[Cite as *State v. Snyder,* 2011-Ohio-6346.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-02-018
	:	O P I N I O N
- vs -		12/12/2011
	:	
PETE SNYDER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-03-0515

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Pete Snyder, #A627-641, London Correctional Institution, P.O. Box 69, London, Ohio 43140, defendant-appellant, pro se

HENDRICKSON, J.

{¶1} Defendant-appellee, Pete Snyder, appeals his convictions and sentences in the Butler County Court of Common Pleas on one count of grand theft by deception and three counts of passing bad checks, following his no contest plea to those charges. We affirm the trial court's decision to impose consecutive sentences on Snyder for his convictions on two of the three counts of passing bad checks because those offenses were committed separately for purposes of R.C. 2941.25(B). However, we reverse the trial court's decision to impose

consecutive sentences on Snyder for his conviction on one count of grand theft by deception and the three counts of passing bad checks, because under the facts of this case, those offenses are allied offenses of similar import that should have been merged under R.C. 2941.25. Therefore, we will remand this matter for resentencing.

{¶2} Snyder was the owner of Gulf Coast Drywall, a Louisiana company. In January 2009, Snyder contracted with J.N. Linrose Manufacturing, LLC (Linrose), a corporation in Hamilton, Ohio, to buy $73,762.33 in steel studs. On February 11, 2009, Linrose shipped a partial load of the steel studs to Snyder in Louisiana, and Snyder sent Linrose a check for $25,116.65. One week later, Linrose shipped two more loads of steel studs to Snyder, and Snyder sent Linrose two more checks, one for $18,699.55 and the other for $6,154.39. Upon learning that Snyder's checks had "bounced," Linrose contacted the Butler County Sheriff's Office, which sent deputies to Louisiana, who located the material that Linrose had shipped to Snyder and shipped it back to Linrose.

{¶3} Snyder was indicted on one count of grand theft by deception in violation of R.C. 2913.02(A)(3) and three counts of passing bad checks in violation of R.C. 2913.11, with all four counts being fourth-degree felonies. Snyder pled no contest to the charges. The trial court found Snyder guilty as charged and sentenced him to one year in prison on each of the four counts. The trial court ordered Snyder to serve his sentences for grand theft by deception and the first two counts of passing bad checks consecutively to one another, and to serve his sentence on the third count of passing bad checks concurrently with his sentence for grand theft by deception.

{¶4} Snyder now appeals, raising five assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND COMMITTED PLAIN ERROR BY SENTENCING THE APPELLANT TO CONSECUTIVE SENTENCES ON

THE THREE BAD CHECK CHARGES AND THE GRAND THEFT CHARGE, BECAUSE THE GRAND THEFT CHARGE IS AN ALLIED OFFENSE OF SIMILAR IMPORT TO THE THREE BAD CHECK CHARGES."

{¶7} Snyder argues the trial court committed plain error by ordering him to serve his sentences for the three counts of passing bad checks consecutive to his sentence for grand theft by deception, because under the facts of this case, those offenses are allied offenses of similar import that should have been merged under R.C. 2941.25. We agree with this argument.

{¶8} Initially, Snyder acknowledges that he failed to raise this issue at his sentencing hearing and thus has waived all but plain error. See, e.g., *State v. Denham*, Greene App. No. 2001 CA 105, 2002-Ohio-3912, ¶15. However, as the state acknowledges, the Ohio Supreme Court has held that the failure to merge allied offenses of similar import is plain error. See *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶9} The Double Jeopardy Clauses of the United States and Ohio Constitutions protect citizens from both successive prosecutions and cumulative punishments for the same offense. *State v. Moss* (1982), 69 Ohio St.2d 515, 518. This case involves the issue of cumulative punishments for the same offense. R.C. 2941.25 is Ohio's multiple-count statute, which prohibits the imposition of multiple punishments for the same criminal conduct. *State v. McCullough,* Fayette App. Nos. CA2010-04-006 and CA2010-04-008, 2011-Ohio-992, ¶11. The statute provides:

{¶10} "(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.

{¶11} "(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."

{¶12} "R.C. 2941.25 is a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions." *State v. Johnson*, 128 Ohio St. 3d 153, 161-162, 2010-Ohio-6314, ¶45. The purpose of this statute "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." Id. at ¶43, quoting *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 242. "When 'in substance and effect but one offense has been committed,' the defendant may be convicted of only one offense." *Johnson*, quoting *State v. Botta* (1971), 27 Ohio St.2d 196, 203.

{¶13} In *Johnson*, the Ohio Supreme Court held that "[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." Id. at syllabus, overruling *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. *Johnson* set forth the following approach to determine whether two or more offenses constitute allied offenses of similar import under R.C. 2941.25:

{¶14} "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue [as had been required under *Rance*] in order to conclude that the offenses are subject to merger.

{¶15} "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. [*State v.*] *Blankenship* [(1988),] 38 Ohio St.3d [116] at 119 * * * (Whiteside, J.,

concurring) ('It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.' [Emphasis sic]). 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.

{¶16} "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.' [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569 * * * at ¶50 (Lanzinger, J., dissenting).

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

{¶18} "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 separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson*, 2010-Ohio-6314 at ¶47-51.

{¶19} Applying *Johnson* to the facts of this case, we must first determine whether it is possible to commit the offenses of grand theft by deception and passing a bad check with the same conduct. Id. at ¶48. For the reasons that follow, we conclude that it is.

{¶20} Snyder was charged in count one with grand theft by deception in violation of R.C. 2913.02(A)(3), which provides that "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y deception[.]" He was charged in counts two, three and four with passing bad checks in violation of R.C. 2913.11, which provides that no person, "with purpose to defraud, shall issue * * * a check or other negotiable instrument, knowing that it will be

dishonored[.]" It is certainly possible for a person to commit the offenses of grand theft by deception in violation of R.C. 2913.02(A)(3) and passing bad checks in violation of R.C. 2913.11 with the same conduct. Id.

{¶21} Having determined that the offenses of grand theft by deception and passing bad checks "*can be* committed by the same conduct," we next "must determine whether the offenses *were* committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, * * * at ¶50 (Lanzinger, J., dissenting)." *Johnson* at ¶49. We conclude that these offenses were committed by the same conduct in this case that amounted to a single act, committed with a single state of mind. Id.

{¶22} In count one of the indictment, Snyder was charged with engaging in a "continuing course of criminal conduct," from January 26, 2009 to March 3, 2009, with the purpose of depriving the owner of property and services worth $5,000 or more, but less than $100,000, by "knowingly obtain[ing] or exert[ing] control of such property or services by deception," a fourth-degree felony. In counts two, three and four of the indictment, Snyder was charged with passing a bad check, knowing that it would be dishonored, and acting with purpose to defraud. In count two, Snyder was charged with issuing a bad check to Linrose in the amount of $25,116.65 on February 11, 2009; in court three, he was charged with issuing a bad check to Linrose in the amount of $18,699.59 on February 18, 2009; and in count four, he was charged with issuing a bad check to Linrose in the amount of $6,154.39 on February 18, 2009.

{¶23} At first glance, it may appear that these three acts of passing a bad check cannot qualify as a "single act, committed with a single state of mind[,]" for purposes of the analysis set forth in *Johnson* at ¶49. However, Snyder was charged in count one with engaging in a "continuing course of criminal conduct" from January 26, 2009 to March 3,

2009. He was then charged with three counts of passing bad checks in violation of R.C. 2913.11, once on February 11, 2009 (count two) and twice on February 18, 2009 (counts three and four). It is readily apparent from the statement of facts provided by the state at Snyder's plea acceptance hearing that the state was prosecuting Snyder for the same conduct in count one of the indictment that it was prosecuting him for in counts two, three and four of the indictment.

{¶24} Having determined that the offenses of grand theft by deception in violation of R.C. 2913.02(A)(3) and passing bad checks in violation of R.C. 2913.11 *can be* committed by the same conduct, and that those offenses *were* committed by the same conduct under the facts of this case, we now must determine if any of the circumstances listed in R.C. 2941.25(B) are present in this case that would prevent these offenses from being merged. See *Johnson* at ¶51. If we determine that (1) the commission of grand theft by deception "will *never* result in the commission of" passing bad checks, (2) those offenses were committed separately, or (3) Snyder had separate animus for each offense, "then, according to R.C. 2941.25(B), the offenses will not merge." Id.

{¶25} For the reasons set forth above, it is apparent that passing bad checks can result in grand theft by deception, and that the offense of grand theft by deception, carried out by way of a continuing course of conduct from January 26, 2009 to March 3, 2009, was committed at the same time as, rather than separately from, the three offenses of passing bad checks committed on February 11, 2009 and February 18, 2009. Thus, the remaining question is whether Snyder committed the offenses of grand theft by deception and passing bad checks with "separate animus."

{¶26} The state argues that Snyder committed the offenses of grand theft by deception and passing bad checks with separate animus because Snyder "completed the offense of theft by deception the moment he acquired tens of thousands of dollars [sic] worth

of steel studs without the means to pay for them[,]" and that "he then wrote checks that he knew would be dishonored in order to delay detection of his crime." We find this argument unpersuasive.

{¶27} In *State v. Logan* (1979), 60 Ohio St.2d 126, 131, the court defined "animus," for purposes of R.C. 2941.25(B), as follows:

{¶28} "R.C. 2941.25(B), by its use of the term 'animus,' requires us to examine the defendant's mental state in determining whether two or more offenses may be chiseled from the same criminal conduct. In this sense, we believe that the General Assembly intended the term 'animus' to mean purpose or, more properly, immediate motive.

{¶29} "Like all mental states, animus is often difficult to prove directly, but must be inferred from the surrounding circumstances. [Citations omitted.]

{¶30} "Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, A priori [sic], commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime."

{¶31} The facts alleged in the indictment against Snyder, the bill of particulars provided to him upon his request, and the statement of facts provided by the state at Snyder's plea acceptance hearing reveal that Snyder contracted with Linrose to purchase $73,762.33 in steel studs from Linrose with an implied understanding that he would pay for those materials. When the materials arrived, Snyder issued three checks to Linrose that he drew on a closed account, knowing that they would be dishonored.

{¶32} The "statement of facts" recited by the state at Snyder's plea acceptance hearing stated that as to count one of the indictment charging Snyder with grand theft by deception, Snyder, "in his capacity as owner of GulfCoast [sic] Drywall * * * contracted with * * * Linrose * * * and *knowingly obtained and exerted control over three shipments of steel*

studs for the contract price of $73,762.33, *by writing three checks drawn on [Snyder]'s closed checking account*." (Emphasis added.) Thus, it is clear that the state prosecuted Snyder on the charge of grand theft by deception in count one of the indictment on the basis of his conduct in passing three, separate bad checks as alleged in counts two, three and four of the indictment. Snyder clearly acted with the same animus, i.e., the same purpose, intent, or motive, in committing the offenses of passing the three bad checks and grand theft by deception, namely, to defraud Linrose of the $73,762.33 in steel studs he had ordered from them.

{¶33} In light of the foregoing, the offense of grand theft by deception and the offenses of three counts of passing bad checks were allied offenses of similar import under the facts of this case, and therefore the trial court erred by convicting and sentencing Snyder on all of those charges. See *Johnson* at ¶51 and R.C. 2941.25(A). On remand, the state will have the right to elect which allied offense of similar import it wishes to pursue at sentencing, i.e., grand theft by deception in violation of R.C. 2913.02(A)(3) *or* three counts of passing bad checks in violation of R.C. 2913.11, and the trial court will be bound by the state's election. See *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-319, paragraphs one, two and three of the syllabus.

{¶34} Therefore, Snyder's first assignment of error is sustained.

{¶35} Assignment of Error No. 2:

{¶36} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND COMMITTED PLAIN ERROR BY SENTENCING THE APPELLANT TO CONSECUTIVE SENTENCES ON THE THREE BAD CHECK CHARGES, BECAUSE THE CHECK CHARGES ARE ALLIED OFFENSES OF SIMILAR IMPORT TO EACH OTHER." [sic]

{¶37} Snyder argues the trial court erred by imposing consecutive sentences against him for his convictions on the three counts of passing bad checks in violation of R.C.

2913.11, because those three counts are allied offenses of similar import that should have been merged under R.C. 2941.25. We disagree with this argument.

{¶38} Initially, the trial court did not, as Snyder claims, impose consecutive sentences on him for his convictions on all *three* counts of passing bad checks; instead, the trial court ordered him to serve his sentence on the third of those counts concurrently with his sentence for grand theft by deception.

{¶39} R.C. 2941.25(B) provides that "[w]here 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." For purposes of R.C. 2941.25(B), "animus" means "purpose" or "immediate motive," and generally "must be inferred from the surrounding circumstances." *Logan*, 60 Ohio St.2d at 131.

{¶40} The statement of facts provided by the state at Snyder's sentencing hearing indicated that on February 11, 2009, Snyder wrote one bad check to Linrose to cover one shipment of steel studs he received from that company on that day. This conduct formed the basis of count two. One week later (on February 18, 2009), Snyder wrote two additional bad checks to cover two additional shipments he received from Linrose on that day. That conduct formed the basis of counts three and four. Thus, the facts of this case show that Snyder wrote three different bad checks, for three different amounts, on two separate days, to cover three separate shipments of steel studs. In light of these facts, we deem Snyder to have committed three separate offenses for purposes of R.C. 2941.25(B). We further deem that Snyder committed those three counts of passing bad checks with a separate animus for purposes of R.C. 2941.25(B), because he wrote the three bad checks to defraud Linrose out of three separate shipments of steel studs. Consequently, the three counts of passing bad

checks are not allied offenses of similar import to each other, and therefore R.C. 2941.25 does not apply. See *State v. Polk*, Cuyahoga App. No. 88639, 2007-Ohio-4436, ¶15.

{¶41} In light of the foregoing, Snyder's second assignment of error is overruled.

{¶42} Assignment of Error No. 3:

{¶43} "THE APPELLANTS [sic] TRIAL COUNSEL WAS INEFFECTIVE, TO THE PREJUDICE OF APPELLANT, WHEN COUNSEL FAILED TO MAKE THE COURT AWARE OR BRING TO THE COURTS [sic] ATTENTION THE FACT THAT THE STEEL STUDS WERE OBTAINED BY APPELLANT AFTER THE ALLEGED VICTIM EXTENDED CREDIT TO HIM ON THE PHONE ORDER, AT THE NO CONTEST PLEA HEARING AFTER THE TRIAL JUDGE ASKED COUNSEL IF HE HAD ANYTHING TO SAY ABOUT THE FACTS OF THE CASE." [sic]

{¶44} Assignment of Error No. 4:

{¶45} "THE APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE TO THE PREJUDICE OF APPELLANT, WHEN COUNSEL ALLOWED DEFENDANT/APPELLANT TO PLEAD NO CONTEST TO A CHARGE OF THEFT, WHEN COUNSEL KNEW, OR AT LEAST HAD A DUTY TO KNOW, AND ESPECIALLY AFTER RECEIVING THE DISCOVERY AND BILL OF PARTICULARS FROM THE STATE, THAT THE TRUE FACTS ABOUT HOW THE APPELLANT OBTAINED AND EXERTED CONTROL KNOWING THE STATE WAS MISLEADING THE COURT AS TO HOW THE APPELLANT OBTAINED AND EXERTED CONTROL OVER SAID STUDS, THEREBY MAKING HIS PLEA NOT KNOWING, INTELLIGENTLY, AND VOLUNTARILY ENTERED."

{¶46} Assignment of Error No. 5:

{¶47} "THE APPELLANTS [sic] TRIAL COUNSEL WAS INEFFECTIVE, TO THE PREJUDICE OF APPELLANT, WHEN COUNSEL FAILED TO MOVE TO DISMISS THE INDICTMENT ON THE GROUNDS THAT IT WAS FRAUDULENTLY OBTAINED BY THE

STATE, AS IS PROVED BY THE FACTS ALLEGED IN THE BILL OF PARTICULARS."

{¶48} Snyder's third, fourth and fifth assignments of error are closely related, and therefore we shall address them together.

