[Cite as *State v. Workman*, 2015-Ohio-4483.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA25
vs.	:	
ELY F. WORKMAN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Carrie Wood, Assistant State Public Defender, Columbus, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:10-13-15

ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment that denied a motion to dismiss an indictment filed by Ely F. Workman, defendant below and appellant herein. Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT HELD THAT ELY WORKMAN'S INDICTMENT FOR RECEIVING STOLEN PROPERTY DID NOT VIOLATE DOUBLE JEOPARDY

PRINCIPLES AS A SUCCESSIVE PROSECUTION FOR AN ALLIED OFFENCE [SIC] OF SIMILAR IMPORT."

SECOND ASSIGNMENT OF ERROR:

"MR. WORKMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL MISADVISED THE TRIAL COURT REGARDING WHETHER HIS CLIENT COULD BE CONVICTED FOR ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 2} This case involves two criminal prosecutions against appellant. On July 22, 2013, McArthur Police Department Chief Tony Wood filed a complaint in the Vinton County Court that charged appellant with grand theft of a motor vehicle, in violation of R.C. 2913.02(A)(3). The complaint alleged:

> "On or about July 16, 2013, in Vinton County, Ohio, Ely Franklin Workman did, with purpose to deprive Flossie Coleman, the owner, of her property, did knowingly obtain and exert control over said property, to wit: a 1996 Jeep Cherokee: by deception; in violation of [R.C. 2913.02(A)(3) and 2913.02(B)(5)."

On August 1, 2013, appellant entered a guilty plea to an amended charge of unauthorized use of a motor vehicle in violation of R.C. 2913.03(A). The Vinton County Court found appellant guilty of unauthorized use of a motor vehicle.

{¶ 3} On August 12, 2013, an Athens County Grand Jury returned an indictment that charged appellant with receiving stolen property, in violation of R.C. 2913.51(A). The indictment alleged:

> "On or about [July 17, 2013], in the County of Athens, [appellant] unlawfully did receive, retain, or dispose of 1996 Jeep, the property of Flossie Coleman, knowing or having reasonable cause to believe that the property had been obtained through commission of a theft offense and the property involved was a motor vehicle."

{¶ 4} On December 4, 2013, appellant filed a motion to dismiss the receiving stolen property indictment and asserted that the indictment violated his Fifth Amendment right against double jeopardy. Appellant argued that because the Vinton County Court convicted him of unauthorized use of the same motor vehicle alleged to have been involved in the receiving stolen property offense, the state could not prosecute him again for a crime that involved the same vehicle.

{¶ 5} The state countered that the receiving stolen property offense is a separate offense that occurred at a different time, in a different jurisdiction, and involved different actions.

{¶ 6} On June 13, 2014, the trial court denied appellant's motion to dismiss.[1] This appeal followed.

I

{¶ 7} In his first assignment of error, appellant asserts that the trial court erred by denying his motion to dismiss the indictment because the court wrongly determined that the Double Jeopardy Clause does not bar the state from prosecuting him for receiving stolen property. Appellant argues that (1) the Double Jeopardy Clause prohibits a successive prosecution for

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[1]On March 12, 2014, the trial court filed an entry that states: "Now comes the Court this 9th day of January, 2014 upon Defendant's Motion to Suppress." The court found "the Motion is not well taken" and denied the motion. On May 27, 2014, appellant filed a notice of appeal from this judgment. His notice of appeal indicated that he appealed "from the judgment entry denying Defendant's Motion to Dismiss on double jeopardy grounds, entered in this action on the 12th day of March, 2014." On June 5, 2014, this Court issued a magistrate's order that directed appellant to address our jurisdiction to hear the appeal. The order noted that appellant did not file the notice of appeal within thirty days of the trial court's March 12, 2014 order and that the court's entry denied a motion to suppress. Appellant subsequently filed a motion to dismiss the appeal. On June 18, 2014, this court granted appellant's motion to dismiss the appeal.

On June 13, 2014, the trial court issued an entry that states: "Now comes the Court this 9th day of January, 2014 upon Defendant's Motion to Dismiss filed December 4, 2013." The court found "the Motion is not well taken" and denied the motion. On June 17, 2014, appellant filed a notice of appeal from the court's June 13, 2014 entry.

receiving stolen property because receiving stolen property is an allied offense of similar import to the crime with which Vinton County originally charged him (grand theft of a motor vehicle); and (2) he entered a negotiated plea in the Vinton County case and, thus, had a reasonable expectation that his guilty plea to unauthorized use of a motor vehicle would end further criminal prosecution based upon the incident.

{¶ 8} The state disputes appellant's argument that the Double Jeopardy Clause bars a successive prosecution for receiving stolen property. The state argues that appellant incorrectly employs an allied offense analysis to determine whether the Double Jeopardy Clause bars a successive prosecution and that R.C. 2941.25, the multiple count statute, does not govern the analysis to determine whether the Double Jeopardy Clause prohibits a successive prosecution. Rather, the state contends that the test set forth in United States v. Blockburger, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 305 (1932), provides the proper analysis to determine whether the Double Jeopardy Clause bars a successive prosecution for receiving stolen property.

A

STANDARD OF REVIEW

{¶ 9} We apply a de novo standard of review when reviewing a trial court's decision to deny a motion to dismiss on double jeopardy grounds. State v. Trimble, 4th Dist. Pickaway No. 13CA8, 2013-Ohio-5094, ¶5. We thus afford no deference to the trial court's decision, but instead independently review the record to ascertain whether the trial court's decision is legally correct. E.g., Dolan v. Glouster, 4th Dist. Athens Nos. 11CA18, 11CA19, 11CA33,12CA1, and 12CA6, 2014-Ohio-2017, ¶106.

B

DOUBLE JEOPARDY CLAUSE

{¶ 10} The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." This means that when "'a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'"[2] Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), quoting In re Nielsen, 131 U.S. 176, 188, 9 S.Ct. 672, 33 L.Ed.2d 119 (1889). Thus, the Double Jeopardy Clause "'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" Brown, 432 U.S. at 165, quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

{¶ 11} The case at bar involves a second prosecution following a conviction and whether that second prosecution is for the "same offense." Thus, we must decide whether appellant's prior unauthorized use of a motor vehicle conviction bars his subsequent prosecution for receiving stolen property involving the same vehicle.

{¶ 12} To determine whether the Double Jeopardy Clause bars a second, or successive, prosecution, a court must apply the test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). State v. Fairbanks, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, ¶6 (explaining that Blockburger governs analysis when determining if Double Jeopardy Clause bars successive prosecution); State v. Zima, 102 Ohio St.3d 61, 2004-

[2] In United States v. Dixon, 509 U.S. 688, 705, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), the court stated that "incident," as used in this context, "obviously means * * * 'element.'" .

Ohio-1807, 806 N.E.2d 542, ¶¶18-20 and fn. 3 (stating that Blockburger supplies appropriate test when considering if Double Jeopardy Clause bars successive prosecution); State v. Tolbert, 60 Ohio St.3d 89, 573 N.E.2d 617 (1991), paragraph one of the syllabus (applying Blockburger test in subsequent prosecution context); Trimble at ¶7.

{¶ 13} The R.C. 2941.25 multiple count statute and allied offense analysis do not apply when examining a double jeopardy claim based upon a successive prosecution. Zima at fn. 3 (stating that when a case "involves only the issues of successive prosecutions, it is not controlled by R.C. 2941.25 or Rance"); State v. Woodruff, 3rd Dist. Logan No. 8-14-21, 2015-Ohio-1342, ¶9; In re A.G., — Ohio App.3d —, 2014-Ohio-4927, 21 N.E.3d 355, ¶9 (8th Dist.) (recognizing different analyses apply); State v. Thompson, 1st Dist. Hamilton No. 130053, 2013-Ohio-2647, ¶1 and ¶5; State v. Mullins, 5th Dist. Fairfield No. 12CA17, 2013-Ohio-1826, ¶14; State v. Lamp, 9th Dist. Summit No. 26602, 2013-Ohio-1219, ¶¶7-8 (stating that "standard for determining whether a successive prosecution violates the double jeopardy clause is separate and distinct from the allied offenses standard set forth in R.C. 2941.25"); State v. Volpe, 10th Dist. Franklin No. 06AP-1153, 2008-Ohio-1678, ¶64; State v. Bentley, 4th Dist. Athens No. 01CA13 (Dec. 6, 2001), fn. 3. We therefore reject appellant's assertion that R.C. 2941.25 and the allied offense analysis govern our disposition of this appeal.

{¶ 14} We do recognize, however, that some of our prior opinions, as well as opinions from other Ohio appellate courts, appear to indicate that an allied offense analysis may apply when determining if a successive prosecution in a separate jurisdiction violates double jeopardy principles. In State v. Morgan, 4th Dist. Ross No. 12CA3305, 2012-Ohio-3936, which appellant cites in his brief, and in State v. Clelland, 83 Ohio App.3d 474, 615 N.E.2d 276 (4th Dist. 1992),

we set forth the following analysis that a court should apply to determine whether successive prosecutions in separate jurisdictions violate double jeopardy principles:

> "When an offender, as part of a course of criminal conduct commits offenses in different jurisdictions, he may be tried for all of those offenses in any jurisdiction in which one of those offenses occurred. R.C. 2901.12(H). In [State v. Urvan, 4 Ohio App.3d 151, 446 N.E.2d 1161 (8th Dist. 1982)], the Eighth District Court of Appeals held that once one jurisdiction takes action first, it preempts venue and jurisdiction for the whole matter, and jeopardy must attach as a result of the activity of the first actor. See, also, State v. DeLong (1990), 70 Ohio App.3d 402, 591 N.E.2d 345. In reaching their holdings, the Urvan (theft and receiving stolen property) and DeLong (robbery and receiving stolen property) courts emphasized that the offenses [charged in different jurisdictions] were allied offenses of similar import pursuant to R.C. 2941.25. See, e.g., DeLong, supra, 70 Ohio App.3d at 405, 591 N.E.2d at 346, where the Tenth District Court of Appeals stated that '[a]ny possible question stemming from one jurisdiction's failure to include another available charge in its prosecution is resolved by R.C. 2941.25, which requires an election between convictions for allied offenses when the state chooses to pursue both.' Pursuant to Urvan and DeLong, we must consider whether the offenses here are allied offenses of similar import pursuant to R.C. 2941.25."

Clelland, 83 Ohio App.3d at 483-484; Morgan at 9. Thus, in both Morgan and Clelland we appeared to apply an allied offense analysis to decide whether the defendant's successive prosecution violated the Double Jeopardy Clause.

{¶ 15} However, we believe that the principal case upon which Morgan and Clelland relied, State v. Urvan, has been implicitly overruled. To support its holding, Urvan relied upon Brown v. Ohio. Id. at 156. The Urvan court stated that Brown indicated that the state does not have the authority to divide and distribute responsibility for prosecuting each of several crimes among its county agencies. Id. at 156. The Urvan court then stated: "And even if the actions could be split only one could be fully pursued." Id. at 156. The Urvan court noted that the Ohio Supreme Court held in Maumee v. Geiger, 45 Ohio St.2d 238, 244, 344 N.E.2d 133 (1976):

> "'Although receiving is technically not an included offense of theft, it is, under R.C. 2941.25, an 'allied offense of similar import.' An accused may be tried for both but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense.'"

The Urvan court thus concluded that because the two offenses were allied offenses of similar import, and because one county already elected to pursue one of those charges, the second county was then foreclosed from pursuing the other charge.

{¶ 16} Since Urvan, the United States Supreme Court has indicated that the government need not pursue all of its prosecutions at one time. In United States v. Dixon, the court held the government "is entirely free to bring [its prosecutions] separately, and can win convictions in both." Dixon, 509 U.S. at 705. Furthermore, the Ohio Supreme Court has held that the allied offense analysis has no application to the successive prosecution branch of the Double Jeopardy Clause. Zima, supra. We further observe that other courts have limited Urvan to its facts. Those courts generally note that the defendant in Urvan "signed a contract to enter a pretrial diversion program when the state attempted to bring another, allied-offense charge arising from the same course of conduct" and stated that "'[a] reading of [Urvan] seems to emphasize that the prosecutor cannot play "dirty pool" where a person is in a diversion program.'" State v. Mayne, 1st Dist. Hamilton No. C-950764 (Aug. 21, 1996), quoting State v. Mutter, 14 Ohio App.3d 356, 357, 471 N.E.2d 782. Because Morgan and Clelland rely upon principles that both the Ohio and United States Supreme Courts have called into question, we overrule those decisions to the extent that they hold that an allied offense analysis governs a claimed violation of the Double Jeopardy Clause prohibition against successive prosecutions for the same offense. Once again, we reiterate that the Ohio Supreme Court has clearly stated that the allied offense analysis is

inapplicable to claimed double-jeopardy-successive-prosecution violations. Zima, supra. Thus, even if we found merit to appellant's argument that applying different tests leads to incongruous results,[3] we must apply the Blockburger "same elements" test to determine whether the Double Jeopardy Clause prohibits the state from prosecuting appellant for receiving stolen property following his conviction for unauthorized use of a motor vehicle. See State v. Collins, 12th Dist. Clermont No. CA2007-01-010, 2007-Ohio-5392, 13, quoting State v. Wagerman, 12th Dist. Warren No. CA2006-05-054, 2007-Ohio-2299 (explaining that "'separate prosecutions arising from a single course of conduct may be pursued in separate jurisdictions as long as the prosecutions do not violate Blockburger * * *. [D]ouble Jeopardy does not require that the government bring all prosecutions for the same course of conduct in a single prosecution in one jurisdiction * * * ; it only prohibits a defendant from being charged twice with the same offense or a subsequent charge for a lesser included offense'").

THE BLOCKBURGER TEST

{¶ 17} The Blockburger test states:

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. * * * 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which

[3] In Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 2226, 53 L.Ed.2d 187 (1977), court explained:

> "If two offenses are the same under [the Blockburger] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. See In re Nielsen, 131 U.S. 176, 187-188, 9 S.Ct. 672, 675-676, 33 L.Ed. 118 (1889); cf. Gavieres v. United States, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911). Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless 'each statute requires proof of an additional fact which the other does not,' Morey v. Commonwealth, 108 Mass. 433, 434 (1871), the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment."
>
> Applying this rule in Ohio, however, is more complicated because Ohio does not use the Blockburger test for both analyses, which seems to be the assumption underlying the Brown court's explanation.

> the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'"

Id. at 304 (citations omitted), quoting Morey v. Commonwealth, 108 Mass. 433. Thus, the Blockburger, or "same elements," test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). "'The Blockburger test emphasizes the elements of the two crimes. Essentially, '[i]f each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" Fairbanks at ¶12, quoting Tolbert, 60 Ohio St.3d at 91, quoting Iannelli, 420 U.S. at 785, fn.17; Zima at ¶35 ("Blockburger requires a comparison of elements, not evidence."). If the offenses share identical statutory elements or one is a lesser included offense of the other, a second prosecution is barred. Fairbanks at ¶6, citing Tolbert, paragraph one of the syllabus. Thus, the successive prosecution branch of the Double Jeopardy Clause "prohibits the state from trying a defendant for a greater offense after a conviction of a lesser included offense" and from twice trying a defendant for the same offense. State v. Bickerstaff, 10 Ohio St.3d 62, 64, 461 N.E.2d 892 (1984), citing Brown v. Ohio, 432 U.S. 161, 52 S.Ct. 180, 76 N.E .2d 187 (1977).

{¶ 18} Before we can determine whether the Double Jeopardy Clause bars appellant's receiving stolen property indictment, we must ascertain whether the receiving stolen property offense is the same offense for which Vinton County had placed appellant in jeopardy. The Vinton County Court convicted appellant of unauthorized use of a motor vehicle. However, appellant originally stood charged with grand theft of a motor vehicle. The state contends that to determine whether appellant has been twice placed in jeopardy for the same offense, we must

examine the offense of which appellant was convicted (unauthorized use of a motor vehicle). On the other hand, appellant asserts that we must examine the offense of which appellant originally was charged, grand theft of a motor vehicle. We agree with appellant.

{¶ 19} "[A]n accused must suffer jeopardy before he can suffer double jeopardy." Serfass v. United States, 420 U.S. 377, 393, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). "Double jeopardy can only protect defendants against further prosecutions if the defendant was already placed in jeopardy, defined as the single moment that jeopardy attached to the proceeding." State v. Castro, — Ohio App.3d —, 2014-Ohio-2398, 13 N.E.2d 720 (8th Dist.), ¶6.

{¶ 20} Jeopardy does not attach upon the mere filing of an indictment. State v. Baranski, 173 Ohio App.3d 410, 2007-Ohio-4072, 878 N.E.2d 1058, (4th Dist.), ¶7. Instead, jeopardy attaches when the jury is empaneled and sworn or upon a plea of guilty or no contest and the trial court's subsequent finding of guilt. Id. at ¶7.

{¶ 21} In State ex rel. Sawyer v. O'Connor, 54 Ohio St.2d 380, 382♥83, 377 N.E.2d 494, 497 (1978), the court explained that a trial court's finding of guilt on a lesser charge constitutes a finding of not guilty to the greater charge alleged in the indictment. The court explained:

> "For purposes of double jeopardy, this case is no different than had the trial court found defendant not guilty of any offense after accepting the plea of no contest. Thus, so far as the [greater] charge * * * is concerned, there has been a final determination of not guilty irrespective of whether, in arriving at that determination, the trial court grossly abused its discretion or erroneously determined that reckless operation is a lesser-included offense of the principal charge."

Id. at 382-383. Thus, in accordance with Sawyer the Vinton County Court made a final determination of not guilty regarding the greater charge (grand theft of a motor vehicle) and

jeopardy attached to that offense, in addition to the unauthorized use offense.[4] We therefore must determine whether in this situation, receiving stolen property is the same offense as grand theft of a motor vehicle or unauthorized use of a motor vehicle.

D

SAME OFFENSE TEST

{¶ 22} Offenses are the same within the meaning of the Double Jeopardy Clause's successive prosecution prohibition if the offenses share identical statutory elements, or if one is a lesser included offense of the other. Fairbanks at ¶6, citing Tolbert, paragraph one of the syllabus.

{¶ 23} To determine whether one offense is a lesser included offense of another, a court must consider whether (1) "one offense carries a greater penalty than the other," (2) "some element of the greater offense is not required to prove commission of the lesser offense," and (3) "the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed." State v. Evans, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, paragraph two of the syllabus, clarifying State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988).

{¶ 24} R.C. 2913.02 sets forth the elements for the offense of theft as follows:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
> (1) Without the consent of the owner or person authorized to give consent;

[4] A "trial court has the power to consider whether the facts alleged in the complaint * * * constitute the basis for a finding of guilty or not guilty. In the event of a finding of not guilty as to the principal charge, the court may find defendant guilty of a lesser-included offense." State ex rel. Sawyer v. O'Connor, 54 Ohio St.2d 380, 382, 377 N.E.2d 494 (1978).

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

{¶ 25} R.C. 2913.51(A) sets forth the elements of the offense of receiving stolen property and states: "No 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."

{¶ 26} R.C. 2913.03(A) sets forth the elements of the offense of unauthorized use of a motor vehicle and states: "No person shall knowingly use or operate an aircraft, motor vehicle, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner or person authorized to give consent."

{¶ 27} Our review of the statutes reveals that they do not share identical elements. Moreover, prior case law establishes that receiving stolen property is not a lesser included offense of either unauthorized use of a motor vehicle or theft. State v. Thomas, 8th Dist. Cuyahoga No. 87343, 2006-Ohio-4499, ¶6; State v. Newton, 11th Dist. Lake No. 96-L-058 (June 27, 1997); State v. Peek, 110 Ohio App.3d 165, 167, 673 N.E.2d 938 (1st Dist. 1996); State v. Rogers, 6th Dist. Lucas No. L-88-169 (Apr. 21, 1989); State v. Yarbrough, 104 Ohio St.3d 1, 17, 2004-Ohio-6087, 817 N.E.2d 845, ¶99, citing Maumee v. Geiger, 45 Ohio St.2d 238, 244, 74 O.O.2d 380, 344 N.E.2d 133 (1976) (stating that "receiving stolen property is technically not a lesser included offense of theft"); State v. Botta, 27 Ohio St.2d 196, 204, 271 N.E.2d 776 (1971). Because the Ohio Supreme Court stated in Yarbrough and Geiger that "receiving stolen property is technically not a lesser included offense of theft," we must follow this rule unless and until the Ohio Supreme Court overrules it.

{¶ 28} Consequently, because receiving stolen property is not a lesser included offense of either theft or unauthorized use, the Double Jeopardy Clause does not bar a successive prosecution for receiving stolen property. We must point out, however, the concern expressed in Bentley, supra:

> "[R]egardless of our ultimate conclusion in the case sub judice, the fact that appellant was prosecuted on the charges separately, at different times and in different courts, is indeed troubling. We join those courts who have expressed the view that in the interest of judicial efficiency and of fairness, a defendant should answer at one time and in one court for crimes committed at one time and in one place. State v. Moore (1996), 110 Ohio App.3d 649, 675 N.E.2d 13, citing State v. Gartrell (1995), 103 Ohio App.3d 588, 590, 660 N.E.2d 527, 529 (Painter, J., concurring); see, also, State v. Ellenburg (July 9, 1998), Pike App. No. 97CA597, unreported. Multiple prosecutions, like those in the case sub judice, should be strongly discouraged even though the multiple prosecution may not run afoul of our constitutional guarantees. Once again, defendants should be required to answer at one time and in one court for all crimes committed in a single incident."

{¶ 29} To the extent that appellant claims that Blockburger is not the only standard to determine whether successive prosecutions impermissibly involve the same offense, we note that the United States Supreme Court expressly rejected this argument. Dixon, 509 U.S. at 706-709. In Dixon, the court observed that a footnote in Brown v. Ohio stated that "[t]he Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." Brown, 432 U.S. at 166–167, fn.6. The Dixon court found, however, that "[n]ot only is this footnote the purest dictum, but it flatly contradicts the text of the opinion * * *." Id. at 706.

{¶ 30} We nevertheless observe that Dixon recognized that "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts." Id. at 705.

> "Collateral estoppel is the doctrine that recognizes that a determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings. Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'"

State v. Lovejoy, 79 Ohio St.3d 440, 444, 683 N.E.2d 1112 (1997), quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Thus, "[c]ollateral estoppel may be used to bar a later prosecution for a separate offense only where the government loses in the first proceeding." State v. Phillips, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995), citing Dixon, 509 U.S. at 705. Furthermore, "in order to consider a claim of collateral estoppel, [a reviewing] court must examine the record of the earlier proceeding in order to determine which issues were actually decided therein. A court cannot perform that function unless one of the parties brings the previous trial's record before it." Id. (citation omitted).

{¶ 31} In the case sub judice, the government did not lose an earlier prosecution that involved the same facts. Consequently, under Phillips, the collateral estoppel aspect of the Double Jeopardy Clause does not apply here. We also point out that appellant entered a guilty plea and the record does not contain the underlying facts to allow us to determine whether the second prosecution requires a re-litigation of the same facts.

{¶ 32} Appellant contends that the facts in the case sub judice are similar to the facts in Brown and requires us to reverse the trial court's decision. In Brown, the court held that the defendant could not be successively prosecuted for theft of a vehicle following a joyriding conviction. We, however, do not agree with appellant that Brown requires us to reverse the trial court's decision.

{¶ 33} In Brown, the court considered "whether the Double Jeopardy Clause bars prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent." Id. at 162. The court examined the statutory elements of the offenses under the Blockburger test and concluded that "joyriding and auto theft * * * constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause." Id. at 168. The court noted that the Ohio court had defined joyriding as the "taking or operating a vehicle without the owner's consent," and auto theft as "joyriding with the intent permanently to deprive the owner of possession." Id. at 167. The court explained: "The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well." Id. at 167-168. The court further rejected the argument that the defendant "could be convicted of both crimes because the charges against him focused on different parts of his 9-day joyride." Id. at 169. The court stated:

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal and spatial units. The applicable Ohio statutes, as written and construed in this case, make the theft and operation of a single car a single offense. Although the [two government entities] may have had different perspectives on Brown's offense, it was still only one offense under Ohio law. Accordingly, the specification of different dates in the two charges on which Brown was convicted cannot alter the fact that he was placed twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments."

Id. at 169-170 (citation and footnote omitted).

{¶ 34} While we agree with appellant that both Brown and the case sub judice involve charged offenses involving a single motor vehicle, we do not agree that the case at bar falls

within the main rationale of the Brown court's holding. In Brown, the court's holding rested upon the Ohio court's construction of the two statutes and the Blockburger test, i.e., joyriding is a lesser included offense of auto theft. The court simply rejected the argument that the prosecution could take the "same offense" under the Blockburger test, and then divide this offense "into a series of temporal and spatial units." Id. In the case at bar, however, receiving stolen property is not the same offense under Blockburger as either theft or unauthorized use of a motor vehicle, unlike Brown where the court determined that joyriding is a lesser included offense of auto theft. We thus find Brown inapposite.

{¶ 35} Appellant also argues that to allow the second prosecution to proceed is contrary to "his negotiated plea agreement" in the Vinton County prosecution. However, even if this claim has arguable merit in principle, see generally Zima at ¶7-8, the record contains no evidence concerning a plea agreement in the Vinton County case and, even if it did, the record contains no evidence to document the terms of that agreement. Thus, we have no basis to conclude that the second prosecution in Athens County violates any plea agreement that appellant may have negotiated in the Vinton County case.

{¶ 36} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 37} In his second assignment of error, appellant argues that his trial counsel did not provide effective assistance of counsel. Appellant contends that in view of the fact that trial counsel informed the trial court that appellant "could be 'convicted' of two charges that were allied offenses," counsel's statement is erroneous and had counsel not so informed the court, "a

reasonable probability exists that the trial court would have granted [appellant]'s motion to dismiss."

{¶ 38} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. Creech, 188 Ohio App.3d 513, 2010–Ohio–2553, 936 N.E.2d 79, ¶39 (4th Dist.).

{¶ 39} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. Strickland, 466 U.S. at 687; State v. Powell, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶85. "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Conway, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); accord State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81. "Failure to establish either element is fatal to the claim." State v. Jones, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶14. Therefore, if one element is dispositive, a court need not analyze both. State v. Madrigal, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000)

(stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶ 40} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." State v. Taylor, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing State v. Smith, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. State v. Gondor, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; State v. Hamblin, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 41} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. State v. Short, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; State v. White, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. State v. Clark, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; State v. Tucker, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002).

{¶ 42} In the case sub judice, we do not believe that appellant has established trial counsel's deficient performance. Reading trial counsel's statement in context suggests that counsel responded to the trial court's reflection upon whether appellant could be found guilty of both offenses, but sentenced for only one under the allied offense statute.[5] The following colloquy occurred between the trial court judge and appellant's trial counsel:

> "By the Judge: Well even if they are allied offenses, you can just be sentenced on one.
>
> By [trial counsel]: Correct.
>
> By the judge: You can be charged and convicted.
>
> By [trial counsel]: Right.
>
> By the judge: But sentenced, for purposes of sentencing they merge. We're talking about almost apples and oranges. We're trying to get by the first part right now.
>
> By [trial counsel]: Right.
>
> By the judge: So we're just talking about getting convicted. You can still in all the cases that you mentioned, um you can be convicted of both, but where * * * there's a single [animus], sentence is imposed on defendant for both crimes are improper [sic]. I mean you have that in your brief. * * * *
>
> By [trial counsel]: Yes.
>
> By the judge: So we, you would agree we're not at sentencing phase here?
>
> By [trial counsel]: I would however, since he's already changed his plea and been sentenced [in the Vinton County case], I don't * * * think there's an opportunity to go back and try to say oh, theses [sic] are allied offenses so we can plead him guilty but only sentence him on the one, he's already done. I don't think that, I don't think that's the way it goes. * * * *"

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[5] R.C. 2941.25 states:

(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.

{¶ 43} We recognize that the word "conviction" in R.C. 2941.25 means "a guilty verdict and the imposition of a sentence or penalty." State v. Whitfield, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶12. However, other courts have noted that in certain contexts the word "conviction" means only the determination of guilt. State ex rel. Watkins v. Fiorenzo, 71 Ohio St.3d 259, 260, 643 N.E.2d 521 (1994) (determining that "convicted," as used in phrase "convicted of or pleads guilty to," means only the determination of guilt–not the imposition of sentence); State v. Cash, 40 Ohio St.3d 116, 118, 532 N.E.2d 111 (1988) (determining that prior plea of guilty constituted a conviction for impeachment purposes under Evid.R. 609(A)); State v. Maye, 129 Ohio App.3d 165, 169, 717 N.E.2d 402 (10th Dist. 1998) (concluding that "convicted" as used in R.C. 2950.01(E) referred to finding of guilt and not the imposition of sentence).

{¶ 44} In the case sub judice, we do not find it unreasonable to believe that both trial counsel and the trial court used the term "convicted" to mean "found guilty" and not "found guilty and sentenced." The overall context of the conversation reveals that both the trial court and trial counsel were well-aware that a defendant charged with allied offenses of similar import may be found guilty of each offense, but sentenced for only one. Thus, although appellant technically is correct that under R.C. 2941.25, a defendant can be "convicted" of only one offense, the conversation that occurred between trial counsel and the court reveals that both were knowledgeable regarding the allied offense statute and its prohibition against multiple "convictions" for allied offenses of similar import. Consequently, we do not believe appellant established that trial counsel performed deficiently, or that any alleged deficiency prejudiced the outcome of appellant's motion to dismiss.

{¶ 45} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:_____

Peter B. Abele, 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.