[Cite as *State v. Smith*, 2015-Ohio-1063.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-T-0071**
- vs -	:	
ADEMILSON JEFFREY SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2011 CR 618.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Andrew R. Zellers, 3810 Starrs Centre Drive, Canfield, OH 44406 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Trumbull County Court of Common Pleas. Appellant, Ademilson Jeffrey Smith, appeals from the final judgment sentencing him for burglary and receiving stolen property following a jury trial. On appeal, he maintains that the trial court failed to merge offenses. For the following reasons, we affirm.

{¶2} On November 16, 2011, appellant was indicted by the Trumbull County Grand Jury on three counts: count one, burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2) and (C); count two, receiving stolen property, a felony of

the fifth degree, in violation of R.C. 2913.51(A) and (C); and count three, receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.51(A) and (C).

{¶3} Patrolman Edwards, with the Warren City Police Department ("WCPD"), indicated that from midnight to 4:00 a.m. on September 25, 2011, he was working a side security job with a fellow officer, Brian Cononico, at the Hampshire House Apartments located on Fifth Street.[1] The officers were in uniform and sitting in a marked cruiser. While parked, they received information of a home burglary on Atlantic Street. In addition to items stolen from inside the residence, a purple Toyota RAV4 was stolen from the driveway. A description of the stolen vehicle, including the license plate number, was part of the dispatch.

{¶4} Within two to five minutes of receiving the dispatch, a vehicle matching the description passed in front of the officers and pulled into a parking space at the apartment complex. At that point, Patrolman Edwards positioned the cruiser behind the purple RAV4. The officers approached the driver, identified as appellant. Patrolman Edwards recognized appellant from prior arrests. The officers observed a flat screen television inside the vehicle. Patrolman Edwards confirmed that the purple RAV4 driven by appellant was the purple RAV4 stolen from the Atlantic Street residence.

{¶5} In the course of a search incident to arrest, Patrolman Edwards discovered on appellant's person a wallet belonging to the victim, Timothy Sekela, the occupant of the burglarized residence and the owner of the purple RAV4. The wallet contained Sekela's identification card and three credit cards.

1. Patrolman Edwards explained that a "side job" is extra employment in which a business requires police protection or assistance to help fight local crime. He stated that they were working in almost a security capacity but technically on duty as a Warren police officer.

{¶6} Sekela testified that he was awakened before 4:00 a.m. on September 25, 2011, when he heard his car starting in his driveway. When he looked out the window, he noticed his car was gone. Sekela went downstairs and noticed his television was missing in addition to his wallet. He called 9-1-1 and reported this information.

{¶7} As to the timeline of the 9-1-1 dispatch and arrest, Patrolman Edwards testified again that the arrest occurred between two and five minutes after he and Officer Cononico had received the dispatch.

{¶8} Officer Brian Holmes, with the WCPD, testified that he was working the midnight shift on the night at issue. He was sent to Sekela's residence after the burglary was reported. Officer Holmes and Sekela walked through the house and discovered that a sliding glass door at the rear of the residence was unlocked. Outside were footprints in the wet grass. Officer Holmes surmised that the sliding glass door was the burglar's point of entry.

{¶9} On June 12, 2013, the trial court sentenced appellant to a total of nine and one-half years in prison. The trial court merged the two counts of receiving stolen property. However, it did not merge those counts with the burglary count. Specifically, the court imposed an eight-year term for burglary to be served consecutively to an 18-month sentence for receiving stolen property.

{¶10} This appeal followed.

{¶11} Appellant raises the following assignment of error:

{¶12} "The trial court erred when it elected not to merger (sic) the offenses committed by the Defendant-Appellant for the purpose of sentencing as the offense (sic) were allied offenses of similar import under R.C. 2941.25."

{¶13} In his sole assignment of error, appellant argues the trial court erred by failing to merge all three counts for the purpose of sentencing as all three counts are allied offenses of similar import arising from the same conduct.

{¶14} Our review of an allied offenses question is de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶12.

{¶15} R.C. 2941.25 states:

{¶16} "(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.

{¶17} "(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."

{¶18} "R.C. 2941.25(A) clearly provides that there may be only *one conviction* for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense. * * * [A]llied offenses of similar import are to be merged at sentencing. *See State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, * * * ¶43; *State v. McGuire*, 80 Ohio St.3d 390, 399 * * * (1997). Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. * * * Both R.C. 2941.25 and the Double Jeopardy Clause prohibit multiple convictions for the same conduct. For this reason, a trial court is required to merge allied offenses of similar import at sentencing." *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, ¶26-27. (Emphasis sic.) (Parallel citations omitted.)

{¶19} "Under Crim.R. 52(B), '(p)lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' * * * [I]mposition of multiple sentences for allied offenses of similar import is plain error. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087 * * * ¶96-102." *Underwood, supra,* at ¶31. (Parallel citation omitted.)

{¶20} According to a plurality of the Ohio Supreme Court, "[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." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus; *State v. May*, 11th Dist. Lake No. 2010-L-131, 2011-Ohio-5233. The *Johnson* court provided the new analysis as follows:

{¶21} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), 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. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶22} "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.' * * *.

{¶23} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶24} "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has [a] separate animus for each offense, then,

according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶48-51. (Citations omitted.) (Emphasis sic.)

{¶25} This court went on to state in *May, supra,* at ¶50-51:

{¶26} "'In departing from the former test, the court developed a new, more context-based test for analyzing whether two offenses are allied thereby necessitating a merger. In doing so, the court focused upon the unambiguous language of R.C. 2941.25, requiring the allied-offense analysis to center upon the defendant's conduct, rather than the elements of the crimes which are charged as a result of the defendant's conduct.' [*State v.*] *Miller* [, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161,] at ¶47, citing *Johnson* at ¶48-52.

{¶27} "'The (*Johnson*) court acknowledged the results of the above analysis will vary on a case-by-case basis. Hence, while two crimes in one case may merge, the same crimes in another may not. Given the statutory language, however, this is not a problem. The court observed that inconsistencies in outcome are both necessary and permissible "* * * given that the statute instructs courts to examine a defendant's conduct - an inherently subjective determination."' *Miller* at ¶52, quoting *Johnson* at ¶52."

{¶28} The issue here is whether appellant's convictions are allied offenses of similar import subject to merger for purposes of sentencing, which we review de novo. *Williams, supra,* at ¶12.

{¶29} R.C. 2911.12(A)(2), burglary, states: "[n]o person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is

present or likely to be present, with purpose to commit in the habitation any criminal offense[.]"

{¶30} R.C. 2913.51(A), receiving stolen property, states: "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶31} Applying the first step of *Johnson*, it is possible to commit burglary and receiving stolen property with the same conduct. *See* *State v. Blackburn*, 4th Dist. Pickaway No. 10CA46, 2011-Ohio-4624 (burglary, theft, and receiving stolen property are allied offenses of similar import subject to merger); *State v. Fair*, 2d Dist. Montgomery No. 24120, 2011-Ohio-3330 (burglary and receiving stolen property are allied offenses subject to merger).

{¶32} Under the second step, the specific facts of this case must be reviewed to determine whether appellant committed the charged offenses separately or with a separate animus so as to permit multiple punishments. Appellant relies on *Blackburn, supra*, in support of his position that all three of his offenses should merge. In *Blackburn*, the appellant and his co-defendant broke into the victim's home, removed a television, and left with it. *Id.* at ¶2. The victim's son was home and witnessed the two men getting into a small, red car and leaving the scene. *Id.* Thereafter, police later spotted the vehicle. *Id.* at ¶3. Despite the cruiser's overhead lights, the appellant continued driving for nearly two miles before stopping. *Id.* at ¶4. The appellant was charged and sentenced for burglary, failure to comply with an order or signal of a police officer, theft, and receiving stolen property. *Id.* at ¶6.

{¶33} On appeal, appellant in *Blackburn* claimed the trial court should have merged his convictions for burglary, theft, and receiving stolen property. *Id.* at ¶8. The Fourth District agreed reasoning that "it is possible to commit the offenses of burglary,

theft, and receiving stolen property with the same conduct. One can trespass in an occupied structure with the intent to commit a theft (burglary), actually commit the theft (theft), and retain the stolen property (receiving stolen property)." *Id.* at ¶15. The Fourth District found the appellant committed the offenses with the same conduct and with a single state of mind and, thus, sustained his assignment of error regarding merger. *Id.* at ¶16, 18.

