotely-possible scenarios do not defeat merger.

This development is not a good one, as prosecutors were best served by the clear-cut lines and predictability offered by the 100% "necessarily" test. Now, a subjective factor is introduced, giving judges the ability to assess "plausibility." Overall, the predictability of Supreme Court decision-making in this area is reduced as well.

One way to avoid the problem is to charge more counts based on separable conduct. A shooter who fires five times could often be charged with five counts of attempted murder and/or five counts of felonious assault, so that, even if a court merges attempted murder and felonious assault, the prosecutor would still have at least five counts of one or the other.

Insofar as defendants might seek merger of the five counts into one count, strong arguments against such merger are available under the second part of the test, as an offender who attempts to kill once should not have four "freebie" attempts thereafter.

Joint recommendations would be another way to reduce the uncertainty of merger issues, as most courts have concluded that a joint recommendation, if followed by the sentencing court, bars later appellate review of merger. R.C. 2953.08(D). Reviewability after a joint recommendation is now before the Supreme Court in *State v. Underwood*, Case Nos. 2008-2133 and 2008-2228 (argued 9-1-09).

Court can enforce Plea-Bargain Deadline

In *State v. Irish*, 11th Dist. No. 2008-A-0051, 2009-Ohio-3791, the trial court had set a “plea cut-off” date of April 4, 2008, after which the defendant would not be able to accept the State’s plea offer of pleading to the F-4 domestic violence charge in exchange for the State’s recommendation of community control. The date came and went with no acceptance of the plea offer, and the court set the case for trial on May 13th. On the trial date, however, the defendant asked that the court accept a plea bargain to a misdemeanor. The court refused, saying that the cut-off date should be enforced and that there was no reason why such a plea bargain could not have been reached before the cut-off.

The defendant pleaded no contest to the F-4 charge, received community control, and then appealed, complaining about the court’s refusal to accept the misdemeanor plea bargain.

The appellate court upheld the refusal in a 2-1 ruling. The majority recognized that trial courts have discretion on whether to accept a plea, and docket control is a good reason for setting plea cut-off dates:

{¶20} As noted, the trial court expressed, on the record, its reasoning in refusing to accept the plea bargain. Irish was aware that the trial court imposed an April 4, 2008 deadline for accepting a plea. Certainly, plea bargains should not be discouraged; however, there is nothing in the record to justify the inability of the state and Irish to arrive at an agreement by the deadline imposed by the court. It is a well-established principle that a trial court has wide discretion in control of its docket. *State v. Berner*, 9th Dist. No. 3275-M, 2002-Ohio-3024, at ¶14. (Citation omitted.) Moreover, Irish has not cited to any authority that stands for the proposition that a trial court abuses its discretion in refusing to accept a plea bargain.

While the majority found no abuse of discretion, the dissenter believed that the trial court had abused its discretion in following a “blanket policy” not to accept untimely-tendered plea bargains.

No Jurisdiction to Consider Motion to Withdraw Plea After Affirmance on Appeal

In *State v. Akemon*, 1st Dist. No. C-080443, 2009-Ohio-3728, the defendant had pleaded guilty in 2004 to two counts of drug trafficking, and the convictions had been affirmed in December 2004. In April 2005, the defendant filed a pro se motion to withdraw his pleas, which was later supplemented in October 2006. The trial court denied the motion, and, upon appeal, the First District in 2007 reversed because the trial court had not waited a sufficient time for the defense to respond to a prosecution memorandum. On further proceedings below, the trial court again denied the motion.

On further appeal, the First District found, based on *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, that the trial court had lacked jurisdiction all along to even consider the motion to withdraw plea:

{¶8} * * * [A]n appeal from a judgment of conviction divests a trial court of jurisdiction over the case, unless the appellate court remands the case to the trial court for a ruling on a pending motion, or the trial court’s exercise of jurisdiction is in aid of the appeal or is otherwise “not inconsistent with [the jurisdiction] of the appellate court to review, affirm, modify or reverse the final order, judgment or decree from which the appeal has been perfected.” And the trial court does not regain jurisdiction after the appellate court has decided the appeal, unless the appellate court remands the case. Therefore, a trial court has no jurisdiction to entertain a Crim.R. 32.1 motion to withdraw a guilty plea after the defendant has perfected his direct appeal and the judgment of conviction has been affirmed. And to the extent that our 2007 decision supports the contrary proposition, it is overruled. (Footnotes omitted)

Bruise can be Serious Physical Harm

In *State v. Jarrell*, 4th Dist. No. 08CA3250, 2009-Ohio-3753, the defendant was charged with felonious assault but, in a plea bargain, she pleaded guilty to aggravated assault and received a community-control sanction that included a 90-day jail sentence. Seventeen months later, she moved to withdraw her plea, contending that the victim had not really suffered serious physical harm.

The victim had suffered a minor fracture to the orbital floor of the right eye, and substantial bruising was visible around the right eye, lip, and left forehead. Serious physical harm means, inter alia, “[a]ny physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement[.]” R.C. 2901.01(A)(5)(d). Based thereon, the Fourth District surveyed the case law and concluded that bruising can be sufficient for serious physical harm:

{¶14} Under certain circumstances, a bruise can constitute serious physical harm because a bruise may satisfy the statutory requirement for temporary serious disfigurement. *State v. Worrell*, Franklin App. No. 04AP-410, 2005-Ohio-1521, at ¶47-51, rev’d on other grounds by In re Ohio Criminal Sentencing Statutes Cases, 109 Ohio St.3d 313, 2006-Ohio-2109. The question is whether the bruising is severe enough to qualify as serious disfigurement. In *Worrell*, the victim suffered “extensive bruising on her lower back and hip.” *Id.* at ¶50. Other Ohio courts of appeals have found similar injuries constituted serious physical harm. *State v. Barbee*, Cuyahoga App. No. 82868, Scioto App. No. 08CA3250, 2004-Ohio-3126, at ¶60 (a bruise “three to four inches in length and approximately * * * two inches in width” and visible four days after the assault); *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 715 (“profuse bruising across [the victim’s] buttocks extending into her back area” could reasonably be found to be serious physical harm); *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, at ¶23 (“bruising and marks on his buttocks and thighs that caused pain that likely lasted several days after being inflicted.”). But see *State v. Massey* (1998), 128 Ohio App.3d 438, 442 (“[Victim] had a slight bruise on her head, but the injury was inarguably minor.”).

{¶15} Based on the foregoing cases, it is certainly possible that the injuries the victim suffered could be found by a reasonable juror to be “serious physical harm.” * * *

The trial court had not abused its discretion in denying the motion to withdraw plea, as a jury reasonably could have found the defendant guilty of the offense. Although the defendant might have been able to convince the jury that the injuries were not serious physical harm, a mere possibility of acquittal was not a valid basis for allowing withdrawal of a plea.

Implicit Threat Sufficient for Robbery

In *State v. Eckert*, 12th Dist. No. CA2008-10-099, 2009-Ohio-3312, the defendant entered a bank and handed a teller a note, "this is a robbery." The startled teller showed another teller the note, and that teller triggered a silent alarm and told the first teller to give him the money. Still waiting, the defendant pressed for "his money," and the first teller handed him \$2,000. The defendant never showed or indicated a weapon. The defendant fled. The tellers were visibly upset afterward because they had believed he might pull a gun. The defendant was caught a month later and confessed. In a bench trial, he was convicted of robbery under R.C. 2911.02(A)(2), which prohibits the commission or attempted commission of a theft offense through, inter alia, the reckless threatening of physical harm.

The Twelfth District rejected the defendant's insufficient-evidence challenge. Threats can be implicit:

"[T]he threat of physical harm need not be explicit; rather, an implied threat of physical harm is sufficient * * *." *State v. Harris*, Franklin App. No. 07AP-137, 2008-Ohio-27, ¶14; *State v. Ellis*, Franklin App. No. 05AP-800, 2006-Ohio-4231, ¶7. As the United States Sixth Circuit Court of Appeals found, written or verbal demands for money to a bank teller are common means used to rob a bank and "carry with them an implicit threat: if the money is not produced, harm to the teller or other bank employee may result." *United States v. Gilmore* (C.A.6, 2002), 282 F.3d 398, 402; *United States v. Bell* (C.A.6, 2008), 259 Fed.Appx. 733, 2009 WL 77783 * * *.

"[A]ppellant's conduct, although not explicit, inherently conveyed a threat to the bank teller that he would inflict physical harm upon her, or her fellow employees, if she failed to comply with his monetary demands." No overt "fighting gestures" or indications of a weapon were necessary to support conviction. "To hold otherwise would effectively render appellant's assertion that '[t]his is a robbery,' as well as his verbal demand for 'his money,' meaningless."

Excited Utterance by Four-year-old Rape Victim Admissible Despite Nine-Day Delay

In *State v. Girts*, 5th Dist. No. 08-CA-31, 2009-Ohio-3422, the four-year-old rape victim was at home with her mother and aunt. It had been nine days since her last weekend visitation with her father, the defendant. When the mother saw that the family pet bulldog had an erection, she told the dog to "put that away." The girl then volunteered, "My daddy has a pee thing like that." When the mother asked how she knew that, the girl responded, "He puts it in my mouth." The mother and aunt said, "what?" When they assured the girl she was not in trouble, the girl stated, "My daddy puts his pee thing in my mouth." The defendant later confessed that, during the last visitation, he had put his erect penis in the girl's mouth for a "few seconds."

The defendant was convicted in a bench trial of child rape after the girl's statement "My daddy puts his pee thing in my mouth" was admitted as an excited utterance. The girl did not testify, as she was ruled not competent to testify.

Because the trial court had not abused its discretion, the Fifth District affirmed the admission of the statement. A child-victim of sexual assault can remain in a state of nervous excitement longer than an adult, and even substantial lapses of time can be tolerated. *State v. Taylor* (1993), 66 Ohio St.3d 295, 304. Conducting a wide survey of the case law, the Fifth District noted that the standard is an "extremely liberal" one. Several cases have upheld admissibility after delays of, inter alia, 10 days, 2 weeks, 27 days, 4 to 6 weeks, 2 months, and even 7 months. "[C]ases involving very young children

focus on the spontaneity of the statement, not the progression of a startling event or occurrence.” The court therefore concluded that, “because the statement was spontaneous, because the victim was of such a young age, and because her statements did not indicate a reflective process, the statement constituted an excited utterance.” The girl’s incompetency to testify did not affect the admissibility of the statement. *State v. Wallace* (1988), 37 Ohio St.3d 87, 93-94.

Tampering with Evidence – Evidence Need Not be Incriminating

In *State v. Rardon*, 9th Dist. No. 24478, 2009-Ohio-3361, police arrived at the scene in response to a report of a man with a gun. The defendant began walking away, ignoring orders by the police to stop. In the process, the defendant threw away a flare gun he had been carrying (which had been mistaken as a gun because it had been spray-painted black). The police captured the defendant and retrieved the flare gun, and the defendant was ultimately convicted of tampering with evidence. In a 2-1 ruling, the Ninth District upheld the conviction.

“R.C. 2921.12(A)(1) makes it a crime to conceal a ‘thing’ with ‘purpose to impair its value or availability as evidence in a proceeding or investigation.’ * * * The text of the statute does not suggest that something should not be considered ‘evidence’ for the purposes of an investigation simply because it cannot be offered as proof of criminal conduct at a subsequent criminal proceeding.”

The court noted that “[t]he police investigation was in specific response to a 911 call regarding a man in possession of a gun,” and “no fact was of greater value than the fact that the subject of the 911 call was in possession of a flare-gun, and not a firearm.” “[K]nowing that Rardon was in possession of a flare-gun allowed law enforcement to accurately assess the level of danger surrounding the situation.”

Foster and Harmless Error

To impose consecutive sentences, R.C. 2929.14(E)(4) generally required that the trial court make certain findings, including that consecutive service was necessary to protect the public or punish the offender and that consecutive service was not disproportionate to the seriousness of the defendant’s conduct and to the danger posed by the defendant.

Based on *Blakely v. Washington* (2004), 542 U.S. 296, the Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, held that such finding requirements were unconstitutional and severed those finding requirements. Given that the Court later summarily reversed a large number of cases based on *Foster* and ordered resentencing hearings, the implication was that, if a sentencing court had relied on the now-severed sentencing findings, a resentencing was required. But, in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, the Court rejected the “perceived implications” of the many summary reversals and concluded that, at a minimum, the *Blakely-Foster* issue would not result in reversal if there was no objection in the trial court at the time of sentencing.

The issue continues to linger. In *State v. Shepherd*, 3rd Dist. No. 6-08-16, 2009-Ohio-3315, the sentencing court had imposed consecutive sentences and had not mentioned any severed consecutive-sentencing findings at the sentencing hearing. But in the subsequent judgment entry, the court included the former findings for consecutive sentencing. The appellate court reluctantly reversed and remanded for resentencing in light of *Foster*.

A substantial argument exists, however, that no reversal is necessary under harmless-error review. *Payne* followed *Washington v. Recuenco* (2006), 126 S.Ct. 2546, which held that *Blakely* error is subject to harmless-error review. *Payne* further recognized that *Foster* was a Pyrrhic victory for defendants, since it resulted in a severance of the finding requirements and left the sentencing courts with even greater discretion to impose longer or consecutive sentences. *Payne* noted that, “[i]f Payne were to be resentenced, nothing in the record would hinder the trial court from considering the same factors it previously had been required to consider and imposing the same sentence or even a more stringent one.”

Inasmuch as the former consecutive-sentence findings remain relevant as sentencing factors, a sentencing court does not commit reversible error in referring to them, as any sentencing court is allowed to consider things like the seriousness of the offense, proportionality, protecting the public, and punishing the offender. Even post-*Foster*, courts can consider such factors, and so a court referring to such factors in their former guise as consecutive-sentence finding requirements should be harmless error.

Tape-Recorded Interrogation; No Transcript needed for Appellate Review

In *State v. Dunn*, 2nd Dist. No. 2008 CA 20, 2009-Ohio-3304, the evidence in the suppression hearing included an audiotape of the detective’s non-custodial interview of the defendant. The court heard the tape and denied the motion to suppress.

On appeal, the issue arose as to whether the tape should have been transcribed under App.R. 9(A) for purposes of appellate review. The Second District concluded that no transcription was necessary:

{¶ 12} Appellate courts are split on this issue. Some courts have held that, because an audiotape was an exhibit and not part of the trial court proceedings, it was not required to be transcribed pursuant to App.R. 9(A). See, e.g., *State v. Carter*, Jefferson App. Nos. 04-JE-32, 07-JE-33, 2008-Ohio-6594, at ¶81; *State v. Wedge* (Dec. 21, 2001), Hamilton App. No. C-000747. Other courts have held that the contents of audiotapes admitted as exhibits fall within the App.R. 9(A) requirement that proceedings recorded by means other than videotape must be transcribed into written form. See, e.g., *In re Grand Jury* (June 1, 1995), Washington App. Nos. 93CA09, 93CA10, 93CA12, affirmed on other grounds, (1996), 76 Ohio St.3d 236. We have not previously addressed this issue.

{¶ 13} Although the best practice is to have the attorneys agree that the evidentiary tape need not be transcribed simultaneously with its playing to the trier-of-fact, a court reporter does not need to transcribe such a tape. “Audiotapes which are admitted into evidence as exhibits are evidence, rather than a part of the trial proceedings. When appellate courts review these exhibits, we should review in the same state that the jury reviewed the evidence, i.e., as audiotape exhibits.” *Carter* at ¶81.