[Cite as *State v. Oehler*, 2011-Ohio-6501.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-11-001

Appellee — Trial Court No. 10 CR 119

v.

Kevin Oehler — **DECISION AND JUDGMENT**

Appellant — Decided: December 16, 2011

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, and Katherine J. Middleton, Assistant Prosecuting Attorney, for appellee.

Stacey Burns, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Williams County Court of Common Pleas that found appellant guilty of one count of involuntary manslaughter and one count of endangering children following appellant's plea of guilty. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} On August 18, 2010, appellant was indicted on one count of involuntary manslaughter in violation of R.C. 2903.04(A), one count of endangering children in violation of R.C. 2919.22(A) and (E)(2)(c) and one count of endangering children in violation of R.C. 2919.22(B)(1) and (E)(2)(d), in connection with the death of appellant's infant son.

{¶ 3} On November 18, 2010, appellant entered pleas of guilty to involuntary manslaughter (Count I), a felony of the first degree, and one count of endangering children (Count II), a felony of the third degree. The state agreed to dismissal of Count III, a felony of the second degree. At the plea hearing, the state and the defense indicated to the court that it was understood that the state would recommend consecutive sentences for the two charges. Appellant's pleas were accepted.

{¶ 4} At the sentencing hearing on December 17, 2010, the trial court stated, "[I]t appears to me that after reviewing the PSI, the pre-sentence investigation report, as well as the controlling cases, * * * that there is different conduct involved in these two counts, so therefore, it appears to me that these two counts are not allied offenses and that the legislature will permit separate penalties for those two counts." When the trial court asked counsel if either of them wished to comment on that issue, defense counsel responded, "That is consistent with my research, yes, Your Honor." The state had no comment. Thereafter, the trial court sentenced appellant to nine years incarceration on Count I and four years on Count II. The trial court ordered the sentences to be served consecutively.

{¶ 5} Appellant sets forth the following sole assignment of error:

2.

{¶ 6} "I. Whether the Defendant's convictions for Involuntary Manslaughter and Felony Child Endangerment should be merged for sentencing purposes as allied offenses under R.C. 2941.25?"

{¶ 7} R.C. 2941.25 codifies the constitutional prohibition against multiple punishments for the same offense. The statute states:

{¶ 8} "(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.

{¶ 9} "(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."

{¶ 10} Accordingly, allied offenses of similar import are to be merged at sentencing. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569.

{¶ 11} This court notes, however, that the failure to raise an allied offense issue before the trial court constitutes a waiver of the error later claimed. *State v. Comen* (1990), 50 Ohio St.3d 206. See, also, *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845; *State v. Jones*, 6th Dist. No. L-05-1232, 2007-Ohio-563. The record before us reflects that appellant did not raise the allied offenses issue in the trial court; therefore, the potential error was waived. See *Comen*, supra; *Adams*, supra; *Jones*, supra. Further,

as noted above, defense counsel expressed agreement with the trial court's conclusion that the two counts were not allied offenses and that appellant was, therefore, subject to two separate penalties.

{¶ 12} Based on the foregoing, we find pursuant to the invited error doctrine that any error the trial court may have made in failing to merge the convictions for involuntary manslaughter and child endangerment in this case was induced by appellant and is therefore not reversible. See *State v. Thomas*, 12th Dist. No. CA2006-030041, 2006-Ohio-7029; *State v. Johnson*, 6th Dist. No. OT-05-008, 2005-Ohio-5029; *State v. Stansell* (Apr. 20, 2000), 8th Dist. No. 75889.

{¶ 13} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 14} On consideration whereof, the judgment of the Williams County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.