{¶49} Snyder argues his trial counsel provided him with ineffective assistance by failing to advise him to go to trial on the charge of grand theft by deception and not to plead no contest to it, because he had a valid defense to that charge, to wit: Linrose extended a 30-day line of credit to him regarding payment on the $73,762.33 in steel studs, and therefore Linrose's only recourse was to bring a civil action against him for the amount due under the parties' contract, rather than to bring criminal charges against him. Snyder also argues his trial counsel was ineffective for not moving to dismiss the indictment against him on the ground that the state had "fraudulently obtained" it by falsely alleging in the indictment that he obtained the steel studs by writing three bad checks, when in fact he obtained the material as a result of Linrose's act of sending the material to him on credit, providing him with 30 days to pay the invoice for the material. We find these arguments unpersuasive.

{¶50} To establish an ineffective assistance of counsel claim, a criminal defendant must show that his trial counsel's performance was "deficient" in that it "fell below an objective standard of reasonableness[,]" and that he was "prejudiced" by his counsel's performance in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The defendant must establish both the "performance" and "prejudice" prongs of the *Strickland* standard to prevail on an ineffective assistance claim. Id. at 687. Moreover, an appellate court must give wide deference to the strategic and tactical choices made by trial counsel in determining whether counsel's performance was constitutionally ineffective. Id. at 689.

{¶51} Initially, Snyder's arguments rely on material that is "dehors" or outside the record in this case, namely, the invoices Linrose sent to Snyder that indicated Snyder would have 30 days to pay them. However, we cannot consider this material because Snyder never admitted it into the record at trial. See, e.g., *State v. Ishmail* (1978), 54 Ohio St.2d 402, syllabus ("A reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and decide the appeal on the basis of the new matter.") However, even if this court could consider the material, Snyder still would not prevail on his ineffective assistance claim.

{¶52} Snyder's ineffective assistance claim is predicated upon his assumption that he had a valid defense to the theft charge in that the invoices for the steel studs show that Linrose gave him 30 days to pay for that material, and therefore Linrose's only recourse was to bring a civil action against him for not paying the amount due Linrose under the parties' contract, rather than to bring a criminal action against him for grand theft by deception. Snyder believes that "no crime [was] committed in regards to the theft charge, [sic] as the shipment of steel was gotten [sic] on credit from the supplier in this case, without the checks having to be written at all to secure the deliverly [sic] of said order/shipment." However, Snyder overlooks the fact that he did write several checks to Linrose in payment of the steel studs that he had ordered, which Snyder knew would be dishonored. By issuing those checks to Linrose, Snyder committed the offenses of grand theft by deception and passing bad checks. The fact that the invoices that Linrose sent Snyder show that Linrose gave him 30 days to pay for the steel studs is of no consequence, since Snyder attempted to pay those invoices with three checks written on a closed account, which were subsequently dishonored.

{¶53} Snyder claimed at the sentencing hearing, and again claims on appeal, that he issued the checks to Linrose believing that he had an agreement with a third company that wanted to purchase the steel studs, from whom he was to receive sufficient funds to cover

the checks he issued to Linrose, but that agreement unexpectedly fell through, thereby leaving him without sufficient funds to cover the checks he wrote to Linrose. However, if Snyder had gone to trial, the state would have been permitted to present evidence of his lengthy history of passing bad checks, which the trial court outlined at the sentencing hearing. While Evid.R. 404(A) prohibits the state from presenting evidence of Snyder's other crimes, wrongs or acts to prove his character and that he was acting in conformity therewith at the time of the events in question, the state would have been entitled to present such evidence to show the absence of mistake on Snyder's part. Evid.R. 404(B).

{¶54} In light of the foregoing, the decision of Snyder's trial counsel to advise him to plead no contest to the charges against him rather than to take his chances at trial has not been shown to be objectively unreasonable. See *Strickland*, 466 U.S. at 687-688. Moreover, Snyder has failed to show that the outcome of these proceedings would have been different had it not been for his trial counsel's alleged, unprofessional errors. Id. at 694. Therefore, Snyder cannot prevail on his claim of ineffective assistance of counsel. Id. at 687.

{¶55} Accordingly, Snyder's third, fourth and fifth assignments of error are overruled.

{¶56} The trial court's judgment is affirmed in part and reversed in part, and this cause is remanded for resentencing consistent with this opinion.

POWELL, P.J., and RINGLAND, J., concur.