[Cite as *State v. Lewis*, 2012-Ohio-885.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-10-045
	:	O P I N I O N
- vs -		3/5/2012
	:	
MICHAEL A. LEWIS, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2008-5105

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Craig A. Newburger, 477 Forest Edge Drive, South Lebanon, Ohio 45065, for defendant-appellant

POWELL, P.J.

{¶ 1} A defendant convicted of two counts of trafficking in crack cocaine argues for merger of the two counts as allied offenses and reversal of an order to pay a mandatory fine and the cost of his expert witness. We find no merger necessary as the record indicates the two trafficking offenses were not allied offenses committed with the same animus and the order to pay the fine and expert fees was proper, given the defendant's failure to request

waiver of the financial sanctions and the trial court's consideration of defendant's financial status.

{¶ 2} Michael A. Lewis, Jr. pled guilty in 2008 in Clinton County Common Pleas Court to one count of R.C. 2925.03(A)(1) trafficking in crack cocaine (sell or offer to sell), and one count of R.C. 2925.03(A)(2) trafficking in crack cocaine (prepare for shipment, ship, transport, deliver, prepare for distribution or distribute). As part of the plea agreement, a felony count of tampering with evidence was dismissed.

{¶ 3} The trial court imposed a 12-month prison term for the R.C. 2925.03(A)(1) count and a mandatory four-year term for the R.C. 2925.03(A)(2) count, to be served consecutively. Also included in the sentence was an order for Lewis to pay a mandatory fine of $5,000 and to reimburse the state for the "reasonable fees approved by the Court for an expert." The record indicates Lewis previously sought and received permission to hire an expert at the state's expense to conduct an independent analysis of the drugs seized.

{¶ 4} Lewis appealed his conviction in 2008, but that appeal was dismissed. His request to reinstate his appeal was granted and he now raises two assignments of error for our review.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE CONVICTIONS AND PRISON SENTENCES FOR: TRAFFICKING IN CRACK COCAINE, ORC 2925.03(A)(1), A FELONY OF THE FOURTH DEGREE; AND TRAFFICKING IN CRACK COCAINE, ORC 2925.03(A)(2), A FELONY OF THE THIRD DEGREE. [sic]

{¶ 7} Lewis argues that the recitation of facts at his plea hearing didn't provide a "sufficient basis" for him to make a voluntary, knowing, and intelligent plea. However, the only discussion set forth by Lewis for this proposition is that the statement of facts failed to demonstrate that "any selling related act was distinct from any act intended to transport."

{¶ 8} Lewis also directly asserts the two offenses were allied offenses of similar import committed with the same animus. Both of Lewis' arguments challenge whether the recited statement of facts presents a separate animus for the two counts or whether the two counts should have been merged for sentencing. We will consider both arguments together in our discussion to follow.

{¶ 9} R.C. 2941.25, the statute providing guidance on the charging of multiple offenses, provides:

> (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.
>
> (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.

{¶ 10} More than two years after Lewis was sentenced, the Ohio Supreme Court issued *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, in which it 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. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, overruled.)." *Id.* at syllabus; *see State v. Sydnor*, 4th Dist. No. 10CA3359, 2011-Ohio-3922 (Ohio Supreme Court recently overruled its prior judgments in this area of the law, and it articulated the proper analysis for determining whether merger is appropriate).

{¶ 11} Under the *Johnson* test, courts must first determine whether it is possible to commit one offense and commit the other with the same conduct. *Johnson* at ¶ 48. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is

possible for both offenses to be committed by the same conduct. *Id.*

{¶ 12} If it is found that the offenses can be committed by the same conduct, courts must then determine whether the offenses were committed by the same conduct, i.e., a single act, committed with a single state of mind. *Johnson* at ¶ 49. If both questions are answered in the affirmative, the offenses are allied offenses of similar import; however, if 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, the offenses are not allied offenses of similar import subject to merger. *Id.* at ¶ 50-52. This analysis "may result in varying results for the same set of offenses in different cases," given that R.C. 2941.25 instructs courts to examine a defendant's conduct—an inherently subjective determination. *Id*.

{¶ 13} "Animus" has been defined as "purpose," or "more properly, immediate motive." *See State v. Logan*, 60 Ohio St.2d 126, 131 (1979). If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses. *State v. Rivarde*, 12th Dist. No. CA2010-10-259, 2011-Ohio-5354, fn. 1.

{¶ 14} The defendant bears the burden of establishing his entitlement to the protection provided by R.C. 2941.25 against multiple punishments for a single criminal act. *State v. Mughni*, 33 Ohio St.3d 65, 67 (1987) (pre-Senate Bill 2 case superseded by statute on other grounds); *see Logan* at 129; *State v. Douse*, 8th Dist. No. 79318, 2001 WL 1524420 (Nov. 29, 2001).

{¶ 15} First, we note that Lewis waived all but plain error by failing to raise any allied offense objection with the trial court; however, the Ohio Supreme Court has said the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31-33 (under Crim.R. 52[B], plain errors or defects affecting substantial rights may be noticed although they were not brought to the

attention of the court.).

{¶ 16} According to the record of Lewis' plea hearing, the state read the following statement of facts into the record:

> * * * that on the 3rd day of April, 2008, in Clinton County, Ohio, the defendant * * * did knowingly sell or offer to sell crack cocaine, a schedule 2 controlled substance and that was in the amount that equaled or exceeded one gram but was less than five grams.
>
> In regard to Count 2, on the same day, the 3rd of April, 2008, * * * the defendant * * * did knowingly prepare for shipment or distribution crack cocaine, a schedule 2 controlled substance. The defendant * * * knew or had reasonable cause to believe that this was a controlled substance, that was intended for sale and this was in the amount of five grams, but less than ten grams of crack cocaine. [sic]

{¶ 17} At the sentencing hearing, the trial court indicated it reviewed the presentence investigation report (PSI) and allowed defense counsel to review it. The trial court read extensively from the PSI with regard to Lewis' history and criminal record, asking Lewis to correct the court if something was not true.

{¶ 18} The prosecutor asked for a specific sentence at the sentencing hearing, stating "[t]here are two separate (inaudible) that must be taken into consideration of the two separate crimes." Recognizing that Lewis was facing a mandatory prison term for his third-degree felony, Lewis' trial counsel suggested the trial court impose a reduced prison term, but asked for consecutive sentences because he said Lewis, who admitted he was addicted to drugs, needed to be eligible for transitional control before he reentered society.

{¶ 19} A summary in Lewis' PSI indicated that Lewis was a passenger in a vehicle when he sold a bag of crack cocaine to an undercover officer in a controlled buy. Law enforcement subsequently stopped the vehicle and Lewis jumped out, dropping rocks of crack cocaine as he ran. Lewis was eventually tackled and a bag of crack cocaine rocks was found near him.

{¶ 20} In considering the brief statement of facts read into the record at the plea hearing, we are mindful that a guilty plea is a complete admission of the defendant's guilt, and the merger of offenses is a sentencing issue, not a plea issue. *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, 96483, 2011-Ohio-6430; *see also* Crim.R. 11(B)(1).

{¶ 21} We need not rely solely on the statement of facts at the plea hearing as there were sufficient facts in the record to find under *Johnson* that the two trafficking offenses were not allied offenses committed with a single animus. The record indicates Lewis sold less than five grams of crack cocaine to an undercover agent, left the scene, and when stopped by law enforcement, discarded other crack cocaine rocks, and a bag of crack cocaine rocks was found near him after he was tackled.

{¶ 22} Lewis failed to establish his entitlement to the protection provided by R.C. 2941.25. The trial court did not err in failing to merge the two offenses and in imposing a separate sentence for each of the offenses. Lewis' first assignment of error is overruled.

{¶ 23} Assignment of Error No. 2:

{¶ 24} THE TRIAL COURT ERRED WHEN IT IMPOSED THE COSTS OF THE DEFENSE EXPERT AND THE $5,000.00 MANDATORY FINE ON APPELLANT, A PERSON ACKNOWLEDGED BY THE COURT TO BE INDIGENT.

{¶ 25} Lewis argues the trial court erred in ordering him to pay a fine and the cost of his expert witness because the trial court knew he was indigent when he obtained an expert witness at the state's expense and was represented by court-appointed counsel. Lewis acknowledges he did not bring this alleged error to the trial court's attention below, but asks this court to find plain error.

{¶ 26} While Lewis does not appear to be contesting the imposition of any other costs, reimbursement of the expert fees was taxed as costs. Costs must be assessed against all defendants, but a judge has discretion to waive costs assessed against an indigent

defendant. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, syllabus, ¶ 23; R.C. 2947.23. An indigent defendant must move a trial court to waive payment of costs at the time of sentencing. *Threatt*. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard; otherwise, the issue is waived and costs are res judicata. *Id*.

{¶ 27} As previously mentioned, Lewis did not ask the trial court to waive the cost of the expert fees, even after the trial court's entry ordering the state to pay the reasonable costs of an expert witness indicated the expert fees would be taxed as costs that Lewis would be ordered to repay if he was convicted.

{¶ 28} Lewis likewise contests the trial court's imposition of a $5,000 fine. The record indicates Lewis was subject to a mandatory fine, based on the statutory versions applicable to this case: R.C. 2925.03(D)(1), (court shall impose upon the offender the mandatory fine specified for the offense R.C. 2929.18, unless, as specified in that division, the court determines that the offender is indigent); and R.C. 2929.18 (B)(1), (sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense; if offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine).

{¶ 29} Lewis did not ask or otherwise move the trial court to waive the mandatory fine before his sentencing. Further, even if the trial court was generally aware of his indigent status, the trial court reviewed the PSI and specifically stated at the sentencing hearing that Lewis was 28 years of age, in relatively good health and "capable of employment at one time." *See State v. Gipson*, 80 Ohio St.3d 626 (1998); *see State v. Williams*, 4th Dist. No.

08CA3, 2009-Ohio-657, ¶ 22-25.

{¶ 30} Therefore, regardless of whether Lewis waived the fine and costs issue, we decline his invitation to find error, plain or otherwise, as the trial court did not abuse its discretion in ordering the mandatory fine or reimbursement of the expert fees. Lewis' second assignment of error is overruled.

{¶ 31} Judgment affirmed.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth District Court of Appeals, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.