[Cite as *State v. Frederick*, 2014-Ohio-548.]

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

State of Ohio — Court of Appeals No. E-13-034

Appellee — Trial Court No. 2012-CR-474

v.

Eddie Frederick — **DECISION AND JUDGMENT**

Appellant — Decided: February 14, 2014

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Matthew H. Kishman, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Eddie Frederick, appeals the judgment of the Erie County Court of Common Pleas, convicting him of gross sexual imposition and assault. We reverse.

A. Facts and Procedural Background

{¶ 2} On November 10, 2012, Frederick's daughter invited her friend, L.M., over to spend the night at Frederick's house. The girls spent the evening together watching movies. Frederick proceeded to give Nyquil to the girls, and L.M. fell asleep on the couch shortly thereafter. She awoke in the middle of the night to find Frederick rubbing her genitals, and noticed something wet on her face. L.M. contacted her father, who took her to the hospital. At the hospital, the wet substance was tested and it was determined that the substance was Frederick's semen. Frederick subsequently confessed that he masturbated and groped L.M. as she slept.

{¶ 3} Frederick was indicted on January 22, 2013. He was charged with one count of gross sexual imposition, two counts of attempted rape, and two counts of abduction. Following plea negotiations, Frederick entered a guilty plea on March 18, 2013, to one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree, and one count of assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree. The remaining charges were dismissed. The trial court held a sentencing hearing on April 25, 2013. Ultimately, Frederick was sentenced to five years in prison on the gross sexual imposition count, and another 180 days in jail for the assault count, to be served consecutive to the prison sentence. Frederick's timely appeal followed.

B. Assignment of Error

{¶ 4} On appeal, Frederick assigns the following error for our review:

The trial court erred to Appellant's prejudice when it failed to merge Appellant's convictions for gross sexual imposition and assault pursuant to R.C. 2941.25.

II. Analysis

{¶ 5} In his sole assignment of error, Frederick argues that his convictions for gross sexual imposition and assault should have merged as allied offenses of similar import. The state notes that Frederick did not raise the merger issue at the plea hearing or at sentencing. However, we have previously held that failure to raise the merger issue does not waive that argument on appeal. *State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 32 (6th Dist.). Rather, on appeal, we review the trial court's sentence for plain error. *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *State v. Richcreek*, 6th Dist. Wood No. WD-09-072, 2011-Ohio-4686, ¶ 65. Additionally, "it is now clearly established law that imposing multiple sentences for allied offenses constitutes plain error." *Id.*, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31.

{¶ 6} Nonetheless, the state argues that Frederick waived this issue because he entered a guilty plea. Essentially, the state concludes that the trial court is free to ignore an allied offenses analysis where the defendant enters a guilty plea. We disagree.

{¶ 7} The Ohio Supreme Court has explained that the trial court's duty to merge allied offenses of similar import is mandatory, not discretionary. *Underwood* at ¶ 26.

Thus, "[a] sentence that contains an allied-offenses error is contrary to law." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 14. "Under R.C. 2941.25, the sentencing court has a duty in the first instance 'to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense.'" *Swiergosz* at ¶ 34, quoting *Underwood* at ¶ 29; *see also State v. Woolum*, 4th Dist. Athens No. 12CA46, 2013-Ohio-5611, ¶ 23 ("Put simply, when the plea agreement is silent on the issue of allied offenses of similar import, the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense."). Therefore, we find that Frederick's decision to enter a guilty plea does not preclude him from raising the merger issue on appeal, nor does it relieve the trial court from its obligation to conduct a merger analysis where "a facial review of the charges and elements of the crimes present a viable question of merger." *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, ¶ 28.

{¶ 8} Having found that Frederick did not waive the merger issue by entering a guilty plea, we now turn to the determination of whether the two offenses for which he was convicted were allied offenses of similar import. While he contends that the offenses should have merged, the state argues that the trial court properly sentenced Frederick because the offenses are not allied offenses of similar import.

{¶ 9} Concerning allied offenses of similar import, 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.

{¶ 10} 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." *Id.* 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.

{¶ 11} Regarding the first step, we conclude that it is possible to commit the offenses of gross sexual imposition and assault with the same conduct. R.C. 2907.05 sets forth the crime of gross sexual imposition as follows:

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

* * *

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶ 12} The crime of assault is set forth in R.C. 2903.13, which states, in relevant part: "(A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." Clearly, one can envision a scenario where the sexual contact that is prohibited by R.C. 2907.05(A) causes physical harm to the victim as prohibited by R.C. 2903.13(A). Thus, the first step under *Johnson* is satisfied.

{¶ 13} Next, we must determine whether the offenses were committed by the same conduct in this case. Our determination is made impossible in this case, however, because the record does not reveal what conduct formed the basis for the assault conviction. The state failed to specify, at the plea hearing or at sentencing, whether Frederick was being charged for assault for providing Nyquil to L.M., or for the sexual act that gave rise to the gross sexual imposition charge. Given the possibility of merger in this case, we conclude that the trial court committed plain error in failing to conduct an allied offenses analysis prior to sentencing. *See State v. Cleveland*, 2d Dist. Montgomery No. 24379, 2011-Ohio-4868, ¶ 20 ("[W]here the record suggests that multiple offenses of

which a defendant has been found guilty may be allied offenses of similar import under R.C. 2941.25, but is inconclusive in that regard, it is plain error for the trial court not to conduct the necessary inquiry to determine whether the offenses are, in fact, allied offenses of similar import[.]").

{¶ 14} Accordingly, we find Frederick's sole assignment of error well-taken.

III. Conclusion

{¶ 15} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is reversed, and this matter is remanded to the trial court solely for a hearing on merger and for resentencing consistent with the requirements of R.C. 2941.25. Costs are assessed to appellee pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

Judgment reversed.

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, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE