[Cite as *State v. Sowers*, 2016-Ohio-7500.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

HEATHER M. SOWERS

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 16 CA 00002

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 15 CR 00023
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 14, 2016

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Heather M. Sowers appeals her sentence entered February 10, 2016, in the Perry County Common Pleas Court following a guilty plea to one count of aggravated possession of drugs and two counts of possession of drugs.

{¶2} Appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} The undisputed facts and procedural history are as follows:

{¶4} On March 26, 2015, Appellant Heather Sowers was indicted on one count of Aggravated Possession of Drugs, in violation of R.C. §2925.11(A)(1) and (C)(1)(a); one count of Possession of Drugs, in violation of R.C. §2925.11 (A)(1) and (C)(2)(a); and one count of Possession of Drugs, in violation of R.C. §2925.11 (A)(1) and (C)(2)(a), all being felonies of the fifth degree. It was alleged that Appellant possessed methamphetamine for the first count, Alprazolam .25 mg for the second count, and Alprazolam 1 mg for the third count.

{¶5} On November 18, 2015, Appellant entered pleas of guilty to three felony charges at the Perry County Court of Common Pleas: Aggravated Possession of Drugs (methamphetamine), a felony of the fifth degree; Possession of Drugs (Alprazolam), a felony of the fifth degree; and Possession of Drugs (Alprazolam), a felony of the fifth degree.

{¶6} On February 10, 2016, the trial court sentenced Appellant to eleven (11) months in prison on each count, to be served consecutively, for an aggregate sentence of thirty-three (33) months in prison. (Sentencing Hearing, p. 8). At sentencing it was

acknowledged that Appellant, following a brief furlough from jail after her change of plea hearing, absconded from the jurisdiction of the court.

{¶7} It is from this judgment entry that Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶8} "I. THE TRIAL COURT ERRED IN FAILING TO PROPERLY MERGE TWO ALLIED OFFENSES OF SIMILAR IMPORT AT SENTENCING PURSUANT TO R.C. 2941.25."

I.

{¶9} In Appellant's sole Assignment of Error she argues that the trial court erred in failing to merge two allied offenses. We disagree.

{¶10} Revised Code §2941.25 protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions. *See State v. Jackson,* Montgomery App.No. 24430, 2012–Ohio–2335, ¶133, citing *State v. Johnson,* 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010–Ohio–6314, ¶45. Appellate review of an allied offense question is de novo. *State v. Williams,* 134 Ohio St.3d 482, 2012–Ohio–5699, ¶ 12.

{¶11} R.C. §2941.25, Multiple counts, states:

{¶12} (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.

{¶13} (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.

{¶14} In *State v. Johnson,* 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061, the Ohio Supreme Court held:

> Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
>
> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. [*State v.*] *Blankenship,* 38 Ohio St.3d [116] at 119, 526 N.E.2d 816 [(1988)] (Whiteside, J., concurring). ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then 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.*] *Brown,* 119 Ohio St.3d 447, 2008–Ohio–4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

{¶15} Recently, the Ohio Supreme Court in *State v. Ruff,* 2015–Ohio–995, 143 Ohio St.3d 114, addressed the issue of allied offenses, determining the analysis set forth in *Johnson* to be incomplete. The Court in *Ruff,* revised its allied-offense jurisprudence, holding"

1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors-the conduct, the animus, and the import.

2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

{¶16} The Court further explained,

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? If any of the following is 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.
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> * * *
>
> An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

{¶17} In the instant case, Appellant argues that the two counts of possession of drugs: Alprazolam, were allied offenses and should have been merged. Appellant argues that the offenses stemmed from a single act, with a single state of mind: to possess Alprazolam, without a prescription.

{¶18} Upon review, we find that the trial court did not err in finding that the drug possession counts in this matter were not allied offenses of similar import. While it is true that both Counts Two and Three were based on Appellant's possession of the same drug: Alprazolam, Appellant possessed two different strengths of this drug: .25 mg and 1 mg, respectively. Appellant would have needed a different prescription to obtain each of these drugs. It would be possible for someone to have a legal prescription for one dosage strength and not the other. We therefore find that the trial court did not err in finding that the Alprazolam possession counts were not allied offenses and should not merge.

{¶19} Appellant's sole Assignment of Error is overruled.

{¶20} For the foregoing reasons, the judgment of the Court of Common Pleas, Perry County, Ohio, is affirmed.

By: Wise, J.

Delaney, J., concurs.

Hoffman, P. J., dissents.

JWW/d 0920

Hoffman, P.J., dissenting

{¶21} I respectfully dissent from the majority opinion. I find Counts II and III for possession of Alprazolam should merge despite the fact Appellant possessed two different strengths of the substance.[1] See, *State v. Painter*, 12th Dist. Clermont No. CA2014-03-022, 2014-Ohio-5011, for the same result.

[1] I find the fact two different prescriptions would be necessary to legally possess Alprazolam in different strengths does not bear on whether the simultaneous illegal possession of the substance in different strengths results in allied or separate offenses.