

NO. 08-1669

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 90244

STATE OF OHIO,
Plaintiff-Appellant

-vs-

DARNELL WHITFIELD,
Defendant-Appellee

MERIT BRIEF OF APPELLANT

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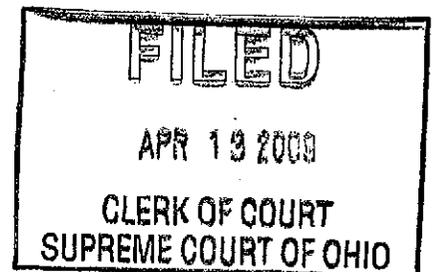
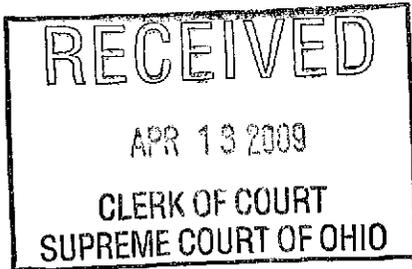


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STATEMENT OF THE CASE

On June 15, 2006, Defendant-Appellee Darnell Whitfield (“Appellee”) was indicted by the Cuyahoga County Grand Jury for the following offenses: Possession of drugs, R.C. 2925.11, with a one-year firearm specification; Drug trafficking, R.C. 2925.03, with a one-year firearm specification; Possessing criminal tools, R.C. 2923.24, Having a weapon while under disability, R.C. 2923.13, with a one-year firearm specification, and Carrying a concealed weapon, R.C. 2923.12. On June 6, 2007, Appellee executed a written jury trial waiver and a bench trial commenced on June 12, 2007. The trial court found Appellee guilty of all counts and specifications except for Possessing criminal tools.

On July 9, 2007, the trial court sentenced Appellee to four-year prison terms for Possession of drugs, Drug trafficking and Having a weapon while under disability, all of which included the mandatory one-year prison term for the firearm specifications. Appellee was sentenced to one year for Carrying a Concealed Weapon. All were ordered to run concurrent with each other.

Appellee appealed to the Eighth District Court of Appeals (hereinafter the “Eighth District.”). On June 26, 2008, the Eighth District found Possession of drugs and Drug trafficking to be allied offenses of similar import and concluded that Appellee could not be convicted of both offenses. The Eighth District held:

It is plain error to impose multiple sentences for allied offenses of similar import, even if the sentences are run concurrently. *State v. Sullivan*, Cuyahoga App. No. 82816, 2003-Ohio-5930. Therefore, the court should have merged the convictions for the two offenses rather than imposed concurrent sentences. *Id.*”

State v. Whitfield, Cuyahoga App. No. 90244, 2008-Ohio-3150, at ¶ 37.

The Eighth District reversed Appellee's conviction for Possession of drugs and remanded the case to the trial court with instructions to *vacate* that conviction and sentence. On July 16, 2008, the trial court entered an Order vacating Appellee's conviction for Possession of drugs and deleted its concurrent sentence.

On August 21, 2008, Plaintiff-Appellant State of Ohio (the "State") filed a Notice of Appeal and Memorandum in Support of Jurisdiction. The State sought this Honorable Court's jurisdiction in order to return to the Court's decision in *State v. Yarbrough* (2004), 104 Ohio St.3d 1, 2004-Ohio-6087, which requires *dismissal* of one of the offenses found to be allied under R.C. 2941.25(A), Ohio's multiple count statute. The State asserted that courts, when applying R.C. 2941.25, should leave the underlying convictions intact, and only merge the *sentences* of the allied offenses.

This Honorable Court accepted jurisdiction with respect to Appellant's sole proposition of law, that upon finding one or more counts to constitute two or more allied offenses of similar import, R.C. 2941.25(A) requires that the verdicts merge for the purposes of sentencing only, and the defendant be sentenced on only one of the allied offenses. See *State v. Whitfield*, 120 Ohio St.3d 1486, 2009-Ohio-278.

STATEMENT OF THE FACTS

The State adopts the statement of the facts as set forth by the Eighth District's opinion, as follows:

Defendant-appellant, Darnell Whitfield, appeals from a judgment of conviction which found him guilty of drug possession, drug trafficking, having a weapon while under disability, and carrying a concealed weapon. Appellant raises five assignments of error for review. For the reasons set forth below, we affirm in part, reverse in part and remand.

The record before us demonstrates that on April 10, 2006, appellant was driving a vehicle that was stopped by the Cleveland police for running a stop sign. Police discovered appellant's driver's license was suspended and arrested him for

driving under suspension. During an inventory of the car prior to towing, police looked in the glove compartment and found a loaded handgun and a bag containing 26.19 grams of crack cocaine. The drugs and gun were confiscated, along with more than \$6,000 cash found in appellant's pocket.

Whitfield, supra, 2008-Ohio-3150, at ¶1-2.

LAW AND ARGUMENT

PROPOSITION OF LAW I:

Upon Finding One Or More Counts To Constitute Two Or More Allied Offenses Of Similar Import, R.C. 2941.25(A) Requires That The Convictions Are Merged For The Purposes Of Sentencing And The Defendant Be Sentenced Only On One.

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.

R.C. 2941.25(A).

R.C. 2941.25(A) describes how the doctrine of merger of criminal offenses is to be applied. The statute permits an indictment to contain all criminal offenses returned by a grand jury, including those that may constitute allied offenses. The statute plainly prohibits a defendant from being “convicted” of all offenses that are allied.

In *State v. Yarbrough* (2004), 104 Ohio St.3d 1, 2004-Ohio-6087, this Court recognized that convictions for offenses it found to be allied required their merger and then *dismissed* one of those convictions:

***[C]onvicting and sentencing Yarbrough both for receiving the stolen Blazer and for theft of the Blazer violated R.C. 2941.25(A). ***Yarbrough's conviction for receiving stolen property (County 19) shall be merged into his conviction for grand theft (Count 20), *Count 19 is dismissed*, and the 18-month sentence Yarbrough received for Count 19 is vacated.

Id., 2004-Ohio-6087 at ¶102-103 [Emphasis added].

Because R.C. 2941.25(A) contains no language that requires the vacation or dismissal of an offense found to be allied to another, the State's proposition to this Court

is that all bench and jury verdicts, all guilty pleas and findings of a court upon which a conviction is based must remain intact after an allied offenses analysis, even if they are considered allied offenses of similar import. R.C. 2941.25(A) must be applied so that only the *sentences* for allied offenses are merged.

The State's proposition herein applies R.C. 2941.25(A) in a manner that appropriately gives effect to the plain language of the statute and the terms therein. R.C. 2941.25(A) is not ambiguous. As a result, the State's proposition also adheres to the tenets of statutory construction set forth in *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606 ("a court may not add words to an unambiguous statute, but must apply the statute as written."). *Id.*, 2007-Ohio-606 at ¶ 15, citing *Portage Cty. Bd. Of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954. The State's proposition to this Honorable Court preserves trial court and jury verdicts for offenses found to be allied and merges only the sentences for allied offenses. Interpretation and application of R.C. 2941.25 in this manner is consistent with the common law doctrine of merger, which is the basis for R.C. 2941.25(A). As the State demonstrates herein, the Fifth Amendment to the United States Constitution affords criminal defendants certain protections, however, dismissal of a verdict pursuant to R.C. 2941.25(A) is not one of them. The Ohio Legislature did not empower courts with the authority to vacate a criminal verdict by enacting R.C. 2941.25(A). The interpretation and application of the merger doctrine in R.C. 2941.25(A) in *State v. Whitfield* is incompatible with the statute's stated legislative intent.

As shown below, appellate courts in Ohio have applied R.C. 2941.25(A) in a number of different ways, producing inconsistent results with varying constitutional implications. Consistent with recent precedent from this Court and the State's

proposition herein, some courts have appropriately merged only sentences for allied offenses. Others, relying on *Yarbrough*, which was not overruled by this Court in subsequent cases, have dismissed, vacated and reversed jury and trial court verdicts after finding offenses to be allied. The State respectfully submits that vacation of a verdict is not contemplated by R.C. 2941.25(A) and usurps and denigrates the role of the trier of fact and the constitutional protections of a jury trial provided to both parties to a criminal suit.

Accordingly, the State seeks a modification of the procedure for applying R.C. 2941.25 that requires a reviewing court to recognize that all jury and trial court verdicts, findings of guilt and guilty pleas must be preserved even if offenses are found to be allied and only the sentences of allied offenses should merge. This posture is consistent with R.C. 2941.25(A) as well as the U.S. and Ohio Constitutions.

(A) A Literal and Plain Reading of R.C. 2941.25(A) Does Not Require Dismissal of a Verdict

As noted above, R.C. 2941.25(A) permits an indictment to include allied offenses of similar import, but prevents a “conviction” on all allied offenses. While the term “conviction” is used frequently through Ohio’s criminal statutes, it is not defined in the Revised Code. It is therefore necessary to look to how the term has been used to determine its meaning. In *State v. Lowry* (April 6, 1995), 4th App. No. 94CA2061, 1995 WL 232693, the Appellate Court noted that the word “conviction” has been used interchangeably in Ohio: first, as including both a finding of guilt and a sentence and second, as a legal determination separate and apart from a sentence. The *Lowry* Court found:

We begin by noting that normally the term “conviction” includes both the finding of guilt and the sentence. *State v. Henderson* (1979), 58 Ohio

St.2d 171. In *Henderson*, at paragraphs one and two of the syllabus, the court held that a defendant who has pled guilty but is awaiting sentencing for a theft offense has not been previously convicted of a "theft offense" within the meaning of R.C. 2913.02(B), and that in order to constitute a prior theft conviction, there must be a "judgment of conviction," as defined in Crim.R. 32(B), for the prior offense. Crim.R. 32(B) provides that a "judgment of conviction shall set forth the plea, the verdict or findings, and the sentence." See, also, *State v. Pointdexter* (1988), 36 Ohio St.3d 1 where conviction was defined to include the guilt determination and the sentence.

The Supreme Court has not woodenly applied such definition of conviction in every situation. In *State v. Cash* (1988), 40 Ohio St.3d 116 the court held that a prior plea of guilty, without sentence, on an unrelated charge is a conviction within the meaning of Evid.R. 609(A) and may be used for impeachment purposes. In *State ex rel. Watkins v. Fiorego* (1994), 71 Ohio St.3d 259, the respondent County Engineer of Trumbull County was found guilty after trial of the offense of theft in office. The court construed the terms in R.C. 2921.41(C)(1) of "convicted" to mean a determination of guilty as the same as a guilty plea and justified removal from office even though sentence had not been imposed.

In *Watkins, supra*, the court noted a similar conclusion by the Court of Appeals for Auglaize County in *In re Forfeiture of One 1986 Buick Somerset Auto.* (1993), 91 Ohio App.3d 558, 562-563. In that case the court, after noting the general rule that conviction includes a sentence, stated at p. 561:

"On the other hand, various provisions of the Criminal Rules and the Revised Code used the term 'conviction' in reference to the legal determination of guilty, as opposed to the complete final judgment including the sentence. Crim.R. 46(E) refers to 'a person who has been convicted and is * * * awaiting sentence.' R.C. 2929.02(B) provides that '[w]hoever is convicted of * * * murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.' In addition, R.C. 2929.11 (penalties for felony), 2929.21 (penalties for misdemeanor), 2929.71 (firearm offenses) and 2929.72 (additional incarceration for automatic firearm offenses) all make a similar distinction between conviction and sentencing. Also, R.C. 2949.08(A) provides that '[w]hen a person convicted of a misdemeanor is sentenced to imprisonment' and R.C. 2949.12 speaks of designating 'each section of the Revised Code that the felon violated and that resulted in his conviction and sentence' and of specifying 'the total number of days, if any, that the felon was confined, for any reason, prior to conviction and sentence.'"

Id., 1995 WL 232693 at *3.¹

As *Lowry* notes, this Court normally defines “conviction” to include both the finding of guilt and the sentence. *Id.*, citing *Henderson, supra*. Recently, in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, this Court confirmed that interpretation when it held that for the purposes of determining whether an order is final and appealable, a judgment of conviction includes, *inter alia*, both the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based and the sentence. *Id.* at syllabus. Defining a conviction to include both the finding of guilt and sentence, R.C. 2941.25(A) must therefore be read to allow the finding of guilt to stand for each and every offense, even those that are allied offenses, but to prevent a criminal defendant from being sentenced for all offenses found to be allied. Given the most-often used definition of conviction (and the stated legislative intent discussed below), the import of the statute is unambiguous: when offenses are found to be allied offenses of similar import, criminal defendants cannot be *sentenced* for each.

To permit any other interpretation that allows for a verdict to be vacated or dismissed usurps the right of the trier of fact to render a verdict and unnecessarily

¹ The *Lowry* Court considered when a conviction occurred for the purposes of assessing the timeliness of a forfeiture hearing under former R.C. 2933.43(C), which equated a conviction with a guilty plea or a finding of guilt, as separate from a sentence. “Finally, an analysis of the language of the forfeiture statute also supports the proposition that ‘conviction’ occurs at the time guilty (sic) is legally ascertained, and not at the point sentence is imposed. First of all, the statute provides that no forfeiture hearing may be held ‘unless the person pleads guilty to or is convicted of the commission of * * * the offense.’ R.C. 2933.43(C). Thus, the statutory language appears to equate a defendant’s pleading guilty with a defendant’s being convicted, with either serving as the triggering event for the forfeiture hearing time limit. *Id.* at *4. Chapter 2981. does not contain similar language. Ohio’s forfeiture statutes codified in Chapter 2933 have since been repealed and replaced with Chapter 2981. which does not contain the same language.

inserts words into R.C. 2941.25(A) that were not adopted by the Legislature or authorized pursuant to *Lowe, supra*.

(B) Dismissal of a Verdict is Contrary to United States Constitution, Amend. VI and O Constit. Sect. 5

Vacation of both the jury's verdict and the trial court's sentence for drug possession not only constitutes an unjust intrusion into Whitfield's right to a trial by jury, it usurps the jury's right and responsibility to weigh evidence and render a verdict in a criminal case. See United States Constitution, Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury***"); O Constit. Sect. 5 ("The right of a trial by jury shall be inviolate***"). So venerated are these constitutional rights and responsibilities that a jury's verdict is normally not overturned unless evidence is lacking or a manifest injustice has occurred and the verdict is against the manifest weight of the evidence, See, *State v. Jenks* (1991), 61 Ohio St.3d 259, syllabus at ¶2; *Rohde v. Farmer* (1970), 23 Ohio St. 2d 82, syllabus at ¶3.

The interpretation of R.C. 2941.25(A) as requiring vacation or dismissal of the jury's verdict with respect to an offense found to be allied to another represents a misapprehension of the merger doctrine codified therein. R.C. 2941.25(A) contains no language mandating the dismissal or vacation of a jury's verdict: it disallows convictions for offenses found to be allied, which means that it requires the merger of sentences for those offenses. By merging sentences only, *verdicts* of a trial court or jury are properly kept intact, resulting in a single conviction ("the defendant may be convicted of only one"). This interpretation upholds the inviolability of federal and state constitutional jury trial rights guaranteed under the federal and state constitutions.

(C) The Dismissal Of A Jury Verdict is Inconsistent with the Legislative Intent of R.C. 2941.25

The United States Supreme Court has determined that because the substantive power to prescribe crimes and determine punishments is vested with the legislature, whether or not punishments are multiple under the Double Jeopardy Clause is one of legislative intent. *United States v. Wiltberger* (1820), 18 U.S. 76, 103 S.Ct. 673, 5 Wheat 76; see also *Missouri v. Hunter* (1983), 459 U.S. 359, 366-368, 103 S.Ct. 673, 75 L.Ed.2d 535. In Ohio, by enacting R.C. 2941.25(A), the Legislature prohibited trial courts from imposing cumulative punishments for a single criminal act when those offenses are allied. The express provision is that the accused can be “convicted” of only one allied offense of similar import. *Id.*

The Legislature’s intent in enacting R.C. 2941.25(A) was to prevent what was coined “shot gun convictions” by creating a ceiling on the length of punishment if offenses are determined to be allied. Legislative Service Commission Summary of Am. Sub H.B. 511 (June 1973) at 69. To be clear, Ohio’s Legislature did not intend for those convicted of criminal offenses to be absolved of guilt. R.C. 2941.25(A) expressly reserves to the State the right to indict an accused for all allied offenses (“***the indictment or information may contain counts for all such offenses***”). The U.S. Supreme Court upheld the state’s right to prosecute a criminal defendant for multiple offenses in a single proceeding, noting that the prohibition against cumulative punishment is intended to prevent multiple sentences, not multiple verdicts. See *Ohio v. Johnson* (1984), 467 U.S. 493, 499-500, 104 S.Ct. 2536, 81 L.Ed.2d 425.

The expressed intent of criminal sentencing in R.C. 2929.11(A) – to punish criminal conduct and to protect the public from future criminal acts – also gives insight

into the Legislature's purpose for enacting R.C. 2941.25. What the Legislature deemed offensive by enacting R.C. 2941.25 is an additional sentence, not an additional verdict. When a verdict is dismissed or vacated, there is no longer a criminal act. Despite a jury's or trial court's verdict of guilt for that criminal offense, it simply no longer exists. The Legislature's stated intent in seeking punishment and protection for the public via sentencing statutes demonstrates that it was the intent to uphold all criminal verdicts and to prevent only multiple punishments for allied offenses.

(D) Dismissal of a Verdict Prevents the State from Enforcing Verdicts and Seeking Punishment for Criminal Offenses

“But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

Snyder v. Com. of Mass. (1934), 291 U.S. 97, 123, 54 S.Ct. 330, 78 L.Ed. 674.

While the dismissal of a count instead of merger may at first appear to be a distinction without a difference, the consequences are significant for the State. By requiring dismissal of one of the allied offenses, a criminal defendant can never be sentenced on the dismissed count of which he/she was properly found guilty should the remaining allied offense be overturned on appeal. To prevent such an injustice to the State under these circumstances, this Court must conclude that after offenses are found to be allied, R.C. 2941.25(A) is properly applied by leaving the allied verdicts unaffected and merging only the sentences for the allied offenses. This application maintains the integrity of the jury's finding of guilt and protects the State's right to resolve all criminal charges in one proceeding. *Id.*

(E) Dismissal of a Verdict Violates Constitutional Guarantees of Fairness

The State's proposition not only follows the plain language of R.C. 2941.25, including the usual definition of what constitutes a "conviction", but also brings the application of R.C. 2941.25 in line with the Double Jeopardy protections afforded by the Fifth Amendment to the U.S. Constitution. To protect the accused's liberty, the U.S. and the Ohio Constitutions prohibit an accused from twice being placed in jeopardy. U.S. Constit., Amend. V; O Constit. Article I, Sect. 10. Once the accused is placed in jeopardy the State has but a single opportunity to convict. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The protection against being held twice in jeopardy acts as a shield that prevents oppressive government actions and abuse of the judicial process. *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824 (1978); *Ohio v. Johnson*, *supra*. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." *Arizona v. Washington*, 434 U.S. at 503.

Although the Fifth Amendment appears to be a total bar against future prosecution, application of Fifth Amendment protections requires a balancing of interests that is guided by a constitutional guarantee of fairness.² *Wade v. Hunter*, 336

² The fairness of the Fifth Amendment prevents the prosecution from testing a weak case before the jury and then abandoning it when that case's weaknesses are exposed. *Green v. U.S.* (1957), 355 U.S. 184, 78 S.Ct. 221. Jeopardy bars a second trial on a greater offense when defendant was found guilty of lesser offense. *Id.* It is also unfair to allow a second prosecution after acquittal on the first. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (*overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865).

Conversely, fairness also prevents the use of the Fifth Amendment to frustrate an otherwise valid prosecution. Jeopardy does not bar a second trial when the jury in the first cannot agree on a verdict. *Wade v. Hunter*, 336 U.S. 684. The accused cannot plead to a lesser offense to prevent prosecution of the greater. *Ohio v. Johnson*, *supra*.

U.S. 684, 689-690, 69 S.Ct. 834, 93 L.Ed. 974. The balance between prevention of government oppression, justice, and providing a fair proceeding is relevant herein because terminating a prosecution prior to a finding of guilt denies the State its right to one full and fair opportunity to convict those who have violated its laws. *Ohio v. Johnson*, 467 U.S. at 502, quoting *Arizona v. Washington*, 434 U.S. at 509. By removing the force of law from a verdict, this procedure denies the State its fundamental right to a verdict and to adjudicate all criminal penalties in a single proceeding.

Such an application of R.C. 2941.25 does not prevent government oppression or serve justice, but does create an unfair proceeding. If a valid verdict is dismissed, vacated, or reversed because the court deems the offenses allied, then the court is utilizing the Fifth Amendment shield where its protection was never intended.

(F) Vacating a Verdict because Offenses are Allied Offenses of Similar Import violates the United States and Ohio Constitutions

The State's proposition comports with general Fifth Amendment requirements of fairness and is consistent with its specific prohibition against cumulative punishments. Both the U.S. Supreme Court and this Honorable Court have held that R.C. 2941.25 is a codification of the Fifth Amendment's prohibition against cumulative punishments. *Ohio v. Johnson, supra; State v. Roberts* (1980), 62 Ohio St.2d 170, 173-174. A single criminal act can give rise to distinct offenses codified within separate statutes. *Albernaz v. U.S.* (1981), 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275. Generally, the State is permitted to bring charges for any violation of the laws of its jurisdiction without violating the Double Jeopardy Clause. *Id.* See also O. Constit. Article I, Sec. 10.

The court cannot accept a plea to an allied offense and prohibit the prosecution of the other allied offenses. *Id.*, 467 U.S. at 502.

However, the U.S. Supreme Court has interpreted the Fifth Amendment's prohibition against multiple punishments for the same offense as a shield wielded by the legislature. *Albernaz v. U.S.*, *supra*. Unlike other double jeopardy protections, the double jeopardy protection against cumulative punishments is designed to ensure that the *sentencing* discretion of the sentencing court is confined to the limits established by the legislature. *Ohio v. Johnson*, 467 U.S. at 499 (*emphasis added*). In *Ohio v. Johnson*, the U.S. Supreme Court held that Double Jeopardy prohibition against cumulative punishments does not prohibit the State from prosecuting a defendant for cumulative offenses in a single prosecution. *Id.*, 467 U.S. at 500. The goal of the Fifth Amendment's prohibition against cumulative punishments is not to frustrate the prosecution of crime, but to limit the length of a sentence after a determination that the accused is guilty. *Id.*, 467 U.S. at 502.

As the embodiment of the Fifth Amendment's prohibition against cumulative punishment, R.C. 2941.25 merely restrains sentencing. By restraining the prohibition against cumulative punishments to sentencing the U.S. Supreme Court has limited the scope of R.C. 2941.25. *Id.*, 467 U.S. at 502. As a limitation on sentencing, R.C. 2941.25 should not be interpreted to constrain the State's ability to prosecute crimes. *See Id.*, *supra*. As the U.S. Supreme Court in *Ohio v. Johnson* made clear, the prohibition against cumulative punishments is not a restriction on the right of the State to secure a finding of guilt, but is a restriction on the court's ability to sentence the accused. *Id.* Any application of R.C. 2941.25 that affects a verdict overreaches and constrains more conduct than that which the U.S. Constitution permits. Application of the State's proposed procedure prevents the imposition of cumulative punishments and avoids an unconstitutional application of R.C. 2941.25.

(F) Ohio Courts have interpreted and applied R.C. 2941.25(A) disparately

Concluding that convictions for both offenses violated R.C. 2941.25(A), this Court ordered Yarbrough's conviction for receiving stolen property be merged into his conviction for grand theft. *Yarbrough*, 2004-Ohio-6087 at ¶103. This Court then dismissed the count of receiving stolen property and vacated the sentence for that offense. *Id.*

After *Yarbrough*, this Court decided two cases involving allied offenses of similar import. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the Court affirmed the holding of the First Appellate District, which vacated separate sentences for the allied offenses and remanded the case to the trial court to merge the sentences. *Id.*, 2008-Ohio-1625 at ¶34. Recently, in *State v. Winn*, 2009-Ohio-1059, 2009 WL 723268, this Court wrote: "[t]he appellate court properly merged Winn's kidnapping conviction into his aggravated robbery conviction and vacated the separate sentence imposed on the kidnapping charge." *Id.*, 2009-Ohio-1059 at ¶ 25. In *Cabrales*, this Court upheld the lower court's remand to the trial court for the purposes of merging the sentences for the allied offenses. In *Winn*, the Court held that the appellate court properly vacated the sentence of one allied offense.

Since neither *Cabrales* nor *Winn* overruled *Yarbrough's* mandate that one of the allied offenses' verdicts be vacated, there must be clear precedent to instruct Ohio litigants and courts. Whether the case is remanded for the trial court to merge sentences or the appellate court vacates one sentence, the procedure for dealing with sentences for allied offenses should be consistent.

In addition to the Eighth District Court of Appeals, other Ohio appellate jurisdictions that continue to follow Yarbrough's mandate of vacating a verdict after offenses are found to be allied include the Second, Fourth, Sixth, and Seventh Districts. In *State v. Taylor* Washington App. No. No. 07CA29, 2008-Ohio-484, the Fourth Appellate District found error in Taylor's conviction and sentence for both kidnapping and gross sexual imposition. *Taylor*, 2008-Ohio-484 at ¶ 29, citing *Yarbrough*, 2004-Ohio-6087 at ¶ 102. The Appeals Court vacated the conviction and sentence for gross sexual imposition and remanded the case. *Id.* at ¶ 32. In *State v. Coffey*, Miami App. No. 2006, 2007-Ohio-21, the Sixth District Court of Appeals held that convictions for kidnapping and aggravated robbery should merge under R.C. 2941.25(A). *Id.*, 2007-Ohio-21 at ¶ 31. The Court vacated the sentence imposed, found the conviction on the kidnapping offense merges under R.C. § 2941.25 into the conviction for aggravated robbery, and remand the cause for re-sentencing. *Id.* at ¶37. On remand the trial court vacated the kidnapping verdict and imposed the following sentence: nine years for Aggravated Robbery, nine years for Aggravated Burglary, and twelve months for Theft of a Motor Vehicle, all sentences to be served concurrently. *Id.* at ¶ 5. The outcome is that the guilty verdict for the kidnapping charge no longer has any legal effect even though the defendant's conduct would support a verdict. See also *State v. Manns*, Clark App No. 2000CA58, 2001-Ohio-1922; *State v. Bunch*, Mahoning App. No. 02CA196, 2005-Ohio-3309 (overruled in part by *In re Ohio Criminal Sentencing Statutes*, 109 Ohio St.3d 313, 2006-Ohio-2109).

Appellate Districts that have left verdicts intact after concluding offenses to be allied include the First, Eighth and Tenth District Courts of Appeals. See *State v. Smith*, Hamilton App. No. C-070216, 2008-Ohio-2469; *State v. McIntosh* (2001), 145

Ohio App. 3d 567; *State v. Bybee* (1999), 134 Ohio App.3d 395; and *State v. Tillman* (Mar. 16, 1989), Franklin App. No. 88AP-683, 1989 WL 23692. In *State v. McSwain*, Cuy.App. No. 83394, 2004-Ohio-3292, the Eighth Appellate District held the trial court should have merged two counts of kidnapping and two counts of felonious assault. In effectuating the merger, the Court vacated all four convictions and sentences and remand for the limited purpose of merging the convictions re-sentencing. *Id.*, 2004-Ohio-3292 at ¶ 51. The Appellate Court specifically stated:

“On remand, the common pleas court will first merge the convictions for the allied offenses under counts two and three (kidnapping) and under counts ten and eleven (felonious assault), and will sentence appellant on the two charges which survive the merger. The court will also sentence appellant on the charge of robbery. The court will also advise appellant of the potential consequences of violating post-release control, the term of which has not been affected by this appeal.”

Id. at ¶56.

CONCLUSION

After a court determines that offenses are allied, it is manifestly unjust and patently unfair to allow a court to frustrate the State’s ability to maintain a verdict. Allowing a court to dismiss or vacate a verdict is tantamount to an acquittal on the dismissed, vacated, or reversed charge. Once the criminal proceedings are completed, the State can no longer seek prosecution for any offenses based on the already tried criminal conduct. Therefore, the State asks this Court to reverse the Eighth District Court of Appeal’s decision in *State v. Whitfield*, and hold the correct application of R.C. 2941.25 is to leave the allied verdicts unmolested and in force, allow the prosecution to elect the allied offense upon which sentencing should proceed or choose the higher level

felony offense for sentencing purposes, and merge the distinct sentences for each allied offense into a single sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant State of Ohio has been sent by regular U.S. Mail this 10th day of April, 2009, to Joseph V. Pagano, attorney for defendant-appellee, 1240 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113 and to Spencer Cahoon, Assistant State Public Defender, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215



Assistant Prosecuting Attorney

CASE NO. **08-1669**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CA 90244

STATE OF OHIO
Plaintiff/Appellant

vs.

DARNELL WHITFIELD
Defendant/Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

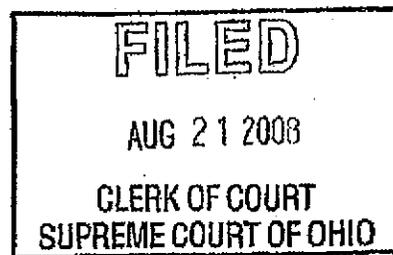
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CASE NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CA 90244

STATE OF OHIO
Plaintiff/Appellant

vs.

DARNELL WHITFIELD
Defendant/Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Now comes the State of Ohio and hereby give Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized July 7, 2008, which affirmed in part and reversed in part the Trial Court's Decision.

Said cause did not originate in the Court of Appeals, is a felony, involves a substantial constitutional question, and is of great general and public interest.

Respectfully submitted,

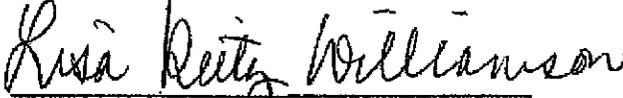
WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:

Lisa Reitz Williamson
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SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 20th day of August, 2008 to Joseph Vincent Pagano, 1370 Ontario Street, Suite 1240, Cleveland, Ohio 44113; and the Ohio Public Defender's Office, 8 East Long Street, 11 Floor, Columbus, OH 43215.


Lisa Reitz Williamson
Assistant Prosecuting Attorney

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90244

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARNELL WHITFIELD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART AND
REVERSED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-482118

BEFORE: Stewart, J., Gallagher, P.J., and Celebrezze, J.

RELEASED: June 26, 2008

JOURNALIZED: JUL 7 - 2008

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FILED AND JOURNALIZED
PER APP. R. 22(E)

JUL - 7 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: *[Signature]* DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JUN 26 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: *[Signature]* DEP.

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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).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

VOL 661 P. 0318

MELODY J. STEWART, J.:

Defendant-appellant, Darnell Whitfield, appeals from a judgment of conviction which found him guilty of drug possession, drug trafficking, having a weapon while under disability, and carrying a concealed weapon. Appellant raises five assignments of error for review. For the reasons set forth below, we affirm in part, reverse in part and remand.

The record before us demonstrates that on April 10, 2006, appellant was driving a vehicle that was stopped by the Cleveland police for running a stop sign. Police discovered appellant's driver's license was suspended and arrested him for driving under suspension. During an inventory of the car prior to towing, police looked in the glove compartment and found a loaded handgun and a bag containing 26.19 grams of crack cocaine. The drugs and gun were confiscated, along with more than \$6,000 cash found in appellant's pocket.

Appellant was indicted on one count each of possession of drugs, drug trafficking, possessing criminal tools, having weapons while under disability, and carrying a concealed weapon. Counts 1, 2, and 4 also included one-year firearm specifications. Appellant entered pleas of not guilty to all counts.

On June 12, 2007, appellant's case was tried to the bench. Upon completion of the state's case, the trial court denied appellant's motion to

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suppress. The court also denied his Crim.R. 29 motion for acquittal. At the close of appellant's case, the trial court found appellant guilty on four of the five counts. The court found no evidence that the money confiscated was intended to be used in the commission of a drug offense and found appellant not guilty of possessing criminal tools. The trial court imposed a sentence of three-years imprisonment on counts 1, 2, and 4, and one-year on count 5, all to be served concurrently. Additionally, the court merged the firearm specifications and imposed a one-year term to be served prior to the other sentences; resulting in a four-year prison term. Appellant appealed raising the following five errors.

"I. The trial court erred in denying appellant's motion to suppress."

In support of this assignment, appellant claims the officers searched the car prior to arresting him and, therefore, the search of the vehicle was not incident to a lawful arrest. Additionally, appellant claims that the traffic stop was an unlawful pretext to search the vehicle. He argues that any evidence discovered as a result of this stop must be suppressed. We disagree.

"A motion to suppress evidence seeks to challenge the arrest, search or seizure as somehow being in violation of the Fourth Amendment of the United States Constitution. The principal remedy for such a violation is the exclusion of evidence from the criminal trial of the individual whose rights have been

violated. See Katz, Ohio Arrest, Search and Seizure (2001) 31, Section 2.1. Exclusion is mandatory under *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, when such evidence is obtained as a result of an illegal arrest, search or seizure." *State v. Williams*, Cuyahoga App. No. 81364, 2003-Ohio-2647, at ¶7.

Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357. An appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543. Accepting these facts as true, the appellate court must then independently determine whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

At the suppression hearing, the two arresting officers related the events leading up to the traffic stop and to appellant's subsequent arrest. The officers testified that they observed appellant run a stop sign. They followed the vehicle and ran the license plates through the police data base. The computer showed that the vehicle was registered to appellant, and that his driver's license was

suspended. At that time, they activated the lights and sirens and tried to pull appellant over.

The officers testified that appellant slowed down but did not pull over in response to their lights and siren. He continued to drive at a slow speed for a few blocks, before pulling into and then out of the Karamu House parking lot. Officers observed appellant reaching over to the passenger's side while driving slowly. Finally, after they used the loudspeaker and twice ordered him to stop, appellant pulled over and stopped the car on East 89th Street. The officers testified that as appellant stepped out of the car, he was patted down and placed under arrest. He was handcuffed and placed in the back of the zone car. They then ordered a tow truck and took an inventory of the car's content prior to it being towed. The drugs and gun were found during the inventory search.

Appellant argues that the stop was invalid. He challenges the testimony of the two officers and points to inconsistencies in their testimony as to how the situation actually transpired. However, as previously stated, the trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses. The trial court considered the inconsistencies in the officers' testimony and found them to be minor. The court found that appellant ran the stop sign and was driving with a suspended license. We accept the factual

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findings of the trial court. We must now determine whether these facts satisfy the legal standard.

Appellant argues the stop was merely a pretext to search his car for contraband. The Ohio Supreme Court has recognized that "where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question." *City of Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 1996-Ohio-431. See, also, *Whren v. United States* (1996), 517 U.S. 806, 135 L.Ed.2d 89, 116 S.Ct. 1769 (reaching the same holding). Accordingly, regardless of the officers' motivation, based on the trial court's finding that appellant ran the stop sign, the initial stop was lawful.

It is undisputed that appellant was driving under a suspended license. Therefore, the arrest was valid and the police were warranted in towing appellant's car. This court has previously held that it is reasonable to do an inventory search before surrendering a car to a towing company in order to insure the proper accounting of the contents of the car. *State v. Bridges*, Cuyahoga App. No. 80171, 2002-Ohio-3771; *State v. Cook* (2001), 143 Ohio App.3d 386. "In order for an inventory search to be constitutionally valid, it

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must be 'reasonable;' that is, it must be conducted in good faith, not as a pretext for an investigative search, and in accordance with standard police procedures or established routine." *State v. Odavar*, Cuyahoga App. No. 89029, 2007-Ohio-5535, citing *State v. Hathman*, 65 Ohio St.3d 403, 1992-Ohio-63, paragraph one of the syllabus. The arresting officers testified that they followed the Cleveland police department's policy for inventorying vehicles prior to being towed. A copy of that written policy was admitted into evidence.

Therefore, the record reflects that the traffic stop, arrest, and subsequent search of the vehicle were constitutionally valid. The trial court did not err in denying appellant's motion to suppress. The first assignment of error is overruled.

"II. The trial court erred when it denied appellant's motion for acquittal under Crim.R. 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions."

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant

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inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court will not overturn a conviction for insufficiency of the evidence unless it finds that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4.

The weight to be given the evidence introduced at trial and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, syllabus. Further, it is not the function of an appellate court to substitute its judgment for that of the factfinder. *Jenks*, supra, at 279.

Appellant was convicted of drug possession, drug trafficking, having a weapon under disability, and carrying a concealed weapon. Appellant claims that there was no evidence that he possessed the drugs or the gun found in the car. He further argues that there is no evidence that he knew or had reasonable cause to believe that the drugs were intended for sale or resale to another person. We disagree.

R.C. 2925.11(A), provides that, "no person shall knowingly obtain, possess, or use a controlled substance."

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R.C. 2925.03 (A)(2) provides that no person shall knowingly "prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

A person acts knowingly, regardless of his or her purpose, when that person is aware that his or her conduct will probably cause a certain result or will probably be of a certain nature. R.C. 2901.22(B). It is necessary to look at all the attendant facts and circumstances in order to determine if a defendant knowingly possessed a controlled substance. *State v. Teamer* (1998), 82 Ohio St.3d 490, 492.

Possession "means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). Interpreting the meaning of the term "possession," Ohio courts have held possession may be actual or constructive. See *State v. Wolery* (1976), 46 Ohio St.2d 316, 329; *State v. Hankerson* (1982), 70 Ohio St.2d 87, 90-1; *State v. Boyd* (1989), 63 Ohio App.3d 790. To establish constructive possession, the state must prove the defendant was able to exercise dominion or control over

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the object, even though that object may not be within his immediate physical possession. *Boyd*, supra, at 796. Further, it must also be shown that the person was "conscious of the presence of the object." *Hankerson*, supra, at 91.

