ORIGINAL

IN THE SUPREME COURT OF OHIO
2010

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

JEREMY S. DAMRON,

Defendant-Appellee.

Case No. 10-0937

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 09AP-807

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This felony case asks whether a mistakenly-imposed sentence is valid simply because it falls within the statutory range. By answering this question in the affirmative, the Tenth District has improperly drafted an exception to the mandatory sentencing considerations in R.C. Chapter 2929, one that is worthy of this Court's review.

The sentence in this case was accidental. Although the State requested consecutive prison terms and argued against merger, the trial court imposed concurrent sentences for domestic violence and felonious assault, believing that it was merging two allied offenses of similar import. Tenth Dist. Op. ¶4. But because concurrent sentences are authorized by law, the Tenth District refused to review the trial court's erroneous ruling on merger. It did not matter that the trial court otherwise "would have" imposed *consecutive* terms for what it called "the worst felonious assault/domestic violence I've seen since I've been on the bench." Id. ¶4. Nor did it matter that the court abandoned its discretion, believing it had "no alternative" but to impose concurrent terms. Id. The Tenth District reviewed the sentence in a vacuum, "notwithstanding [the court's] conclusion that it was required to merge the two counts * * * ." Id. ¶10. Finding no error, the Tenth District held that even if the sentence were based on "faulty reasoning," the court's merger ruling "resulted in a sentence authorized by the statutes governing sentencing." ¶11.

The Tenth District's decision contains serious flaws warranting this Court's review. Contrary to the panel's holding, a "faulty" sentencing justification cannot "result" in a valid sentence simply because the sentence itself falls within the statutory range. "[S]entencing courts in this state must still consider all of the remaining sentencing factors contained in several sections of R.C. Chapter 2929." *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶9. If a court abandons these considerations based on a mistaken legal belief, the sentence is invalid.

See *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, ¶19. But by holding that sentences are reviewable "notwithstanding" their legal justifications, the Tenth District has created an opt-out proviso that will relieve courts from the mandatory sentencing criteria in R.C. Chapter 2929.

This holding will also prohibit appellate review of every sentence falling within the statutory range. The merger error in this case deprived the State of the consecutive sentences that it requested; however, the Tenth District ignored the State's arguments since the court's mistake "resulted" in concurrent sentences. Tenth Dist. Op. ¶11. Even though the sentencing entry stated that concurrent sentences were required "pursuant to *State v. Harris*, 2009 Ohio 3323"—an allied-offense decision that *actually prohibits* concurrent sentences when merger is required—the Tenth District refused to correct this obvious legal error "because, notwithstanding its conclusion that it was required to merge the two counts, it did not do so." ¶10. This new serendipitous-sentencing exception defies R.C. 2953.08(B)(2) and improperly limits appellate review to sentences falling outside the statutory range.

In *Johnson*, this Court found sentencing error in the opposite context, where the trial court mistakenly believed that *consecutive* prison terms were required by R.C. 2929.13(F). Also, several appellate districts—including the Tenth—have reversed sentences where the court erroneously believes that a prison term is mandatory rather than discretionary. See *State v. Warren*, 7th Dist. No. 05 MA 91, 2006-Ohio-1281, ¶68; *State v. Kepiro*, 10th Dist. No. 06AP-1302, 2007-Ohio-4593, ¶37. These cases prove that sentencing error is not limited to sentences falling outside the statutory range. Error can also occur within the permitted range when the trial court considers a factor it should not have, or, as in this case, when it takes a sentencing option off the table because of an express legal error. The trial court here took the consecutive-

sentencing option off the table, and failed to exercise its discretion in that respect, because of its erroneous legal belief that merger was required.

The Tenth District now applies a different standard of review to State sentencing appeals, finding that they deserve neither review nor correction unless the sentence exceeds the statutory limit. This sets dangerous precedent. As argued below, the State has the right to request consecutive prison terms for certain offenses, and if a court arbitrarily declines such a request because of an express error in its legal reasoning, sentencing error occurs. And here the State was plainly prejudiced, as the trial court also expressly stated that it "would have" imposed consecutive sentences but for its erroneous "merger" conclusion. Tenth Dist. Op. ¶4.

The question presented in this case is the converse of the question answered in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1. While it is plain error for a court to impose multiple sentences for two allied offenses, ¶30, it is also cognizable error for a court to purportedly merge two nonallied offenses of dissimilar import. In either scenario, the duty imposed R.C. 2941.25 is "mandatory, not discretionary." Id. at ¶26. It makes no difference whether a court attaches concurrent prison terms to its mistake. Id. Just as a defendant is prejudiced by receiving multiple convictions for allied offenses, the State is prejudiced by being deprived of a lawfully imposed sentence. "Every judge has a duty to impose lawful sentences." *Underwood*, ¶20, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶27.

The instant case presents the issue of reviewability under perfect conditions for review by this Court. The trial court's legal error was express, and the prejudice to the State was express as well. This case therefore presents a perfect vehicle in which to consider this question of reviewability.

Finally, this case highlights the need for this Court to hold that felony domestic violence and felonious assault are not allied offenses of similar import. Although the Tenth District noted that there was "some authority" for the proposition that the two offenses are not allied offenses of similar import, Tenth Dist. Op. ¶9, it did not rule on the issue and refused to find any sentencing error in the court's imposition of concurrent sentences. Domestic violence is a grave, statewide concern that the General Assembly has protected separately from crimes involving "stranger" violence. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, ¶29. An offender does not deserve a "merger" discount when the "family or household member" abuse escalates into a felonious assault. In such cases, the State has the right to multiple convictions and consecutive sentences.

This felony case presents several issues of public and great general interest. As the Tenth District concedes, its holding will shield a sentencing court's "faulty reasoning" from appellate review. Tenth Dist. Op. ¶11. The bench and bar also need guidance as to whether felonious assault and felony domestic violence are allied offenses of similar import. Accordingly, the State respectfully requests that this Court accept jurisdiction.

STATEMENT OF FACTS

On June 27, 2008, a Franklin County Grand Jury indicted defendant-appellee Jeremy Damron of one count of felonious assault, a second-degree felony; two counts of domestic violence, both third-degree felonies; and one count of rape, a first-degree felony. On May 5, 2009, he pleaded guilty to the felonious assault count and to one of the domestic violence counts, understanding that he could receive maximum, consecutive sentences for his crimes.

The prosecutor recited the facts at the plea hearing, indicating that defendant had spent the day drinking before he came home and savagely beat his girlfriend M.H. in front of their three children: L.B. (age 11); I.D. (age seven); and Z.D. (age six). By the time deputies arrived,

M.H. had already been transported to Grant Hospital, and defendant was still inside the house, naked.

The bedroom was in complete disarray. Blood spatter covered the walls, bedspread, and blinds. A clump of hair was on the bed, and another hung from a nail on the door frame. Pooling blood soaked into the floor and pillows. One of the windows was smashed, and shards of glass were lying on the floor. All but one blade from the ceiling fan had been snapped off; each was covered in blood. A black chair was broken into pieces on the ground.

I.D. and L.B. told detectives that they were forced to watch as defendant savagely beat their mother. I.D. jumped on defendant's back and begged him to stop, but defendant threw I.D. off and continued pounding M.H. L.D. approached defendant with a knife but "didn't have the guts to hurt him." Because defendant cut every phone line in the house, the children ran for help. I.D. repeatedly asked detectives why it took so long for them to arrive.

When interviewed by detectives, defendant said that he warned M.H. for three days to stop talking to him in an emasculating way. He said that M.H. would order him around and make him feel like "hired help." When asked about the attack, he did not remember much since he drank beer and Skyy Vodka all day. Although he "blacked out" earlier, defendant knew he beat M.H. Scratches and bruises covered his fingers and knuckles.

At Grant Hospital, doctors were initially unable to examine whether M.H. suffered a concussion because her eyes were completely swollen shut. She could not speak or give detectives a statement. Later, doctors determined that she suffered a nasal fracture and a concussion.

A sentencing hearing was held on July 27, 2009. The prosecution requested a seven-year prison sentence for the felonious-assault count and a five-year sentence for the domestic-violence

count. In its sentencing memorandum and at the hearing, the prosecutor argued that the two crimes were not allied offenses and, therefore, were not subject to merger.

The defense argued that the felonious assault and domestic violence convictions should merge. In a sentencing memorandum, the defense omitted R.C. 2941.25(A)—governing allied offenses of similar import—and instead argued that offenses must merge whenever they are committed with the same animus against the same victim.

After listening to counsel and defendant, the court stated the following:

> * * * I have to be real frank with you, Mr. Damron. This is probably the worst domestic violence/felonious assault I've seen since I've been on the bench; okay? I mean, nobody deserves that. If you love somebody, they don't deserve that. I know you're not justifying it. That rage, and there's, what, three other incidents where this has happened before. This is clearly the worst situation I've seen.
>
> Based upon that, it will be an eight-year sentence on count one; a five-year sentence on count two.
>
> I do agree with [defense counsel] in *State vs. Harris*, needs to merge. *I would have found, if I did not think that Harris dictated that, that those would run consecutive to each other.* By appeal, I feel I have no alternative but to run them concurrent. That's pursuant to the *State vs. Harris* 2009-Ohio-3323.

(emphasis added) Even in its sentencing entry, the court stated that the allied-offenses case of *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, required concurrent sentences.

> The Court hereby imposes the following sentence: **EIGHT (8) YEARS as to Count One and FIVE (5) YEARS as to Count Three, to be served CONCURRENT to each other pursuant to *State v. Harris*, 2009-Ohio-3323 at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION.**

The State appealed the court's sentence under R.C. 2953.08(B)(2), arguing that the trial court erred by purporting to merge the offenses of felonious assault and domestic violence through the imposition of concurrent sentences. The State contended that (1) felonious assault and domestic violence are not allied offenses, (2) allied offenses cannot be merged by concurrent

sentences, and (3) the court mistakenly abandoned the mandatory sentencing criteria in R.C. Chapter 2929.

The Tenth District affirmed, finding no error in the court's sentence. Acknowledging the trial court's mistaken reliance on *Harris* and its original intention to impose consecutive sentences, the panel concluded, "notwithstanding [the court's] conclusion that it was required to merge the two counts, it did not do so." Tenth Dist. Op. ¶10. "[B]ecause the court did not actually merge the two counts," the panel held that it could not review the underlying merger rationale. Id. ¶11. When addressing the State's argument that the court abandoned its sentencing discretion, the panel held, "Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing." Id. ¶11.

ARGUMENT

> **Proposition of Law One:** Even when the sentence falls within the permitted statutory range, the sentence is contrary to law if the court fails to consider the mandatory provisions in R.C. Chapter 2929, or if the court relies on an erroneous legal determination that removes a sentencing option from its consideration.
>
> **Proposition of Law Two:** When a court imposes concurrent prison terms under the mistaken belief that it is merging two allied offenses of similar import, sentencing error occurs, and that error can be corrected on appeal.

A sentence is not valid simply because it falls within the statutory range. "Adopting this reasoning would mean that jointly recommended sentences imposed within the statutory range but missing mandatory provisions, such as postrelease control (R.C. 2929.19(B)(3)(c)) or consecutive sentences (R.C. 2929.14(D) and (E)), would be unreviewable." *Underwood*, at ¶20. Although this Court eliminated judicial factfinding in *State v. Foster*, 109 Ohio St.3d 1, 2006-

Ohio-856, "courts have not been relieved of the obligation to consider the overriding purposes of felony sentencing, the seriousness and recidivism factors, or the other relevant considerations set forth in R.C. 2929.11, 2929.12, and 2929.13." *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶25. "Sentences that do not comport with these mandatory provisions are subject to total resentencing." *Underwood*, at ¶20.

The sentence in this case was the product of legal error, not discretion. As explained in the State's third proposition of law, felonious assault and domestic violence are not allied offenses of similar import. But even still, allied offenses cannot merge through the imposition of concurrent prison terms. "A defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶17, citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶42. "This duty is *mandatory*, not discretionary." *Underwood*, ¶25 (emphasis added); see, also, *Harris*, at ¶21. "A trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions." *Underwood*, ¶20.

The court's palpably incorrect merger ruling forced it to abandon the mandatory sentencing provisions in R.C. Chapter 2929. Its statement that it "would have" imposed consecutive prison terms showed that the court *would have* applied its discretion. But its erroneous belief that it had "no alternative" but to impose concurrent prison terms pursuant to *Harris* removed a sentencing option that it should have considered. See *Johnson*, ¶19 (because of its "mistaken belief" that consecutive sentences were required by R.C. 2929.13(F), the trial court "did not exercise its discretion to determine whether the facts and circumstances of this case warranted the imposition of consecutive prison terms.").

Accordingly, the State's first and second propositions of law warrant review.

Proposition of Law Three: Felonious assault and felony domestic violence are not allied offenses of similar import.

In *State v. Rance*, 85 Ohio St.3d 632, 635, this Court set forth a two-part analysis for determining whether offenses will "merge" for sentencing purposes under R.C. 2941.25. First, under R.C. 2941.25(A), a court must determine whether the elements of the offenses correspond to such a degree that the commission of one offense will automatically result in the commission of the other offense. *Rance*, 85 Ohio St.3d at 636, 638, 639. In this step, the elements are compared in the *statutory* abstract, i.e., at the level of the statute as written, not at the level of how the indictment is worded. Id. at 637. If the offenses do not satisfy this test, then they have a dissimilar import, the "merger" inquiry ends, and multiple sentences are allowed. Id. at 636.

If the offenses have similar import under the first step, the analysis proceeds to a second step under R.C. 2941.25(B), where the court must determine whether the offenses were committed separately or with a separate animus. *Rance*, 85 Ohio St.3d at 636. If the offenses were committed separately or with a separate animus, the defendant may be punished for both. Id. If not, the court must merge the offenses of similar import. Id. The burden of persuasion is on the defendant to prove entitlement to merger. *State v. Mughni* (1987), 33 Ohio St.3d 65, 67.

This Court's decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, did not change the *Rance* analysis. To be sure, in *Cabrales*, this Court criticized those lower courts that had purported to invoke *Rance* to impose a "strict textual comparison" test on the first prong of the allied-offenses analysis, but *Cabrales* said it was merely clarifying *Rance* and otherwise adhered to the *Rance* comparing-elements-in-abstract approach.

Under the above analysis, felonious assault and felony domestic violence are not allied offenses of similar import. Domestic violence can occur when one knowingly attempts to cause physical harm to a family or household member, but a person can commit felonious assault by

knowingly causing serious physical harm to another—irrespective of their relationship to the victim. To constitute a third-degree felony, the domestic violence statute also requires proof that the offender has two prior convictions for certain offenses where the victim was a family or household member. R.C. 2919.25(A) and (D)(4). Therefore, when comparing the statutory elements in the abstract, the two offenses possess a dissimilar import and cannot be merged. Felonious assault does not automatically or necessarily result in the commission of felony domestic violence, and, vice versa, felony domestic violence does not automatically or necessarily result in felonious assault. Indeed, the commission of each offense often occurs without the commission of the other.

While the Tenth District has now twice avoided this question, see *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, several appellate courts have concluded that the two offenses are not allied offenses of similar import. See *State v. Robinson*, 3rd Dist. No. 8-08-05, 2008-Ohio-4956, ¶26 (after *Cabrales*, the court held, "Felonious assault requires a finding of serious physical harm committed against any person, whereas domestic violence only requires a lesser degree of harm, and requires the additional circumstance that the act be against a family or household member."); see, also, *State v. Bowyer*, 8th Dist. No. 88014, 2007-Ohio-719, ¶24; *State v. Marshall*, 9th Dist. No. 22706, 2005-Ohio-5947; *State v. Yun* (2001), 5th Dist. No. 2000CA00276; *State v. Claycraft*, 12th Dist. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, ¶96-104; *State v. Bosley*, 1st Dist No. C-090330, 2010-Ohio-1570.

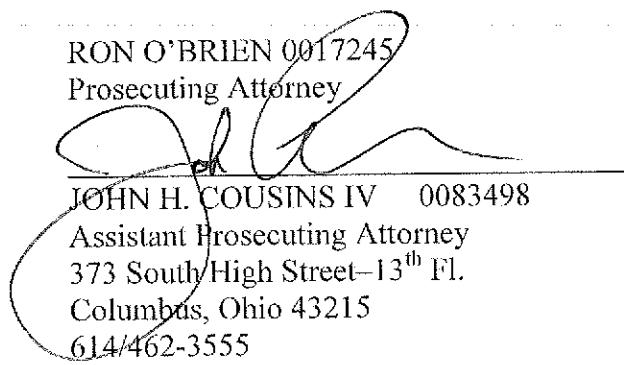
Thus, under *Rance* and *Cabrales*, felonious assault and domestic violence are not allied offenses of similar import, and the trial court's attempt to merge the two offenses violated R.C. 2941.25(A), whether or not concurrent prison terms were ultimately imposed. Accordingly, the State respectfully submits that this Court should grant further review of this proposition of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of public or great general interest as would warrant further review by this Court. Review is also warranted upon leave granted in a felony case. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



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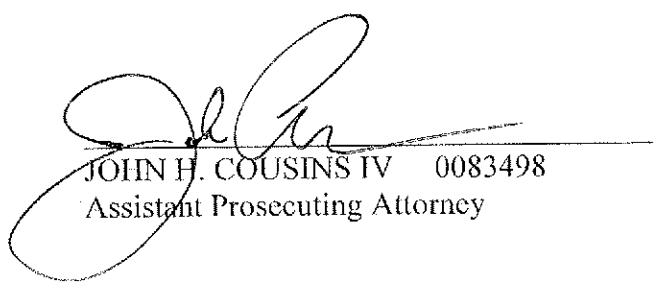
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, May 25, 2010, to KEITH O'KORN, 440 Polaris Parkway, Ste. 150, Westerville, OH 43082; Counsel for Defendant-Appellee.



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Assistant Prosecuting Attorney

APPENDIX

Opinion (rendered and filed 4-27-10) A-1

Judgment (filed 4-27-10) A-6

20682 R11

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 09AP-807
v.	:	(C.P.C. No. 08CR05-4804)
Jeremy S. Damron,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 27, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellant.

Keith O'Korn, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, state of Ohio ("state"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas imposing sentence on defendant-appellee, Jeremy S. Damron ("defendant"), after his convictions on one charge of felonious assault and one charge of domestic violence. For the reasons that follow, we affirm the trial court's judgment.

{¶2} On June 27, 2008, defendant was indicted by the Franklin County Grand Jury on one count of felonious assault, a second-degree felony; two counts of domestic violence, each a third-degree felony; and one count of rape, a first-degree felony. On

May 5, 2009, defendant entered pleas of guilty to the felonious assault count and to one of the domestic violence counts. Nolle prosequis were entered on the rape count and on the second count of domestic violence.

{¶3} On July 27, 2009, the trial court held a sentencing hearing. At the hearing, defendant's counsel argued that the felonious assault count and the domestic violence count were allied offenses of similar import, and therefore had to be merged for purposes of sentencing, citing the decision by the Supreme Court of Ohio in *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. The state argued that felonious assault and domestic violence are not allied offenses of similar import, and that the circumstances of the case made imposition of consecutive sentences on the two counts appropriate.

{¶4} After hearing argument from both sides on the issue of merger, the trial court stated:

> And I have to be real frank with you. Mr. Damron. This is probably the worst domestic violence/felonious assault I've seen since I've been on the bench; okay? I mean, nobody deserves that. If you love somebody, they don't deserve that. I know you're not justifying it. That rage, and there's, what, three other incidents where this has happened before? This is clearly the worst situation I've seen.
>
> Based upon that, it will be an eight-year sentence on count one; a five-year sentence on count two.[1]
>
> I do agree with [defense counsel] in State vs. Harris, needs to merge. I would have found, if I did not think that Harris dictated that, that those would run consecutive to each other. By appeal, I feel I have no alternative but to run them

[1] Although the trial court referred to the domestic violence charge set forth in count two of the indictment during the sentencing hearing, at the May 5, 2009 hearing, and in the court's judgment entry imposing sentence the domestic violence count to which defendant pleaded guilty was the one set forth in count three of the indictment which alleged the same date of offense as the felonious assault count set forth in count one.

> concurrent. That's pursuant to the State vs. Harris 2009-Ohio-3323.

(July 27, 2009 Tr., 15-16.)

{¶5} The state filed this appeal, and asserts a single assignment of error:

> THE COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT AND DOMESTIC VIOLENCE.

{¶6} The statute governing multiple criminal counts, R.C. 2941.25, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶7} Determining whether two offenses are allied offenses of similar import for purposes of R.C. 2941.25 requires a two-step process. In the first step, it is necessary to consider whether the elements of the offenses, compared in the abstract, correspond to such a degree that commission of one necessarily results in commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14, 26; *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291. If the first step is satisfied, in the second step, it is necessary to consider the defendant's conduct in order to determine whether the two offenses were committed separately or with a separate animus. *Cabrales* at ¶14.

{¶8} For purposes of R.C. 2941.25, a conviction consists of both a finding of guilt and a sentence. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶12. Where a defendant has been found guilty of offenses that are allied offenses, R.C. 2941.25

prohibits the imposition of multiple sentences. Id. at ¶18. This requires the trial court to effect a merger of the offenses at sentencing. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548. In effecting this merger, the trial court must give the prosecution the opportunity to identify which of the offenses to pursue at sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶43.

{¶9} In this case, the state argues that the trial court erred by concluding that it was required to merge defendant's convictions in this case because felonious assault and domestic violence are allied offenses of similar import. The case upon which the trial court relied for its conclusion that the two offenses were allied offenses, *State v. Harris*, involved an application of the "elements" portion of the *Rance-Cabrales* test to felonious assault as set forth in two separate sections of R.C. 2903.11(A), and therefore does not control application of the "elements" test to felonious assault and domestic violence. In fact, there is some authority for the proposition that the elements of the offense of felonious assault and the offense of domestic violence are not so similar that commission of one necessarily results in commission of the other, and thus the two are not allied offenses. *State v. Craycraft*, 12th Dist. No. CA2009-02-013, 2010-Ohio-596; *State v. Bosley*, 1st Dist. No. C-090330, 2010-Ohio-1570.

{¶10} However, we need not reach the issue of whether the trial court erred by concluding that it was required to merge the counts of felonious assault and domestic violence because, notwithstanding its conclusion that it was required to merge the two counts, it did not do so. In order to effect a proper merger, the trial court would have to have given the state the opportunity to elect which offense it would pursue sentencing for, and then impose a sentence only on the offense selected by the state. *Brown*. Instead,

the court imposed separate sentences on each of the two counts, but ordered the sentences to be served concurrently. Imposition of concurrent sentences is not the equivalent of merging allied offenses of similar import. *State v. Carter*, 8th Dist. No. 90504, 2009-Ohio-5961.[2]

{¶11} In this case, because the trial court did not actually merge the two counts, the only error the state can allege is that the trial court imposed concurrent sentences after having stated during the sentencing hearing that it would have imposed consecutive sentences if it were legally authorized to do so. Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing.

{¶12} Accordingly, the state's assignment of error is overruled. Having overruled the single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH, J., concurs.
TYACK, P.J., concurring separately.

TYACK, P.J., concurring separately.

{¶1} I reach the same result in this case, but for slightly different reasons. I, therefore, concur separately.

---

[2] If we were to conclude that the trial court was correct that felonious assault and domestic violence are allied offenses, the court would have erred in its subsequent sentencing, and the imposition of concurrent sentences would not have rendered this error harmless. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶30 ("[E]ven when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.").

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 09AP-807
v.	:	(C.P.C. No. 08CR05-4804)
Jeremy S. Damron,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 27, 2010, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

SADLER, J., TYACK, P.J., and McGRATH, J.

By _____
Judge Lisa L. Sadler