

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2009-0897
Plaintiff-Appellee,	:	
	:	On Appeal from the Summit
vs.	:	County Court of Appeals
	:	Ninth Appellate District
LONDEN K. FISCHER,	:	
	:	C.A. Case No. CA-24406
Defendant-Appellant.	:	

APPELLANT LONDEN K. FISCHER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Londen K. Fischer relies on the statement of the case and facts in his previously filed merit brief.

ARGUMENT

A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

A. Mr. Fischer's initial direct appeal is a nullity, because the lack of a final, appealable order deprived the court of appeals of subject-matter jurisdiction.

Only a final, appealable order serves as a final judgment of conviction. *State ex. rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, at ¶9-10, citing *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. Without it, there is no conviction. *State v. Whitfield*, Slip Opinion No. 2010-Ohio-2, at ¶12. Subject-matter jurisdiction is conferred on Ohio's courts of appeals only by way of a final, appealable order. R.C. 2953.02; Article IV, Section 3(B)(2), Ohio Constitution. Without a final, appealable order, an appellate court has no subject-matter jurisdiction to review a case. *State Auto Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, at ¶8, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20.

Here, the Ninth District Court of Appeals lacked subject-matter jurisdiction to hear Mr. Fischer's initial direct appeal, as there was no final, appealable order. See *State v. Fischer*, 181 Ohio App.3d 758, 2009-Ohio-1491. The trial court did not properly impose postrelease control on Mr. Fischer during his 2002 sentencing hearing, which rendered his sentence void. *State v. Bezak*, 114 Ohio St.3d. 94, 2007-Ohio-3250, at syllabus. While Mr. Fischer did initially take a direct appeal from his void sentence, it was not until he was sentenced again on August 6, 2008

that he had a final, appealable order from which to take a valid direct appeal as of right. Therefore, the court of appeals lacked subject-matter jurisdiction to hear Mr. Fischer's first direct appeal, and Mr. Fischer can now take a new direct appeal as of right.

1. A lack of subject-matter jurisdiction cannot be overcome for the sake of convenience.

Judicial decisions about the rule of law and interpretations of the Ohio Revised Code cannot be based on what would be convenient or inconvenient for the prosecution. This Court must apply a decade's worth of its own postrelease-control case law and honor the statutory requirements that have been prescribed by the Ohio General Assembly, despite the fact that reversing the court of appeals' holding in the instant case will open the door to additional criminal defendants seeking new direct appeals. According to Amicus, the Ohio Prosecuting Attorneys Association, a ruling from this Court that Mr. Fischer's initial direct appeal was invalid will entitle thousands of criminal defendants to new direct appeals. (Amicus' Brief, 3). Although some criminal defendants will gain new direct appeals because of improper postrelease control advisements, the number of criminal defendants that will be affected is substantially less than what the Amicus suggests.

The 14,000 ex-inmates that Amicus cites, (Amicus' Brief, 3), are not subject to new sentencing hearings to impose postrelease control, because they have completed their prison sentences. See, e.g., *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus (holding that a criminal defendant cannot be resentenced to apply postrelease control when that defendant has completed his or her sentence). Unless some of those ex-inmates were sentenced again under *Bezak* before their release, they will not be eligible for a new direct appeal based on this Court's decision in the instant case. For those ex-inmates who were given postrelease control *Bezak* sentencing hearings before release, it is unlikely that the majority of those men and

women will seek new direct appeals now that their sentences have been served and they have been released from incarceration.

Amicus provides no evidence of the number of ex-inmates who were actually sentenced following *Bezak*, nor does this Court have a way to know how many of those former inmates might even be interested in seeking a new direct appeal. Additionally, the number of potential inmates seeking new direct appeals is limited by the number of defendants who were improperly advised following the enactment of former R.C. 2929.14(F) and R.C. 2929.19(B)(3)(b). Only those inmates who were sentenced for offenses committed on or after July 1, 1996, and who were improperly advised of postrelease control, would be eligible for a new direct appeal following a *Bezak* resentencing.

That Mr. Fischer is now entitled to have his first direct appeal as of right is an outcome that this Court already anticipated. Justice Lanzinger wrote in her dissent in *Simpkins*, “A sentence that is null and void impairs the underlying conviction as a final, appealable order... therefore a defendant may be able to appeal the underlying conviction when the judge eventually imposes a nonvoid sentence and time begins to run for appeal.” *Id.* at ¶48. That point is the logical conclusion to this Court’s postrelease control line of cases.

2. Res judicata does not apply to a void sentence.

Principles of *res judicata* are inapplicable in light of a void sentence. The State argues that granting Mr. Fischer a new direct appeal from his only valid sentencing entry would undermine *res judicata*. (State’s Brief, 10). In support, the State cites to the inconvenience of new direct appeal litigation and Mr. Fischer’s invalid direct appeal in a court that lacked subject-matter jurisdiction or a final, appealable order to hear his claims. *Id.* at 10-12. However, this Court in *Simpkins* declined to apply *res judicata* to cases that involve a void sentence, because “a

prosecutor cannot bind the people or a court to an unlawful or otherwise void sentence by failing to appeal it properly.” *Id.*, at ¶28, 30.

Likewise, reliance on collateral estoppel and “practical finality” are misplaced. (Amicus Brief, 7). Collateral estoppel means “that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated....” *State v. Lovejoy*, 79 Ohio St.3d 440, 443, 1997-Ohio-371. Again, in the instant case there was no valid and final judgment before the court of appeals heard Mr. Fischer’s initial direct appeal. For that reason, collateral estoppel and its logical underpinnings do not apply to the instant case. The distinction drawn between finality for purposes of appeal and finality required for collateral estoppel is inapplicable for the same reasons. (See Amicus Brief, 6-7).

3. Stare decisis must be applied to the instant proposition of law.

While *res judicata* is not applicable here, *stare decisis* is. This Court has issued over a decade’s worth of case law holding that improper postrelease control advisements render a sentence void. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, at ¶35; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶3; *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶1; *Simpkins*, 117 Ohio St.3d, at syllabus; *Bezak*, 114 Ohio St.3d, at syllabus; *State ex. rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 357, 2006-Ohio-5795, at ¶20; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶25; *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, at ¶16; *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171. This Court has likewise been consistent in holding that a void sentence is a legal nullity, which means that it is as if the sentencing never took place. E.g., *Romito v. Maxwell*, (1967), 10 Ohio St.2d 266, 267-268.

In *Simpkins*, this Court pointed out that stare decisis is a critical doctrine which should be applied to postrelease control cases. *Simpkins*, at ¶19, fn. 2. Specifically, “[d]espite any individual disagreement with precedent, we abide by [*Bezak*] in order to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry.” *Id.*, citing *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, at ¶26-28. This Court recognized that stare decisis is “perhaps particularly needed in areas of the law that are in flux.” *Id.* Applying stare decisis to the instant case requires this Court to hold that Mr. Fischer’s first direct appeal was invalid.

B. There is no expectation of finality in a void judgment.

The State argues that this Court must recognize the finality of Mr. Fischer’s sentence, because the court of appeals already rendered a decision in his first direct appeal. (State’s Brief, 10). But reliance on a conviction is not reasonable when it lacks a final, appealable order. A conviction is both a guilty verdict and the imposition of a sentence. *Whitfield*, at ¶12. Absence of a sentence means that a conviction is not final. *State v. Henderson* (1979), 58 Ohio St.2d 171, 178-79. For that reason, neither the state nor a criminal defendant has a legitimate expectation of finality in a conviction that lacks a valid sentence. Because improper postrelease control advisements render a sentence void, that voidness effects the sentence so that it is as if it never existed. See, e.g., *Bezak*, at syllabus, ¶12. Therefore, there is no reasonable expectation of finality in that void sentence.

This Court has already held that there is no reasonable, legitimate expectation of finality in a void sentence. *Simpkins*, at ¶36. The *Simpkins* Court also cited to Justice Scalia’s dissent in *Jones v. Thomas* (1989), 491 U.S. 376, 395, in which he noted that a criminal defendant has no legitimate expectation of finality in a statutorily improper sentence. *Id.* Mr. *Simpkins* argued

that he could not be resentenced under *Bezak*, because he had already served a substantial majority of his sentence. *Id.* at ¶31. But this Court held that resentencing Mr. Simpkins was not a violation of due process or double jeopardy, as there was no reasonable expectation of finality in his void sentence. *Id.* at 32-37. Just as a criminal defendant can find no finality in a void sentence, likewise the State cannot rely on an appeal that flows from a void sentence.

CONCLUSION

Mr. Fisher's first direct appeal was a legal nullity because it stemmed from a void sentence. *Romito*, 10 Ohio St.2d at 267-268. That void sentence meant that there was no final, appealable order. The lack of a final, appealable order deprived the court of appeals of subject-matter jurisdiction. *State Auto Mut. Ins. Co.*, 108 Ohio St.3d, at ¶8 Therefore, this Court must find that Mr. Fischer's subsequent direct appeal is his first valid direct appeal as of right, and remand this case to the court of appeals so that that appeal may be heard on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Appellant Londen K. Fischer's Reply Brief** was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308, and Carley J. Ingram, Montgomery County Assistant Prosecutor, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422, on this 9th day of March, 2010.


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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
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Plaintiff-Appellee,	:	
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	:	Ninth Appellate District
LONDEN K. FISCHER,	:	
	:	C.A. Case No. CA-24406
Defendant-Appellant.	:	

APPENDIX TO APPELLANT LONDEN K. FISCHER'S REPLY BRIEF



LEXSEE 2010 OHIO 2

THE STATE OF OHIO, APPELLANT, v. WHITFIELD, APPELL-
LEE.

No. 2008-1669

SUPREME COURT OF OHIO

2010 Ohio 2; 2010 Ohio LEXIS 1

September 15, 2009, Submitted
January 5, 2010, Decided

NOTICE:

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

PRIOR HISTORY: [**1]

APPEAL from the *Court of Appeals for Cuyahoga County, No. 90244, 2008 Ohio 3150. State v. Whitfield, 2008 Ohio 3150, 2008 Ohio App. LEXIS 2672 (Ohio Ct. App., Cuyahoga County, June 26, 2008)*

DISPOSITION: Judgment reversed and cause remanded.

HEADNOTES

Criminal law -- Allied offenses of similar import -- Sentencing -- R.C. 2941.25(A) -- Appellate procedure -- State retains right to elect which offense to pursue on remand to trial court -- Court of appeals must remand for new sentencing hearing upon finding reversible error in imposition of multiple punishments for allied offenses -- Determinations of guilt for

each offense remain intact after merger of allied offenses for sentencing.

SYLLABUS

1. The state retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal.

2. Upon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.

3. Because *R.C. 2941.25(A)* protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing.

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Timothy Young, Ohio Public Defender, and Spencer Cahoon, Assistant Public Defender, for appellee.

JUDGES: O'CONNOR, J. MOYER, C.J., and LUNDBERG STRATTON, O'DONNELL, and CUPP, JJ., concur. PFEIFER and LANZINGER, JJ., dissent.

OPINION BY: O'CONNOR

OPINION

O'CONNOR, J.

[*P1] In this appeal, we address the proper procedure for courts [*2] of appeals to follow after finding reversible error with respect to sentences imposed for allied offenses of similar import.

Relevant Background

[*P2] After a bench trial, the trial judge found appellee, Darnell Whitfield, guilty of drug possession, drug trafficking, having a weapon under disability, and carrying a concealed weapon, as well as three firearms specifications. The judge imposed three-year concurrent sentences on all counts, to be served consecutively to a term of one year for the three firearms specifications, which the judge merged at sentencing.¹

¹ Inexplicably, the trial judge did not merge the drug-possession and trafficking charges, however.

[*P3] Whitfield appealed, arguing that the trial court had erred in denying his motions to suppress and for acquittal and that it had "committed plain error by convicting and sentencing him on both drug possession and drug trafficking which are allied offense of similar import." After rejecting his claims on suppression and acquittal, the court of appeals applied our decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008 Ohio 1625, 886 N.E.2d 181,

paragraph two of the syllabus, and agreed that the trial court had committed plain error by [*3] convicting Whitfield of both drug possession and drug trafficking, which are allied offenses of similar import. *State v. Whitfield, Cuyahoga App. No. 90244, 2008 Ohio 3150, P 36-37*. There was no error in that portion of the ruling.

[*P4] In reversing, however, the court of appeals stated, "We therefore sustain [Whitfield'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 [846 N.E.2d 824]; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004 Ohio 6087 [817 N.E.2d 845]." (Emphasis added.) *Id.* at P 38.

[*P5] We accepted discretionary review of the state's appeal, 120 Ohio St. 3d 1486, 2009 Ohio 278, 900 N.E.2d 197. The state asserts 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 convictions are merged for the purposes of sentencing and [that] the defendant [can] be sentenced only on one." We agree and take this opportunity to provide guidance on the proper manner in which the courts of appeal should remand cases after finding errors committed in sentencing [*4] on allied offenses.

Analysis

[*P6] R.C. 2941.25(A) provides, "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

[*P7] At the outset of our analysis, we recognize that the statute incorporates the constitutional protections against double jeopardy. These protections generally forbid successive

prosecutions and multiple punishments for the same offense.

[*P8] In the case of multiple punishments, a defendant is protected only from multiple punishments that were not intended by the legislature. Legislatures are empowered to either permit or prohibit multiple punishments for the same offense. *State v. Childs* (2000), 88 Ohio St.3d 558, 561, 2000 Ohio 425, 728 N.E.2d 379. By its enactment of R.C. 2941.25(A), the General Assembly has clearly expressed its intention to prohibit multiple punishments for allied offenses of similar import. *State v. Rance* (1999), 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699, paragraph three of the syllabus. See also *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 242-243, 74 O.O.2d 380, 344 N.E.2d 133 (the statute is designed to [*5] prevent "shotgun convictions" and "double punishment" for the same offense); *State v. Stewart, Franklin App. No. 05AP-1073*, 2006 Ohio 3310, P 6, 2006 WL 1781412, citing *Rance*, 85 Ohio St.3d at 635, 710 N.E.2d 699 ("Ohio's General Assembly has indicated its intent to permit or prohibit cumulative punishments for the commission of certain offenses through the multiple-count statute set forth in R.C. 2941.25"). This case involves the latter protection -- the prohibition against multiple punishments for the same offense.

[*P9] By contrast, the General Assembly exercised its power to permit multiple punishments by enacting R.C. 2941.25(B). *State v. Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, P 17; *Rance*, 85 Ohio St.3d at 635, citing *Albernaz v. United States* (1981), 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275. Here, however, we are not presented with such a case.

[*P10] Rather, the parties agree that R.C. 2941.25(A) forbids multiple punishments for drug possession and drug trafficking, which are allied offenses of similar import. *Cabrales*, 118 Ohio St.3d 54, 2008 Ohio 1625, 886 N.E.2d 181, paragraph two of the syllabus. The court

of appeals properly recognized that on the facts [*6] of this case, the trial court committed reversible error and that Whitfield's convictions for the allied possession and trafficking offenses must be merged on remand.

[*P11] This appeal poses two questions: (1) What exactly does R.C. 2941.25(A) prohibit when it states that a defendant may be "convicted" of only one of two allied offenses? and (2) When a sentencing court violates this prohibition, what is the proper procedure on remand?

[*P12] We have little trouble with the first question. Our past decisions make clear that for purposes of R.C. 2941.25, a "conviction" consists of a guilty verdict *and* the imposition of a sentence or penalty. *State v. Gapen*, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, P 135; *State v. McGuire* (1997), 80 Ohio St.3d 390, 399, 1997 Ohio 335, 686 N.E.2d 1112 ("a conviction consists of a verdict and sentence"). See also *State v. Fenwick* (2001), 91 Ohio St.3d 1252, 1253, 2001 Ohio 51, 745 N.E.2d 1046 (Cook, J., concurring), citing *McGuire* ("[f]or purposes of R.C. 2941.25, this court has already determined that a 'conviction' consists of both 'verdict and sentence'" [emphasis sic]); *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5, 520 N.E.2d 568 ("as there is only one order of execution, there [*7] can be only one conviction. See R.C. 2941.25(A) and *State v. Henderson* (1979), 58 Ohio St. 2d 171, 389 N.E.2d 494, wherein 'conviction' includes *both* the guilt determination and the penalty imposition" [emphasis sic]).

[*P13] We recognize that certain decisions from this court might be read to suggest that a conviction does not necessarily require a sentence. For example, in *State v. Cash* (1988), 40 Ohio St.3d 116, 118, 532 N.E.2d 111, we held that a prior plea of guilty, without a sentence, was a "conviction" for purposes of *Evid.R. 609(A)* and could be used for impeachment of a witness. See also *State ex rel. Watkins v. Fiorenza* (1994), 71 Ohio St.3d 259, 260, 1994

Ohio 104, 643 N.E.2d 521 (holding for purposes of R.C. 2921.42(C)(1) that a guilty finding alone is sufficient to constitute a conviction). But those decisions are expressly limited to the discrete issues presented in them. See *Cash at 118*, 532 N.E.2d 111 (acknowledging precedent requiring both a finding of guilt and a sentence and limiting its own holding to impeachment under *Evid.R. 609(A)*); *Watkins at 260*, 643 N.E.2d 521 (recognizing that "the term 'conviction' normally includes both the finding of guilt and the sentence" and [**8] justifying its departure from that rule by the language of R.C. 2921.41(C)(1)). Thus, these cases do not conflict with our holding today that for purposes of R.C. 2941.25(A), a conviction is a determination of guilt and the ensuing sentence.

[*P14] We now turn to the second question: When a sentencing court violates R.C. 2941.25(A) by convicting a defendant of two allied offenses and then sentencing the defendant on both, what is the proper procedure on remand?

[*P15] The state contends that when a court correctly applies R.C. 2941.25(A) and merges convictions for allied offenses, only the sentences should be merged, i.e., both underlying determinations of guilt should be left intact. The state urges this court to revisit *State v. Yarbrough*, 104 Ohio St.3d 1, 2004 Ohio 6087, 817 N.E.2d 845, in which this court, upon finding that the defendant had been improperly convicted and sentenced for two allied offenses of similar import, merged the convictions and dismissed one of the two counts. *Id. at P 103*. The state asks us to clarify the law, contending that confusion has resulted from *Yarbrough* and our seemingly conflicting subsequent decisions in *State v. Winn*, 121 Ohio St.3d 413, 2009 Ohio 1059, 905 N.E.2d 154, [**9] and *Cabrales*, 118 Ohio St.3d 54, 2008 Ohio 1625, 886 N.E.2d 181. In the latter two cases, we affirmed appellate court decisions vacating *only the sentence* for one of the allied offenses and leaving

both convictions intact, without reference to *Yarbrough*.

[*P16] Although *Yarbrough*, *Cabrales*, and *Winn* addressed important aspects of allied-offense jurisprudence, none of them address the narrow argument advanced by the state. Rather, in answering the question, we start with our understanding that R.C. 2941.25(A) codifies the judicial doctrine of merger. *State v. Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, P 42; *State v. Logan (1979)*, 60 Ohio St. 2d 126, 131, 397 N.E.2d 1345, 397 N.E.2d 1345. That doctrine operates to merge allied offenses of similar import into a single conviction. *Brown at P 42*.

[*P17] A defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *Brown at P 43*, citing *Geiger*, 45 Ohio St.2d at 244, 74 O.O.2d 380, 344 N.E.2d 133. In fact, our precedent, including cumulative-punishment cases that predate the 1972 enactment of R.C. 2941.25(A), makes clear that a defendant may be found guilty of allied offenses [**10] but not sentenced on them. See, e.g., *State v. Botta (1971)*, 27 Ohio St.2d 196, 203, 56 O.O.2d 119, 271 N.E.2d 776 ("Where * * * in substance and effect but one offense has been committed, a verdict of guilty by the jury under more than one count does not require a retrial but only requires that *the court not impose more than one sentence*" [emphasis added]); *Weaver v. State (1906)*, 74 Ohio St. 53, 77 N.E. 273, 3 Ohio L. Rep. 622, paragraph one of the syllabus (when there are multiple counts of violating liquor statutes, but only one offense, "it is error for the court, on a verdict of guilty under each count, to *inflict the penalties prescribed by each of the said sections*" [emphasis added]); *Woodford v. State (1853)*, 1 Ohio St. 427, paragraph three of the syllabus ("Where an offence forms but one transaction, and the indictment containing several counts on which the jury have returned a verdict of guilty,

it is error in the court to sentence on each count separately" [emphasis added]).

[*P18] In cases in which the imposition of multiple punishments is at issue, *R.C. 2941.25(A)*'s mandate that a defendant may only be "convicted" of one allied offense is a protection against multiple sentences rather than multiple [**11] convictions. See, e.g., *Ohio v. Johnson* (1984), 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425, in which the United States Supreme Court held that the *Double Jeopardy Clause* protects against successive prosecutions and against *multiple punishments* for the same offense. Thus, to ensure that there are not improper cumulative punishments for allied offenses, courts must be cognizant that *R.C. 2941.25(A)* requires that "the trial court effects the merger at sentencing." *State v. Gapen*, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, P 135. See also *State v. Palmer* (1997), 80 Ohio St.3d 543, 572, 1997 Ohio 312, 687 N.E.2d 685; *Stewart*, 2006 Ohio 3310, P 6.

[*P19] In this case, the court of appeals properly corrected the trial court's error in sentencing Whitfield for the allied offenses of drug possession and drug trafficking. But the court of appeals erred in ordering that this case be "remanded to the trial court with instructions to vacate the conviction and sentence for drug possession only." (Emphasis added.)

[*P20] The General Assembly has made clear that it is the state that chooses which of the allied offenses to pursue at sentencing, and it may choose any of the allied offenses. *Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, P 16 [**12] and 43, citing *Geiger*, 45 Ohio St.2d at 244, 74 O.O.2d 380, 344 N.E.2d 133; Legislative Service Commission Summary of Am.Sub.H.B. 511, The New Ohio Criminal Code (June 1973) 69. In conferring that right on the state, the legislature did not specify when the state must make that election. The Legislative Service summary states that "the prosecution sooner or later must elect

as to which offense it wishes to pursue," (emphasis added), *id.*, thereby implying that the state has latitude in determining when to decide which offense to pursue at sentencing.

[*P21] In light of the legislative history, we concluded previously that the statute does not require the state to make its election prior to trial. *State v. Weind* (1977), 50 Ohio St.2d 224, 236, 4 O.O.3d 413, 364 N.E.2d 224, vacated on other grounds (1978), 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1156. See also *State v. Roberts* (June 23, 1988), *Auglaize App. No. 2-87-18*, 1988 Ohio App. LEXIS 2861, 1988 WL 68700 (the state does not lose its right to elect by failing to exercise it before a verdict of guilty has been returned). We see nothing in the language of *R.C. 2941.25(A)* that would deny the state the same right on remand. The state therefore retains the right to elect [**13] which allied offense to pursue on sentencing on a remand to the trial court after an appeal.

[*P22] The court of appeals impermissibly intruded on the state's right to elect by directing the trial court to vacate the drug-possession conviction. We reverse that portion of the court of appeals' decision in this case and remand the cause to the trial court for a new sentencing hearing at which the state must elect the offense for which Whitfield should be punished.

[*P23] When confronted with allied offenses, courts must be guided by two principles: that *R.C. 2941.25(A)* prohibits "convictions" for allied offenses and that the state controls which of the two allied offenses the defendant will be sentenced on.

[*P24] When the state elects which of the two allied offenses to seek sentencing for, the court must accept the state's choice and merge the crimes into a single conviction for sentencing, *Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, P 41, and impose a sentence that is appropriate for the merged offense. Thereafter, a "conviction" consists of a guilty verdict *and* the imposition of a sentence or

penalty. See, e.g., *Gapen*, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, P 135; *McGuire*, 80 Ohio St.3d at 399, 686 N.E.2d 1112; [*14] *Fenwick*, 91 Ohio St.3d at 1253, 745 N.E.2d 1046 (Cook, J., concurring). The defendant is not "convicted" for purposes of R.C. 2941.25(A) until the sentence is imposed.

[*P25] If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. On remand, trial courts must address any double jeopardy protections that benefit the defendant. However, as this court observed in *State v. Calhoun* (1985), 18 Ohio St.3d 373, 376-377, 18 OBR 429, 481 N.E.2d 624, "At least in the absence of an acquittal or a termination based on a ruling that the prosecution's case was legally insufficient, no interest protected by the *Double Jeopardy Clause* precludes a retrial when reversal is predicated on trial error alone. The purpose of the *Double Jeopardy Clause* is to preserve for the defendant acquittals or favorable factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations." Thus, the state is not precluded [*15] from pursuing any of the allied offenses upon a remand for a new sentencing hearing.

[*P26] On remand, the trial court should fulfill its duty in merging the offenses for purposes of sentencing, but remain cognizant that R.C. 2941.25(A)'s mandate that a "defendant may be convicted of only one" allied offense is a proscription against sentencing a defendant for more than one allied offense. Nothing in the plain language of the statute or in its legislative history suggests that the General Assembly intended to interfere with a determination by a jury or judge that a defendant is guilty of allied offenses. As the state asserts, by enacting R.C. 2941.25(A), the General Assembly condemned

multiple sentences for allied offenses, not the determinations that the defendant was guilty of allied offenses.

[*P27] Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. ² Thus, the trial court should not vacate or dismiss the guilt determination.

2 [P a] The dissent contends that "[in] essence, the offense that the state [*16] elects to pursue absorbs the other offense and nothing remains of the absorbed offense, including the finding of guilt." [Dissent at P 36.] In so asserting, the dissent relies on our decision in *State v. Saxon*, 109 Ohio St.3d 176, 2006 Ohio 1245, 846 N.E.2d. 824, and on two decisions from the Eighth District Court of Appeals, *Gates Mills v. Yomtovian*, 8th Dist. No. 88942, 2007 Ohio 6303, and *State v. Waters*, 8th Dist. No. 85691, 2005 Ohio 5137.

[P b] *Saxon*, which held that the sentencing packaging doctrine is not applicable in Ohio law, is inapposite here and does not support the proposition for which it is cited by the dissent. *Waters*, and the cases upon which it relies, *State v. Garner*, *Trumbull App. No. 2002-T-0025*, 2003 Ohio 5222, citing *State v. Collins* (October 18, 2001), *Cuyahoga App. No. 79064*, 2001 Ohio App. LEXIS 4666, are also inapposite because they are not allied offense cases. Rather, in those cases, each judge failed to impose a sentence in cases in which there were multiple counts or specifications.

Conclusion

[*P28] For the reasons set forth herein, we reverse the decision of the court of appeals and

remand this cause to the trial court for further proceedings consistent with this opinion.

Judgment reversed [**17] and cause remanded.

MOYER, C.J., and LUNDBERG STRATTON, O'DONNELL, and CUPP, JJ., concur.

PFEIFER and LANZINGER, JJ., dissent.

DISSENT BY: LANZINGER

DISSENT

LANZINGER, J., dissenting.

[*P29] I respectfully dissent because the majority's analysis impairs the finality of the judgment and may ultimately lead to a violation of a defendant's right to be free from double jeopardy.

[*P30] The majority states that "[t]his appeal poses two questions: (1) What exactly does *R.C. 2941.25(A)* prohibit when it states that a defendant may be 'convicted' of only one of two allied offenses? and (2) When a sentencing court violates this prohibition, what is the proper procedure on remand?" The majority concludes that "conviction" includes both the guilt determination and the imposition of a sentence or penalty, citing precedent from mostly death-penalty cases that offer little analysis. Two cases that were decided shortly after the effective date of *R.C. 2941.25* offer better insight. In *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 74 O.O.2d 380, 344 N.E.2d 133, the issue was whether a person who admitted to the theft of property could be convicted of receiving stolen property. There we stated that "the intent of the General Assembly controls [**18] in this case, and that intent is plainly expressed in *R.C. 2941.25*, supra, and the accompanying committee comment. Although receiving is technically not an included offense of theft, it is, under *R.C. 2941.25*, an 'allied offense of similar import.' An accused may be tried for both but *may be convicted and sentenced for*

only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." (Emphasis added.) *Id. at 244*, 74 O.O.2d 380, 344 N.E.2d 133.

[*P31] In *State v. Henderson* (1979), 58 Ohio St.2d 171, 12 O.O.3d 177, 389 N.E.2d 494, we were asked to determine the intent of the General Assembly in enacting the phrase "previously been convicted of a theft offense" as used in former *R.C. 2913.02(B)*, which elevated a misdemeanor theft offense to grand theft, a fourth-degree felony. Henderson had been separately indicted on one count of receiving stolen property and one count of grand theft. Although he had pleaded guilty to receiving stolen property, and the court had accepted that plea, he had not yet been sentenced when he was indicted for grand theft. The trial court determined that [**19] a plea of guilty was sufficient to satisfy the prior-conviction element. The court of appeals reversed, holding that a judgment entry of conviction was necessary to constitute a "conviction." In affirming the appellate court, we noted two important considerations: (1) a prior conviction was an integral element of the offense of grand theft and (2) *R.C. 2901.04(A)* requires that we construe the meaning of "convicted" strictly against the state and liberally in favor of the defendant. *Id. at 174*, 12 O.O.3d 177, 389 N.E.2d 494. This court determined that the statute required a more final adjudication of the defendant's guilt, i.e., the pronouncement of a sentence. *Id. at 178*, 12 O.O.3d 177, 389 N.E.2d 494.

[*P32] In Whitfield's case, however, defining the term "convicted" to mean both a finding of guilt and a sentence works to the defendant's detriment, thereby raising constitutional issues relating to a defendant's rights. By leaving the separate finding of guilt pending, the majority prevents the defendant from having a final judgment on all charged offenses.

[*P33] Furthermore, the use of the term "convicted" throughout the Revised Code, while not defined, clearly implies only the finding of guilt. [**20] See, e.g., *R.C. 2929.01(EE)* ("Sentence' means the sanction or combination of sanctions imposed by the sentencing court on an offender who is *convicted* of or pleads guilty to an offense") (emphasis added); *R.C. 2929.19(A)* ("The court shall hold a sentencing hearing before imposing a *sentence* under this chapter upon an offender who was *convicted* of or pleaded guilty to a felony * * *") (emphasis added); *R.C. 2929.16(E)* ("If a person who has been *convicted* of or pleaded guilty to a felony is *sentenced* to community residential sanction") (emphasis added); *R.C. 2930.19 (C)* ("The failure of any person or entity to provide a right, privilege, or notice to a victim under this chapter does not constitute grounds for declaring a mistrial or new trial, for setting aside a *conviction, sentence, adjudication, or disposition, or for granting postconviction release to a defendant or alleged juvenile offender*") (emphasis added).

[*P34] In *Henderson, 58 Ohio St. 2d at 178, 12 Ohio Op. 3d 177, 389 N.E.2d 494*, a case involving the enhanced penalty provisions of former *R.C. 2913.02(B)*, we acknowledged that the General Assembly used the term "conviction" to mean simply the finding of guilt in several statutes, but concluded [**21] that "the distinction between conviction and sentencing in these few provisions exists solely for the purpose of depicting various procedures to be followed during the interval after a defendant's guilt is legally adjudicated and before an appropriate penalty or treatment is determined. It is unreasonable to assume that the General Assembly intended an intermediate stage in a criminal proceeding, evidenced by the entry of a plea of guilty, to invoke the enhanced penalty provisions of *R.C. 2913.02(B)*." But for purposes of *R.C. 2941.25*, it makes sense that the General Assembly intended to confine the term "convicted" to the finding of guilt, because allied offenses are to be merged *before* sentenc-

ing. See *State v. Harris, 122 Ohio St.3d 373, 2009 Ohio 3323, 911 N.E.2d 882, P 23* ("*Geiger* requires the prosecution to elect which offense it will pursue after a finding of guilt but prior to sentencing").

[*P35] Even if I were to accept that "conviction" includes sentencing as well as a finding of guilt in this case, I cannot agree with the majority's remedy. In *State v. Brown, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, P 42*, this court acknowledged that *R.C. 2941.25* is a legislative attempt [**22] to codify the judicial doctrine of merger, i.e., the principle that "a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime." *Id.*, quoting *State v. Botta (1971), 27 Ohio St.2d 196, 201, 56 O.O.2d 119, 271 N.E.2d 776*. See also *State v. Rice (1982), 69 Ohio St.2d 422, 424, 23 O.O.3d 374, 433 N.E.2d 175; State v. Roberts (1980), 62 Ohio St.2d 170, 172, 16 O.O.3d 201, 405 N.E.2d 247; State v. Logan (1979), 60 Ohio St.2d 126, 131, 14 O.O.3d 373, 397 N.E.2d 1345*. Although the majority acknowledges the merger doctrine, it inexplicably holds that the separate determination of the defendant's guilt on each allied offense remains intact, both before and after merged sentencing.

[*P36] This holding contradicts the concept of merger. The allied offenses combine into one pursuant to *R.C. 2941.25(A)*. In essence, the offense that the state elects to pursue absorbs the other offense and nothing remains of the absorbed offense, including the finding of guilt. See *Gates Mills v. Yomtovian, 8th Dist. No. 88942, 2007 Ohio 6303, P 23* ("merge' in criminal law is defined as, '[t]he absorption of [**23] a lesser included offense into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy.' Black's Law Dictionary (8 Ed. Rev.2004) 1009"). To say that a determination of guilt on the merged offense survives means it remains pending in limbo and prevents

a final judgment from being entered. See *State v. Saxon*, 109 Ohio St.3d 176, 2006 Ohio 1245, 846 N.E.2d 824, P 8 (a trial court must separately assign a particular sentence to each offense); *State v. Waters*, 8th Dist. No. 85691, 2005 Ohio 5137 (an order that fails to impose sentence for an offense for which the offender was found guilty not only violates this rule, but renders the resultant order nonfinal and not immediately appealable).

[*P37] Once the state elects which allied offense it will pursue, that decision should be final, and the trial court should dismiss the

other allied count. If the court of appeals reverses the judgment of conviction, the state should not be given a second chance to convict on the charge merged. By holding that the determination of guilt remains undisturbed after the merger of the allied offenses, the majority focuses on the prohibition against multiple [**24] punishments for the same offense, but ignores the equally important double jeopardy protection against successive prosecutions for the same conduct. I respectfully dissent.

PFEIFER, J., concurs in the foregoing opinion.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE IV: JUDICIAL

§ 3 Court of Appeals.

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL AS-
 SSEMBLY AND
 FILED WITH THE SECRETARY OF STATE THROUGH FEBRUARY 26, 2010 ***
 *** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH FEBRUARY 22, 2010 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES

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§ 2953.02. Review of judgments

In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which a sentence of death is imposed for an offense committed before January 1, 1995, and in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except that, in cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, and in which the question of the weight of the evidence to support the judgment has been raised on appeal, the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death as provided in *section 2929.05 of the Revised Code*.

HISTORY:

GC § 13459-1; 113 v 123(211), ch 38; Bureau of Code Revision, 10-1-53; 128 v 141 (Eff 1-1-60); 133 v S 530 (Eff 6-12-70); 139 v S 1 (Eff 10-19-81); 146 v S 4. Eff 9-21-95.