

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **07-0595**
Plaintiff-Appellant : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
FERNANDO CABRALES : Court of Appeals
Defendant-Appellee : Case Number C050682

NOTICE OF CERTIFICATION OF CONFLICT

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FILED
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MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE
SUPREME COURT OF OHIO

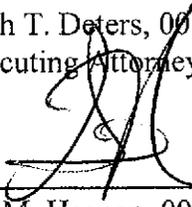
STATE OF OHIO : NO.
Plaintiff-Appellant :
vs. :
FERNANDO CABRALES : NOTICE OF CERTIFICATION OF
 : CONFLICT
Defendant-Appellee :

Pursuant to Rule IV of the Ohio Supreme Court Rules of Practice, Plaintiff-Appellant the State of Ohio gives this Court notice that the First District Court of Appeals has certified a conflict to this Court. The issue certified is: Are the offenses of trafficking in a controlled substance in violation of R.C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

Pursuant to Rule IV, copies of the entry certifying the conflict as well as copies of the decisions that the First District found itself to be in conflict with are attached to this notice.

Respectfully,

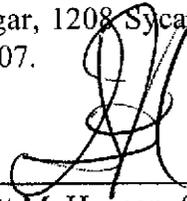
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Certification of Conflict, by United States mail, addressed to Elizabeth E. Agar, 1208 Sycamore Street, Cincinnati, Ohio 45210, counsel of record, this 2nd day of April, 2007.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney

APPENDIX

Entry granting motion to certify conflict	A1
<i>State v. Cabrales</i> , 1 st Dist. Case o. C050682, 2007-Ohio-857	A2
<i>State v. McGhee</i> , 4 th Dist. Case No. 04CA15, 2005-Ohio-1585	A12
<i>State v. Ross</i> , 6 th Dist. Case No. E-92-24, 1992 WL 371887	A30
<i>State v. Moore</i> , 6 th Dist. Case No. E-03-006, 2004-Ohio-685	A33
<i>State v. Burnett</i> , 8 th Dist. Case No. 70618, 1997 WL 127176	A41
<i>State v. Bridges</i> , 8 th Dist. Case No. 80171, 2002-Ohio-3771	A46
<i>State v. Guzman</i> , 10 th Dist. Case No. 02AP-1440, 2003-Ohio-4822	A55
<i>State v. Greitzer</i> , 11 th Dist. Case No. 2003-P-0110, 2005-Ohio-4037	A63
<i>State v. Alvarez</i> , 12 th Dist. Case No. CA2003-03-067, 2004-Ohio-2483	A77



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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

APPEAL NO. C-050682

Appellee,

TRIAL NO. B-0403121D

vs.

ENTRY OVERRULING MOTION FOR
RECONSIDERATION AND GRANTING
MOTION TO CERTIFY CONFLICT

FERNANDO CABRALES,

Appellant.

This cause came on to be considered upon the motion of the appellee for reconsideration and, in the alternative, to certify this appeal to the Ohio Supreme Court as being in conflict with *State v. Greitzer*, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037; as well as a series of cases cited in appellee's motion from the 4th, 6th, 8th, 10th, and 12th appellate districts of Ohio. The Court has also considered the appellant's memorandum in opposition.

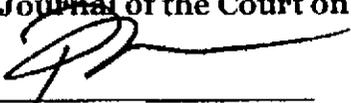
The Court finds that the motion for reconsideration is not well taken and is overruled. The Court finds that the motion to certify a conflict in this appeal is well taken and is granted.

It is the order of this Court that the appeal be certified to the Ohio Supreme Court as being in conflict with the above cases regarding the following issue:

Are the offenses of trafficking in a controlled substance in violation of R. C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

To The Clerk:

Enter upon the Journal of the Court on MAR 29 2007 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

Slip Copy, 2007 WL 624995 (Ohio App. 1 Dist.), 2007 -Ohio- 857
 (Cite as: Slip Copy)

State v. Cabrales Ohio App. 1 Dist., 2007.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, First District, Hamilton
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Fernando CABRALES, Defendant-Appellant.
 No. C-050682.

Decided March 2, 2007.

Criminal Appeal from Hamilton County Court of
 Common Pleas.

Joseph T. Deters, Hamilton County Prosecuting
 Attorney, and Scott Heenan, Assistant Prosecuting
 Attorney, for plaintiff-appellee.

Elizabeth E. Agar, for defendant-appellant.

MARK P. PAINTER, Judge.

*1 {¶ 1} Defendant-appellant Fernando Cabrales
 appeals his convictions for two counts of trafficking
 in marijuana,^{FN1} one count of possession of
 marijuana,^{FN2} and one count of conspiracy.^{FN3}
 We affirm Cabrales's conviction, but sustain his
 challenge to part of his sentence, and remand to the
 trial court for resentencing.

FN1. R.C. 2925.03(A)(1) and (2).

FN2. R.C. 2925.11(A).

FN3. R.C. 2923.01(A)(2).

I. Six Assignments of Error

{¶ 2} Cabrales argues that the trial court erred by
 (1) overruling his motion to suppress the evidence
 seized from his house in California; (2) convicting
 him when Ohio lacked jurisdiction to charge him

with conspiracy; (3) sentencing him on allied
 offenses of similar import (possession of,
 transportation of, and offering to sell the same
 drugs); (4) refusing a jury instruction on the
 lesser-included offense of attempt under one count
 of trafficking; (5) allowing a conviction that was
 based on insufficient evidence and was against the
 weight of the evidence, and failing to grant his
 motion for an acquittal; and (6) imposing
 consecutive sentences.

{¶ 3} Because trafficking in violation of R.C.
 2925.03(A)(2) and possession in violation of R.C.
 2925.11(A) are allied offenses of similar import, we
 vacate the separate sentences for these offenses and
 remand so that the trial court can merge the offenses
 for a single sentence. And in light of the Ohio
 Supreme Court's decision in *State v. Foster*,^{FN4} we
 must also vacate the remaining sentences and
 remand for resentencing. With respect to Cabrales's
 other assignments of error, they are without merit
 and overruled.

FN4. See *State v. Foster*, 109 Ohio St.3d
 1, 2006-Ohio-856, 845 N. E.2d 470.

II. Smuggling Marijuana into Ohio

{¶ 4} On March 26, 2004, Officer Thomas Canada
 of the Regional Narcotics Unit ("RENU") stopped a
 car driven by Sean Matthews for crossing lane lines
 several times on Interstate 74. (RENU is a task
 force that is made up of officers from the Hamilton
 County Sheriff's Department and the Cincinnati
 Police Department and that targets drug traffickers
 in Hamilton County.) Matthews's car had just
 crossed the Indiana-Ohio border when Officer
 Canada noticed the erratic driving.

{¶ 5} Officer Canada approached the car and
 asked Matthews for his driver's license. He noticed
 that Matthews was very tired and asked where he
 was coming from and where he was going.

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Matthews stated that he was coming from Arizona and going to Columbus, Ohio, to visit a friend. When Officer Canada asked who the friend was, Matthews was uncertain.

{¶ 6} Because people generally know whom they are visiting, Officer Canada's suspicion was aroused by Matthews's response. Officer Canada walked back to his vehicle to check Matthews's license. When he approached Matthew's car for a second time, he noticed a marijuana odor. Officer Canada then asked Matthews and his companion, James Longenecker, to get out of the car.

{¶ 7} At this time, Agent Arnold arrived with a drug-sniffing dog. When Officer Canada asked Matthews if he could search the car, Matthews responded, "If you wish." Because Officer Canada did not get a clear affirmative answer to the search request, he asked Agent Arnold to walk his dog around the car. The dog indicated a scent on the left rear passenger door. In Officer Canada's view, this gave him the probable cause he needed to investigate further.

*2 {¶ 8} Underneath a stack of clothes in the back seat was a black duffle bag that emitted a marijuana odor. A subsequent search of the entire car resulted in the confiscation of three duffle bags containing over 300 pounds of marijuana. Matthews and Longenecker were arrested and taken to a police station for questioning.

{¶ 9} During their questioning of Longenecker, the officers discovered that he had been delivering marijuana for a man known as Boo Boo (also known as Bow Bow). Both Matthews and Longenecker agreed to cooperate with RENU by attempting to complete the marijuana delivery. Because Longenecker had completed other deliveries for Boo Boo in the past (from California to Denver), and because it was Matthews's first experience transporting narcotics, the police asked Longenecker to place recorded phone calls to Boo Boo and to complete the delivery.

{¶ 10} Officer Steven Lawson, an undercover narcotics investigator with RENU, took Matthews's place as the driver of the vehicle. After

Longenecker resumed contact with Boo Boo, he explained that rainy weather and traffic had delayed their arrival in Cincinnati. Boo Boo seemed to understand and instructed Longenecker to take the marijuana to a hotel parking lot in the Kenwood suburb. Boo Boo was recorded as stating that a man named Mundy, driving a silver Honda, would meet them and pick up the marijuana at the hotel parking lot.

{¶ 11} A person later identified as Mundy Williams eventually arrived at the hotel parking lot in a silver Honda, but refused to accept delivery at that location. He asked Longenecker and Officer Lawson to follow him to a nearby house to complete the delivery. But Officer Lawson refused to follow him to another location (for safety reasons and because the police were in position at the hotel parking lot).

{¶ 12} Williams became angry that Longenecker and Officer Lawson were not going to follow him to another location, and he attempted to leave. But RENU officers stopped and arrested him before he could exit from the parking lot.

{¶ 13} After Williams's arrest, Longenecker was further questioned about his trafficking activities. Longenecker told the police that he had transported drugs for Boo Boo approximately six to seven times over the previous year, and that he had typically driven the drugs from California to Colorado. When Boo Boo had contacted him about this transport from California to Ohio, Longenecker enlisted the help of Matthews because he knew it would require a long drive.

{¶ 14} Longenecker testified that he and Matthews had driven to Boo Boo's residence on March 24, 2004. They then went to the residence of a person whom he only knew by the name of Jessie. At this house, Longenecker and Boo Boo loaded the car that Matthews had borrowed from a friend with three duffle bags filled with marijuana. Two of the bags fit in the trunk, but the third had to be placed in the back seat.

*3 {¶ 15} After getting some sleep, Longenecker and Matthews began to drive nonstop from

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California to Ohio on the morning of March 25. Throughout the trip, Longenecker kept in contact with Boo Boo by using Matthews's cellular phone. While the original route was supposed to end in Cleveland, Boo Boo called while Longenecker and Matthews were in Indiana, and instructed them to change the delivery to Cincinnati. Almost immediately after they crossed the Indiana-Ohio border on I-74, RENU officers stopped the vehicle based on Matthews's erratic driving.

{¶ 16} With the information Longenecker provided about Boo Boo's description, residence, family, and vehicles, RENU contacted the Riverside, California, police department. The Riverside police believed that the physical description matched Fernando Cabrales. Cabrales's picture was sent by e-mail to RENU officers, and both Longenecker and Matthews separately identified Fernando Cabrales as the "Boo Boo" they had been in contact with throughout the transaction.

{¶ 17} Riverside police obtained a search warrant, and Hamilton County obtained an arrest warrant for Fernando Cabrales. He was arrested on March 31, during a search of his residence. No drugs or cash was seized, but the cellular phone that was used to place the calls between Boo Boo and Longenecker was found in Cabrales's home and seized.

{¶ 18} Cabrales testified in his own defense at trial. He claimed that he had no idea what Longenecker had been delivering, but that he believed that the merchandise might have included clothing. While he admitted to being the voice on the recorded telephone calls, he claimed that he had merely been offering translation services between Longenecker and another party. The jury did not believe this defense and found Cabrales guilty on all charges. He was sentenced to 24 years' incarceration.

III. Motion to Suppress

{¶ 19} In his first assignment of error, Cabrales argues that the trial court erred by overruling his motion to suppress any evidence seized from the search of his residence on March 31, 2004.

Cabrales maintains that the affidavit used to obtain a search warrant contained no probable cause to believe that either drugs or money related to the alleged offenses would be found on the premises. Cabrales's assignment is without merit.

{¶ 20} Appellate review of a suppression ruling involves mixed questions of law and fact.^{FN5} When ruling on a motion to suppress, the trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight of the evidence.^{FN6} An appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence.^{FN7} But the appellate court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard.^{FN8}

FN5. See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8.

FN6. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583.

FN7. *Burnside*, supra, at ¶ 8.

FN8. *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 21} In determining whether a search warrant was adequately supported by probable cause, the reviewing court's duty is merely to ensure that the issuing magistrate or judge had a substantial basis for concluding that probable cause existed.^{FN9} This standard of review grants a great deal of deference to the issuing magistrate.^{FN10}

FN9. See *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640.

FN10. See *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141.

*4 {¶ 22} To establish probable cause to issue a search warrant, an affidavit must contain sufficient

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information to allow a magistrate to draw the conclusion that evidence is likely to be found at the place to be searched.^{FN11} Probable cause exists when a reasonably prudent person would believe that there is a fair probability that the place to be searched contains evidence of a crime.^{FN12}

FN11. See *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741.

FN12. See *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317.

{¶ 23} In the present case, the affidavits used to secure the search and arrest warrants were prepared after Longenecker and Matthews had been arrested and had provided the police with detailed information about Cabrales. The affidavit for the search warrant accurately described Cabrales's primary residence. Both Longenecker and Matthews identified Cabrales's picture as the man they knew as "Boo Boo." They detailed how Cabrales had led them to Jessie's residence to pick up the marijuana and how they were in constant contact with Cabrales throughout their drive from California to Ohio. Longenecker also attested that Cabrales had directed him to deliver the drugs to a hotel parking lot in Kenwood, and that a person named Mundy in a silver Honda would be there to pick up the drugs.

{¶ 24} According great deference to the judge authorizing the search warrant, we hold that the incidents described in the affidavit provided a substantial basis to conclude that probable cause existed to issue the warrant. All of Cabrales's instructions demonstrated his intimate knowledge of the delivery of 300 pounds of marijuana from California to Ohio. Thus the trial court did not err in overruling Cabrales's motion to suppress, and his first assignment of error is overruled.

IV. Jurisdiction

{¶ 25} Cabrales's second assignment of error contends that the trial court erred by denying his motion to dismiss for lack of jurisdiction under R.C. 2901.11 and for failure to state an offense in count

four of the indictment.

{¶ 26} Under R.C. 2901.11, a person is subject to criminal prosecution and punishment in Ohio if "while out of this state, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in this state." While Cabrales argues that there was no evidence that he knew that drugs were being sold or offered for sale in Ohio, all the evidence pointed to the contrary: (1) Longenecker and Matthews were constantly in contact with Cabrales by cellular phone; (2) Cabrales instructed Longenecker and Matthews where to deliver the marijuana; and (3) he provided a description of the person who would be waiting for the marijuana in Cincinnati, as well as the type of car that person would be driving. These facts illustrate that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶ 27} Additionally, the trial court did not err in overruling Cabrales's motion to dismiss count four for failure to state an offense. Count four of the indictment stated that Cabrales, "with purpose to commit or to promote or to facilitate the commission of aggravated trafficking and possession, agreed with another person or persons * * * that one or more of them would engage in conduct that facilitate[d] the commission of any of the specified offenses, and subsequent to [their] entrance into such plan or agreement, a substantial overt act, to wit: the transport of marihuana from California to Hamilton County in furtherance of the conspiracy was committed by the defendant or another person or persons." (Marijuana is spelled with an "h" in the statute. We note that both spellings are acceptable.)

*5 {¶ 28} Under R.C. 2921.01(A), conspiracy prohibits a person from purposely committing, promoting, or facilitating the commission of "felony drug trafficking, manufacturing, processing, or possession offense[s]." Thus the indictment incorrectly used the wording "aggravated trafficking and possession" instead of "felony drug trafficking, manufacturing, processing, or possession." The trial court granted the state's motion to amend the indictment to substitute the

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word "felony" for the word "aggravating" so that the charge would conform with R.C. 2923.01(A).

{¶ 29} Crim.R. 7(D) provides that "[t]he court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." Here, the trial court could have amended the indictment so long as the amendment did not change the name or identity of the crime charged.

FN13

FN13. Crim.R. 7(D); *State v. O'Brien* (1987), 30 Ohio St.3d 122, 125-26, 508 N.E.2d 144.

{¶ 30} In this case, the trial court allowed the amendment merely to substitute the word "felony" for "aggravating." This amendment did not alter the name or identity of the crime charged. The amendment did not add any additional elements that the state was required to prove. And Cabrales has been unable to show that he had been misled or prejudiced by the amendment. Cabrales had notice of both the offense and the applicable statute. Accordingly, the second assignment of error is overruled.

V. Allied Offenses of Similar Import

{¶ 31} In his third assignment of error, Cabrales argues that the possession of, transportation of, and offering to sell the same drugs are allied offenses of similar import under R.C. 2941.25(A), and that no separate animus existed for the commission of each of these crimes. As a result, Cabrales contends that he should not have been sentenced separately for each crime. In support of his argument, Cabrales relies on our decision in *State v. Jennings*,^{FN14} where we held that a defendant may be indicted for both possession and trafficking, but that if the charges stem from a single transaction involving the same type and quantity of drugs, there can only be one conviction under R.C. 2941.25(A).^{FN15} Cabrales's reliance on *Jennings* is misplaced

because it was superseded by the Ohio Supreme Court's decision in *State v. Rance*.^{FN16} But Cabrales is correct that trafficking in drugs in violation of R.C. 2925.03(A)(2) and possession of drugs in violation of R.C. 2925.11(A) are allied offenses of similar import.

FN14. See *State v. Jennings* (1987), 42 Ohio App.3d 179, 537 N.E.2d 685.

FN15. *Id.*

FN16. See *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, 710 N.E.2d 699.

{¶ 32} R.C. 2941.25(A) provides, "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment * * * may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 33} In *Rance*, the Ohio Supreme Court held that to determine whether crimes are allied offenses of similar import under R.C. 2941.25(A), courts must assess "whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other." ^{FN17} The *Rance* test requires a strict textual comparison of the statutory elements, without reference to the particular facts of the case, to determine if one offense requires proof of an element that the other does not. If the elements do correspond, the defendant may be convicted and sentenced for only one offense, unless the court finds that the defendant committed the crimes separately or with separate animus.^{FN18} Therefore, we must determine whether the possession and trafficking counts involved allied offenses of similar import or whether the charged offenses were committed separately or with separate animus.^{FN19}

FN17. *Id.* at 638.

FN18. *Id.* at 638-39.

FN19. *Id.*

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*6 {¶ 34} Since *Rance*, we have held that possession and trafficking in the same type and quantity of a controlled substance are not allied offenses, because when the elements of each offense are compared in the abstract, each requires proof of a fact that the other does not.^{FN20} But this analysis was restricted to trafficking in violation of R.C. 2925.03(A)(1)-selling or offering to sell a controlled substance-and did not involve trafficking in violation of R.C. 2925.03(A)(2)-preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance.

FN20. See *State v. Foster*, 1st Dist. No. C-050378, 2006-Ohio-1567; see, also, *State v. Salaam*, 1st Dist. No. C-020324, 2003-Ohio-1021, and *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

{¶ 35} A possession charge only requires proof that a defendant obtained, possessed, or used a controlled substance, while a trafficking charge under R.C. 2925.03(A)(1) requires proof that the defendant was either selling or offering to sell the controlled substance. The added mens rea of intending to sell or offering to sell the controlled substance is the differentiating element. As we have said previously, "It is possible to possess [marijuana] without offering it for sale, and it is possible to sell or offer to sell [marijuana] without possessing it, e.g., when one serves as a middleman." ^{FN21} Accordingly, possession and trafficking in violation of R.C. 2925.03(A)(1) are not allied offenses of similar import.

FN21. *Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

{¶ 36} But Cabrales also claims that possession of drugs in violation of R.C. 2925.11(A) and trafficking in drugs in violation of R.C. 2925.03(A)(2) are allied offenses of similar import. We agree. Although the Tenth and Twelfth Appellate Districts have ruled otherwise,^{FN22} for a person to commit a trafficking offense in violation

of R.C. 2925.03(A)(2), that person would also have to violate R.C. 2925.11(A)-possession of drugs. The trafficking statute prohibits a person from preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance when the defendant knows or reasonably believes that the controlled substance is intended for resale. For a person to prepare for shipment or transport drugs, that person would necessarily have to possess the drugs. The statutory elements of these crimes correspond to such a degree that the commission of one crime will result in the commission of the other.

FN22. See *State v. Guzman*, 10th Dist. No. 02AP-1440, 2003-Ohio-4822; *State v. Alvarez*, 12th Dist. No. CA2003-03-067, 2004-Ohio-2483.

{¶ 37} Thus, Cabrales's third assignment of error is sustained as to possession of drugs in violation of R.C. 2925.11(A) and trafficking in drugs in violation of R.C. 2925.03(A)(2). We reverse the sentences for these offenses and remand this case so that the trial court may resentence Cabrales in accordance with this decision-so that Cabrales is sentenced for only one of these offenses.

{¶ 38} We also note that Cabrales claims that the two counts of trafficking involved allied offenses, and that he should not have been sentenced separately for these offenses. But Cabrales was charged under two separate subsections of R.C. 2925.03(A). Subsection (1) forbids a person from selling or offering to sell a controlled substance, while subsection (2) prohibits a person from preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance when the defendant knows or reasonably believes that the controlled substance is intended for resale. Because Cabrales needed a separate animus to commit each crime-offering to sell and transporting-these crimes were not allied offenses of similar import.

VI. Lesser-Included Offense

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*7 {¶ 39} Cabrales's fourth assignment of error argues that the trial court erred by refusing his request for a jury instruction on the lesser-included offense of attempt under count one of the indictment-the trafficking count that prohibited him from selling or offering to sell a controlled substance. Cabrales contends that the jury could have found that he had not offered the drugs for sale, or had even known that a sale was involved, but that he knew or should have known that the drugs were being delivered. Cabrales further rationalizes that since the delivery was never completed, the jury would likely have found him guilty only of attempting to traffick in a controlled substance. Cabrales's argument is without merit.

{¶ 40} We note the oddity of this question-how does a person *attempt to offer to sell* a controlled substance? Doesn't a person merely offer to sell the drug, not attempt to offer to sell? It seems the answer is within the statute.

{¶ 41} R.C. 2925.03(A)(1) prohibits a person from selling or *offering to sell* a controlled substance. For purposes of R.C. 2925.03(A)(1), the phrase " 'offer to sell a controlled substance,' simply means to declare one's readiness or willingness to sell a controlled substance or to present a controlled substance for acceptance or rejection." FN23 And for a person to be convicted of trafficking, the delivery of the narcotics need not be completed. As the Ohio Supreme Court has stated, "A person can 'offer to sell a controlled substance' in violation of R.C. 2925.03(A)(1) without transferring a controlled substance to the buyer." FN24 Thus the statute subsumes an attempt to traffick in a controlled substance within its definition-there does not need to be an actual delivery.

FN23. See *State v. Henton* (1997), 121 Ohio App.3d 501, 510, 700 N.E.2d 371, citing *State v. Patterson* (1982), 69 Ohio St.2d 445, 432 N.E.2d 802.

FN24. See *State v. Scott* (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798.

{¶ 42} Additionally, the state presented sufficient evidence at trial from which the jury could reasonably have inferred that Cabrales had acted as a conspirator in offering to sell a controlled substance in violation of R.C. 2925.03(A)(1). Cabrales was constantly in contact with Longenecker and Matthews by cellular phone, he instructed Longenecker and Matthews where to deliver the marijuana, and he provided descriptions of the person and the car that were to be waiting for the marijuana in Cincinnati. These facts illustrate that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶ 43} Accordingly, the trial court did not err in refusing to instruct the jury on attempt, and we overrule Cabrales's fourth assignment of error.

VII. Sufficiency and Weight; Crim.R. 29 Motion for Acquittal

{¶ 44} In his fifth assignment of error, Cabrales argues that there was insufficient evidence to convict him, that his conviction were against the manifest weight of the evidence, and that the trial court erred by denying his Crim.R. 29 motion for an acquittal.

{¶ 45} When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt. FN25

FN25. See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

*8 {¶ 46} A review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror." FN26 We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact

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clearly lost its way and created a manifest miscarriage of justice.^{FN27} A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.^{FN28}

FN26. See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

FN27. *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

FN28. *Id.*

{¶ 47} And the standard of review for the denial of a Crim.R. 29(A) motion to acquit is the same as the standard of review for the sufficiency of the evidence. A motion for a judgment of acquittal should not be granted when reasonable minds can reach different conclusions as to whether each element of the crime charged has been proved beyond a reasonable doubt.^{FN29}

FN29. See Crim.R. 29; see, also, *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

{¶ 48} Cabrales was found guilty of two counts of trafficking in a controlled substance, one count of possession of a controlled substance, and conspiracy. The trafficking statute prohibits a person from knowingly (1) selling or offering to sell a controlled substance, or (2) preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance that the person has reasonable cause to believe will be resold.^{FN30} The possession statute forbids a person from knowingly obtaining, possessing, or using a controlled substance.^{FN31} And the conspiracy statute proscribes a person from facilitating and planning with another person the commission of trafficking in or possessing drugs.^{FN32}

FN30. R.C. 2925.03(A)(1) and (2).

FN31. R.C. 2925.11(A).

FN32. R.C. 2923.01(A)(1).

{¶ 49} The state presented the testimony of coconspirators Longenecker and Matthews, as well as the testimony of RENU Officers Canada, Morgan, and Lawson, and of Riverside, California, Police Officer Robert Roggeveen.

{¶ 50} Longenecker testified that he had transported drugs several times for a man named "Boo Boo," from California to Colorado. He stated that Boo Boo had contacted him in March 2004 to make a delivery to Ohio. Because of the nonstop driving that was involved in the drug delivery, Longenecker had enlisted the assistance of Matthews to make the drive from California to Ohio.

{¶ 51} Longenecker further testified that he and Matthews had met at Boo Boo's residence on March 24. They then drove to another person's home to pick up three duffle bags of marijuana weighing over 300 pounds. The following day, Longenecker and Matthews began the drive to Ohio. Along the journey, Boo Boo would regularly call to chart their progress. Once Longenecker and Matthews reached Indiana, Boo Boo instructed them to change their delivery destination from Cleveland to Cincinnati. Once they crossed the Indiana-Ohio border, RENU Officer Canada pulled them over for traffic infractions.

{¶ 52} Officer Canada testified that his suspicions had been aroused when Matthews had failed to answer questions competently. He also had noticed an odor of marijuana when he approached the car for a second time. When Officer Canada was not given a clear affirmative on his request to search the vehicle, he asked Agent Arnold and his drug-sniffing dog to walk around the car. The dog indicated a scent on the left rear passenger door. Officer Canada then searched the car where the dog had indicated, and he found a duffle bag containing marijuana. In all, there was over 300 pounds of marijuana in the vehicle.

*9 {¶ 53} Longenecker and Matthews both testified that, after they were arrested, they had

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cooperated with the RENU officers. Officer Lawson sat in the place of Matthews and attempted to make the drug delivery with Longenecker. They contacted Boo Boo again, and he instructed them to deliver the drugs to a hotel parking lot in Kenwood. Longenecker also testified that Boo Boo had told them that a person named Mundy would pick up the marijuana in a silver Honda.

{¶ 54} A person later identified as Mundy arrived in the hotel parking lot in a silver Honda, but refused delivery at that location. He wanted Longenecker and Officer Lawson to follow him to a nearby house, but they refused. When Williams became angry that Longenecker and Officer Lawson would not follow him to another location, he attempted to leave. But RENU officers arrested him before he could exit from the parking lot.

{¶ 55} Based on the information that Longenecker had provided about Boo Boo's description, residence, family, and vehicles, RENU contacted the Riverside, California, police department. The Riverside police believed that the physical description matched Fernando Cabrales. The Riverside police then e-mailed a picture to RENU officers. Both Longenecker and Matthews independently confirmed that Cabrales was the Boo Boo who had organized the transportation of over 300 pounds of marijuana from California to Ohio.

{¶ 56} Thus, the evidence demonstrated that Longenecker and Matthews were constantly in contact with Cabrales by cellular phone, that Cabrales instructed Longenecker and Matthews where to deliver the marijuana, and that he provided descriptions of the person and car that were to be waiting for the marijuana in Cincinnati. It is clear that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶ 57} We conclude that a rational factfinder, viewing the evidence in a light most favorable to the state, could have found that the state had proved beyond a reasonable doubt that Cabrales had possessed, trafficked in, and conspired to deliver over 300 pounds of marijuana in Hamilton County. Therefore, the evidence presented was legally

sufficient to sustain the convictions. And the trial court did not err in overruling Cabrales's Crim.R. 29(A) motion.

{¶ 58} Although Cabrales insists that he was merely translating instructions to Longenecker and Matthews, our review of the record does not persuade us that the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding Cabrales guilty of possession of a controlled substance, two counts of trafficking in a controlled substance, and conspiracy. Therefore, his convictions were not against the manifest weight of the evidence.

{¶ 59} We overrule Cabrales's fifth assignment.

VIII. Sentencing

{¶ 60} In Cabrales's sixth and final assignment of error, he challenges the trial court's imposition of consecutive sentences. He maintains that the sentences violated his rights to a jury trial and due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Sections Five and Sixteen, Article I, of the Ohio Constitution, because the sentences were made consecutive based on facts not determined by a jury or proved beyond a reasonable doubt. Cabrales also contends that the Ohio Supreme Court's decision in *State v. Foster*,^{FN33} which held that the imposition of consecutive sentences based on judicial factfinding is unconstitutional, retroactively modifies a defendant's sentence in violation of the Ex Post Facto Clause of the United States Constitution.

FN33. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

*10 {¶ 61} In this case, the trial court imposed consecutive sentences after making findings under R.C. 2929.14(E)(4) that Cabrales's crimes reflected a total disregard for the safety of the public. The court also determined that consecutive terms were necessary to protect the public from future crimes, since it believed that Cabrales had transported drugs

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into Colorado multiple times and that a return trip to Cleveland had been discussed.

{¶ 62} In *Foster*, the Ohio Supreme Court noted that “R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) require trial courts that impose consecutive sentences to make the statutorily enumerated findings and to give reasons at the sentencing hearing to support those findings for review on appeal.”^{FN34} But because the “total punishment increases through consecutive sentences only after judicial findings beyond those determined by the jury or stipulated to by the defendant, R.C. 2929.14(E)(4) violates principles announced in *Blakeley*”^{FN35} and is therefore unconstitutional.

FN34. *Id.* at ¶ 66, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

FN35. *Id.* at ¶ 67.

{¶ 63} The court's remedy was to sever R.C. 2929.14(E)(4) as unconstitutional and to keep the remaining unaffected provisions of the sentencing statutes. After the severance, judicial factfinding is not required before a trial court imposes consecutive prison terms. Trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to provide reasons for imposing a sentence involving consecutive prison terms.^{FN36}

FN36. *Id.* at ¶ 100.

{¶ 64} In this case, the trial court imposed consecutive sentences for possession and the two trafficking offenses after it had made findings based on an unconstitutional statute. We must sustain the assignment of error, vacate the consecutive sentences, and remand the case for resentencing in light of *Foster*. But Cabrales's other argument is without merit. We have previously held that the Ohio Supreme Court's decision in *Foster* does not violate ex post facto and due process principles.^{FN37}

FN37. See *State v. Bruce*, 1st Dist. No. C-060456, 2007-Ohio-175.

{¶ 65} For all the foregoing reasons, we hereby vacate the sentences imposed by the trial court and remand this case for resentencing in light of *Foster*^{FN38} and for the imposition of only one sentence for the trafficking offense in violation of R.C. 2925.03(A)(2) and the possession offense in violation of R.C. 2925.11(A). In all other respects, the trial court's judgment is affirmed.

FN38. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

Judgment affirmed in part, sentence vacated, and cause remanded for resentencing.

HENDON and WINKLER, JJ., concur.
 RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.
 Please Note:

The court has recorded its own entry on the date of the release of this decision.

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H

State v. McGhee Ohio App. 4 Dist., 2005.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District,
 Lawrence county.

STATE of Ohio, Plaintiff-Appellee,

v.

Jerome MCGHEE, Defendant-Appellant.

No. 04CA15.

March 30, 2005.

Background: Defendant was convicted in the Court of Common Pleas, Lawrence County, of possession of cocaine, trafficking in cocaine, possession of crack cocaine, trafficking in crack cocaine, possession of criminal tools, and having a weapon while under a disability, and received the maximum sentence on each count. Defendant appealed, and defendant's appointed counsel filed *Anders* brief.

Holdings: The Court of Appeals, Harsha, J., held that:

- (1) offenses of trafficking in crack cocaine and possession of crack cocaine were not allied offenses of similar import;
- (2) defense counsel did not have a conflict of interest;
- (3) defendant was not prejudiced by counsel's failure to request findings of fact;
- (4) counsel was not ineffective for failing to move to discharge jury;
- (5) defendant's statement to law enforcement officers was knowingly and voluntarily given;

(6) defendant was not held in jail pending trial solely on the pending charges;

(7) trial court could not sentence defendant to the maximum sentence for each offense;

(8) trial court could impose consecutive sentences;

(9) sufficient evidence supported convictions;

(10) search warrant was supported by probable cause; and

(11) convictions were not against the manifest weight of the evidence.

Affirmed in part, reversed in part, and remanded.

[1] Double Jeopardy 135H ↔ 146

135H Double Jeopardy

135HV Offenses, Elements, and Issues
 Foreclosed

135HV(A) In General

135Hk139 Particular Offenses, Identity of

135Hk146 k. Drugs and Narcotics.

Most Cited Cases

Offenses of trafficking in crack cocaine and possession of crack cocaine were not allied offenses of similar import such that it was impossible to commit one without committing the other, and thus defendant's conviction of both offenses did not violate double jeopardy; it was possible to obtain, possess, or use crack cocaine without preparing it for shipment or distributing it, and it was possible to distribute crack cocaine, or prepare it for distribution, without actually possessing it, such as by directing its transportation or serving as middle man in a drug sale. U.S.C.A. Const.Amend. 5; R.C. §§ 2925.03(A)(2), .11(A), 2941.25(A, B).

[2] Criminal Law 110 ↔ 641.5(5)

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110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.5 Number of Counsel; Codefendants and Conflict of Interest

110k641.5(5) k. In General. Most

Cited Cases

Fact that individual who previously lived in defendant's apartment was a former client of defense counsel did not create a conflict of interest at trial on charges including possession of controlled substances that were found in apartment, and thus such prior representation did not constitute ineffective assistance of counsel, despite defendant's contention that prior representation prevented counsel from vigorously arguing that the controlled substances belonged to former client; counsel no longer represented former client, and counsel in fact argued at trial that the controlled substances belonged to someone who previously resided in apartment, such as former client. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ↪641.13(2.1)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.13 Adequacy of Representation

110k641.13(2) Particular Cases and

Problems

110k641.13(2.1) k. In General.

Most Cited Cases

Defendant was not prejudiced by trial counsel's failure to request findings of fact when trial court denied defendant's motion to dismiss on speedy trial grounds, and thus such failure did not constitute ineffective assistance of counsel, even though better practice would have been to request such findings; record was sufficient to allow review of the alleged violation of defendant's speedy trial rights, and a request for findings would not have changed outcome of motion. U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 12(F).

[4] Criminal Law 110 ↪641.13(2.1)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.13 Adequacy of Representation

110k641.13(2) Particular Cases and

Problems

110k641.13(2.1) k. In General.

Most Cited Cases

Defense counsel did not provide ineffective assistance at drug trial by failing to move to discharge the jury after new indictment was issued; rule entitling defendant to discharge of jury in case of substantive amendment of indictment did not apply because State did not amend indictment, but rather grand jury issued new indictment and State dismissed original indictment. U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 7(D).

[5] Criminal Law 110 ↪412(4)

110 Criminal Law

110XVII Evidence

110XVII(M) Declarations

110k411 Declarations by Accused

110k412 In General

110k412(4) k. Circumstances Affecting Admissibility in General. Most Cited Cases

Criminal Law 110 ↪412.2(5)

110 Criminal Law

110XVII Evidence

110XVII(M) Declarations

110k411 Declarations by Accused

110k412.2 Right to Counsel; Caution

110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases

Drug defendant's statement to law enforcement officers was knowingly and voluntarily given, and thus trial court's refusal to suppress statement did not deprive defendant of his constitutional right to be free from compelled self-incrimination, even if statement was recorded without defendant's

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knowledge; defendant was informed of, and waived, his *Miranda* rights before making statement, there was no evidence of coercion, and defendant's lack of knowledge that statement was being recorded did not make statement involuntary. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 10.

[6] Criminal Law 110 ⚡577.11(1)

110 Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966

110k577.11 Status of Persons Affecting Trial Time

110k577.11(1) k. In General;

Confinement. Most Cited Cases

Defendant who remained in jail pending trial on drug and other charges, and against whom probation officer placed a holder, was not held solely on the pending charges, and thus State's failure to bring defendant to trial within 90 days did not violate defendant's speedy trial rights pursuant to speedy trial provision triple counting days for which a defendant is held solely on the pending charges, even though the holder was also based on the pending charges; placement of holder meant that defendant would not have been released from jail if he posted bail, and probation violation was separate cause with different scope of inquiry. R.C. § 2945.71(E).

[7] Sentencing and Punishment 350H ⚡373

350H Sentencing and Punishment

350HIII Sentencing Proceedings in General

350HIII(G) Hearing

350Hk369 Findings and Statement of Reasons

350Hk373 k. Sufficiency. Most Cited

Cases

Trial court could not sentence defendant convicted of possession of and trafficking in controlled substances, among other charges, to the maximum sentence for each offense, even though trial court outlined defendant's extensive criminal history, opined that defendant lied during his trial testimony, and observed that defendant expressed no remorse for his actions, where trial court did not find that defendant committed the worst forms of the

offenses or that he posed the greatest likelihood of committing future crimes, and defendant did not meet the statutory definition of a major drug offender or a repeat violent offender. R.C. §§ 2929.14(C), .19(B)(2)(d).

[8] Sentencing and Punishment 350H ⚡596

350H Sentencing and Punishment

350HIII Sentence on Conviction of Different Charges

350HIII(B) Consecutive or Cumulative Sentences

350HIII(B)3 Factors and Purposes

350Hk596 k. Offense Committed While on Bail, Probation, or Parole. Most Cited Cases

Sentencing and Punishment 350H ⚡601

350H Sentencing and Punishment

350HIII Sentence on Conviction of Different Charges

350HIII(B) Consecutive or Cumulative Sentences

350HIII(B)3 Factors and Purposes

350Hk601 k. Offender's Criminal History or Other Misconduct. Most Cited Cases

Trial court that sentenced defendant following his conviction on charges including possession of and trafficking in controlled substances could impose consecutive sentences, where trial court found that, based on defendant's extensive record, consecutive sentences were necessary to protect public from future claims or crimes and to punish defendant, that consecutive sentences were not disproportionate to the seriousness of defendant's conduct, that defendant was under community control sanctions and probation at time he committed the offenses, and that no single prison term could adequately reflect the seriousness of defendant's offenses. R.C. §§ 2929.14(E)(4), .41(A).

[9] Controlled Substances 96H ⚡80

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk80 k. Possessory Offenses. Most

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Cited Cases

Controlled Substances 96H ↔82

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk82 k. Sale, Distribution, Delivery, Transfer or Trafficking. Most Cited Cases

Sufficient evidence supported conviction for possession of cocaine, trafficking in cocaine, possession of crack cocaine, and trafficking in crack cocaine; county drug task force executed search warrant at apartment defendant shared with girlfriend and found crack cocaine in various places, packaged in small plastic bags typically used for resale, as well as powder commonly used to cut cocaine for resale, and cash, including cash used in a controlled purchase a few days earlier, and defendant admitted to investigator that he sold crack, and that the drugs in the apartment belonged to him. R.C. §§ 2925.03(A)(2), .11(A).

[10] Controlled Substances 96H ↔74

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk74 k. Substance and Quantity in General. Most Cited Cases

Sufficient evidence at drug trial established the weight of powdered and crack cocaine recovered in his apartment; forensic scientist's report revealed that 16.81 grams of crack cocaine and 34.58 grams of cocaine were recovered.

[11] Controlled Substances 96H ↔89

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk89 k. Paraphernalia and Instrumentalities. Most Cited Cases

Sufficient evidence supported conviction for possession of criminal tools; police officer testified that officers discovered c-clamp in defendant's apartment, and defendant admitted that he used c-clamp to turn powder cocaine into crack cocaine. R.C. § 2923.24.

[12] Weapons 406 ↔17(4)

406 Weapons

406k17 Criminal Prosecutions

406k17(4) k. Weight and Sufficiency of Evidence. Most Cited Cases

Sufficient evidence supported conviction for having a weapon while under a disability; defendant had three previous convictions for felony possession of crack cocaine, police officers executing a search warrant found gun in defendant's bedroom and bullets in kitchen cabinet, firearms examiner testified that gun was operable, and defendant admitted that gun was his. R.C. § 2923.13(A)(3).

[13] Controlled Substances 96H ↔146

96H Controlled Substances

96HIV Searches and Seizures

96HIV(C) Search Under Warrant

96Hk144 Affidavits, Complaints, and Evidence for Issuance of Warrants

96Hk146 k. Probable Cause in General. Most Cited Cases

Search warrant pursuant to which police officers searched defendant's apartment was supported by probable cause, and thus drugs and other items found in apartment were admissible at defendant's trial on charges including possession of cocaine and possession of crack cocaine, despite defendant's contention that the events forming the basis for the search warrant occurred while defendant was in jail; affidavit supporting warrant established evidence of drug activity at defendant's apartment. U.S.C.A. Const.Amend. 4.

[14] Controlled Substances 96H ↔80

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk80 k. Possessory Offenses. Most Cited Cases

Controlled Substances 96H ↔82

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

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96Hk82 k. Sale, Distribution, Delivery,
 Transfer or Trafficking. Most Cited Cases

Controlled Substances 96H ⇌89

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk89 k. Paraphernalia and
 Instrumentalities. Most Cited Cases

Weapons 406 ⇌17(4)

406 Weapons

406k17 Criminal Prosecutions

406k17(4) k. Weight and Sufficiency of
 Evidence. Most Cited Cases

Defendant's conviction for possession of and trafficking in drugs, possession of criminal tools, and having a weapon while under a disability were not against the manifest weight of the evidence, despite defendant's contention that he admitted ownership of drugs and other items found in his apartment solely to protect his girlfriend from being prosecuted for possession of the items; jury was free to disbelieve defendant's last-minute denial of ownership.

Defendant's conviction for possession of and trafficking in drugs, possession of criminal tools, and having a weapon while under a disability were not against the manifest weight of the evidence, despite defendant's contention that he admitted ownership of drugs and other items found in his apartment solely to protect his girlfriend from being prosecuted for possession of the items; jury was free to disbelieve defendant's last-minute denial of ownership.

Philip J. Heald, Ironton, Ohio, for Appellant Jerome McGhee.

J.B. Collier, Jr., Prosecuting Attorney and Jeffrey M. Smith, Assistant Prosecuting Attorney, Ironton, Ohio, for Appellee.

DECISION AND JUDGMENT ENTRY

HARSHA, J.

*1 {¶ 1} Jerome McGhee appeals his convictions

and sentences for trafficking in crack cocaine, possession of crack cocaine, trafficking in cocaine, possession of cocaine, possession of criminal tools, and having a weapon while under a disability. His appointed counsel advised this Court that he has reviewed the record and can discern no meritorious claims for appeal. Accordingly, under *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, counsel has moved to withdraw.

{¶ 2} After independently reviewing the record, we disagree with counsel's assessment because the record contains a meritorious claim. Specifically, we find that the trial court erred in sentencing Appellant to the maximum sentences available without making the requisite findings or stating its reasons for those findings. Because the error is clear from the record, we grant appellate counsel's motion to withdraw and reverse and remand this matter to the trial court for re-sentencing.

{¶ 3} In October 2003, the Lawrence County Drug Task Force executed a search warrant on the apartment Appellant shared with his girlfriend. The Task Force discovered cocaine, crack cocaine, marijuana, a gun, bullets, a scale, and a C-clamp or vice, while executing the warrant. The grand jury indicted Appellant on seven charges; however, the grand jury later issued a second indictment based on the same factual basis, modifying the charges brought against Appellant. The State dismissed the original indictment.

{¶ 4} A jury found Appellant guilty of all charges in the second indictment and the trial court sentenced Appellant to a total of sixteen years imprisonment, suspended his driver's license for five years, and fined him \$75,000. The trial court appointed new counsel for Appellant after sentencing. Newly appointed counsel filed a motion to withdraw as counsel, notifying this Court that he could discern no meritorious issues for appeal, and filed an *Anders* brief.

{¶ 5} In *Anders*, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. *Id.* at 744. Counsel

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must accompany the request with a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel also must furnish the client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that the client chooses. *Id.* Once these requirements have been satisfied, the appellate court must then fully examine the proceedings below to determine if meritorious issues exist. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.* Alternatively, if the appellate court concludes that any of the legal points are arguable on their merits, it must afford the appellant the assistance of counsel to argue the appeal. *Id.*

*2 {¶ 6} Here, Appellant's counsel satisfied the requirements set forth in *Anders*. Additionally, Appellant has filed a pro se brief setting forth additional proposed assignments of error. Accordingly, we will examine appointed counsel's proposed assignments of error, the proposed assignments of error raised by Appellant, and the entire record to determine if this appeal lacks merit. Appointed counsel raises the following proposed assignments of error: "I. Counts One and Two, and Counts Three and Four of the Indictment are allied offenses of similar import, and therefore Mr. McGhee's convictions were in violation of his rights against double jeopardy, and he should not have been convicted and/or sentenced on all of the charges. II. Mr. McGhee's trial counsel had a conflict of interest that resulted in ineffective assistance of counsel. III. The trial court erred by not suppressing Mr. McGhee's statement to law enforcement officers, as it was not knowingly and voluntarily given. IV. Failure to request findings of fact as to trial court's denial of Appellant's motion to dismiss was ineffective assistance of trial counsel, and therefore Appellant should be entitled to a new trial. V. The trial court erred by not granting Mr. McGhee's Motion to Dismiss on speedy trial grounds. VI. The trial judge failed to make the proper findings upon which to impose maximum sentences and consecutive sentences, and therefore the sentence should be vacated and the matter remanded to the trial court for re-sentencing.

VII. The cumulative effect of errors in the trial court deprived Mr. McGhee of a fair trial."

{¶ 7} Appellant assigns the following proposed errors in his pro se brief: "I. Reversal of the conviction is warranted when the accused is deprived of a fair trial as guaranteed by the United States and Ohio Constitutions and the resulting convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. II. Appellant was denied effective assistance of counsel as guaranteed by the United States and Ohio Constitutions when counsel failed to file a motion to discharge jury after amendment to cure a variance in the evidence. III. The trial court erred by ordering a consecutive sentence when it failed to make all the necessary findings required by law under R.C. 2929.14(E)(4), and in doing so, McGhee was sentenced to 16 years, when he should've been sentenced to 8 years. IV. Reversal of a conviction is warranted when the accused is deprived of a fair trial as guaranteed by the United States and Ohio Constitutions when the evidence in the case shows "actual innocence" and when the resulting conviction is not supported."

I.

{¶ 8} In his first proposed assignment of error, counsel suggests that if counts one (trafficking in crack cocaine) and two (possession of crack cocaine) of the indictment are allied offenses of similar import, the trial court may have violated Appellant's rights against double jeopardy by convicting and sentencing him on both counts. Similarly, he contends that counts three (trafficking in cocaine) and four (possession of cocaine) may also be allied offenses of similar import.

*3 {¶ 9} The double jeopardy protections afforded by the federal and state Constitutions guard citizens against successive prosecutions and cumulative punishments for the "same offense." *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 433 N.E.2d 181, 184. In *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309, the United States Supreme Court held that the test for determining whether two offenses are the "same"

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for double jeopardy purposes, i.e., one offense as opposed to two separate offenses, is whether each offense requires proof of an element that the other does not. Thus, where two offenses arise from one course of conduct, the Double Jeopardy clauses protection from cumulative punishments do not apply.

{¶ 10} In *State v. Rance*, 85 Ohio St.3d 632, 635, 1999-Ohio-291, 710 N.E.2d 699, the Ohio Supreme Court recognized that a legislature “may prescribe the imposition of cumulative punishments for crimes that constitute the same offense under *Blockburger* without violating the federal protection against double jeopardy or corresponding provisions of a state’s constitution.” Therefore, when a legislature intends to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, application of *Blockburger* is improper and the legislature’s expressed intent is dispositive. *Id.*, citing *Ohio v. Johnson* (1984), 467 U.S. 493, 499, 104 S.Ct. 2536, 2541, 81 L.Ed.2d 425, 433. Moreover, citing *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535, 542, the Court held that “[T]he Double Jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”^{FN1} Finally, the Court determined that Ohio’s multiple-count statute, R.C. 2941.25, “is a clear indication of the General Assembly’s intent to permit cumulative sentencing for the commission of certain offenses.” *Id.*, citing *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65, 461 N.E.2d 892, 895.

FN1. While we might find the dissent in *Hunter* to be a more tenable interpretation of the protection afforded by the Double Jeopardy clause, we are not in a position to substitute our judgment for that of either Supreme Court.

{¶ 11} R.C. 2941.25 permits a defendant to be punished for multiple offenses of dissimilar import. R.C. 2941.25(B); *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817. “If, however, a defendant’s actions ‘can be construed to constitute two or more allied offenses of *similar*

import,’ the defendant may be convicted (i.e., found guilty and punished) of only one.” *Rance* at 636, 710 N.E.2d 699, citing R.C. 2941.25(A). But where a defendant commits offenses of similar import either separately or with a separate animus, he may be punished for both under R.C. 2941.25(B). *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14, 676 N.E.2d 80, 81.

{¶ 12} Therefore, under *Rance*, the first step is to determine whether the offenses are “allied offenses of similar import” within the meaning of R.C. 2941.25. Two offenses are “allied” if the elements of the crimes “ ‘correspond to such a degree that the commission of one crime will result in the commission of the other.’ ” *Id.* at 636, 710 N.E.2d 699. If not, the court’s inquiry ends because the crimes are offenses of dissimilar import and the defendant may be convicted for both. R.C. 2941.25(B); *id.* However, if the elements do correspond, the court must proceed to a second step and review the defendant’s conduct to determine if the crimes were committed separately or with a separate animus for each crime. If so, the trial court may convict the defendant of both offenses. R.C. 2941.25(B).

*4 {¶ 13} When undertaking the first step of the analysis, *Rance* expressly held that the court must compare the elements of the offenses in the abstract. *Id.*, paragraph one of the syllabus. In other words, the court must simply examine the statutory elements of the involved crimes without considering the particular facts of the case. *Id.* at 636-638, 710 N.E.2d 699.

[1] {¶ 14} Counsel suggests that trafficking in crack cocaine in violation of R.C. 2925.03(A)(2) and possession of crack cocaine in violation of R.C. 2925.11(A) may be allied offenses. R.C. 2925.03 provides: “A. No person shall knowingly do any of the following: * * * (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.” R.C. 2925.11(A) provides: “No person shall knowingly obtain, possess, or use a controlled substance.”

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{¶ 15} In comparing the elements of these crimes in the abstract, we conclude that the elements of R.C. 2925.07(A)(2) do not correspond to the elements of R.C. 2925.11(A) to such a degree that the commission of one requires the commission of another. See *State v. Alvarez*, Butler App. No. CA2003-03-067, 2004-Ohio-2483 (possession of and trafficking in a controlled substance are not allied offenses of similar import); *State v. Rotarius*, Cuyahoga App. No. 78766, 2002-Ohio-666 (possession of drugs and their preparation for sale are not allied offenses of similar import). A person may obtain, possess or use a controlled substance in violation of R.C. 2925.11 without preparing it for shipment or distributing it in violation of R.C. 2925.07. Likewise, a person may distribute or prepare a controlled substance for distribution without actually possessing it, e.g. when one directs the transportation or preparation of the controlled substance for sale or serves as a middleman in a drug transaction. Therefore, we conclude that counts one (trafficking in crack cocaine) and two (possession of crack cocaine) are not allied offenses of similar import. For the same reasons, counts three (trafficking in cocaine) and four (possession of cocaine) are not allied offenses of similar import either. The first proposed assignment of error lacks merit.

II.

{¶ 16} In his second and fourth proposed assignments of error, counsel argues that trial counsel may have been ineffective. Appellant makes the same argument in his second proposed assignment of error.

{¶ 17} The Sixth Amendment to the United States Constitution and Section 10, Article I, of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean that a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693. In order to prove the ineffective assistance of counsel, a criminal

defendant must show that (1) counsel's performance was in fact deficient, i.e., not reasonably competent, and (2) such deficiencies prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus, 42 Ohio St.3d 136, 538 N.E.2d 373.

*5 {¶ 18} When considering whether trial counsel's representation amounts to a deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* The United States Supreme Court has noted that "there can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96.

A.

[2] {¶ 19} In his second proposed assignment of error, counsel argues that trial counsel may have been ineffective because he had an actual conflict of interest which adversely affected his performance. Trial counsel previously represented Cameron Simmons, who lived in the apartment with Appellant's girlfriend between May and August 2003 while Appellant was in jail. Appellant argued that the drugs and other items found in the apartment did not belong to him and may have been left by Simmons or other individuals who lived in the apartment during the summer of 2003.

{¶ 20} Trial counsel filed a "Motion to Resign" based on his prior representation of Simmons and Appellant's displeasure with that representation. The trial court concluded that there was no conflict because trial counsel no longer represented Simmons and counsel was free to assign ownership of the drugs and other illegal items to Simmons at trial. Therefore, the court denied the motion to withdraw.

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{¶ 21} When a right to counsel exists, the Sixth Amendment to the United States Constitution guarantees that representation will be free from conflicts of interest. *State v. Gillard* (1992), 64 Ohio St.3d 304, 312, 595 N.E.2d 878, 883. Both defense counsel and the trial court have an affirmative duty to ensure that a defendant's representation is without conflict. *State v. Dillon*, 74 Ohio St.3d 166, 167-168, 1995-Ohio-169, 657 N.E.2d 273. The court's duty arises when the defendant objects to the multiple representation or when the court knows or reasonably should know that a conflict of interest exists. *State v. Manross* (1988), 40 Ohio St.3d 180, 181, 532 N.E.2d 735, 737. Then, the court is required to conduct an inquiry into the possible conflict of interest. *Id.*

{¶ 22} Joint representation of conflicting interests is "suspect because of what it tends to prevent an attorney from doing." *Holloway v. Arkansas* (1978), 435 U.S. 475, 489-490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426, 438. "A lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." *Manross*, 40 Ohio St.3d at 182, 532 N.E.2d at 738. A possibility of a conflict exists if the "interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties." *Cuyler v. Sullivan* (1980), 446 U.S. 335, 356, 100 S.Ct. 1708, 1722, 64 L.Ed.2d 333, 351-352 (Marshall, J., concurring in part and dissenting in part).

*6 {¶ 23} In order for a defendant to demonstrate an actual conflict of interest, he must first show that "some plausible alternative defense strategy or tactic might have been pursued. He need not show that the alternative defense would necessarily have been successful * * * but that it possessed sufficient substance to be a viable alternative." *State v. Gillard*, 78 Ohio St.3d 548, 552, 1997-Ohio-183, 679 N.E.2d 276. The defendant must also show that this alternative defense could not be pursued because of an inherent conflict with counsel's other representation. *State v. Peoples*, Franklin App. No. 02AP-945, 2003-Ohio-4680.

{¶ 24} Appellant contends that trial counsel may have had a conflict of interest because he previously

represented Cameron Simmons and, therefore, could not vigorously argue that Simmons owned the drugs discovered during the search rather than Appellant. We disagree. Trial counsel stated at the motion hearing that he no longer represented Simmons. Therefore, he was able to argue at trial that Simmons was the actual owner of the drugs found in the apartment. In fact, trial counsel actually pursued this strategy at trial. He argued that several individuals, including Simmons, resided in the apartment while Appellant was in jail and that one of those individuals left the drugs when he vacated. We find no conflict of interest in trial counsel's representation of Appellant. Counsel's second proposed assignment of error has no merit.

B.

[3] {¶ 25} In his fourth proposed assignment of error, counsel argues that trial counsel may have been ineffective by failing to request findings of fact when the trial court denied Appellant's Motion to Dismiss on speedy trial grounds. Counsel contends that, because of trial counsel's ineffectiveness, key information may be missing from the record that could now aid this appeal. We disagree.

{¶ 26} Crim.R. 12(F) mandates that a trial court state its essential findings on the record when factual issues are involved in determining a motion. However, in order to invoke this provision, trial counsel must request that the trial court state its findings of fact on the record. *State v. Benner* (1988), 40 Ohio St.3d 301, 317, 533 N.E.2d 701.

{¶ 27} Although the better practice would have been for trial counsel to request findings of fact on the record, here the record is sufficient to allow a full review of Appellant's claims regarding the alleged violation of his right to a speedy trial. Therefore, Appellant suffered no prejudice as a result of counsel's failure to request findings of fact. See *State v. Sapp*, Clark App. No. 99CA84, 2002-Ohio-6863, at ¶ 59. Moreover, a request for findings of fact would not have changed the outcome of the motion. See *State v. Clark*, Pike App. No. 02CA684, 2003-Ohio-1707, at ¶ 21.

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Counsel's fourth proposed assignment of error has no merit.

C.

[4] {¶ 28} In his second proposed assignment of error, Appellant argues that his counsel was ineffective because he failed to move to discharge the jury under Crim.R. 7(D) after the State amended the indictment to cure a variance in the evidence. Here, the State never sought to amend the indictment. Rather, the grand jury issued a new indictment and the State dismissed the original indictment. Therefore, Crim.R. 7(D) provisions concerning amendments have no application in this case and trial counsel could not have successfully moved to discharge the jury based on the issuance of a second indictment. Appellant's second proposed assignment of error is without merit.

III.

*7 [5] {¶ 29} In his third proposed assignment of error, counsel states that the trial court may have erred by not suppressing Appellant's statement to law enforcement officers on the basis it was not knowingly and voluntarily given.

{¶ 30} Appellate review of a trial court's decision regarding a motion to suppress involves mixed questions of law and fact. *State v. Featherstone*, 150 Ohio App.3d 24, 2002-Ohio-6028, 778 N.E.2d 1124, at paragraph 10, citing *State v. Vest*, Ross App. No. 00CA2576, 2001-Ohio-2394; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. When ruling on a motion to suppress, the trial court assumes the role of trier of fact, and as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Dunlap*, 73 Ohio St.3d 308, 314, 1995-Ohio-243, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 582. Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Dunlap*; *Long*; *State v. Medcalf* (1996), 111 Ohio App.3d 142, 675 N.E.2d 1268. Accepting those facts as true, we must

independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard. *Featherstone*; *Medcalf*; *State v. Fields* (Nov. 29, 1999), Hocking App. No. 99CA11.

{¶ 31} The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall be compelled to be a witness against himself. This safeguard is applicable to the states through the Due Process Clause of the Fourteenth Amendment to the Constitution, see *Carter v. Kentucky* (1981), 450 U.S. 288, 305, 101 S.Ct. 1112, 67 L.Ed.2d 241; *Malloy v. Hogan* (1964), 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653, and, in any event, similar protections are afforded residents of this state under Section 10, Article 1 of the Ohio Constitution. *State v. Simmons* (Aug. 25, 1992), Pike App. No. 473. A confession which is the product of "coercive police activity" is involuntary and thus violative of both the United States and Ohio Constitutions. See *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473; see, also, *State v. Loza* (1994), 71 Ohio St.3d 61, 66, 641 N.E.2d 1082. Courts determine whether a confession was involuntary by examining the "totality of the circumstances" involved. See *State v. Broom* (1988), 40 Ohio St.3d 277, 286, 533 N.E.2d 682. Factors to be considered when reviewing the totality of the circumstances include the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment, and the existence of threat or inducement. See *State v. Slagle* (1992), 65 Ohio St.3d 597, 600, 605 N.E.2d 916; *State v. Brewer* (1989), 48 Ohio St.3d 50, 57, 549 N.E.2d 491. In order for a confession to be deemed admissible, the prosecution must prove by a preponderance of the evidence that the statements were voluntary. *Lego v. Twomey* (1972), 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618. See, also, *State v. Melchior* (1978), 56 Ohio St.2d 15, 25, 381 N.E.2d 195.

*8 {¶ 32} At the outset of his interview with Appellant, David Marcum, an investigator with the Lawrence County Drug Task Force, advised Appellant of his constitutional rights and Appellant

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executed a written *Miranda* waiver. Investigator Marcum then proceeded to interview Appellant. Unbeknownst to Appellant, Investigator Marcum was tape recording the interview. Towards the end of their discussion, Investigator Marcum asked Appellant if he could record his statement and Appellant refused. According to Investigator Marcum, he did not ask Appellant for permission to record the statement before the interview began.

{¶ 33} Appellant disputes Investigator Marcum's testimony. Appellant testified that Investigator Marcum asked him at the beginning of the interview if Marcum could record their discussion and Appellant denied permission. Appellant argues that his statement was coerced because he did not know he was being recorded and would not have spoken with Investigator Marcum if he had known.

{¶ 34} The trial court concluded that Appellant voluntarily made his statement to Investigator Marcum. The court determined that Investigator Marcum was not required to inform Appellant that he was being recorded and that Appellant first objected to the recording near the end of the interview. Based on these findings, the trial court denied Appellant's motion to suppress.

{¶ 35} We have found no case law supporting counsel's argument that Appellant's statement may have been rendered involuntary simply because it was recorded without his knowledge. In fact, in *State v. Aguirre*, Gallia App. No. 03CA5, 2003-Ohio-4909, at fn. 1, we recommended that law enforcement electronically record confessions so that challenges to the confessions can be more easily resolved. It is clear from the record that Appellant was informed of his *Miranda* rights and waived them following his arrest. He then voluntarily made a statement to law enforcement officers. There is no evidence, even based on Appellant's own testimony, that Investigator Marcum coerced him in any way. We find no error in the court's denial of Appellant's motion to suppress. Therefore, counsel's third proposed assignment of error is without merit.

IV.

[6] {¶ 36} In his fifth potential assignment of error, counsel argues that the trial court may have erred by not granting Appellant's motion to dismiss on speedy trial grounds. Appellant was indicted on November 18, 2003, and then re-indicated on February 2, 2004. The factual basis for the second indictment was identical to that of the first, but the charges differed somewhat. The State dismissed the first indictment.

{¶ 37} Appellant moved to dismiss the second indictment, arguing that the speedy trial "three for one" provision of R.C. 2945.71(E) applied to his case and that he should be discharged because he was not tried within ninety days of the first indictment. The State argued that the "three for one" provision was inapplicable because, in addition to being held on bond in this case, Appellant was also being held on a holder filed by the Lawrence County Bureau of Community Control. Consequently, the State had two hundred and seventy days, rather than ninety days, to bring Appellant to trial. The holder was based on Appellant's indictment in this case, not for any other violation of his community control. Counsel argues that the court may have erred in denying the motion to dismiss because the holder would not have been placed but for the new indictment and Appellant was effectively being held solely based on the charges in this case.

*9 {¶ 38} A person arrested and charged with a felony must be brought to trial within two hundred and seventy days. R.C. 2945.71(C)(2). But, if the accused remains in jail in lieu of bail solely on the pending charges, each day is counted as three days. R.C. 2945.71(E). This is the triple-count provision. Therefore, if the accused is held in jail in lieu of bail solely on the pending charges the State must bring him to trial within ninety days. Generally, when we review speedy trial issues, mixed questions of law and fact exist. *State v. Hiatt* (1997), 120 Ohio App.3d 247, 261, 697 N.E.2d 1025. We will accept the facts as found by the trial court if they are supported by some competent, credible evidence; but we will freely review the application of the law to the facts. Id.

{¶ 39} An accused presents a prima facie case for

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discharge based upon a violation of speedy trial limitations by alleging in a motion to dismiss that he or she was held solely on the pending charges and for a period of time exceeding the R.C. 2945.71 limits. *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368. The burden of proof then shifts to the State to show that the R.C. 2945.71 limitations have not expired, either by demonstrating that the time limit was extended by R.C. 2945.72 or by establishing that the accused is not entitled to use the triple-count provision in R.C. 2945.71(E). *Butcher*, 27 Ohio St.3d at 31, 500 N.E.2d 1368. An accused is not entitled to the triple-count provision when he is detained in jail under a valid holder. *State v. Brown*, 64 Ohio St.3d 476, 479, 1992-Ohio-96, 597 N.E.2d 97; *State v. Cremeans* (June 26, 2000), Lawrence App. No. 99CA12.

{¶ 40} Appellant made a prima facie case for discharge when he alleged that he was being held solely on the pending charges and that he had been held in excess of ninety days. The State then had the burden to demonstrate that Appellant was not held solely on the pending charges so the triple-count provision did not apply.

{¶ 41} To meet its burden, the State introduced the testimony of two witnesses. Jeff Lawless testified that he is the Jail Administrator for the Lawrence County Sheriff's Office. Deputy Lawless testified that he possessed Appellant's file and that it included a probation holder from Community Control Corrections Officer Janet Hieronimus. Thus, even if Appellant posted bond in this case, he would not be released from the jail.

{¶ 42} Janet Hieronimus testified that she is a Project Director and Corrections Officer with the Lawrence County Intensive Supervised Probation Department. She placed a holder on Appellant when the initial indictment was filed against him based on his criminal activity.

{¶ 43} After hearing this testimony, the trial court denied Appellant's motion to dismiss. Although, as discussed previously, trial counsel did not request findings of fact from the trial court, it is apparent that the court determined that Appellant was being

held on a valid probation holder in addition to the bond in this case. Therefore, the triple-count provision was inapplicable and the State was required to try Appellant within two hundred and seventy days. Since two hundred and seventy days had not yet passed, the State had not violated Appellant's speedy trial rights.

*10 {¶ 44} Here, the State introduced testimony that the Lawrence County Probation Department issued a parole holder and that it was received by the jail holding Appellant. Trooper Lawless testified that Appellant was being held on that holder in addition to the pending charges and would not be released even if he posted bail. Although it would have been helpful for the State to introduce a copy of the holder into the record, we conclude that the State carried its burden by introducing the testimony of the two witnesses. See *State v. Brown*, 64 Ohio St.3d 476, 1992-Ohio-96, 597 N.E.2d 97 (transcript of hearing and in-chambers conference sufficient evidence of parole holder even absent findings of fact and copy of the parole holder).

{¶ 45} We also reject counsel's contention that the triple-count provision may apply because the holder was based solely on the pending charges in this case. In *State v. Martin* (1978), 56 Ohio St.2d 207, 383 N.E.2d 585, the Ohio Supreme Court rejected this argument. The Court noted that a offender who is on probation is subject to specific restraints and conditions. *Id.* at 587. Although a probation violation may be based on the offender's commission of another crime, this does not mean that the probation violation and the underlying criminal charge are inextricably linked. *Id.* The probation violation is a separate cause with a different scope of inquiry; moreover, the failure to prosecute the offender on criminal charges would not bar the use of the offense as grounds for revoking the offender's probation. *Id.*, citing *Kennedy v. Maxwell* (1964), 176 Ohio St. 215, 198 N.E.2d 658. Likewise, an acquittal in the criminal proceeding does not preclude the revocation of probation based on the same charge. *Id.* (citations omitted). Therefore, the triple-count provision is inapplicable when an offender is being held on a probation holder, even if that holder is based on the underlying criminal charges.

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{¶ 46} We find no merit in counsel's fifth proposed assignment of error.

V.

{¶ 47} In his sixth proposed assignment of error, counsel argues that the trial court may have erred by failing to make the requisite findings when imposing maximum and consecutive sentences on Appellant. In his third assignment of error, Appellant argues makes a similar argument.

{¶ 48} When an appellate court reviews a trial court's sentencing decision, the reviewing court will not overturn the trial court's sentence unless the court "clearly and convincingly" finds that: (1) the sentence is not supported by the record; (2) the trial court imposed a prison sentence without following the appropriate statutory procedures; or (3) the sentence imposed was contrary to law. See R.C. 2953.08(G)(1); *State v. McCain*, Pickaway App. No. 01CA22, 2002-Ohio-5342. Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. See *State v. Eppinger*, 91 Ohio St.3d 158, 164, 2001-Ohio-247, 743 N.E.2d 881; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

*11 {¶ 49} R.C. 2929.14(C) limits a trial court's authority to impose the maximum prison sentence. Under R.C. 2929.14(C), maximum sentences are reserved for those offenders who (1) have committed the worst forms of the offense; (2) pose the greatest likelihood of committing future crimes; (3) certain major drug offenders; and (4) certain repeat violent offenders. If the trial court imposes the maximum sentence, it must not only make one of the required findings but also give its reason for doing so orally on the record at the sentencing hearing. R.C. 2929.19(B)(2)(d); *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, paragraphs one and two of the syllabus.

[7] {¶ 50} The court sentenced Appellant to the maximum sentence for each of his six convictions. After careful review of the sentencing transcript, we

conclude that the court erred in sentencing Appellant to the maximum sentence without making any of the necessary findings. Although the court outlined Appellant's extensive criminal history, opined that Appellant lied during his trial testimony, and observed that Appellant expressed no remorse for his actions, the court never found that Appellant committed the worst forms of the offenses or that he posed the greatest likelihood of committing future crimes. Appellant does not meet the statutory definition of a major drug offender or a repeat violent offender so those provisions are inapplicable here. And, as the court never made any of the requisite findings before imposing the maximum sentence, reasons to support them are also nonexistent. Therefore, counsel's sixth proposed assignment of error has merit.

{¶ 51} Generally, trial courts in Ohio must impose concurrent prison sentences. R.C. 2929.41(A). However, a trial court may impose consecutive prison sentences under R.C. 2929.14(E)(4), which sets forth a tri-partite procedure that the court must follow. First, a trial court must find that consecutive sentences are "necessary" to protect the public or to punish the offender. Second, a court must find that the proposed consecutive sentences are "not disproportionate" to the seriousness of the offender's conduct and the "danger" that the offender poses. Third, a court must find the existence of one of the three enumerated circumstances in sub-parts (a) through (c), which provide: "(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense. (b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct. (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." The court must make its three statutorily enumerated findings, and state the reasons supporting those findings, at the sentencing hearing. *Comer*, at paragraph one of the syllabus (

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R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c) interpreted).

*12 [8] {¶ 52} The court did make the requisite findings and give its reasons for imposing consecutive sentences. The court found that, based on Appellant's extensive record, he is a "career person" and consecutive sentences are necessary to protect the public from "future claims or crimes" and to punish the offender. The court found that, despite numerous incarcerations, Appellant "just hasn't gotten the message." The court also found that consecutive sentences were not disproportionate to the seriousness of Appellant's conduct. The court found that Appellant was involved in a "major, major drug outlet" which posed a danger to the public and that Appellant possessed a gun. Finally, the court found that Appellant was under community control sanctions and probation at the time he committed the multiple offenses and that no single prison term could adequately reflect the seriousness of Appellant's acts. The court noted that Appellant had been released from jail for only a short time when he began distributing drugs.

{¶ 53} We find merit in counsel's sixth proposed assignment of error to the extent it challenges the trial court's imposition of the maximum sentences without making the requisite statutory findings or stating its reasons for those findings. However, we overrule Appellant's third proposed assignment of error because the court made the requisite findings before imposing consecutive sentences.

VI.

{¶ 54} In his seventh proposed assignment of error, counsel asserts that the cumulative effect of trial court errors may warrant reversal of Appellant's convictions even if no single error constitutes reversible error.

{¶ 55} Before we consider whether "cumulative error" is present, we must find that the trial court committed multiple errors. *State v. Goff* (1998), 82 Ohio St.3d 123, 140, 694 N.E.2d 916. Although we found error in the trial court's sentencing of

Appellant, we have found no other errors in the pre-trial or trial proceedings. Therefore, the "cumulative error" principle is inapplicable. Counsel's seventh proposed assignment of error has no merit.

VII.

{¶ 56} In his first proposed assignment of error, Appellant argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Additionally, in his fourth assignment of error, Appellant argues that the evidence in the case shows that he was "actually innocent." We interpret this argument as an additional challenge to the sufficiency and the weight of the evidence.

{¶ 57} When reviewing the sufficiency of the evidence, an appellate court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

*13 {¶ 58} Appellant was convicted of one count of trafficking in crack cocaine and one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2). He was also convicted of one count of possession of crack cocaine and one count of possession of cocaine in violation of R.C. 2925.11(A). As we explained in section I of this opinion, R.C. 2925.03(A)(2) prohibits an individual from preparing a controlled substance for distribution when the individual has reasonable cause to believe that the controlled substance is intended for sale by that individual or another person. R.C. 2925.11(A) prohibits an individual from knowingly possessing a controlled substance.

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[9] {¶ 59} The evidence presented at trial demonstrated that the Lawrence County Drug Task Force executed a search warrant on the apartment Appellant shared with his girlfriend Michelle Lewis, aka Deanna Saxton. The officers discovered a pill bottle containing forty-eight tablets and eight pieces of crack cocaine in the closet, a spray can with a false bottom that contained crack cocaine under the kitchen sink, and a potato stick can with a false bottom that contained crack cocaine in the bedroom on top of a dresser built into the headboard of the bed. Captain Chris Bowman testified that the drugs were packaged in small plastic bags, which is typical for re-sale in the community. The officers also found weight control formula powder, a product which is commonly mixed with cocaine to cut the product for resale, and recovered \$1,233 in cash from Appellant, including two twenty dollar bills used in a controlled purchase a few days prior to the execution of the search warrant.

{¶ 60} Following Appellant's arrest, Investigator David Marcum interviewed him. During this interview, Appellant acknowledged that he sold crack cocaine in the community "thousands" of times. He stated that he would purchase cocaine in Columbus, "cut it" with weight control powder to increase the amount of product, and re-sell the drugs. Appellant told Marcum he'd made approximately \$10,000 selling drugs since his release from jail approximately a month earlier. Appellant admitted that the drugs found in the apartment belonged to him. Additionally, Deputies Amanda Efaw and Michael Brown, corrections officers for the Lawrence County Sheriff's Department, both testified that Appellant admitted "they had got him good this time" and that he "had got busted with a lot of stuff."

[10] {¶ 61} Appellant also challenges the sufficiency of the evidence as to the weight of the drugs. The jury found that Appellant trafficked in and possessed ten to less than twenty-five grams of crack cocaine, that Appellant trafficked in ten to less than one hundred grams of cocaine, and that Appellant possessed twenty-five to less than one hundred grams of cocaine.

{¶ 62} Appellant argues that these findings are not

supported by sufficient evidence because the initial weight of the drugs as recorded by the officers varies somewhat from the weight of the drugs as determined by the forensic scientist who tested the drugs. However, the evidence demonstrated that the officers provided only an estimated weight as determined by the scale found in Appellant's apartment and that some of the drugs were used in the testing process. Further, there appeared to be some initial confusion as the quantity of crack cocaine versus the quantity of powder cocaine. The report prepared by the forensic scientist reveals that the police recovered 16.81 grams of crack cocaine and 34.58 grams of cocaine from Appellant's apartment. Therefore, the jury's findings are supported by sufficient evidence.

*14 {¶ 63} We conclude that the State presented sufficient evidence that Appellant trafficked in crack cocaine and cocaine, and possessed crack cocaine and cocaine, and the amounts of drugs present. Appellant's convictions are supported by sufficient evidence.

[11] {¶ 64} Appellant was also convicted of possession of criminal tools in violation of R.C. 2923.24. R.C. 2923.24 states: "(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally. (B) Each of the following constitutes prima-facie evidence of criminal purpose: * * * (3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use. * * *"

{¶ 65} Captain Chris Bowman testified that the officers discovered a C-clamp or a vice, which is used to press together powder cocaine and various other ingredients in order to increase the weight of the drug for sale, in a kitchen cabinet during the search of Appellant's apartment. During his interview with Investigator Marcum, Appellant admitted he used the C-clamp to "rock up" the cocaine himself, i.e. to turn cocaine into crack cocaine. There is sufficient evidence to support the jury's guilty verdict on the charge of possession of criminal tools.

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[12] {¶ 66} Appellant was also convicted of having weapons while under a disability in violation of R.C. 2923.13(A)(3), which provides: “(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: * * * (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse * * * . * * * ” The State introduced evidence that Appellant had three previous convictions of felony possession of crack cocaine. Therefore, he was under a disability as defined in the statute. Investigator Bowman testified that officers found a gun between the mattress and the bedsprings of the bed in the master bedroom. Additionally, they found a box of .32 caliber bullets in a kitchen cabinet. William D. Mark, a firearms examiner, testified that the gun was operable. The State also introduced Appellant's statement to Investigator Marcum in which he admitted that “everything [found in the apartment] was his,” and Appellant admitted that he testified at the preliminary hearing that he owned the gun. Therefore, we conclude that the State introduced sufficient evidence that Appellant possessed a weapon while under a disability.

{¶ 67} Finally, we note that the jury also found that Appellant possessed a firearm while committing a felony in violation of R.C. 2929.14(D)(1)(a)(iii), also known as a firearm specification. We find there was sufficient evidence to support this finding.

*15 {¶ 68} Having concluded that there is sufficient evidence to support Appellant's convictions, we now consider whether the convictions are against the manifest weight of the evidence. Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In order to undertake this review, we must sit as a “thirteenth juror” and review the entire record, weigh the evidence and all reasonable inferences, consider the

credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. If we find that the factfinder clearly lost its way, we must reverse the convictions and order a new trial. *Id.* On the other hand, we will not reverse a conviction so long as the State presented sufficient evidence for a reasonable trier of fact to conclude that all the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998-Ohio-533, 702 N.E.2d 866; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus. In conducting our review, we are guided by the presumption that the jury “is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

[13] {¶ 69} First, Appellant argues that because there was no probable cause to support the search warrant, the fruits of that search should not have been admitted. He contends that he was in jail when most of the events forming the basis for the search warrant occurred, including drug sales by Lewis. Appellant's trial counsel filed a motion to suppress the results of the search warrant, arguing that there was no probable cause to search. The court denied this motion and, after reviewing the record, we find no error in the court's decision. The affidavit supporting the application for the search warrant established that there was evidence of drug activity in the apartment to be searched and that at least one occupant of the apartment had sold drugs. Because the court properly denied the motion, the evidence discovered during the search was admissible.

{¶ 70} Appellant also argues that he admitted ownership of the drugs and other items found in the apartment solely to protect Lewis from being prosecuted for possession of the items. He testified at trial that the statements he made to Investigator Marcum were not true and that the gun belonged to Lewis. Both he and Lewis testified that they did not know the drugs were in the apartment and that they likely belonged to Cameron Simmons or other

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individuals who resided in the apartment while Appellant was in jail. Lewis testified that Simmons gave her the gun for protection after the police arrested Appellant for breaking in her door.

*16 [14] {¶ 71} Appellant admitted that he testified at his preliminary hearing and that he stated then that the gun and ammunition were his and that the statements he made to Investigator Marcum were truthful. Given his last minute denial of these statements, the jury was free to disbelieve Appellant's testimony. Likewise, Lewis was not a credible witness. Therefore, we conclude that Appellant's convictions are not against the manifest weight of the evidence.

{¶ 72} Appellant's first and fourth proposed assignments of error are overruled.

VIII.

{¶ 73} We recognize that, pursuant to *Anders*, if we find merit in any of the propositions raised by appellate counsel or by the appellant, we are to appoint new counsel for the appellant and afford new counsel the opportunity to argue on appeal. We found merit in counsel's sixth proposed assignment of error, which asserts that the court erred in imposing the maximum sentences without making the necessary findings and citing its reasons for the findings. Given that Appellant's sentence is clearly contrary to law and that none of the other proposed assignments of error have merit, we find that justice requires an immediate remand to the trial court for re-sentencing. See *Sate v. Meyer*, Williams App. No. WM-03-008, 2004-Ohio-5229, at ¶ 75; *State v. Shannon*, Preble App. No. CA20003-02-005, 2004-Ohio-1866, at ¶¶ 4-6. We grant appellate counsel's motion to withdraw as counsel and instruct the trial court to appoint new counsel to represent Appellant at re-sentencing.

{¶ 74} The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded to the trial court.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED and that the Appellant and Appellee split costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

*17 A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KLINE, J. and MCFARLAND, J.: concur in Judgment and Opinion.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

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H

State v. Ross Ohio App. 6 Dist., 1992. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Erie County.

STATE of Ohio, Appellee,

v.

Dominic ROSS, Appellant.

No. E-92-24.

Dec. 18, 1992.

Kevein J. Baxter, Pros. Atty., and Mary Ann Baryliski, for appellee.
 Dennis Levin, for appellant.

DECISION AND JUDGMENT ENTRY

*1 This is an accelerated appeal from a judgment of the Erie County Court of Common Pleas wherein appellant, Dominic Ross, was convicted on five felony drug offenses and one count of possessing criminal tools. Appellant raises the following assignments of error:

"FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS.

"SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN SENTENCING APPELLANT FOR BOTH THE POSSESSION CHARGES AND PREPARATION FOR DISTRIBUTION CHARGES.

"THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN FINING APPELLANT \$10,000.00 AFTER APPELLANT FILED HIS AFFIDAVIT OF INDIGENCY PURSUANT TO O.R.C. SEC. 2925.03(L)."

In 1990, the Erie County Drug Task Force received information from a confidential informant that appellant was growing and selling marijuana from his home. The informant also stated that appellant was engaging in the sale of cocaine. On May 10 and May 11 respectively, police officers executed search warrants at appellant's residence. They confiscated a large amount of marijuana, drug paraphernalia, a large amount of money, several weapons and banking, tax and business records related to appellant's drug trafficking activities.

Appellant was indicated on two counts of drug abuse, violations of R.C. 2925.11; two counts of trafficking in marijuana, violations of R.C. 2925.03(A)(2) and (6); one count of possessing criminal tools, a violation of R.C. 2923.24, and; one count of aggravated drug trafficking, a violation of R.C. 2925.03(A)(6). He was found guilty on all counts and sentenced to a five and one-half year term of imprisonment. He was also fined \$10,000.

Appellant filed a notice of appeal with this court on January 10, 1991. In his brief, appellant asserted the same assignments of error that are before us in this appeal. However, appellant asserted one assignment of error not raised in this instant appeal. Appellant argued that the trial court erred in failing to permit appellant to withdraw his plea before sentencing. This court found the assignment of error to be well-taken because the trial court had failed to hold an evidentiary hearing on appellant's motion. As a result, the remaining assignments of error were rendered moot or no longer ripe for review. Appellant's conviction was vacated and his case was remanded to the trial court for further proceedings. See [E-91-4].

On April 16, 1992, a hearing was held in the Erie County Court of Common Pleas on appellant's motion to withdraw his plea. The court denied appellant's motion and ordered his sentence reimposed. Appellant filed this instant appeal on May 8, 1992.

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In his first assignment of error, appellant argues that the court erred in denying his motion to suppress. Specifically, appellant challenges the credibility of the Erie County Drug Task Force's confidential informant and argues that the judge lacked probable cause to issue search warrants for appellant's residence.

*2 The affidavit for both search warrants read, in pertinent part:

"ON 3-12-90 DET. SAMS OF THE ERIE COUNTY DRUG TASK FORCE TALKED WITH [INFORMANT] ABOUT * * * ROSS. THE [INFORMANT] IS A CONFIDENTIAL RELIABLE SOURCE AND HAS BEEN RESPONSIBLE FOR THE SERVICE OF A SEARCH WARRANT AND CONFISCATION OF MORE THAN TWO OUNCES OF COCAINE. THE CI WAS ALSO RESPONSIBLE FOR THE PURCHASE OF AN EIGHTBALL OF COCAINE FROM A SOURCE. BOTH CASES ARE STILL UNDER INVESTIGATION AT THIS TIME. THE [INFORMANT] ADVISED THAT ROSS GROWS AND DEALS MARIJUANA FROM THE BASEMENT OF HIS HOME AT 602 CARROL AVE IN SANDUSKY.

"ON 3-15-90 DET SAMS TALKED WITH [INFORMANT] WHO ADVISED THAT ROSS HAS BEEN DEALING MARIJUANA AND ALSO COCAINE. THIS [INFORMANT] ADVISED THAT ROSS DOES GROW MARIJUANA BUT HE ALSO GETS SOME MARIJUANA AND COCAINE FROM A BUDDY THATCHER. THE [INFORMANT] ADVISED THAT ROSS GETS HALF A KILO OF COCAINE AND MULTI POUNDS OF MARIJUANA. * * *

"ON 4-16-90 [INFORMANT] ADVISED THAT HE OBSERVED TWO KNOWN COCAINE USERS AT ROSS'S HOME AT 602 CARROL ST. THE [INFORMANT] ADVISED THAT THEY CAME FOR A SHORT PERIOD OF TIME AND LEFT. [INFORMANT] ADVISED THAT ROSS DEALS NOTHING SMALLER THAN A 7 OUNCE OF COCAINE. THE [INFORMANT] ADVISED THIS TOOK PLACE ON 4-13-90 AND ROSS WAS ONLY AT THE HOUSE FOR ABOUT 8 AN HOUR.

"ON 4-30-90 [INFORMANT] ADVISED THAT ROSS HAS BEEN AT 602 CARROL ST

BETWEEN 5PM AND 6PM THE LAST THREE WEEKS ON THURSDAY AND FRIDAY AND BEEN DEALING COCAINE. THE [INFORMANT] ADVISED THAT ROSS'S GIRLFRIEND IS INVOLVED AND THAT ROSS PUT HIS TRUCK IN HER NAME. THE [INFORMANT] ADVISED THAT ROSS DRIVES THE TRUCK AND IT WOULD BE IN THE DRIVEWAY WHEN HE WAS DEALING. THE [INFORMANT] GAVE THE PLATE AS NT4335. THIS WAS CHECKED AND FOUND TO COME BACK TO A CINDY MILLER ON A 1989 FORD TRUCK AT 602 CARROL ST.

"ON 5-9-90 DET SAMS TALKED WITH CI# CWS-035 ABOUT * * * ROSS. THE CI ADVISED ROSS JUST GOT IN A MAJOR SHIPMENT OF COCAINE AND MARIJUANA. THE CI ADVISED THAT THE DRUGS ARE BEING KEPT IN THE BASEMENT OF 602 CARROL AVE IN A SAFE.

"ON 12-7-90 OFC. FLUGGA OF THE SANDUSKY POLICE DEPT ARRESTED DOMINIC ROSS FOR POSSESSION OF MARIJUANA."

The Supreme Court of Ohio has held:

"In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate court should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *State v. George* (1989), 45 Ohio St.3d 325, paragraph 2 of the syllabus.

Based on the above case as well as the preeminent case dealing with this issue, *Illinois v. Gates* (1983), 462 U.S. 213, appellant's first assignment of error is found not well-taken.

In appellant's second assignment of error, he contends that the court erred in sentencing him for possession of an illegal substance and preparation for distribution of an illegal substance. Essentially, appellant contends that possession of an illegal substance and preparation for distribution of an illegal substance. are allied offenses of similar

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import.

*3 Appellant was sentenced for the possession of marijuana and cocaine. The relevant statutes read:

"No person shall knowingly do any of the following:
 " * * * Possess a controlled substance in an amount equal to or exceeding three times the bulk amount; R.C. 2925.03(A)(6)

"No person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11.

Appellant was also sentenced under R.C. 2925.03(A)(2)

"No person shall knowingly * * *

"Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

The charges of possession of an illegal substance and preparation for distribution of an illegal substance are not allied offenses of similar import as both crimes require a proof of fact the other does not. R.C. 2941.25, see, also, *State v. Mateo* (August 17, 1989), Cuyahoga App. No. 55833, unreported, affirmed in part and reversed on other grounds (1991), 57 Ohio St.3d. 50. Accordingly, appellant's second assignment of error is found not well-taken.

In appellant's third assignment of error, he contends that the court abused its discretion in fining appellant \$10,000 after appellant filed his affidavit of indigency. In his affidavit, appellant claimed he was indigent because (1) the federal government had levied all of his assets and requested forfeiture; and (2) he had been incarcerated and therefore without income.

Upon review, we do not find the trial court's sentence to be arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore* (1984), 5 Ohio St.3d 217, 219. Appellant's third assignment of error is found not well-taken.

On consideration whereof, the court finds that the

defendant was not prejudiced or prevented from having a fair trial, and the judgment of the Erie County Court of Common Pleas is hereby affirmed. Costs to appellant.

HANDWORK, MELVIN L. RESNICK and SHERCK, JJ., concur.

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State v. Moore Ohio App. 6 Dist., 2004.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Erie
County.

STATE of Ohio, Appellee

v.

William Henry "Tony" MOORE, Appellant.
No. E-03-006.

Decided Feb. 13, 2004.

Background: Defendant was convicted on guilty plea in the Court of Common Pleas, Erie County, No. 2000-CR-572, of drug trafficking and drug possession. Defendant appealed.

Holdings: The Court of Appeals, Handwork, P.J., held that:

- (1) drug trafficking and drug possession were not allied offenses;
- (2) hearing was not required to determine if offenses were allied;
- (3) court was not required to advise defendant that he would be ineligible for judicial release;
- (4) court sufficiently notified defendant of his right to confront his accusers; and
- (5) court complied with statutory requirements when imposing consecutive sentences.

Affirmed.

West Headnotes

[1] Sentencing and Punishment 350H ◀524

350H Sentencing and Punishment

350HIII Sentence on Conviction of Different Charges

350HIII(A) In General

350Hk515 Particular Offenses

350Hk524 k. Drugs and Narcotics.

Most Cited Cases

Defendant's drug trafficking and drug possession convictions were not allied offenses of similar import, and thus court could lawfully sentence defendant on both counts. R.C. §§ 2925.07(A), R.C. 2925.11(A), 2941.25.

[2] Criminal Law 110 ◀29(8)

110 Criminal Law

110I Nature and Elements of Crime

110k29 Different Offenses in Same Transaction

110k29(5) Particular Offenses

110k29(8) k. Drugs and Narcotics

Offenses. Most Cited Cases

Trial court acted within its discretion in finding that drug trafficking and drug possession charges were not allied offenses without a hearing. R.C. § 2941.25.

[3] Criminal Law 110 ◀273.1(4)

110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

110k273.1 Voluntary Character

110k273.1(4) k. Ascertainment by

Court; Advising and Informing Accused. Most Cited Cases

Trial court was not required to advise defendant, who pleaded guilty to drug offenses, that he would be ineligible for judicial release during his prison term, where eligibility for judicial release had not yet been determined at time of guilty plea.

[4] Criminal Law 110 ◀273.1(4)

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110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

110k273.1 Voluntary Character

110k273.1(4) k. Ascertainment by Court; Advising and Informing Accused. Most Cited Cases

Trial court sufficiently notified defendant of his right to confront his accusers at time of guilty plea when the court informed him of his right to cross-examine the state's witnesses, where transcript reflected that the court inquired whether defendant understood that by pleading guilty he would waive certain constitutional rights, and defendant acknowledged that he understood that concept. Rules Crim.Proc., Rule 11(C)(2)(c).

[5] Sentencing and Punishment 350H ↔ 373

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(G) Hearing

350Hk369 Findings and Statement of Reasons

350Hk373 k. Sufficiency. Most Cited

Cases

Trial court complied with statutory findings requirements when imposing consecutive sentences on drug defendant, where court found that consecutive sentences were required to protect public from future crime, that sentences were not disproportionate to seriousness of defendant's conduct, that sentences were not disproportionate to danger defendant posed to public, that defendant had an extensive criminal history, that defendant had served prior terms, and that the it was hard to find defendant had genuine remorse. R.C. § 2929.14.

Kevin J. Baxter, Erie County Prosecuting Attorney, and Roger Binette, Assistant Prosecuting Attorney, for appellee.

Benjamin M. Chapman, for appellant.
 HANDWORK, P.J.

*1 ¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas which, following the entry of a guilty plea, sentenced appellant, William Henry "Tony" Moore, to a term

of imprisonment. For the reasons stated herein, this court affirms the judgment of the trial court.

¶ 2} The following facts are relevant to this appeal. On October 17, 2000, an indictment was filed against appellant with six counts: four counts of trafficking in crack cocaine in violation of R.C. 2925.03(A); one count of possession of crack cocaine in violation of R.C. 2925.11(A); and one count of carrying a concealed weapon in violation of R.C. 2923.12(A). The violations were alleged to have occurred in May and July 2000.

¶ 3} On February 9, 2001, a second indictment was filed against appellant with two additional counts: one count of possession of crack cocaine in violation of R.C. 2925.11(A) and one count of preparation of cocaine for sale in violation of R.C. 2925.07. The violations were alleged to have occurred in November 2000.

¶ 4} On June 8, 2001, a third indictment was filed against appellant with two additional counts of aggravated possession of drugs in violation of R.C. 2925.11(A). The violations were alleged to have occurred in July 2000.

¶ 5} On November 19, 2002, appellant entered a guilty plea to three counts: one count of trafficking in crack cocaine (count one from the first indictment) and one count of possession of crack cocaine and one count of preparation of cocaine for sale (counts seven and eight from the second indictment). On January 16, 2003, the trial court sentenced appellant to a term of eight years, with five years mandatory, on the possession count; four years on the preparation of cocaine for sale count; and seventeen months on the trafficking in crack cocaine count. The possession and preparation for sale counts were to be served consecutive to each other and concurrent with the trafficking count. Appellant filed a timely notice of appeal.

¶ 6} Appellant sets forth the following five assignments of error:

¶ 7} "ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW BY APPELLANT.

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{¶ 8} "ASSIGNMENT OF ERROR NO. 1 The Trial Court erred to the prejudice of the appellant when it sentenced the appellant to consecutive sentences on Count Seven and Count Eight of the indictment in violation of O.R.C. 2941.25 as to the conduct of defendant in said counts constituted two or more allied offenses of similar import.

{¶ 9} "ASSIGNMENT OF ERROR NO. 2 The Trial Court erred to the prejudice of appellant by failing to hold a hearing on whether Count Seven and Count Eight were allied offenses of similar import.

{¶ 10} "ASSIGNMENT OF ERROR NO. 3 The Court erred by failing to advise appellant that his pleas could mean Appellant would be ineligible for Judicial Release his entire prison term.

{¶ 11} "ASSIGNMENT OF ERROR NO. 4 It was error when the Court failed to inform the Appellant that he had a right to confront his accusers at the time Appellant's guilty pleas were entered.

*2 {¶ 12} "ASSIGNMENT OF ERROR NO. 5 The Trial Court erred by not finding on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

[1] {¶ 13} In his first assignment of error, appellant argues that the trial court erred when it sentenced him on two counts that he argues were allied offenses of similar import. This court finds no merit in this assignment of error.

{¶ 14} R.C. 2941.25, Ohio's allied offenses statute, protects against multiple punishments for the same criminal conduct in violation of the Double Jeopardy Clause of the United States and Ohio Constitutions. *State v. Moore* (1996), 110 Ohio App.3d 649, 653, 675 N.E.2d 13. R.C. 2941.25 governs our analysis when determining whether two offenses are allied offenses of similar import. *State v. Rance* (1999), 85 Ohio St.3d 632, 636, 710 N.E.2d 699. Ohio's multiple count statute governs our analysis when determining whether the trial court violated appellant's right against double

jeopardy. *Id.*, paragraph three of the syllabus.^{FN1}

FN1. In *Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, paragraph three of the syllabus, when it addressed the Double Jeopardy Clause, the Ohio Supreme Court stated:

"In Ohio it is unnecessary to resort to the *Blockburger* test in determining whether cumulative punishments imposed within a single trial for more than one offense resulting from the same criminal conduct violate the federal and state constitutional provisions against double jeopardy. Instead, R.C. 2941.25's two-step test answers the constitutional and state statutory inquiries. The statute manifests the General Assembly's intent to permit, in appropriate cases, cumulative punishments for the same conduct. (Citations omitted.)"

{¶ 15} Under *Rance*, the first step is to determine whether the offenses are "allied offenses of similar import" within the meaning of R.C. 2941.25. ^{FN2} Two offenses are "allied" if the elements of the crimes " 'correspond to such a degree that the commission of one crime will result in the commission of the other.' " *Id.* at 636. If not, the court's inquiry ends. The crimes are considered offenses of dissimilar import and the defendant may be convicted, i.e., found guilty and punished, for both. R.C. 2941.25(B); *Id.* However, if the elements do correspond in the manner described, the court must proceed to a second step. At that point, the court will review the defendant's conduct to determine if the crimes were committed separately or with a separate animus for each crime; if so, under R.C. 2941.25(B), the trial court may convict the defendant of both offenses. *Id.*

FN2. R.C. 2941.25 states:

"(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.

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“(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.”

{¶ 16} When undertaking the first step of the analysis, *Rance* expressly held that the court must compare the elements of the offenses in the abstract. *Id.*, paragraph one of the syllabus. Put simply, the court must look at the statutory elements of the involved crimes without considering the particular facts of the case. *Id.* at 636-38.

{¶ 17} In this assignment of error, appellant argues that drug trafficking pursuant to R.C. 2925.07(A) and drug possession pursuant to R.C. 2925.11(A) are allied offenses. At that time of the offense, R.C. 2925.07(A)^{FN3} provided:

FN3. R.C. 2925.07(A) was repealed in February 2001; while the statute was relocated as R.C. 2925.03(A)(2), the elements of the offense were not altered.

{¶ 18} “No person shall knowingly do any of the following:

{¶ 19} “ * * *

{¶ 20} “Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.”

*3 {¶ 21} R.C. 2925.11(A) provides:

{¶ 22} “(A) No person shall knowingly obtain, possess, or use a controlled substance.”

{¶ 23} In comparing the elements of these crimes in the abstract, this court cannot find the elements of

R.C. 2925.07(A) correspond to the elements of R.C. 2925.11(A) to such a degree that the commission of one requires the commission of another. Thus, we find the offenses are not allied offenses of similar import. See, *State v. Smith* (June 19, 1992), 6th App. No. S-92-1; *State v. Ross* (Dec. 18, 1992), 6th App. No. E-92-24.

{¶ 24} Accordingly, appellant's first assignment of error is found not well-taken.

[2] {¶ 25} In his second assignment of error, appellant argues that the trial court erred when it failed to hold a hearing on whether two counts were allied offenses. This court finds no merit in this assignment of error.

{¶ 26} In addressing this same argument in regard to drug trafficking and drug possession, the appellate court in *State v. Fort*, 8th App. No. 80604, 2002-Ohio-5068, ¶ 54, appeal denied, 98 Ohio St.3d 1491, 2002-Ohio-2234, concluded:

{¶ 27} “Because it was apparent that the offenses were not allied offenses of similar import, the trial court had no duty to conduct a hearing pursuant to R.C. 2941.25.”

{¶ 28} This court agrees with the analysis of the Eighth Appellate District. Because it was apparent that appellant's offenses were not allied offenses of similar import, it was not necessary for the trial court to conduct a hearing.

{¶ 29} Accordingly, appellant's second assignment of error is found not well-taken.

[3] {¶ 30} In his third assignment of error, appellant argues that the trial court erred when it failed to advise him that he would be ineligible for judicial release during his prison term. This court finds no merit in this assignment of error.

{¶ 31} In support of this assignment of error, appellant relies upon *State v. Pape*, 2nd App. No.2000 CA 98, 2001-Ohio-1827. In *Pape*, the appellate court vacated the defendant's sentence because the trial court did not advise the defendant at the time of his plea proceedings that he was not

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eligible for judicial release because of the four year mandatory sentence on the drug trafficking count to which he pled. However, in *State v. Kitchens*, 2nd App. No.2001 CA 92, 2002-Ohio-4335, ¶ 32, appeal denied, 98 Ohio St.3d 1411, 2003-Ohio-60, the Second Appellate District distinguished *Pape*. In *Kitchens*, the defendant was ultimately sentenced to a prison term aggregating 18 years. In rejecting the defendant's argument that the trial court erred in not determining he understood at the time of his plea that he was ineligible for judicial release, the appellate court stated:

{¶ 32} "In the case before us, in contrast with *Pape*, supra, the defendant was not ineligible for judicial release when his plea was tendered and accepted. He only became ineligible for release as a result of the trial court's exercise of its sentencing discretion to impose a sentence longer than ten years. The trial court could not have informed *Kitchens*, at the time of his plea, that he was ineligible for judicial release, without having predetermined his sentence, something the trial court certainly should not be required to do. Consequently, we distinguish the situation in the case before us from the situation in *Pape*, supra. At the time *Kitchen's* guilty plea was tendered and accepted, he was not ineligible for judicial release; his eligibility for judicial release had not yet been determined. Accordingly, the trial court was not obligated to determine that *Kitchens* understood that he was ineligible for judicial release."

*4 {¶ 33} This court agrees with the analysis of the Second Appellate District.

{¶ 34} Accordingly, appellant's third assignment of error is found not well-taken.

[4] {¶ 35} In his fourth assignment of error, appellant argues that the trial court erred when it failed to inform him at the time his guilty pleas were entered that he had a right to confront his accusers. This court finds no merit in this assignment of error.

{¶ 36} Crim.R. 11(C)(2)(c) provides:

{¶ 37} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and

shall not accept such plea without first addressing the defendant personally and doing all of the following:

{¶ 38} " * * *

{¶ 39} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 40} In relation to constitutional rights, such as waiver of the right to confront witnesses, strict compliance with the dictates of Crim.R. 11(C)(2)(c) is necessary before it can be determined that a plea was given knowingly, intelligently and voluntarily. *State v. Colbert* (1991), 71 Ohio App.3d 734, 737, 595 N.E.2d 401. The transcript in the case sub judice reflects that the court inquired whether appellant understood that by pleading guilty he would waive certain constitutional rights, and he acknowledged that he understood that concept. Then the court reviewed the rights which would be waived. The transcript of the plea hearing contains the following colloquy:

{¶ 41} "THE COURT: * * * You understand, Mr. Moore, that when you're entering a guilty plea you're giving up certain rights? First of all, the Court's automatically going to be finding you guilty when you enter a guilty plea, you understand that?"

{¶ 42} "The Defendant: Yes.

{¶ 43} "THE COURT: And you're giving up your right to a trial by jury? If you chose to go to trial today there would be 12 jurors seated in the jury box up there-excuse me, the Prosecutor would have to convince all 12 of them, each and everyone of those jurors, of your guilt beyond a reasonable doubt on each and every element of any offense before you could be convicted of that offense, do you understand that?"

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{¶ 44} “The Defendant: Okay. Yes.

{¶ 45} “ * * *

{¶ 46} “THE COURT: All right. You understand that if you chose to go to trial, [the Prosecutor] here would have the right to call his witnesses; [your defense attorney] could cross-examine those witnesses on your behalf; [your defense attorney] could use the subpoena power of the Court to bring in any witnesses that would testify favorably to you, so you're also waiving that right when you enter a plea, guilty plea, do you wish to waive that right at this time?

*5 {¶ 47} “The Defendant: Yeah.

{¶ 48} “THE COURT: And finally, you understand that, as I said before, the Prosecutor is the one that bears the burden of proof at the trial, you would not have to take the stand in your own defense. If you chose not to take the stand, the Prosecutor could not comment to the jury on what that means to them, do you understand that?

{¶ 49} “The Defendant: Yes.

{¶ 50} “THE COURT: Do you wish to waive that right, as well?

{¶ 51} “The Defendant: Yes.”

{¶ 52} In addressing this same argument in regard to waiver of the right to confront witnesses with a guilty plea, the appellate court in *State v. Millhouse*, 8th App. No. 79910, 2002-Ohio-2255, ¶ 47, after reviewing a substantially similar plea hearing colloquy, stated:

{¶ 53} “Realizing that the right to confront witnesses against a defendant is done by the process of cross-examination of witnesses called by the state to testify against the accused, the record here supports the conclusion that the court explained and that Millhouse knew he would waive the right to confront witnesses against him by entering his guilty pleas.”

{¶ 54} This court agrees with the analysis of the

Eighth Appellate District. The trial court sufficiently notified appellant of his right to confront his accusers when the court informed him of his right to cross-examine the state's witnesses.

{¶ 55} Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 56} In his fifth assignment of error, appellant argues that the trial court erred by not finding on the record that the shortest prison term would demean the seriousness of his conduct or would not adequately protect the public from future crime by the offender or others. Appellant argues that the common pleas court failed to make the findings needed to impose more than the minimum sentences as well as consecutive sentences. This court finds no merit in this assignment of error.

{¶ 57} R.C. 2929.14(A) provides in relevant part:

{¶ 58} “(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

{¶ 59} “ * * *

{¶ 60} “(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

{¶ 61} “(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.”

{¶ 62} Appellant pled guilty to a felony of the first degree and received eight years; pled guilty to a felony of the third degree and received four years; and pled guilty to a felony of the fourth degree and received seventeen months. In regard to appellant's argument that he received more than the minimum sentences, R.C. 2929.14(B) provides:

{¶ 63} “(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925 of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is

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required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to R.C. 2929.14(A) of this section, unless one or more of the following applies:

*6 {¶ 64} “(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

{¶ 65} “(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.”

{¶ 66} At the sentencing hearing, the trial judge noted that appellant previously had served three prison terms. Thus, appellant was not eligible for the shortest prison term authorized for any of these offenses.

{¶ 67} In regard to appellant's argument concerning his consecutive sentences, in *State v. Comer*, 99 Ohio St.3d 463, 793 N.E.2d 473, 2003 Ohio 4165, paragraph one of the syllabus, the Supreme Court of Ohio held:

{¶ 68} “Pursuant to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), when imposing consecutive sentences, a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing.”

{¶ 69} Under R.C. 2929.14(E) ^{FN4}, three findings are necessary for the court to order an offender to serve multiple prison terms consecutively. The court must find: (1) consecutive sentences are necessary either to protect the public or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public, and (3) any of the following: (a) the offender committed the multiple offenses while awaiting trial or sentencing; (b) the harm caused by the multiple offenses was so great or unusual that no single term of imprisonment for offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct, or

(c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime. Pursuant to R.C. 2929.19(B)(2)(c), the court must make a finding that gives its reasons for imposing consecutive sentences. “Reasons are different from findings. Findings are the specific criteria enumerated in [R.C. 2929.14(E)(4)] which are necessary to justify [consecutive] sentences; reasons are the trial court's bases for its findings * * *.” *State v. Anderson* (2001), 146 Ohio App.3d 427, 437-438, 766 N.E.2d 1005, 2001 Ohio 4297, ¶ 53. R.C. 2929.19(B)(2) provides that:

FN4. R.C. 2929.14(E)(4) governs the imposition of consecutive sentences and states in relevant part:

“(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

“(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

“(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

“(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.”

{¶ 70} “The court shall impose a sentence and

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shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

{¶ 71} “ * * *

{¶ 72} “(c) If it imposes consecutive sentences under section 2929.12 of the Revised Code, its reasons for imposing the consecutive sentences.”

[5] {¶ 73} In the instant matter, this court finds the trial court complied with R.C. 2929.14 when imposing consecutive sentences on appellant. First, the trial court found consecutive sentences were required in this case to protect the public from future crime and to punish the offender. Second, the trial court made a finding that the proposed consecutive sentences are not disproportionate to the seriousness of the offender's conduct. Third, the trial court made a finding that the proposed consecutive sentence is not disproportionate to the danger that the defendant posed to the public. And lastly, the trial court also specified which of the three enumerated circumstances is present from R.C. 2929.14(E)(4)(a)-(c), selecting sections (a) and (c) as the reasons for consecutive sentences.

*7 {¶ 74} In addition to making the above findings, the trial court is also required to give the reasons for its findings. Failure to sufficiently state the reasons for imposing consecutive sentences for convictions of multiple offenses constitutes reversible error. *State v. Anderson*, 146 Ohio App.3d at 439-440, 766 N.E.2d 1005, 2001 Ohio 4297, ¶ 71. The trial court stated the following reasons for imposing consecutive sentences. First, appellant has an extensive criminal history as well as the fact that appellant was awaiting trial when he committed some of the offenses. The court also noted that appellant had served prior prison terms. Additionally, at the sentencing hearing, the court found that that the question of remorse was “up in the air,” and that it was hard to find appellant had genuine remorse for the crimes he committed. This court concludes the trial court's findings and reasons for consecutive sentences were proper.

{¶ 75} Accordingly, appellant's fifth assignment of error is found not well-taken.

{¶ 76} On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

PETER M. HANDWORK, P.J., RICHARD W. KNEPPER, J., and JUDITH ANN LANZINGER, J., concur.

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State v. St. Aubyn Burnett Ohio App. 8 Dist., 1997. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
 Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee,

v.

ST. AUBYN BURNETT, Defendant-Appellant
 No. 70618.

March 20, 1997.

Criminal Appeal from the Common Pleas Court,
 No. CR-330762.

Stephanie Tubbs Jones, Cuyahoga County
 Prosecutor, by Arthur A. Elkins, Assistant County
 Prosecutor, Cleveland, for plaintiff-appellee.

James A. Draper, Cuyahoga County Public
 Defender, by Scott R. Hurley, Assistant Public
 Defender, Cleveland, for defendant-appellant.

JOURNAL ENTRY AND OPINION

SPELLACY, Judge:

*1 Defendant-appellant, St. Aubyn Burnett, ("appellant") appeals from his conviction of drug trafficking in violation of R.C. 2925.03(A)(2), drug abuse in violation of R.C. 2925.11 and possession of criminal tools in violation of R.C. 2923.24. Appellant assigns the following errors for our review:

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF COUNT ONE, AGGRAVATED TRAFFICKING, IN VIOLATION OF R.C. 2925.03(A)(2).

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF COUNT THREE, POSSESSION OF CRIMINAL TOOLS, IN VIOLATION OF R.C. 2923.24.

III. THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT TO SEPARATE CONSECUTIVE SENTENCES FOR COUNT ONE [AGGRAVATED TRAFFICKING] AND COUNT TWO [DRUG ABUSE] SINCE THESE COUNTS CONSTITUTE ALLIED OFFENSES OF SIMILAR IMPORT, PURSUANT TO R.C. 2941.25, AND MULTIPLE CONVICTIONS THEREON CONSTITUTE A DENIAL OF APPELLANT'S RIGHT AGAINST DOUBLE JEOPARDY GUARANTEED BY ART. I, SECT. 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO MULTIPLE PUNISHMENTS FOR ALLIED OFFENSES OF SIMILAR IMPORT.

Finding appellant's appeal to lack merit, the judgment of the trial court is affirmed.

I.

On December 1, 1995, appellant was issued a three-count indictment. Count I charged appellant with drug trafficking, in violation of R.C. 2925.03(A)(2). Count II charged appellant with drug trafficking, in violation of R.C. 2925.03(A)(4). Count III charged appellant with possession of criminal tools, in violation of R.C. 2923.24. On March 27, 1996, Count II of appellant's indictment was amended charging appellant with drug abuse, in violation of R.C. 2925.11. (Tr. 169-170).

On March 27, 1996, a jury trial was held. Subsequently, the jury found appellant guilty on all three counts. On April 10, 1996, appellant was sentenced to a term of one year on each count.

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Count II was to run consecutive to Count I; and Count III was to run concurrently with Counts I and II.

II.

On June 8, 1995, Officers James Cudo and Jeff Follmer of the Cleveland Police Department received several citizen complaints about suspected drug activity in the area of East 36th Street and Community College Avenue, Cleveland, Ohio. After receiving the complaints, the officers parked their zone car near 3702 Community College Avenue and proceeded to walk toward 3652 Community College Avenue. (Tr. 195). Upon their arrival, the officers observed appellant make some sort of transaction with another male. (Tr. 198). Both officers observed what appeared to be a plastic bag in appellant's left hand and noticed that appellant was getting ready to exchange something in the plastic bag with the other male. (Tr. 198).

As the officers continued to approach the two men, both males took off running. (Tr. 199). Officers Cudo and Follmer proceeded to pursue appellant. Further, Officer Cudo radioed other patrol cars in the area for their assistance in apprehending appellant. (Tr. 203). Subsequently, Officers Wayne Leon and Michael Qualey responded to Officer Cudo's broadcast and helped in the eventual apprehension of appellant.

*2 Prior to apprehending appellant, Officer Leon observed appellant reach into his left pocket with his left hand, pull out a baggy and throw it to the ground. (Tr. 262). Officers Cudo and Follmer also observed appellant reach into his pocket with his left hand and throw a plastic object to the ground. (Tr. 203, 296).

Appellant was apprehended. Officers Cudo and Follmer conducted a search incident to arrest and found three hundred thirty-nine dollars (\$339.00) and a pager upon appellant's person. (Tr. 208, 299). Officer Leon picked up the plastic bag which he had observed appellant throw to the ground and gave it to Officer Cudo who determined that the bag appeared to contain several rocks of crack cocaine.

Cynthia Lewis of the Scientific Investigation Unit of the Cleveland Police department subsequently examined the contents of the plastic bag. Ms. Lewis determined that the bag contained 12 unit doses of crack cocaine weighing 1.65 grams. (Tr. 326-333).

Appellant's wife, Julilah Burnett, testified at trial. In particular, Mrs. Burnett testified that she had given appellant three hundred and twenty-five dollars on the day in question to pay bills. (Tr. 347). Appellant's neighbor, Pamela Nelson, also testified. Ms. Nelson stated that, on June 8, 1995, she observed appellant running from the police. (Tr. 361). However, Ms. Nelson stated that she did not observe appellant discard anything from his pockets while he was being pursued. Ms. Nelson did, however, testify that she observed the police remove money and a pager from appellant's person. (Tr. 369).

III.

In his first assignment of error, appellant contends that insufficient evidence existed to convict him on Count I, aggravated trafficking, in violation of R.C. 2925.03(A)(2).

An appellate court's function when reviewing a claim of insufficient evidence was affirmatively set forth by the Ohio Supreme Court in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, as follows:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

Based upon our review of the record *sub judice*, construing the evidence in the light most favorable to the prosecution, we find any rational trier of fact

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could have properly found beyond a reasonable doubt that defendant committed the offense of aggravated trafficking.

In the present case, appellant was charged and convicted of aggravated trafficking in violation of R.C. 2925.03(A)(2). R.C. 2925.03(A)(2) states:

(A) No person shall knowingly do any of the following:

*3 (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe the controlled substance is intended for sale or resale by the offender or another * * *.

Appellant asserts the State failed to prove that the rocks of crack cocaine found in the plastic bag were for anything but personal use. Thus, appellant contends, mere possession of cocaine is insufficient to support a conviction under R.C. 2925.03(A)(2).

In the present case, evidence presented by the prosecution, if believed, indicated that appellant was involved in a hand-to-hand drug transaction with another individual in a territory of high drug sales activity. Furthermore, both officers indicated that they observed appellant holding a plastic bag during the transaction. Moreover, eyewitness testimony of the officers who apprehended appellant indicated that appellant discarded a bag of crack cocaine from his person immediately prior to being apprehended. Subsequently, the arresting officers testified that they found \$339.00 and a pager on appellant's person.

Under the totality of the circumstances, when viewed in the light most favorable to the prosecution, the jury could reasonably infer from the evidence presented in the case *sub judice* that appellant did knowingly prepare for shipment, shipped, transported, delivered, prepared for distribution or distributed cocaine knowing or having reasonable cause to believe the cocaine was intended for sale or resale in violation of R.C.

2925.03(A)(2). The aforementioned evidence and testimony amply support the charge of drug trafficking, in violation of R.C. 2925.03(A)(2).

Accordingly, appellant's first assignment of error is overruled.

IV.

In his second assignment of error, appellant challenges the sufficiency of the evidence to sustain his conviction of possession of criminal tools in violation of R.C. 2923.24.

R.C. 2923.24 states as follows:

(A) No person shall possess or have under his control any substance, device, instrument, or article, with purpose to use it criminally.

(B) Each of the following constitutes prima facie evidence of criminal purpose:

(1) Possession or control of any dangerous ordnance, or the materials or parts for making dangerous ordnance, in the absence of circumstances indicating such dangerous ordnance, materials, or parts are intended for legitimate use;

(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating such item is intended for criminal use.

(C) Whoever violates this section is guilty of possessing criminal tools, a felony of the fourth degree.

As stated *supra*, sufficient evidence exists where, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. See *Jenks, supra*.

*4 A pager and money in the amount of \$339.00 were found in the possession of appellant at the time he was arrested. Possession of a pager, which, as the police testified, is a known device for

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requesting a drug sale, and money used in drug activity is sufficient to support a conviction under R.C. 2923.24. *State v. Freeman* (November 22, 1995), Cuyahoga App. No. 68320, unreported, citing *State v. McShan* (1991), 77 Ohio App. 3d 781; *State v. Powell* (1993), 87 Ohio App.3d 157. Thus, we find no error in the trial court finding appellant guilty of possession of criminal tools.

Accordingly, appellant's second assignment of error is overruled.

V.

Appellant's third assignment of error concerns his convictions for drug trafficking, R.C. 2925.03(A)(2), and drug abuse, R.C. 2925.11. He argues that R.C. 2925.11 and R.C. 2925.03(A)(2) are allied offenses of similar import, thereby requiring a vacation of the drug abuse conviction regardless of whether the issue was raised in the trial court.

Initially, as noted by appellant, he failed to raise an allied offense of similar import argument in the trial court. This court is firm in its position that pursuant to *State v. Comen* (1990), 50 Ohio St.3d 206, this claimed error is waived when it is not raised in the trial court. *State v. Sapp* (September 5, 1996), Cuyahoga App. No. 69429, unreported.

Assuming *arguendo* the finding of waiver is inapposite with recent decisions of the Supreme Court of Ohio, *State v. Huertas* (1990), 51 Ohio St.3d 22, cert. dismissed (1991), 498 U.S. 336, and *State v. Hawkins* (1993), 66 Ohio St.3d 339, certiorari denied, 510 U.S. 984, appellant's assignment of error is without merit.

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 purpose of this statute is to prohibit duplication of punishment where both crimes are motivated by the same purpose and where conviction of both would be dependent upon identical conduct and similar evidence. *State v. Brown* (1982), 7 Ohio App.3d 113, 116.

Allied offenses of similar import are those offenses, elements of which correspond to such a degree, that the commission of one will result in the commission of the other. *Newark v. Vazarani* (1990), 48 Ohio St.3d 81. In *Newark*, the Ohio Supreme Court set forth a two-step test to determine whether two or more crimes are allied offenses of similar import. In the first step, the elements of the crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. *Id.* at 83. In the second step, if the court finds either that the crimes were committed separately or that there was a separate animus for each crime, defendant may be convicted of both offenses. See *State v. Blankenship* (1983), 38 Ohio St.3d 116, 117.

*5 Applying the foregoing test, this court has held that the elements of drug possession as set forth in R.C. 2925.11, and trafficking in drugs as set forth in R.C. 2925.03(A)(2), do not correspond to such a degree that the commission of one will necessarily result in the commission of the other. *State v. Daanish* (January 6, 1994), Cuyahoga App. No. 64514, unreported; *Sapp, supra*. One may be in possession of drugs, but not in the act of trafficking. *Id.* Furthermore, this court has held that "* * * defendant may be convicted and sentenced for both possession and trafficking of the same physical quantity of drugs, even if there is no evidence demonstrating a completed drug sale, when there is sufficient evidence that defendant committed any of the elements of drug trafficking incident to an

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aborted sale." *Powell, supra* at 170.

Accordingly, appellant's third assignment of error is without merit and is overruled.

VI.

In his fourth assignment of error, appellant contends that his trial counsel was ineffective in failing to object to the non-merger of the allied offenses and failing to object to the sentencing imposed by the trial court on Counts I and II.

In *State v. Harris* (June 2, 1994), Cuyahoga App. No. 65653, unreported, at 23, this court, citing *State v. Aziz* (March 10, 1994), Cuyahoga App. No. 64581, unreported, at 9-10, provided the standard of review for an allegation of ineffective assistance of counsel:

In order to overcome the general rule that a properly licensed attorney in Ohio is presumed competent, the complaining party must meet the following standard enunciated in *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397,

"When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the Defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness."

As to appellant's allegation that his defense counsel was ineffective in failing to object to the non-merger of the offenses and to the multiple punishments imposed by the trial court, we conclude that counsel did not violate a duty to his client in failing to object. Furthermore, there was no prejudice to the appellant because offenses of drug trafficking, R.C. 2925.03(A)(2) and drug abuse, R.C. 2925.11, are offenses of dissimilar import and should have been given separate sentences as imposed by the trial court. Accordingly, appellant's fourth assignment of error is not well taken.

Judgment affirmed.

JAMES D. SWEENEY, C.J., and DYKE, J., concur.
 N.B. This is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(B) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(B). See, also S.Ct.Prac.R. II, Section 2(A)(1).

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State v. Bridges Ohio App. 8 Dist., 2002.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Curtis BRIDGES, Defendant-Appellant.

No. 80171.

Decided July 25, 2002.

Defendant was convicted in the Court of Common Pleas, Cuyahoga County, of trafficking in cocaine in an amount exceeding 1,000 grams and possession of cocaine exceeding 1,000 grams and sentenced to him to 25 years incarceration. Defendant appealed. The Court of Appeals, James J. Sweeney, J., held that: (1) police stop of defendant for speeding was lawful and not the result of racial profiling; (2) police had probable cause following that stop to search and inventory vehicle pursuant to call for tow truck; (3) trial court did not err in imposing 25-year sentence; and (4) the convictions were not of similar import and therefore did not merge.

Affirmed.

West Headnotes

[1] **Automobiles 48A** ⇨ 349(2.1)

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or

Deposit

48Ak349(2) Grounds

48Ak349(2.1) k. In General. Most

Cited Cases

Automobiles 48A ⇨ 349.5(3)

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349.5 Search or Seizure Consequent
 to Arrest, Stop or Inquiry

48Ak349.5(3) k. Stop or Arrest as
 Pretext or Ruse, in General. Most Cited Cases
 Police stop of defendant's vehicle for speeding was
 lawful and not the result of racial profiling; officer
 testified that he did not know race of vehicle's
 occupants until after he used laser gun and vehicle
 passed him, and officer testified that he stopped
 four other cars for speeding that morning, the
 drivers of which were all a different race than
 defendant.

[2] **Automobiles 48A** ⇨ 349.5(12)

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349.5 Search or Seizure Consequent
 to Arrest, Stop or Inquiry

48Ak349.5(5) Object, Product, Scope,
 and Conduct of Search or Inspection

48Ak349.5(12) k. Time and Place;
 Impoundment, Inventory, or Booking Search. Most
 Cited Cases

Police had probable cause following initial traffic
 stop to search vehicle driven by defendant, where
 defendant was unable to produce driver's license,
 defendant's companion was unable to produce rental
 papers for car, police made decision to call tow
 truck based on that information, and police
 conducted inventory search of car, including trunk,
 in accordance with decision to call tow truck.

[3] **Sentencing and Punishment 350H** ⇨ 87

350H Sentencing and Punishment

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk87 k. Harm to Third Persons or to
 Institutions. Most Cited Cases

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Sentencing and Punishment 350H ↪97

350H Sentencing and Punishment
350HI Punishment in General
350HI(E) Factors Related to Offender
350Hk93 Other Offenses, Charges,
Misconduct
350Hk97 k. Similarity to Present
Offense. Most Cited Cases

Sentencing and Punishment 350H ↪600

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different
Charges
350HIII(B) Consecutive or Cumulative
Sentences
350HIII(B)3 Factors and Purposes
350Hk600 k. Nature and Degree of
Harm or Injury. Most Cited Cases

Sentencing and Punishment 350H ↪601

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different
Charges
350HIII(B) Consecutive or Cumulative
Sentences
350HIII(B)3 Factors and Purposes
350Hk601 k. Offender's Criminal
History or Other Misconduct. Most Cited Cases
Trial court did not err in sentencing defendant to 25
years in prison for convictions for trafficking in
cocaine in an amount exceeding 1,000 grams and
possession of cocaine exceeding 1,000 grams; each
conviction carried minimum 10 year sentence, court
imposed additional five years due to defendant's
history with drug convictions, large amount of the
cocaine confiscated, and the serious harm and
corruption suffered by the community as a result of
drug offenses, and court made decision on the
record to impose consecutive sentences due to those
same factors. R.C. §§ 2925.03, 2925.11,
2929.14(D)(2)(b),(E)(4).

[4] Sentencing and Punishment 350H ↪94

350H Sentencing and Punishment
350HI Punishment in General

350HI(E) Factors Related to Offender
350Hk93 Other Offenses, Charges,
Misconduct
350Hk94 k. In General. Most Cited
Cases
Defendant's 25-year sentence for trafficking in and
possession of over 1,000 grams of cocaine factors
was not unfairly influenced by non-statutory and
prejudicial factors, including trial court's conclusion
that defendant was involved in an ongoing activity
of bringing illegal drugs into the community and the
fact that he had ten children by eight different
mothers and that four of the children were present
in the courtroom at sentencing; defendant was
caught with a large amount of cocaine, with a
market value of over one million dollars, and
defendant had an extensive criminal record. R.C. §§
2925.03, 2925.11.

[5] Criminal Law 110 ↪30

110 Criminal Law
110I Nature and Elements of Crime
110k30 k. Merger of Offenses. Most Cited
Cases
Convictions for trafficking in cocaine and
possession of cocaine are not allied offenses of
similar import and therefore do not merge, since
trafficking imposes the additional element that
possession of the controlled substance is incident to
preparation for shipment, transportation, delivery or
distribution of the drug through a sale. R.C. §§
2925.03, 2925.11, 2941.25.

Criminal appeal from Court of Common Pleas, Case
No. CR-407434(B).

William D. Mason, Cuyahoga County Prosecutor,
Deborah Naiman, Assistant Prosecuting Attorney,
Cleveland, OH, for plaintiff-appellee.

James R. Willis, Esq., Cleveland, OH, for
defendant-appellant.

JAMES J. SWEENEY, J.

*1 {¶ 1} Defendant-appellant Curtis Bridges
appeals from a judgment of the Court of Common
Pleas denying his motion to suppress. Defendant
was found guilty of trafficking in cocaine in an
amount exceeding 1,000 grams, in violation of R.C.

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2925.03 and possession of cocaine exceeding 1,000 grams, in violation of R.C. 2925.11. Defendant also appeals the sentencing by the trial court. For the following reasons, we reject his contentions and affirm the decision of the trial court.

{¶ 2} The record presented to us on appeal reveals the following: On May 11, 2001, Patrolman Jack Butcher of the North Olmsted Police Department observed a Cadillac speeding on I-480 in Cuyahoga County, Ohio. Ptl. Butcher signaled the driver of the Cadillac to pull over, and the driver complied. Upon approaching the car, Ptl. Butcher saw defendant in the driver's seat and co-defendant, Malika Poole, in the passenger seat. Defendant was unable to produce a valid driver's license but did have an Ohio State identification card. Malika Poole was also unable to produce either a driver's license or State ID but did have a work identification card with her name and photograph.

{¶ 3} Defendant told Ptl. Butcher that they were driving from Chicago, that the Cadillac was a rental, and that his cousin had rented it. Neither he nor Malika Poole were able to produce the rental papers.

{¶ 4} Ptl. Butcher returned to his cruiser to check the vehicle's status and defendant's driver and warrant status. The check revealed that the license plate on the Cadillac was registered to a 2000 Chevy Malibu. The check also revealed that defendant had a warrant for his arrest, that his driving status in Ohio was suspended and that Malika Poole's temporary Ohio driver's permit had expired.

{¶ 5} The dispatch center contacted Ptl. Chris Fox to respond to Ptl. Butcher's location so that they could arrest the defendant on the warrant.

{¶ 6} Upon Ptl. Fox's arrival, Ptl. Butcher approached defendant in the Cadillac and advised him of what was happening. Ptl. Butcher removed defendant from the car, patted him down, and placed him in the back of the cruiser. Ptl. Butcher again asked defendant who rented the car. This time, defendant said his sister had rented the car.

{¶ 7} Ptl. Butcher approached Malika Poole in the

passenger side of the vehicle and again asked her for the rental papers. She was still unable to produce them. Ptl. Butcher then advised her that he was going to tow the vehicle. He removed her from the vehicle, checked her for weapons, and placed her in his cruiser.

{¶ 8} Defendant asked Ptl. Butcher if Malika Poole could drive the car away. Ptl. Butcher said no because there was no valid rental agreement. Ptl. Butcher then informed defendant that he would be doing an inventory of the vehicle. The North Olmsted Police Department requires an inventory of all vehicles prior to being towed.

{¶ 9} Ptl. Butcher and Ptl. Fox performed an inventory of the vehicle. During the inventory, they discovered a large quantity of cocaine.

*2 {¶ 10} On May 17, 2001, defendant was indicted for one count of possession of cocaine in an amount exceeding 1,000 grams, in violation of R.C. 2925.11 and trafficking in cocaine in an amount exceeding 1,000 grams, in violation of R.C. 2925.03. Both of these counts are felonies of the first degree with mandatory terms of incarceration of ten years. Additionally, each count had a Major Drug Offender's specification which allows the sentencing judge to run an additional one to ten years consecutively on the underlying mandatory ten years. Malika Poole was also indicted for her conduct arising out of these events.

{¶ 11} On May 31, 2001, June 13, 2001, and June 15, 2001, defendant filed motions to suppress in which he maintained that all evidence relating to his arrest for possession and trafficking cocaine should be excluded for the following reasons: lack of probable cause for the initial stop, and the search exceeded the scope of an inventory search.

{¶ 12} An evidentiary hearing on defendant's motion to suppress was conducted on June 18, 2001. During the hearing, Penelope Wohlgemuth, a counter supervisor for Alamo Rental Car at Cleveland Hopkins Airport, testified that the vehicle driven by defendant had been rented by a female named Beatrice Hunter. Pursuant to company policy, no one other than Beatrice Hunter was

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authorized to drive the rented car. Ptl. Butcher also testified that he saw defendant's car traveling at a greater speed than the posted 60 mph. He testified that he activated his laser gun on the defendant's car and he received a reading of 76 mph. He took a second reading and it was 64 mph. He testified that the defendant slowed down once he saw the cruiser. Ptl. Butcher testified that he did not know the race of the defendants until their car passed him. Ptl. Butcher testified that neither defendant nor co-defendant had a driver's license on their person and that a check revealed that defendant had a suspended license and an outstanding warrant from South Euclid. He testified that he decided to tow the car because neither party could produce the rental papers for the car. Finally, he testified that he is required to perform an inventory prior to towing a car.

{¶ 13} On June 21, 2001, the trial court denied defendant's motion to suppress. The trial court found that Ptl. Butcher had probable cause to stop and detain the defendant since he was speeding. The court also found that the inventory search was legal.

{¶ 14} On June 21, 2001, defendant plead guilty to the indictment of trafficking in cocaine in an amount exceeding 1,000 grams, in violation of R.C. 2925.03 and possession of cocaine exceeding 1,000 grams, in violation of R.C. 2925.11.

{¶ 15} On July 31, 2001, defendant was sentenced to a mandatory term of ten years on each underlying count and to five years on the specification, to run consecutively. The total sentence was 25 years.

{¶ 16} Defendant appeals his conviction and sentence and raises five assignments of error for our review. We will address defendant's assignments of error in the order asserted and together where it is appropriate for discussion.

*3 {¶ 17} "1. The court erred when it denied the defendant's motion to suppress and for the return of illegally seized property."

{¶ 18} In this first assignment of error, we must determine whether the North Olmsted Police had probable cause to stop and detain the defendant and

perform an inventory search of the vehicle.

{¶ 19} When considering a motion to suppress, the trial court assumes the role of trier-of-fact and is in the best position to resolve factual questions and evaluate the credibility of a witness. *State v. Kobi* (1997), 122 Ohio App.3d 160, 701 N.E.2d 420. An appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Accepting the facts as found by the trial court as true, the appellate court must then independently determine, as a matter of law, without deferring to the trial court's conclusions, whether the facts meet the applicable legal standard. *Id.*

{¶ 20} A police officer may stop a vehicle based on probable cause that a traffic violation has occurred. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

[1] {¶ 21} Here, Ptl. Butcher stopped defendant for a traffic violation, speeding. Defendant contests the legality of the initial stop and claims that the stop was based on racial profiling. Our review of the record mandates that we agree with the trial court's conclusion that there was not a "scintilla of evidence" that Ptl. Butcher was engaged in racial profiling. Ptl. Butcher testified that he did not know the race of the occupants of the Cadillac until after he used the laser gun and they passed him on the berm of I-480. He also testified that he stopped four other cars for speeding on the morning of May 11, 2001, and that the race of all four of those drivers was white. (Tr. 161-165). Thus, we conclude that the stop was lawful.

[2] {¶ 22} When Ptl. Butcher approached defendant, following the stop, and asked for his driver's license, defendant was unable to produce one. When Ptl. Butcher ran defendant's information into the database and found that there was a warrant for his arrest, Ptl. Butcher was entitled to arrest defendant, which he did.

{¶ 23} After arresting defendant, Ptl. Butcher decided to call for a truck to tow the Cadillac because Malika Poole was unable to produce the rental papers for the car. Under these

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circumstances, we conclude that Ptl. Butcher's decision to have the Cadillac towed was reasonable.

{¶ 24} Pursuant to North Olmsted Police policy, Ptl. Butcher conducted an inventory search of the car. Ptl. Butcher testified that the inventory search is done to protect the police department and the individual against allegations of theft. Ptl. Butcher also testified that he is required to search the entire vehicle, including locked areas.

{¶ 25} Based on Ptl. Butcher's testimony, we conclude that the officer's inventory search of the trunk and the suitcases was in accordance with the policy of the North Olmsted Police Department concerning an inventory search of a car that is going to be towed. We further conclude that the inventory search of the Cadillac was reasonable, for the reasons indicated in Ptl. Butcher's testimony. Specifically, it is reasonable to do an inventory search before surrendering a car to a towing company, in order to make sure that the car's contents are properly accounted for.

*4 {¶ 26} We conclude that the stop, arrest and search were all reasonable and lawful. Accordingly, the trial court did not err in denying defendant's motion to suppress.

{¶ 27} Defendant's first assignment of error is overruled.

{¶ 28} "II. The court erred in sentencing the appellant to consecutive sentences and in sentencing him to the gross sentence of twenty-five years.

{¶ 29} "III. The court erred when it imposed the maximum sentences possible for the charges made herein on the basis of R.C. of Ohio, § 2925.03(c)(4)(g), i.e., Count I (preparation of drugs for shipment, etc.) and § 2925.11(c)(4), i.e., Count II (possession of more than 1,000 grams of cocaine)."

[3] {¶ 30} In these assignments of error, defendant challenges the trial court's imposition of a maximum, consecutive term of incarceration. Defendant was convicted of possession of cocaine exceeding 1,000 grams, in violation of R.C. 2925.11

and trafficking in cocaine in an amount exceeding 1,000 grams, in violation of R.C. 2925.03. Both of these counts are felonies of the first degree with mandatory terms of incarceration of ten years imprisonment. Accordingly, the trial court did not err in imposing two ten-year sentences.

{¶ 31} Next, we find that the trial court did not err when it imposed an additional five years under the major drug offender specification. Pursuant to R.C. 2925.11(C)(4)(f) and R.C. 2929.14(D)(3)(b), the trial court may impose an additional penalty of anywhere from one to ten additional years imprisonment upon the making of certain findings enumerated in the statute. Specifically, R.C. 2929.14(D)(2)(b) provides in pertinent part:

{¶ 32} "(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

{¶ 33} "(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense."

{¶ 34} Here, in support of its decision to impose an additional five years of incarceration, the trial court noted the following factors: (1) defendant's history with drug convictions; (2) the large amount of the cocaine confiscated with a street value of over one million dollars; and (3) the serious harm and corruption suffered by the community as a result of drug offenses.

{¶ 35} The trial court then made the requisite findings. The trial judge stated that defendant is a likely recidivist. (Tr. 51). The trial judge stated that this was the worst form of the offense due to the amount of cocaine. (Tr. 51). The court also stated

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that a shorter term would demean the seriousness of the defendant's conduct and not adequately protect the public. Accordingly, the trial court did not err in imposing an additional five-year sentence.

*5 {¶ 36} Finally, we find that the trial court did not err in the imposition of consecutive sentences. Pursuant to R.C. 2929.14(E)(4), the trial court may impose consecutive prison terms for convictions of multiple offenses upon the making of certain findings enumerated in the statute. Specifically, R.C. 2929.14(E)(4) provides in pertinent part:

{¶ 37} "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶ 38} "(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶ 39} "(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

{¶ 40} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶ 41} Under R.C. 2929.19(B)(2)(c), if the trial court imposes consecutive sentences, it must make a finding on the record that gives its reason for imposing consecutive sentences. *State v. Nichols* (Mar. 2, 2000), Cuyahoga App. No. 75605, 75606; *State v. Parker* (Dec. 9, 1999), Cuyahoga App. Nos.

75117, 75118; *State v. Cardona* (Dec. 16, 1999), Cuyahoga App. No. 75556. The record must confirm that the trial court's decision-making process included all of the statutorily required sentencing considerations. See *Cardona*, supra; *Nichols*, supra, citing *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131. The trial court need not use the exact words of the statute; however, it must be clear from the record that the trial court made the required findings. *State v. Garrett* (Sept. 2, 1999), Cuyahoga App. No. 74759.

{¶ 42} Here, at the sentencing hearing, the trial court stated the following in pertinent part:

{¶ 43} "Isn't it ironic that the Defendant here and his girlfriend, and mother of one of his children, went to such extents that you rent a car in some third-party's name, pay the people to rent the car, you are not even on the rental agreement yourself, and you have these drugs in the trunk of your car surrounded by babies' clothing, to add insult to injury.

{¶ 44} "If it wasn't for the careless, stupid speeding by the Defendant Bridges, he probably would never have been apprehended, and would continue what I believe was an ongoing activity by him to bring illegal drugs into this Community, and the err of speeding, probably if you had a driver's license, which you didn't, you would have gone on and would not have been brought to the attention of law enforcement authorities.

*6 {¶ 45} " * * *

{¶ 46} "Certainly they were appropriate and proper in seizing the vehicle, and conducting their inventory search, incidental to the seizing.

{¶ 47} "Now, the Court is certainly aware of the fact that ten kilos of Cocaine, and its street value of \$1,250,000 to \$1,500,000, is an enormous amount, and if not being apprehended by the North Olmsted Police Department, would have gone into our community, and I can only envision the continual harm that it would have wreaked upon the people that use it and buy the 10 and \$20 of rock, and that this community already, through this Court alone, I

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know we have over 1,200 people actively in treatment at the cost of millions of dollars to the taxpayers.

{¶ 48} “The illness that it causes to the people that it wreaks havoc upon Crack Cocaine, and the corruption it causes along the way.

{¶ 49} “So the fact that this was brought to the attention of the Legal System, in this Court's opinion, is a very serious offense, and that's the way this Judge is going to treat this.

{¶ 50} “The Court is taking into consideration the fact that the Defendant, in August of 2001, was convicted of-plea of guilty to manual delivery of Cocaine, in Lake County, Illinois and was sentenced to thirteen months probation-strike that.

{¶ 51} “I think it was 1991, 36 months probation, and then in February of 96, was found guilty of a Felony and Possession of a Firearm, received a sentence of six months, suspended sentence, apparently, that you were convicted of no driver's license in Cleveland Heights in 98-that's not in my consideration here-was convicted of Battery, also in Waukegan, Illinois on July 28th for which there's a Warrant out for his arrest.

{¶ 52} “The record of the Defendant, in this Court's opinion, does make him a likely recidivist. He has served some time in the Penal Institution before. He had an arrest warrant for him at the time of the incident in this particular case. Past rehabilitation has failed.

{¶ 53} “This court finds, among other things, that a prison term is consistent with protecting the public from future crime in punishing this Defendant, that the shortest term demeans the seriousness of the offender's conduct, and the shortest term would not adequately protect he [sic] public from the Defendant and others.

{¶ 54} “The Court finds that in this Court's opinion, that the amount of this Crack Cocaine does rise to the level of the worst form of this offense.

{¶ 55} “The argument of Mr. Willis that there

could be twice this amount or more, does not, in this Court's opinion, remove this from being the worst form of this type of offense.

{¶ 56} “ * * *

{¶ 57} “I believe this Defendant was in the business of trafficking these drugs by way of the number of trips back and forth, using a bogus car and so forth, and that the Defendant does pose the greatest likelihood of committing future crimes, and would still be committing them if not apprehended, as I already stated.

*7 {¶ 58} “The Court believes that consecutive terms are necessary to protect the public.

{¶ 59} “The Court believes that consecutive terms are necessary to punish the Defendant, and the terms that I will render here are not disproportionate to the seriousness of the Defendant's conduct, and the danger the Defendant poses to the public, and further that the harm caused is so great that no single prison term would adequately reflect the seriousness of the Defendant's conduct.

{¶ 60} “The Defendant's history of criminal conduct demonstrates the consecutive sentences are necessary to protect the public from future crimes by this Defendant.

{¶ 61} “All of those things having been taken under full consideration, as well as incorporating herein, of course, the evidence that the Court has heard, on the Motion to Suppress and the trial of the co-Defendant, as well as the Exhibits submitted by the Prosecutor for purposes of sentencing, they re incorporated therein, it's the Court's opinion, further for the record, that the Defendant really is void of any sense of responsibility to the eight women he got pregnant, to the ten different children he has here and in Chicago, that he has no sense of moral values as well as transporting these illegal drugs into the community of Cuyahoga County.”

{¶ 62} We find that the trial court complied with the dictates of R.C. 2929.14(E)(4) when imposing consecutive sentences. The trial court stated that it imposed these sentences because of the large

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amount of cocaine defendant was carrying; the harm the public suffers when such a large amount of cocaine is brought and sold into the community; the harm to taxpayers who pay millions of dollars for the treatment of addicts; the defendant had a history of criminal convictions and he has not responded favorably to sanctions previously imposed. The trial court also specifically found that this rose to the level of the worst form of the offense and that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and the danger he poses to the community.

{¶ 63} The record before us supports the trial court's decision to impose consecutive sentences in this case, and the sentences are not contrary to law. Defendant's second and third assignments of error are overruled.

{¶ 64} "IV. To the extent the court relied on facts that were not a part of the trial record made in this case, as distinguished from that made in the trial of the co-defendant, the appellant was denied due process."

[4] {¶ 65} In defendant's fourth assignment of error, defendant argues that the assessment of the sentencing factors was unfairly influenced by non-statutory and prejudicial factors. Specifically, defendant argues that the trial court was unfairly influenced by its conclusion that the defendant was involved in an ongoing activity of bringing illegal drugs into the community and by the fact that the defendant had ten children by eight different mothers and that four of the children were present in the courtroom at sentencing. We disagree.

*8 {¶ 66} The trial court's comments, when viewed in the context of the entire proceeding, demonstrate a legitimate basis for its decision to impose consecutive sentences. Defendant was caught with a large amount of cocaine, with a market value of over one million dollars. Defendant had an extensive criminal record preceding his convictions in this case. Although the trial court may have made some additional comments regarding the defendant's personal life history that need not have been included, considering the record in its entirety, we cannot find that the trial court's

findings either tainted the fairness of the entire proceeding or demonstrated the trial court's prejudice against the defendant. See *State v. Williams* (Jan. 29, 2002), Cuyahoga App. Nos. 79590, 79591; *State v. Payton* (Dec. 13, 2001), Cuyahoga App. No. 79302.

{¶ 67} Defendant's fourth assignment of error is overruled.

{¶ 68} "V. The court erred in sentencing the defendant consecutively on Counts I and II, the drug possession charge and the preparation for shipment charge involving the same drugs."

[5] {¶ 69} In his fifth assignment of error, defendant argues that the trial court improperly failed to merge his convictions for possession of cocaine and trafficking in cocaine. We disagree.

{¶ 70} R.C. 2941.25, Ohio's allied offenses statute, protects against multiple punishments for the same criminal conduct in violation of the Double Jeopardy Clauses of the United States and Ohio Constitutions. *State v. Moore* (1996), 110 Ohio App.3d 649, 653, 675 N.E.2d 13. Specifically, R.C. 2941.25 states:

{¶ 71} "(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.

{¶ 72} "(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."

{¶ 73} In determining whether crimes are allied offenses of similar import under R.C. 2941.25(A), courts must assess whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the

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commission of the other. *State v. Rance* (1999), 85 Ohio St.3d 632, 638, 710 N.E.2d 699. If the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus. *Id.* at 638-639, 710 N.E.2d 699. The burden of establishing that two offenses are allied falls upon the defendant. *State v. Douse* (2001), Cuyahoga App No. 79318.

{¶ 74} Here, defendant was convicted of possession of cocaine exceeding 1,000 grams, in violation of R.C. 2925.11 and trafficking in cocaine in an amount exceeding 1,000 grams, in violation of R.C. 2925.03. R.C. 2925.11 provides that no person shall knowingly obtain, possess or use a controlled substance. R.C. 2925.03(A)(2) provides that no person shall knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another.

*9 {¶ 75} This Court has consistently held that drug trafficking and drug possession are not allied offenses of similar import since R.C. 2925.03(A)(2) imposes the additional element that possession of the controlled substance is incident to preparation for shipment, transportation, delivery or distribution of the drug through a sale. See *State v. Powell* (1993), 87 Ohio App.3d 157, 169, 621 N.E.2d 1328; *State v. Jordan* (1992), 73 Ohio App.3d 524, 542, 597 N.E.2d 1165; *State v. Cordero* (July 23, 1992), Cuyahoga App. No. 61030; *State v. Pall* (Sept. 12, 1991), Cuyahoga App. No. 59232; *State v. Mateo* (Aug. 17, 1989), Cuyahoga App. No. 55833.

{¶ 76} Defendant's fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, P.J., and COLLEEN CONWAY COONEY, J., concurs.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

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H

State v. Guzman Ohio App. 10 Dist., 2003.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Rigoberto S. GUZMAN, Defendant-Appellant.

No. 02AP-1440.

Decided Sept. 11, 2003.

Defendant plead guilty in the County Court of
 Common Pleas, Franklin County, No.
 02CR05-2879, to trafficking in cocaine and
 attempted possession of cocaine. Following denial
 of motion to withdraw plea, defendant was
 sentenced to consecutive sentences for total of 15
 years in prison. Defendant appealed. The Court of
 Appeals, Bowman, J., held that: (1) defendant was
 not entitled to withdraw guilty plea; (2) defendant
 waived any error in failing to suppress evidence
 when he pled guilty; (3) court adequately explained
 reasoning for sentencing defendant to maximum
 sentence; (4) court could impose consecutive
 sentences; (5) offenses were not allied so as to
 prohibit multiple offenses; and (6) court could
 consider testimony from co-defendant's trial when
 considering sentencing.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇨ 274(4)

110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

110k274 Withdrawal

110k274(3) Grounds for Allowance

110k274(4) k. Fraud, Duress,

Mistake, or Ignorance. Most Cited Cases

Defendant was not entitled to withdraw his guilty

plea to trafficking in cocaine and possession of
 cocaine, despite claims he did not understand
 proceeding because he only spoke Spanish;
 defendant was represented by competent counsel,
 defendant was given a full hearing before entering
 the plea, defendant was given a complete and
 impartial hearing on motion to withdraw, trial court
 gave full and fair consideration to the request, and
 defense counsel retained interpreters for
 proceedings who testified they discussed matters
 with defendant and that defendant understood
 everything that happened to him.

[2] Criminal Law 110 ⇨ 273.4(1)

110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

110k273.4 Waiver of Defenses and
 Objections

110k273.4(1) k. In General. Most
 Cited Cases

Defendant waived any error by trial court in failing
 to suppress evidence by pleading guilty to
 trafficking in cocaine and possession of cocaine.
 U.S.C.A. Const. Amend. 14; Const. Art. 1, § 14.

[3] Sentencing and Punishment 350H ⇨ 373

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(G) Hearing

350Hk369 Findings and Statement of
 Reasons

350Hk373 k. Sufficiency. Most Cited
 Cases

Trial court adequately explained reasoning for
 sentencing defendant to maximum sentences for
 trafficking in cocaine and possession of cocaine,
 where court stated that shortest prison term would
 demean seriousness of defendant's conduct and
 would not adequately protect public from future
 harm. R.C. § 2929.14(B).

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[4] Sentencing and Punishment 350H ↔587

350H Sentencing and Punishment

350HIII Sentence on Conviction of Different Charges

350HIII(B) Consecutive or Cumulative Sentences

350HIII(B)3 Factors and Purposes

350Hk587 k. Protection of Society.

Most Cited Cases

Sentencing and Punishment 350H ↔600

350H Sentencing and Punishment

350HIII Sentence on Conviction of Different Charges

350HIII(B) Consecutive or Cumulative Sentences

350HIII(B)3 Factors and Purposes

350Hk600 k. Nature and Degree of

Harm or Injury. Most Cited Cases

Trial court could impose consecutive sentences for convictions for trafficking in cocaine and possession of cocaine; court found that amount of drugs involved was one of largest amounts of cocaine to come into county, that consecutive sentences were necessary to protect the public from future crime and are necessary to punish defendant, that sentences were not disproportionate to the seriousness of his conduct and the danger he posed to the public, and that harm caused by multiple offenses was so great or unusual that a single prison term would not adequately reflect their seriousness. R.C. § 2929.14(E)(4).

[5] Double Jeopardy 135H ↔146

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk139 Particular Offenses, Identity of

135Hk146 k. Drugs and Narcotics.

Most Cited Cases

Trafficking in cocaine and attempted possession of cocaine were not allied offenses of similar import, and thus defendant could be given multiple sentences for the two offenses, as it was possible to attempt to possess cocaine without preparing it for

shipment, shipping, transporting or delivering or preparing it for distribution or distributing it. R.C. § 2923.02, 2925.03(A)(2), 2925.11(A), 2941.25.

[6] Constitutional Law 92 ↔270(2)

92 Constitutional Law

92XII Due Process of Law

92k256 Criminal Prosecutions

92k270 Judgment and Sentence

92k270(2) k. Matters Considered; Presentence Report. Most Cited Cases

Criminal Law 110 ↔662.60

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k662 Right of Accused to Confront Witnesses

110k662.60 k. Testimony at Preliminary Examination, Former Trial, or Other Proceeding. Most Cited Cases

Court could consider testimony from co-defendant's trial when sentencing defendant for trafficking in cocaine and attempted possession of cocaine, despite defendant's confrontation clause and due process clause arguments; testimony was relevant to the circumstances surrounding the offenses, and the testimony was similar to the testimony at defendant's suppression hearing. U.S.C.A. Const.Amends. 6, 14; Const. Art. 1, § 10.

Appeal from the Franklin County Court of Common Pleas.

Ron O'Brien, Prosecuting Attorney, and Susan E. Day, for appellee.

David K. Greer, for appellant.

BOWMAN, J.

*I {¶ 1} Defendant-appellant, Rigoberto S. Guzman, was indicted by the Franklin County Grand Jury on four counts, including: (1) trafficking in cocaine with a major drug offender specification, in that at least one kilogram of cocaine was prepared for shipment, in violation of R.C. 2925.03 and 2941.1410; (2) possession of the same cocaine in an amount equal to or exceeding one kilogram,

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and a corresponding major drug offender specification based on possession of at least one gram of cocaine, in violation of R.C. 2925.11 and 2941.1410; and (3) two complicity counts based on the same alleged activity.

{¶ 2} Appellant filed two motions to suppress evidence and, after a hearing, the trial court overruled both motions. Appellant then pled guilty to Count 1, trafficking in cocaine, without the major drug dealer specification and to attempted possession of cocaine, as a stipulated lesser-included offense of Count 2, without the major drug offender specification. The trial court entered a nolle prosequi as to Counts 3 and 4.

{¶ 3} Prior to sentencing, appellant filed a motion to withdraw his guilty plea. The trial court held a hearing but overruled the motion. Appellant was sentenced to consecutive periods of incarceration for a total of 15 years. He was also fined \$10,000 and ordered to serve five years of post-release control.

{¶ 4} Appellant filed a notice of appeal and raises the following assignments of error:

I. The trial court abused its discretion in refusing to grant appellant's pre-sentence motion to withdraw his guilty plea.

II. The trial court erred in overruling appellant's motion to suppress evidence, after appellant was arrested without probable cause, in violation of the Fourth Amendment of the United States Constitution and Article I, § 14 of the Ohio Constitution.

III. The trial court failed to adequately explain its findings in sentencing appellant to maximum and consecutive prison terms.

IV. Appellant was deprived of the effective assistance of counsel by counsel's failure to object to multiple sentences for allied offenses of similar import, in violation of R.C. 2941.25 and the Double Jeopardy Clauses of the United States and Ohio Constitutions.

V. The trial court committed plain error by entering judgments of conviction and sentencing appellant to consecutive prison terms for allied offenses of similar import, in violation of R.C. 2941.25 and the Double Jeopardy Clauses of the United States and

Ohio Constitutions.

VI. The trial court violated appellant's rights under the Confrontation and Due Process Clauses of the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, § 10 of the Ohio Constitution, and also violated Criminal Rule 43(A), when it considered evidence from the co-defendant's trial, of which appellant was not a party, in sentencing appellant.

{¶ 5} The charges against appellant arose out of events occurring on May 19-20, 2002. Detective Michael Johnson testified at the suppression hearing that, in the afternoon of May 19, he received a tip from a confidential informant that Jose Pena, a substantial cocaine trafficker, was receiving a big drug shipment that evening. Pena was working with one or more Mexicans and coordinating a shipment of cocaine from Arizona. Another confidential informant told Johnson that he had purchased cocaine from Pena in the previous month. Johnson watched Pena all afternoon. At approximately midnight, Pena left his house in a silver Nissan Maxima. Johnson lost sight of him, so he drove to the Interstate 270 and Roberts Road area where he believed the drug transaction was to take place. Johnson saw the Maxima in front of the Waffle House. A white semi trailer with Arizona license plates was parked behind the Waffle House and a man, later identified as Christopher Luty, was pacing nervously in front of the truck. Pena and appellant were inside the Waffle House and another police officer saw Pena on a cell phone. Then Pena and appellant got back into the Maxima and drove behind the Waffle House. By the time Johnson arrived behind the building, he saw the Maxima parked near the truck and Luty had a large suitcase and appellant was just closing the trunk of the Maxima. Johnson believed a drug transaction had just taken place and followed the Maxima as it drove away. Johnson stopped the Maxima, which appellant was driving. Pena exited the vehicle and fled on foot and was found approximately one hour later. When the police officers stopped appellant, he was removed from the car, placed on the ground and handcuffed. Nothing was found inside the trunk of the car. Johnson then ran back approximately 100 yards to the truck, knocked on the door and removed Luty from the truck. When Johnson looked

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inside the truck, there were 23 kilos of cocaine on the sleeper bunk. Johnson also observed a screwdriver and screws on the seat. After the truck was impounded, it was ascertained that another 9 kilos of cocaine were hidden in the ceiling. Johnson testified that it was approximately one minute or one and one-half minutes between the time appellant was stopped and the time Johnson saw the cocaine in the truck.

*2 [1] {¶ 6} By the first assignment of error, appellant contends that the trial court abused its discretion in refusing to grant appellant's pre-sentence motion to withdraw his guilty plea. While a pre-sentence motion to withdraw a guilty plea should be "freely and liberally granted," a defendant does not have an absolute right to withdraw a plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. A trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis to withdraw the plea. *Id.*, at paragraph one of the syllabus. The decision to grant or deny the motion is within the discretion of the trial court. *Id.*, at paragraph two of the syllabus. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 7} In *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, the Cuyahoga County Court of Appeals stated that a trial court does not abuse its discretion in overruling a motion to withdraw a guilty plea if: (1) the defendant is represented by highly competent counsel; (2) the defendant was given a full hearing pursuant to Crim .R. 11 before entering the plea; (3) after the motion to withdraw was filed, the defendant is given a complete and impartial hearing on the motion; and (4) the record reveals that the trial court gave full and fair consideration to the request. The record indicates that all of these conditions were met in this case.

{¶ 8} In his written motion, appellant provided no reasons for withdrawing his plea but did present two reasons at the hearing, including that he did not

understand the proceedings when he signed the guilty plea because the form was written in English and he only speaks Spanish, and also that he was innocent.

{¶ 9} Appellant's counsel retained an interpreter who testified at the hearing on the motion to withdraw the guilty plea. She stated that she was present during appellant's guilty plea hearing and she believed that the court interpreter paraphrased the judge and did not provide a complete translation. Appellant also testified that he did not understand the guilty plea form. The court interpreter who had interpreted the guilty plea hearing testified that he had interpreted the proceedings and he was confident that appellant understood everything that happened that day.

{¶ 10} The trial court also extensively questioned appellant through the interpreter during the hearing on his motion to withdraw. The trial court asked appellant whether he had understood during the plea hearing that he was giving up rights and that he could be sentenced to 15 years in prison, that he could have had a jury trial, that he could have testified or remained silent, that he could have had witnesses testify and he could have appealed an adverse ruling. Appellant answered affirmatively that he understood all the questions.

*3 {¶ 11} The interpreter hired by defense counsel testified that she spent approximately 45 minutes with appellant in the holding cell discussing and interpreting the plea form and appellant told her that he understood. She also testified that, at no time, had appellant told her he did not understand the proceedings.

{¶ 12} Appellant has failed to demonstrate that the trial court abused its discretion in overruling his motion to withdraw his guilty plea. Appellant was represented by competent counsel and was afforded a full hearing before he entered his plea. Appellant was also afforded a full hearing on the motion to withdraw, at which appellant stated he understood the rights he had waived. Both interpreters testified that appellant understood the proceedings. The trial court considered the evidence. A defendant is not entitled to change his plea merely because he

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changed his mind, even prior to sentencing. *State v. Lambros* (1988), 44 Ohio App.3d 102, 541 N.E.2d 632. Appellant's first assignment of error is not well-taken.

[2] {¶ 13} By the second assignment of error, appellant contends that the trial court erred in overruling appellant's motion to suppress evidence, after appellant was arrested without probable cause, in violation of the Fourth Amendment of the United States Constitution, and Section 14, Article I, of the Ohio Constitution. It is well-settled that a guilty plea constitutes a waiver of alleged errors by the trial court in not suppressing evidence. *State v. Elliott* (1993), 86 Ohio App.3d 792, 621 N.E.2d 1272. Appellant's second assignment of error is not well-taken.

{¶ 14} By the third assignment of error, appellant contends that the trial court failed to adequately explain its findings in sentencing appellant to maximum and consecutive prison terms. During sentencing, the trial court stated the following:

THE COURT: Mr. Guzman, the amount of drugs involved in this case is in my experience the largest amount of cocaine that's ever come in Franklin County, Ohio. It is very clear to me that you are a major player in this operation; not only this operation but organized criminal operation emanating from Mexico to the United States. And the basis of your operation is to do as much harm that you can possible do to the citizens of the United States of America.

I'm going to make a finding that you are what the court considers the worst form offender that poses the greatest likelihood of committing future crime.

I'm also going to find that the shortest prison term would demean the seriousness of your conduct and would not adequately protect the public from future crime.

On the felony one charge, you're going to get a sentence of ten years in the state penitentiary. On the felony three charge, you're going to get a sentence of five years in the state penitentiary. And those sentences are going to run consecutive with each other. Consecutive sentences are set forth in this case because they are necessary to protect the public from future crime and are necessary to punish you and they are not disproportionate to the

seriousness of your conduct and the danger you pose to the public.

*4 * * *

THE COURT: I'm also going to find that the harm caused by the multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of this offense.

Also, I have reviewed all of the testimony from the trial which dealt with your conduct in this organized criminal activity. And I'm also going to find that based upon all of that information, your history of criminal conduct dealing with this organized activity demonstrates that consecutive sentences are necessary to protect the public from future crime.

(Tr. Vol. IV, at 19-20.)

[3] {¶ 15} Appellant contends that the trial court erred in failing to give its reasons for imposing both maximum and consecutive prison terms. The version of R.C. 2929.14(B), in effect at the time of the offense, provided that, if an offender has not previously served a prison term, the court shall impose the shortest term authorized for the offense unless it finds that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender. In the recent Supreme Court of Ohio case, *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, the court found that the record of the sentencing hearing must reflect that the trial court made oral findings that either or both of the two statutorily sanctioned reasons for exceeding the minimum prison term warranted the longer sentence.

{¶ 16} In the syllabus of *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131, the Supreme Court of Ohio stated that R.C. 2929.14(B) does not require that the trial court give its reasons for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence. In this case, the trial court did find on the record that the shortest prison term would demean the seriousness of appellant's conduct and would not adequately protect the public from future crime. Appellant also argues that the trial court was required to find that appellant's

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conduct met one of the conditions justifying a maximum sentence under R.C. 2929.14(C); however, R.C. 2929.14(B) and (C) are mutually exclusive. *State v. Evans*, Franklin App. No. 02AP-230, 2002-Ohio-6559.

[4] {¶ 17} Appellant also contends that the trial court erred in imposing consecutive sentences. The applicable version of R.C. 2929.14(E)(4) requires the trial court to find that “consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and if the court also finds [.]” as applicable to this case, that “[t]he offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.” In *Comer*, the Supreme Court of Ohio stated that, when imposing consecutive sentences, a trial court is required to make its statutorily enumerated findings and give its reasons supporting those findings at the sentencing hearing.

*5 {¶ 18} In this case, the trial court found that the amount of drugs involved was one of largest amounts of cocaine to come into Franklin County. The trial court also stated that consecutive sentences were appropriate because they were necessary to protect the public from future crime and are necessary to punish appellant, and were not disproportionate to the seriousness of appellant’s conduct and the danger he poses to the public. Finally, the trial court found that the harm caused by the multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of this offense. After reviewing the testimony from Pena’s trial, the trial court concluded that appellant was a major player in the organized crime activity emanating from Mexico and his history of criminal conduct dealing with this organized activity demonstrated that consecutive sentences are necessary to protect the public from future crime. Thus, the trial court made the necessary findings required by statute. The trial court also provided its reasons, finding that appellant was a major player in the drug activity emanating from Mexico and he posed a risk of

future crime. Appellant’s third assignment of error is not well-taken.

[5] {¶ 19} By the fourth assignment of error, appellant contends that he was deprived of the effective assistance of counsel by counsel’s failure to object to multiple sentences for allied offenses of similar import, in violation of R.C. 2941.25 and the Double Jeopardy Clauses of the United States and Ohio Constitutions.

{¶ 20} R.C. 2941.25, Ohio’s allied offense statute, protects against multiple punishments for the same criminal conduct which could violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. R.C. 2941.25 provides, as follows:

(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 this 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.

{¶ 21} In *State v. Rance* (1999), 85 Ohio St.3d 632, 638, 710 N.E.2d 699, the Supreme Court of Ohio clarified the R.C. 2941.25(A) analysis and determined that the statutorily defined elements of offenses are compared in the abstract to determine if they correspond to such a degree that the commission of one crime will result in the commission of the other crime. If the elements so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with a separate animus.

{¶ 22} Appellant pled guilty to trafficking in cocaine and to attempted possession of cocaine. R.C. 2925.03(A)(2) defines trafficking and provides, as follows:

*6 (A) No person shall knowingly do any of the following:

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* * *

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

{¶ 23} Appellant also pled guilty to attempted possession of cocaine. Possession is defined in R.C. 2925.11(A) and provides that “[n]o person shall knowingly obtain, possess, or use a controlled substance.” R.C. 2923.02 is the attempt statute and provides that “[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.” In comparing these statutorily defined elements, they do not correspond to such a degree that the commission of one crime will result in the commission of the other crime. It is possible to attempt to possess cocaine without preparing it for shipment, shipping, transporting or delivering or preparing it for distribution or distributing it. Since the elements of the offenses do not correspond to such a degree that the commission of one crime will result in the commission of the other crime, they are not allied offenses and appellant's counsel was not ineffective for failing to object to multiple sentences for allied offenses of similar import. Appellant's fourth assignment of error is not well taken.

{¶ 24} By the fifth assignment of error, appellant contends that the trial court committed plain error by entering judgments of conviction and sentencing appellant to consecutive prison terms for allied offenses of similar import, in violation of R.C. 2941.25 and the Double Jeopardy Clauses of the United States and Ohio Constitutions. As addressed in the fourth assignment of error, these offenses are not allied offenses of similar import and the trial court did not err by entering judgments of conviction and sentencing appellant to consecutive prison terms. Appellant's fifth assignment of error is not well-taken.

[6] {¶ 25} By the sixth assignment of error, appellant contends that the trial court violated

appellant's rights under the Confrontation and Due Process Clauses of the Sixth and Fourteenth Amendments of the United States Constitution, and Section 10, Article I, of the Ohio Constitution, and also violated Crim.R. 43(A), when it considered evidence from the co-defendant's trial, of which appellant was not a party, in sentencing appellant. The United States Supreme Court recognized, in *Williams v. People of State of New York* (1949), 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337, that courts have long practiced a policy in which they could exercise “a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.” In *Williams*, the court stated that the rules of evidence and the same due process rights as afforded a defendant in the guilt phase do not apply in the sentencing phase and a judge has discretion to consider out-of-court information. *Id.* The Ohio Rules of Evidence set forth that the rules are not applicable to sentencing hearings. See Evid.R. 101(C)(3). A trial court may even consider information during the sentencing hearing that may have been inadmissible at trial. *State v. Cassidy* (1984), 21 Ohio App.3d 100, 101, 487 N.E.2d 322, citing *State v. Davis* (1978), 56 Ohio St.2d 51, 381 N.E.2d 641. “At sentencing the court is not concerned with the guilt or innocence of the defendant, but rather with imposing an appropriate sentence based upon the seriousness of the crime committed and the character of the defendant.” *Cassidy*, at 101, 487 N.E.2d 322, citing *State v. Barker* (1978), 53 Ohio St.2d 135, 150-151, 372 N.E.2d 1324. Thus, the trial court has wide discretion to consider information, to gather facts concerning the circumstances of the offense and the defendant's character and to determine an appropriate sentence. In this case, the trial court considered a portion of the transcript of co-defendant Pena's trial. The trial court did not err in considering information that was relevant to the circumstances surrounding the offense. Also, the testimony at trial was similar to the testimony at appellant's suppression hearing. Appellant's sixth assignment of error is not well-taken.

*7 {¶ 26} For the foregoing reasons, appellant's six assignments of error are overruled, and the judgment of the Franklin County Court of Common

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Pleas is affirmed.

Judgment affirmed.

KLATT and DESHLER,^{FN*} JJ., concur.

FN* DESHLER, J., retired, of the Tenth
Appellate District, assigned to active duty
under authority of Section 6(C), Article
IV, Ohio Constitution.

Ohio App. 10 Dist., 2003.

State v. Guzman

Not Reported in N.E.2d, 2003 WL 22099257 (Ohio
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▶
State v. Greitzer Ohio App. 11 Dist., 2005.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District,
Portage County.
STATE of Ohio, Plaintiff-Appellee,
v.
Edwin B. GREITZER, Defendant-Appellant.
No. 2003-P-0110.

Aug. 5, 2005.

Background: Defendant was convicted in the Court of Common Pleas, Portage County, No. 02 CR 0477, of fourth-degree felony trafficking in drugs within 1,000 feet of a school, fourth-degree felony trafficking in drugs, second-degree felony preparation of drugs for sale, and second-degree possession of cocaine. He appealed.

Holdings: The Court of Appeals, Rice, J., held that:

- (1) trial court acted within its discretion in admitting tape recordings of conversations during three drug buys;
- (2) defense counsel did not render ineffective assistance by failing to interview witness who claimed to be present when defendant's girlfriend allegedly planted drugs in defendant's room;
- (3) evidence was insufficient to show that defendant recklessly disregarded known risk that he was selling drugs within 1,000 feet of a school;
- (4) trial court did not commit plain error by failing to instruct jury that it had to find that defendant acted recklessly in selling cocaine close to a school;
- (5) imposition of nonminimum sentences for

offenses did not violate defendant's Sixth Amendment right to trial by jury;

(6) concurrent sentences of six years in prison for the second-degree offenses were proportional to sentences given other offenders convicted of similar offenses; and

(7) trial court's failure to notify defendant about postrelease control at sentencing hearing required remand for resentencing.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] **Criminal Law 110** ↪ 438.1

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438.1 k. Sound Recordings. Most

Cited Cases

Criminal Law 110 ↪ 444

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k444 k. Authentication of Documents.

Most Cited Cases

Trial court acted within its discretion in drug trial in admitting tape recordings of conversations during three drug buys, even though recordings contained certain inaudible portions; law enforcement officer explained how recording device operated, authenticated recordings, testified as to their accuracy, explained how recordings had not been altered and could not be altered after recording, and stated means by which recordings were securely stored prior to trial, recordings corroborated testimony of undercover deputy who was present at drug buys, confidential informant testified to

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consent of conversations captured by recordings, and recordings had some probative evidentiary value.

[2] Criminal Law 110 ⇨29(8)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(8) k. Drugs and Narcotics Offenses. Most Cited Cases

Double Jeopardy 135H ⇨146

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk146 k. Drugs and Narcotics. Most Cited Cases
Trafficking in drugs and possession of cocaine were not allied offenses of similar import, and thus convictions for both did not violate double jeopardy and were allowed under multiple-count statute. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 10; R.C. §§ 2925.03, 2925.11, 2941.25.

[3] Criminal Law 110 ⇨641.13(6)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) k. Evidence; Procurement, Presentation and Objections. Most Cited Cases
Defense counsel did not render ineffective assistance in drug prosecution by failing to interview witness who claimed to be present when defendant's girlfriend allegedly planted drugs in defendant's room; defense counsel made strategic

decision to present defense of entrapment and, to that end, called confidential informant who testified that he was aware that girlfriend had, in past, hidden crack cocaine in defendant's home, and thus jury was aware of possibility that some crack cocaine found in home at any given time might not belong to defendant. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⇨938(3)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(3) k. Facts Within Knowledge of Defendant. Most Cited Cases
Trial court acted within its discretion in denying defendant's motion for new trial for drug offenses based on allegedly newly discovered evidence that witness saw defendant's girlfriend plant drugs in defendant's room and that girlfriend stated that she was doing it to get even with defendant; trial court determined that defense clearly had girlfriend under subpoena and could have called her as witness, and there was clear reference during trial that girlfriend occasionally hid her drugs in defendant's apartment. Rules Crim.Proc., Rule 33(A).

[5] Controlled Substances 96H ⇨100(1)

96H Controlled Substances
96HIII Prosecutions
96Hk100 Sentence and Punishment
96Hk100(1) k. In General. Most Cited Cases
Evidence was insufficient to show that defendant recklessly disregarded known risk that he was selling drugs within 1,000 feet of a school, as required for enhancement of underlying crime of trafficking in drugs from fifth-degree felony to fourth-degree felony; the state did not offer any evidence relating to whether defendant was aware that elementary school was near location of drug sale, and there was evidence that location of drug sale was chosen by confidential informant and not defendant. R.C. § 2925.03(A), (C)(4)(a, b).

[6] Criminal Law 110 ⇨1038.2

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110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1038 Instructions

110k1038.2 k. Failure to Instruct in
General. Most Cited Cases

Trial court did not commit plain error, in trial for trafficking in drugs within 1,000 feet of a school, by failing to instruct jury that it had to find that defendant acted recklessly regarding selling crack cocaine in close proximity to a school; until time that the state Supreme Court decided to certify and resolve conflict between one appellate court and other appellate courts on issue of culpable mental state required to violate school specification, all appellate courts that had addressed issue had held that school specification was strict liability, and, furthermore, appellate court that created conflict had concluded that knowledge was required mens rea for school specification. R.C. § 2925.03(A), (C)(4)(a, b).

[7] Sentencing and Punishment 350H ⇌98

350H Sentencing and Punishment

350HI Punishment in General

350HI(E) Factors Related to Offender

350Hk93 Other Offenses, Charges,
Misconduct

350Hk98 k. Arrests, Charges, or
Unadjudicated Misconduct. Most Cited Cases
Trial court could consider pending charges against defendant in sentencing him for felony drug offenses. R.C. §§ 2929.12, 2929.13, 2929.14.

[8] Jury 230 ⇌34(8)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of
Functions of Jury

230k34(5) Sentencing Matters

230k34(8) k. Drug Offenses. Most

Cited Cases

(Formerly 230k34(1))

Imposition of nonminimum sentences for felony

drug offenses based on trial court's findings did not violate defendant's Sixth Amendment right to trial by jury; sentences were within relevant statutory range for each offense. R.C. § 2929.14(B)(2).

[9] Controlled Substances 96H ⇌100(2)

96H Controlled Substances

96HIII Prosecutions

96Hk100 Sentence and Punishment

96Hk100(2) k. Extent of Punishment.

Most Cited Cases

Sentencing and Punishment 350H ⇌55

350H Sentencing and Punishment

350HI Punishment in General

350HI(C) Factors or Purposes in General

350Hk55 k. Comparison with Dispositions
in Other Cases. Most Cited Cases

Concurrent sentences of six years in prison for second-degree trafficking in drugs and second-degree possession of cocaine were proportional to sentences given other offenders convicted of similar offenses. R.C. § 2929.11(B).

[10] Criminal Law 110 ⇌1181.5(8)

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition
of Cause

110k1181.5 Remand in General; Vacation

110k1181.5(3) Remand for
Determination or Reconsideration of Particular
Matters

110k1181.5(8) k. Sentence. Most
Cited Cases

Sentencing and Punishment 350H ⇌354

350H Sentencing and Punishment

350HIII Sentencing Proceedings in General

350HII(G) Hearing

350Hk350 Advice and Warnings

350Hk354 k. Other Particular Issues.
Most Cited Cases

Trial court's failure to notify defendant about postrelease control at sentencing hearing for felony

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offenses required remand for resentencing, even though term of postrelease control was included in trial court's written judgment entry of sentence. R.C. § 2929.19(B)(3)(c, d).

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 02 CR 0477. Affirmed in part, reversed in part and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and Pamela J. Holder, Assistant Prosecutor, Ravenna, OH, for Plaintiff-Appellee.
Mark B. Marein, Cleveland, OH, for Defendant-Appellant.

OPINION

RICE, J.

*1 {¶ 1} Defendant-appellant, Edwin Greitzer ("Greitzer"), appeals from the judgment of the Portage County Court of Common Pleas, convicting him on Count One of Trafficking in Drugs, a fourth-degree felony in violation of R.C. 2925.03(A) and (C)(4)(b), including the statutory enhancement for selling within 1,000 feet of a school; Count Two of Trafficking in Drugs, a fourth degree felony, in violation of R.C. 2925.03(A) and (C)(4)(c); Count Three of Trafficking in Drugs, a felony of the second degree, in violation of R.C. 2925.03(A) and (C)(4)(e); Count Four of Preparation of Drugs for Sale, a felony of the second degree, in violation of R.C. 2925.03(A) and (C)(4)(e); and Count Five of Possession of Cocaine, a felony of the second degree, in violation of R.C. 2925.11(A) and (C)(4)(d). Greitzer also appeals his sentencing related to these convictions. For the foregoing reasons, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

{¶ 2} On January 6, 2003, the Portage County Grand Jury returned a five count indictment against Greitzer. The charges stemmed from an investigation by the Portage County Sheriff's Intelligence Unit ("SIU"), which employed Ken Dippel ("Dippel") as a confidential informant. Dippel had reported to agents of the SIU, based on a conversation with Greitzer's girlfriend, Deanna Cross ("Cross") that Greitzer had been selling crack

cocaine from his residence, located in Kent, Ohio. Based upon this information, agents of the SIU, through Dippel, arranged a series of three controlled drug buys over a four day period between Greitzer, and Deputy Palozzi, ("Palozzi") an SIU undercover narcotics agent. The events surrounding each controlled drug buy were secretly recorded by the SIU from a transmission via a wire worn either by Palozzi or Dippel. These transmissions were monitored and recorded by SIU officers involved in the investigation.

{¶ 3} On November 19, 2002, Palozzi made the first buy when he purchased .82 grams of crack cocaine from Greitzer for \$100. This buy took place in Palozzi's vehicle in a Wendy's restaurant parking lot. The Wendy's restaurant was located within 1,000 feet of Brimfield Elementary School. Palozzi made the second buy on November 20, 2002, when he purchased 2.98 grams of crack cocaine from Greitzer for \$260. The third buy, which occurred on November 22, 2002, was a "buy-bust" involving a purchase of 11.54 grams of crack cocaine for \$700. This took place at the Indian Valley Apartment Complex in the City of Kent. The fourth count was related to the packaging for sale of the crack cocaine related to the November 22 possession charge. The possession charge relates to the crack cocaine found pursuant to a consent search of Greizer's room, which was conducted subsequent to his arrest on November 22, 2002.

{¶ 4} On August 1, 2003, following a three day trial, the jury returned a guilty verdict on all five counts. On September 15, 2003, Greitzer was sentenced to twelve months on Count One; twelve months on Count Two; six years on Count Three; six years on Count Four; and six years on Count Five, to run concurrently. In addition, the court fined Greitzer \$7,500 each on Counts Three, Four and Five, for a total fine of \$22,500.

*2 {¶ 5} Greitzer timely appealed, asserting eleven assignments of error:

{¶ 6} "[1.] Trial counsel rendered constitutionally deficient assistance in violation of the defendant-appellant's Sixth Amendment rights.

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{¶ 7} “[2.] Prosecutorial and police misconduct in violation of the defendant-appellant's Fifth Amendment right to the due process of law and his right to a fair trial.

{¶ 8} “[3.] The trial court erred in admitting into evidence completely inaudible tape recorded conversations in violation of the defendant-appellant's right to the due process of law and a fair trial.

{¶ 9} “[4.] The defendant-appellant was twice put in jeopardy in violation of his Sixth Amendment rights.

{¶ 10} “[5.] The evidence was insufficient to sustain a verdict in Count One that included the Schoolyard Specification.

{¶ 11} “[6.] The trial court plainly erred when it failed to instruct the jury that a mens rea of recklessness was an essential element of the Schoolyard Specification attendant to Count One.

{¶ 12} “[7.] The trial court erred when it denied Mr. Greizer's motion for a new trial on the basis that the evidence presented in support of the motion was known to him at the time of trial.

{¶ 13} “[8.] The trial court improperly sentenced Mr. Greitzer to more than the minimum term of imprisonment when its sentence was based on a finding that Mr. Greitzer engaged in criminal activity not found by the jury and not admitted by Mr. Greitzer.

{¶ 14} “[9.] The trial court failed to adequately ensure that its total sentence was proportionate to sentences being given to similarly situated offenders who have committed similar offenses.

{¶ 15} “[10.] The trial court improperly included a term of post-release control in its journal entry memorializing the sentence imposed, despite not having made post-release control a part of the sentence it imposed in open court.

{¶ 16} “[11.] Mr. Greitzer received the ineffective assistance of counsel in violation of his rights under

the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

{¶ 17} For the purposes of judicial economy, Greitzer's assigned errors will be discussed out of order and consolidated, where applicable.

[1] {¶ 18} In his third assignment of error, Greitzer asserts that the trial court erred by admitting into evidence “completely inaudible” tape recorded conversations in violation of his right to a fair trial. The tapes at issue were created by police during the three drug buys and recorded conversations which occurred during each of the transactions. Greitzer maintains that the trial court abused its discretion in admitting the audiotapes, since the tapes were so inaudible that a trained court reporter hired by the defense was unable to transcribe the tapes created on November 19 and November 20, 2002, “due to excessive amounts of inaudible and indistinguishable audiotape,” and merely served to “bolster the testimony of the state's witnesses” at trial. We disagree.

*3 {¶ 19} Evidentiary rulings are within the discretion of the trial court and will not be overturned absent a clear abuse of discretion whereby the defendant has suffered material prejudice. *State v. Long* (1978), 53 Ohio St.2d 91, 98, 372 N.E.2d 804.

{¶ 20} An abuse of discretion consists of more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (citation omitted). Reversal, under an abuse of discretion standard is not warranted merely because appellate judges disagree with the trial judge or believe the trial judge erred. Id. Reversal is appropriate only if the abuse of discretion renders “the result * * * palpably and grossly violative of fact and logic [so] that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (citation omitted).

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{¶ 21} With respect to the admission of audiotapes at trial, audiotapes must be “authentic, accurate and trustworthy.” *State v. Gotsis* (1984), 13 Ohio App.3d 282, 469 N.E.2d 548, at paragraph one of the syllabus. “In determining whether to admit tape recordings, the trial court must assess whether the unintelligible portions are so substantial as to render the recordings *as a whole* untrustworthy.” *Id.* (emphasis added). Furthermore, “[i]t is not an abuse of discretion for the trial court to admit into evidence tape recordings containing inaudible portions, when their authenticity, accuracy and trustworthiness are established by extensive, uncontradicted testimony as to the recording and custody of the tapes and the content of the conversations recorded.” *Id.* at paragraph two of the syllabus.

{¶ 22} In the instant matter, the prosecution used testimony from Detective Sergeant James Carozzi (“Carozzi”), who monitored and operated the recording device used during each of the three buys. In his testimony, Carozzi explained how the particular recording device operated, authenticated the tapes, testified as to their accuracy, explained how the tapes had not been altered and could not be altered after recording, and stated the means by which the tapes were securely stored prior to trial. Carozzi then discussed the technical limitations of the recording equipment, including factors which might affect the quality of the recordings.

{¶ 23} Moreover, the tape recordings at issue merely corroborated the testimony of Palozzi, who was present during each transaction, and subject to cross-examination as to the content of the conversations he had with Greitzer regarding each transaction. In addition, Dippel, who was called as a *defense witness*, also testified as to the content of the conversations captured by the recordings. A tape recording which cannot be transcribed due to certain inaudible portions is not automatically rendered inadmissible, if it is relevant to corroborate the testimony of witnesses who are subject to cross-examination. *State v. Dello* (Dec. 16, 1994), 11th Dist. No. 93-L-075, 1994 Ohio App. LEXIS 5705, at *11-*14. Having reviewed the content of the tape recordings, this court finds that, while the recordings contained certain inaudible

portions, substantial portions of the tapes were audible. The tapes contained extensive drug conversation including how to cook up crack cocaine and the going rates for cocaine. On the November 19, 2002 tape, the seller introduces himself as “Eddie.” Therefore, the tapes had some probative evidentiary value. The trial court did not abuse its discretion by admitting the tapes into evidence. Greitzer’s third assignment of error is without merit.

*4 [2] {¶ 24} In his fourth assignment of error, Greitzer claims he was twice put in jeopardy by being convicted and sentenced for both possession of crack cocaine under R.C. 2925.11(A) and (C)(4)(d) and for preparing for distribution the “same quantity of crack cocaine” under R.C. 2925.03(A) and (C)(4)(e), in violation of his constitutional rights. Greitzer essentially argues that at least one of his convictions for a quantity of crack cocaine exceeding ten grams represents a “double counting of the crack cocaine he was actually involved with” and, therefore, must be reversed. We disagree.

{¶ 25} “The guarantees against double jeopardy contained in Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, protect against multiple punishments for the same offense.” *State v. McCoy* (Nov. 9, 2001), 1st Dist. Nos. C-000659, C-00660, 2001 Ohio App. LEXIS 5031, at *14 citing *North Carolina v. Pearce* (1969), 395 U.S. 711. In order to effectuate these protections, the Ohio General Assembly enacted R.C. 2941.25, which provides as follows:

{¶ 26} “(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.”

{¶ 27} “(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

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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.” (Emphasis added).

{¶ 28} The Supreme Court of Ohio established a test for determining whether offenses are allied pursuant to R.C. 2941.25: First, a court must compare the elements of each offense, *in the abstract*, and determine if the crimes correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. *State v. Sanders*, 11th Dist. No.2003-P-0072, 2004-Ohio-5629, at ¶ 49, citing *State v. Rance*, 85 Ohio St.3d 632, 638, 710 N.E.2d 699, 1999-Ohio-291.

{¶ 29} In the instant case, the three charges relating to the events of November 22, 2002, involve two separate quantities of crack cocaine. The first was in the amount of 11.54 grams, which was found underneath the visor of Greitzer's vehicle during the buy-bust. This amount corresponds with the charge in Count Three. The second consisted of separate quantities of crack cocaine, which were recovered from Greitzer's room during a consent search. The total weight of the crack cocaine found in the search of Greitzer's room was 13.13 grams, according to testimony adduced at trial from Detective Nicolino (“Nicolino”), who conducted the search of Greitzer's room. Nicolino stated the crack cocaine was found in “several different packages,” including loosely contained in “a breath mint container”, “wrapped in plastic, the little baggie tied,” and one “larger chunk” in a “glass-I believe a baby jar.” Greitzer's argument on appeal attempts to create confusion between which amount in excess of ten grams was the subject of Count Four. Were the amount “packaged for sale” the same as that offered for sale, Greitzer would have a colorable double jeopardy argument. However, Nicolino's testimony that the multiple packages found in Greitzer's room meant that “they are packaged for sale, split up, maybe somebody already ordered up and he had the weights split for distribution,” along with the testimony of Dippel, who told Greitzer that he “sold a lot of cocaine,” make it clear that the crack cocaine found in Greitzer's room was also packaged for sale.

*5 {¶ 30} Finally, it is well-established that trafficking in drugs under R.C. 2925.03 and possession of drugs under R.C. 2925.11 are not allied offenses of similar import. *Sanders*, 2004-Ohio-5629, at ¶ 49; *State v. Burnett* (Mar. 20, 1997), 8th Dist. No. 70618, 1997 Ohio App. LEXIS 1105, at *13 (holding that a defendant may be convicted and sentenced for both possession and trafficking of the same physical quantity of drugs under R.C. 2925.03(A)(2) and R.C. 2925.11); *State v. Daanish* (Jan. 6, 1994), 8th Dist. No. 64514, 1994 Ohio App. LEXIS 7, at *12-*13; *McCoy*, 2001 Ohio App. LEXIS 5031, at *16-*17. Greitzer's fourth assignment of error is without merit.

[3] {¶ 31} In his first assignment of error, Greitzer claims that his defense counsel was ineffective for failing to conduct an adequate pre-trial investigation. Greitzer maintains that had defense counsel attempted to interview the residents of the boarding house, he would have discovered and called Dodie Shingleton (“Shingleton”), as a “key defense witness.” Shingleton claimed to be present when Cross, whom Greitzer also describes as a “confidential informant,” allegedly planted drugs in his room on the day of his arrest.

{¶ 32} The United States Supreme Court adopted a two-part test for determining whether trial counsel was ineffective: “First, the defendant must show that counsel's performance was deficient,” meaning that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.*

{¶ 33} “[T]he proper standard for attorney performance is that of reasonably effective assistance * * * [and] the defendant must show that counsel's representation fell below an objective standard of reasonableness.” *Id.* at 687-688. A court “must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.” *Id.* at 689. Thus, a defendant “must overcome the presumption that,

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under the circumstances, the challenged action ' might be considered sound trial strategy.' ' Id., quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83. "Debatable trial tactics generally do not constitute a deprivation of effective counsel." *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643, 1995-Ohio-171.

{¶ 34} "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. However, "[d]ecisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics. The mere failure to subpoena witnesses for a trial is not a substantial violation of defense counsel's essential duty absent a showing of prejudice." *State v. Coulter* (1992), 75 Ohio App.3d 219, 230, 598 N.E.2d 1324

*6 {¶ 35} "To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229, 598 N.E.2d 1324. Reversal of a conviction, therefore, places the burden on the defendant to show that counsel's deficient performance raises a reasonable probability that, but for counsel's errors, the result of the trial would have been different. See, *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (citation omitted); *State v. Henderson*, 11th Dist. No.2001-T-0047, 2002-Ohio-6715, at ¶ 13 (citation omitted).

{¶ 36} Reviewing the record, we find that trial counsel made the strategic decision to set forth a defense of entrapment. To this end, defense counsel chose to subpoena, but did not call, Cross as a defense witness. Instead, the defense called Dippel, who was subpoenaed as a witness for the prosecution, who testified that he was aware that Cross had, in the past, hid crack in Greitzer's home. Courts must be highly deferential to counsel's performance and will not second-guess trial strategy

decisions. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965, 1995-Ohio-104. Furthermore, since the jury was aware, through Dippel's testimony, of the possibility that some of the crack found in the apartment at any given time might not be Greitzer's and could consider and weigh this evidence, Greitzer has failed to demonstrate that the counsel's decision to forego additional investigation was constitutionally ineffective. Greitzer's first assignment of error is without merit.

{¶ 37} In his second assignment of error, Greitzer contends that the alleged planting of drugs by Cross, prior to Greitzer's arrest on November 22, 2002, are bad acts that should be imputed to the police, and furthermore alleges prosecutorial misconduct for a failure to disclose Dippel, as an agent of the police, was aware that Cross occasionally would hide drugs at Greitzer's apartment and then go back and pick them up later.

{¶ 38} With respect to Greitzer's allegations of prosecutorial misconduct, there is no evidence in the record supporting the assertion that Dippel either was aware that Cross had planted drugs in Greitzer's apartment on the day of the arrest, or that the prosecution did not inform defense counsel that Dippel knew that Cross hid drugs in Greitzer's apartment on occasion. On the contrary, the fact that Dippel was called by the defense and testified to the fact that Cross sometimes hid drugs at Greitzer's apartment, belies Greitzer's assertion that the prosecution did not make defense counsel aware of this fact.

{¶ 39} Greitzer's argument that Cross acted as a " confidential informant" on behalf of the police is even more tenuous. The basic test to determine whether an agency relationship exists between two parties is "whether the alleged principal had the right of control over the alleged agent, and whether their alleged agent's actions were directed toward the principal's objectives." *Woodworth v. Huntington Nat'l Bank* (Dec. 7, 1995), 10th Dist. No. 95APE02-219, 1995 Ohio App. LEXIS 5424 at *10, citing *Hanson v. Kynast* (1986), 24 Ohio St.3d 171, 494 N.E.2d 1091, paragraph one of the syllabus. Under this test, there is absolutely no evidence in the record to support an agency

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relationship between Cross and the SIU.

*7 {¶ 40} Greitzer cites to Dippel's testimony that he called Cross on the day of the buy-bust and asked her to call Greitzer on the telephone, but there is no evidence that he ever directed Cross to plant crack cocaine in Greitzer's apartment or to act in any way in furtherance of the investigation against Greitzer. In fact, Dippel testified that he "never let [Cross] know I was dealing with [Greitzer]. She likes to run her mouth and it's dangerous." Greitzer's second assignment of error is without merit.

[4] {¶ 41} Greitzer's seventh assignment of error is related to his first and second assignments of error. Greitzer argues that the trial court erred in denying his motion for a new trial on the basis that the evidence presented in support of the motion was known to him at the time of the trial.

{¶ 42} Crim.R. 33(A) governs the grounds for granting a new trial upon motion by the defendant. To warrant the granting of a motion for new trial, based upon newly discovered evidence, the defendant must show that the new evidence (1) is likely to change the result of the trial if a new trial is granted; (2) has been discovered since the trial; (3) could not, within the exercise of due diligence, have been discovered before the trial; (4) is material to the issues; (5) is not merely cumulative of other evidence, and (5) does not merely impeach or contradict the former evidence. *State v. Nahhas*, 11th Dist. No.2001-T-0045, 2002-Ohio-3708, at ¶ 11-17, citing *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, at the syllabus. The evidence must meet all six criteria to properly be classified as new evidence. *Nahhas*, 2002-Ohio-3708, at ¶ 26. An appellate court reviews the trial court's allowance of a motion for new trial on the grounds of newly discovered evidence under an abuse of discretion standard, and in the absence of a clear showing of abuse, the trial court's decision will not be disturbed. *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, at paragraph two of the syllabus.

{¶ 43} In the case sub judice, a hearing was held on the affidavit submitted by Shingleton, in which

she stated she observed Cross planting drugs in Greitzer's apartment and that Cross had made the statement that she was doing it to "get even with Ed." The trial court determined that the defense clearly had Cross under subpoena and could have called her as a witness, and there was also a clear reference during the trial that Cross occasionally hid her drugs in Greitzer's apartment. The trial court determined, therefore, that the defense either used or referred to this evidence during trial, and therefore it was not newly discovered, because the third factor was not satisfied. We find that the court did not abuse its discretion in denying Greitzer's motion for a new trial. Greitzer's seventh assignment of error is without merit.

[5] {¶ 44} In his fifth assignment of error, Greitzer argues that based upon the Ohio Supreme Court's recent holding in *State v. Lozier*, 101 Ohio St.3d 161, 803 N.E.2d 770, 2004-Ohio-732, the state's evidence was insufficient to sustain the sentencing enhancement in Count One based upon the "schoolyard specification" of R.C. 2925.03(A) and (C)(4)(b). *Lozier* held that "[t]he culpable mental state of recklessness applies to the offense of trafficking [in drugs] 'in the vicinity of a school' * * *." 101 Ohio St.3d 161, 803 N.E.2d 770, at the syllabus. Greitzer concedes that the state's evidence was sufficient to sustain a guilty verdict to the underlying charge that he sold less than one gram of cocaine on November 19, 2002. However, Greitzer maintains there was insufficient evidence, as a matter of law, to elevate his underlying crime from a fifth degree to a fourth degree felony. We agree.

*8 {¶ 45} A challenge on the basis of sufficiency of the evidence is predicated on whether the state has presented evidence for each element of the charged offense. *State v. Barno*, 11th Dist. No.2000-P-0100, 2001-Ohio-4319, 2001 Ohio App. LEXIS 4280, at *16. The relevant inquiry when testing the sufficiency of the evidence is whether, after reviewing the evidence and the inferences drawn from it in the light most favorable to the prosecution, any rational trier of fact could find all elements of the offense proven beyond a reasonable doubt. *Id.*, citing *State v. Jones*, 91 Ohio St.3d, 335, 345, 744 N.E.2d 1163, 2001-Ohio-57.

{¶ 46} A challenge to the sufficiency of the evidence raises a question of law; thus, an appellate court is not permitted to weigh the evidence when making this inquiry. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *13 (citations omitted). Finally, a reviewing court should not reverse a verdict if sufficient evidence exists from which a trier of fact could reasonably conclude that all elements of an offense were proven beyond a reasonable doubt. *Id.* at *14. (Citation omitted).

{¶ 47} Appellate courts have held that any factor that serves to elevate the degree of a crime is not a sentencing enhancement, but rather an element of the crime, which must be proven beyond a reasonable doubt. See, *State v. Cole* (1994), 94 Ohio App.3d 629, 633, 641 N.E.2d 732 (holding that specifications which elevate a crime from a misdemeanor to a felony are elements of a crime, and not penalty enhancements.) cf. *State v. Allen* (1987), 29 Ohio St.3d 53, 54-55, 506 N.E.2d 199 (holding that where the existence of a fact enhances the penalty for an offense, but does not elevate the degree of the offense, the fact is not an essential element which need not be alleged in the indictment or proved). Thus, the schoolyard specification is an element of the crime, which must be proved beyond a reasonable doubt to elevate the crime of trafficking in cocaine from a fifth degree felony under R.C. 2925.03(C)(4)(a), to a fourth degree felony, under R.C. 2925.03(C)(4)(b). See, *State v. Brown* (1993), 85 Ohio App.3d 716, 722, 621 N.E.2d 447 (holding that the finding of "within one thousand feet of the boundaries of any school premises" is an essential element of the state's case-in-chief which must be proved beyond a reasonable doubt before an enhanced penalty can be imposed.)

{¶ 48} The Supreme Court of Ohio's opinion in *Lozier* was released on March 3, 2004, while this appeal was pending, but subsequent to Greitzer's trial and conviction on Count One, which contained the schoolyard specification. At the time of Greitzer's trial, the majority of appellate courts in Ohio that had decided the issue of the culpable mental state attendant to the schoolyard specification under R.C. 2925.03, treated a

violation of the specification as a strict liability offense. See, *State v. Harris* (1993), 89 Ohio App.3d 147, 623 N.E.2d 1240; *State v. Altick*, (1992), 82 Ohio App.3d 240, 611 N.E.2d 863; *State v. Rippey* (Feb. 7, 1996), 9th Dist. No. 95CA006106, 1996 Ohio App. LEXIS 373; *State v. Rogers* (Apr. 14, 1995), 9th Dist. No. 19176, 1999 Ohio App. LEXIS 1735, but see, *State v. Lozier*, 5th Dist. No. 01 CA 21, 2002-Ohio-1671, 2002 Ohio App. LEXIS 1640, at *11 (holding that the applicable degree of culpability with regard to the schoolyard specifications of R.C. 2925.03 is knowingly). However, the Ohio Supreme Court had certified the conflict between the appellate districts, but had not yet decided the issue when Greitzer's trial was held in July and August of 2003. *State v. Lozier*, 98 Ohio St.3d 1501, 785 N.E.2d 756, 2003-Ohio-1439; see also, 96 Ohio St.3d 1446, 2002-Ohio-3512.

*9 {¶ 49} Following the Supreme Court's holding in *Lozier*, the schoolyard specification now requires that a jury find beyond a reasonable doubt that a defendant recklessly violated R.C. 2925.03(A) and (C)(4)(b). R.C. 2901.22(C) states that a person's act is reckless with respect to circumstances when, "with heedless indifference to the consequences, he *perversely disregards a known risk that such circumstances are likely to exist.*" (Emphasis added).

{¶ 50} It is well-settled in Ohio that when a decision of our state supreme court overruling a prior rule of law is released during the pendency of an appeal, application of the new rule is not considered retrospective, and the new rule is applicable to all active cases pending as of the announcement date. *State v. Evans* (1972), 32 Ohio St.2d 185, 188, 291 N.E.2d 466, citing *State v. Lynn* (1966) 5 Ohio St.2d 106, 108, 214 N.E.2d 226; *State v. Poling* (May 17, 1991), 11th Dist. No. 88-T-4112, 1991 Ohio App. LEXIS 2294, at *11-*12; *Lamendola v. Beatty* (Mar. 29, 1991), 11th Dist. No. 90-P-2159, 1991 Ohio App. LEXIS 1412, at *3-*4. Thus, the *Lozier* rule dictates that it was the prosecution's burden to prove, beyond a reasonable doubt, that Greitzer, recklessly "disregarded a known risk" that he was selling crack cocaine within 1,000 feet of a schoolyard.

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{¶ 51} The state did not offer any evidence relating to whether Greizer was aware that Brimfield Elementary was nearby. Moreover, there was evidence at trial that the Wendy's restaurant was chosen as a location by Dippel and not Greitzer. Since the prosecution failed to sustain their burden of proof under *Lozier* with respect to the element of recklessly disregarding a *known risk* that the sale took place within 1,000 feet of a schoolyard, Greitzer's fifth assignment of error has merit. This court reverses and orders the trial court to vacate Greitzer's conviction on Count One under the schoolyard specification of R.C. 2925.03(A)(C)(b), and enter judgment on the underlying conviction for selling or offering to sell cocaine in an amount less than one gram, under R.C. 2925.03(A)(C)(a).

[6] {¶ 52} In his sixth assignment of error Greitzer asserts that the trial court committed plain error and abused its discretion when it failed to instruct the jury that it must find, beyond a reasonable doubt, that Greitzer acted recklessly regarding selling crack cocaine in close proximity to a school. We disagree.

{¶ 53} The test for "plain error" is enunciated under Criminal Rule 52(B). In order for Crim.R. 52(B) to apply, a reviewing court must find that (1) there was an error, i.e., a deviation from a legal rule; (2) that the error was plain, i.e., that there was an "obvious" defect in the trial proceedings; and (3) that the error affected "substantial rights," i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, 2002-Ohio-68 (citations omitted). Moreover, "[t]he decision to issue a particular jury instruction rests within the sound discretion of the trial court." *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252, *supra*, at *18 (citation omitted).

*10 {¶ 54} As previously mentioned, the issue of the culpable mental state required to violate the schoolyard specification of R.C. 2925.03 was a settled issue prior to the Fifth District's decision in *Lozier*, and the Ohio Supreme Court's decision to certify and resolve the conflict created by the Fifth District's ruling. Until that time, the appellate courts in Ohio that had addressed this issue unanimously

held that the schoolyard specification was strict liability. Furthermore, the appellate court in *Lozier* concluded that *knowledge* was the required mens rea for the schoolyard specification. 2002 Ohio App. LEXIS 1640, at *13. Thus, there was no error in the trial court's failure to instruct the jury that *recklessness* was the required mens rea for the schoolyard specification. Thus, the trial court did not act in an unreasonable, arbitrary or unconscionable manner by not providing jury instructions on this issue. Greitzer's sixth assignment of error is without merit.

{¶ 55} For the same reasons as listed in Greitzer's sixth assignment of error, his defense counsel was not ineffective for failing to specifically challenge "the sufficiency of the evidence" or in failing to "request a jury instruction regarding criminal intent" on Count One. "Appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings." *State v. Harvey* (Jul. 7, 1998), 8th Dist. No. 71774, 1998 Ohio App. LEXIS 3139, at *6 (citation omitted). Greitzer's eleventh assignment of error is without merit.

{¶ 56} In his eighth, ninth, and tenth assignments of error, Greitzer challenges his sentence.

{¶ 57} Pursuant to R.C. 2953.08(G)(2), this court reviews a felony sentence de novo. *State v. Gibson*, 11th Dist. No.2002-T-0055, 2003-Ohio-5695, at ¶ 68. In doing so, we conduct a meaningful review of the imposition of sentence. *State v. Comer*, 99 Ohio St.3d 463, 793 N.E.2d 473, 2003-Ohio-4165, at ¶ 10. " 'Meaningful review' means that an appellate court hearing an appeal of a felony sentence may modify or vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds that the record does not support the sentence or that the sentence is otherwise contrary to law." *Id.*, citing R.C. 2953.08.

{¶ 58} In his eighth assignment of error, Greitzer asserts that the court based this finding on the "impermissible" factual premise that he had new charges pending against him at the time of his sentencing. Greitzer additionally argues that as a person who has not previously been imprisoned, he

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was entitled to the presumption of minimum sentences on each count, and that the court's finding that a minimum sentence would "demean the seriousness of the offense" violated his Sixth Amendment right to trial by jury under the rule of *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. We disagree.

*11 {¶ 59} R.C. 2929.14(A) provides the relevant penalty ranges with respect to felony sentencing, and provides, in relevant part:

{¶ 60} "For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years." R.C. 2929.14(A)(2).

{¶ 61} "For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." R.C. 2929.14(A)(4).
 FN1

FN1. R.C. 2929.14(A)(5) states that "[f]or a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven or twelve months." We note this, since we have determined that Greitzer's fifth assignment of error has merit. As a result, the twelve month term imposed would still be in the statutory range, but it would be a *maximum sentence* for a fifth degree felony. On remand, since there are multiple convictions involved, a court may wish to "review what remains and reconstruct the sentence in light of the original sentencing plan." *State v. Nelloms* (2001), 144 Ohio App.3d 1, 6, 759 N.E.2d 416 (citations omitted); *State v. Couturier* (Sep. 13, 2001), 10th Dist. No. 00AP-1293, 2001 Ohio App. LEXIS 4050, at *6.

{¶ 62} In Ohio, sentencing law carries with it a presumption that a defendant who has not previously served a prison term should receive the minimum statutory term. *State v. Stambolia*, 11th Dist. No.2003-T-0053, 2004-Ohio-6945, at ¶ 31.

However, this presumption is rebuttable if the court makes a finding, on the record, that "the shortest prison term will demean the seriousness of the conduct or will not adequately protect the public from future crime by the offender." *Id.*, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 325, 715 N.E.2d 131, 1999-Ohio-110; *Comer*, 2003-Ohio-4165, at ¶ 26, 99 Ohio St.3d 463, 793 N.E.2d 473; R.C. 2929.14(B)(2).

{¶ 63} Moreover, under R.C. 2929.14(B)(2), a trial court is not required to "give its *reasons* for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence." *Edmonson*, 86 Ohio St.3d at 326, 715 N.E.2d 131. The word "finds," as used in R.C. 2929.14(B) merely requires that the court "note that it engaged in the analysis and that it varied from the minimum for at least one of the two sanctioned reasons." *State v. Aponte*, 11th Dist. No.2001-L-097, 2002-Ohio-3374, at ¶ 10, citing *Edmonson*, 86 Ohio St.3d at 326, 715 N.E.2d 131.

{¶ 64} In our review of the record, we find that the trial court made the statutory finding required. The court specifically stated with respect to Count One that, "in analyzing the factors set forth in R.C. 2929.13(C), the Court would find that none of the more serious factors apply. In analyzing the recidivism factors, the court would make the following specific findings: That the defendant does have a history of criminal conviction; that he's not responded favorably to sanctions imposed; that while out on bond on these charges, he was charged with four additional charges * * * of trafficking in cocaine, or possession of cocaine." The court considered substantially the same factors with respect to the remaining counts. Although these statements were couched in the terms of "findings," they are more accurately characterized as evidence that the court analyzed the factors under R.C. 2929.12 and R.C. 2929.13, before making its finding under R.C. 2929.14(B).

[7] {¶ 65} We do not find the court's consideration of the pending cases against Greitzer improper. "[A]ppellate courts have held that a trial court may

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not consider a crime *neither charged nor proven* when it is sentencing an offender." *Stambolia*, 2004-Ohio-6945, at ¶ 26 (citations omitted). However, this phrase is written in the disjunctive, which means that conversely, a trial court *may* look at crimes that have been either charged *or* proven. See *State v. Burton* (1977), 52 Ohio St.2d 21, 23, 368 N.E.2d 297 ("a sentencing court may weigh such factors as arrest for other crimes"); *Maple Heights v. Dickard* (1986), 31 Ohio App.3d 68, 508 N.E.2d 994, paragraph two of the syllabus ("in sentencing, a trial court may weigh such factors as prior arrests and charges, even though such arrests and charges did not lead to convictions"); *State v. English* (1991), 77 Ohio App.3d 371, 386, 602 N.E.2d 655 ("[i]n sentencing, a trial court may consider information which would have been inadmissible at trial * * * including information regarding other arrests, regardless of whether convictions resulted") (citations omitted). We see no logical reason why the court could not also consider arrests *subsequent* to the arrest for which the defendant is convicted, particularly when determining the defendant's likelihood of recidivism.

*12 {¶ 66} After making the statutorily enumerated finding under R.C. 2929.14(B), the trial court sentenced Greitzer to twelve months on each of the two fourth degree felonies; and six years on each of the two second degree felonies, to be served concurrently.

[8] {¶ 67} With respect to Greitzer's second argument, this court has determined that *Blakely* does not apply to Ohio's sentencing scheme, when the trial court makes a finding that "the minimum sentence * * * would demean the seriousness of the offense * * * ." *State v. Murphy*, 11th Dist. No.2003-L-049, 2005-Ohio-412, at ¶¶ 54-60. "The General Assembly has made it clear that the R.C. 2929.14(B)(2) findings * * * are sentencing factors." *State v. Rupert*, 11th Dist. No.2003-L-154, 2005-Ohio-1098, at ¶ 42. Moreover, "[a]s a criminal defendant has never enjoyed a Sixth Amendment right to jury sentencing, the penalty phase of a criminal trial does not implicate the full panoply of rights guaranteed by due process." *Id.* at ¶ 38. "Thus, judicial fact finding in the course of selecting a sentence within the authorized range

does not implicate the indictment, jury-trial and reasonable doubt components of the Fifth and Sixth Amendments." *Id.* See, also, *Murphy*, 2005-Ohio-412, at ¶ 56. Since the sentences imposed by the trial court were within the relevant statutory range for each offense, *Blakely* is not implicated. For the foregoing reasons, Greitzer's eighth assignment of error is without merit.

[9] {¶ 68} In his ninth assignment of error, Greitzer alleges that the trial court "failed in its responsibility to ensure consistency and proportionality" since it "articulated nothing in the record to suggest that it even considered the issue."

{¶ 69} R.C. 2929.11(B) states, in relevant part, that "[a] sentence imposed for a felony shall be * * * commensurate with and not demeaning of the offender's conduct and * * * consistent with the sentences imposed for similar crimes committed by similar offenders." This court has held that although " 'a trial court is required to engage in the analysis set forth by R.C. 2929.11(B) to ensure the consistency of sentences,' a court is not required 'to make specific findings on the record' in this regard." *State v. Adams*, 11th Dist. No.2003-L-110, 2005-Ohio-1107, at ¶ 57 (citations omitted). As mentioned in the previous assignment of error, it is clear that the court considered the seriousness and recidivism factors in pronouncing sentence. Moreover, Greitzer points to no specific instances indicating that his sentence is not proportional to other similarly situated offenders. However, in our review of the applicable Ohio case law, we find that his sentence of six years was proportional to sentences given other offenders convicted of similar offenses. See, *State v. Sieng*, 10th Dist. No. 04AP-556, 2005-Ohio-1003 (defendant sentenced to seven years for one count of trafficking in cocaine, a second degree felony under 2925.03(A) and (C)(4)(e)); *State v. Price*, 10th Dist. No. 02-AP1215, 2003-Ohio-4764 (seven year sentence imposed on one count of trafficking in crack cocaine, a second degree felony); *State v. Williams*, 12th Dist. No. CA2002-09-233, 2003-Ohio-4114 (four year sentence for one count of trafficking in cocaine, a second degree felony); *State v. Turner*, 11th Dist. No.2000-T-0074, 2001-Ohio-8880, (defendant sentenced to five years and four years, to

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be served *consecutively* for two counts of trafficking in crack cocaine under R.C. 2925.03(A) and (C)(4)(e)). Greitzer's ninth assignment of error is without merit.

*13 [10] {¶ 70} In his tenth assignment of error, Greitzer, on the basis of the Ohio Supreme Court's holdings in *State v. Jordan*, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085, and *State v. Finger*, 104 Ohio St.3d 157, 818 N.E.2d 1171, 2004-Ohio-6390, which were released during the pendency of this appeal, asserts that the trial court improperly included a term of post-release control in its written judgment entry of sentence when no mention was made of the post-release control term in the sentencing hearing; and thus, the post-release control term must be vacated, and the case remanded for resentencing. We agree.

{¶ 71} *Jordan* held that when a felony offender is sentenced to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post-release control and is also required to incorporate that notice into its written judgment entry imposing sentence. 104 Ohio St.3d 21, 817 N.E.2d 864, at paragraph one of the syllabus. When a trial court fails to notify an offender about post-release control at the sentencing hearing, but incorporates that notice in its written judgment entry of sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and the sentence must be vacated and the matter remanded to the trial court for resentencing. *Id.* at paragraph two of the syllabus; accord, *State v. Peacock*, 11th Dist. No.2002-L-115 2003-Ohio-6772, at ¶¶ 40-41. This requirement applies regardless of whether the post release control term is mandatory or discretionary. *Jordan*, at ¶ 4.

{¶ 72} Our review of the sentencing transcript indicates, and the state concedes, that the trial court did not mention any post-release control term during the sentencing hearing, but included a term in its judgment entry of sentence. Therefore, Greitzer's tenth assignment of error has merit, and the case must be remanded to the trial court for resentencing.

{¶ 73} Based on the foregoing analysis, we find that Greitzer's fifth and tenth assignments of error have merit. All of the other assignments of error are without merit. We therefore affirm in part, reverse in part and remand this matter with an order to vacate judgment as to the specification on Count One and for resentencing consistent with this Opinion.

DONALD R. FORD, P.J., COLLEEN M. O'TOOLE, J., concur.

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C

State v. Alvarez Ohio App. 12 Dist., 2004.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Butler
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Hector Manuel ALVAREZ, Defendant-Appellant.

No. CA2003-03-067.

Decided May 17, 2004.

Background: Defendant pled guilty in the Court of
 Common Pleas, Butler County, to trafficking in
 cocaine and possession of cocaine, and he appealed.

Holding: The Court of Appeals, Valen, J., held
 that, since the elements of the offenses did not
 correspond to such a degree that the commission of
 one crime would result in the commission of the
 other, trafficking in cocaine and possession of
 cocaine were not allied offenses, and thus, the trial
 court did not err in sentencing defendant for both.

Affirmed.

West Headnotes

[1] Criminal Law 110  **577.14**

110 Criminal Law

110XVIII Time of Trial

110XVIII(B) Decisions Subsequent to 1966

110k577.14 k. Refiling Charge; Second
 Trial. Most Cited Cases

Defendant's speedy-trial waiver which applied to
 the original charge also applied to the amended
 charge since the amendment did not change the
 name or identity of the offense, and because the
 speedy-trial waiver applied to the amended charge,
 defendant's trial counsel did not violate any

substantial duty in failing to make a futile motion to
 dismiss the charge based on a speedy trial violation,
 and therefore, counsel could not be deemed
 ineffective on this ground. U.S.C.A. Const.Amend.
 6.

[2] Criminal Law 110  **1167(4)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1167 Rulings as to Indictment or
 Pleas

110k1167(4) k. Amendment. Most
 Cited Cases

Defendant waived any error regarding the amended
 charge by not objecting at the time of the
 amendment.

[3] Sentencing and Punishment 350H  **524**

350H Sentencing and Punishment

350HIII Sentence on Conviction of Different
 Charges

350HIII(A) In General

350Hk515 Particular Offenses

350Hk524 k. Drugs and Narcotics.
 Most Cited Cases

Since the elements of the offenses did not
 correspond to such a degree that the commission of
 one crime would result in the commission of the
 other, trafficking in cocaine and possession of
 cocaine were not allied offenses, and thus, the trial
 court did not err in sentencing defendant for both; it
 was possible to obtain, possess, or use a controlled
 substance without preparing it for shipment, and it
 was also possible to sell or offer to sell cocaine
 without possessing it, e.g., when one serves as a
 middleman. R.C. § 2941.25; R.C. § 2925.03(A)(2);
 R.C. § 2925.11(A).

Criminal Appeal from Butler County Court of
 Common Pleas, Case No. CR02-04-0510.

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Robin N. Piper, Butler County Prosecuting Attorney, Randi E. Froug, Hamilton, OH, for plaintiff-appellee.

Scott N. Blauvelt, Hamilton, OH, for defendant-appellant.

VALEN, J.

*1 ¶ 1 Defendant-appellant, Hector Alvarez, appeals his convictions and sentence in the Butler County Court of Common Pleas for trafficking in cocaine and possession of cocaine. We affirm the decision of the trial court.

¶ 2 Appellant was arrested on March 21, 2002 after police found two pounds of cocaine in his vehicle. Appellant was initially indicted for three counts: trafficking in cocaine, possession of cocaine, and driving without a motor vehicle operator's license.

¶ 3 On May 16, 2002, appellant signed a written waiver of his right to a speedy trial. Then, on November 6, 2002, the state moved to amend the subsection of the statute charged in the indictment for the crime of trafficking in cocaine. The subsection in the indictment was amended from R.C. 2925.03(A)(1), which prohibits the sale or offer to sell a controlled substance, to R.C. 2925.03(A)(2), which prohibits the shipment, delivery, or distribution of a controlled substance intended for sale or resale by the offender or another person.

¶ 4 During a December 20, 2002 plea hearing, appellant executed a jury waiver form and pled guilty to trafficking in cocaine and possession of cocaine. On February 12, 2003, appellant was sentenced to serve four years concurrently for each of the convictions, in accordance with his plea agreement. Judgment of conviction was entered on May 20, 2003. Appellant appeals his trafficking conviction and sentence raising two assignments of error:

¶ 5 Assignment of Error No. 1:

¶ 6 "DEFENDANT-APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE VIOLATED BY HIS CONVICTION UNDER

COUNT ONE OF THE INDICTMENT."

[1] ¶ 7 Appellant argues that when a charge is amended to allege a new offense based on the identical facts as the original charge, "the speedy trial time relates back to the date of the original charge and any time which was waived or tolled under the original charge is not tolled or waived under the amended charge." Appellant contends that his trial counsel was ineffective for failing to move for a dismissal as the state failed to conduct a trial within the requisite time period.

¶ 8 In determining whether an accused received ineffective assistance of counsel, a reviewing court must determine whether counsel's performance fell below an objective standard of reasonable professional competence, and if so, whether there is a reasonable probability that counsel's unprofessional error affected the outcome of the proceedings. *Strickland v. Washington* (1989), 466 U.S. 668, 690-691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674.

¶ 9 On May 16, 2002, appellant executed a written speedy trial waiver after he was originally charged with trafficking in cocaine. On December 20, 2002, appellant then pled guilty to the amended charge of trafficking in cocaine. Appellant is not claiming that his plea was not knowingly, voluntarily and intelligently made.

¶ 10 The state responds to appellant's argument by indicating that appellant chose to enter a guilty plea to the amended trafficking charge. In doing so, the state asserts that appellant waived his right to assert on appeal that his speedy trial rights were violated. We agree with the state.

*2 ¶ 11 Nevertheless, appellant argues his right to a speedy trial was violated because the charge was amended to allege a new offense, citing *State v. Adams* (1989), 43 Ohio St.3d 67, 68-69, 538 N.E.2d 1025. The Ohio Supreme Court held in *Adams* that "when new and additional charges arise from the same facts as the original charge and the state knew of those facts at the time of the initial indictment, the time within which trial must begin on the additional charges is subject to the same

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statutory limitations period that applied to the original charge." Further, the accused's waiver of his speedy-trial rights as to the initial charge "is not applicable to additional charges filed after the waiver arising from the same set of circumstances." *Id.* at syllabus.

{¶ 12} However, a distinction exists between an additional charge based on the same facts and circumstances as the original charge and an amendment to the original charge. An additional charge creates an additional burden on the defendant's liberty interests. *State v. Butt* (Aug. 29, 1997), Montgomery App. No. 16215, at *2. Therefore, the speedy-trial requirements applicable to the additional charge must commence with the defendant's arrest, and the waivers and extensions chargeable to the defendant with respect to the original charge cannot apply to the additional charge. But, an amendment that does not change the name or identity of the offense creates no additional burden to liberty. *State v. Campbell*, 150 Ohio App.3d 90, 2002-Ohio-6064, at ¶ 24.

{¶ 13} So long as the amendment is consistent with Crim.R. 7(D), the speedy trial time waivers and extensions applicable to the original charge apply as well to the amended charge. See *id.* Crim.R. 7(D) states, in part, that "the trial court may at any time before, during or after a trial amend the indictment * * * provided no change is made in the name or identity of the crime charged." It is well-established that the provision of Crim.R. 7(D) is for the protection of the defendant, who can waive it. *State v. Cook* (1987), 35 Ohio App.3d 20, 23, 519 N.E.2d 419.

[2] {¶ 14} Appellant waived any error by not objecting at the time of the amendment. *Brooklyn v. Ritter* (Aug. 17, 2000), Cuyahoga App No. 76979, at *2. Furthermore, appellant cannot show any prejudice, because defense counsel specifically stated that, "I researched the prosecutor's right to amend the indictment as a matter of law and was confident that they did have it right. * * * I explained to Mr. Alvarez, and shortly thereafter, so this is not a surprise or in any way news to us. And we are willing to accept an amended indictment * * * It did not change the nature of the offense."

{¶ 15} The trial court merely amended the original charge; it did not create an additional charge. The amendment did not change the name or identity of the offense. Appellant's counsel admitted that the amendment "did not change the nature of the offense." Therefore, the speedy-trial waiver applicable to the original charge applied as well to the amended charge. *Campbell*, 2002-Ohio-6064, at ¶ 24, 150 Ohio App.3d 90, 779 N.E.2d 811.

*3 {¶ 16} Because the speedy-trial waiver applied to the amended charge, appellant's trial counsel did not violate any substantial duty in failing to make a futile motion to dismiss the trafficking in cocaine charge based on a speedy trial violation; therefore, counsel cannot be deemed ineffective on this ground. See *State v. Thompson* (1988), 46 Ohio App.3d 157, 546 N.E.2d 441. Consequently, appellant received effective assistance of counsel and his right to a speedy trial was not violated. Therefore, the first assignment of error is overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} "THE TRIAL COURT ERRED IN IMPOSING SENTENCE ON BOTH COUNTS ONE AND TWO OF THE INDICTMENT WHERE SAID COUNTS WERE ALLIED OFFENSES OF SIMILAR IMPORT."

[3] {¶ 19} Appellant argues that merger of allied offenses of similar import is required unless the offenses are committed separately or with a separate animus. Appellant maintains that the trial court erred in sentencing him for both trafficking in cocaine and possession of cocaine.

{¶ 20} R.C. 2941.25, Ohio's allied offense statute, protects against multiple punishments for the same criminal conduct, which could violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. R.C. 2941.25 provides, as follows:

{¶ 21} "(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.

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{¶ 22} “(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where this 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.”

{¶ 23} In *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, the Supreme Court of Ohio clarified the R.C. 2941.25(A) analysis and determined that the statutorily defined elements of offenses are compared in the abstract to determine if they correspond to such a degree that the commission of one crime will result in the commission of the other crime. If the elements so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with a separate animus.

{¶ 24} Appellant pled guilty to trafficking in cocaine. R.C. 2925.03(A)(2) defines trafficking and provides, as follows:

{¶ 25} “(A) No person shall knowingly do any of the following:

{¶ 26} “ * * *;

{¶ 27} “(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe the controlled substance is intended for sale or resale by the offender or another person.”

*4 {¶ 28} Appellant also pled guilty to possession of cocaine. Possession is defined in R.C. 2925.11(A) and provides that “[n]o person shall knowingly obtain, possess, or use a controlled substance.”

{¶ 29} In comparing these statutorily defined elements, they do not correspond to such a degree that the commission of one crime will result in the commission of the other crime. It is possible to obtain, possess, or use a controlled substance without preparing it for shipment, shipping,

transporting, delivering, preparing for distribution, or distributing it. It is also possible to sell or offer to sell cocaine without possessing it, e.g., when one serves as a middleman. Since the elements of the offenses do not correspond to such a degree that the commission of one crime will result in the commission of the other, trafficking in cocaine and possession of cocaine are not allied offenses and the trial court did not err in sentencing appellant for both. See *State v. Gonzales*, 151 Ohio App.3d 160, 174, 2002-Ohio-4937, at ¶ 37. Therefore, appellant's second assignment of error is overruled.

{¶ 30} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.
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