**[Cite as *State v. Houston*, 2013-Ohio-323.]**

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

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| State of Ohio | Court of Appeals No. S-10-027 |
| Appellee | Trial Court No. 09CR000864 |
| v. | |
| Jimmy L. Houston | **DECISION AND JUDGMENT** |
| Appellant | Decided: February 1, 2013 |

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Timothy Young, State Public Defender, and Craig M. Jaquith,
Assistant State Public Defender, for appellant.

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**YARBROUGH, J.**

## I. Introduction

**{¶ 1}** This matter is before the court on a reopened appeal. On September 16, 2011, this court issued its decision in *State v. Houston*, 6th Dist. No. S-10-027, 2011-Ohio-4689, in which we affirmed appellant's, Jimmy L. Houston, sentence following his

guilty plea to two counts of attempted murder, one count of kidnapping, one count of aggravated burglary with a firearm specification, and one count of grand theft.

**{¶ 2}** Thereafter, appellant moved to reopen his appeal pursuant to App.R. 26(B) on the grounds that his appellate counsel was ineffective for failing to assign as error the issue of whether appellant's convictions for aggravated burglary and grand theft should have merged for purposes of sentencing. On February 8, 2012, we granted appellant's application to reopen the appeal so that he could challenge the trial court's failure to merge allied offenses of similar import.

**{¶ 3}** The salient facts giving rise to appellant's convictions are as follows. Appellant recruited his co-defendants Ronald Ruby and Paul Biddwell to break into the home of James and Mary Kohler, in order to steal money and guns believed to be in the home. On July 2, 2009, Biddwell and Ruby entered the house and beat Mr. Kohler, threatening to kill him if he did not give up the money. One of the assailants also beat Mrs. Kohler with his fists. Thereafter, Biddwell and Ruby tied up the Kohlers with black straps that had been taken to the residence for the purpose of securing the Kohlers while the theft took place. The assailants then took over 30 firearms from the residence. Appellant, although he planned the invasion, was not identified by the Kohlers as being present during the invasion.

**{¶ 4}** Appellant, in this reopened appeal, now raises as his sole assignment of error:

The trial court erred when it failed to merge Mr. Houston's convictions for aggravated burglary and grand theft at sentencing.

## II. Analysis

**{¶ 5}** Appellant raises the same assignment as his co-defendant, Ronald Ruby. Because appellant's convictions are based on the same facts as Ruby's convictions, we will adopt the analysis set forth in Ruby's direct appeal:

**{¶ 6}** R.C. 2941.25 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."

The Supreme Court of Ohio recently redefined the test for determining whether multiple offenses should be merged as allied offenses of similar import under R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44, the court overruled its prior decision in *State v.*

*Rance* (1999), 85 Ohio St.3d 632, "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." Pursuant to *Johnson*, the conduct of the accused must be considered in determining whether two offenses should be merged as allied offenses of similar import under R.C. 2941.25. *Id.*, at the syllabus. The determinative inquiry is two-fold: (1) "whether it is possible to commit one offense *and* commit the other with the same conduct," and (2) "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" (Emphasis sic.) *Id.* at ¶ 48-49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 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." *Id.* at ¶ 50. "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." (Emphasis sic.) *Id.* at ¶ 51.

We can summarily conclude at the outset that the counts of aggravated burglary and grand theft should have been merged. * * * The theft of firearms and money was the purpose and grand incidence of the burglary, and only those items were taken from the residence. See *State v.*

*Bridgeman*, 2d Dist. No. 2010 CA 16, 2011-Ohio-2680, ¶ 54 (holding that the offenses of aggravated burglary and grand theft were committed with a single state of mind where the defendant forcibly entered a bank to commit grand theft, threatened the employees with a firearm, and left with money from the bank). *State v. Ruby*, 6th Dist. No. S-10-028, 2011-Ohio-4864, ¶ 55-59.

**{¶ 7}** Therefore, we find appellant's sole assignment of error well-taken, and consequently we find that appellant was prejudiced by appellate counsel's performance.

## III. Conclusion

**{¶ 8}** App.R. 26(B)(9) provides that "[i]f the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment." Accordingly, our September 16, 2011 judgment affirming appellant's sentence is vacated as to the counts of aggravated burglary and grand theft. Our September 16, 2011 judgment is confirmed in all other respects.

**{¶ 9}** The judgment of the Sandusky County Court of Common Pleas is affirmed, in part, and reversed, in part. The sentences imposed for aggravated burglary and grand theft are vacated. The cause is remanded for a new sentencing hearing only on those counts. Costs of this reopened appeal are assessed to the state pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE