

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	Case No. 14CA24
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
SAMANTHA J. HARDIE,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 04/24/2015

APPEARANCES:

David A. Sams, West Jefferson, Ohio, for appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} Samantha J. Hardie pleaded guilty to three counts of theft in connection with her stealing of cash, credit services, and drugs from an elderly person to whom she provided home health care. After she agreed to be sentenced on all three of the charges, the trial court convicted her and ordered two of her prison sentences to run consecutively to the third.

{¶2} Hardie asserts that the trial court improperly convicted and sentenced her for multiple theft offenses because R.C. 2913.61(C) required that the offenses be tried as a single offense. Because she invited any potential error by the trial court in convicting and sentencing her separately, we reject her assertion and affirm her convictions and sentence.

I. FACTS

{¶3} In March 2014, the Washington County Grand Jury indicted Samantha J. Hardie of four counts of theft based on property she stole in her capacity as a home health aide for an elderly woman named Thelda Hall. The first three counts charged Hardie with stealing different dangerous drugs, Xanax, Vicodin, and Tramadol, and the fourth count charged Hardie with stealing approximately \$2,000 in cash and credit services from Hall. Hardie retained counsel and pleaded not guilty to the charges.

{¶4} The parties subsequently entered into a plea agreement in which the state would dismiss the first count, charging her with the theft of Xanax, in return for Hardie pleading guilty to the remaining three theft charges and making restitution to Hall. The parties further agreed that “the Court can sentence as to all three charges, but the State is recommending that sentences are to be imposed concurrently.”

{¶5} The Washington County Court of Common Pleas conducted a hearing on Hardie’s change of plea and the state presented the following statement of the factual basis for the charges. In late 2012, Thelda Hall, who was over 80 years old at the time of the offenses, lived alone at her apartment in Marietta. She had hip surgery and after undergoing rehabilitation, was released to her residence and received home health care. As an employee of one of the agencies providing home health care, Hardie began working with Hall on a daily basis and developed a friendship with her.

{¶6} In September 2013, Hall fell in her house and was transported to Marietta Memorial Hospital. The persons who held her medical and financial powers of attorney were contacted and they subsequently discovered that Hardie had used Hall’s credit and checking account to purchase services for Hardie’s personal use, e.g., her cable television bill. When Hall’s fiduciaries noticed Hardie’s fraudulent purchases, which

resulted in overdraft charges, and missing Tramadol and Vicodin which had been replaced with aspirin in Hall's pill keeper, they contacted the police. Hardie paid \$1,963 in restitution to replenish the amount she stole from Hall's checking account. When an additional \$573 in stolen funds was discovered after additional investigation, Hardie paid that additional sum.

{¶17} At the plea hearing the trial court specifically informed Hardie that she could receive consecutive prison sentences for the theft charges she was pleading guilty to, and Hardie responded she understood that. After a detailed colloquy explaining the effect of a guilty plea, Hardie entered a plea of guilty to three counts of theft. The trial court accepted her guilty pleas to those three counts and dismissed the remaining count.

{¶18} The trial court convicted Hall of the three theft offenses that she pleaded guilty to and sentenced her to 17 months for each conviction, with her conviction on the two counts for theft of drugs to be served consecutively to her conviction for the remaining count for theft of cash and credit services, for an aggregate prison sentence of 34 months. At the change of plea and sentencing, Hall failed to object to the trial court's conviction and imposition of sentence on each of the three theft counts. This appeal ensued.

II. ASSIGNMENT OF ERROR

{¶19} Hardie assigns the following error for our review:

THE DEFENDANT-APPELLANT WAS IMPROPERLY CONVICTED OF
AND SENTENCED FOR MULTIPLE OFFENSES UNDER OHIO LAW
AND THE STATE AND FEDERAL CONSTITUTIONS (Id).

III. LAW AND ANALYSIS

{¶10} In her sole assignment of error Hardie asserts that the trial court erred in improperly convicting and sentencing her for multiple theft offenses. She primarily claims that the trial court erred because of R.C. 2913.61(C)(1), which provides:

When a series of offenses under section 2913.02 of the Revised Code * *
* involving a victim who is an elderly person or disabled adult, is
committed by the offender in the offender's same employment, capacity,
or relationship to another, all of those offenses shall be tried as a single
offense. * * * The value of the property or services involved in the series
of offenses for the purpose of determining the value as required by
division (A) of this section is the aggregate value of all property and
services involved in all offenses in the series.

{¶11} The state contends that based on the express terms of her plea agreement, Hardie invited any potential error in convicting her of the three theft charges and sentencing her separately. "Under the invited-error doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the trial court to make." (Emphasis omitted.) *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 243, citing *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27; see also *Lester v. Leuck*, 142 Ohio St.91, 50 N.E.2d 145 (1943), paragraph one of the syllabus. Courts, including the Supreme Court of Ohio and this court, have applied this doctrine to cases in which a defendant entered into a plea agreement covering the alleged error claimed on appeal. See *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10 (defendant invited any error, including plain error, in a conviction on an amended charge when he bargained for the amendment and pleaded guilty to the amended charge as part of a plea agreement); *State v. Marcum*, 4th Dist. Hocking Nos. 12CA22 and 12CA26, 2013-Ohio-2189, ¶ 10-11, and cases cited therein (the invited-error "doctrine applies to errors arising from a negotiated plea agreement").

{¶12} Although matters involving the subject-matter jurisdiction of the trial court cannot be waived or subjected to the invited-error doctrine, Hardie makes no argument here that her contention impacts the subject-matter jurisdiction of the court. *Compare Kline* at ¶ 27 (“challenging improper assignment and transfer of a case is an attack on the subject-matter jurisdiction of the transferee court; hence, the doctrines of invited error and waiver do not apply”). At best, Hardie’s contention that her theft offenses should have been merged into one conviction and sentence is akin to an allied-offenses-of-similar-import argument. Even if it is true, it does not render her sentence void, but is an error that must be raised on appeal. *See State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 8 (noting that the rule to be applied for void sanctions does not apply to most sentencing challenges, including “challenges to a sentencing court’s determination whether offenses are allied and its judgment as to whether sentences must be served concurrently or consecutively”). Consequently, it is also an error that may be waived on appeal because it is invited by the defendant. *See Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001), indicating that invited error “is merely a branch of the waiver doctrine.”

{¶13} By agreeing that the trial court could convict and sentence her separately for the charged theft offenses and pleading guilty to three of these offenses, Hardie intentionally relinquished her right to challenge the trial court’s imposition of separate convictions and sentences for the offenses. *See State v. Quartermann*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a

known right.’ * * *. Mere forfeiture, as opposed to waiver, does not extinguish an ‘error’ * * *”). Thus Hardie waived any error, including plain error, in the trial court’s convictions and sentence based on her assent to the plea agreement. *Rohrbaugh* at ¶ 10; see also *Faulks v. Flynn*, 4th Dist. Scioto No. 13CA3568, 2014-Ohio-1610, ¶ 22, citing *Rohrbaugh* (“even plain error is waived where error is invited”).

{¶14} Hardie’s additional claim that her convictions and sentence violated the constitutional prohibition against double jeopardy is likewise waived because of her invited error. “R.C. 2941.25 ‘codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense.’” *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 13, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. More importantly, this case does not implicate double jeopardy concerns—it involves the application of R.C. 2913.61(C) instead of R.C. 2941.25 and the offenses here—three theft offenses, two involving different drugs and one involving stolen cash and credit services—are for separate criminal acts.

{¶15} Because Hardie waived any claimed error regarding her convictions and sentence, and invited it by specifically assenting to being separately convicted and sentenced for each of the offenses, her sole assignment of error is meritless. We need not address the substance of Hardie’s assignment of error and the state’s remaining arguments because of our holding. See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786,

799 (Roberts, J., concurring in part and in the judgment) (“ ‘This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further’ ”); see also *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 31 (4th Dist.).

IV. CONCLUSION

{¶16} Having overruled Hardie’s sole assignment of error, we affirm her convictions and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.