[Cite as *State v. Huhn*, 2014-Ohio-5559.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SAMANTHA HUHN Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 14 CA 00011 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 13 CR 0057
JUDGMENT:	Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	December 12, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH A. FLAUTT PROSECUTING ATTORNEY 111 North High Street Post Office Box 569 New Lexington, Ohio 43764	JAMES S. SWEENEY JAMES SWEENEY LAW, LLC 341 South Third Street Suite 300 Columbus, Ohio 43215

Wise, J.

{¶1}. Appellant Samantha Huhn appeals from her felony convictions in the Court of Common Pleas, Perry County. Appellee is the State of Ohio. The relevant facts and procedural history leading to this appeal are as follows.

{¶2}. On August 25, 2013, appellant forcibly entered the home of an 84-year-old woman in New Lexington and robbed her of her purse and money. On September 18, 2013, appellant was indicted by the Perry County Grand Jury on one count of aggravated burglary, two counts of aggravated robbery with a firearm specification, and one count of theft from an elderly person, also with a firearm specification.

{¶3}. On December 23, 2013, appellant entered pleas of guilty to one count of aggravated robbery and one count of aggravated burglary, both felonies of the first degree.

{¶4}. The trial court, on February 5, 2014, sentenced appellant to six years in prison on each of the aforesaid two counts, with the sentences to run consecutively.

{¶5}. Appellant filed a notice of appeal on March 6, 2014. She herein raises the following sole Assignment of Error:

{¶6}. "I. THE TRIAL COURT ERRED IN FAILING TO PROPERLY MERGE TWO ALLIED OFFENSES OF SIMILAR IMPORT AT SENTENCING PURSUANT TO R.C. 2941.25."

I.

{¶7}. In her sole Assignment of Error, appellant contends the trial court erred in failing to merge her count of aggravated robbery and count of aggravated burglary as allied offenses of similar import.

{¶8}. R.C. 2941.25 states as follows:

{¶9}. "(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.

{¶10}. "(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}. Historically, Ohio courts have struggled interpreting the language of R.C. 2941.25. *State v. Rogers*, 994 N.E.2d 499, 2013-Ohio-3235, (8th Dist.) ¶ 9. For a number of years, the law in Ohio concerning R.C. 2941.25 was based on *State v. Rance,* 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999-Ohio-291, wherein the Ohio Supreme Court had held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *Id.* The *Rance* court further held that courts should compare the statutory elements in the abstract. *Id.* at 637. However, in 2010, the Ohio Supreme Court decided *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, which specifically overruled the 1999 *Rance* decision. The Court held: "When determining whether two offenses are allied offenses of similar import subject to

merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.,* at the syllabus.[1]

{¶12}. In the case sub judice, our review is hampered by the limited evidentiary specifics about the offenses at issue. The record before us contains the indictment itself and some police report photocopies filed as discovery responses, which of course were never entered as exhibits due to appellant's plea. We also note that the victim's daughter spoke at sentencing; however, the main source in the transcript of information about the events of August 25, 2013 is the following statement made by the prosecutor at the change of plea hearing:

{¶13}. "Yes your Honor, the State believes that the evidence would have show [sic] that the Defendant forced herself into the home of [the victim] on Railroad Street, here in the city of New Lexington. That once she entered the home there was a physical confrontation between the two of them that resulted in the Defendant removing a firearm from the possession of [the victim], she also found her purse which did contain a little less than 1,000.00 dollars and stole the purse from her."

{¶14}. Plea Tr. at 7.

{¶15}. In *State v. Blackford*, Perry App.No. 12 CA 3, 2012-Ohio-4956, this Court also faced a situation where a defendant had entered pleas to various counts, and similarly, the record before us contained "scant documentation, outside of the

[1] As this Court has previously recognized, the Ohio Supreme Court in *Johnson* was unanimous in its judgment and the syllabus. However, the Supreme Court could not agree on how the courts should apply that syllabus holding. The *Johnson* case thus lacks a majority opinion, containing instead two plurality opinions, and a separate concurrence in the judgment and syllabus only. *See State v. Brown*, 5th Dist. No. 12CA63, 995 N.E.2d 955, 2013-Ohio-3109, ¶ 48, citing *State v. Helms,* 7th Dist. No. 08 MA 199, 2012-Ohio-1147, 2012 WL 966810, ¶ 71 (DeGenaro, J., concurring in part and dissenting in part).

indictment itself and a single paragraph in the plea hearing transcript, of the specific 'conduct of the accused' as required by *Johnson." Id.* at ¶ 20. Upon defendant's appeal claiming error in the trial court's failure to merge kidnapping and aggravated robbery offenses as allied offenses, we proceeded to apply the principle that in the absence of an adequate record, an appellate court presumes the regularity of the trial court proceedings, and we thus denied the assignment of error. *Id.* at ¶ 20.

{¶16}. However, subsequent to *Blackford*, this Court decided *State v. Cisco*, Delaware App.No. 13 CAA 04 0026, 2013-Ohio-5412, in which we recognized: "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; if a trial court fails to merge allied offenses of similar import, the defendant has the right to appeal the sentence." *Id.* at ¶ 24, emphasis added. Other Ohio appellate courts have concluded that it is the trial court that should undertake the *Johnson* analysis "in the first instance." *See, e.g.*, *State v. Woolum*, Athens App.No. 12CA46, 2013-Ohio-5611, ¶ 24. The Ohio Supreme Court has also indicated that the failure to merge allied offenses of similar import constitutes plain error. *See State v. Underwood,* 124 Ohio St.3d 365, 922 N.E.2d 923, 2010–Ohio–1, ¶ 31. Furthermore, "[a] defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." *Id*. at ¶ 26.

{¶17}. Thus, although we could attempt to review the police reports and other discovery documents ourselves pursuant to the guidelines of *Johnson*, we hold appellant's sole Assignment of Error must be sustained to the extent that the matter will

be remanded for a limited re-sentencing hearing to analyze appellant's conduct in the offenses at issue and to review potential merger of the offenses for sentencing.

{¶18}. For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Perry County, Ohio, is hereby reversed in part and remanded for further proceedings consistent herewith.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

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