[Cite as *State v. Hervey*, 2013-Ohio-4746.]

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

State of Ohio — Court of Appeals No. WD-12-030

Appellee — Trial Court No. 2012CR0012

v.

Devon Hervey — **DECISION AND JUDGMENT**

Appellant — Decided: October 25, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and Thomas A. Matuszak and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Devon Hervey, appeals the judgment of the Wood County Court of Common Pleas, wherein he was sentenced to three years of community control following his decision to enter a plea of guilty to two counts of receiving stolen property, two counts of possessing criminal tools, and one count of misuse of credit cards. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On January 5, 2012, Hervey was indicted on eight felony counts stemming from his unauthorized use of a stolen credit card and the discovery of various stolen goods in his home and in a 2001 Ford Taurus that he was driving at the time of his arrest. Specifically, Hervey was charged with two counts of burglary in violation of R.C. 2911.12(A)(1) and (A)(2), two counts of receiving stolen property in violation of R.C. 2913.51(A) and (C), one count of money laundering in violation of R.C. 1315.55(A)(3), two counts of possessing criminal tools in violation of R.C. 2923.24(A) and (C), and one count of drug possession in violation of R.C. 2925.11(A) and (C)(1)(a). At his arraignment on January 20, 2012, Hervey stood mute as to the charges in the indictment. Consequently, the court entered a plea of not guilty on his behalf.

{¶ 3} During plea negotiations, the state offered to dismiss the burglary and drug possession charges, as well as reduce the money laundering charge to a misdemeanor misuse of credit card charge, in exchange for Hervey's guilty plea. Hervey agreed, and, on April 13, 2012, he entered a guilty plea to the amended indictment. The court continued the matter for sentencing pending completion of a presentence investigation report.

{¶ 4} Prior to sentencing, Hervey filed a motion for merger, arguing that the misuse of credit card count should merge with the receiving stolen property count premised on his receipt of the stolen credit card. In addition, Hervey argued that the possessing criminal tools count stemming from his use of the Ford Taurus to transport the stolen goods (count 5) must merge with the remaining receiving stolen property count

that was based on stolen property recovered by the police during the execution of a search warrant at Hervey's home and within the vehicle (count 6).

{¶ 5} At sentencing, the court heard oral arguments from the state and Hervey's defense counsel on the issue of merger. At the conclusion of the arguments, the following discussion took place:

> [PROSECUTOR]: Your Honor, with respect to Misuse of Credit Cards and [receiving stolen property], I understand that the Court is predisposed of finding the merger. The State simply wanted to recite its case law. With respect to the others, I believe that we are in agreement they do not merge.
>
> THE COURT: Mr. Schuman?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.

{¶ 6} Ultimately, the court denied Hervey's motion for merger, and proceeded to sentence him to three years of community control pursuant to the determination of guilt on each of the charges contained in the amended indictment. In addition, the court informed Hervey that any violation of the terms of his community control could result in a prison term of one year each on the felony counts. No prison sentence was reserved for the misuse of credit card count.

{¶ 7} On June 25, 2012, Hervey filed his timely notice of appeal.

B. Assignment of Error

{¶ 8} On appeal, Hervey assigns the following error for our review:

> The trial court erred to the prejudice of Appellant in denying his motion for merger.

II. Analysis

{¶ 9} In his sole assignment of error, Hervey argues that the trial court erroneously denied his motion for merger. Specifically, Hervey states that "the trial court committed error by not ordering merger for Counts 5 and 6." The state responds by arguing that the counts do not merge when, as here, there are multiple victims and separate crimes.

{¶ 10} Allied offenses of similar import are governed by R.C. 2941.25, which provides:

> (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.
>
> (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.

{¶ 11} 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." *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 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." *Id.* at ¶ 50.

{¶ 12} Here, the state concedes that, under *Johnson*, it is possible to commit receiving stolen property and possessing criminal tools with the same conduct. Thus, the issue before us is whether these offenses actually were committed by the same conduct. *Id.*

{¶ 13} At the plea hearing, the state alleged that the following relevant facts would have been established had the matter proceeded to trial:

> Count 5. On December 11, 2011, Bowling Green police received a call of a suspicious vehicle in which the caller provided a description of Mr. Hervey's 2001 gray Ford Taurus. During the late evening hours, the police located the vehicle and began rolling surveillance. That surveillance led to a traffic stop, at which time Mr. Hervey, the only occupant in the car at the time, bailed from his car and then led police on a prolonged foot chase. Ultimately, the police apprehended Mr. Hervey and executed a search warrant on the Ford Taurus. When they did, they discovered several items of property that had been stolen during a burglary on December 18, 2011.

The victims of that burglary subsequently identified that stolen property by providing serial numbers for various electronic equipment. * * *

Count 6. When the Bowling Green police executed search warrants on Mr. Hervey's 2001 gray Ford Taurus and his apartment, they discovered several stolen items, including a Dell laptop computer, Toshiba laptop computer, gaming system with three games and controller, boom box, and 55" Samsung LED flat-screen TV, among other things.

{¶ 14} In his brief, Hervey argues that the two counts should merge because "the vehicle, deemed a criminal tool in Count 5, was used to transport stolen property to his residence and the vehicle was, in fact, used to actually 'receive the stolen property.'" Essentially, Hervey contends that the two crimes were committed by a single act with the same animus. We disagree.

{¶ 15} While it is apparent from the record that the vehicle was, in fact, used to transport the stolen merchandise, there is no indication that the receipt of the goods and the transport of them in the vehicle occurred simultaneously. Indeed, the fact that some of the stolen merchandise was discovered inside Hervey's apartment belies the contention that the two crimes were committed with a single act. Rather, the evidence suggests that Hervey used the vehicle on more than one occasion to transport stolen merchandise.

{¶ 16} Because the conduct giving rise to Hervey's conviction for receiving stolen property was different from the conduct relating to the possessing criminal tools charge,

the two offenses do not merge. Notably, Hervey acknowledged as much at the plea hearing, where defense counsel agreed that the two charges were not subject to merger.

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

III. Conclusion

{¶ 18} Based on the foregoing, the judgment of the Wood County Court of Common Pleas is hereby affirmed. Costs are assessed to Hervey in accordance with 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.

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE