[Cite as *State v. Little*, 2009-Ohio-4328.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2008-CA-76
	:	
Plaintiff-Appellee	:	Trial Court Case No. 2007-CR-0867
	:	
v.	:	(Criminal Appeal from
	:	Common Pleas Court)
ADRIAN LITTLE	:	
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 21st day of August, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Adrian Little appeals from his conviction and sentence, following a guilty plea, on four counts of conspiracy to commit drug trafficking. Little contends that the trial court erred when it sentenced him on more than one count of conspiracy; that the trial court erred by informing him at the plea

hearing that the maximum sentence for conviction on all counts would be 32 years; that the trial court erred by failing to take into consideration the principles of felony sentencing set forth in R.C. 2929.11 and 2929.12; that the trial court erred by ordering the forfeiture of certain property of his that was only included within the scope of the forfeiture specified in the indictment by virtue of an amendment to the indictment made after his guilty plea; and that his trial counsel was ineffective for having failed to object to these irregularities.

{¶ 2} We conclude that Little specifically consented, at the plea hearing, to the forfeiture of his property as requested by the State; that the trial court is not required to consider the principles of felony sentencing set forth in the Ohio Revised Code when imposing a sentence that has been agreed upon by the defendant and the State, as this one was; and that the trial court did not err when it informed him, correctly, that the maximum sentence that could be imposed for all four of the counts to which he was pleading guilty could be 32 years. We also conclude that Little's trial counsel was not ineffective.

{¶ 3} We do conclude, however, that the trial court committed plain error when it entered convictions on all four conspiracy counts without first holding a hearing to determine whether these counts were required to be merged by R.C. 2923.01(F). Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} Little was charged by indictment with one count of Engaging in a Pattern of Corrupt Activity, in violation of R.C. 2923.01(A)(1); with one count of

Conspiracy to Commit the Offense of Engaging in a Pattern of Corrupt Activity, in violation of R.C. 2923.01(A)(2); with two counts of Conspiracy to Commit the Offense of Trafficking in Cocaine, in violation of R.C. 2923.01(A)(1) and R.C. 2925.03(A)(1); and with two counts of Conspiracy to Commit the Offense of Trafficking in Heroin, in violation of R.C. 2923.01(A)(1) and R.C. 2925.03(A)(1). One of the Conspiracy to Commit the Offense of Trafficking in Cocaine counts, being Count 5 of the indictment, included four forfeiture specifications, alleging that various items were used or intended to be used in the commission of the offense, so that they were subject to forfeiture.

{¶ 5} In April, 2008, Little appeared in open court, and entered pleas of guilty to the four counts of Conspiracy to Commit Trafficking, and to the forfeiture specifications. Pursuant to a plea bargain, the State dismissed the other two counts, and both parties informed the trial court that there was an agreed sentence of twelve years. The maximum possible sentence on each count was eight years, and the trial court informed Little that the maximum possible sentence on the counts to which he was tendering his plea was 32 years.

{¶ 6} During the plea hearing, the following colloquy occurred:

{¶ 7} "THE COURT: Okay. Paragraph 14 says the Defendant will plead guilty as charged to Counts III, IV, V and VI, and that would be to two counts of Conspiracy to Trafficking in Heroin, felonies of the second degree; two counts of Trafficking in Cocaine [sic], felonies of the second degree. So four felonies, all second degree felonies, and you will not contest the forfeiture specifications that were in the Indictment. We haven't gone over this with you. Do you know what

those specifications are?

{¶ 8} "THE DEFENDANT: (Conferring with attorney.) Yes.

{¶ 9} "THE COURT: Do you understand all of those?

{¶ 10} "THE DEFENDANT: Yes.

{¶ 11} "MR. HAYES [representing the State]: And, Your Honor, if I may for just a moment, just so all the parties are clear, that when the State uses the language, 'the Indictment in the plea agreement' [sic, interior quotation marks should probably be around 'the Indictment'], we're referring to the Indictment as originally charged and any subsequent amendments that were filed by the State of Ohio. There were at least two.

{¶ 12} "THE COURT: Why don't we just do this, why don't you tell me what's being forfeited by the specs and we'll make sure Mr. Little knows for sure.

{¶ 13} "MR. HAYES: Certainly, Your Honor. Give me just a moment. Your Honor, the first item the State is seeking forfeiture of $19,955 cash money identified in Forfeiture Specification No. 1; $620 in cash identified in Forfeiture Specification No. 2; 2005 Dodge Magnum identified in Forfeiture Specification No. 3; and a 40 caliber Tauras [sic, it's 'Taurus' in the indictment] handgun identified in Forfeiture Specification No. 4.

{¶ 14} "In addition, Your Honor, the subsequent amendment filed by the State identifies $88,788 in cash identified under the amendment as No. 1; a 2002 Cadillac Escalade identified in the amendment as Item 2; a 2002 GMC Yukon Denali identified in the amendment as Item No. 3; a 2001 GMC Yukon Denali identified in the amendment as No. 4; silver bracelet and silver watch identified in the indictment

as No. 5; a Century model H-2300 fire safe identified in the amendment as Item No. 6; and a 2001 Pontiac Bonneville identified in the amendment as Item No. 7.

{¶ 15} "Those are the specific forfeiture items that the State is referring to with regard to the plea agreement in this case.

{¶ 16} "In addition, Your Honor, I want to make sure that we are all clear with regard to the Motion to Amend the Indictment, filed February 14th, 2008, pursuant to Criminal Rule 7(B) [sic], which changed the – which clarified, pardon me, the amounts of the substance at issue in each count with regard to Counts III, IV, V, VI, pardon me, III, IV, V and VI, and, with that clarification, the State has nothing further.

{¶ 17} "THE COURT: All right. Mr. O'Brien, Mr. Little, are those items that the Prosecutor indicated, the items that are identified in this agreement, that you will not contest the forfeiture of those specific items of property?

{¶ 18} "MR. O'BRIEN: Your Honor, with the following understanding, and everything that's been said up to this point is exactly correct. My client is willing to relinquish whatever interest he might have in a certain Dodge Magnum which they have talked about, but he informs me it isn't really his.

{¶ 19} "THE COURT: That's acceptable.

{¶ 20} "MR. O'BRIEN: To the extent that he would ever have an interest, equitable or legal, he would relinquish that, but he does want to put the Court on notice and the Prosecutor's Office with regard to the Dodge Magnum belongs to somebody else.

{¶ 21} "THE DEFENDANT: It was never mine.

{¶ 22} "THE COURT: It's not titled in your name?

{¶ 23} "THE DEFENDANT: I never paid for it or nothing.

{¶ 24} "THE COURT: We will not hold any obligation to you, Mr. Little, regarding that item.

{¶ 25} "MR. O'BRIEN: All right. Thank you, Judge. That's all. Everything else they said is exactly correct.

{¶ 26} "My client also says that there was a certain gun that they mentioned that's been forfeited. He had no interest in it. They can forfeit it as much as they want. He relinquishes any interest that he would have, but he denies he has any interest of any kind. So the Court can do and the Prosecutor can do whatever they want to do with that gun. We deny any interest in the gun.

{¶ 27} "THE COURT: All right. I think we're settled on the specifications identified by the State and –

{¶ 28} "MRS. SCHMIDT [representing the State]: Your Honor, if I may, as to the filing on February 27th, 2008, we made reference to a 2001 Pontiac Bonneville. I don't know whether – if you could look at the Court's official file, the No. 7, it was actually written in, or on the copy I have it's written in. I just want to make sure that we're clear on that.

{¶ 29} "THE COURT: No. 7?

{¶ 30} "MRS. SCHMIDT: No. This is my copy and this is written in here. I don't know if that was before or after, that's why I'm asking.

{¶ 31} "THE COURT: You're saying this is an additional vehicle?

{¶ 32} "(WHEREUPON, Counsel conferring.)

{¶ 33} "MRS. SCHMIDT: As long as he acknowledges we're talking about this

one Bonneville. I don't know if it's in the item that was filed February 27th, 2008.

{¶ 34} "THE COURT: It is not.

{¶ 35} "MRS. SCHMIDT: Well, if we could further amend the record to reflect that. It was read into the record by Mr. Hayes to be a 2001 Pontiac Bonneville. The VIN number is 1G2HY54K014281977, that he would relinquish any interest, if he has any, in that vehicle. We will accept that amendment. I just want to make sure it's on the record.

{¶ 36} "THE COURT: All right. Now, Mr. Little, do you agree that any interest you may have in that vehicle will be subject to this agreement and that it would be forfeited?

{¶ 37} "THE DEFENDANT: Yes.

{¶ 38} "THE COURT: Is that a yes, sir?

{¶ 39} "THE DEFENDANT: Yes.

{¶ 40} "THE COURT: Okay. I think I have an understanding on the forfeiture specs."

{¶ 41} After a full plea colloquy, Little's guilty pleas to the four conspiracy counts were accepted, and the matter was set for hearing at a later date. No pre-sentence investigation was ordered. At no point did Little, the State, or the trial court, raise the issue of any possible merger of the four conspiracy counts to which Little pled guilty.

{¶ 42} At the sentencing hearing, Little was sentenced to six years on each count. The sentences on Counts III and VI, which involved Conspiracy to Commit Trafficking in Heroin, but over different periods of time, were ordered to be served

concurrently. And the sentences on Counts IV and V, which involved Conspiracy to Commit Trafficking in Cocaine, but over different periods of time, were also ordered to be served concurrently. But the two pairs of concurrent six-year sentences were ordered to be served consecutively, making an aggregate sentence of twelve years, as agreed. The time periods specified in Counts III and IV of the indictment, while involving different drugs, were the same; and the time periods specified in Counts V and VI of the indictment, while involving different drugs, were the same, although different from the time periods specified in Counts III and IV.

{¶ 43} The trial court ordered the property forfeited, as previously agreed. No fine was imposed.

{¶ 44} Nothing in the transcripts of the plea hearing and the sentencing hearing provides any insight into the nature of conspiracies charged in Counts III, IV, V, and VI, beyond the bare bones of the indictment.

{¶ 45} From his conviction and sentence, Little appeals.

II

{¶ 46} Little's First Assignment of Error is as follows:

{¶ 47} "EVEN ON AGREED UPON SENTENCE IN ACCORDANCE WITH R/C 2953.08(d) TRIAL COURT ERRED AND LACK AUTHORITY TO SENTENCE APPELLANT ON MORE THAN ONE COUNT PURSANT [sic] TO OHIO REVISED CODE 2923.01 CONSPIRACY A1F [sic] UNDER SINGLE INDICTMENT CASE."[1]

[1]Accounting for the errors in Little's initial brief is the fact that he filed it pro se, in handwriting. His reply brief was filed by counsel, but the assignments of error are set

{¶ 48} Little relies upon R.C. 2923.01(F), which provides as follows:

{¶ 49} "A person who conspires to commit more than one offense is guilty of only one conspiracy, when the offenses are the object of the same agreement or continuous conspiratorial relationship."

{¶ 50} This provision was discussed in *State v. Childs* (2000), 88 Ohio St.3d 558. The Court opined that the clauses "object of the same agreement" and "[object of the same] continuous conspiratorial relationship" are separate and distinct, and that if either clause is satisfied, then the accused may only be convicted of one of the multiple conspiracy offenses satisfying the clause. The Court also likened the merger required by R.C. 2923.01(F) to the merger required by R.C. 2941.25(A) (which was also at issue in *Childs*) for allied offenses of similar import, in the sense that in each situation, if merger applies, then the defendant may only be convicted of one of the merged offenses.

{¶ 51} In a case involving an allied-offenses-of-similar-import merger, the Ohio 8th District Court of Appeals held that it is plain error for a trial court to fail to hold a hearing on the issue of merger where the nature of the offenses suggests that merger might be required, and the facts before the trial court, at the time of sentencing, do not permit a determination of that issue. *State v. Latson* (1999), 133 Ohio App.3d 475. That case, like the one before us, involved a guilty plea to multiple offenses, a silent record on the merger issue, and the defendant's failure to raise the issue in any form before sentencing.

{¶ 52} We find *State v. Latson*, supra, persuasive, and we follow it in this

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forth in Little's initial brief.

case.

{¶ 53} Upon remand, the trial court is directed to hold a hearing on the issue of whether any two or more of the conspiracy offenses to which Little has pled guilty must be merged. If the result of that determination is that only one conviction may be entered, for which the maximum penalty would be imprisonment for eight years, the trial court may wish to consider whether the State should be relieved of the effect of the plea bargain upon the ground that one of its essential objects, an agreed sentence of twelve years, is no longer attainable.

{¶ 54} Little's First Assignment of Error is sustained.

III

{¶ 55} Little's Second Assignment of Error is as follows:

{¶ 56} "TRIAL COURT ERRED BY INFORMING APPELLANT AT CHANGE OF PLEA HEARING [the hearing at which his pleas of guilty were tendered and accepted] THE MAXIMUM SENTENCE WOULD BE 32 YEARS OPPOSED TO 8 YEARS CREATING U.S. AND STATE CONSTITUTION VIOLATIONS, VIOLATING THE EQUAL PROTECTION CLAUS [sic], WHEREFORE MAKING SENTENCE NULLITY AND VOID AND AT ODD WITH CRIMINAL RULE 11(C) 2 MORE LESS [sic] INVOLUNTARY PLEA."

{¶ 57} When Little tendered his pleas, the trial court engaged in a thorough plea colloquy, as required by 11(C)(2). During the course of that colloquy, the trial court informed Little that the maximum aggregate sentence that might result from his pleas would be 32 years, the maximum sentence on each of the four counts being

eight years. This statement was entirely correct, based upon the information available to the court at that time.

{¶ 58} A trial court may accept pleas to multiple counts, just as it may accept and file jury verdicts of guilty on multiple counts, but it may not enter convictions on multiple counts in situations covered by R.C. 2923.01(F). The trial court is required to hold a hearing to determine whether merger applies (in a case in which merger appears, from the nature of the indicted offenses, to be a possibility) before entering convictions on multiple counts.

{¶ 59} "When a defendant enters a guilty plea to multiple offenses of similar import and the trial court accepts the plea, the trial court must conduct a hearing before entering a judgment of conviction and make a determination as to whether there were allied offenses of similar import committed with a single animus; whether there were offenses committed separately or with a separate animus as to each offense. If the offenses are found to be allied offenses, a judgment of conviction may be entered for only one offense. If the offenses are found not to be allied offenses, a judgment of conviction may be entered for each offense." *State v. Stephens* (June 10, 1993), Cuyahoga App. Nos. 62554, 62555, 62556, quoted approvingly in *State v. Latson*, supra, at 481.

{¶ 60} Thus, when the trial court in the case before us advised Little of the possible consequences of his guilty pleas, and then accepted them, the trial court was not required to conduct, and had not conducted, a hearing on the merger issue. Consequently, when the trial court advised Little that a possible consequence of his guilty pleas to the four conspiracy offenses could be an aggregate sentence totaling

32 years, the trial court was entirely correct. At that time, the trial court was in no better position than Little to calculate the likelihood of merger of the conspiracy offenses, and arguably was in a worse position, since Little presumably had some knowledge of the facts underlying the offenses.

{¶ 61} Little's Second Assignment of Error is overruled.

IV

{¶ 62} Little's Third Assignment of Error is as follows:

{¶ 63} "TRIAL COURT ERRED BY NOT PROPERLY TAKING INTO CONSIDERATION R/C 2929.11 AND 2929.12 BEFORE SENTENCING APPELLANT ESPECIALLY WHEN IT ORDER A P.S.I. REPORT BUT APPELLANT NEVER WAS INTERVIEWED FOR P.S.I. REPORT."

{¶ 64} This assignment of error asserts error in the sentencing. "[O]nce a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify that sentence." *State v. Haney*, Greene App. No. 06CA105, 2007-Ohio-5174. Little and the State jointly recommended the sentence imposed by the trial judge. By jointly recommending the sentence, Little stipulated that it was justified. No further justification was required.

{¶ 65} We have found nothing in the record to reflect that the trial court ordered a pre-sentence investigation. We have been advised by the Greene County Clerk of Courts that there is no pre-sentence investigation report in this case.

{¶ 66} Little's Third Assignment of Error is overruled.

V

{¶ 67} Little's Fourth Assignment of Error is as follows:

{¶ 68} "THE TRIAL COURT ERRED BY LETTING FORFEITURE TAKE PLACE WHEN TRIAL COURT DIDN'T GRANT AMENDMENT UNTIL AFTER APPELLANT CHANGE OF PLEA."

{¶ 69} Little contends that because the amendment of the forfeiture specifications in the indictment, to add additional property subject to forfeiture, did not occur until after his guilty pleas were tendered and accepted, he should not be bound by the amended specifications. This assignment of error would have some plausibility but for the fact that all of the additional property was recited at the plea hearing, and Little specifically consented to the forfeiture of that additional property. See the quoted passages from the plea hearing set forth in Part I of this opinion.

{¶ 70} Little, having consented to the inclusion of the additional property within the scope of the forfeiture to be ordered, may not now complain of its inclusion.

{¶ 71} Little's Fourth Assignment of Error is overruled.

VI

{¶ 72} Little's Fifth Assignment of Error is as follows:

{¶ 73} "APPELLANT COUNSEL WAS INEFFECTIVE VIOLATING APPELLANT CONSTITUTIONAL RIGHTS."

{¶ 74} In this assignment of error, Little essentially re-casts each of his other assignments of error as ineffective assistance of counsel claims.

{¶ 75} With the possible exception of trial counsel's failure to have raised the

issue of the potential merger of the four conspiracy counts to which Little pled guilty, we find nothing in the record to reflect that Little's trial counsel was ineffective, or was acting contrary to Little's interests and intent. Any ineffectiveness of trial counsel on the merger issue is moot, in view of our disposition of Little's First Assignment of Error.

{¶ 76} Little's Fifth Assignment of Error is overruled.

VII

{¶ 77} Little's First Assignment of Error having been sustained, and his other assignments of error having been overruled, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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