[Cite as *State v. Kalman*, 2017-Ohio-6910.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
wwFIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 16-COA-042
	:	
MARK E. KALMAN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Case No. 15-CRI-083
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 17, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CHRISTOPHER R. TUNNELL ASHLAND CO. PROSECUTOR CHRISTOPHER E. BALLARD 110 Cottage St., Third Floor Ashland, OH 44805	MATTHEW J. MALONE 10 East Main St. Ashland, OH 44805

Delaney, P.J.

{¶1} Appellant Mark E. Kalman appeals from the November 8, 2016 Judgment Entry-Sentencing of the Ashland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are taken from appellee's bill of particulars.

{¶3} This case arose when appellant, acting in concert with others, repeatedly purchased pseudoephedrine in the form of cold medicine from pharmacies in Ashland, Lorain, Richland, Seneca, Huron, Erie, and Medina counties to use in the manufacture of methamphetamine, a Schedule II controlled substance. Appellant also assembled various items necessary for the manufacture of methamphetamine at an address in Sullivan, Ohio. Appellant manufactured methamphetamine between May 1, 2015 and June 9, 2015.

{¶4} At the same location, appellant grew and cultivated marijuana for the purpose of extracting T.H.C. from the marijuana to be used in the manufacture of hashish, a Schedule I controlled substance.

{¶5} Appellant was alleged to have committed these offenses in the presence of his son, a juvenile.

{¶6} Appellant also possessed various firearms despite being under disability for a prior felony drug abuse conviction. Appellant also possessed various drug abuse instruments including pipes and/or syringes and/or hypodermic needles.

{¶7} Appellant was charged by indictment as follows: Count I, illegal assembly or possession of chemicals for the manufacture of drugs [methamphetamine], a felony of

the second degree pursuant to R.C. 2925.041(A); Count II, illegal assembly or possession of chemicals for the manufacture of drugs [methamphetamine], a felony of the third degree pursuant to R.C. 2925.041(A); Count III, illegal manufacture of drugs [methamphetamine], a felony of the first degree pursuant to R.C. 2925.04(A); Count IV, illegal manufacture of drugs [hashish], a felony of the first degree pursuant to R.C. 2925.04(A); Count V, illegal cultivation of marijuana, a misdemeanor of the fourth degree pursuant to R.C. 2925.04(A); Count VI, having weapons while under disability, a felony of the third degree pursuant to R.C. 2923.13(A)(3); and Count VII, possessing drug abuse instruments, a misdemeanor of the second degree pursuant to R.C. 2925.12(A).

{¶8} Counts I, III, and IV contained specifications that the offenses were recklessly committed in the presence of a juvenile.

{¶9} The offense date of Count I, Count V, and Count VII is June 9, 2015. The offense dates of Count II are March 2, 2013 through June 5, 2015. The offense dates of Count III, Count IV, and Count VI are May 1, 2025 through June 9, 2015.

{¶10} Appellant entered pleas of not guilty and the matter proceeded to trial by jury. Appellant was found guilty as charged, including the specifications to Counts I, II, and IV.

{¶11} The trial court requested a pre-sentence investigation (P.S.I.) and set the matter for sentencing on November 9, 2015.[1] The Judgment Entry--Sentencing of November 13, 2015 states appellee moved to amend Counts III and IV to felonies of the second degree, eliminating the specification that the offenses were committed in the presence of a juvenile, and the trial court granted the motion.

[1] The P.S.I. was filed under seal and is in the appellate record.

{¶12} The trial court sentenced appellant to an aggregate prison term of 12 years as follows:

COUNT	OFFENSE	LEVEL	PRISON/JAIL SENTENCE	TO BE SERVED
I	Illegal assembly	F2	3 years	
II	Illegal assembly	F3	12 months	Consecutively to Count I
III	Illegal manufacture	F2	3 years	Consecutively to Counts I and II
IV	Illegal manufacture	F2	2 years	Consecutively to Counts I, II, and III
V	Cultivation of marijuana	M4	30 days	Concurrently to Counts I through IV
VI	Weapons /disability	F3	36 months	Consecutively to Counts I through IV
VII	Poss. drug abuse inst.	M2	30 days	Concurrently to Counts I through VI

{¶13} Appellant directly appealed from his convictions and sentence, raising two assignments of error: he received ineffective assistance of trial counsel and his convictions were against the manifest weight and sufficiency of the evidence. *State v. Kalman*, 5th Dist. Ashland No. 15 COA 041, 2016-Ohio-5013, appeal not allowed, 147 Ohio St.3d 1507, 2017-Ohio-261, 67 N.E.3d 824 [*Kalman I*].

{¶14} We affirmed in part, reversed in part, and remanded, finding appellant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence with the exception of Count VI, having weapons while under disability. We also found appellant did not receive ineffective assistance of trial counsel. We remanded to the trial court with instructions to vacate appellant's conviction and sentence upon Count VI, to vacate any "vicinity of a juvenile" language in the convictions, and to resentence accordingly.

{¶15} On August 17, 2016, appellant filed an application to reopen his appeal pursuant to App.R. 26(B). Appellant argued he received ineffective assistance of appellate counsel because counsel failed to: 1) raise as an assigned error the failure to merge offenses as to the counts of illegal manufacture of drugs and the counts of illegal assembly or possession of chemicals for the manufacture of drugs; 2) raise as an assigned error the improper imposition of consecutive driver's license suspensions; and 3) meet the "fair presentation requirement for constitutional issues."