The evidence shows that the car was registered to appellant, and that he was the sole occupant of the car at the time the police stopped him for the traffic violation. The officers testified that appellant did not immediately stop when the lights and siren were activated, but continued at a slow speed for a number of blocks during which time he was observed reaching over into the passenger side of the car. The gun and drugs were found in the glove compartment on the passenger side of the car. We find appellant, as owner and operator of the vehicle, had the ability to exercise dominion or control over the drugs found in his car's glove compartment. Additionally, appellant's actions in failing to stop when signaled by police and in reaching over into the passenger's side of the car, support an inference that appellant had knowledge of the illegal drugs and gun in the glove compartment and, therefore, knowingly possessed them.

Based upon the amount of drugs seized and the testimony of the vice detective, we also find there was sufficient evidence to support the finding that appellant was transporting the drugs for sale or resale.

In addition to the testimony of the arresting police officers, the state presented the following evidence: a laboratory report showing that the gun seized was loaded and operable; a laboratory report showing that the contents of the bag found in the glove compartment was 26.19 grams of cocaine; a copy of the citation issued to appellant for the traffic violations; a certified copy of the journal entry showing appellant's prior felony burglary conviction; and a copy of the city of Cleveland's written policy regarding the towing of vehicles.

Viewing this evidence in a light most favorable to the prosecution, and considering all the attendant facts and circumstances, we find that a rational trier of fact could have found the essential elements of all of the crimes charged proven beyond a reasonable doubt, therefore, we find there was sufficient evidence to support appellant's convictions. Appellant's second assignment is overruled.

"III. The trial court committed plain error by convicting and sentencing appellant to both drug possession and drug trafficking which are allied offenses of similar import."

In addition to the conviction for carrying a concealed weapon and having a weapon while under a disability, the trial court convicted appellant of possession of drugs in violation of R.C. 2925.11 (A), and trafficking in drugs in

violation of R.C. 2925.03(A)(2), each with a one-year firearm specification. In sentencing, the trial court merged the firearm specifications but imposed separate, concurrent sentences on the drug possession and drug trafficking offenses. Appellant argues that pursuant to R.C. 2941.25(A), the two drug offenses are allied offenses of similar import and therefore the trial court erred in convicting him on both offenses.

R.C. 2945.25 states:

“(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

“(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 requires a two-step analysis. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶14, citing *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, syllabus; *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117; *State v.*

Mughni (1987), 33 Ohio St.3d 65, 67; *State v. Talley* (1985), 18 Ohio St.3d 152, 153; *State v. Logan* (1979), 60 Ohio St.2d 126, 128. "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." *Cabrales* at ¶14, quoting *State v. Blankenship*, 38 Ohio St.3d 116, 117.

In the instant case, the first step is determined by the holding in *Cabrales* which states:

"Trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second." *Id.* at paragraph two of the syllabus.

In the second step, we look to appellant's conduct to determine whether he committed the two offenses separately, or with a separate animus. The state's evidence demonstrated that the offenses were committed at the same time and that appellant possessed the cocaine with the single intent to sell it to street-level suppliers. Under these facts, pursuant to R.C. 2941.25, appellant cannot be convicted of both drug possession and drug trafficking.

Allied offenses of similar import do not merge until sentencing, since a conviction consists of the verdict and sentence. *State v. McGuire* (1997), 80 Ohio St.3d390, 399, 1997-Ohio-335. It is plain error to impose multiple sentences for allied offenses of similar import, even if the sentences are run concurrently. *State v. Sullivan*, Cuyahoga App. No. 82816, 2003-Ohio-5930. Therefore, the court should have merged the convictions for the two offenses rather than imposed concurrent sentences. *Id.*

We therefore sustain appellant's third assignment of error, reverse the conviction for drug possession and remand the case to the trial court to vacate the drug possession conviction. See R.C. 2953.08(G)(2); *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087.

“TV. Appellant’s convictions are against the manifest weight of the evidence.”

When reviewing a claim that a verdict is against the manifest weight of the evidence, we weigh all the reasonable inferences, consider the credibility of witnesses and, in considering conflicts in the evidence, determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. In doing so, we remain mindful that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. This gives the trier of fact the authority to “believe or disbelieve any witness or accept part of what a witness says and reject the rest.” *State v. Antill* (1964), 176 Ohio St. 61, 67.

Appellant argues that the quality of the evidence was poor and unreliable and that the trial court lost its way in convicting him. He asserts again that inconsistencies in the officers’ testimony renders the evidence unreliable. We disagree.

The trial court heard the two arresting officers testify to the events leading up to appellant’s arrest on April 10, 2007. The court heard the

inconsistencies in their testimony and found them to be minor. The court also heard appellant testify to a completely different set of events leading up to his arrest and his claim that the police officers were not telling the truth.

It was within the trial court's province to weigh the evidence and the credibility of the witnesses. After reviewing the testimony and all the evidence before the court, we cannot say that the trial court clearly lost its way in resolving the conflicts in the evidence. Appellant's fourth assignment is overruled.

"V. The trial court erred by not ordering the return of the proceeds taken from appellant."

Appellant argues that the trial court failed to order the state to return the money confiscated from him during his arrest. This argument is belied by the record. The court's journal entry of June 19, 2007 states: "\$6,124.00 FOUND ON DEFENDANT AT TIME OF ARREST IS ORDERED RETURNED TO DEFENDANT, FOUND NOT TO BE A CRIMINAL TOOL AS CHARGED."

Additionally, in light of the trial court's findings that, "[t]here's no evidence at all that the money was the fruit of drug transactions," and that there was "evidence submitted by defendant that it was money he had taken from the bank," we find no merit to the state's assertion that the court needs to

hold a forfeiture hearing regarding the money. We note that the state has not filed a cross-appeal on this or any other issue, and has asked us to affirm the trial court's judgment. Therefore, we overrule appellant's fifth and final assignment of error.

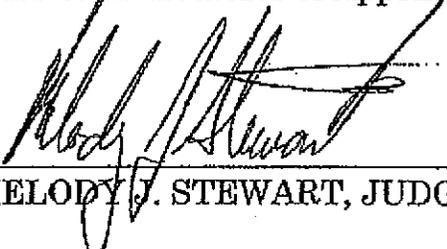
Accordingly, the judgment of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court with instructions to vacate the conviction and sentence for drug possession only.

It is ordered that appellant and appellee share 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 affirmed in part, 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.



MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

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R.C. § 2913.02

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

- (1) Without the consent of the owner or person authorized to give consent;
- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception;
- (4) By threat;
- (5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five

thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall ~~serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.~~

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised

Code, provided that the suspension shall be for at least six months.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to section 2929.18 or 2929.28 of the Revised Code. Restitution may include, but is not limited to, the cost of repairing or replacing the stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of section 2913.72 of the Revised Code.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

R.C. § 2941.25

(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)

UNCODIFIED LAW

2005 S 20, § 3, eff. 7-13-05, reads:

The General Assembly hereby declares that it intends by the amendments made by Sections 1 and 2 of this act to prospectively overrule the decision of the Ohio Supreme Court in State v. Yarbrough (2004), 104 Ohio St. 3d 1.

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 2941.25 repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 13437-24.

Pre-1953 H 1 Amendments: 113 v 168, Ch 16, § 24

LEGISLATIVE SERVICE COMMISSION

1973:

This section provides that when an accused's conduct can be construed to amount to two or more offenses of similar import, he may be charged with all such offenses but may be convicted of only one. If his conduct constitutes two or more dissimilar offenses, or two or more offenses of the same or similar kind but committed at different times or with a separate "ill will" as to each, then he may be charged with and convicted of all such offenses.

The basic thrust of the section is to prevent "shotgun" convictions. For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue.

On the other hand, a thief who commits theft on three separate occasions or steals different property from three separate victims in the space, say, of 5 minutes, can be charged with and convicted of all three thefts. In the first instance the same offense is committed three different times, and in the second instance the same offense is committed against three different victims, i.e. with a different animus as to each offense. Similarly, an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of aggravated robbery and of two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.

R.C. § 2923.12

(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

- (1) A deadly weapon other than a handgun;
- (2) A handgun other than a dangerous ordnance;
- (3) A dangerous ordnance.

(B) No person who has been issued a license or temporary emergency license to carry a concealed handgun under section ~~2923.125~~ or ~~2923.1213~~ of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code shall do any of the following:

- (1) If the person is stopped for a law enforcement purpose and is carrying a concealed handgun, fail to promptly inform any law enforcement officer who approaches the person after the person has been stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then is carrying a concealed handgun;
- (2) If the person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun, knowingly fail to keep the person's hands in plain sight at any time after any law enforcement officer begins approaching the person while stopped and before the law enforcement officer leaves, unless the failure is pursuant to and in accordance with directions given by a law enforcement officer;
- (3) If the person is stopped for a law enforcement purpose, if the person is carrying a concealed handgun, and if the person is approached by any law enforcement officer while stopped, knowingly remove or attempt to remove the loaded handgun from the holster, pocket, or other place in which the person is carrying it, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers at any time after the law enforcement officer begins approaching and before the law enforcement officer leaves, unless the person removes, attempts to remove, grasps, holds, or has contact with the loaded handgun pursuant to and in accordance with directions given by the law enforcement officer;
- (4) If the person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun, knowingly disregard or fail to comply with any lawful order of any law enforcement officer given while the person is stopped, including, but not limited to, a specific order to the person to keep the person's hands in plain sight.

(C)(1) This section does not apply to any of the following:

(a) An officer, agent, or employee of this or any other state or the United States, or to a law enforcement officer, who is authorized to carry concealed weapons or dangerous ordnance or is authorized to carry handguns and is acting within the scope of the officer's, agent's, or employee's duties;

(b) Any person who is employed in this state, who is authorized to carry concealed weapons or dangerous ordnance or is authorized to carry handguns, and who is subject to and in compliance with the requirements of section 109.801 of the Revised Code, unless the appointing authority of the person has expressly specified that the exemption provided in division (C)(1)(b) of this section does not apply to the person;

(c) A person's transportation or storage of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in a motor vehicle for any lawful purpose if the firearm is not on the actor's person;

(d) A person's storage or possession of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in the actor's own home for any lawful purpose.

(2) Division (A)(2) of this section does not apply to any person who, at the time of the alleged carrying or possession of a handgun, is carrying a valid license or temporary emergency license to carry a concealed handgun issued to the person under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, unless the person knowingly is in a place described in division (B) of section 2923.126 of the Revised Code.

(D) It is an affirmative defense to a charge under division (A)(1) of this section of carrying or having control of a weapon other than a handgun and other than a dangerous ordnance that the actor was not otherwise prohibited by law from having the weapon and that any of the following applies:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of a character or was necessarily carried on in a manner or at a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor, a member of the actor's family, or the actor's home, such as would justify a prudent person in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in the actor's own home.

(E) No person who is charged with a violation of this section shall be required to obtain a license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code as a condition for the dismissal of the charge.

(F)(1) Whoever violates this section is guilty of carrying concealed weapons. Except as otherwise provided in this division or division (F)(2) of this section, carrying concealed weapons in violation of division (A) of this section is a misdemeanor of the first degree. Except as otherwise provided in this division or division (F)(2) of this section, if the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, carrying concealed weapons in violation of division (A) of this section is a felony of the fourth degree. Except as otherwise provided in division (F)(2) of this section, if the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons in violation of division (A) of this section is a felony of the third degree.

(2) If a person being arrested for a violation of division (A)(2) of this section promptly produces a valid license or temporary emergency license to carry a concealed handgun issued under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, and if at the time of the violation the person was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code, the officer shall not arrest the person for a violation of that division. If the person is not able to promptly produce any of those types of license and if the person is not in a place described in that section, the officer may arrest the person for a violation of that division, and the offender shall be punished as follows:

(a) The offender shall be guilty of a minor misdemeanor if both of the following apply:

(i) Within ten days after the arrest, the offender presents a license or temporary emergency license to carry a concealed handgun issued under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, which license was valid at the time of the arrest to the law enforcement agency that employs the arresting officer.

(ii) At the time of the arrest, the offender was not knowingly in a place described

in division (B) of section 2923.126 of the Revised Code.

(b) The offender shall be guilty of a misdemeanor and shall be fined five hundred dollars if all of the following apply:

(i) The offender previously had been issued a license to carry a concealed handgun under section 2923.125 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code and that was similar in nature to a license issued under section 2923.125 of the Revised Code, and that license expired within the two years immediately preceding the arrest.

(ii) Within forty-five days after the arrest, the offender presents any type of license identified in division (F)(2)(a)(i) of this section to the law enforcement agency that employed the arresting officer, and the offender waives in writing the offender's right to a speedy trial on the charge of the violation that is provided in section 2945.71 of the Revised Code.

(iii) At the time of the commission of the offense, the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code.

(c) If neither division (F)(2)(a) nor (b) of this section applies, the offender shall be punished under division (F)(1) of this section.

(3) Except as otherwise provided in this division, carrying concealed weapons in violation of division (B)(1) of this section is a misdemeanor of the first degree, and, in addition to any other penalty or sanction imposed for a violation of division (B)(1) of this section, the offender's license or temporary emergency license to carry a concealed handgun shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code. If, at the time of the stop of the offender for a law enforcement purpose that was the basis of the violation, any law enforcement officer involved with the stop had actual knowledge that the offender has been issued a license or temporary emergency license to carry a concealed handgun, carrying concealed weapons in violation of division (B)(1) of this section is a minor misdemeanor, and the offender's license or temporary emergency license to carry a concealed handgun shall not be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.

(4) Carrying concealed weapons in violation of division (B)(2) or (4) of this section is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(2) or (4) of this section, a felony of the fifth degree. In addition to any other penalty or sanction imposed for a misdemeanor violation of division (B)(2) or (4) of this section, the offender's license or temporary emergency license to carry a concealed handgun shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.

(5) Carrying concealed weapons in violation of division (B)(3) of this section is a felony of the fifth degree.

(G) If a law enforcement officer stops a person to question the person regarding a possible violation of this section, for a traffic stop, or for any other law enforcement purpose, if the person surrenders a firearm to the officer, either voluntarily or pursuant to a request or demand of the officer, and if the officer does not charge the person with a violation of this section or arrest the person for any offense, the person is not otherwise prohibited by law from possessing the firearm, and the firearm is not contraband, the officer shall return the firearm to the person at the termination of the stop. If a court orders a law enforcement officer to return a firearm to a person pursuant to the requirement set forth in this division, division (B) of section 2923.163 of the Revised Code applies.

R.C. § 2923.24

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

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

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

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

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

(C) Whoever violates this section is guilty of possessing criminal tools. Except as otherwise provided in this division, possessing criminal tools is a misdemeanor of the first degree. If the circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony, possessing criminal tools is a felony of the fifth degree.

R.C. § 2925.11

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory

prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds one hundred grams but

is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is

a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L. S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L. S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses

but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1)(a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code in accordance with and subject to the requirements of division (F) of section 2925.03 of the Revised Code. The agency that receives the fine shall use the fine as specified in division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge of a fourth degree felony violation under this section that the

controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use.

Notwithstanding any contrary provision of this section, if, in accordance with section 2901.05 of the Revised Code, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of section 2925.03 of the Revised Code applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

R.C. § 2929.02

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) (1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D)(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's

license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

R.C. § 2929.11

Overriding purposes of felony sentencing

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

R.C. § 2929.21

Sentencing considerations for misdemeanor or municipal ordinance violation similar to misdemeanor or minor misdemeanor

(A) A court that sentences an offender for a misdemeanor or minor misdemeanor violation of any provision of the Revised Code, or of any municipal ordinance that is substantially similar to a misdemeanor or minor misdemeanor violation of a provision of the Revised Code, shall be guided by the overriding purposes of misdemeanor sentencing. The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public.

(B) A sentence imposed for a misdemeanor or minor misdemeanor violation of a Revised Code provision or for a violation of a municipal ordinance that is subject to division (A) of this section shall be reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a misdemeanor or minor misdemeanor violation of a Revised Code provision or for a violation of a municipal ordinance that is subject to division (A) of this section shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

(D) Divisions (A) and (B) of this section shall not apply to any offense that is disposed of by a traffic violations bureau of any court pursuant to Traffic Rule 13 and shall not apply to any violation of any provision of the Revised Code that is a minor misdemeanor and that is disposed of without a court appearance. Divisions (A) to (C) of this section do not affect any penalties established by a municipal corporation for a violation of its ordinances.

Convicted arsonist to make restitution to public agency; hearing

(A) As used in this section:

(1) "Agency" means any law enforcement agency, other public agency, or public official involved in the investigation or prosecution of the offender or in the investigation of the fire or explosion in an aggravated arson, arson, or criminal damaging or endangering case. An "agency" includes, but is not limited to, a sheriff's office, a municipal corporation, township, or township police district police department, the office of a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, the fire marshal's office, a municipal corporation, township, or township fire district fire department, the office of a fire prevention officer, and any state, county, or municipal corporation crime laboratory.

(2) "Assets" includes all forms of real or personal property.

(3) "Itemized statement" means the statement of costs described in division (B) of this section.

(4) "Offender" means the person who has been convicted of or pleaded guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.02 or 2909.03 of the Revised Code, or, when the means used are fire or explosion, division (A)(2) of section 2909.06 of the Revised Code.

(5) "Costs" means the reasonable value of the time spent by an officer or employee of an agency on the aggravated arson, arson, or criminal damaging or endangering case, any moneys spent by the agency on that case, and the reasonable fair market value of resources used or expended by the agency on that case.

(B) Prior to the sentencing of an offender, the court shall enter an order that directs agencies that wish to be reimbursed by the offender for the costs they incurred in the investigation or prosecution of the offender or in the investigation of the fire or explosion involved in the case, to file with the court within a specified time an itemized statement of those costs. The order also shall require that a copy of the itemized statement be given to the offender or offender's attorney within the specified time. Only itemized statements so filed and given shall be considered at the hearing described in division (C) of this section.

(C) The court shall set a date for a hearing on all the itemized statements filed with it and given to the offender or the offender's attorney in accordance with division (B) of this section. The hearing shall be held prior to the sentencing of the offender, but may be held on the same day as the sentencing. Notice of the hearing date shall be given to the offender or the offender's attorney and to the

agencies whose itemized statements are involved. At the hearing, each agency has the burden of establishing by a preponderance of the evidence that the costs set forth in its itemized statement were incurred in the investigation or prosecution of the offender or in the investigation of the fire or explosion involved in the case, and of establishing by a preponderance of the evidence that the offender has assets available for the reimbursement of all or a portion of the costs.

The offender may cross-examine all witnesses and examine all documentation presented by the agencies at the hearing, and the offender may present at the hearing witnesses and documentation the offender has obtained without a subpoena or a subpoena duces tecum or, in the case of documentation, that belongs to the offender. The offender also may issue subpoenas and subpoenas duces tecum for, and present and examine at the hearing, witnesses and documentation, subject to the following applying to the witnesses or documentation subpoenaed:

(1) The testimony of witnesses subpoenaed or documentation subpoenaed is material to the preparation or presentation by the offender of the offender's defense to the claims of the agencies for a reimbursement of costs;

(2) If witnesses to be subpoenaed are personnel of an agency or documentation to be subpoenaed belongs to an agency, the personnel or documentation may be subpoenaed only if the agency involved has indicated, pursuant to this division, that it intends to present the personnel as witnesses or use the documentation at the hearing. The offender shall submit, in writing, a request to an agency as described in this division to ascertain whether the agency intends to present various personnel as witnesses or to use particular documentation. The request shall indicate that the offender is considering issuing subpoenas to personnel of the agency who are specifically named or identified by title or position, or for documentation of the agency that is specifically described or generally identified, and shall request the agency to indicate, in writing, whether it intends to present such personnel as witnesses or to use such documentation at the hearing. The agency shall promptly reply to the request of the offender. An agency is prohibited from presenting personnel as witnesses or from using documentation at the hearing if it indicates to the offender it does not intend to do so in response to a request of the offender under this division, or if it fails to reply or promptly reply to such a request.

(D) Following the hearing, the court shall determine which of the agencies established by a preponderance of the evidence that costs set forth in their itemized statements were incurred as described in division (C) of this section and that the offender has assets available for reimbursement purposes. The court also shall determine whether the offender has assets available to reimburse all such agencies, in whole or in part, for their established costs, and if it determines that the assets are available, it shall order the offender, as part of the offender's sentence, to reimburse the agencies from the offender's assets for all or a

specified portion of their established costs.

R.C. § 2929:72

Actual incarceration for persons committing felonies and having automatic
firearm or firearm with silencer--Repealed

R.C. § 2933.43

Seizure of contraband; notice; holding period; records and reports; forfeiture proceeding; hearings; disposition; written internal control policy on use or disposition of proceeds--Repealed

Crim. R. Rule 32

(A) Imposition of sentence

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment

A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

Crim. R. Rule 46

(A) Types and amounts of bail. Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:

- (1) The personal recognizance of the accused or an unsecured bail bond;
- (2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;
- (3) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.

(B) Conditions of bail. The court may impose any of the following conditions of bail:

- (1) Place the person in the custody of a designated person or organization agreeing to supervise the person;
- (2) Place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) Place the person under a house arrest, electronic monitoring, or work release program;
- (4) Regulate or prohibit the person's contact with the victim;
- (5) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;
- (6) Require a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail;
- (7) Any other constitutional condition considered reasonably necessary to ensure appearance or public safety.

(C) Factors. In determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to:

- (1) The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon;
- (2) The weight of the evidence against the defendant;

(3) The confirmation of the defendant's identity;

(4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;

(5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order.

(D) Appearance pursuant to summons. When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, a recognizance bond shall be the preferred type of bail.

(E) Amendments. A court, at any time, may order additional or different types, amounts, or conditions of bail.

(F) Information need not be admissible. Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at a bail proceeding shall not be received as substantive evidence in the trial of the case.

(G) Bond schedule. Each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions (B) and (C)(5) of this rule. Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card. No credit card transaction shall be permitted when a service charge is made against the court or clerk unless allowed by law.

(H) Continuation of bonds. Unless otherwise ordered by the court pursuant to division (E) of this rule, or if application is made by the surety for discharge, the same bond shall continue until the return of a verdict or the acceptance of a guilty plea. In the discretion of the court, the same bond may also continue pending sentence or disposition of the case on review. Any provision of a bond or similar instrument that is contrary to this rule is void.

(I) Failure to appear; breach of conditions. Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bail given for the person's release may be forfeited. If there is a breach of condition of bail, the court may amend the bail.

(J) Justification of sureties. Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances

on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court or clerk, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

Evid. R. Rule 609

(A) General rule

For the purpose of attacking the credibility of a witness:

(1) subject to Evid. R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.

(2) notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that ~~the accused has been convicted of a crime is admissible if the crime was~~ punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(3) notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

(B) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(C) Effect of pardon, annulment, expungement, or certificate of rehabilitation

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, expungement, or other equivalent procedure based on a finding of innocence.

(D) Juvenile adjudications

Evidence of juvenile adjudications is not admissible except as provided by statute enacted by the General Assembly.

(E) Pendency of appeal

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(F) Methods of proof

~~When evidence of a witness's conviction of a crime is admissible under this rule,~~ the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is not the person to whom the public record refers.

Ohio Constitution Article I, § 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

United State's Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United State's Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.