{¶34} In this case, the state alleges that appellant's reliance on *Blackburn* regarding merger is misplaced. The state maintains that the only way appellant could have committed burglary and receiving stolen property with a single act and with the same animus would be if the victim, Sekela, had parked his RAV4 in his living room rather than his driveway. We agree with the State. The facts show different sets of conduct for the separate offenses. A burglary occurred once appellant entered the house with the purpose to commit a crime *inside* the house. Unlike *Blackburn*, the burglary was not ancillary to the completion of the receiving stolen property offense; rather, it is only upon appellant's exit from the house that he received stolen property, that being the RAV4. Thus, appellant committed burglary by entering the house and after the burglary was complete decided to steal the car. These separate sets of conduct thereby preclude merger.

{¶35} The sole assignment of error is without merit.

{¶36} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶37} I respectfully dissent.

{¶38} The majority holds that appellant committed burglary by entering the house and, after the burglary was complete, decided to steal the car. Thus, the majority contends that those "separate sets of conduct" preclude merger. For the following reasons, I disagree.

{¶39} Appellant was charged with, convicted of, and sentenced on three counts: count one, burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2); count two, receiving stolen property, a felony of the fifth degree, in violation of R.C. 2913.51(A); and count three, receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.51(A).

{¶40} R.C. 2911.12(A)(2), burglary, states: "[n]o person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]"

{¶41} R.C. 2913.51(A), receiving stolen property, states: "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶42} Applying *Johnson*, burglary and receiving stolen property are allied offenses of similar import, as it is possible to commit one offense and commit the other with the same conduct. *See* ***Blackburn***, ***supra*** (burglary, theft, and receiving stolen

property are allied offenses of similar import subject to merger); *Fair*, *supra* (burglary and receiving stolen property are allied offenses subject to merger).

{¶43} Under R.C. 2941.25, Ohio's multiple-count statute, if a defendant's conduct results in allied offenses of similar import, the defendant may ordinarily be convicted of only one of the offenses. R.C. 2941.25(A). However, if the defendant commits each offense separately or with a separate animus, then convictions may be entered for both offenses. R.C. 2941.25(B).

{¶44} Thus, although burglary and receiving stolen property are allied offenses, the specific facts of this case must be reviewed to determine whether appellant committed the charged offenses separately or with a separate animus so as to permit multiple punishments.

{¶45} As stated, appellant was charged and convicted with one count of burglary and two counts of receiving stolen property. At sentencing, the trial court merged the two counts of receiving stolen property. However, it did not merge those counts with the burglary count. Thus, based on the facts presented, I believe the trial court erred in not merging all three counts for sentencing.

{¶46} This case involves only one victim. The facts do not support that appellant committed a burglary offense, then decided separately to commit a receiving stolen property offense, then decided separately to commit another receiving stolen property offense. Rather, the manner of appellant's actions supports a single "purpose" that should lead to merger. The evidence reveals that appellant, in order to support his drug addiction, broke into the victim's home, stole his television, credit cards, and car keys, took the RAV4 which was parked in the driveway, and left the scene before he was apprehended by police. There were no signs of forced entry into the RAV4 and/or no signs that the vehicle was hot-wired.

{¶47} The record does not reveal any temporal break which would make merger inapplicable. Rather, the record establishes that the incident occurred simultaneously. Also, appellant evidenced the same animus in committing the offenses. Looking to appellant's conduct, this was a single act with a single state of mind against a single victim. The test under *Johnson* is not whether the elements line up, which is the essence of the overruled analysis in *State v. Rance*, 85 Ohio St.3d 632 (1999). Rather, the test is whether the crimes were committed by the same conduct and with the same animus. In this case, I believe they were.

{¶48} "'[T]he purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence.'" *State v. Helms*, 7th Dist. Mahoning No. 08 MA 199, 2012-Ohio-1147, ¶68, quoting *Johnson, supra,* at ¶43, citing *Maumee v. Geiger*, 45 Ohio St.2d 238, 242 (1976). In this case, multiple sentences have been improperly "heaped" on appellant, pursuant to the principles and purposes of sentencing under R.C. 2929.11, which under H.B. 86 now provides: "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources*." R.C. 2929.11(A). (Emphasis added.) Thus, the legislature has given us the tools as well as a mandate to address the issues of keeping dangerous criminals off the street, while balancing Ohio's financial deficits and an already overcrowded prison system.

{¶49} Based on the facts in this case, burglary and receiving stolen property are allied offenses of similar import, were committed with the same animus, and should

have merged. Therefore, I disagree with the outcome reached by the majority as I believe the trial court erred in stacking appellant's offenses.

{¶50} I respectfully dissent.