**[Cite as *State v. Harless,* 2015-Ohio-4753.]**

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
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| | : | Hon. W. Scott Gwin, P.J. |
| Plaintiff-Appellee | : | Hon. Sheila G. Farmer, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 14-COA-034 |
| | : | |
| WARREN S. HARLESS | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Ashland County Court of Common Pleas, Case No. 14-CRI-093 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | November 5, 2015 |

APPEARANCES:

| For Plaintiff-Appellee: | For Defendant-Appellant: |
|---|---|
| CHRISTOPHER R. TUNNELL<br>ASHLAND COUNTY PROSECUTOR | ERIN N. POPLAR<br>DANIEL D. MASON<br>103 Milan Ave., Suite 6 |
| MICHAEL D. DONATINI<br>110 Cottage St., 3rd Floor<br>Ashland, OH 44805 | Amherst, OH 44001 |

*Delaney, J.*

{¶1} Defendant-Appellant Warren S. Harless appeals the October 1, 2014 sentencing entry of the Ashland County Court of Common Pleas.

**FACTS AND PROCEDURAL HISTORY**

{¶2} Defendant-Appellant Warrant S. Harless was indicted on June 26, 2014 on one count of complicity to breaking and entering, a fifth degree felony in violation of R.C. 2923.03(A)(2) and 2911.13(A); complicity to theft, a fifth degree felony in violation of R.C. 2923.03(A)(2) and 2913.02(A)(1); complicity to tampering with evidence, a third degree felony in violation of R.C. 2929.03(A)(2) and 2921.12(A)(1); and complicity to possessing criminal tools, a fifth degree felony in violation of R.C. 2923.03(A)(2) and 2923.24(A). Harless pleaded not guilty to the charges.

{¶3} Harless changed his plea to guilty on Counts One and Two of the indictment: complicity to breaking and entering, a fifth degree felony in violation of R.C. 2923.03(A)(2) and 2911.13(A) and complicity to theft, a fifth degree felony in violation of R.C. 2923.03(A)(2) and 2913.02(A)(1). The trial court ordered a pre-sentence investigation and scheduled a sentencing hearing.

{¶4} The following facts are set forth in the pre-sentence investigation report and are part of the record on appeal. On June 10, 2014 at approximately 2:10 a.m., the Ashland County Sheriff's Department received a 911 call regarding an alarm going off at the Callihan Corner Store. The Callihan Corner Store is located at the corner of U.S. 224 and State Route 511 in Nova, Ohio. The caller reported seeing two males running across a parking lot carrying a bag. The males got into a white car parked across the

street. The callers observed the white car travel westbound on State Route 224 and turn northbound on County Road 1181.

{¶5} Deputy John Hale with the Ashland County Sheriff's Department was at the intersection of State Route 250 and State Route 224 when he received the call from dispatch regarding the alarm and the white car. Deputy Hale turned northbound on Township Road 1281, which runs parallel to County Road 1181, in hopes of observing the white car on Township Road 126 or County Road 16. Deputy Hall observed a train at the crossing on Township Road 1281, so he turned east onto Township Road 126 and headed toward County Road 1181. As the deputy approached the railroad tracks on Township Road 126, he saw the gates going up from the train that had just passed. He also noticed a set of brake lights from a vehicle parked on the roadway on the opposite side of the railroad tracks and facing eastbound. The lights on the vehicle were turned off.

{¶6} Deputy Hale crossed the railroad tracks and followed the white car to a stop sign at Township Road 126 and County Road 1181. The white car turned south on County Road 1181 and headed towards State Route 224. Deputy Hale called in the license plate number and determined the car was registered to Shawn M. Hunter from Columbus, Ohio.

{¶7} Other officers responded to the area and Deputy Hale initiated a traffic stop at the intersection of State Route 250 and County Road 500. The officer observed four subjects in the vehicle. All four subjects were taken out at gunpoint and each one placed in a different vehicle. Deputy Hale reported that none of the subjects questioned why they were being taken out at gunpoint.

{¶8} The occupants of the vehicle were identified as Alexander E. Bond (driver), Harless (front seat passenger), Michael R. Scarberry (rear seat), and James R. Stroud (rear seat). The four individuals were from Columbus, Ohio. During the traffic stop, Harless told Deputy Hale that the white car was titled to his brother, Shawn Hunter, but the car belonged to Harless.

{¶9} Sergeant Sims drove to Callihan's Corner Store. At the store, Sergeant Sims observed that a rock had been thrown through the glass front door and a large amount of cigarettes had been stolen. Sergeant Sims spoke to another witness who saw two males dressed in black running from the store carrying trash bags.

{¶10} Sergeant Sims and Deputy Hale returned to the area near the railroad tracks where Deputy Hale had first encountered the white car. The officers located two black trash bags filled with cartons of cigarettes.

{¶11} The white car was impounded and searched. The officers discovered bolt cutters, black clothes, gloves, shoes, hats, and sweat pants. The officers also removed black trash bags and a large rock from the vehicle.

{¶12} The pre-sentence investigation stated Harless admitted to Deputy Hale that he stole cigarettes.

{¶13} At the sentencing hearing, the State recommended the trial court impose maximum consecutive sentences. The State argued it believed Harless was the primary offender in the case. Upon the trial court's review of the pre-sentencing investigation, the trial court agreed and sentenced Harless to nine months in prison on each count, to be served consecutively. The trial court did not analyze whether the charges were allied offenses of similar import nor did counsel for Harless object to the trial court's failure to

merge the offenses. The sentencing entry was journalized on October 1, 2014 and it is from this judgment Harless now appeals.

## ASSIGNMENTS OF ERROR

{¶14} Harless raises two Assignments of Error:

{¶15} "I. THE COURT ERRED AND COMMITTED PLAIN ERROR IN SENTENCING APPELLANT TO SEPARATE SENTENCES FOR THE OFFENSES OF COMPLICITY TO BREAKING AND ENTERING AND COMPLICITY TO THEFT, WHICH CONVICTIONS SHOULD HAVE BEEN MERGED PURSUANT TO OHIO REVISED CODE 2941.25.

{¶16} "II. IN THE ALTERNATIVE, APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BECAUSE HIS COUNSEL DID NOT MOVE THE TRIAL COURT TO MERGE THE OFFENSES FOR WHICH APPELLANT WAS CONVICTED FOR SENTENCING."

## ANALYSIS

### I. Merger of Allied Offenses

{¶17} Harless argues in his first Assignment of Error that the trial court erred in imposing consecutive sentences, in violation of R.C. 2941.25, because his crimes of complicity to breaking and entering and complicity to theft were allied offenses. Harless pleaded guilty to the two offenses; therefore, we review his argument under the plain error analysis.

A. Allied Offenses

{¶18} R.C. 2941.25, Ohio's allied offense statute, provides that:

> (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.

{¶19} In *State v. Johnson,* 128 Ohio St.3d 153, 2010–Ohio–6314, the Court held: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.,* at the syllabus. The test in *Johnson* for determining whether offenses are subject to merger under R.C. 2921.25 was two-fold: "First, the court must determine whether the offenses are allied and of similar import. In so doing, the pertinent question is 'whether it is possible to commit one offense *and* commit the other offense with the same conduct, not whether it is possible to commit one *without* committing the other.' (Emphasis sic.) Second, 'the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind."' *State v. Cherryholmes*, 5th Dist. Fairfield No. 14 CA 27, 2015-Ohio-3063, ¶ 110. If both

questions are answered in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Johnson,* at ¶ 50.

{¶20} The Ohio Supreme Court again considered the issue of allied offenses in *State v. Ruff,* -- Ohio St.3d --, 2015-Ohio-995, -- N.E.3d --. *Ruff* clarified and supplemented *Johnson* to hold:

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? In any of the following are true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance -- in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

*Id.* at ¶ 25. "At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct." *Id.* at ¶ 26.

B. Plain Error and Allied Offenses

{¶21} In this case, Harless failed to object to his sentences in the trial court. In *State v. Rogers*, the Ohio Supreme Court recently examined a case where the defendant was convicted of multiple offenses pursuant to a guilty plea. *State v. Rogers*, -- Ohio St.3d --, 2015-Ohio-2459, -- N.E.3d --. The defendant appealed and argued for the first time on appeal that some of the convictions should have merged for sentencing. *Id*. at ¶ 11. The matter was certified as a conflict and presented to the Ohio Supreme

Court. In making its decision, the Court clarified the difference between waiver and forfeiture as it pertains to allied offenses. *Id.* at ¶ 19-21. The Court rejected the argument that by entering a guilty plea to offenses that could be construed to be two or more allied offenses of similar import, the accused waives the protection against multiple punishments under R.C. 2941.25. *Id*. at ¶ 19. The Court held that an accused's failure to seek the merger of his or her convictions as allied offenses of similar import in the trial court, the accused forfeits his or her allied offenses claim for appellate review. *Id*. at ¶ 21. "[F]orfeiture is the failure to timely assert a right or object to an error, and * * * 'it is a well-established rule that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." ' " *Id*. at ¶ 21.

{¶22} The accused may raise a forfeited claim on appeal through Crim.R. 52(B). Pursuant to Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The Court held in *Rogers*:

> An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent

> that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

2015-Ohio-2459, ¶ 3.

{¶23} The Court reaffirmed that even if an accused shows the trial court committed plain error affecting the outcome of the proceeding, the appellate court is not required to correct it. *Id*. at ¶ 23. It stated:

> we have "admonish[ed] courts to notice plain error 'with the utmost caution, under exceptional circumstances and *only* to prevent a manifest miscarriage of justice.' " (Emphasis added.) *Barnes* at 27, 759 N.E.2d 1240, quoting *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

*Id.*

C. Harless Failed to Meet His Burden

{¶24} Harless was convicted of complicity to breaking and entering and complicity to theft. Complicity is defined under R.C. 2923.03(A)(2) as: "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense * * *." R.C. 2911.13(A) defines breaking and entering as, "[n]o person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony." R.C. 2911.13(A). Theft, a violation of R.C. 2913.02(A)(1), states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or

services * * * [w]ithout the consent of the owner or person authorized to give consent * * *."

{¶25} The only record of the facts underlying Harless's conviction is the pre-sentence investigation report. The pre-sentence investigation report states a rock was thrown through the front glass door of the store, causing glass to be found on the floor. Witnesses saw two men dressed in black running across the parking lot of the store carrying black trash bags. The report does not identify which of the four men found in the vehicle were the two men carrying the trash bags. Two black trash bags were found filled with cartons of cigarettes stolen from the store. The pre-sentence investigation report states that Harless was the owner of the white car and was found in the front passenger seat when the police officers removed the occupants from the white car. Harless's only statement to the police was, "I stole cigarettes."

{¶26} Pursuant to *Rogers*, it is Harless's burden to demonstrate a reasonable probability that the convictions were for allied offenses of similar import committed with the same conduct and without a separate animus. On this record, we find that Harless has failed to demonstrate any probability that he was convicted of allied offenses of similar import committed with the same conduct and with the same animus.

{¶27} The trial court could infer that Harless aided and abetted in the commission of breaking and entering, which resulted in damage to the store, and then aided and abetted in the commission of theft, which was the removal of the cartons of cigarettes from the store. The conduct for breaking and entering and theft were separate and distinct acts and resulted in separate and identifiable harm.

{¶28} We find the trial court did not commit plain error in imposing separate sentences for complicity to breaking and entering and complicity to theft.

{¶29} Harless's first Assignment of Error is overruled.

**II. Ineffective Assistance of Counsel**

{¶30} Harless argues in his second Assignment of Error he received ineffective assistance of counsel when his counsel failed to move the trial court to merge his convictions for sentencing. We disagree.

{¶31} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, “a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ “ *Id.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶32} “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland,* 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶33} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶34} Based on our analysis of the first Assignment of Error, we find Harless has failed to meet his burden to demonstrate he received ineffective assistance of counsel. First, we cannot say Harless's trial counsel acted outside the wide range of professionally competent assistance in failing to move the trial court to merge his sentences. Second, Harless cannot show there is a reasonable probability that, but for his trial counsel's errors, the result of the proceedings would have been different. Our review of Harless's argument as to allied offenses found the trial court could have determined the charges of complicity to breaking and entering and complicity to theft were not allied offenses of similar import and should not merge for sentencing.

{¶35} Harless's second Assignment of Error is overruled.

**CONCLUSION**

{¶36} The judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Farmer, J., concur.