

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

RICHARD L. UNDERWOOD, JR.

Defendant-Appellee.

CASE NO. 08-2133 & 08-2228

ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 22454

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APPELLANT'S MERIT BRIEF

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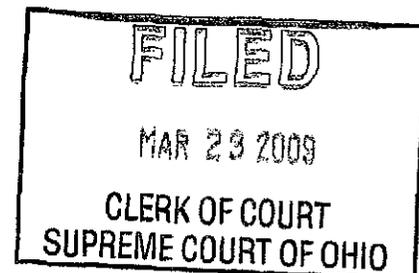
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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES	ii-iii
STATEMENT OF FACTS	1-4
ARGUMENT	4-15
<b><u>STATE'S FIRST PROPOSITION OF LAW &amp; ISSUE</u></b>	
<b><u>CERTIFIED FOR REVIEW</u></b>	
<b>A Jointly Recommended Sentence is Authorized by Law, and Thus, Pursuant to R.C. 2953.08(D), Not Reviewable on Appeal, Regardless of Whether Such Sentence Includes Multiple Convictions on Allied Offenses of Similar Import.</b>	4-13
<b><u>SECOND PROPOSITION OF LAW</u></b>	
<b>Where A Defendant is Sentenced to a Jointly Recommended Sentence Pursuant to a Plea Agreement, The Failure to Merge Convictions on Allied Offenses Cannot be Said to Constitute Plain Error.</b>	13-15
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX	APPX. PAGE
Notice of Appeal to the Supreme Court of Ohio (November 3, 2008)	1-2
Notice of Certified Conflict to the Supreme Court of Ohio (November 17, 2008)	3-40
Final Entry of the Montgomery County Court of Appeals (September 19, 2008)	41-42
Opinion of the Montgomery County Court of Appeals (September 19, 2008)	43-50
R.C. 2953.08	51-56
R.C. 2941.25	57
Crim.R. 52	58

**TABLE OF AUTHORITIES**

<b><u>CASES:</u></b>	<b><u>PAGE</u></b>
<i>Lester v. Leuck</i> (1943), 142 Ohio St. 91, 50 N.E.2d 408	14
<i>NACCO Indust., Inc. v. Tracy</i> , 79 Ohio St.3d 314, 1997-Ohio-368, 681 N.E.2d 900	8
<i>State v. Baird</i> , Columbiana App. No. 06-CO-4, 2007-Ohio-3400	5, 7
<i>State v. Butts</i> (1996), 112 Ohio App.3d 683, 679 N.E.2d 1170	6
<i>State v. Cabrales</i> , 118 Ohio St.3d 54, 2008 Ohio 1625	4
<i>State v. Coats</i> (Mar. 30, 1999), Franklin App. No. 98AP-927	6
<i>State v. Comen</i> (1990), 50 Ohio St.3d 206, 553 N.E.2d 640	13
<i>State v. Ferguson</i> (1991), 71 Ohio App.3d 342, 594 N.E.2d 23	14
<i>State v. Foster</i> , 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470	10
<i>State v. Graham</i> (Sep. 30, 1998), Franklin App. No 97AP11-1524	5, 6, 14
<i>State v. Henderson</i> (Sep. 27, 1999), Warren App. No. CA99-01-002	5, 7
<i>State v. Jackson</i> , Cuyahoga App. No. 86506, 2006-Ohio-3165	5, 7, 14, 15
<i>State v. Kalish</i> , 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124	10
<i>State v. Lopez</i> , Clark App. No. 2001 CA 08, 2002-Ohio-1807	5
<i>State v. Porterfield</i> , 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690	9, 10
<i>State v. Stansell</i> (April 20, 2000), Cuyahoga App. No. 75889	13, 14
<i>State v. Styles</i> (Oct. 9, 1997), Cuyahoga App. No. 71052	6
<i>State v. Turrentine</i> , Allen App. No. 1-08-18, 2008-Ohio-3231	5
<i>State v. Wilson</i> , 77 Ohio St.3d 334, 1997-Ohio-35, 673 N.E.2d 1347	8
 <b><u>OTHER:</u></b>	
Crim.R. 11	3

Crim.R. 52(B)	13
R.C. 2929.02	9
R.C. 2929.06	9
R.C. 2929.11	10
R.C. 2929.12	10
R.C. 2929.14	10
R.C. 2929.14(E)(4)	9
R.C. 2941.25(A)	4
R.C. 2953.08	3, 4, 7
R.C. 2953.08(A)	4, 8
R.C. 2953.08(A)(4)	8
R.C. 2953.08(D)	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
R.C. 2953.08(D)(1)	3, 4

## STATEMENT OF FACTS

Defendant-Appellee, Richard L. Underwood, Jr., in the years 2003 and 2005, committed a number of thefts through his position as a housing contractor. Jack and Patricia Smith paid Underwood \$80,000 in September 2005 as a down payment for building a home on their vacant lot. Underwood hired subcontractors who began work excavating and pouring a basement, but construction ended when the subcontractors were never paid. Underwood kept the \$80,000 but the Smiths received no further work on their home. (State's Sentencing Memorandum p.2-3).

Similarly, Gerald and Lynn Stover gave Underwood a \$12,000 down payment in September 2005 for remodeling work on their home. Underwood again began demolition, but never placed any orders for materials. Again, the job was abandoned unfinished when subcontractors were not paid. Underwood kept the money paid to him and the Stovers were forced to hire a second company to finish the job. (State's Sentencing Memorandum p.3-5).

Underwood orchestrated the same scam in the same month against Joshua and Buffy Whitt. The Whitts gave Underwood \$19,566.00 as a down payment on remodeling and construction projects. Again, excavation and construction were halted when subcontractors were never paid. Underwood kept the money paid to him despite abandoning the project. (State's Sentencing Memorandum p.5-6).

These three separate thefts were charged in the indictment as two separate counts of aggravated theft. Count 1 (A Indictment) charged Underwood with aggravated theft by deception for the amount collectively stolen from the Smiths, the Stovers, and the Whitts. Count 1 (B Indictment) charged Underwood with aggravated theft by exerting use and control of the money taken beyond the scope of the express or implied consent of the Smiths, the Stovers, and the Whitts. (Docket Entry No. 1, 23).

Underwood also committed a theft against Robert Bowman back in February 2003, when he was employed by Bowman's home improvement company. Underwood obtained a \$1,100 cash down payment from a customer who wanted to hire Bowman's company to do repair work to his home. Underwood never informed Bowman of the contract, kept the cash, and quit his job at Bowman's company just days later. (State's Sentencing Memorandum p.6-7). This theft was charged as two offenses in Counts 2 and 3 (A Indictment). (Docket Entry No. 1). Count 2 charged Underwood with theft by exerting use or control of the money beyond the scope of Bowman's express or implied consent. Count 3 charged Underwood with theft by deception. Id.

On the day scheduled for Underwood's jury trial, August 13, 2007, the State and Underwood's trial counsel announced that they had reached a plea agreement. The court then proceeded with a plea hearing on the record. (Plea & Sentencing Tr. 3-15). During the plea colloquy, the court noted that certain agreements with regard to sentencing had been reached. (Plea & Sentencing Tr. 5) The court explained that, pursuant to an agreement, upon Underwood's pleas of no contest to the charges in the indictments, the following agreements as to sentencing had been reached:

If Underwood paid \$40,000 in restitution by the time of his sentencing (then scheduled for August 29, 2007) the parties agreed to a sentence of either community control with six months local incarceration or up to two years imprisonment at the Correctional Reception Center with the State offering no opposition to judicial release. However, if Underwood failed to pay the \$40,000 in restitution by the time of sentencing, the parties agreed to an aggregate sentence of up to two years imprisonment at the Correctional Reception Center. (Plea & Sentencing Tr. 6).

Both Underwood's trial counsel and the State confirmed their agreement to those terms on the record. (Plea & Sentencing Tr. 6-7). The court then continued its Crim.R. 11 plea colloquy and accepted Underwood's four pleas of no contest to the charges in the indictment. (Plea & Sentencing Tr. 8-15). When Underwood returned for sentencing on September 26, 2007, he had made no payments toward restitution. Therefore, in accordance with the terms of the agreement placed on the record at the plea hearing, the court imposed the aggregate sentence of two years. (Plea & Sentencing Tr. 40-54). Underwood was sentenced to a prison term of one year on Count 1 (A Indictment) aggravated theft, two years on Count 1 (B Indictment) aggravated theft, and six months on each of the two theft counts, with all sentences to run concurrently for an aggregate prison term of two years. (Docket Entry No. 50, 55).

Underwood appealed. On appeal, the Second District Court reviewed an *Anders* brief submitted by Underwood's counsel and noted that a potential issue with regard to allied offenses required further briefing. Underwood's counsel filed a supplemental brief on July 8, 2008 and raised the issue of allied offenses for the first time. The Appellate Court rejected the State's position that R.C. 2953.08(D)(1) barred review of Underwood's sentence as a jointly recommended sentence pursuant to a plea agreement. The Court held that Underwood's multiple convictions represented allied offenses and were therefore not "authorized by law," as required by R.C. 2953.08. The Court vacated Underwood's conviction for aggravated theft (by deception) and his conviction for theft (by deception). Because the Court left in place the aggravated theft (beyond the scope) conviction for which Underwood was sentenced to a two year prison term, Underwood's sentence was not changed.

The Court certified a conflict with its decision and acknowledged that its finding was in conflict with numerous other jurisdictions that have found that R.C. 2953.08(D) bars appellate

review notwithstanding convictions on allied offenses. The State filed the certified conflict as well as a notice of appeal, raising two propositions of law. This Court accepted the conflict certification as well as the notice of appeal and consolidated the two appeals. This is the State's merit brief in support of those propositions.

## ARGUMENT

### STATE'S FIRST PROPOSITION OF LAW & ISSUE CERTIFIED FOR REVIEW

**A Jointly Recommended Sentence is Authorized by Law, and Thus, Pursuant to R.C. 2953.08(D), Not Reviewable on Appeal, Regardless of Whether Such Sentence Includes Multiple Convictions on Allied Offenses of Similar Import.**

R.C. 2941.25(A) provides that where "the same conduct by a 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." R.C. 2941.25(A). As such, findings of guilt on multiple allied offenses of similar import must be merged at sentencing so that a defendant is subject to only one punishment for the one act. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008 Ohio 1625. However, where sentences are imposed pursuant to a plea agreement, appellate review of the sentence is barred and the sentences are lawful even where imposed on convictions for allied offenses. R.C. 2953.08(D).

R.C. 2953.08 governs a defendant's appeal of a felony sentence. In division (A), the statute establishes the grounds for appellate review, including grounds based on the term imposed and whether the term is contrary to law. After articulating the grounds for appeal, division (D) of that section then removes certain sentences from appellate review. More specifically, division (D)(1) provides that "[a] sentence imposed upon a defendant is not subject

to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.”

As recognized by the Second District Court of Appeals in its certification of the issue now before this Honorable Court, Ohio courts have repeatedly applied R.C. 2953.08(D) to uphold negotiated plea agreements and jointly recommended sentences, despite the existence of convictions on allied offenses. *State v. Turrentine*, Allen App. No. 1-08-18, 2008-Ohio-3231; *State v. Graham* (Sep. 30, 1998), Franklin App. No. 97AP11-1524; *State v. Jackson*, Cuyahoga App. No. 86506, 2006-Ohio-3165; *State v. Henderson* (Sep. 27, 1999), Warren App. No. CA99-01-002; see also, *State v. Baird*, Columbiana App. No. 06-CO-4, 2007-Ohio-3400. In fact, despite its rejection of that theory in this case, the Second District Court itself has previously held that the R.C. 2953.08(D) bar to an appeal applies “even when a sentencing court fails to address a possible defect in the sentence, e.g. a possible merger as to whether the defendant committed allied offenses of similar import.” *State v. Lopez*, Clark App. No. 2001 CA 08, 2002-Ohio-1807. In *Lopez*, the State reduced one trafficking charge and dismissed four others pursuant to an agreement wherein the defendant pleaded guilty to one count of trafficking and one count of possession in exchange for an agreed sentence of four years. The Court explained that “none of the arguments presented by Mr. Lopez can overcome the flat statutory bar to an appeal from a sentence that is within the law,” and has been jointly recommended by the parties. *Id.* at \*3.

Protecting the validity of guilty pleas and the reliability of negotiated plea agreements has been a central focus in the application of R.C. 2953.08(D). In *Graham*, *supra*, the Tenth District Court of Appeals rejected appellate review where a defendant had negotiated pleas to aggravated robbery and involuntary manslaughter, in exchange for dismissal of a charge of complicity to

aggravated murder and an agreed sentence of 16 years. When Graham appealed, claiming he was improperly convicted of allied offenses, the Court explained that “an agreement that is knowingly and voluntarily entered into by the defendant is sufficient to withstand any later attack even when the attack involves a plea to allied offenses.” *Id.* at \*3, citing *State v. Styles* (Oct. 9, 1997), Cuyahoga App. No. 71052; *State v. Butts* (1996), 112 Ohio App.3d 683, 679 N.E.2d 1170. “[A] plea bargain itself is contractual in nature and subject to contract law standards.” *Id.* The Court continued, “defendant is prohibited from appealing the trial court’s acceptance of the agreed sentence in an attempt to circumvent the terms of the plea agreement at the expense of the interests of the state.” *Id.*

Following that decision, the Court in *State v. Coats* (Mar. 30, 1999), Franklin App. No. 98AP-927, upheld a plea agreement despite its finding that the defendant’s convictions for theft and receiving stolen property did constitute allied offenses. *Coats* was indicted on counts of burglary, theft, receiving stolen property, and possession of criminal tools, but plea negotiations resulted in reduction of the burglary to a count of mere theft. *Coats* pled to the amended charges and agreed to a sentence of 12 months on each count, consecutive for a total prison term of four years. Admitting that “essentially a ‘legal fiction’ was created by agreement of the parties,” in that only one theft was actually committed, the Court found that the agreement was to the benefit of the defendant and such agreement could not be disbanded on appeal.

The *Coats* court explained:

“Although there is semantic tension in attempting to reconcile literal applications of the allied offenses statute and the R.C. 2953.08(D) bar to challenge such sentences, practicality and reason dictate enforcement of a valid plea agreement such as that entered into in *Graham*. Since the ultimate purpose of the allied offenses statute is to prevent unfair, cumulative punishments for identical conduct, appellant's express agreement to such a sentence should withstand any attack claiming inequity or unlawfulness in the name of allied offenses.” *Id.* at \*4.

Similarly, the Eighth District Court of Appeals employed R.C. 2953.08 to bar review of a plea agreement, noting that “a guilty plea waives all appealable orders except for a challenge as to whether the defendant made a knowing, intelligent, and voluntary acceptance of the plea.” *Jackson*, 2006 Ohio 3165 at ¶5. In *Jackson*, the State reduced two murder charges in exchange for pleas of guilty to one count of involuntary manslaughter and one count of felonious assault and an agreed sentence of 13 years. The Court held that the fact that the defendant’s plea may have included allied offenses did not per se invalidate the plea. Further, the Court held that when an agreed sentence is part of the plea agreement, the trial court does not commit plain error in failing to hold a hearing to determine whether the offenses are allied. *Id.* at ¶28.

By its decision in this case, the Second District Court of Appeals has alleged that the courts in the above-mentioned cases left undecided the issue of whether a sentence which includes multiple convictions on allied offenses may be considered “authorized by law.” The State submits that not only did those cases consider and decide that issue, but they have done so properly.

#### **A Sentence May Be “Contrary to Law” But Still Be “Authorized By Law.”**

Among the cases applying R.C. 2953.08(D), the phrase “authorized by law” has repeatedly been interpreted to mean merely that the sentence falls within the range authorized by the applicable sentencing statute. *Henderson*, CA99-01-002 at \*4. A sentence is “authorized by law” as long as it does not exceed the maximum term prescribed for the offense. *Jackson*, 2006 Ohio 3165, ¶49. “Thus, any sentence imposed upon an offender within the statutory range remains a sentence authorized by law.” *Baird*, 2007 Ohio 3400, ¶ 14. The Second District Court abandoned that widely accepted legal interpretation in this case, and adopted instead an interpretation of “authorized by law” that improperly likens itself to the legal concept of

“contrary to law.” However, the two are intentionally different legal concepts. They are treated as such in the statute itself, in Ohio law, and even by this Court.

The rules of statutory construction and interpretation are plain. When construing a statute, the paramount concern is the legislature's intent in enacting the statute. *State v. Wilson*, 77 Ohio St.3d 334, 1997-Ohio-35, 673 N.E.2d 1347. There is a presumption that every word in the statute is designed to have legal effect, and every part of the statute must be regarded where practicable so as to give effect to every part of it. *Id.* Further, the legislature is presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another. *NACCO Indust., Inc. v. Tracy*, 79 Ohio St.3d 314, 1997-Ohio-368, 681 N.E.2d 900.

In evaluating the Second District Court's interpretation of the phrase “authorized by law” in R.C. 2953.08(D), this Court must look to the structure and intent of the statute as a whole. As stated above, the statute sets forth the grounds for appeal of a defendant's sentence. Division (A) provides, in relevant part, that “[i]n addition to any other right to appeal and *except as provided in division (D) of this section* a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

“(4) The sentence is contrary to law.” R.C. 2953.08(A)(4) (emphasis added).

Under the aforementioned division (D), the statute then specifically excepts jointly recommended sentences which are “authorized by law.” R.C. 2953.08(D). Pursuant to the clearly established rules of statutory construction, courts must presume that the legislature intentionally used two different phrases to depict two distinct concepts. By the intentional use of these two different phrases, the legislature clearly intended there to be sentences which are

outwardly “contrary to law” that may still be upheld, even barred from appellate review, so long as they are otherwise “authorized by law.” If the sentence was compliant with the law to begin with, there would be no grounds for appeal.

Recognizing the legislature’s intentional distinction, it is clear that Ohio courts have correctly interpreted the phrase “authorized by law” to mean merely that the sentence falls within the applicable statutory range. The Second District Court of Appeals in this case improperly substituted the concept of a sentence which is “contrary to law” when finding Underwood’s sentences not “authorized by law.” While Underwood’s sentence may have otherwise been considered “contrary to law,” in that it arguably contained multiple convictions on allied offenses, it clearly falls within the statutorily prescribed range and is therefore “authorized by law.”

This Honorable Court has, even recently and under analogous circumstances, employed the concept that a sentence is authorized by law where it falls within the statutorily prescribed range. *State v. Porterfield*, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690. Pursuant to a plea agreement, Porterfield pleaded guilty to two counts each of aggravated murder and kidnapping and one count each of attempted aggravated murder, aggravated burglary and aggravated robbery and agreed to a sentence of 53 years to life in prison. Porterfield then appealed his sentence, claiming that the trial judge had failed to make the factual findings previously required under R.C. 2929.14(E)(4) for consecutive sentences. The State responded, referring to language in R.C. 2953.08(D) which also precludes review of murder sentences imposed pursuant to R.C. 2929.02 to 2929.06.

This Court held that the portion of R.C. 2953.08(D) barring review of murder sentences did not preclude review of the consecutive nature of sentences. However, this Court further held

Porterfield's sentence was entered pursuant to a plea bargain in which he had agreed to the precise sentence that was imposed and had stipulated to the relevant findings of fact as a part of his plea. Citing to R.C. 2953.08(D), this Court noted that Porterfield's sentence was both authorized by law and recommended jointly by the defense and the prosecution. This Court explained,

“[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.” *Id.* at ¶25.

Finding that Porterfield was sentenced pursuant to a jointly recommended sentence that was authorized by law, this Court held it was not subject to review. *Id.* at ¶26.

While judicial findings under R.C. 2929.14 are no longer relevant after *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, this Court's decision in *Porterfield* is instructive in this case. See, also, *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 (plurality opinion wherein this Court applied a definition of “contrary to law” that included consideration of both the statutorily authorized range *and* sentencing factors in R.C. 2929.11 and 2929.12). Although Porterfield's sentence could have been considered “contrary to law” in that the court had failed to make the necessary findings, this Court found that it was nonetheless “authorized by law.” Porterfield had stipulated to the correctness of the sentence and had therefore removed it from appellate review. In the interest of protecting the agreement of the parties, this Court unanimously held that Porterfield's sentence was not subject to appellate review.

Like Porterfield, Underwood stipulated to the correctness of his sentence when he agreed to the terms of his plea agreement. Underwood's sentence falls within the applicable statutory range for a felony of the third degree of one to five years. Regardless of the fact that

Underwood's sentence might otherwise be considered "contrary to law," his sentence is "authorized by law." As a fairly negotiated and jointly recommended part of a plea agreement, his sentence should have fallen under the protection of R.C. 2953.08(D), barring appellate review.

**Public Policy Considerations Calling for Finality in Judgments, Validity and Reliability in Plea Agreements, and Fundamental Fairness Require a Limited Interpretation of the Phrase, "Authorized by Law."**

The consequences of the Second District Court's interpretation of R.C. 2953.08(D) in this case should not be overlooked. While the Court's decision to vacate Underwood's multiple convictions in this case did not, in fact, affect his sentence, this Court cannot rely on that to always be the case.

In this case, Underwood was sentenced to two years in prison pursuant to his conviction on aggravated theft (beyond the scope), concurrent to one year in prison pursuant to his conviction on aggravated theft (by deception), and six months on each of the two convictions for theft. On appeal, the Court vacated the one year sentence on his conviction for aggravated theft (by deception) and left in place the two year prison term imposed on the conviction for aggravated theft (beyond the scope). While the decision in this case left Underwood's sentence unchanged, the Court has left open the possibility that future courts may unilaterally vacate multiple convictions and alter plea agreements on its precedent. There may be nothing that could have prevented the Court in this case from vacating the two year sentence instead of the one year sentence, thereby reducing Underwood's prison term and undermining the agreement of the parties altogether. Such a policy threatens the finality and reliability of plea agreements and stifles the practice of plea bargaining. Without plea agreements to rely on, judicial dockets would become disastrously overcrowded.

Even more troubling, however, is the effect that the Court of Appeals' decision would have on cases where the merger of allied offenses would result in a reduction of the statutorily available sentence. By way of example, suppose a defendant is indicted on three counts of rape and three counts of kidnapping. Rape, as a felony of the first degree, would carry an authorized sentencing range of three to ten years. Kidnapping, as a felony of the second degree, would carry an authorized sentencing range of two to eight years. Suppose further that within each rape count, the kidnapping counts were indeed allied offenses of similar import. As indicted, a maximum allowable sentence under such circumstances would be ten years for each merged count, or 30 years.

Finally, suppose that the defendant enters into a plea agreement whereby the State agrees to dismiss two counts of rape and two counts of kidnapping, in exchange for pleas of guilty to one count of rape and one count of kidnapping, and maximum, consecutive sentences on each for a total of 18 years. As it stands today, the decision of the Court of Appeals in this case would allow that defendant to appeal his sentence. More importantly, the Court of Appeals' decision would require merger of the kidnapping conviction, as the lesser of the two allied offenses. As a result, the only remaining conviction on which the defendant could legally be sentenced, rape, would carry a maximum allowable sentence of only 10 years and would require total alteration of the plea agreement of the parties. The defendant in this hypothetical scenario has now plea bargained his way out of a potential 30 years to an agreed sentence of 18 years, and then manipulated the plea agreement to a mere 10 years. Surely, any policy which allows defendants to undercut or repudiate a valid plea contract and pursue a new deal for themselves, independent of the State's agreement, was not the intention of the General Assembly in enacting R.C. 2953.08(D).

In summary, there is much in established Ohio law supporting the proposition that a defendant may knowingly, intelligently, and voluntarily agree to plead to multiple convictions on allied offenses pursuant to a plea agreement. It has been written into Ohio law by the legislature and upheld numerous times on appeal. The Second District Court has improperly interpreted that statute in this case, and the State asks that this Court reverse that decision and restore validity to the language intentionally employed by the legislature in R.C. 2953.08(D).

### **SECOND PROPOSITION OF LAW**

#### **Where A Defendant is Sentenced to a Jointly Recommended Sentence Pursuant to a Plea Agreement, The Failure to Merge Convictions on Allied Offenses Cannot be Said to Constitute Plain Error.**

Even if this Court finds that a plea agreement which includes allied offenses is not protected from appellate review, the failure of the trial court to determine the existence of allied offenses in the plea agreement which includes an agreed sentence does not rise to the level of reversible error. If such an agreement can be found to be error, it could only be considered to have been invited or induced by the defendant himself. Further, it cannot be said to have affected the outcome of the case. In finding that Underwood's multiple convictions amounted to plain error, the Second District Court of Appeals abandoned the doctrine of invited error and misapplied the rule of plain error in this case.

The basic concepts of waiver and plain error analysis precluded reversal in this case. It is well established that the failure to raise the issue of allied offenses at the trial court level waives review of the issue for all but plain error. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640; *Stansell* at \*9. Plain error consists of an obvious error or defect in the trial proceedings that affects a substantial right. Crim.R. 52(B). Reversal is warranted only when the outcome of the proceedings would clearly have been different absent the error. *Stansell* at \*9.

In the case now before this Honorable Court, there is nothing which can be said to have affected the outcome of Underwood's case which he did not specifically bargain for. Not only did Underwood fail to raise the issue of allied offenses to the trial court, but he specifically requested that the court accept his pleas of no contest to the multiple counts in exchange for the agreed sentence. In such a case, the only error which can be said to have occurred was invited.

Under the doctrine of invited error, a party is not entitled to take advantage of an error that he himself invited or induced the court to make. See *State v. Ferguson* (1991), 71 Ohio App.3d 342, 594 N.E.2d 23; citing *Lester v. Leuck* (1943), 142 Ohio St. 91, 50 N.E.2d 408. Unlike plain error, invited error is not reversible. *State v. Stansell* (April 20, 2000), Cuyahoga App. No. 75889; *Jackson*, 2006-Ohio-3165. Ohio courts finding that R.C. 2953.08(D) bars review of jointly recommended sentences to allied offenses have also recognized that the relevant agreements could amount only to invited error, not reversible on appeal. In *Stansell*, the Eighth District Court upheld a plea agreement whereby the defendant, indicted on 38 counts related to sexual conduct and activities with two boys under the age of 13, entered pleas of guilty to only eight counts and agreed to a sentence of twenty years to life in prison. When Stansell raised the issue of allied offenses for the first time on appeal, the Court noted that he had waived any complaint regarding allied offenses and that the agreement between the parties amounted to invited error.

Underwood specifically bargained for the benefit of an agreed sentence and invited the court to accept his pleas to all four counts in the indictment. As a result of this plea bargain, Underwood negotiated his way out of a potential six year prison term, if run consecutively, to a mere two years. "Under such circumstances, the failure of the court to address the issue of merger [can] not constitute plain error." *Graham*, 97APA11-1524 at \*10; *Jackson*, 2006-Ohio-

3165, ¶28. Left to stand, the Court of Appeals' decision in this case allows defendants to invite and then manipulate an error that they themselves have induced the court to make.

**CONCLUSION**

By vacating the convictions in Underwood's case, the Court of Appeals allowed Underwood to bargain his way into the benefit of a reduced sentence and then avoid the detriment of his negotiated bargain. The General Assembly intended to prevent such a scenario when it enacted R.C. 2953.08(D) and the State respectfully requests that this Court reverse that portion of the Court of Appeals' decision which vacated Underwood's convictions for aggravated theft (by deception) and theft (by deception).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 20<sup>th</sup> day of March, 2009, to Opposing Counsel: Claire R. Cahoon, Assistant State Public Defender, 8 East Long Street – 11<sup>th</sup> Floor, Columbus, Ohio 43215.

By:

  
**KELLY D. MADZEY**

REG. NO. 0079994

Assistant Prosecuting Attorney

APPELLATE DIVISION

# APPENDIX

## IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 08-

08-2133

Plaintiff-Appellant,

ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT

VS.

RICHARD L. UNDERWOOD, JR.

COURT OF APPEALS  
CASE NO: 22454

Defendant-Appellee.

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**NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO**

---

**MATHIAS H. HECK, JR.**

PROSECUTING ATTORNEY

By KELLY D. CRAMMER (COUNSEL OF RECORD)  
REG. NO. 0079994

Assistant Prosecuting Attorney

Montgomery County Prosecutor's Office

Appellate Division

P.O. Box 972

301 West Third Street - Suite 500

Dayton, Ohio 45422

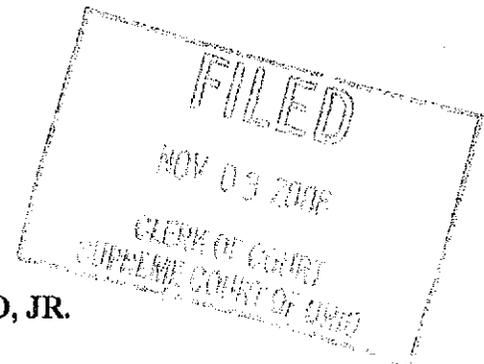
(937) 225-4117

**COUNSEL FOR APPELLANT, STATE OF OHIO**

GRIFF M. NOWICKI

5613 Brandt Pike

Huber Heights, Ohio 45424

**COUNSEL FOR APPELLEE, RICHARD L. UNDERWOOD, JR.**

**NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO**

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Richard L. Underwood, Jr.*, Case No. 22454 on September 19, 2008.

This case involves a felony and presents a substantial constitutional question and a question of public or great general interest.

Respectfully submitted,

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

BY   
KELLY D. CRAMMER  
REG NO. 0079994  
Assistant Prosecuting Attorney  
APPELLATE DIVISION

COUNSEL FOR APPELLANT,  
STATE OF OHIO

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this notice of appeal was sent by first class mail on this 31<sup>st</sup> day of October, 2008, to the following: Griff M. Nowicki, 5613 Brandt Pike, Huber Heights, Ohio 45424; Richard L. Underwood, Jr., Inmate #A559-433, London Correctional Institution, P. O. Box 69, London, Ohio 43140 and Timothy Young, Ohio Public Defender Commission, 8 East Long Street - 11<sup>th</sup> Floor, Columbus, OH 43266-0587.

  
KELLY D. CRAMMER  
REG NO. 0079994  
Assistant Prosecuting Attorney  
APPELLATE DIVISION

## IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 08-08-2228

Plaintiff-Appellant,

ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT

vs.

RICHARD L. UNDERWOOD, JR.

COURT OF APPEALS  
CASE NO: 22454

Defendant-Appellee.

---

NOTICE OF CERTIFIED CONFLICT

---

**MATHIAS H. HECK, JR.**

PROSECUTING ATTORNEY

By KELLY D. CRAMMER (COUNSEL OF RECORD)

REG. NO. 0079994

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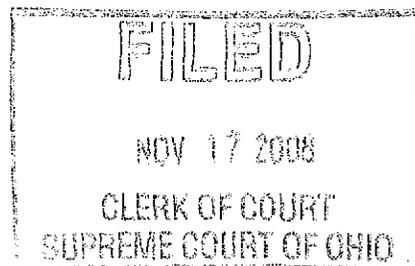
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**COUNSEL FOR APPELLANT, STATE OF OHIO**

GRIFF M. NOWICKI (COUNSEL OF RECORD)

5613 Brandt Pike

Huber Heights, Ohio 45424

**COUNSEL FOR APPELLEE, RICHARD L. UNDERWOOD, JR.**

**NOTICE OF CERTIFIED CONFLICT**

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice, pursuant to S. Ct. Prac. R. IV Sec. 1, of a certified conflict to the Supreme Court of Ohio of the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Richard L. Underwood, Jr.*, Case No. 22454 on September 19, 2008, in accordance with Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Respectfully submitted,

**MATHIAS H. HECK, JR.**  
**PROSECUTING ATTORNEY**

By   
**KELLY D. CRAMMER**  
REG NO. 0079994  
Assistant Prosecuting Attorney  
APPELLATE DIVISION

**COUNSEL FOR APPELLANT,  
STATE OF OHIO**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Notice of Certified Conflict was sent by first class mail on or before this 14<sup>th</sup> day of November, 2008, to the following: Griff M. Nowicki, 5613 Brandt Pike, Huber Heights, Ohio 45424; Richard L. Underwood, Jr., Inmate #A559-433, London Correctional Institution, P. O. Box 69, London, Ohio 43140; and Timothy Young, Ohio Public Defender Commission, 8 East Long Street – 11<sup>th</sup> Floor, Columbus, Ohio 43215-2998.

  
**KELLY D. CRAMMER**  
REG NO. 0079994  
Assistant Prosecuting Attorney  
APPELLATE DIVISION

2008 OCT 20 PM 1:22

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

v. :

RICHARD L. UNDERWOOD, JR. :

Defendant-Appellant :

C.A. CASE NO. 22454

T.C. NO. 2006-CR-2008

**DECISION AND ENTRY**

Rendered on the 20th day of October, 2008.

KELLY D. CRAMMER, Atty. Reg. No. 0079994, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, OH 45422  
 Attorney for Plaintiff-Appellee

GRIFF M. NOWICKI, Atty. Reg. No. 0071849, 5613 Brandt Pike, Huber Heights, OH 45424  
 Attorney for Defendant-Appellant

RICHARD L. UNDERWOOD, JR., #A559-433, London Correctional Inst., P.O. Box 69, London, OH 43140  
 Defendant-Appellant, Pro Se

PER CURIAM:

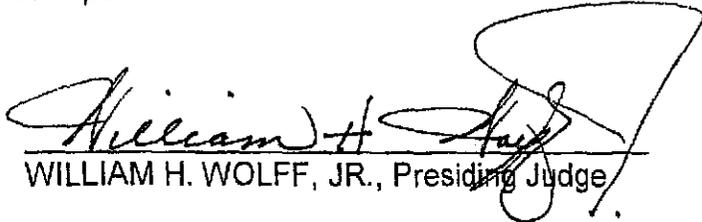
This matter comes before the Court on the State of Ohio's App.R. 25 motion to certify that our opinion and judgment in this case, rendered on September 19, 2008, is in conflict with judgments of the Third, Eighth, Tenth, and Twelfth District Courts of Appeals.

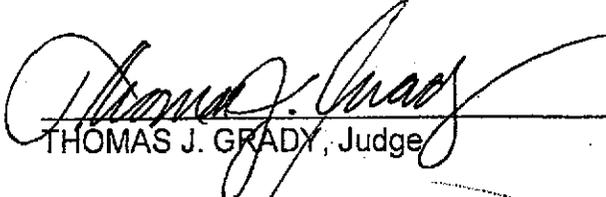
In our opinion, we noted that several Ohio appellate districts have concluded that R.C. 2953.08(D)(1) bars an appeal of an agreed sentence, even if the sentence includes counts that are allied offenses of similar import. See, e.g., *State v. Turrentine*, Allen App. No. 01-08-18, 2008-Ohio-3231; *State v. Jackson*, Cuyahoga App. No. 86506, 2006-Ohio-3165; *State v. Graham* (Sept. 30, 1998), Franklin App. No. 97APA11-1524; *State v. Henderson* (Sept. 27, 1999), Warren App. No. CA99-01-002. Following *State v. Manns*, Clark App. No. 2000 CA 58, 2001-Ohio-1822, we held otherwise. We concluded that Underwood's agreed sentence was not "authorized by law" when the trial court failed to merge allied offenses of similar import and, thus, his sentence was reviewable.

We agree with the State that our opinion and judgment in this case is in conflict with judgments of the Third, Eighth, Tenth, and Twelfth District Courts of Appeals as to whether R.C. 2953.08(D)(1) bars an appeal of an agreed sentence when the sentence includes convictions for offenses that are allied offenses of similar import. We therefore certify the following question to the Supreme Court of Ohio for review:

"Is an agreed and jointly recommended sentence 'authorized by law' under R.C. 2953.08(D)(1), and thus not reviewable, when the agreed sentence includes convictions for offenses that are allied offenses of similar import?"

IT IS SO ORDERED.

  
WILLIAM H. WOLFF, JR., Presiding Judge



---

THOMAS J. GRADY, Judge



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MARY E. DONOVAN, Judge

Copies mailed to:

- Kelly D. Crammer
- Griff M. Nowicki
- Richard L. Underwood, Jr.
- Hon. Jeffrey E. Froelich

RECEIVED  
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COURT OF APPEALS  
MONTGOMERY COUNTY, OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 22454  
v. : T.C. NO. 2006-CR-2008  
RICHARD L. UNDERWOOD, JR. :  
Defendant-Appellant :

**OPINION**

Rendered on the 19<sup>th</sup> day of September, 2008.

CARLEY J. INGRAM, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, OH 45422  
Attorney for Plaintiff-Appellee

GRIFF M. NOWICKI, Atty. Reg. No. 0071849, 5613 Brandt Pike, Huber Heights, OH 45424  
Attorney for Defendant-Appellant

RICHARD L. UNDERWOOD, JR., #A559-433, London Correctional Inst., P.O. Box 69, London, OH 43140  
Defendant-Appellant, Pro Se

WOLFF, P.J.

Richard L. Underwood pled no contest in the Montgomery County Court of Common

Pleas to two counts of aggravated theft and two counts of theft. The trial court sentenced Underwood to one year in prison on one count of aggravated theft, to two years in prison on the second count of aggravated theft, and to six months in prison for each count of theft, all four sentences to be served concurrently to each other but consecutive to eleven months in prison imposed in another case. Underwood was also ordered to pay restitution totaling \$101,004.75 and court costs.

On appeal, Underwood's counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that he could not find any meritorious issue for appellate review. We informed Underwood that his counsel had filed an *Anders* brief and of the significance of an *Anders* brief. We invited Underwood to file a pro se brief within 60 days of March 21, 2008. Underwood did not file a brief.

Upon our independent review of the entire record, we determined that Underwood's sentence on each of the four counts arguably violated R.C. 2941.25(A), which states "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." We ordered Underwood's appellate counsel to file a supplemental brief on this issue.

Underwood now raises two assignments of error, which we will address together.

I. "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT SENTENCED DEFENDANT-APPELLANT TO MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO R.C. § 2941.25(A)."

II. "DEFENDANT-APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF HIS ATTORNEY

FAILING TO OBJECT TO THE SENTENCE IMPOSED BY THE COURT SINCE IT VIOLATED R.C. § 2941.25(A).”

Underwood claims that the trial court erred in failing to merge the two counts of aggravated theft – Count One in Indictment A (R.C. 2913.02(A)(3)) and the sole count in Indictment B (R.C. 2913.02(A)(2)) – as allied offenses of similar import. Underwood states that these counts stated the same charge over the same period of time with the same victims. Likewise, Underwood claims that both theft counts – Counts Two (R.C. 2913.02(A)(2)) and Three (R.C. 2913.02(A)(3)) of Indictment A – charge theft over \$500 on the same date and against the same victim. Underwood further claims that his counsel rendered ineffective assistance by failing to object to the court’s failure to merge the charges.

In response, the State indicates that Underwood was sentenced in accordance with an agreed sentence. Citing R.C. 2953.08(D), the State asserts that Underwood has waived any claim of error with regard to allied offenses and that his sentence is not subject to review on appeal.

At the plea hearing, the trial court articulated the plea as follows:

“It’s my understanding that on the pleas of no contest, that you will be found guilty and that you will be referred for a presentence investigation with sentencing two weeks from this Wednesday which would take us to August the 29<sup>th</sup>; that the restitution figure which the parties agree is over one hundred thousand but the exact amount is to be determined during the presentence investigation; that \$40,000 of that restitution will have an effect on your sentencing to the point that if \$40,000 in restitution is paid prior to your disposition on August 29<sup>th</sup>, that you would either receive a community control sanction with

local incarceration or you would receive a term of not to exceed two years at the Corrections Reception Center in which case the State would not oppose judicial release.

"On the other hand, if the \$40,000 in restitution is not paid, you would not receive community control but you would be sentenced to the Corrections Reception Center, again, not to exceed two years."

Underwood and Underwood's trial counsel both acknowledged that the court's statement was their understanding of the plea as well.

At the sentencing hearing, Underwood acknowledged that he had not paid any restitution. The court imposed an aggregate two-year sentence, indicating that "I believe that was the plea agreement, that there would be a two-year maximum sentence."

R.C. 2953.08(D)(1) provides: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

Several Ohio appellate districts have concluded that R.C. 2953.08(D)(1) bars an appeal of an agreed sentence, even if the sentence includes counts that are allied offenses of similar import. See, e.g., *State v. Turrentine*, Allen App. No. 01-08-18, 2008-Ohio-3231; *State v. Jackson*, Cuyahoga App. No. 86506, 2006-Ohio-3165; *State v. Graham* (Sept. 30, 1998), Franklin App. No. 97APA11-1524; *State v. Henderson* (Sept. 27, 1999), Warren App. No. CA99-01-002.

We have held otherwise. In *State v. Manns*, Clark App. No. 2000 CA 58, 2001-Ohio-1822, the defendant pled guilty to three counts of rape and two counts of kidnapping, pursuant to a negotiated plea. As part of the plea agreement, the State and Manns agreed

to a 30-year sentence and to Manns' classification as a sexual offender. On appeal, Manns argued, in part, that the trial court erred in sentencing him to concurrent 10-year prison terms for rape and kidnapping because the offenses were allied offenses of similar import. We agreed, stating:

"Because the facts in this case are very similar to those in [*State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345], we conclude, as the State appears to concede that we must, that the trial court did err in failing to merge the sentences for kidnapping and rape. Thus, this portion of the trial court's sentence was not authorized by law \*\*\*."

Since *Manns*, we have noted that R.C. 2953.08(D)(1)'s "bar to an appeal has been upheld even when a sentencing court fails to address a possible defect in the sentence, e.g., a possible merger as to whether the defendant committed allied offenses of similar import." *State v. Lopez*, Clark App. No. 2001 CA 08, 2002-Ohio-1807, citing *Graham*, supra. However, as *Lopez* did not concern whether an agreed sentence is authorized by law when the court failed to merge allied offenses of similar import, our holding in *Manns* controls. (Although we are not inclined to overrule the precedent of this Court, we find the interplay between R.C. 2941.25 and R.C. 2953.08(D)(1) to be an important issue that should be definitively resolved. Should the State be so inclined, this Court is willing to entertain a motion to certify a conflict pursuant to App.R. 25.)

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."

R.C. 2941.25 implements the protections of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution. The Double Jeopardy Clauses prohibit a second punishment for the same offense. *State v. Lovejoy* (1997), 79 Ohio St.3d 440. To avoid that result, when two or more allied offenses of similar import are charged and guilty verdicts for two or more are returned, R.C. 2941.25 mandates that "the defendant may be convicted of only one."

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

In this case, the State conceded in its sentencing memorandum that the offenses at issue are allied offenses of similar import. The State represented in the first paragraph of its memorandum:

"The Defendant was charged by an A & B indictment with two counts of Aggravated Theft, felonies of the third degree and two counts of Theft (over \$500.00), felonies of the fifth degree. The two counts in each of the different categories of thefts would be

considered allied offenses of similar import and would require the Court to sentence the defendant to only one of the thefts."

R.C. 5053.08(D) bars appellate review of sentences which a defendant and the prosecution have jointly agreed to recommend when the sentence is one "authorized by law." In light of the State's concession, Underwood's multiple sentences were improperly imposed on convictions the court was required by R.C. 2941.25 to merge. Those multiple sentences were not authorized by law, and our review of the error assigned is not precluded by R.C. 2953.08(D).

Accordingly, we find that the trial court erred in failing to merge the convictions of aggravated theft and theft, respectively. Thus, the conviction for aggravated theft under R.C. 2913.02(A)(3) (Count One), for which Underwood received a one-year concurrent sentence, and the conviction for theft under R.C. 2913.02(A)(3) (Count Three), for which Underwood received a six month concurrent sentence will be vacated. We note, however, that correction of this error will not shorten the amount of prison time that Underwood must serve because Underwood received a two-year sentence for aggravated theft under R.C. 2913.02(A)(2) and all sentences were ordered to be served concurrently.

The State asserts that, even if this Court finds that the sentences are erroneous, the error does not amount to plain error and we should uphold the convictions. We disagree. We have held that the failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-2; *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, 877 N.E.2d 1020, at ¶26.

The assignments of error are sustained.

The convictions for aggravated theft under R.C. 2913.02(A)(3) (Count One) and for theft under R.C. 2913.02(A)(3) (Count Three) will be vacated. In all other respects, the judgment will be affirmed.

.....

GRADY, J., and DONOVAN, J., concur.

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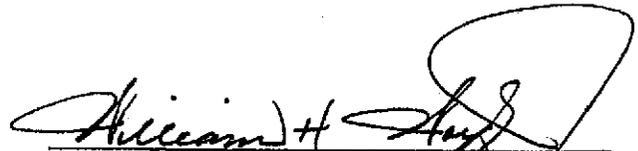
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- Hon. Jeffrey E. Froelich

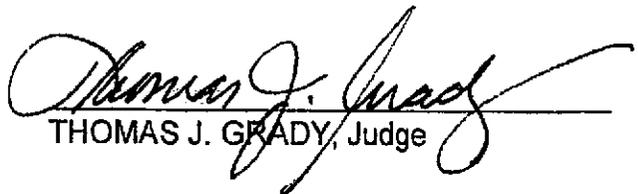
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

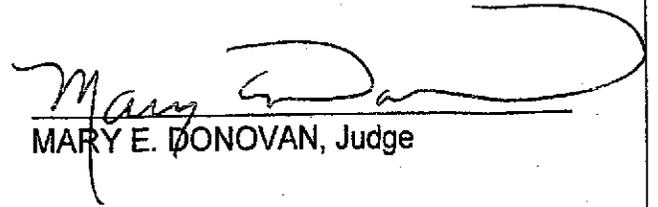
STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 22454  
v. : T.C. NO. 2006-CR-2008  
RICHARD L. UNDERWOOD, JR. : FINAL ENTRY  
Defendant-Appellant :

.....  
Pursuant to the opinion of this court rendered on the 19<sup>th</sup> day of  
September, 2008, the judgment of convictions for aggravated theft under R.C.  
2913.02(A)(3) (Count One) and for theft under R.C. 2913.02(A)(3) (Count Three) are  
vacated. In all other respects, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

  
WILLIAM H. WOLFF, JR., Presiding Judge

  
THOMAS J. GRADY, Judge



MARY E. DONOVAN, Judge

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Richard L. Underwood, Jr.  
#A559-433  
London Correctional Inst.  
P.O. Box 69  
London, OH 43140

Hon. Jeffrey E. Froelich  
Montgomery Co. Common Pleas Court  
41 N. Perry Street, P.O. Box 972  
Dayton, OH 45422

LEXSEE 2008 OHIO 3231

STATE OF OHIO, PLAINTIFF-APPELLEE, v. JAMES L. TURRENTINE, JR.,  
DEFENDANT-APPELLANT.

CASE NUMBER 1-08-18

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, ALLEN  
COUNTY

2008 Ohio 3231; 2008 Ohio App. LEXIS 2754

June 30, 2008, Date of Judgment Entry

**PRIOR HISTORY:** [\*\*1]

CHARACTER OF PROCEEDINGS: Appeal from  
Common Pleas Court.

**DISPOSITION:** Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review  
of the judgment of the Court of Common Pleas, Allen  
County, Ohio, which overruled his motion to modify his  
sentence.

**OVERVIEW:** Defendant pled guilty to two counts of  
rape and one count of gross sexual imposition. As part of  
the plea agreement, defendant and the State reached an  
agreed sentence of six years for each count of rape and  
three years for the count of gross sexual imposition. The  
agreed sentence provided that the terms would be served  
consecutively. After the trial court imposed the sentence,  
defendant filed a motion to modify the sentence. The  
court held that the trial court properly did not err by  
overruling defendant's motion. A review of defendant's  
sentence was barred pursuant to *R.C. 2953.08(D)* as the  
sentence imposed was jointly recommended by defend-  
ant and the State. Further, the trial court did not err in  
failing to order a presentence investigation before impos-  
ing defendant's sentence. Under *Crim. R. 32.2*, a presen-  
tence investigation was not required unless the trial court  
was imposing community control or granting probation.  
Moreover, the sentence agreed to by defendant and the  
State specifically provided that a presentence investiga-  
tion would not be ordered.

**OUTCOME:** The court affirmed the judgment of the  
trial court.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Sentencing > Appeals > Appealability*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN1] See *R.C. 2953.08(D)(1)*.

*Criminal Law & Procedure > Sentencing > Presentence Reports*

[HN2] *Crim. R. 32.2* provides that in felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation. Therefore, unless a sentencing court is imposing community control or granting probation in a felony case, there is no requirement that a court order a presentence investigation.

**COUNSEL:** JAMES L. TURRENTINE, JR., Lima, OH, Appellant.

JANA E. EMERICK, Assistant Prosecuting Attorney, Lima, OH, For Appellee.

**JUDGES:** Shaw, P.J. WILLAMOWSKI and ROGERS, JJ., concur.

**OPINION BY:** Shaw

**OPINION**

Shaw, P.J.

[\*P1] Although originally placed on the accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry.

[\*P2] Defendant-Appellant James L. Turrentine, Jr. ("Turrentine") appeals from the February 25, 2008 Order of the Court of Common Pleas, Allen County, Ohio overruling Turrentine's motion to modify his sentence.

[\*P3] On September 19, 2003 Turrentine pled guilty to a Bill of Information charging him with two counts of Rape, in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, and one count of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree. As part of the plea agreement, Turrentine and the State reached an agreed sentence of six years for each count of Rape, and three years for the single count of Gross Sexual Imposition. The agreed sentence provided for these terms be served consecutively for a total sentence of fifteen years.

[\*P4] On January [\*\*2] 15, 2008 Turrentine filed a "Motion to Modify Sentence as a Matter of Law." In this motion, Turrentine argued that his sentence was contrary to law based on the United States Supreme Court decision in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and the Ohio Supreme Court decision in *State v. Foster*, 109 Ohio St. 3d 1, 845 N.E.2d 470, 2006 Ohio 856.

[\*P5] The trial court overruled Turrentine's motion on January 18, 2008. The trial court found that

**Defendant tendered pleas to 2 Counts of Rape (F-1) and 1 Count of Gross Sexual Imposition (F-3). Defendant faced a sentence of up to 25 years. By agreement of the parties, by the written plea agreement, and on the record defendant agreed to an aggregate sentence of 15 years.**

**The Court made proper findings as required at the time and, regardless, the two cases cited by defendant are irrelevant since it was an "Agreed Sentence."**

[\*P6] Turrentine filed another "Motion to Modify Sentence as a Matter of Law" on February 21, 2008. This time, Turrentine's motion argued that because he was a first time offender he should not have received consecutive sentences.

[\*P7] The trial court overruled Turrentine's motion on February 25, 2008, [\*\*3] finding as follows:

**Defendant was sentenced on September 19, 2003 for:**

**Count 1 -- Rape (F1)  
(2907.02(A)(1)(b)) -- 6 years**

**Count 2 -- Rape (F1)  
(2907.02(A)(1)(b)) -- 6 years**

**Count 3 -- Gross Sexual Imposition (F3) (2907.05(A)(1)(4)) -- 3 years**

**Said sentences ran consecutive, for a total of 15 years. The Court mistakenly did not indicate that Counts 1 and 2 were mandatory. However, there was an agreed sentence of 6 years on each Rape charge and 3 years on the Gross Sexual Imposition. Defendant agreed to the 15 year sentence - when he, in fact, was facing 25 years. There was no Pre-sentence Investigation ordered because of the agreed sentence.**

**Further, to arrive at 15 years, the sentences had to run consecutive.**

**Defendant now brings up the argument of mitigating factors -- even though he agreed, when he was facing a 25-year sentence, to a 15 year sentence.**

[\*P8] Turrentine now appeals, asserting four assignments of error.

#### **ASSIGNMENT OF ERROR I**

**THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT CONSECUTIVELY FOR ALLIED OFFENSES, IN CONTRADICTION TO THE ALLIED OFFENSES DOCTRINE OF THE OHIO REVISED CODE.**

#### **ASSIGNMENT OF ERROR II**

**THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES, WHEN THE DEFENDANT IS [\*\*4] A FIRST-TIME FELONY OFFENDER.**

#### **ASSIGNMENT OF ERROR III**

**THE TRIAL COURT ERRED BY FAILING TO ISSUE AN ORDER THAT A PRE-SENTENCE INVESTI-**

GATION BE CONDUCTED PRIOR TO SENTENCING.

#### ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO MORE THAN THE MINIMUM TERM OF INCARCERATION, WITHOUT ENGAGING IN THE ANALYSIS REQUIRED BY *ORC 2929.14(B)*.

[\*P9] For ease of discussion, we elect to address Turrentine's assignments of error out of order. Moreover, we elect to address his first, second, and fourth assignments of error together. Turrentine argues that the trial court erred in sentencing him consecutively for allied offenses, that the trial court erred in imposing consecutive sentences on a first time offender, and that the trial court erred by sentencing him to more than the minimum sentence in contravention of *R.C. 2929.14(B)*.

[\*P10] As a preliminary matter, we note that *R.C. 2953.08* governs appeals based on felony sentencing guidelines and *R.C. 2953.08(D)(1)* specifically provides as follows:

**(D)(1) [HN1] A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, [\*\*5] and is imposed by a sentencing judge.**

[\*P11] In the present case, Turrentine pled by Bill of Information to two counts of Rape and one count of Gross Sexual Imposition pursuant to a negotiated plea agreement. The agreement explicitly states that Turrentine agreed to plead guilty to both counts of Rape and the single count of Gross Sexual Imposition. Moreover, the plea agreement provided the maximum penalties for each charge, as well as that prison terms for each count would be served consecutively.

[\*P12] The plea agreement also stated "Agreed sentences: 6 years on each Rape [and] 3 years on Gross Sexual Imposition -- Total 15 years. No pre-sentence, but will order post sentence." This agreement was signed by Turrentine, his counsel, the prosecuting attorney, and the trial court judge. <sup>1</sup>

<sup>1</sup> We note that Turrentine did not provide a copy of his sentencing transcript for our review. However, based on his signed plea and agreed upon sentence, we do not believe the transcript would reflect anything outside the "Negotiated Plea of Guilty."

[\*P13] Accordingly, we find that a review of Turrentine's sentence is barred pursuant to *R.C. 2953.08(D)*. See *State v. Knisely 3rd Dist. No. 5-07-37, 2008 Ohio 2255*. Based [\*\*6] on the foregoing, Turrentine's first, second, and fourth assignments of error are overruled.

[\*P14] In his third assignment of error, Turrentine argues that the trial court erred in failing to order a pre-sentence investigation before imposing his sentence. As an initial matter, we note that [HN2] *Crim. R. 32.2* provides that "[i]n felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation." Therefore, unless a sentencing court is imposing community control or granting probation in a felony case, there is no requirement that a court order a pre-sentence investigation. See also *State v. Cyrus (1992), 63 Ohio St. 3d 164, 586 N.E.2d 94*.

[\*P15] Moreover, as previously noted, this case involved an agreed upon plea which included joint recommendation as to sentencing. The agreed sentence specifically provided that a pre-sentence investigation would not be ordered. Accordingly, Turrentine's third assignment of error is overruled.

[\*P16] [\*\*7] Based on the foregoing, the February 25, 2008 Order of the Court of Common Pleas, Allen County, Ohio overruling Turrentine's motion to modify his sentence is affirmed.

*Judgment affirmed.*

WILLAMOWSKI and ROGERS, JJ., concur.

LEXSEE 2006 OHIO 3165

STATE OF OHIO, Plaintiff-Appellee vs. DESHAWN JACKSON, Defendant-Appellant

NO. 86506

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

*2006 Ohio 3165; 2006 Ohio App. LEXIS 3044*

June 22, 2006, Date of Announcement of Decision

**SUBSEQUENT HISTORY:** Discretionary appeal not allowed by *State v. Jackson*, 2006 Ohio 5625, 2006 Ohio 5625, 855 N.E.2d 1260, 2006 Ohio LEXIS 3145 (Ohio, Nov. 1, 2006)

**PRIOR HISTORY:** **[\*\*1]** CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case No. CR-435236.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment from the Cuyahoga County Court of Common Pleas (Ohio), which convicted him of voluntary manslaughter and felonious assault. He was sentenced to consecutive terms of imprisonment.

**OVERVIEW:** Defendant entered a guilty plea to an amended indictment, and an agreed sentence of consecutive terms of imprisonment was imposed. On appeal, the court found that his plea was knowingly, intelligently, and voluntarily entered. The trial court's allocution was sufficient, there was substantial compliance with *Ohio R. Crim. P. 11*, and defendant indicated that he understood the implications of the plea. Whether the charges were allied offenses under *Ohio Rev. Code Ann. § 2941.25* or not was irrelevant because the plea was properly entered. However, an allied offense determination under Kent was not required because the sentence was agreed to as part of the plea agreement. Defendant's counsel's failure to raise that issue was not ineffectiveness, as it could have been a matter of trial strategy, defendant did not show that he was prejudiced, and he failed to show that he would not have entered the plea but for counsel's ineffectiveness. Further, the fact that defendant was not spe-

cifically informed that he could be sentenced to consecutive terms did not invalidate the plea. Blakely was inapplicable to the agreed sentence, and it was not appealable under *Ohio Rev. Code Ann. § 2953.08(D)*.

**OUTCOME:** The court affirmed the judgment of the trial court.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement*

*Criminal Law & Procedure > Guilty Pleas > Voluntariness*

*Criminal Law & Procedure > Guilty Pleas > Waiver of Defenses*

[HN1] A guilty plea waives all appealable orders except for a challenge as to whether a defendant made a knowing, intelligent, and voluntary acceptance of the plea. A guilty plea will be considered knowing, intelligent, and voluntary if, before accepting the plea, a trial court, at the very least, substantially complied with the procedures set forth in *Ohio R. Crim. P. 11*. Substantial compliance means that, under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving.

*Criminal Law & Procedure > Guilty Pleas > Allocution & Colloquy*

[HN2] See *Ohio R. Crim. P. 11(C)(2)*.

*Criminal Law & Procedure > Guilty Pleas > Allocution & Colloquy*

***Criminal Law & Procedure > Sentencing > Consecutive Sentences***

[HN3] The Ohio Supreme Court has held that the failure to inform a defendant who pleads guilty to more than one offense that a court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of *Ohio R. Crim. P. 11(C)(2)*, and does not render the plea involuntary. The Court reasoned that the language in *Rule 11(C)* refers to the maximum penalty for each individual charge to which the defendant is pleading, not to the cumulative total of all sentences received for all charges.

***Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement***

***Criminal Law & Procedure > Guilty Pleas > Voluntariness***

***Criminal Law & Procedure > Sentencing > Merger***

[HN4] Ohio courts have repeatedly upheld plea agreements that are knowingly, intelligently, and voluntarily entered into even if a defendant argues that his plea included allied offenses. An agreement that is knowingly and voluntarily entered into by the defendant is sufficient to withstand any later attack even when the attack involves a plea to allied offenses. Therefore, the fact that a plea may have included allied offenses does not per se invalidate the plea. The plea can be invalidated only if the defendant can show that his plea was not made knowingly, intelligently, or voluntarily.

***Criminal Law & Procedure > Guilty Pleas > Appeals***

***Criminal Law & Procedure > Trials > Burdens of Proof > Defense***

[HN5] In order to challenge the validity of a plea, a defendant must show a prejudicial effect. Failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice. The test for prejudice is whether the plea would have otherwise been made.

***Criminal Law & Procedure > Sentencing > Merger***

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview***

[HN6] If a defendant fails to raise the issue of allied offenses at trial, the issue is waived for purposes of appeal unless plain error is shown.

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions***

[HN7] Plain error consists of an obvious error or defect in a trial proceeding that affects a substantial right. *Ohio R. Crim. P. 52(B)*. Under this standard, reversal is warranted only when the outcome of the proceedings below would have been different absent the error. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy***

***Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments***

[HN8] The Double Jeopardy Clause provides that no person shall be placed in jeopardy twice for the same offense. The double jeopardy protections afforded by the federal and state Constitutions guard citizens against cumulative punishments for the "same offense."

***Criminal Law & Procedure > Sentencing > Merger***

[HN9] *Ohio Rev. Code Ann. § 2941.25* sets forth the conditions under which multiple punishments may and may not be imposed for the same or similar offenses.

***Criminal Law & Procedure > Sentencing > Merger***

[HN10] See *Ohio Rev. Code Ann. § 2941.25*.

***Criminal Law & Procedure > Sentencing > Merger***

[HN11] To determine if two crimes are allied offenses of similar import, a court must align the elements of each crime in the abstract to determine 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. If the elements do so correspond, a defendant may not be convicted of both crimes unless the court finds that the defendant committed the crimes separately or with a separate animus. To determine whether the crimes were committed separately or with a separate animus, the facts and the defendant's conduct are considered.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Voluntary Manslaughter > Elements***

[HN12] Pursuant to *Ohio Rev. Code Ann. § 2903.03*, a person is guilty of voluntary manslaughter if, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, the person knowingly causes the death of another.

*Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Aggravated Offenses > Elements*

[HN13] A person is guilty of felonious assault, under *Ohio Rev. Code Ann. § 2903.11*, if he knowingly causes serious physical harm to another.

*Criminal Law & Procedure > Guilty Pleas > General Overview*

*Criminal Law & Procedure > Sentencing > Merger*

[HN14] When a defendant pleads to multiple offenses of similar import and a trial judge accepts the plea, a court must conduct a hearing and make a determination before entering judgment as to whether the offenses were of similar or dissimilar import and whether there was a separate animus with regard to each crime committed.

*Criminal Law & Procedure > Guilty Pleas > General Overview*

*Criminal Law & Procedure > Sentencing > Merger*

*Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Guilty Pleas*

[HN15] It has been held that the failure to hold a hearing on whether two offenses were of similar import in a case involving a guilty plea is plain error. However, when an agreed sentence is part of the plea agreement, a trial court does not commit plain error by failing to hold a hearing on the allied offense issue.

*Criminal Law & Procedure > Guilty Pleas > Appeals*

[HN16] The imposition of a sentence to which the parties agreed as part of a proper plea agreement may not be challenged on appeal.

*Criminal Law & Procedure > Guilty Pleas > Appeals*

[HN17] A defendant has a duty to speak when a court commits error when taking a plea. The United States Supreme Court has reasoned that otherwise, a defendant could choose to say nothing about a plain lapse and simply relax and wait to see if his sentence later struck him as satisfactory; if not, his *Ohio R. Crim. P. 11* silence would have left him with clear and uncorrected *Rule 11* error. The Court further explained that the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on.

*Criminal Law & Procedure > Sentencing > Imposition > General Overview*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN18] It is well settled that sentencing is within the sound discretion of a trial court. Although the trial court should consider the recommendation proffered by the State, it is not bound to accept such recommendation.

*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

*Criminal Law & Procedure > Sentencing > Merger*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN19] Although there is semantic tension in attempting to reconcile literal applications of the allied offenses statute and the *Ohio Rev. Code Ann. § 2953.08(D)* bar to challenge such sentences, practicality and reason dictate enforcement of a valid plea agreement. Since the ultimate purpose of the allied offenses statute is to prevent unfair, cumulative punishments for identical conduct, an appellant's express agreement to such a sentence should withstand any attack claiming inequity or unlawfulness in the name of allied offenses.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel*

*Criminal Law & Procedure > Counsel > Effective Assistance > Tests*

*Criminal Law & Procedure > Trials > Burdens of Proof > Defense*

[HN20] In a claim of ineffective assistance of counsel, the burden is on a defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. To reverse a conviction for ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard or reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel*

*Criminal Law & Procedure > Counsel > Effective Assistance > Tests*

*Criminal Law & Procedure > Trials > Burdens of Proof > Defense*

[HN21] In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is whether an accused, under all the circumstances, had a fair trial and substantial justice was done. When making that evaluation, a court must determine whether there has been a substantial violation

of any of defense counsel's essential duties to his client and whether the defense was prejudiced by counsel's ineffectiveness. As to the second element of the test, the defendant must establish that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. The failure to prove either prong of the Strickland test makes it unnecessary for a court to consider the other prong.

*Criminal Law & Procedure > Counsel > Effective Assistance > Pleas*

*Criminal Law & Procedure > Counsel > Effective Assistance > Tests*

*Criminal Law & Procedure > Trials > Burdens of Proof > Defense*

[HN22] The Strickland test can be applied to guilty pleas. A defendant must show that counsel's performance was deficient and that a reasonable probability exists that, but for counsel's errors, he would not have pled guilty.

*Criminal Law & Procedure > Appeals > Reversible Errors > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview*

[HN23] Invited error is not reversible error.

*Criminal Law & Procedure > Sentencing > Imposition > Findings*

[HN24] The Ohio Supreme Court's recent decision in Foster relieves a trial court of any obligation to make findings or state reasons for a sentence imposed.

*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN25] See *Ohio Rev. Code Ann. § 2953.08(D)*.

*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

*Criminal Law & Procedure > Sentencing > Ranges*

[HN26] The Ohio Supreme Court has recently held that pursuant to *Ohio Rev. Code Ann. § 2953.08(D)*, a sentence is not subject to review when the sentence is authorized by law, jointly recommended by the parties, and imposed by the sentencing judge. It reasoned that the

General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. "Authorized by law" under *§ 2953.08(D)* means that the sentence falls within the statutorily set range of available sentences. A sentence is authorized by law as long as the prison term imposed does not exceed the maximum term prescribed by the statute for the offense.

*Criminal Law & Procedure > Criminal Offenses > Homicide > Voluntary Manslaughter > Penalties*

*Criminal Law & Procedure > Sentencing > Ranges*

[HN27] The statutory range for voluntary manslaughter, a felony in the first degree, is 3-10 years.

*Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Aggravated Offenses > Penalties*

*Criminal Law & Procedure > Sentencing > Ranges*

[HN28] The statutory range for felonious assault, a felony in the second degree, is two to eight years.

*Criminal Law & Procedure > Sentencing > Imposition > Statutory Maximums*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN29] Blakely has no application to agreed sentences. Blakely addressed only those instances in which a judge makes findings statutorily required for the imposition of certain sentences.

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN30] There is no requirement that a trial court "confirm" that it is imposing an agreed sentence.

COUNSEL: For Plaintiff-Appellee: WILLIAM D. MASON, Cuyahoga County Prosecutor, PAMELA BOLTON, Assistant, Cleveland, Ohio.

For Defendant-Appellant: JONATHAN N. GARVER, Cleveland, Ohio.

JUDGES: COLLEEN CONWAY COONEY, JUDGE. JAMES J. SWEENEY, P.J. and ANTHONY O. CALABRESE, JR., J., CONCUR.

OPINION BY: COLLEEN CONWAY COONEY

OPINION

JOURNAL ENTRY and OPINION

COLLEEN CONWAY COONEY, J.:

[\*P1] Defendant-appellant, DeShawn Jackson ("Jackson"), appeals his convictions and agreed sentence after his guilty plea. Finding no merit to the appeal, we affirm.

[\*P2] In 2003, Jackson was charged with two counts of murder. Jackson pled guilty to an amended indictment, which charged voluntary manslaughter and felonious assault. He was sentenced to nine years for voluntary manslaughter and four years for felonious assault, to run consecutively, for a total sentence of thirteen years.

[\*P3] Jackson filed a delayed appeal, raising five assignments of error, which will be addressed together and out of order where appropriate.

#### Plea

[\*P4] In his first, second, and third assignments of error, [\*\*2] Jackson argues that his guilty plea was not made knowingly, intelligently, or voluntarily. First, he claims his plea should be held invalid because the trial court failed to advise him of the possibility of consecutive sentences. Jackson also claims his plea should be held invalid because he was not advised by his counsel or the trial court that felonious assault and voluntary manslaughter are allied offenses. He claims that because they are allied offenses, he could be convicted of only one pursuant to *R.C. 2941.25*.

[\*P5] [HN1] A guilty plea waives all appealable orders except for a challenge as to whether the defendant made a knowing, intelligent, and voluntary acceptance of the plea. *State v. Spates*, 64 Ohio St.3d 269, 272-273, 1992 Ohio 130, 595 N.E.2d 351. A guilty plea will be considered knowing, intelligent, and voluntary if, before accepting the plea, the trial court, at the very least, substantially complied with the procedures set forth in *Crim.R. 11*. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. "Substantial compliance means that, under the totality of the circumstances, the [\*\*3] defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.*

[\*P6] *Crim.R. 11(C)(2)* provides,

[HN2] "In felony cases the court may refuse to accept a plea of guilty \* \* \*, and shall not accept a plea of guilty \* \* \* without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making

the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty \*\*\*, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(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 [\*\*4] 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."

[\*P7] In the instant case, Jackson entered into a plea bargain in which he agreed to plead guilty to two separate crimes in exchange for a thirteen-year sentence. We find that Jackson knowingly, intelligently, and voluntarily entered into a plea agreement with an agreed sentence. Prior to accepting Jackson's guilty pleas, the trial court explained to him that by entering a guilty plea he was admitting guilt and that he would be waiving his right to a trial by jury, the right to confront witnesses, the right to compulsory process of witnesses, the right to be proven guilty beyond a reasonable doubt, and the right

against self-incrimination. The trial court also fully apprised Jackson of the nature of the offenses, the range of the minimum and maximum penalties and the fines provided for each offense, the possibility of the imposition of post-release control, and the potential consequences for a violation of post-release control. The trial court also inquired whether Jackson had been threatened or promised anything in exchange [\*\*5] for his plea.

[\*P8] Jackson responded that he understood. He never raised any issue regarding his plea or questioned the possibility of any sentence. He did not dispute his counsel's statement that the only agreement made involved "what has been spread on the record."

[\*P9] We find that the trial court substantially complied with the nonconstitutional requirements of *Crim.R. 11* and strictly complied with *Crim.R. 11*'s constitutional mandates. Thus, his plea was made knowingly, intelligently, and voluntarily.

[\*P10] Although we find that the court satisfied the mandates of *Crim.R. 11*, Jackson, nevertheless, argues that his guilty plea was not made knowingly, intelligently, and voluntarily because the trial court did not advise him of "the maximum penalty involved." Specifically, he claims that the trial court failed to inform him of the possibility of consecutive sentences.

[\*P11] This court has consistently followed [HN3] the Ohio Supreme Court's decision in *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295, holding that the "failure to inform a defendant who pleads guilty [\*\*6] to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of *Crim.R. 11(C)(2)*, and does not render the plea involuntary." *Id. at syllabus*. See, *State v. Gooch*, 162 Ohio App.3d 105, 2005 Ohio 3476, 832 N.E.2d 821; *State v. Kerin*, Cuyahoga App. No. 85153, 2005 Ohio 4117; *State v. McGee*, Cuyahoga App. No. 77493, 2001 Ohio 4238. The court reasoned that the language in *Crim.R. 11(C)* refers to the maximum penalty for each individual charge to which the defendant is pleading, not to the cumulative total of all sentences received for all charges. *Johnson, supra at 133*.

[\*P12] Therefore, we find that the trial court's failure to advise Jackson of the possibility of consecutive sentences does not render his plea invalid. We also find that his plea was made knowingly, intelligently, and voluntarily despite Jackson's argument that he was not advised that felonious assault and voluntary manslaughter are allied offenses.

[\*P13] First, [HN4] Ohio courts have repeatedly upheld plea agreements [\*\*7] that are knowingly, intelligently, and voluntarily entered into even if the defen-

dant argues that his plea included allied offenses. *State v. Stansell* (Apr. 20, 2000), Cuyahoga App. No. 75889, 2000 Ohio App. LEXIS 1726; *State v. Richard* (Nov. 10, 1999), Cuyahoga App. No. 74814, 1999 Ohio App. LEXIS 5295; *State v. Styles* (Oct. 9, 1997), Cuyahoga App. No. 71052, 1997 Ohio App. LEXIS 4547, motion for delayed appeal denied (1998), 84 Ohio St. 3d 1410, 701 N.E.2d 1020; *State v. Coats* (Mar. 30, 1999), Franklin App. No. 98AP-927, 1999 Ohio App. LEXIS 1424; *State v. Graham* (Sept. 30, 1998), Franklin App. No. 97APA11-1524, 1998 Ohio App. LEXIS 4676. "An agreement that is knowingly and voluntarily entered into by the defendant is sufficient to withstand any later attack even when the attack involves a plea to allied offenses." *Styles, supra*, citing *State v. Butts* (1996), 112 Ohio App.3d 683, 679 N.E.2d 1170.

[\*P14] Therefore, the fact that his plea may have included allied offenses does not per se invalidate the plea. The plea can be invalidated only if the defendant can show that his plea was not made knowingly, intelligently, or voluntarily. As we have previously determined, Jackson has not met such burden. Accordingly, the fact that his plea may have contained allied [\*\*8] offenses does not render his plea invalid.

[\*P15] Furthermore, [HN5] in order to challenge the validity of a plea, a defendant must show a prejudicial effect. *Nero, supra at 108*. "Failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *State v. Griggs*, 103 Ohio St.3d 85, 2004 Ohio 4415, 814 N.E.2d 51, citing *Nero, supra at 108*. The test for prejudice is "whether the plea would have otherwise been made." *Id.* Jackson has not demonstrated that he suffered prejudice by entering into the plea agreement. To the contrary, Jackson benefitted from his plea bargain. As indicted, he faced two counts of murder, both punishable by life imprisonment. Pleading guilty to voluntary manslaughter and felonious assault, as amended, in exchange for a thirteen-year sentence is a better deal than the potential of life in prison.

[\*P16] Moreover, we need not address the issue of whether voluntary manslaughter and felonious assault are allied offenses because Jackson has waived any argument on appeal regarding allied offenses by failing to raise the issue during his plea hearing and then [\*\*9] by ultimately entering into a plea agreement containing an agreed sentence.

[\*P17] [HN6] If a defendant fails to raise the issue of allied offenses at trial, the issue is waived for purposes of appeal unless plain error is shown. *State v. Comen* (1990), 50 Ohio St.3d 206, 211, 553 N.E.2d 640; *State v. Burge* (1992), 82 Ohio App.3d 244, 249, 611 N.E.2d 866 ("Appellant did not object at trial to his conviction and

sentence on the basis that the offenses with which he was charged were allied offenses of similar import, and so waives the argument on appeal."); *Stansell*, supra. Therefore, we must determine whether the trial court committed plain error in failing to determine whether voluntary manslaughter and felonious assault are allied offenses.

[\*P18] [HN7] Plain error consists of an obvious error or defect in the trial proceeding that affects a substantial right. *Crim.R. 52(B)*. Under this standard, reversal is warranted only when the outcome of the proceedings below would have been different absent the error. *Stansell*, supra, citing *State v. Lindsey*, 87 Ohio St.3d 479, 482, 2000 Ohio 465, 721 N.E.2d 995. [\*\*10] Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Richard*, supra, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

[\*P19] [HN8] The *Double Jeopardy Clause* provides that no person shall be placed in jeopardy twice for the same offense. "The double jeopardy protections afforded by the federal and state Constitutions guard citizens against \* \* \* cumulative punishments for the 'same offense.'" *State v. Rance*, 85 Ohio St.3d 632, 634, 1999 Ohio 291, 710 N.E.2d 699, quoting *State v. Moss* (1982), 69 Ohio St. 2d 515, 518, 433 N.E.2d 181.

[\*P20] [HN9] *R.C. 2941.25* sets forth the conditions under which multiple punishments may and may not be imposed for the same or similar offenses.

[HN10] "(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 [\*\*11] 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."

[\*P21] Therefore, if voluntary manslaughter and felonious assault are allied offenses of similar import and committed with the same animus, Jackson could be convicted of only one.

[\*P22] [HN11] To determine if two crimes are allied offenses of similar import, the court must align the elements of each crime in the abstract to determine 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. *Rance*, supra at 638.

[\*P23] If the elements do so correspond, the defendant may not be convicted of both crimes unless the court finds that the defendant committed the crimes separately or with a separate animus. *Id.* at 638-639. To determine whether the crimes were committed separately or with a separate animus, the facts and the defendant's conduct are considered. *State v. Cooper*, 104 Ohio St.3d 293, 296-297, 2004 Ohio 6553, 819 N.E.2d 657. [\*\*12]

[\*P24] [HN12] Pursuant to *R.C. 2903.03*, a person is guilty of voluntary manslaughter if, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, the person knowingly causes the death of another. [HN13] A person is guilty of felonious assault, under *R.C. 2903.11*, if he knowingly causes serious physical harm to another.

[\*P25] We cannot make a determination based on the record before us whether voluntary manslaughter and felonious assault are allied offenses. Irrespective of whether the elements of the two offenses align, the record before us is devoid of the facts surrounding the incident. No facts about the commission of the crimes were placed on the record by the State, the court, or Jackson. In order to determine the second prong of *Rance*, we must consider whether voluntary manslaughter and felonious assault were committed with the same animus. To make this determination, the court must look at the circumstances of the case. *Cooper*, supra. Without [\*\*13] any facts before this court, we cannot make this determination. Therefore, we cannot address Jackson's argument that voluntary manslaughter and felonious assault are allied offenses.

[\*P26] Nevertheless, Jackson argues that the trial court should have examined the facts to determine whether the crimes were committed with the same animus, thus precluding a double jeopardy violation.

[\*P27] This court has previously held that, [HN14] when a defendant pleads to multiple offenses of similar import and the trial judge accepts the plea, the court must conduct a hearing and make a determination before entering judgment as to whether the offenses were of similar or dissimilar import and whether there was a separate animus with regard to each crime committed. *State v. Kent* (1980), 68 Ohio App.2d 151, 428 N.E.2d 453. See, also, *State v. Dunihue* (1984), 20 Ohio App.3d 210, 20

*Ohio B. 256, 485 N.E.2d 764*. Again, because Jackson failed to raise the issue of allied offenses at his plea hearing, we review this issue under a plain error analysis.

[\*P28] [HN15] It has been held that the failure to hold a hearing on whether two offenses were of similar import in a case involving [\*\*14] a guilty plea is plain error. *State v. Latson* (1999), 133 Ohio App.3d 475, 728 N.E.2d 465. However, when an agreed sentence is part of the plea agreement, the trial court does not commit plain error by failing to hold a hearing on the allied offense issue. *Stansell*, supra; *Graham*, supra; *Styles*, supra.

[\*P29] In *Stansell*, this court declined to extend the hearing requirement in *Kent* to agreed sentences. *Id.* We held that [HN16] the imposition of the sentence to which the parties agreed as part of a proper plea agreement may not be challenged on appeal. *Id.*, citing *State v. Henderson* (Sept. 27, 1999), Warren App. No. CA99-01-002, 1999 Ohio App. LEXIS 4597; *Coats*, supra; *State v. Stacy* (May 10, 1999), Warren App. No. CA98-08-093, 1999 Ohio App. LEXIS 2110, appeal dismissed (1999), 86 Ohio St. 3d 1488, 716 N.E.2d 720; *Graham*, supra; *State v. Hooper*, *Columbiana App. No. 03 CO 30, 2005 Ohio 7084*. Therefore, the hearing requirement as outlined in *Kent* applies only to plea agreements not involving an agreed sentence.

[\*P30] On appeal, Jackson argues that there was no agreed sentence at the time of his plea. Contrary to his argument, the record before us [\*\*15] demonstrates that Jackson agreed to a thirteen-year sentence in exchange for his plea. At the plea hearing, the State presented the plea agreement to the court:

"Your Honor, after speaking to defense counsel after full and open discovery in with compliance *Rule 16* I believe we have come to an arrangement with regard to this matter.

I would ask the Count 1 originally indicted as murder be amended, that amendment being reflecting voluntary manslaughter in violation of 2903.03 of the Ohio Revised Code, that is punishable from three to ten years in prison. And also a fine of up to \$ 20,000.

Count 2 originally also murder, in violation of 2903.02, I would ask that that be amended to reflect felonious assault in violation of *Ohio Revised Code 2903.11*. This is a felony of the second degree and punishable anywhere from two to eight years in prison, your Honor. Fine on that one of up to \$ 15,000.

Your Honor, it's also been agreed that there would be a total of 13 years served, agreed sentence, no shock probation, no early release, and your Honor, there would also be five years post-release control [\*\*16] after that prison term. Otherwise, there's been no threats or promises made to defense counsel or the defendant from the State of Ohio. And there is a factual basis for the same."

[\*P31] In response, Jackson's trial counsel stated:

"Yes, judge. The statement made by Mr. Smith is accurate. We've had the opportunity to receive discovery from State of Ohio and had ample time to discuss everything. At this point it is my understanding Mr. Jackson would withdraw his previously entered pleas of not guilty and enter pleas of guilty to the amended indictment. Both count 1 and 2. He is aware of his constitutional and statutory rights I believe he will make a knowing, voluntary and intelligent plea. Further, your Honor, the only promise that has been -- or agreement, whatever you want to say, has been made to us is what has been spread on the record."

[\*P32] Following this presentation of the plea agreement, the court addressed Jackson and entered into the required colloquy under *Crim.R. 11*. Jackson never personally objected to the accuracy of the plea agreement or agreed sentence. [HN17] A defendant has a duty to speak when the court commits [\*\*17] error when taking a plea. *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90. The United States Supreme Court reasoned that otherwise, "a defendant could choose to say nothing about a plain lapse" and "simply relax and wait to see if his sentence later struck him as satisfactory; if not, his *Rule 11* silence would have left him with clear and uncorrected *Rule 11* error." *Id.* at 73. The Court further explained that "the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on." *Id.*

[\*P33] Following the trial court's acceptance of Jackson's guilty plea, the court proceeded to sentencing. Jackson argues that the trial court's conducting a sentencing hearing further bolsters his argument that he did not

"agree" to a sentence. This is a "red herring." [HN18] It is well settled that sentencing is within the sound discretion of the trial court. *State v. Bailey, Knox App. No. 05-CA-13, 2005 Ohio 5329*, citing *State v. Mathews (1982)*, 8 Ohio App.3d 145, 8 Ohio B. 202, 456 N.E.2d 539. Although the trial court should consider the recommendation proffered by the State, it is not [\*\*18] bound to accept such recommendation. *State v. Crawford (June 18, 1992)*, *Cuyahoga App. No. 62851, 1992 Ohio App. LEXIS 3149*, citing *Akron v. Ragsdale (1978)*, 61 Ohio App. 2d 107, 109, 399 N.E.2d 119. Therefore, it was appropriate for the court to conduct a sentencing hearing. The fact that the court imposed the same sentence recommended by both prosecutor and defense counsel demonstrates that the court agreed with and accepted the proffered sentencing recommendation.

[\*P34] As the court in *Coats*, supra, explained:

[HN19] "Although there is semantic tension in attempting to reconcile literal applications of the allied offenses statute and the R.C. 2953.08(D) bar to challenge such sentences, practicality and reason dictate enforcement of a valid plea agreement \*\*\*. Since the ultimate purpose of the allied offenses statute is to prevent unfair, cumulative punishments for identical conduct, appellant's express agreement to such a sentence should withstand any attack claiming inequity or unlawfulness in the name of allied offenses."

[\*P35] Therefore, we conclude that an allied offense determination hearing under *Kent* was not required because [\*\*19] the record demonstrates that Jackson entered into a plea agreement containing an agreed sentence. The fact that Jackson's plea agreement possibly contained allied offenses, did not render his plea invalid. Moreover, irrespective of whether voluntary manslaughter and felonious assault are allied offenses, we find that Jackson knowingly, intelligently, and voluntarily entered into a plea agreement with an agreed sentence. Finally, the trial court's failure to advise him of the possibility of consecutive sentences did not invalidate his plea. Consistent with this court's previous rulings, we find no plain error in Jackson's plea agreement containing an agreed sentence.

[\*P36] Accordingly, his first, second, and third assignments of error are overruled.

Effective Assistance of Counsel

[\*P37] In his fourth assignment of error, Jackson argues that he was denied his constitutional right to effective assistance of trial counsel because his counsel failed to object or raise the issue of allied offenses at his plea hearing.

[\*P38] [HN20] In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective [\*\*20] standard of reasonable representation and prejudiced the defense. *Strickland v. Washington (1984)*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052. To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard or reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000 Ohio 448, 721 N.E.2d 52, citing *Strickland*, supra, at 687-688.

[\*P39] [HN21] In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, \* \* \* had a fair trial and substantial justice was done." *State v. Hester (1976)*, 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus. When making that evaluation, a court must determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client" and "whether the defense was prejudiced by counsel's [\*\*21] ineffectiveness." *State v. Lytle (1976)*, 48 Ohio St.2d 391, 358 N.E.2d 623, vacated on other grounds (1978), 438 U.S. 910, 57 L.Ed.2d 1154, 98 S.Ct. 3135; *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999 Ohio 102, 714 N.E.2d 905.

[\*P40] As to the second element of the test, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley (1989)*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus; *Strickland*, supra, at 686. The failure to prove either prong of the *Strickland* test makes it unnecessary for a court to consider the other prong. *Madrigal*, supra, at 389, citing *Strickland*, supra, at 697.

[\*P41] In *State v. Xie (1992)*, 62 Ohio St.3d 521, 584 N.E.2d 715, the court explained that [HN22] the *Strickland* test can be applied to guilty pleas, citing *Hill v. Lockhart (1985)*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203. The defendant must show that counsel's performance was deficient and that a [\*\*22] -reasonable probability exists that, but for counsel's errors, he would not have pled guilty. *Id.* at 524 citing *Hill*, supra at 370.

[\*P42] We have previously found that Jackson knowingly, intelligently, and voluntarily entered into a

plea agreement containing an agreed sentence. Although Jackson argues that a determination by the trial court whether the offenses were allied would have yielded a lesser prison sentence, Jackson invited this error by entering into a plea agreement with an agreed sentence. [HN23] Invited error is not reversible error. *Stansell*, supra. We cannot say that his counsel was ineffective for negotiating a plea to which Jackson ultimately agreed. Moreover, Jackson has failed to demonstrate that he would not have entered into the plea agreement.

[\*P43] As indicted, Jackson faced two counts of murder, both punishable with life imprisonment. Jackson's trial counsel successfully negotiated a plea which amended the indictment to voluntary manslaughter and felonious assault. Pleading guilty to voluntary manslaughter and felonious assault in exchange for thirteen years in prison is a better deal than the potential of life in prison. Under the circumstances, [\*\*23] we find that trial counsel was not ineffective and his decision not to raise allied offenses could be attributed to sound strategy. If the offenses were determined to be allied, the maximum that Jackson could receive would be ten years. Because Jackson originally faced two counts of murder, carrying possible life sentences, the State might not have agreed to amend the indictment had Jackson faced only ten years in prison.

[\*P44] We find that trial counsel was not ineffective for negotiating a plea bargain containing an agreed sentence when Jackson ultimately accepted the sentence which was shorter than he originally faced.

[\*P45] Accordingly, Jackson's fourth assignment of error is overruled.

#### *Blakely* Argument

[\*P46] In his final assignment of error, Jackson argues that his sentence violates *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, because the imposition of consecutive sentences was based on findings neither found by a jury nor admitted by him. However, [HN24] the Ohio Supreme Court's recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, relieves the trial court of any obligation [\*\*24] to make findings or state reasons for the sentence imposed.

[\*P47] Nevertheless, because the sentence was agreed to by the parties as part of a plea bargain, Jackson's sentence is not subject to appellate review. *State v. Ranta*, Cuyahoga App. No. 84976, 2005 Ohio 3692. R.C. 2953.08(D) provides:

[HN25] "A sentence imposed upon a defendant is not subject to review under this section if the sentence is au-

thorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

[\*P48] Moreover, [HN26] the Ohio Supreme Court recently held in *State v. Porterfield*, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690, that pursuant to R.C. 2953.08(D), a sentence is not subject to review when the sentence is authorized by law, jointly recommended by the parties, and imposed by the sentencing judge. It reasoned, "[T]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate." *Id.* at 10.

[\*P49] "Authorized by law" under [\*\*25] R.C. 2953.08(D) means that the sentence falls within the statutorily set range of available sentences. *State v. Gray*, Belmont App. No. 02 BA 26, 2003 Ohio 805. A sentence is authorized by law as long as the prison term imposed does not exceed the maximum term prescribed by the statute for the offense. *Ranta*, supra, citing *State v. Walker* (Dec. 6, 2001), Cuyahoga App. No. 79630, 2001 Ohio App. LEXIS 5401.

[\*P50] [HN27] The statutory range for voluntary manslaughter, a felony in the first degree, is three to ten years. Jackson was sentenced to nine years for this charge. [HN28] The statutory range for felonious assault, a felony in the second degree, is two to eight years. Jackson was sentenced to four years for felonious assault. Thus, both sentences were within the statutory range. Therefore, Jackson's agreed sentence was authorized by law. Accordingly, R.C. 2953.08 precludes review of Jackson's sentence.

[\*P51] We also find that [HN29] *Blakely* has no application to agreed sentences. In *Ranta*, we stated:

"Furthermore, *Blakely* addressed only those instances in which a judge makes findings statutorily required [\*\*26] for the imposition of certain sentences. Because we conclude in the case at bar that as a result of the plea agreement no findings were required, *Blakely* does not apply for this very specific reason." *Id.* at P17.

[\*P52] In *State v. Woods*, Clark App. No. 05CA0063, 2006 Ohio 2325, the court addressed the impact of *Foster* on agreed sentences. In holding that *Foster* is not implicated, the court found that R.C.

2953.08(D) puts a *Foster* issue beyond appellate review when the sentence is a result of an agreement between the parties. *Id.* at PP 13-15.

[\*P53] Therefore, contrary to both Jackson's and the State's arguments, we need not vacate the sentence or remand for resentencing under *Foster* because the sentence appealed arises from an agreed sentence.

[\*P54] Jackson again argues under this assignment of error that he did not "agree" to the thirteen-year sentence as further supported by the fact that the "trial court did not confirm the existence of an agreed sentence." [HN30] There is no requirement that the trial court "confirm" that it is imposing an agreed sentence. As we previously stated, the fact that [\*\*27] the trial court imposed the same sentence as recommended jointly by the State and defense strongly suggests the court accepted the agreed sentence. Furthermore, the record demonstrates that Jackson agreed to the thirteen-year sentence because the State presented the plea agreement to the court, Jackson's counsel confirmed that was the agreement, and Jackson never objected that the sentence was not part of the plea agreement.

[\*P55] Therefore, because Jackson's sentence was authorized by law, was recommended jointly by his counsel and the prosecution, and was imposed by a sentencing judge, the sentence is not subject to review. *R.C. 2953.08(D)*. Moreover, because it was an agreed sentence, *Blakely* and *Foster* have no application.

[\*P56] Accordingly, Jackson's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant the 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been [\*\*28] 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 J. SWEENEY, P.J. and ANTHONY O. CALABRESE, JR., J. CONCUR

JUDGE

COLLEEN CONWAY COONEY

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. II, Section 2(A)(1)* [\*\*29] .

1 of 1 DOCUMENT

State of Ohio, Plaintiff-Appellee, v. Christopher J. Graham, Defendant-Appellant.

No. 97APA11-1524

## COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1998 Ohio App. LEXIS 4676

September 30, 1998, Rendered

**SUBSEQUENT HISTORY:** Post-conviction relief denied at *State v. Graham*, 2006 Ohio 914, 2006 Ohio App. LEXIS 809 (Ohio Ct. App., Franklin County, Feb. 28, 2006)

**PRIOR HISTORY:** [\*1] APPEAL from the Franklin County Court of Common Pleas.

**DISPOSITION:** *Judgment affirmed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from the order of the Franklin County Court of Common Pleas (Ohio) that sentenced him to a combined sentence of 16 years in prison for his plea of guilty with respect to the crimes of aggravated robbery and involuntary manslaughter.

**OVERVIEW:** Defendant was previously indicted and charged with complicity to commit aggravated murder, aggravated robbery, and involuntary manslaughter following the attempted robbery of a gas station, during which the attendant was shot and killed by a co-defendant. Defendant pled guilty to the offense of aggravated robbery and involuntary manslaughter and was ordered to serve 10 years for involuntary manslaughter, 3 years for aggravated robbery, and 3 years on associated firearm specifications. On appeal, defendant alleged that the offenses of aggravated robbery and involuntary manslaughter constituted allied offenses of similar import such that the court of common pleas erred in failing to merge those offenses for sentencing. The court affirmed, holding that there was no error in the court of common pleas' acceptance of defendant's plea or the jointly recommended sentence. The court held that because defendant made an informed and voluntary decision to enter his guilty plea in exchange for the dismissal of the ag-

gravated murder charge and the state's promise to recommend only a 16-year sentence, his plea agreement was not subject to review pursuant to *Ohio Rev. Code* § 2953.08(D).

**OUTCOME:** The court affirmed the order of the court of common pleas that ordered defendant to serve a prison term of 16 years in exchange for his guilty plea for the crimes of aggravated robbery and involuntary manslaughter.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Guilty Pleas > Appeals*  
*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

[HN1] *Ohio Rev. Code* § 2953.08(D) provides that: A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

*Criminal Law & Procedure > Guilty Pleas > Appeals*  
*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

[HN2] Pursuant to *Ohio Rev. Code* § 2953.08(G), an appellate court may not disturb a sentence imposed under Senate Bill 2 unless it finds by clear and convincing evidence that the sentence is not supported by the record or is contrary to law. Clear and convincing evidence is that evidence which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

*Criminal Law & Procedure > Guilty Pleas > Appeals*  
*Criminal Law & Procedure > Guilty Pleas > Knowing*  
*& Intelligent Requirement*  
*Criminal Law & Procedure > Sentencing > Plea*  
*Agreements*

[HN3] An agreement that is knowingly and voluntarily entered into by the defendant is sufficient to withstand any later attack even when the attack involves a plea to allied offenses.

*Criminal Law & Procedure > Guilty Pleas > Breach of*  
*Plea Agreements*  
*Criminal Law & Procedure > Guilty Pleas > Enforce-*  
*ment of Plea Agreements*  
*Criminal Law & Procedure > Sentencing > Plea*  
*Agreements*

[HN4] A plea bargain itself is contractual in nature and subject to contract law standards. A breached plea agreement may be remedied by specific performance.

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

David J. Graeff, for appellant.

JUDGES: PETREE, J. BRYANT, J., and DESHLER, P.J., concur.

OPINION BY: PETREE

OPINION

(REGULAR CALENDAR)

OPINION

PETREE, J.

Defendant, Christopher J. Graham, appeals from a decision of the Franklin County Court of Common Pleas finding him guilty of aggravated robbery and involuntary manslaughter in connection with the January 17, 1997 shooting death of Larry Teets. Defendant now raises the following assignment of error:

"When the trial court sentences the accused to consecutive terms on involuntary manslaughter and aggravated robbery, the sentence is contrary to law regarding the aggravated robbery since, under the facts presented, the aggravated robbery is an allied offense of similar import; the sentence is thus excessive contrary to the double jeopardy provisions of the Federal and Ohio Constitutions under the Fifth

Amendment and Article I, Section 10 and R.C. 2941.25."

On February 5, 1997, defendant was indicted and charged with complicity to commit aggravated murder, aggravated [\*2] robbery, and involuntary manslaughter. Those charges stemmed from the attempted robbery of a gas station in Dublin, Ohio, during which the attendant, Larry Teets, was shot and killed by defendant Graham's co-defendant, Rafik Mirmohamed.

On September 19, 1997, defendant Graham appeared before the Franklin County Court of Common Pleas for the purpose of pleading guilty to the offense of aggravated robbery in violation of R.C. 2911.01, and involuntary manslaughter in violation of R.C. 2903.04. Defendant also pled guilty to the firearm specifications which accompanied both charges.

The record shows that the trial court held a hearing on Friday, September 19, 1997 for the purpose of determining whether defendant had made a knowing, intelligent, and voluntary decision to enter his guilty pleas. During that hearing, the court engaged defendant in meaningful dialogue, and questioned defendant regarding the implications of a guilty plea in full compliance with the requirements of *Crim.R. 11*. The court then accepted defendant's guilty pleas, and ordered defendant to serve ten years for involuntary manslaughter and three years for aggravated robbery.<sup>1</sup>

I Defendant was also sentenced to three years on the firearm specifications associated with counts one and two of the indictment for a total of sixteen years on all counts.

[\*3] On appeal, defendant does not challenge the court's acceptance of his guilty pleas or the court's finding of guilt. Rather, defendant only challenges the sentence imposed by the court. Specifically, defendant asserts that the offenses of aggravated robbery and involuntary manslaughter constitute allied offenses of similar import such that the court's failure to merge those offenses for purposes of sentencing violated R.C. 2941.25 and R.C. 2953.08(A)(4).

Defendant relies upon our unreported decision in *State v. Wozniak*, 1996 Ohio App. LEXIS 2140 (May 23, 1996), Franklin App. No. 95APA03-345, unreported (1996 Opinions 1960), for the proposition that, despite a defendant's failure to raise the doctrine of merger at the trial stage, the failure of the trial court to address the applicability of merger constitutes plain error.

In 1992, Richard Wozniak was indicted by a Franklin County Grand Jury for kidnapping, felonious penetration, gross sexual imposition, intimidation of a crime

victim, attempted rape, and rape. On September 2, 1992, Wozniak appeared before the trial court, withdrew his previously entered not guilty pleas, and pled guilty to attempted rape, gross sexual imposition, and intimidation of a [\*4] crime victim. Although the remaining charges were dismissed as a result of the plea agreement, no agreement or recommendation was made to the court regarding the sentence to be imposed. In addition, neither counsel nor the court addressed the issue of whether the offenses committed by Wozniak merged for purposes of sentencing. On appeal, we held that the trial court's failure to address the doctrine of merger constituted plain error.

While our decision in *Wozniak* would seem to apply to the facts of this case, upon closer inspection, *Wozniak* is in fact distinguishable. Although Wozniak pled guilty to offenses which might have constituted "allied offenses of similar import," he did not reach an agreement with the prosecutor for a fixed sentence, nor did counsel for Wozniak or the state make a sentencing recommendation to the court.

In this case, however, not only did defendant Graham plead guilty to involuntary manslaughter and aggravated robbery, he did so fully recognizing that he had reached an agreement with the prosecutor for a fixed sentence of sixteen years. During the September hearing, the following exchange between the court and defendant took place:

"THE [\*5] COURT: \*\*\* Mr. Graham, the court has been presented with an entry which indicates at this time that you are going to withdraw your previously entered not guilty plea and specifically enter a plea of guilty to Count Two.

"Count Two is an aggravated robbery violation under *Section 2911.01 of the Ohio Revised Code* with a gun specification. This offense is a felony of the first degree. Do you understand the nature of the offense relative to this specific count of aggravated robbery with the gun specification? I want to make sure you understand the nature of the offense. Do you understand?

"THE DEFENDANT: Yes, sir.

" \*\*\*

"THE COURT: Now, relative to these counts, I want to make sure you understand that Count Two carries a possible incarceration of up to ten years in prison with a gun specification which would total 13 years. That's relative to Count Two. And of course, that is aggravated robbery.

"Now, relative to Count Three, the court may impose a sentence up to ten years. That is the maximum, up to ten years in prison with a gun specification of three years for a total of 13 years. Do you understand?

"THE [\*6] DEFENDANT: Yes, sir.

"THE COURT: The total maximum prison sentence which this court could consider relative to this plea of guilty is 26 years as the gun specifications in this case merge for sentencing purposes.

"Now, I want to make sure you understand the possible sentence is up to 26 years in prison. Do you understand that?

"THE DEFENDANT: Yes, sir.

"MR. BEAL: Your honor, as I explained to my client and as Mr. O'Brien has pointed out, the gun specifications merge so there is a total of 23 years.

"THE COURT: I'm sorry, I have 23 here and I misread that. It is 23 and not 26. I want to make sure you understand that.

"THE DEFENDANT: Yes, sir.

"THE COURT: Now, the entry form I am referring to reflects the signature of your lawyer as well as your signature. I want to make sure that is your signature?

"THE DEFENDANT: Yes, sir.

"THE COURT: You have reviewed this with your attorney, Mr. Beal, and you understand the nature of the offense, as well as the possible penalty?

"THE DEFENDANT: Yes.

\*\*\*

"THE COURT: \*\*\* Your counsel has recommended [\*7] to this court that the court consider imposing a penalty relative to Count Two, aggravated robbery penalty, with a three year gun specification. And relative to Count Three, the recommendation to this court is relative to the involuntary manslaughter penalty of ten years with a three year gun specification, and they are to run consecutive. Consecutive means one will attach on the expiration of the other, that is respective to Count Two. Do you understand?

"THE DEFENDANT: Yes, sir.

"THE COURT: Now, there is a significant difference between concurrent and consecutive, okay? Has Mr. Beal explained that to you?

"THE DEFENDANT: Yes, sir.

"THE COURT: Okay, Except for the gun specifications which merges, they come together for a total joint recommendation of 16 years. I want to make sure you understand that. Do you understand that?

"THE DEFENDANT: Yes, sir." (Tr. 3-6.)

Because the sentence imposed upon defendant Graham was an agreed sentence and was jointly recommended to the court, this matter is controlled by *R.C. 2953.08(D)* and not by our decision in *Wozniak*. [HN1] *R.C. 2953.08(D)* provides that:

"A sentence [\*8] imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge \*\*\*

All three elements are present in this case.

[HN2] Pursuant to *R.C. 2953.08(G)*, an appellate court may not disturb a sentence imposed under Senate Bill 2 unless it finds by clear and convincing evidence that the sentence is not supported by the record or is contrary to law. Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cincinnati Bar Assn. v. Massengale (1991)*, 58 Ohio St. 3d 121, 122, 568 N.E.2d 1222.

In this case, we find that defendant made an informed and voluntary decision to enter his guilty pleas in exchange for the dismissal of the charge of aggravated murder and the state's promise to recommend defendant serve only sixteen years. Thus, not only did the defendant avoid a possible life sentence as a result of his plea agreement, he also negotiated a deal to serve only a portion of the possible maximum sentence for the [\*9] crimes of involuntary manslaughter and aggravated robbery. [HN3] "An agreement that is knowingly and voluntarily entered into by the defendant is sufficient to withstand any later attack even when the attack involves a plea to allied offenses." *State v. Styles*, 1997 Ohio App. LEXIS 4547 (Oct. 9, 1997), Cuyahoga App. No. 71052, unreported, citing *State v. Butts (1996)*, 112 Ohio App. 3d 683, 679 N.E.2d 1170.

Pursuant to *R.C. 2953.08(D)*, we find that defendant's sentence was authorized by law and was properly accepted by the trial court pursuant to *Crim.R. 11* and the applicable provisions of the Revised Code; *to wit*, *R.C. 2943.032*. In addition, defendant's sentence was jointly recommended by counsel for defendant and the state, and was imposed by a sentencing judge. Accordingly, defendant is prohibited from appealing the trial court's acceptance of the agreed sentence in an attempt to circumvent the terms of the plea agreement at the expense of the interests of the state. See *Butts*, *supra*, 112 Ohio App. 3d at 685-686, [HN4] "[a] plea bargain itself is contractual in nature and subject to contract law standards." *Baker v.*

*United States (C.A.6, 1986), 781 F.2d 85, 90.* A breached plea agreement may be remedied by specific [\*10] performance. *Santobello v. New York (1971), 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495.*"

We find no error with the trial court's acceptance of defendant's plea or the jointly recommended sentence. Under the circumstances, the failure of the court to ad-

dress the issue of merger did not constitute plain error. Therefore, for the foregoing reasons, we overrule defendant's assignment of error and hereby affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT, J., and DESHLER, P.J., concur.

1 of 1 DOCUMENT

STATE OF OHIO, Plaintiff-Appellee, - vs - MATTHEW HENDERSON, Defendant-Appellant.

CASE NO. CA99-01-002

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, WARREN COUNTY

1999 Ohio App. LEXIS 4597

September 27, 1999, Decided

**DISPOSITION:** [\*1] Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant pleaded guilty to aggravated robbery and received an agreed upon sentence from the trial court (Ohio). Appellant then appealed from the trial court's acceptance of his plea and the imposition of his sentence.

**OVERVIEW:** Appellant entered a guilty plea to two counts of aggravated robbery and received an agreed sentence jointly proposed by defense counsel and the prosecutor pursuant to *Ohio Rev. Code Ann. § 2953.08(D)*. Appellant challenged the trial court's acceptance of his plea and the imposition of his sentence and on appeal, the court affirmed the judgment. The court found that appellant's claim that his sentence violated *Ohio Rev. Code Ann. § 2941.25* was not subject to appellate review since he knowingly and voluntarily entered a negotiated plea agreement pursuant to *Ohio Rev. Code Ann. § 2953.08(D)*. The court found that the totality of the circumstances demonstrated that the trial court substantially complied with the statutory requirements and that appellant understood the implications of his plea.

**OUTCOME:** The judgment was affirmed. Where the totality of the circumstances showed that the trial court substantially complied with the statutory requirements and appellant understood the implications of his negotiated plea, the plea was voluntarily entered.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

[HN1] Appellate review of a negotiated felony sentence is governed by *Ohio Rev. Code Ann. § 2953.08(D)* which states in part: A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

*Criminal Law & Procedure > Sentencing > Ranges*

[HN2] The plain language of *Ohio Rev. Code Ann. § 2953.08(D)* states that, as long as the sentence is "authorized by law," the appellate court may not review the sentence. A sentence is "authorized by law" under *Ohio Rev. Code Ann. § 2953.08(D)* as long as the prison term imposed does not exceed the maximum term proscribed by statute for the offense.

*Criminal Law & Procedure > Sentencing > Appeals > General Overview*

*Criminal Law & Procedure > Appeals > Reviewability > General Overview*

[HN3] Where a sentence is imposed pursuant to a joint recommendation, it is not reviewable even where the sentences are imposed for convictions on allied offenses.

*Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement*

*Criminal Law & Procedure > Guilty Pleas > Voluntariness*

[HN4] An agreement which is knowingly and voluntarily entered is sufficient to withstand any later attack even when the attack involves a plea to allied offenses.

*Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Penalties*

[HN5] Aggravated robbery, a first degree felony, carries a maximum penalty of 10 years in prison.

*Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Escape > Penalties*

[HN6] Escape, a second degree felony, carries a maximum penalty of eight years in prison. *Ohio Rev. Code Ann. § 2929.14(A)(1)-(2)*.

*Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement*

*Criminal Law & Procedure > Guilty Pleas > Voluntariness*

*Criminal Law & Procedure > Sentencing > Plea Agreements*

[HN7] A defendant's claim that his sentence violates *Ohio Rev. Code Ann. § 2941.25* is not subject to appellate review when he knowingly and voluntarily enters a negotiated plea agreement pursuant to *Ohio Rev. Code Ann. § 2953.08(D)*.

*Criminal Law & Procedure > Guilty Pleas > Voluntariness*

*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Guilty Pleas*

[HN8] Although a defendant's jointly recommended sentence is not subject to appellate review, the voluntariness of his guilty plea pursuant to *Ohio Crim. R. 11(C)* is reviewable on direct appeal.

*Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Role of the Court*

*Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > General Overview*

*Criminal Law & Procedure > Guilty Pleas > Allocation & Colloquy*

[HN9] Before accepting a defendant's guilty plea, the trial court must ensure that the defendant realizes what he is giving up by pleading guilty. The record must demonstrate that the defendant was informed of his constitutional rights in a reasonable manner. The court is not required to use the exact language of *Ohio Crim. R. 11(C)*, but it must explain the constitutional rights that

are waived in a manner reasonably intelligible to the defendant.

*Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > General Overview*

*Criminal Law & Procedure > Guilty Pleas > Appeals*

[HN10] Where the record discloses that the trial court has personally addressed a defendant during his plea hearing and has informed him of his constitutional rights, not informing the defendant of one of the nonconstitutional rights is not prejudicial error and is subject to the substantial-compliance rule.

*Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement*

[HN11] Substantial compliance means that, under the totality of the circumstances, the defendant objectively understood the implication of his plea and the rights he was waiving.

COUNSEL: Timothy A. Oliver, Warren County Prosecuting Attorney, Gregory M. Clark, Lebanon, Ohio, for plaintiff-appellee.

Kenneth L. Lawson, Cincinnati, Ohio, for defendant-appellant.

JUDGES: VALEN, YOUNG, P.J., and WALSH, J., concur.

OPINION BY: VALEN

OPINION

OPINION

VALEN, Defendant-appellant, Matthew Henderson, entered a guilty plea and received an agreed sentence jointly proposed by defense counsel and the prosecutor pursuant to *R.C. 2953.08(D)*. Appellant appeals the trial court's acceptance of his plea and the imposition of his sentence. We affirm the decision of the trial court.

On January 23, 1998, appellant and his co-defendant, Rashad Gary, entered a Sunoco station wearing ski masks and brandishing pistols. On February 9, 1998, appellant was indicted on two counts of aggravated robbery and one count of felonious assault. On April 17, 1998, upon the advice of counsel, appellant pled guilty to both counts of aggravated robbery. The felonious assault charge was dismissed. Prior to accepting appellant's guilty plea, the trial court fully advised appellant of his constitutional rights and the possible maximum penalty. Appellant represented [\*2] to the court that he fully understood that a guilty plea resulted in a waiver of his

rights. In addition, appellant voluntarily signed a written waiver form.

On May 27, 1998, the date set for sentencing, appellant claimed that he had engaged in conversations outside of court which led him to believe that he would not be sentenced to a term longer than five years. The trial court allowed appellant to withdraw his plea, and the case was reset for trial on June 30, 1998.

On June 23, 1998, while awaiting trial, appellant and Gary broke out of the Warren County Jail. Appellant and Gary also committed another crime. Three days later, appellant and Gary were apprehended several miles away. On July 13, 1998, appellant was indicted on one count of escape, one count of burglary, and one count of breaking and entering.

On July 29, 1998, appellant appeared before the court with his attorney, Ronald W. Ruppert. At the hearing, Ruppert and the prosecutor proposed a jointly negotiated sentence to the trial court pursuant to *R.C. 2953.08(D)*. Under the agreement, appellant pled guilty to two counts of aggravated robbery in the first case, and one count of escape in the [\*3] second case. All remaining charges in both cases were dismissed. The agreement proposed consecutive sentences of four years on each count for an aggregate sentence of twelve years.

The trial court again fully advised appellant of his rights. Appellant represented to the court that he understood the agreement which had been proposed, and that he was waiving his rights by pleading guilty. In addition, appellant also voluntarily signed another written waiver form.

The trial court imposed the twelve-year sentence proposed by the prosecutor and Ruppert. Appellant now appeals, raising two issues for our review under the following sole assignment of error:

THE TRIAL COURT ERRED IN ACCEPTING MR. HENDERSON'S GUILTY PLEAS WHEN SAID PLEAS WERE NOT MADE IN A KNOWING, INTELLIGENT AND VOLUNTARY MANNER, THUS VIOLATING THE DUE PROCESS CLAUSE OF BOTH THE OHIO AND FEDERAL CONSTITUTIONS.

We will first discuss appellant's second issue presented for review, in which appellant argues that his sentences violate *R.C. 2941.25* because his offenses were allied offenses of similar import.

[HN1] Appellate review of a negotiated felony sentence is governed by *R.C. 2953.08(D)* [\*4] which states in part: "A sentence imposed upon a defendant *is not subject to review* under this section if the sentence is authorized by law, has been recommended jointly by the

defendant and the prosecution in the case, and is imposed by a sentencing judge." (Emphasis added.) Since appellant was sentenced according to a negotiated agreement under *R.C. 2953.08(D)*, the threshold issue is whether or not appellant's sentence may even be appealed.

[HN2] The plain language of *R.C. 2953.08(D)* states that, as long as the sentence is "authorized by law," the appellate court may not review the sentence. This court has previously held that a sentence is "authorized by law" under *R.C. 2953.08(D)* as long as the prison term imposed does not exceed the maximum term proscribed by statute for the offense. *State v. Stacy*, 1999 Ohio App. LEXIS 2110, \*11 (May 10, 1999), Warren App. No. CA98-08-093, unreported. See, also, *State v. Bristow*, 1999 Ohio App. LEXIS 941 (Jan. 29, 1999), Crawford App. No. 3-98-21, unreported, discretionary appeal not allowed (1999), 85 Ohio St. 3d 1495, 710 N.E.2d 715. Appellant's sentences do not exceed the statutory range, and are therefore "authorized [\*5] by law" under *R.C. 2953.08(D)*.<sup>1</sup>

Ohio courts have construed *R.C. 2953.08(D)* strictly. In fact, the Tenth District Court of Appeals has specifically held that [HN3] where a sentence is imposed pursuant to a joint recommendation, it is not reviewable even where the sentences are imposed for convictions on allied offenses. *State v. Coats*, 1999 Ohio App. LEXIS 1424 (Mar. 30, 1999), Franklin App. No. 98AP-927, unreported. Similarly, the Eighth District Court of Appeals has held that [HN4] an agreement which is knowingly and voluntarily entered is sufficient to withstand any later attack even when the attack involves a plea to allied offenses. *State v. Styles*, 1997 Ohio App. LEXIS 4547 (Oct. 9, 1997), Cuyahoga App. No. 71052, unreported.

1 [HN5] Aggravated robbery, a first degree felony, carries a maximum penalty of ten years in prison. [HN6] Escape, a second degree felony, carries a maximum penalty of eight years in prison. *R.C. 2929.14(A)(1)-(2)*.

Therefore, we find that [HN7] appellant's claim that his sentence [\*6] violates *R.C. 2941.25* is not subject to appellate review since he knowingly and voluntarily entered a negotiated plea agreement pursuant to *R.C. 2953.08(D)*. Accordingly, appellant's second issue for review lacks merit.

Under his first issue presented for review, appellant argues that his guilty plea was not knowingly and voluntarily made. We note that [HN8] although appellant's jointly recommended sentence is not subject to appellate review, the voluntariness of appellant's guilty plea pursuant to *Crim.R. 11(C)* is reviewable on direct appeal. *State v. Griffin*, 1998 Ohio App. LEXIS 3388 (July 24, 1998),

Hamilton App. Nos. C-970507 and C-970527, unreported, discretionary appeal not allowed (1998), 84 *Ohio St. 3d* 1439, 702 *N.E.2d* 1215.

[HN9] Before accepting a defendant's guilty plea, the trial court must ensure that the defendant realizes what he is giving up by pleading guilty. The record must demonstrate that the defendant was informed of his constitutional rights in a reasonable manner. *State v. Ballard* (1981), 66 *Ohio St. 2d* 473, 478, 423 *N.E.2d* 115. The court is not required to use the exact language of *Crim.R. 11(C)*, but it must explain the constitutional [\*7] rights that are waived in a manner reasonably intelligible to the defendant. *State v. Anderson* (1995), 108 *Ohio App. 3d* 5, 11, 669 *N.E.2d* 865, discretionary appeal not allowed (1996), 75 *Ohio St. 3d* 1494, 664 *N.E.2d* 1291.

In this case, appellant was advised of the effect of his guilty plea on two different occasions, first on April 17, 1998 and again on July 29, 1998. Prior to accepting both of appellant's guilty pleas, the trial court engaged appellant in a meaningful plea colloquy. In addition, appellant voluntarily signed waivers prior to entering both guilty pleas.

The only irregularity during these proceedings occurred at the July 29, 1998 hearing. At one point, Ruppert stated that appellant was aware that he may eventually be eligible for judicial release. This passing colloquy was not further commented upon. Upon further review, it is evident that under *R.C. 2929.20(A)(1)(a)*, appellant

would not be eligible for judicial release because his aggregate sentence was in excess of ten years.

Our review of the record shows that, despite this erroneous statement by Ruppert, appellant's plea was voluntarily made. [HN10] "Where the record discloses [\*8] that the trial court has personally addressed a defendant during his plea hearing and has informed him of his constitutional rights, not informing the defendant of one of the nonconstitutional rights is not prejudicial error and is subject to the substantial-compliance rule." *Griffin*, 1998 *Ohio App. LEXIS* 3388, Hamilton App. Nos. C-970507, citing *Ballard*, 66 *Ohio St. 2d* at 475. [HN11] Substantial compliance means that, under the totality of the circumstances, the defendant objectively understood the implication of his plea and the rights he was waiving. *State v. Nero* (1990), 56 *Ohio St. 3d* 106, 108, 564 *N.E.2d* 474.

It is important to note that this is not a case where the trial court misinformed the appellant of one of his rights. Rather, appellant's attorney made a misstatement regarding appellant's eligibility for judicial release, a nonconstitutional right. We find that the totality of the circumstances demonstrates that the trial court substantially complied with the statutory requirements and that appellant understood the implications of his plea. Accordingly, we find that appellant's first issue presented for review lacks merit, and his assignment of error is overruled.

[\*9] Judgment affirmed.

YOUNG, P.J., and WALSH, J., concur.

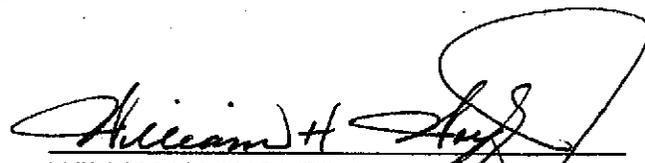
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

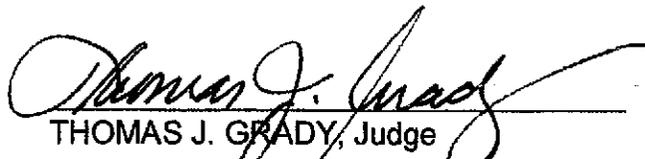
STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22454
v.	:	T.C. NO. 2006-CR-2008
RICHARD L. UNDERWOOD, JR.	:	<u>FINAL ENTRY</u>
Defendant-Appellant	:	

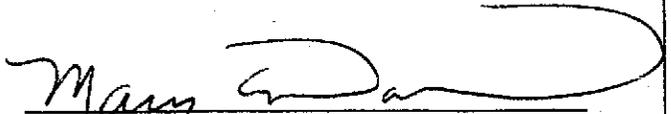
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Pursuant to the opinion of this court rendered on the 19<sup>th</sup> day of September, 2008, the judgment of convictions for aggravated theft under R.C. 2913.02(A)(3) (Count One) and for theft under R.C. 2913.02(A)(3) (Count Three) are vacated. In all other respects, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

  
 WILLIAM H. WOLFF, JR., Presiding Judge

  
 THOMAS J. GRADY, Judge

  
MARY E. DONOVAN, Judge

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Hon. Jeffrey E. Froelich  
Montgomery Co. Common Pleas Court  
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:

C.A. CASE NO. 22454

v.

:

T.C. NO. 2006-CR-2008

RICHARD L. UNDERWOOD, JR.

:

Defendant-Appellant

:

:

OPINION

Rendered on the 19<sup>th</sup> day of September, 2008.

.....

CARLEY J. INGRAM, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, OH 45422  
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Defendant-Appellant, Pro Se

.....

WOLFF, P.J.

Richard L. Underwood pled no contest in the Montgomery County Court of Common

Pleas to two counts of aggravated theft and two counts of theft. The trial court sentenced Underwood to one year in prison on one count of aggravated theft, to two years in prison on the second count of aggravated theft, and to six months in prison for each count of theft, all four sentences to be served concurrently to each other but consecutive to eleven months in prison imposed in another case. Underwood was also ordered to pay restitution totaling \$101,004.75 and court costs.

On appeal, Underwood's counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that he could not find any meritorious issue for appellate review. We informed Underwood that his counsel had filed an *Anders* brief and of the significance of an *Anders* brief. We invited Underwood to file a pro se brief within 60 days of March 21, 2008. Underwood did not file a brief.

Upon our independent review of the entire record, we determined that Underwood's sentence on each of the four counts arguably violated R.C. 2941.25(A), which states "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." We ordered Underwood's appellate counsel to file a supplemental brief on this issue.

Underwood now raises two assignments of error, which we will address together.

I. "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT SENTENCED DEFENDANT-APPELLANT TO MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO R.C. § 2941.25(A)."

II. "DEFENDANT-APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF HIS ATTORNEY

FAILING TO OBJECT TO THE SENTENCE IMPOSED BY THE COURT SINCE IT VIOLATED R.C. § 2941.25(A)."

Underwood claims that the trial court erred in failing to merge the two counts of aggravated theft – Count One in Indictment A (R.C. 2913.02(A)(3)) and the sole count in Indictment B (R.C. 2913.02(A)(2)) – as allied offenses of similar import. Underwood states that these counts stated the same charge over the same period of time with the same victims. Likewise, Underwood claims that both theft counts – Counts Two (R.C. 2913.02(A)(2)) and Three (R.C. 2913.02(A)(3)) of Indictment A – charge theft over \$500 on the same date and against the same victim. Underwood further claims that his counsel rendered ineffective assistance by failing to object to the court's failure to merge the charges.

In response, the State indicates that Underwood was sentenced in accordance with an agreed sentence. Citing R.C. 2953.08(D), the State asserts that Underwood has waived any claim of error with regard to allied offenses and that his sentence is not subject to review on appeal.

At the plea hearing, the trial court articulated the plea as follows:

"It's my understanding that on the pleas of no contest, that you will be found guilty and that you will be referred for a presentence investigation with sentencing two weeks from this Wednesday which would take us to August the 29<sup>th</sup>; that the restitution figure which the parties agree is over one hundred thousand but the exact amount is to be determined during the presentence investigation; that \$40,000 of that restitution will have an effect on your sentencing to the point that if \$40,000 in restitution is paid prior to your disposition on August 29<sup>th</sup>, that you would either receive a community control sanction with

local incarceration or you would receive a term of not to exceed two years at the Corrections Reception Center in which case the State would not oppose judicial release.

"On the other hand, if the \$40,000 in restitution is not paid, you would not receive community control but you would be sentenced to the Corrections Reception Center, again, not to exceed two years."

Underwood and Underwood's trial counsel both acknowledged that the court's statement was their understanding of the plea as well.

At the sentencing hearing, Underwood acknowledged that he had not paid any restitution. The court imposed an aggregate two-year sentence, indicating that "I believe that was the plea agreement, that there would be a two-year maximum sentence."

R.C. 2953.08(D)(1) provides: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

Several Ohio appellate districts have concluded that R.C. 2953.08(D)(1) bars an appeal of an agreed sentence, even if the sentence includes counts that are allied offenses of similar import. See, e.g., *State v. Turrentine*, Allen App. No. 01-08-18, 2008-Ohio-3231; *State v. Jackson*, Cuyahoga App. No. 86506, 2006-Ohio-3165; *State v. Graham* (Sept. 30, 1998), Franklin App. No. 97APA11-1524; *State v. Henderson* (Sept. 27, 1999), Warren App. No. CA99-01-002.

We have held otherwise. In *State v. Manns*, Clark App. No. 2000 CA 58, 2001-Ohio-1822, the defendant pled guilty to three counts of rape and two counts of kidnapping, pursuant to a negotiated plea. As part of the plea agreement, the State and Manns agreed

to a 30-year sentence and to Manns' classification as a sexual offender. On appeal, Manns argued, in part, that the trial court erred in sentencing him to concurrent 10-year prison terms for rape and kidnapping because the offenses were allied offenses of similar import. We agreed, stating:

"Because the facts in this case are very similar to those in [*State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345], we conclude, as the State appears to concede that we must, that the trial court did err in failing to merge the sentences for kidnapping and rape. Thus, this portion of the trial court's sentence was not authorized by law \*\*\*."

Since *Manns*, we have noted that R.C. 2953.08(D)(1)'s "bar to an appeal has been upheld even when a sentencing court fails to address a possible defect in the sentence, e.g., a possible merger as to whether the defendant committed allied offenses of similar import." *State v. Lopez*, Clark App. No. 2001 CA 08, 2002-Ohio-1807, citing *Graham*, supra. However, as *Lopez* did not concern whether an agreed sentence is authorized by law when the court failed to merge allied offenses of similar import, our holding in *Manns* controls. (Although we are not inclined to overrule the precedent of this Court, we find the interplay between R.C. 2941.25 and R.C. 2953.08(D)(1) to be an important issue that should be definitively resolved. Should the State be so inclined, this Court is willing to entertain a motion to certify a conflict pursuant to App.R. 25.)

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."

R.C. 2941.25 implements the protections of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution. The Double Jeopardy Clauses prohibit a second punishment for the same offense. *State v. Lovejoy* (1997), 79 Ohio St.3d 440. To avoid that result, when two or more allied offenses of similar import are charged and guilty verdicts for two or more are returned, R.C. 2941.25 mandates that "the defendant may be convicted of only one."

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

In this case, the State conceded in its sentencing memorandum that the offenses at issue are allied offenses of similar import. The State represented in the first paragraph of its memorandum:

"The Defendant was charged by an A & B indictment with two counts of Aggravated Theft, felonies of the third degree and two counts of Theft (over \$500.00), felonies of the fifth degree. The two counts in each of the different categories of thefts would be

considered allied offenses of similar import and would require the Court to sentence the defendant to only one of the thefts.”

R.C. 5053.08(D) bars appellate review of sentences which a defendant and the prosecution have jointly agreed to recommend when the sentence is one “authorized by law.” In light of the State’s concession, Underwood’s multiple sentences were improperly imposed on convictions the court was required by R.C. 2941.25 to merge. Those multiple sentences were not authorized by law, and our review of the error assigned is not precluded by R.C. 2953.08(D).

Accordingly, we find that the trial court erred in failing to merge the convictions of aggravated theft and theft, respectively. Thus, the conviction for aggravated theft under R.C. 2913.02(A)(3) (Count One), for which Underwood received a one-year concurrent sentence, and the conviction for theft under R.C. 2913.02(A)(3) (Count Three), for which Underwood received a six month concurrent sentence will be vacated. We note, however, that correction of this error will not shorten the amount of prison time that Underwood must serve because Underwood received a two-year sentence for aggravated theft under R.C. 2913.02(A)(2) and all sentences were ordered to be served concurrently.

The State asserts that, even if this Court finds that the sentences are erroneous, the error does not amount to plain error and we should uphold the convictions. We disagree. We have held that the failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-2; *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, 877 N.E.2d 1020, at ¶26.

The assignments of error are sustained.

The convictions for aggravated theft under R.C. 2913.02(A)(3) (Count One) and for theft under R.C. 2913.02(A)(3) (Count Three) will be vacated. In all other respects, the judgment will be affirmed.

.....  
GRADY, J., and DONOVAN, J., concur.

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Richard L. Underwood, Jr.  
Hon. Jeffrey E. Froelich

Westlaw

R.C. § 2953.08

Page 1



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs &amp; Annos)

▣ Chapter 2953. Appeals; Other Postconviction Remedies (Refs &amp; Annos)

▣ Supreme Court

→ **2953.08 Appeals based on felony sentencing guidelines**

&lt;Note: See also version(s) of this section with later effective date(s).&gt;

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the sentence was not imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the

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same meaning as in section 2929.01 of the Revised Code, and a person is “adjudicated a sexually violent predator” in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of section 2929.14 of the Revised Code.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by

a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (H) of section 2929.20 of the Revised Code.

(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(I)(1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the

member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of section 181.25 of the Revised Code. Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of section 2953.21 of the Revised Code or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys

that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that have been so appropriated specifically for the purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

CREDIT(S)

(2006 H 461, eff. 4-4-07; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2000 H 331, eff. 10-10-00; 1999 S 107, eff. 3-23-00; 1997 H 151, eff. 9-16-97; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)

Current through the end of the 127th General Assembly. As of 3/17/09 no legislation from the 128th General Assembly has been approved or filed with the Secretary of State.

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R.C. § 2941.25

Page 1

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs &amp; Annos)

Chapter 2941. Indictment

Pleading, Averments, and Allegations

→ **2941.25 Multiple counts**

(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.

CREDIT(S)

(1972 H 511, eff. 1-1-74)

Current through the end of the 127th General Assembly. As of 3/17/09 no legislation from the 128th General Assembly has been approved or filed with the Secretary of State.

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Crim. R. Rule 52

Page 1

**C**

Baldwin's Ohio Revised Code Annotated Currentness  
Rules of Criminal Procedure (Refs & Annos)  
→ **Crim R 52 Harmless error and plain error**

**(A) Harmless error**

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

**(B) Plain error**

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

CREDIT(S)

(Adopted eff. 7-1-73)

Current with amendments received through 1/31/09

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