[Cite as *State v. Tite*, 2013-Ohio-207.]

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

State of Ohio	Court of Appeals No. H-12-010
Appellee	Trial Court Nos. CRB 1102048 A CRB 1102048 B
v.	
Robert M. Tite	**DECISION AND JUDGMENT**
Appellant	Decided: January 25, 2013

* * * * *

G. Stuart O'Hara, Jr., Norwalk Law Director, and Scott M. Christophel, Assistant Law Director, for appellee.

Michael J. Camera, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Robert M. Tite, appeals his judgments of conviction from the Norwalk Municipal Court, following a no contest plea, for one count of carrying concealed weapons in violation of R.C. 2923.12(A)(2), and one count of using weapons

while intoxicated in violation of R.C. 2923.15(A), both misdemeanors of the first degree. We affirm.

{¶ 2} Appellant assigns two errors:

I. THE COURT ERRED IN FINDING THE DEFENDANT GUILTY OF CARRYING A CONCEALED WEAPON SINCE THE DEFENDANT WAS ON HIS OWN PROPERTY AND HAD A CARRY CONCEAL WEAPON PERMIT;

II. THE COURT ERRED IN ISSUING CONSECUTIVE SENTENCES FOR THE OFFENSES OF CARRYING A CONCEALED WEAPON AND USING WEAPONS UNDER DISABILITY, SINCE THEY ARE ALLIED OFFENSES OF SIMILAR IMPORT.

II. Analysis

{¶ 3} Under his first assignment of error, appellant argues his conviction for carrying concealed weapons should be reversed because (1) he was on his own property, and (2) he had a conceal-carry permit. However, by virtue of his no contest plea, appellant "is foreclosed from challenging the factual merits of the underlying charge." *State v. Bird*, 81 Ohio St.3d 582, 584, 692 N.E.2d 1013 (1998).

{¶ 4} In reviewing appellant's assignment, the issue we must decide is whether the trial court properly made a finding of guilty. We hold that it did. "[W]here the indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the

charged offense." *Id.* Here, the record is devoid of any factual information or description of this incident other than the complaint, which alleges that appellant "did knowingly carry or have, concealed on his person or concealed ready at hand, a handgun other than a dangerous ordnance."[1] This allegation mirrors the description of the conduct prohibited by R.C. 2923.12(A)(2). Therefore, it is a sufficient basis for the trial judge to find appellant guilty. *See Bird* at 584 (appellant's no contest plea to the indictment, which contained language that mirrored the statutory language for felonious assault, was sufficient basis for his conviction).

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

{¶ 6} In support of his second assignment, appellant argues that the offenses of carrying concealed weapons and using weapons while intoxicated should have merged as allied offenses of similar import. As set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the test for whether offenses are allied offenses of similar import under R.C. 2941.25 is two-fold. First, the court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Johnson* at ¶ 48. 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.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895

[1] The state attached an "incident/offense report" that it claims the trial court consulted in finding appellant guilty. However, that report was only included in the record in the presentence investigation report, and therefore we cannot consider it to be evidence that the trial court possessed at the time it made its determination of guilt.

N.E.2d 149, ¶ 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." *Johnson* at ¶ 50.

{¶ 7} The police incident report in the presentence investigation report detailed that appellant was found carrying a shotgun while intoxicated. The incident report also indicated that a subsequent search of appellant revealed that he was carrying a loaded pistol in a leather holster under his coveralls. Appellant argues that the same conduct produced the two offenses in that both were based on his possessing a handgun under his jacket while intoxicated. The state, on the other hand, argues that the using weapons while intoxicated charge was based on appellant's open possession of the shotgun, whereas the carrying concealed weapons charge was based on the concealed handgun. Thus, it contends that the crimes were not committed by the same conduct, and therefore the offenses should not merge. We agree with the state that the offenses in this case are not allied offenses of similar import.

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

III. Conclusion

{¶ 9} For the foregoing reasons, the judgments of the Norwalk Municipal Court are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgments affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE