[Cite as *State v. Stevenson*, 2010-Ohio-2060.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CHAD M. STEVENSON Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 09CA16 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 09CR0004
JUDGMENT:	Affirmed in Part; Sentences Vacated; Remanded
DATE OF JUDGMENT ENTRY:	May 10, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Farmer, J.

{¶1} On January 27, 2009, the Perry County Grand Jury indicted appellant, Chad Stevenson, on one count of assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A) and (C)(1) and illegal manufacture of drugs in violation of R.C. 2925.04(A) and (C)(3)(a). Said charges arose from the manufacture of methamphetamine.

{¶2} A jury trial commenced on July 8, 2009. The jury found appellant guilty as charged. By return of verdict and termination judgment entry filed October 2, 2009, the trial court sentenced appellant to two years on the possession of chemicals charge and three years on the manufacture charge, to be served consecutively.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT ON BOTH THE OFFENSES OF ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS IN VIOLATION OF R.C. 2925.041(A) AND (C)(1) AND THE OFFENSE OF ILLEGAL MANUFACTURE OF DRUGS IN VIOLATION OF R.C. 2925.04 (A) AND (C)(3)(a). SUCH SENTENCES WERE ORDERED IN VIOLATION OF THE STATUTORY PROHIBITION AGAINST MULTIPLE SENTENCES FOR CRIMES OF SIMILAR IMPORT SET FORTH IN R.C. 2941.25(A) AND THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY SET FORTH IN ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

II

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE STATE TO INTRODUCE IMPROPER OTHER ACTS EVIDENCE WHICH DENIED THE APPELLANT A FAIR AND IMPARTIAL TRIAL, RESULTING IN A VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER SECTION 10, ARTICLE ONE OF THE OHIO CONSTITUTION AND THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

III

{¶6} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY THE UNTIMELY FILING OF A MOTION TO SUPPRESS."

I

{¶7} Appellant claims the trial court erred in sentencing him on both the offenses of assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A) and (C)(1) and illegal manufacture of drugs in violation of R.C. 2925.04(A) and (C)(3)(a) as both offenses are allied offenses of similar import. Appellant also claims double jeopardy issues.

{¶8} R.C. 2925.041 governs assembly or possession of chemicals used to manufacture controlled substance with intent to manufacture controlled substance. Subsections (A) and (C)(1) state the following:

{¶9} "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.

{¶10} "(C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree, and, except as otherwise provided in division (C)(1) or (2) of this section, division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the offense was committed in the vicinity of a juvenile or in the vicinity of a school, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the second degree, and, except as otherwise provided in division (C)(1) or (2) of this section, division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the chemical or chemicals assembled or possessed in violation of division (A) of this section may be used to manufacture methamphetamine, the court shall impose a mandatory prison term on the offender as follows:

{¶11} "(1) If the violation of division (A) of this section is a felony of the third degree under division (C) of this section and the chemical or chemicals assembled or possessed in committing the violation may be used to manufacture methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years. If the violation of division (A) of this section is a felony of the third degree under division (C) of this section, if the chemical or chemicals assembled or possessed in committing the violation may be used to manufacture methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the

Revised Code, or a violation of division (A) of section 2925.04 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years."

{¶12} R.C. 2925.04 governs illegal manufacture of drugs. Subsection (A) and (C)(3)(a) state the following:

{¶13} "(A) No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance.

{¶14} "(C)(3) If the drug involved in the violation of division (A) of this section is methamphetamine, the penalty for the violation shall be determined as follows:

{¶15} "(a) Except as otherwise provided in division (C)(3)(b) of this section, if the drug involved in the violation is methamphetamine, illegal manufacture of drugs is a felony of the second degree, and, subject to division (E) of this section, the court shall impose a mandatory prison term on the offender determined in accordance with this division. Except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than three years. If the offender previously has been convicted of or pleaded guilty to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code, or a violation of division (A) of section 2925.041 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than five years."

{¶16} R.C. 2941.25 governs multiple counts and states the following:

{¶17} "(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.

{¶18} "(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."

{¶19} The controlling law on multiple counts from the Supreme Court of Ohio is embodied in two cases, *State v. Rance,* 85 Ohio St.3d 632, 1999-Ohio-291, and *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625. The *Rance* court held the following at paragraphs one and three of the syllabus:

{¶20} "1. Under an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract.* (*Newark v. Vazirani* [1990], 48 Ohio St.3d 81, 549 N.E.2d 520, overruled.)

{¶21} "3. In Ohio it is unnecessary to resort to the *Blockburger* test in determining whether cumulative punishments imposed within a single trial for more than one offense resulting from the same criminal conduct violate the federal and state constitutional provisions against double jeopardy. Instead, R.C. 2941.25's two-step test answers the constitutional and state statutory inquiries. The statute manifests the General Assembly's intent to permit, in appropriate cases, cumulative punishments for the same conduct. (*Garrett v. United States* [1985], 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764; *Albernaz v. United States* [1981], 450 U.S. 333, 101 S.Ct. 1137, 67

L.Ed.2d 275; *State v. Bickerstaff* [1984], 10 Ohio St.3d 62, 10 OBR 352, 461 N.E.2d 892, approved and followed.)"

{¶22} The *Cabrales* court held the following at paragraph one of the syllabus:

{¶23} "1. In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, clarified.)"

{¶24} Appellant argues the analysis required in this case is similar to the case of *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, wherein the Supreme Court of Ohio determined the offenses of possession of drugs and drug trafficking were allied offenses, following paragraph two of the syllabus in *Cabrales* which states the following:

{¶25} "2. Trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second."

{¶26} The *Whitfield* court went on to hold the following at syllabus:

{¶27} "1. The state retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal.

{¶28} "2. Upon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and

remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.

{¶29} "3. Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing."

{¶30} In applying *Rance* and its progeny to the determination of whether convictions for possession of chemicals for the manufacture of drugs and the illegal manufacture of drugs should be merged, we must look to the statutes.

{¶31} Under R.C. 2925.041(A), no one "shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance." Under R.C. 2925.04(A), no one "shall knowingly***manufacture or otherwise engage in any part of the production of a controlled substance." Under both sections, the operable issue is the possession of chemicals for the manufacture of drugs or otherwise engaging in any part of the production of drugs.

{¶32} Using the modified *Cabrales* approach, and applying the facts to appellant's actions as they were charged, we find the possession of chemicals and the engagement in any part of the production of drugs are allied offenses that do not have a separate animus.

{¶33} Assignment of Error I is granted.

{¶34} Pursuant to *Whitfield,* supra, the sentences are vacated and the matter is remanded to the trial court for resentencing where the state must elect the offense for which appellant should be punished.

II

{¶35} Appellant claims the trial court erred in permitting other acts evidence. We disagree.

{¶36} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶37} R.C. 2945.59 governs proof of defendant's motive and states the following:

{¶38} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶39} Evid.R. 404(B) provides the following:

{¶40} "**(B) Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶41} Evid.R. 403 states the following:

{¶42} "**(A) Exclusion mandatory**

{¶43} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶44} "**(B) Exclusion discretionary**

{¶45} "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶46} Appellant argues two witnesses for the state, Staci Ferguson and Maria Robertson, offered evidence of other acts. Ms. Ferguson testified in October of 2008, she purchased pseudoephedrine for a "guy named Dave" and she observed Dave give it to appellant at appellant's trailer. T. at 265-266. Ms. Robertson testified in the summer of 2008, she purchased three boxes of pseudoephedrine and gave them to appellant. T. at 270-271. Pseudoephedrine is a "starting material for methamphetamine manufacture." T. at 191.

{¶47} Defense counsel timely objected to the complained of testimony, but the trial court overruled the objections, stating "[t]he Court will allow them to testify as to the fact they brought these items to him [appellant] to show he has knowledge of the ability to be - - to make methamphetamine with those items." T. at 243-244.

{¶48} We find the stated purpose for the introduction of the evidence was to establish a violation of R.C. 2925.041, the assembly or possession of chemicals used to manufacture drugs. It was the state's burden to establish that appellant assembled the

seized items for the manufacture of methamphetamine and appellant knew how to manufacture the drug. R.C. 2925.041 requires that the assembly be done "knowingly." Therefore, it was necessary to prove the assembly of the items was not an innocent possession and appellant knew how to make methamphetamine. In addition to the pseudoephedrine, items collected during the search included a propane tank with a manufactured nozzle on it which was leaking of ammonia, Epsom salt, and punctured starter fluid caps. T. at 164-165, 168. Separately, all the items are innocent, but collectively, support the manufacture of methamphetamine.

{¶49} Upon review, we find the trial court did not err in permitting the complained of testimony to establish the purpose of pseudoephedrine and appellant's knowledge of manufacturing methamphetamine.

{¶50} Assignment of Error II is denied.

III

{¶51} Appellant claims he was denied the effective assistance of trial counsel because his counsel was deficient in failing to file a motion to suppress the search of the trailer. We disagree.

{¶52} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶53} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623;

Strickland v. Washington [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶54} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶55} The search warrant authorized a search of "10108 Wesley Chapel Road, Mount Perry, Ohio 43760." The property was described as a "one (1) story mobile home situated on 5.6 acres of land." Appellant argues three residences are located on the property and therefore the search warrant was deficient because it failed to state with particularity the residence to be searched.

{¶56} First, the untimely filing of the motion to suppress constitutes deficient legal representation. Therefore, the first prong of *Bradley* has been met. The second prong requires a showing of prejudice, "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶57} Evidence of three residences on the property was elicited during the cross-examination of state's witness Randy Kress:

{¶58} "Q. And there's actually three residences on that property; is that correct?

{¶59} "A. Yes.

{¶60} "Q. There is a trailer in the front?

{¶61} "A. Yes.

{¶62} "Q. And you lived in the trailer behind it?

{¶63} "A. Yes.

{¶64} "Q. And then there is a trailer that - - well, actually a home that lives farther back on the property. It's owned by the owner?

{¶65} "A. Yes." T. at 261.

{¶66} Appellant argues all three residences had the 10108 address. However, it is just as plausible because there were three separate residences, they each had a separate address number.

{¶67} The affidavit to the search warrant contains the following statement:

{¶68} "9. Your Affiant has also learned through confidential informant information that Chad M. Stevenson has been manufacturing methamphetamine at his residence located at 10108 Wesley Chapel Rd, Mount Perry which is situated within the boundaries of Madison Township / Perry County Ohio. A search of the applicable public records revealed that this residence is owned by John E. Robertson which is the same individual listed in paragraph 1 and is rented to Chad M. Stevenson. Confidential informants further state that Stevenson actively manufactures the illicit drugs two (2) to three (3) times a week at this location and further state that the actual methamphetamine lab itself is located just outside his residence in the front yard. According to the confidential informant, Stevenson will only participate in the manufacturing in the night time hours to avoid detection."

{¶69} This implies that each residence has a separate address. Given the nature of the evidence, we cannot conclude that there was any likelihood of success on the merits of appellant's claim. Any conclusion would be but a guess. Therefore, we find appellant's arguments herein fail to establish the second prong of *Bradley*.

{¶70} Assignment of Error III is denied.

{¶71} The judgment of the Court of Common Pleas of Perry County, Ohio is hereby affirmed in part. The sentences are vacated and the matter is remanded to the trial court for resentencing.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ John W. Wise_____

JUDGES

SGF/sg 0426

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHAD M. STEVENSON	:	
Defendant-Appellant	:	CASE NO. 09CA16

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio is hereby affirmed in part. The sentences are vacated, and the matter is remanded to the trial court for resentencing consistent with this opinion. Costs to appellant.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ John W. Wise

JUDGES