

[Cite as *State v. Ulrich*, 2009-Ohio-4610.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22129
vs.	:	T.C. CASE NO. 06CR5284
STEVEN M. ULRICH	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 4<sup>th</sup> day of September, 2009.

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GRADY, J.:

{¶ 1} Defendant, Steven Ulrich, was convicted of four  
 counts of felonious assault arising from his having inflicted  
 a single stab wound to each of two victims. As to each victim,  
 Thomas Morris and Robert Limehouse, Defendant was convicted

of one count of felonious assault causing serious physical harm, R.C. 2903.11(A)(1), and one count of causing physical harm by means of a deadly weapon, R.C. 2903.11(A)(2).

{¶2} The trial court sentenced Defendant to concurrent six year prison terms for each of the two counts of felonious assault pertaining to the attack on Morris, and to concurrent four years on each of the two counts of felonious assault pertaining to the attack on Limehouse. Those four year prison terms were imposed consecutive to the six year sentences imposed for the attack on Morris, for an aggregate sentence totaling ten years.

{¶3} We affirmed Defendant's convictions and sentences on direct appeal. *State v. Ulrich*, Montgomery App. No. 22129, 2008-Ohio-3608. On December 2, 2008, we granted Defendant's App.R. 26(B) application to reopen his appeal on a claim of ineffective assistance of appellate counsel. Ulrich claimed that his counsel was ineffective for failing to argue that the trial court's failure to merge Defendant's multiple convictions for felonious assault as allied offenses of similar import pursuant to R.C. 2941.25 is reversible error. The parties have filed their merit briefs on that issue, and the matter is now before us for a decision on the merits.

ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO MERGE THE OFFENSES OF FELONIOUS ASSAULT UNDER R.C. 2903.11(A)(1) AND R.C. 2903.11(A)(2), FOR EACH ALLEGED VICTIM; ENTERED CONVICTIONS ON BOTH COUNTS FOR EACH ALLEGED VICTIM; AND SENTENCED MR. ULRICH TO MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT. THOSE ERRORS VIOLATED MR. ULRICH'S RIGHTS UNDER R.C. 2941.25; THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 5} The State concedes in its brief that the trial court should have merged the two felonious assault counts as to each victim because felonious assault in violation of R.C. 2903.11(A)(1) (cause serious physical harm) and felonious assault in violation of R.C. 2903.11(A)(2) (cause physical harm by means of a deadly weapon) are allied offenses of similar import under R.C. 2941.25. *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249. After the parties' briefs on this issue were filed, the Ohio Supreme Court announced its decision in *State v. Harris*, Slip Opinion No. 2009-Ohio-3323, wherein the Court held in the syllabus:

{¶ 6} "2. Felonious assault defined in R.C. 2903.11(A)(1) and felonious assault defined in R.C. 2903.11(A)(2) are allied offenses of similar import, and therefore a defendant cannot

be convicted of both offenses when both are committed with the same animus against the same victim. (*State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2 959, followed.)”

{¶ 7} Each of the two felonious assault counts arose from a single stab wound that Defendant inflicted on each of the two victims. On the authority of *Cotton* and *Harris*, the two counts of felonious assault for each victim should have been merged. The State argues, however, that the trial court “constructively” did that and merged the two offenses for each victim when it ordered the multiple sentences for each victim to run concurrently. We disagree.

{¶ 8} When two offenses constitute allied offenses of similar import, Defendant may be convicted of only one. R.C. 2941.25(A). In *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, at ¶26, we stated:

{¶ 9} “We have previously applied a plain-error analysis in cases concerning alleged allied offenses of similar import and found that a defendant’s substantial rights are violated by conviction for two felonies rather than one when the offenses are allied offenses of similar import and committed with a single animus.”

{¶ 10} The Supreme Court of Ohio affirmed our holding in *Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, at ¶25, and held:

{¶ 11} "The appellate court properly merged Winn's kidnapping conviction into his aggravated-robbery conviction and vacated the separate sentence imposed on the kidnapping charge. Accordingly, we affirm the judgment of the court of appeals." In *State v. Underwood*, Montgomery App. No. 22454, 2008-Ohio-4748, we wrote:

{¶ 12} "{¶ 23} R.C. 2941.25 requires a merger of multiple guilty verdicts into a single judgment of conviction, not a merger of sentences upon multiple judgments of conviction. Because the required merger of convictions must precede any sentence the court imposes upon a conviction, Defendant's agreement to the multiple sentences the court imposed could not waive his right to the prior merger that R.C. 2941.25 requires. Neither could his no contest pleas waive his right to challenge his multiple convictions on double jeopardy grounds. *Menna v. New York* (1975), 423 U.S 61, 96 S.Ct. 241, 46 L.Ed.2d 195.

{¶ 13} "{¶ 28} The State asserts that, even if this Court finds that the sentences are erroneous, the error does not amount to plain error and we should uphold the convictions. We disagree. We have held that the failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences. *State v. Coffey*, Miami App. No.2006 CA

6, 2007-Ohio-2; *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, 877 N.E.2d 1020, at ¶ 26.”

{¶ 14} Finally, in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶42, the Ohio Supreme Court indicated that the proper disposition of matters involving allied offenses of similar import committed with a single animus is to merge the crimes into a single conviction.

{¶ 15} The charges of felonious assault in violation of R.C. 2903.11(A) (1) and felonious assault in violation of R.C. 2903.11(A) (2) are, on this record, allied offenses of similar import, and the trial court committed reversible error in failing to merge the guilty verdicts for those two offenses into one conviction for each of the two victims in this case.

{¶ 16} Defendant’s assignment of error is sustained. Defendant’s convictions and sentences will be reversed and the matter remanded to the trial court to merge the multiple convictions as to each victim into a single conviction, and to resentence Defendant accordingly. The guilty verdicts on which the merged convictions are based remain undisturbed by our mandate.

BROGAN, J. And DINKELACKER, J. concur.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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