

NO. **11-0469**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94631

STATE OF OHIO

Plaintiff-Appellant

-vs-

MARQUES MANUS

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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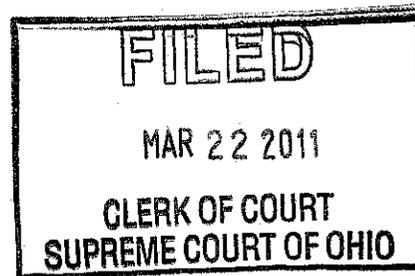
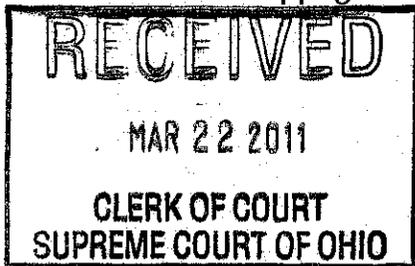


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**WHY THIS FELONY CASE IS A CASE OF GREAT PUBLIC OR GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION**

This case is important for review because the Eighth District's decision shows a misunderstanding of allied offense analysis in relation to the difference between a plea to allied offenses and imposing a sentence i.e. convicting for allied offenses. A misunderstanding by itself is insufficient for counsel to request review by this Court. But the misunderstanding has led to a new rule of law that is unworkable and imposes requirements of trial courts, prosecutors, and defense counsel well beyond any requirements of law, and allows criminal defendants the ability to challenge an allied offense determination on two separate occasions. This new rule of law, that requires an allied offense analysis to be determined before a plea, also allows a person to vacate a plea if the allied offense is ultimately determined to the *favor* of the defendant. This rule of law makes little sense because a person cannot be prejudiced if offenses that are first determined not to be allied are later determined to be allied at a sentencing hearing. This would always result in a lesser potential prison sentence. Despite this benefit, the defendant, under this rule of law established in this case, can have an allied offense determination in his favor and have the plea vacated. This leaves the State in the precarious position of then attempting to convict for offenses that have now been determined to be allied by a higher court despite any new facts that may be adduced at trial or new sentencing hearing. This cannot be the intent of Crim.R. 11 or the allied offense statute. This Court should accept for review the following proposition:

PROPOSED PROPOSITION OF LAW I: A DEFENDANT IS NOT PREJUDICED BY PLEADING TO ALLIED OFFENSES OF SIMILAR IMPORT BECAUSE A DEFENDANT CANNOT BE CONVICTED I.E., SENTENCED AND PUNISHED FOR ALLIED OFFENSES UNLESS THE DEFENDANT AFFIRMATIVELY AGREES BEFORE SENTENCING THAT THE OFFENSES ARE NOT ALLIED OFFENSES OF SIMILAR IMPORT.

STATEMENT OF THE CASE AND FACTS

The facts are not in dispute. Manus attacked his father's girlfriend and grabbed the victim's breasts and buttocks. This resulted in an indictment for kidnapping and two counts of gross sexual imposition. The counts contained various specifications.

Manus then pleaded guilty to a lesser count of abduction and two gross sexual impositions. The trial court explained the maximum penalty as if these offenses were not allied. Thus, Manus was informed of a potential prison sentence of 8 years.

Before sentencing, Manus filed a motion to withdraw guilty pleas claiming that he was prejudiced by his plea to counts that are allied. The trial court denied the motion finding that the offenses were not allied. Despite a history of committing similar sex offenses, the trial court sentenced to community control.

The Eighth District held that the pleas were invalid because Manus pleaded guilty to offenses that were allied offenses of similar import.

LAW AND ARGUMENT

PROPOSED PROPOSITION OF LAW I: A DEFENDANT IS NOT PREJUDICED BY PLEADING TO ALLIED OFFENSES OF SIMILAR IMPORT BECAUSE A DEFENDANT CANNOT BE CONVICTED IE. SENTENCED AND PUNISHED FOR ALLIED OFFENSES UNLESS THE DEFENDANT AFFIRMATIVELY AGREES BEFORE SENTENCING THAT THE OFFENSES ARE NOT ALLIED OFFENSES OF SIMILAR IMPORT.

The Eighth district's opinion conflates the issue of pleading to allied offenses and being sentenced for allied offenses. Both are completely distinct and one is not dependent upon the other. This Court should review this new precedent as it affects thousands of cases and creates three major problems:

- on appeal, a defendant can now successfully challenge a conviction for allied offense *and* have the plea vacated;
- places a burden on the state, defense counsel, and trial courts that is not contemplated under Crim.R. 11 and may not be appropriate to undertake before a plea and;
- prevents the state from pursuing sentences for offenses that were improperly determined to be allied by a superior court after more facts are produced at trial.

Because the Eight District opinion creates these problems, review is necessary.

The Eighth District ultimately held that a trial court errs in accepting a *plea* to allied offenses because defendant is prejudice by the plea and the plea must be vacated. This decision finds reliance on a 2008 Fourth District case that did not have the benefit of this Court's decision in *State v. Whitfield* that defined "conviction" in the allied offenses statute to mean sentence and punishment. In *State v. Whitfield*, this Court held that a defendant can plea or be found guilty of allied offenses but could not be found guilty *and* sentenced for allied offenses "because R.C. 2941.25(A) protects a defendant *only from being punished* for allied offenses"¹

The Fourth District decision held that a person could not be convicted and sentenced on allied offenses under this Court's precedent in *Yarbrough*. Thus, at that time, allowing pleas to allied offense is error because one of the convictions must be dismissed. But *Yarbrough* was modified by this Court's decision in *Whitfield*. Thus,

¹ *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, at paragraph 3 of the syllabus.

reliance on the Fourth District decision is error. Moreover, the Eighth District's decision that a defendant is prejudiced by *pleading* guilty to allied offenses of similar import is in direct contradiction to Tenth District's decision in *State v. Wozniak*:

However, we note that defendant's guilty pleas are valid as to both offenses because he did admit that he was guilty of each offense. Thus, it is not necessary to vacate the pleas and begin anew. The only defect here is that, after the guilty pleas were entered, the trial court did not conduct the necessary proceedings to make a determination regarding the possibility of allied offenses of similar import.

* * *

*Defendant does not argue that, had he known of the merger rule, he would not have pled guilty. Indeed, such an argument, if raised by defendant, makes little sense. Defendant was willing to plead guilty to two separate offenses which carried two separate sentences; how can defendant now argue that he would not have pled guilty if he had known his sentence would be less than what it was if he had received the maximum sentence?*²

Thus, based on Tenth District precedent, vacating a plea because the plea encompasses allied offense makes little sense. The plea must be made knowing the maximum sentence. If a defendant pleads without knowing that the offenses will ultimately merge, he cannot be prejudiced because he will face a lesser maximum penalty than explained during the plea process. An example can highlight this principle. In this case, Manus pleaded guilty to three crimes and was told that he faced a potential sentence of 8 years (5 years for abduction, and 18 months each for gross sexual imposition). Now the Eighth District has held that these offenses merge. Thus, the maximum penalty is either 5 years if the state elects the abduction or 3 years if the state elects each gross sexual imposition. This is, at a minimum, 3 less years than Manus thought he faced. Thus,

² *State v. Wozniak* (May 23, 1993), Tenth District App. No. 95APA03-345, at 6 (emphasis added).

Manus faces no prejudice by accepting a plea to allied offenses because he faces a lesser prison sentence.

If this were the only problem with the Eighth District's analysis, the case might not merit this Court's review. But this error creates a rule of law that undermines the validity of guilty pleas and creates problems for trial courts that cannot be corrected at a later time.

1. On appeal, a defendant can now successfully challenge a sentence for an allied offense and have the plea vacated.

As this Court properly held, unless a defendant affirmatively agrees that his offenses are not allied, the determination concerning allied offenses can always be challenged on direct appeal.³ With this Eighth District precedent, if the trial court improperly determined that the defendant's offenses are not allied the defendant is also entitled to have the plea vacated without demonstrating any prejudice. Thus, a defendant gets two bites at the allied offense apple and the second bite can prevent a correct ruling on the allied offense issue at a later time.

Under this newly established precedent the failure to advise that offenses are allied before the plea creates a plea that must be vacated once the appellate court establishes that the offenses are in fact allied offenses. This provides a perverse incentive for defendants to not raise the issue of allied offenses until the appeal. It is now better for the defendant to remain silent during the plea and if the offenses are ultimately determined to be allied the defendant is entitled to have the plea withdrawn despite facing less prison time than was explained during the plea process. And a

³ *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1.

finding of merger by the appellate court will prevent the state from arguing the offenses are not allied after any subsequent conviction obtained after remand.

- 2. This new rule of prevents the state from pursuing sentences for offenses that were improperly determined to be allied by a superior court after more facts are produced at trial or encourages defendants to plead guilty to indictments that contain allied offenses before the prosecutor has contacted the victim.**

As established, this rule of law encourages defendants to not raise allied issues until after the plea and to sit on this issue until direct appeal. But if the issue is raised before the plea, an adverse ruling by a trial court or adverse ruling on direct appeal concerning allied offenses prevents the State from being able to properly litigate the allied offense issue based on res judicata or law of the case. Two examples can illustrate this point.

- a. Adverse ruling by trial court concerning allied offenses before a plea is entered.**

Suppose a defendant is indicted for one count of rape and one count of kidnapping and decides to plead guilty at arraignment because the offenses are allied on the face of the indictment. The State could not prevent the plea to the indictment. The State may only have a summary report of the facts at the arraignment and scientific testing may not even be complete with certain evidence. These two offenses would legally be allied unless committed with a separate animus or separately. Without any facts to prove a separate animus, the trial court will be forced to tell the defendant that

the offenses are allied and explain that the maximum penalty is only 10 years instead of 20 years if the offense were not allied.

At a subsequent sentencing, the victim may recount facts not available at the plea that would support a finding that the offenses do not merge. The State would be left in the position to not be able to request separate punishment because that would result in an automatic vacation of the guilty plea because the defendant was not properly advised of the maximum penalty—20 years. This cannot be the intent of Crim.R. 11 and R.C. 2941.25. This new rule of law is illogical and should be review.

b. A ruling by an appeals court that counts are allied, vacating the guilty plea, and remanding for trial.

This example is based on the same facts above but suppose a trial court holds before the plea that the offenses of rape and kidnapping do not merge on the face of the indictment.⁴ Then at the subsequent hearing, the court imposes separate punishment for rape and kidnapping on some minimal facts that the prosecutor may have at this point. On appeal, the appellate court reverses and holds that the offenses merge. The appellate court will then be required to vacate the plea under the precedent in *Manus*.

At trial, additional facts may be developed that the offenses do not merge. The trial court could not impose a separate punishment because the superior court held that the offenses did merge and that issue would be law of the case. On the second appeal,

⁴ This finding would actually place the State in a untenable position. If the State later realizes the offenses do merge, the State will be ethically obligated to bring this to the court's attention and that will result in vacation of the plea at the defendant's discretion because under *Manus* an incorrect decision concerning allied offenses requires vacation of the guilty plea as opposed to only vacating the sentence.

the superior court could not then hold the crimes do not merge because the issue would be res judicata.

Thus, by attempting to require facts to be developed at a plea, the Eight District's precedent will prevent a legal sentence for separate counts in an indictment.

3. This new rule of law requiring allied offenses be determined before a plea places a burden on the state, defense counsel, and trial courts that is not contemplated under Crim.R. 11 and may not be appropriate to undertake before a plea.

Crim.R. 11 requires defendants to be advised of their maximum penalty. When viewed in the context of allied offenses, the best course of action is to allow the trial court to explain the maximum penalty as if the offenses are not allied. If a trial court proceeds as if the offenses are not allied, a defendant's potential sentence can only be reduced—never increased. But under this new precedent, proceeding as if the offenses are not allied will always result in reversible error.

There are reasons why the allied offense decision should not be determined at the plea. In Cuyahoga County, pleas are often taken with the permission but without the presence of the victim. But regardless of whether the victim is present at the plea, this rule of law requires the defendant to state his version of the facts so the court can have a clear picture of the defendant's intent to determine animus in relation to allied offenses at the time of the plea. That leaves the defendant in the position of not being able to challenge the plea for any reason because he has stated his version of the facts, which may contain inculpatory information. Some courts require defendants to swear under oath before taking a plea, those statements about intent made by the defendant could then be used against a defendant at trial. Thus, he may not be able to raise a valid

challenge to some aspect of the plea. This new rule of law creates perverse incentives to game the system and is not the intent of Crim.R. 11 or R.C. 2941.25.

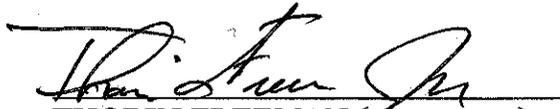
CONCLUSION

Unless the defendant is admitting that certain offenses are not allied, there is no reason to create a rule of law requiring the allied offense issue to be determined *before* time of plea. In fact, this new rule of law requiring the allied offense issue to be determined *before* the plea conflicts with the Tenth District precedent in *Wozniak*, ignores the definition of conviction established by this court in *Whitfield*, and as discussed above creates serious errors that cannot be corrected at a later time and forces defendants to forego valid challenges to a plea colloquy. This Court should exercise jurisdiction to consider the State's proposition that:

A defendant is not prejudiced by *pleading* to allied offenses of similar import because a defendant cannot be convicted ie. sentenced and punished for allied offenses unless the defendant affirmatively agrees before sentencing that the offenses are not allied offenses of similar import.

Respectfully submitted,

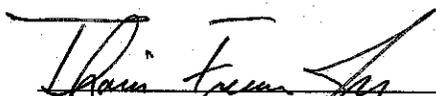
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant was mailed by regular U.S. Mail on the 21st day of March 2011 to Timothy Sweeney The 820 Building Suite 430 820 West superior Ave. Cleveland Ohio 44113 and the Ohio Public Defender 250 East Broad Street Suite 1400 Columbus Ohio 43215.



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[Cite as *State v. Manus*, 2011-Ohio-603.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94631

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARQUES MANUS

DEFENDANT-APPELLANT

**JUDGMENT:
CONVICTIONS AND SENTENCES REVERSED;
REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529473

BEFORE: Rocco, J., Kilbane, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 10, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} After entering guilty pleas to one count of abduction and two counts of gross sexual imposition, defendant-appellant Marques Manus appeals his convictions, his sentence, and his classification as a sexual offender under Ohio's version of the Adam Walsh Act (the "AWA").

{¶ 2} Manus presents seven assignments of error. He argues: the trial court committed plain error in failing to require the state to elect between his convictions because they were “allied offenses”; defense counsel provided ineffective assistance; the trial court abused its discretion in denying his pre-sentence motion to withdraw his guilty pleas and in finding his guilty pleas were knowingly, voluntarily, and intelligently made; and the AWA is unconstitutional because it offends double jeopardy proscriptions, is cruel and unusual punishment, and violates due process of law.

{¶ 3} On the record of this case, this court finds the trial court acted improperly in accepting Manus’s guilty pleas to charges that constituted allied offenses, and in convicting and sentencing Manus on all three charges. Manus’s remaining assignments of error, therefore, are moot.

{¶ 4} Consequently, Manus’s convictions and sentences are reversed, and this case is remanded for further proceedings consistent with this opinion.

{¶ 5} The record reflects Manus’s convictions result from an incident that occurred at his home on September 29, 2009. Manus, who has been diagnosed with mental illnesses that include bipolar disorder, went into a “manic” state, and attacked his father’s girlfriend. During the episode, he forced the woman to the ground and, while he was on top of her, “grabbed her about the breasts and buttocks.” The family dog jumped on him; the woman

took advantage of the distraction to flee. She ran to her car with Manus in pursuit, locked the doors, and, although Manus managed to break off a piece of the driver's side handle, drove away. Upon the arrival of the police, they found Manus in the home holding a knife, threatening to "slice himself."

{¶ 6} On October 14, 2009, Manus was indicted on three counts, charged with kidnapping with a sexual motivation specification and two counts of gross sexual imposition. He pleaded not guilty and received assigned counsel, who filed motions for discovery on October 26, 2009.

{¶ 7} At a pretrial hearing conducted on October 29, 2009, the court set the case for trial on December 14, 2009. However, at the final pretrial hearing, defense counsel requested the court to reschedule the proceeding for January 5, 2010 because he was "not available on the scheduled trial date." The court granted the request.

{¶ 8} On January 5, 2010, Manus filed a pro se motion to dismiss his case for failure to comply with the speedy trial requirements set forth in R.C. 2945.71. The court called the matter for a hearing on January 8, 2010. After the court discussed the issue with the attorneys, it determined that statutory speedy trial time had not expired.

{¶ 9} . At that point, the prosecutor informed the court that the state had "made a plea offer" to Manus, i.e., in exchange for his guilty pleas, the state would amend Count 1 to a

charge of abduction without the specification. The trial court told Manus the potential penalties involved with respect to the case as indicted, and contrasted them to those that could be imposed if he accepted the plea offer. The court then permitted Manus 15 minutes to discuss the matter with defense counsel.

{¶ 10} However, when the recess was over, Manus told the trial court that he still could not “think right now”; he was not able to “focus.” The transcript indicates Manus became somewhat agitated, since the court asked him to “calm” himself, then repeated the information concerning the potential penalties if he should be found guilty of the indictment as charged, versus the potential penalties involved for the plea agreement. Once again, the trial court took a five-minute recess for Manus to consider his choice.

{¶ 11} Defense counsel subsequently stated to the court that Manus decided to accept the state’s offer. The trial court addressed Manus and asked him if he understood everything, and Manus answered, “Yeah.”

{¶ 12} During the ensuing colloquy, Manus informed the trial court that he used two medications for his mental illness, but replied, “Yeah,” when the court asked if he “understood what we’re doing here today * * * ?” Manus thereafter responded in an appropriate manner when the trial court explained his constitutional rights and the potential penalties involved. When the court asked him how he pleaded to each charge, Manus answered, “Guilty.”

{¶ 13} The court accepted Manus's pleas and ordered him referred for a presentence report. The court then commented, "I think I'll also do a referral for recommendations on disposition." Defense counsel stated that he was "going to request" a psychological report, and the trial court responded, "I think a full report would be best also." The court set a sentencing date of January 29, 2010.

{¶ 14} On January 22, 2010, Manus filed a pro se motion to withdraw his guilty pleas. Manus also filed a memorandum in support of his motion, in which he asserted, among other things, that he had not understood that his pleas were to "allied offenses," and that the court's referral of him for a psychological evaluation placed his competency to enter his pleas into question.

{¶ 15} When Manus's case was called for sentencing, the trial court noted that Manus had filed a pro se motion to withdraw his plea, and told him that it had already determined that he "voluntarily, intelligently, and knowingly [gave] up [his] rights and enter[ed his] plea * * * ." The court further stated that it did not know "what [he was] talking about" with respect to "allied offenses," and asked the prosecutor, "Is there anything that merges here?" The prosecutor answered that she did not "believe so." When the court turned to defense counsel for his perspective, counsel merely stated that he had no opinion. The trial court denied Manus's motion.

{¶ 16} At that point, the trial court requested the prosecutor to “articulate the fact pattern” upon which Manus’s guilty pleas were based. The court thereafter stated it would “proceed to sentence.”

{¶ 17} After the trial court heard from the victim, defense counsel, a social worker, and Manus, it told Manus he was sentenced to five years of community control. The court outlined the conditions and informed him that if he did not successfully complete them, he was sentenced to concurrent prison terms of five years on Count 1, and 18 months each on Counts 2 and 3. Finally, the trial court informed Manus that, pursuant to his pleas to Counts 2 and 3, he was classified as a “Tier I sex offender,” with its attendant duties.

{¶ 18} Manus subsequently filed his timely appeal; he presents the following assignments of error for review.

{¶ 19} **“I. Manus’s convictions for abduction and gross sexual imposition should have been merged into a single conviction on only one of the offenses to be selected by the State. The court’s failure to do so violated Ohio merger law, Manus’s right to due process, and his double jeopardy right against cumulative punishments for the same offense.**

{¶ 20} **“II. Trial counsel was ineffective for not objecting to the trial court’s failure to merge the felony offenses into a single conviction on only one of the offenses to be selected by the State.**

{¶ 21} “III. The trial court abused its discretion in refusing to allow Manus to withdraw his guilty plea prior to sentencing.

{¶ 22} “IV. Manus’s guilty plea was not made knowingly, voluntarily and intelligently, and, as a result, the Court’s acceptance of that plea was in violation of Manus’s constitutional rights and Criminal Rule 11.

{¶ 23} “V. Senate Bill 10 violates the Double Jeopardy Clause of the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶ 24} “VI. Senate Bill 10, as applied to appellant, violates the United States and Ohio Constitution’s [sic] prohibition against cruel and unusual punishment.

{¶ 25} “VII. Senate Bill 10’s residency restrictions violate the Due Process Clauses of the United States and Ohio Constitutions.”

{¶ 26} In Manus’s first, third, and fourth assignments of error, he argues that the trial court acted improperly in accepting his pleas, denying his presentence motion to withdraw his pleas, and in imposing sentence on him without fully considering whether, on the facts of his case, the offenses of abduction and gross sexual imposition were allied offenses pursuant to R.C. 2941.25(A). Based upon the circumstances presented herein, these arguments have merit.

{¶ 27} Manus entered guilty pleas to one count of abduction and two counts of gross sexual imposition. Abduction is a lesser included offense to the crime of kidnapping, the crime for which Manus originally was indicted in Count 1. *State v. Cole*, Pickaway App. No. 09CA16, 2010-Ohio-4774, ¶2. This court previously also has stated that gross sexual imposition is a lesser included offense of the crime of rape. *State v. Ferrell*, Cuyahoga App. No. 92573, 2010-Ohio-1201. In addressing the application of R.C. 2941.25 to the crimes of kidnapping and rape, this court has observed as follows:

{¶ 28} “The offenses of rape and kidnapping may be allied offenses of similar import. *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772. In *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, the Supreme Court of Ohio established guidelines to determine whether kidnapping and rape are committed with a separate animus so as to permit separate punishment under R.C. 2941.25(B). The court held that ‘where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions.’ *Id.* at paragraph (a) of the syllabus. Conversely, the *Logan* court recognized that where the asportation or restraint ‘subjects the victim to a substantial

increase in risk of harm separate and apart from * * * the underlying crime, there exists a separate animus.’ Id. at paragraph (b) of the syllabus.

{¶ 29} “In the instant matter, the record reflects that the restraint of the victim was not prolonged. The victim testified that she was held in the living room for approximately five minutes and then held in the bedroom for an additional five minutes. * * * [T]he movement of the victim * * * along with the restraint of the victim, was incidental to [appellant]’s attempted rape of the victim.

{¶ 30} “We find that upon this record the evidence does not demonstrate that the offenses were significantly independent of each other or that there was a separate animus as to each offense. The evidence reveals that the kidnapping and rape arose out of the same conduct, were committed simultaneously, and were committed with the same animus. Thus, the rape and kidnapping were allied offenses of similar import for which, pursuant to R.C. 2941.25(A), [appellant] may be convicted of only one. Therefore, this court finds that the trial court erred in sentencing [appellant] on both the kidnapping and rape charges.” *State v. Miner*, Cuyahoga App. No. 85746, 2005-Ohio-5445, ¶16-18. See, also, *State v. Gibson*, Cuyahoga App. No. 92275, 2009-Ohio-4984, ¶32-34; *State v. Dudley*, Montgomery App. No. 22931, 2010-Ohio-3240, ¶50.

{¶ 31} In like manner, this court has “assumed” the lesser included offenses to kidnapping and rape, viz., abduction and gross sexual imposition, to be allied offenses with respect to an alignment of the elements, and thus, to require an assessment of the defendant’s animus in committing the crimes prior to imposing sentence. *State v. Jackson*, Cuyahoga App. Nos. 90282 and 90283, 2008-Ohio-3535, ¶17-18. That assumption is supported by the Ohio Supreme Court’s recent decision in *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314. However, the record in this case reflects that the trial court made no such assessment.

{¶ 32} In *Johnson*, the supreme court has mandated that “the conduct of the accused must be considered” in determining whether offenses are subject to merger. It is apparent from the prosecutor’s recitation of the facts in this case, facts that were not set forth until the sentencing hearing, that Manus had no separate animus in committing the abduction and the gross sexual impositions upon the victim.

{¶ 33} As stated in *State v. Underwood*, Montgomery App. No. 22454, 2008-Ohio-4748, ¶22-23:

{¶ 34} “R.C. 2941.25 implements the protections of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution. The Double Jeopardy Clauses prohibit a second punishment for the same offense. *State v. Lovejoy* (1997), 79 Ohio St.3d 440. To avoid that result, when two or

more allied offenses of similar import are charged and guilty verdicts for two or more are returned, R.C. 2941.25 mandates that 'the defendant may be convicted of only one.'

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

{¶ 36} The foregoing assessment was affirmed by the supreme court. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. See, also, *Johnson*, at ¶147.

{¶ 37} Moreover, the facts of this case are similar to those faced by the Fourth Appellate District in *State v. Taylor*, Washington App. No. 07CA29, 2008-Ohio-484. Taylor's indictment in that case for kidnapping with specifications and gross sexual imposition were based upon a single incident.

{¶ 38} According to the Fourth District's opinion, Taylor pushed the victim, who had been walking in the park, to the ground, got on top of her, bit her breast area, and grabbed her vaginal area, but the victim "got away." In exchange for Taylor's guilty pleas, the state

agreed to amend the indictment to delete the specifications. The trial court found Taylor guilty on both counts.

{¶ 39} Prior to sentencing, Taylor raised the issue of whether the offenses were allied, but the trial court did not “respond” to the argument before imposing concurrent sentences. The Fourth District in *Taylor* found that the trial court erred in concluding the offenses were not allied offenses of similar import without considering appellant’s animus, in accepting the plea, and in imposing the sentence.

{¶ 40} As in *Taylor*, in this case, Manus raised the issue in his motion to withdraw his plea. Since the issue of whether Manus’s offenses in this case, i.e., abduction and two counts of gross sexual imposition, constituted allied offenses pursuant to R.C. 2941.25(A) had not been resolved during the plea hearing, the trial court erred in accepting Manus’s pleas, in denying his presentence motion to withdraw his pleas, and in imposing sentence.¹

¹R.C. 2941.25 has been called primarily a “sentencing statute.” *State v. Kent* (1980), 68 Ohio App.2d 151, 428 N.E.2d 453, paragraph one of the syllabus. Pursuant to Crim.R.11(C)(2), the total sentence that can be imposed for offenses that are allied would constitute part of the “maximum penalty involved” in entering the plea; the defendant must be aware of that *before* the trial court can determine whether the plea is valid. See, e.g., *Johnson*, at ¶47; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224; *Taylor*, cf. *Kent*, at 156; *State v. Smith* (Dec.10, 1992), Cuyahoga App. No. 61464.

{¶ 41} Based upon the foregoing, Manus's first, third, and fourth assignments of error are sustained. This renders his remaining assignments of error moot. App.R. 12(A)(1)(c).²

{¶ 42} Convictions and sentences reversed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
MARY J. BOYLE, J., CONCUR

²Manus claims in his second assignment of error that his trial counsel rendered ineffective assistance, but, in light of this court's disposition of Manus's appeal, this claim need not be addressed. Manus argues in his fifth, sixth, and seventh assignments of error that the application of Ohio's version of the Adam Walsh Act in this case is unconstitutional. These assignments of error, however, are not ripe for review since Manus's pleas and convictions must be reversed; this court cannot presume Manus will either enter a plea to a sexual offense or be convicted of one.