{¶16} Relevant here is appellant's first proposed assignment of error regarding merger and allied offenses. On pages three and four of our judgment entry, we stated:

> * * * *.
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> In regard to the issue of merger of offenses, the State responds that appellant failed to raise this issue at the trial court level. The Ohio Supreme Court recently concluded that by failing to seek the merger of convictions as allied offenses of similar import in the trial court, a defendant forfeits his or her allied offenses claim for appellate review, except for plain error. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21. Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph 3 of the syllabus.
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> It is well-established that in order to provide effective assistance, appellate counsel need not raise every conceivable

> issue on appeal. *See State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24, 653 N.E.2d 253 (1995). We note that the area of allied offenses and merger law has, over the past decade and a half, undergone a somewhat complex series of developments via the Ohio Supreme Court's line of cases in *State v. Rance*, *State v. Cabrales*, *State v. Johnson*, *State v. Ruff*, and *State v. Earley* (citation formats omitted). Furthermore, the Ninth District Court of Appeals, applying the *Ruff* holding in a case involving drug manufacture and assembly offenses, has held that where a defendant "had been routinely purchasing pseudoephedrine over a period of time," said crimes "were not committed with the same conduct and with the same animus." *See State v. Kirkby*, 9th Dist. Summit Nos. 27381 & 27399, 2015-Ohio-1520, ¶ 31. As such, we reject the implicit proposition herein that appellant's counsel on appeal failed to provide reasonable representation for choosing not to pursue an allied offense argument, under the heightened plain error standard, as to the pertinent drug offenses.
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> * * * *.
>
> Judgment Entry, November 2, 2016.

{¶17} On November 7, 2016, the trial court resentenced appellant, vacating Count VI. Appellant's aggregate prison term of 9 years was imposed as follows:

COUNT	OFFENSE	LEVEL	PRISON/JAIL SENTENCE	TO BE SERVED
I	Illegal assembly	F3	36 months	
II	Illegal assembly	F3	12 months	Consecutively to Count I
III	Illegal manufacture	F2	3 years	Consecutively to Counts I and II
IV	Illegal manufacture	F2	2 years	Consecutively to Counts I, II, and III
V	Cultivation of marijuana	M4	30 days	Concurrently to Counts I through IV
VI	*Vacated*			
VII	Poss. drug abuse inst.	M2	30 days	Concurrently to Counts I through V

{¶18} At resentencing, appellant argued Counts I, II, and III are allied offenses of similar import which should merge for sentencing, but the trial court declined to do so.

{¶19} On February 22, 2017, the Ohio Supreme Court declined jurisdiction of appellant's appeal from our decision overruling his application to reopen. *State v. Kalman*, 148 Ohio St.3d 1412, 2017-Ohio-573, 69 N.E.3d 752.

{¶20} Appellant now appeals from the judgment entry of his resentencing.

{¶21} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶22} "THE TRIAL COURT ERRED BY FAILING TO MERGE APPELLANT'S CONVICTIONS FOR ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR MANUFACTURE OF DRUGS WITH HIS CONVICTION FOR ILLEGAL MANUFACTURE OF DRUGS, AS THE OFFENSES ARE ALLIED OFFENSES OF SIMILAR IMPORT."

ANALYSIS

{¶23} In his sole assignment of error, appellant argues Counts I, II, and III are allied offenses which should merge for sentencing purposes, raising the same argument as the application to reopen *Kalman I*. We disagree.

{¶24} At resentencing, the trial court was limited to the instructions of the remand order, which affected only Count VI and the presence-of-a-juvenile specifications. The trial court lacks jurisdiction to exceed the scope of an appellate court's remand. *State v. Teagarden*, 5th Dist. Licking No. 15-CA-66, 2016-Ohio-3446, ¶ 30, cause dismissed, 146 Ohio St.3d 1495, 2016-Ohio-5680, 57 N.E.3d 1174, and appeal not allowed, 147 Ohio St.3d 1445, 2016-Ohio-7854, 63 N.E.3d 1215, citing *State v. Carsey,* 4th Dist. Athens No. 14CA5, 2014–Ohio–3682, ¶ 10. Our remand in *Kalman I* specifically instructed the trial court to conduct a new sentencing hearing at which the court must vacate appellant's sentence upon Count VI (having weapons while under disability), omit any reference to "in the vicinity of a juvenile," and re-sentence accordingly. In other words, the only modification within the scope of the remand was elimination of the conviction and sentence upon Count VI. Whether the offenses are allied offenses of similar import is outside the scope of our remand. See, *Teagarden,* supra, at ¶ 31.

{¶25} Moreover, we determined in appellant's application to reopen his direct appeal that appellant could not establish plain error with respect to the trial court's failure to merge the drug offenses. The "law of the case" doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan,* 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). The decision of this Court in *Kalman*

I, and the subsequent application to reopen, remains the law of the case as to all subsequent proceedings both at the trial level and upon review. *State v. Boyd,* 5th Dist. Stark No.1999CA00352, 2000 WL 1055798, at *3 (July 24, 2000).

{¶26} In our decision upon appellant's application to reopen, we found no plain error occurred at the original sentencing when the trial court opted not to merge the drug offenses because where a defendant "had been routinely purchasing pseudoephedrine over a period of time," said crimes "were not committed with the same conduct and with the same animus." *See State v. Kirkby*, 9th Dist. Summit Nos. 27381 & 27399, 2015-Ohio-1520, ¶ 31. That decision became final upon the Ohio Supreme Court's decision to decline review on February 22, 2017.

{¶27} The trial court properly limited the scope of appellant' resentencing hearing to the matters contained in the remand order and was without jurisdiction to consider the allied-offenses argument. Moreover, in earlier litigation we have already determined that the decision not to merge the drug offenses was not plain error.

{¶28} Appellant's sole assignment of error is thus overruled.

CONCLUSION

{¶29} Appellant's sole assignment of error is overruled and the judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Wise, Earle, J., concur.