

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94003**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ELVIS TORRES**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-523860

**BEFORE:** Blackmon, J., McMonagle, P.J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** August 5, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Elvis Torres appeals his sentence and assigns the following errors for our review:

**“I. The trial court erred in failing to merge the kidnapping count with the rape, as they were allied offenses of similar import.”**

**“II. The trial court erred in sentencing defendant to consecutive terms of imprisonment without making the findings under Ohio R.C. §2929.14(E)(4).”**

{¶ 2} Having reviewed the record and pertinent law, we affirm in part, reverse in part and remand for merger of the allied offenses. The apposite facts follow.

{¶ 3} On May 1, 2009, a Cuyahoga County Grand Jury indicted Torres on three counts of rape, one count of attempted rape, and five counts of kidnapping with sexual motivation specifications. Torres pleaded not guilty at his arraignment, and several pre-trials followed.

{¶ 4} On July 16, 2009, pursuant to a plea agreement with the state, Torres pleaded guilty to two counts of rape and one count of kidnapping with sexual motivation specification attached. The state indicated that Torres agreed that the two counts of rape were separate and would not merge for purposes of sentencing. The state dismissed the remaining charges.

{¶ 5} At the sentencing hearing on September 1, 2009, the state introduced and played a video recording of events that occurred at a bar on Denison Avenue in Cleveland, Ohio on April 4, 2009. In the recording, Torres is seen engaged in conversation with S.K.,<sup>1</sup> a female bartender, and is later seen dancing with S.K. Torres eventually pulls off S.K.'s jeans and proceeds to rape her off-screen in a back office. When Torres and the victim

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<sup>1</sup>The victim is referred to herein by her initials in accordance with this court's established policy.

reappear on the screen, Torres is seen taking S.K. into the pool room where he raped her a second time on the pool table.

{¶ 6} The trial court sentenced Torres to prison terms of eight years for the first count of rape and nine years for the second count of rape. In addition, the trial court sentenced Torres to seven years for kidnapping. The trial court ordered Torres to serve the sentences consecutively for a total of 24 years.

### **Allied Offenses**

{¶ 7} In the first assigned error, Torres argues the trial court erred when it failed to merge the kidnapping count with the rape counts as they are allied offenses of similar import.

{¶ 8} Ohio's allied offense statute, R.C. 2941.25, prohibits multiple convictions and states as follows:

**“(A) Where the same conduct by [a] 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.**

**“(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.”**

{¶ 9} In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶10-13, the Ohio Supreme Court explained how to determine whether two offenses are allied offenses of similar import by stating that:

**“This court has interpreted R.C. 2941.25 to involve a two-step analysis. ‘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.*, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 10} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶21-24, the Ohio Supreme Court held that in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case. However, an exact alignment of those elements is not required. *Id.*

{¶ 11} In the instant case, Torres was charged with the crime of kidnapping pursuant to R.C. 2905.01, which states, in relevant part:

**“(A) No person, by force, threat, or deception, \* \* \* by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:**

“\* \* \*

**“(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim’s will; \* \* \*.”**

{¶ 12} Torres was also charged with rape pursuant to R.C. 2907.02, which states, in relevant part:

**“(A)(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.**

**“(B) Whoever violates this section is guilty of rape, a felony of the first degree. \* \* \*.”**

{¶ 13} The Supreme Court of Ohio has held that restraint of a victim by force is sufficient to constitute the offense of kidnapping. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶23. Accordingly, “implicit within every forcible rape \* \* \* is a kidnapping.” *Id.* at ¶23, quoting *State v. Logan* (1979), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345. Rape and kidnapping are, therefore, allied offenses of similar import for purposes of R.C. 2941.25(A). *State v. Butts*, 9th Dist. No. 24517, 2009-Ohio-6430, ¶33.

{¶ 14} However, we must next examine whether the two crimes were committed separately or with a separate animus. *Blankenship*. The determining factor in our analysis is “whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.” *Butts*, quoting

*State v. Logan* at 135; *State v. Gibson*, Cuyahoga App. No. 92275, 2009-Ohio-4984.

{¶ 15} In *Logan*, the Ohio Supreme Court provided guidance in determining whether kidnapping and another offense (in this case, rape) were committed with the same or a separate animus. The Court held that “where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions.” *Id.* at subparagraph (a) of the syllabus.

{¶ 16} Further, “[w]here the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from \* \* \* the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.” *Id.* at subparagraph (b) of the syllabus. In *Logan*, the Court defined “animus” for purposes of R.C. 2941.25(B) to mean “purpose or, more properly, immediate motive.” *Logan* at 131.

{¶ 17} In the instant case, the state has not shown that Torres had a separate purpose to kidnap S.K. The state has not shown that Torres moved S.K. beyond the site of the rapes, confined her secretly or for a prolonged period, or subjected her to a higher risk of harm. Torres restrained S.K.

within the bar and raped her in the bar's back office and again on the bar's pool table.

{¶ 18} On these facts, we conclude the kidnapping and rapes arose out of the same conduct, were committed simultaneously, and were committed with the same animus. Thus, the rapes and kidnapping were allied offenses of similar import for which, pursuant to R.C. 2941.25(A), Torres may be convicted of only one. Therefore, this court finds that the trial court erred in sentencing Torres on both the kidnapping and rape charges. Accordingly, we sustain the first assigned error.

#### **Consecutive Sentences**

{¶ 19} In the second assigned error, Torres argues the trial court erred when it imposed consecutive sentences without making any findings.

{¶ 20} Under current Ohio law, a trial court “now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.” *State v. Sturgill*, Cuyahoga App. No. 93158, 2010-Ohio-2090, citing *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582. See, also, *State v. Bates*, 118 Ohio St.3d 174, 178, 2008-Ohio-1983, 887 N.E.2d 328. Although recognized, the Ohio Supreme Court has yet “to address fully all ramifications of [*Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, 172 L.Ed.2d 517.]” In *Elmore*, the court followed its *Foster* decision, and reiterated that trial courts “are no

longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.” *Elmore* at 482, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. Accordingly, we overrule the second assigned error.

{¶ 21} Judgment affirmed in part and reversed in part. The kidnapping conviction is vacated and the matter remanded for merger of the allied offenses.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and  
JAMES J. SWEENEY, J., CONCUR