[Cite as *State v. Heflin*, 2012-Ohio-3988.]

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

State of Ohio	Court of Appeals No. L-11-1173
Appellee	Trial Court No. CR0201002730
v.	
Jamaica Heflin	**DECISION AND JUDGMENT**
Appellant	Decided: August 31, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

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PIETRYKOWSKI, J.

{¶ 1} Jamaica Heflin appeals his conviction and sentence under a June 17, 2011 judgment from the Lucas County Court of Common Pleas for possession of cocaine, a violation of R.C 2925.11(A) and (C)(4)(b) and a fourth degree felony, and for possession of heroin, a violation of R.C. 2925.11(A) and (C)(6)(b) and a fourth degree felony.

Appellant pled guilty to both offenses under an *Alford* plea (*North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

{¶ 2} The trial court found appellant guilty of both offenses and sentenced appellant to serve 17 months in prison on each offense. The sentences are consecutive to each other, thereby providing for an aggregate prison term of 34 months.

{¶ 3} On June 11, 2010, appellant was arrested and charged with possession of cocaine, possession of heroin and trafficking in cocaine after offering to sell the drugs to an undercover Toledo police officer. Police found the drugs in a plastic baggie at the time of arrest. Appellant pled to one count of possessing cocaine and one count of possessing heroin. At the request of the state of Ohio, the trial court entered a nolle prosequi on the trafficking in cocaine count.

{¶ 4} Appellant asserts two assignments of error on appeal:

Assignments of Error

I. The trial court erred in imposing multiple punishments for allied offenses of similar import contrary to R.C. 2941.25 and the Double Jeopardy clauses of the Ohio and United States constitutions.

II. Defendant's sentence is contrary to law.

{¶ 5} Appellant argues under Assignment of Error No. I that his convictions are for allied offenses of similar import under R.C. 2941.25 and that the convictions should have been merged for purposes of sentencing.

{¶ 6} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court overruled *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999) and established a different analysis to determine allied offenses under R.C. 2941.25. Central to the analysis is consideration of the conduct of the defendant.

{¶ 7} The court instructed, "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct." *Johnson* at ¶ 47. The court is to consider "whether it is possible to commit one offense and commit the other with the same conduct." *Id.* at ¶ 48. Next, "[i]f 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.'" *Id.* at ¶ 49, quoting *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.
>
> Id. at ¶ 50-51.

{¶ 8} Appellant refers the court to a decision of the Twelfth District Court of Appeals in *State v. Roy*, 12th Dist. No. CA2009-11-290, 2011-Ohio-1992. In the case,

the court of appeals applied the *Johnson* analysis to determine whether convictions for trafficking in cocaine, in violation of R.C. 2925.03(A)(1), and possession of cocaine, in violation of R.C. 2925.11(A), were allied offenses under R.C. 2945.25. The court concluded that it was possible for trafficking and possession to be committed with the same conduct and that the state in fact relied on the same conduct to prove both crimes. The Twelfth District Court of Appeals ordered that the convictions be merged at sentencing. *Id.* at ¶ 15-16.

{¶ 9} Appellant argues that as in *Roy*, his convictions arose from a single incident when he offered to sell drugs to an undercover police officer. The drugs, cocaine and heroin, were kept in a single plastic bag. Appellant argues that he possessed both drugs with the same intent to sell.

{¶ 10} The state argues in response that cocaine and heroin are distinctly different narcotics and possession of the drugs constitutes distinct and separate offenses. Under R.C. 2925.11, possession of different drugs in specific amounts results in offenses of varying degrees of severity in both level of felony and punishment.

{¶ 11} The state cites the Ohio Supreme Court decision in *State v. Delfino*, 22 Ohio St.3d 270, 490 N.E.2d 884 (1986), as recognizing that the statutory scheme provides for separate offenses for possession of the two drugs. In *Delfino*, the court held that "[t]he simultaneous possession of different types of controlled substances can constitute multiple offenses under R.C. 2925.11." *Id.* at syllabus.

{¶ 12} The state's argument is supported by the decision of the Second District Court of Appeals in *State v. Huber*, 2d Dist. No. 2010-CA-83, 2011-Ohio-6175. In the case, the court of appeals considered multiple convictions arising from possession of the drugs methadone, hydrocodone, oxycodone, acetaminophen with codeine, and fentanyl. All the drugs were found in the same suitcase. As here, the defendant argued that the possession of the drugs constituted a single act with a single intent. *Id.* at ¶ 6.

{¶ 13} Citing *Delfino*, the court of appeals held that possession of different drug groups constitutes different offenses under R.C. 2925.11 for purposes of *Johnson* analysis of allied offenses under R.C. 2925.11. *Id.* at ¶ 7-9. We agree.

{¶ 14} As possession of either cocaine or heroin will never support a conviction for possession of the other, we conclude that they are not allied offenses of similar import under *Johnson* analysis. Accordingly we hold that appellant's convictions for simultaneous possession of cocaine and heroin are not subject to merger as allied offenses of similar import under R.C. 2941.25.

{¶ 15} This same analysis applies to appellant's claim that the sentences violate state and federal constitutional prohibitions against double jeopardy. "[A] person may be punished for multiple offenses arising from a single criminal act without violating the Double Jeopardy Clauses of the United States and Ohio Constitutions, so long as the General Assembly intended cumulative punishment." *Johnson* at ¶ 25; accord *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

We find Assignment of Error No. I not well-taken.

{¶ 16} Under Assignment of Error No. II, appellant argues that the sentences for possession of cocaine and possession of heroin are contrary to law because they are allied offenses of similar import. In view of our ruling on Assignment of Error No. I, we also find Assignment of Error No. II not well-taken.

{¶ 17} We find that justice has been afforded the party complaining and affirm the judgment of the Lucas County Court of Common Pleas. We order appellant to pay the costs pursuant to App.R. 24.

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

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE