

IN THE SUPREME COURT OF OHIO

14-0674

STATE OF OHIO,
Appellee,

vs.

DAVID M. ANDERSON,
Appellant,

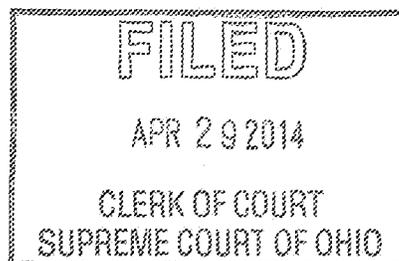
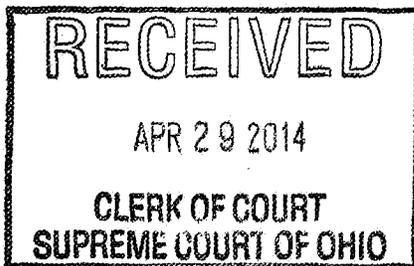
On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No.: CA-26640

NOTICE OF CERTIFIED CONFLICT, S.C.T.R. IV
BY APPELLANT, DAVID M. ANDERSON

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Notice of Certified Conflict by Appellant, David M. Anderson

Appellant, David M. Anderson, hereby give notice, pursuant to S. Ct. R. IV, §3(B)(4), of a certified conflict to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District. The April 23, 2014 Journal Entry certifying the conflict is attached and marked as Exhibit 1. The Ninth District Court's opinion in *State v. Anderson*, 9th Dist. No. 26640, 2014-Ohio-1206, ¶32, decided March 26, 2014, is attached and marked as Exhibit 2.

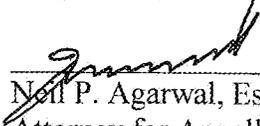
The cases in conflict are *State v. Holly*, 8th Dist. No. 95454, 2011-Ohio-2284, decided May 12, 2011, ¶21, is attached and marked as Exhibit 3; and *State v. Rogers*, 8th Dist. No. 97093, 97094, 2012-Ohio-2496, ¶34, decided June 7, 2012, is attached and marked as Exhibit 4.

Pursuant to Art. IV, §3(B)(4) of the Ohio Constitution, the Ninth Appellate District has certified a conflict as to the following issue:

If a defendant is sentenced to prison for a term of incarceration, does the trial court have the authority to issue against the defendant, a “no contact” order with the victim?

Wherefore, Appellant respectfully requests this Court to determine that a conflict exists, and order briefing in this matter to resolve said conflict.

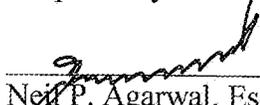
Respectfully Submitted,


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CERTIFICATE OF SERVICE

I, Neil P. Agarwal, Attorney-At-Law, certify that a true and correct copy of the foregoing was sent by First Class United States Mail to Appellee's attorney, Richard S. Kasay, Esq. at the Summit County Prosecutor's Office, 53 University Ave., Akron, Ohio 44308, on April 29, 2014.

Respectfully Submitted,



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STATE OF OHIO
COUNTY OF SUMMIT)

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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

CLERK OF COURTS

C.A. No. 26640

Appellee

v.

DAVID M. ANDERSON

Appellant

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on March 26, 2014, and the judgments of the Eighth District Court of Appeals in *State v. Rogers*, 8th Dist. Cuyahoga Nos. 97093, 97094, 2012-Ohio-2496, and *State v. Holly*, 8th Dist. Cuyahoga No. 95454, 2011-Ohio-2284. The State has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Appellant has proposed that a conflict exists between the districts on the following issue: "If a defendant is sentenced to prison for a term of incarceration, does the trial court have the authority to issue against the defendant, a 'no contact' order with the victim?"

We find that a conflict of law exists; therefore, the motion to certify is granted.


Judge

Concur:

Whitmore, J.

Belfance, P.J.

Westlaw

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

nine assignments of error for review.

Court of Appeals of Ohio,
Ninth District, Summit County.
STATE of Ohio, Appellee
v.
David M. ANDERSON, Appellant.

No. 26640.
Decided March 26, 2014.

Appeal from Judgment Entered in the Court of
Common Pleas, County of Summit, Ohio, Case No.
CR 12 05 1469.

Neil P. Agarwal, Attorney at Law, for Appellant.

Sherri Bevan Walsh, Prosecuting Attorney, and
Richard S. Kasay, Assistant Prosecuting Attorney,
for Appellee.

CARR, Judge.

*1 {¶ 1} Appellant David Anderson appeals the
judgment of the Summit County Court of Common
Pleas. This Court affirms.

I.

{¶ 2} Anderson was indicted on one count of
kidnapping in violation of R.C. 2905.01(A)(4), a
felony of the first degree; and one count of rape in
violation of R.C. 2907.02(A)(2), a felony of the
first degree. Anderson pleaded not guilty at arraign-
ment and the matter was tried before a jury. The
jury found Anderson guilty of both counts. The trial
court adjudicated Anderson a Tier III sex offender,
and sentenced him to seven years in prison for kid-
napping and to ten years for rape, running the terms
consecutively. The trial court further ordered that
Anderson shall have no contact with the victim.
Anderson filed a timely appeal in which he raises

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED REVERS-
IBLE AND PLAIN ERROR BY CONVICTING
AND SENTENCING ANDERSON TO MUL-
TIPLE COUNTS FOR RAPE AND KIDNAP-
PING AS THEY WERE ALLIED OFFENSES
OF A SIMILAR IMPORT.

{¶ 3} Anderson argues that the trial court com-
mitted plain error by sentencing him on both kid-
napping and rape because the two counts were al-
lied offenses of similar import. This Court dis-
agrees.

{¶ 4} A reviewing court reviews the trial
court's determination whether to merge offenses
pursuant to R.C. 2941.25 de novo. *State v. Willi-
ams*, 134 Ohio St.3d 482, 2012--Ohio-5699, ¶ 1.

{¶ 5} Ohio's allied offense statute provides as
follows:

(A) Where the same conduct by defendant can be
construed to constitute two or more allied of-
fenses of similar import, the indictment or in-
formation may contain counts for all such of-
fenses, 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 indict-
ment or information may contain counts for all
such offenses, and the defendant may be con-
victed of all of them.

R.C. 2941.25. Thus, two or more offenses
arising from the same conduct and similar import
only may result in one conviction. R.C.
2941.25(A). Two or more offenses may result in

EXHIBIT 2.p.1

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multiple convictions, however, if: (1) they are offenses of dissimilar import; (2) they are separately committed; or (3) the defendant possesses a separate animus as to each. R.C. 2941.25(B).

{¶ 6} “When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.” *State v. Johnson*, 128 Ohio St.3d 153, 2010–Ohio–6314, syllabus. A plurality of the Ohio Supreme Court set forth a two-part test to analyze whether two offenses are allied offenses of similar import. First, one must determine whether the offenses at issue could be committed by the same conduct. *Id.* at ¶ 47. One does so by asking “whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other.” (Emphasis sic.) *Id.* at ¶ 48. *See also id.* at ¶ 66 (O’Connor, J., concurring) (offenses are allied “when their elements align to such a degree that commission of one offense would probably result in the commission of the other offense.”). Second, one must ask whether the offenses actually were committed by the same conduct, “i.e., ‘a single act, committed with a single state of mind.’” *Johnson* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008–Ohio–4569, ¶ 50 (Lanzinger, J., dissenting). If the answer to both inquiries is yes, the offenses will merge. *Johnson* at ¶ 50.

*2 {¶ 7} Anderson was convicted of kidnapping in violation of R.C. 2905.01(A)(4) which states: “No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim’s will[.]” Anderson was further convicted of rape in violation of R.C. 2907.01(A)(2) which states: “No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.”

{¶ 8} The State concedes, and this Court

agrees, that it is possible to commit rape and kidnapping with the same conduct. “Sexual activity” includes “sexual conduct.” R.C. 2907.01(C). A perpetrator necessarily restrains the victim’s liberty while compelling the victim to submit to sexual conduct. *See State v. Logan*, 60 Ohio St.2d 126, 130 (1979) (“[I]mplicit within every forcible rape is a kidnapping.”) Therefore, the crucial inquiry in this case is whether Anderson committed kidnapping and rape separately or with a separate animus so that the two offenses would not merge. *Johnson* at ¶ 51.

{¶ 9} The Ohio Supreme Court has held:

In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

(a) 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;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

Logan, 60 Ohio St.2d at syllabus.

{¶ 10} In this case, Anderson does not challenge the jury’s finding that the State proved all elements of both rape and kidnapping at trial. The evidence demonstrated that Anderson stopped the victim as she was walking outside, offered her a

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ride to church, drove her instead to another location, and forced her to engage in fellatio and cunnilingus. Based on our review of the evidence of Anderson's conduct, this Court concludes that he committed the offenses of kidnapping and rape separately.

{¶ 11} The victim volunteered to cook lunch every Tuesday at her church as part of the church's community outreach program. To prepare the elaborate lunches, the cooks were required to arrive at the church around 8:00 a.m. When her friend failed to pick her up in the morning of May 15, 2012, the victim decided to make the 15-minute trek on foot. As she was walking, she noticed a car pass her and circle around several times to pass her again and again. As she approached a car wash, she noticed the same car parked in the business' parking lot. Anderson was alone in the car. He called the victim over to his car and asked her if she would like a ride. The victim told him that she was going to Macedonia Baptist Church and she accepted his offer of a ride to church.

*3 {¶ 12} Anderson began driving the victim in the direction of the church. As he reached the front of the church, he began to punch the victim repeatedly in the head and face. He then drove past the church, turned down a side street, and began driving away from the church. Until Anderson began punching her, the victim was unaware that he was not taking her to the church. Anderson threatened to shoot the victim, preventing her out of fear from rolling down her window to yell for help. After driving on several streets, Anderson quickly pulled into the driveway of an abandoned house which was located next door to another abandoned house. Anderson drove to the back of the house which was surrounded on three sides by heavy foliage, bushes, and trees. He then told her to get out of the car and get in the back seat or he would shoot her. She dared not attempt to run away out of fear of being shot and killed.

{¶ 13} Anderson joined the victim in the back seat where he again punched her repeatedly and

strangled her until she began to black out. Despite her pleas that he "stop it," Anderson forced the victim to perform fellatio until he ejaculated in her mouth. He then forced the victim to remove one shoe and one leg from her pants, and forced her to submit to cunnilingus. The victim was able to escape after the police arrived on the scene after a neighbor heard her screams and called 911.

{¶ 14} This Court concludes that Anderson did not commit one single act of kidnapping merely incidental to his restraining the victim during sexual activity. Rather, his conduct indicated that he kidnapped the victim the moment she entered his car, deceiving her that he was driving her to church. Anderson actually drove to the church, but bypassed it at the last moment before beginning to punch the victim in the face and threatening to shoot her. Moreover, he drove her to the back yard of an abandoned house next to another abandoned house where his car was secluded from view by heavy foliage, trees, and bushes which also reasonably muffled any sounds from his car. But for an attentive neighbor who was sitting on her porch across the street, and whose senses were heightened by the sight of an unfamiliar car pulling quickly into the driveway of a vacant house, Anderson's car would have been both visually and audibly secluded from attention. In addition, Anderson did not begin his sexual assault of the victim immediately upon parking his car behind the vacant house. Instead, he forced the victim out of the car and again into the car's back seat where he began to hit and strangle the victim to compel her to submit to sexual conduct. Based on this conduct, this Court concludes that Anderson committed the offenses of kidnapping and rape separately, or with a separate animus. The first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY SENTENCING ANDERSON TO CONSECUTIVE SENTENCES IN VIOLATION OF R.C. 2929.14(C).

ASSIGNMENT OF ERROR III

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*4 ANDERSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES WAS CONTRARY TO LAW.

{¶ 15} Anderson argues that the trial court erred by sentencing him to consecutive sentences without making the factual findings required by R.C. 2929.14(C)(4). This Court disagrees.

{¶ 16} R.C. 2929.14(C)(4) states:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by

the offender.

{¶ 17} This Court recently discussed the requirement that the trial court make the statutory findings enunciated in R.C. 2929.14(C)(4) prior to imposing consecutive sentences. *State v. Brooks*, 9th Dist. Summit Nos. 26437, 26352, 2013-Ohio-2169. We recognized that, although the trial court need not explain its reasoning behind its findings, it must nevertheless make the requisite findings. *Id.* at ¶ 13. Moreover, we held that the trial court must make those findings "at the sentencing hearing on the record[.]" although it need not invoke "talismanic words." *Id.* at ¶ 12 and 13. It is sufficient that the findings are clear from a review of the record. *Id.* at ¶ 12.

{¶ 18} In this case, Anderson concedes that the trial court found that consecutive sentences were necessary to protect the public and to punish him. He argues, however, that the trial court failed to find that (1) consecutive sentences were not disproportionate to the seriousness of his conduct and to the danger he poses to the public, and (2) one of the factors in R.C. 2929.14(C)(4)(a)/(b)/(c) applied. A careful reading of the trial court's comments during the sentencing hearing belies Anderson's arguments.

{¶ 19} At the sentencing hearing, the trial court found, based on the evidence adduced at trial, that "no single prison term could adequately reflect the seriousness of [Anderson's] conduct." Moreover, the trial court noted the "heinous nature of these offenses[.]" including the "significant mental * * * [and] physical harm" Anderson perpetrated on the victim. The trial court referred to the victim's letter which a representative read at the sentencing hearing in which the victim wrote that Anderson's acts against her have rendered her suicidal and "bottled up in fear." The court further referred to the photographs of the victim's injuries and remarked that all of Anderson's statements about the incidents constituted "lie after lie." Finally, the trial court expressly found that the kidnapping and rape were "two separate incidents," i.e., that they were committed as

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part of more than one course of conduct. Accordingly, based upon the record and considering these findings as a whole, this Court concludes that the trial court made the requisite findings that consecutive sentences were not disproportionate to the seriousness of Anderson's conduct, that the rape and kidnapping were committed as part of more than one course of conduct, and that a single prison term would not adequately reflect the seriousness of Anderson's conduct which resulted in great and unusual harm. Anderson's second assignment of error is overruled.

*5 {¶ 20} Anderson argues that defense counsel was ineffective for failing to argue that the trial court's imposition of consecutive sentences was contrary to law. This Court uses a two-step process as set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), to determine whether a defendant's right to the effective assistance of counsel has been violated.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

{¶ 21} Given our resolution of Anderson's second assignment of error, we conclude that trial counsel's performance was not deficient. Anderson's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT FAILED TO PROPERLY NOTIFY ANDERSON OF HIS OBLIGATIONS TO REGISTER AS A SEX OFFENDER AT HIS SENTENCING HEARING.

ASSIGNMENT OF ERROR V

ANDERSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT AT HIS SENTENCING HEARING THAT THE TRIAL COURT FAILED TO PROPERLY NOTIFY HIM OF HIS OBLIGATIONS TO REGISTER AS A SEX OFFENDER.

{¶ 22} Anderson argues that this Court must reverse and remand for a new sentencing hearing because the trial court failed to properly explain his sex offender registration duties or ensure that Anderson read the form explaining his registration duties. This Court disagrees.

{¶ 23} R.C. 2950.03(A)(2) requires a judge to provide notice to the offender of his duty to register. Anderson argues that the trial court failed to comply with R.C. 2950.03(B)(1)(a), which states:

If the notice is provided to an offender under division (A)(1) or (2) of this section, * * * the judge shall require the offender to read and sign a form stating that the offender's duties to register, to file a notice of intent to reside, if applicable, to register a new residence address or new school, institution of higher education, or place of employment address, and to periodically verify those addresses, and the offender's duties in other states as described in division (A) of this section have been explained to the offender. If the offender is unable to read, * * * the judge shall certify on the form that the * * * judge specifically informed the offender of those duties and that the offender indicated an understanding of those duties.

{¶ 24} To the extent that Anderson argues that the trial court judge erred by failing to explain his registration duties, this Court disagrees. The statute requires the judge to "specifically inform[] the offender of those duties" under circumstances where the offender is unable to read the recitation of duties himself on the applicable form. Anderson has

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not alleged that he was unable to read at the time of the sentencing hearing. Moreover, he does not dispute that the trial court provided him with the relevant form that delineated his registration duties. In addition, he admits that he signed that form.

*6 {¶ 25} At the sentencing hearing, the trial court informed Anderson that he was a Tier III sex offender and that, upon release from prison, he would be required to “register for life with in-person verification every 90 days.” The judge then gave the form that delineated Anderson’s registration duties to his attorney so that Anderson could complete it. Again, he does not dispute that he signed the form. Under these circumstances where Anderson was represented by counsel, and the trial court summarized his registration duties and provided the applicable form to defense counsel for completion by Anderson, we presume that defense counsel reviewed the form with Anderson.

{¶ 26} Finally, Anderson argues that the form he admits he signed, and which enunciated his registration duties, is a nullity because it was not filed with the clerk’s office until after he filed his notice of appeal. Anderson cites no authority for the proposition that the form must be filed with the clerk, and we find none. Anderson’s fourth assignment of error is overruled.

{¶ 27} Anderson further argues that trial counsel was ineffective for failing to object to the trial court’s failure to notify him of his registration duties. Given our conclusion that the trial court did not fail to provide him with adequate notification, we conclude that defense counsel’s performance was not deficient. Anderson’s fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN SENTENCING ANDERSON FOR KIDNAPPING AS A FELONY OF THE FIRST DEGREE, INSTEAD OF A FELONY OF THE SECOND DEGREE, BECAUSE THE JURY VERDICT DID NOT IN-

CLUDE THE DEGREE OF THE OFFENSE, NOR ANY AGGRAVATING ELEMENTS AS REQUIRED UNDER R.C. 2945.75(A)(2) AND *STATE V. PELFREY*, 112 OHIO ST.3D 422, 2007–OHIO–256.

ASSIGNMENT OF ERROR VII

ANDERSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT SHOULD HAVE SENTENCED ANDERSON ON HIS KIDNAPPING CONVICTION AS A FELONY OF THE SECOND DEGREE.

{¶ 28} Anderson argues that the trial court erred by sentencing him for kidnapping as a felony of the first degree pursuant to *State v. Pelfrey*, 112 Ohio St.3d 422, 2007–Ohio–256. This Court disagrees.

{¶ 29} In *Pelfrey*, the Ohio Supreme Court held: “Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” ¶ 14. *See also State v. McDonald*, 137 Ohio St.3d 517, 2013–Ohio–5042 (reaffirming the analysis enunciated in *Pelfrey*). R.C. 2945.75(A)(2) states: “When the presence of one or more additional elements makes an offense one of more serious degree [,][a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.” This Court concludes that R.C. 2945.75 and, therefore, *Pelfrey* are not implicated in this case.

*7 {¶ 30} R.C. 2905.01(C)(1) classifies kidnapping as a felony of the first degree except where the offender “releases the victim in a safe place un-

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harmed[.]” Under those circumstances, kidnapping is a felony of the second degree. *Id.* The Ohio Supreme Court has held that the statutory provision reducing the offense level of kidnapping “is not an element of the offense; rather, the accused must plead and prove it in the fashion of an affirmative defense.” *State v. Sanders*, 92 Ohio St.3d 245, 265 (2001). Accordingly, no aggravating or additional element must be proved by the State to elevate kidnapping to a felony of the first degree. Instead, the defendant bears the burden of establishing the existence of a mitigating factor which might reduce the offense level. As neither R.C. 2945.75 nor *Pel-frey* is implicated under these circumstances, Anderson's sixth assignment of error is overruled.

{¶ 31} Anderson further argues that trial counsel was ineffective for failing to argue that the trial court should have sentenced him on the kidnapping charge as a felony of the second degree. Given our conclusion that the trial court did not err by sentencing Anderson for a felony of the first degree, we must conclude that trial counsel's performance was not deficient. Accordingly, Anderson's seventh assignment of error is overruled.

ASSIGNMENT OF ERROR VIII

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT ORDERED ANDERSON HAVE “NO CONTACT” WITH THE PROSECUTING WITNESS.

ASSIGNMENT OF ERROR IX

ANDERSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT'S ORDER OF HAVING “NO CONTACT” WITH THE PROSECUTING WITNESS WAS UNLAWFUL.

{¶ 32} Anderson argues that the trial court erred by ordering him to have no contact with the victim as part of his sentence. Although the State concedes error, this Court does not agree.

{¶ 33} Anderson relies on authority out of the Eighth District for the proposition that a trial court has no authority to impose a no contact order upon a criminal defendant who has been sentenced to prison. *See State v. Holly*, 8th Dist. Cuyahoga No. 95454, 2011-Ohio-2284, ¶ 21 (“While a ‘no contact’ order may be properly imposed as a sanction pursuant to R.C. 2929.25 when a trial court places a defendant on community controlled sanctions, we find no authority in Ohio sentencing law to allow for such a penalty when imposing a prison term * * *.”) This Court is neither bound nor persuaded by the holding of our sister district.

{¶ 34} Arguably, R.C. 2929.13(A) provides that, “if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, * * * [it] may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.” R.C. 2929.16 and R.C. 2929.17 enumerate various community control sanctions relevant to felons. Some appellate districts have recognized that no contact orders constitute community control sanctions. *See e.g., State v. Snyder*, 3d Dist. Seneca No. 13-12-38, 2013-Ohio-2046, ¶ 55; *State v. Miller*, 12th Dist. Butler No. CA2010-12-336, 2011-Ohio-3909, ¶ 21. However, nowhere do R.C. 2929.16 and R.C. 2929.17 expressly identify no contact orders as community control sanctions. While the imposition of a no contact order may under certain circumstances function as a community control sanction, there is nothing to indicate that it may only function as a community control sanction. Not unlike restitution which, pursuant to R.C. 2929.18, may be ordered whether or not the defendant has been sentenced to prison, a no contact order provides a means to attempt to restore the victim, even where that restoration manifests as peace of mind. While there is no statutory provision expressly authorizing the imposition of a no contact order, this Court finds it significant that there is no provision prohibiting the imposition of such orders.

*8 {¶ 35} Moreover, the imposition of a no

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contact order to shield the victim from future harassment, in conjunction with a prison sentence, is consistent with the legislative intent relative to sentencing. R.C. 2929.11(A) establishes two overriding purposes of felony sentencing: to protect the public and to punish the offender, both in consideration of avoiding any unnecessary burden on the state or local government resources. Unfortunately, mere imprisonment does not prevent a defendant from using various direct and indirect means to contact his victim to prolong the victim's suffering, but a no contact order puts the defendant, and the prison, on notice about the victim's wishes.

{¶ 36} A no contact order not only serves the interests of the victim, and meets one of the primary goals of sentencing, but it also gives effect to the Ohio Constitution's amendment to recognize the rights of crime victims. In 1994, the people voted to amend the Ohio Constitution to include a provision addressing the rights of victims of crimes. Article I, Section 10(a), Ohio Constitution provides, in pertinent part: "Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process." No contact orders, imposed in conjunction with sentences of imprisonment, serve the overriding purpose of protecting the public without imposing an unnecessary burden on government resources.

{¶ 37} The General Assembly and the Ohio Constitution have encouraged victims to participate in the criminal justice system. This allows judges to have a greater understanding of the harm caused by the defendant's crimes and gives a voice to the victims of crime. It would be an odd, and unfortunate, result if the victim, after being invited into the courtroom to participate in the process, could not be protected from the defendant after he leaves the courtroom and enters prison.

{¶ 38} There are already mechanisms in place which require the prison system to protect victims. See State of Ohio Department of Rehabilitation and Correction Policy No. 03-OVS-1, eff. June 24, 2013, VI(A)(4)(a) (providing that a victim may request in writing a cease and desist order from the institution, directing the inmate to stop unwanted or inappropriate contact). In addition, penal institutions themselves may establish rules prohibiting inmates from having contact with victims. OAC 5120-9-06, 5120-9-07, and 5120-9-08 establish inmate rules of conduct and prescribe dispositions for rule violations. OAC 5120-9-06(C) enumerates sixty-one types of rules violations, including "[a]ny violation of any published institutional rules, regulations or procedures." (C)(61). Although the onus is placed on the victim to initiate such mechanisms by notifying the institution and filing a written request, the Department of Rehabilitation and Correction has developed a policy to address these requests. Accordingly, a court-issued no contact order, i.e., a writing evidencing the victim's wishes expressed in court in person or through an advocate, would place no greater burden on the institution or any government resources.

*9 {¶ 39} This Court concludes that a trial court may impose a no contact order as part of its sentence. Anderson has not argued, and thus we need not review, whether the terms of the no contact order in this case are appropriate. We recognize that there may be other cases where a no contact order could be troublesome. For example, if a trial court ordered no contact between the defendant and his child, the defendant may have other constitutional arguments that do not apply here. Because we are not presented with that argument in this case, we need not address it.

{¶ 40} Based on the above discussion, this Court concludes that there is no prohibition against a trial court's issuance of a no contact order in conjunction with the imposition of a prison sentence. Accordingly, the trial court did not err by ordering no contact between Anderson and the victim not-

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withstanding his prison sentence. Anderson's eighth assignment of error is overruled.

{¶ 41} Anderson argues in his final assignment of error that trial counsel was ineffective for failing to object to the imposition of the no contact order in conjunction with a term of imprisonment. Based on our resolution of Anderson's eighth assignment of error, this Court concludes that trial counsel's performance was not deficient. Anderson's ninth assignment of error is overruled.

III.

{¶ 42} Anderson's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

WHITMORE, J., concurs.

BELFANCE, P.J., Concurring in part, and Dissenting in part.

{¶ 43} I concur in the majority's judgment with respect to Mr. Anderson's first assignment of error as I agree that the offenses should not have merged for purposes of sentencing because they were separ-

ately committed. *See State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 51 (“[I]f the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R .C. 2941.25(B), the offenses will not merge.”). (Emphasis deleted.) I also concur with the majority's resolution of Mr. Anderson's fourth, fifth, sixth, and seventh assignments of error. However, I respectfully dissent from the majority's resolution of Mr. Anderson's second, third, eighth, and ninth assignments of error.

*10 {¶ 44} Mr. Anderson asserts in his second assignment of error that the trial court failed to make the findings required by R .C. 2929.14(C)(4). Because I cannot conclude that the trial court made one of the required findings, I agree. While it is true that the trial court is not required to use the precise words in the statute in making its findings, it still must be clear from the transcript of the sentencing hearing that the trial court made all the required findings. *See State v. Brooks*, 9th Dist. Summit Nos. 26437, 26352, 2013-Ohio-2169, ¶ 12-13. From the sentencing hearing, I cannot conclude that the trial court found anything that would comport with the finding that “consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public [.]” R.C. 2929.14(C)(4). While the finding in R.C. 2929.14(C)(4)(b), which I agree was made by the trial court, references the seriousness of the offender's conduct, there is nothing in the record which speaks to whether consecutive sentences would be disproportionate to the danger Mr. Anderson poses to the public as required by the statute. Accordingly, I would sustain Mr. Anderson's second assignment of error and remand the matter to the trial court for further proceedings.

{¶ 45} Because I would sustain Mr. Anderson's second assignment of error, I would decline to address Mr. Anderson's third assignment of error as it would have been rendered moot. *See App.R.*

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12(A)(1)(c).

{¶ 46} Mr. Anderson argues in his eighth assignment of error that the trial court erred when it ordered him to have no contact with the victim as part of his sentence. In my view, if the no-contact order was ever a permissible sanction in the felony sentencing scheme, it would be via R.C. 2929.17. However, upon close examination of the applicable statutes, I would conclude that the trial court could not impose this sanction while Mr. Anderson was in prison and, thus, lacked authority to include that as part of Mr. Anderson's sentence.

{¶ 47} “Judges have no inherent power to create sentences. Rather, judges are duty-bound to apply sentencing laws as they are written. [T]he only sentence which a trial court may impose is that provided for by statute.” (Internal quotations and citations omitted.) *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 22. Thus, I question the majority's premise that the trial court possesses authority to impose a no-contact order, simply because there is no provision expressly preventing the imposition of this sanction. In essence, that analytical pathway would open the door to sentencing based upon the legislature's silence. However, this Court has previously concluded, on more than one occasion, that penalties that are not authorized by any statute are impermissible. *See State v. Mose*, 9th Dist. Medina No. 11CA0083-M, 2013-Ohio-635, ¶ 15 (concluding banishment is not authorized under R.C. 2929.21 as a permissible penalty); *State v. Creel*, 9th Dist. Summit No. 26334, 2012-Ohio-3550, ¶ 6 (concluding there was no statutory authority authorizing trial court to order defendant to spend each Christmas Eve he spent in prison in solitary confinement).

*11 {¶ 48} Moreover, the majority's reference to Article I, Section 10(a) of the Ohio Constitution provides no support for its position. That section does not authorize trial courts to impose no-contact orders as part of a sentence. The language itself specifies that victims' rights to protection are to be delineated by the general assembly as it “shall

define and provide by law[.]” Article I, Section 10(a), Ohio Constitution.

{¶ 49} In sentencing a defendant for a felony, “R.C. 2929.11 and 2929.12 * * * serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 17. At the sentencing hearing, the trial court is charged with determining, based upon the governing statutes, the appropriateness of prison and community control sanctions. *See* R.C. 2929.19(B)(2), (4). R.C. 2929.13 provides sentencing guidelines based on the type and degree of the offense at issue. *See* R.C. 2929.13. R.C. 2929.13(A) states in part that

{e}xcept as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender *that are provided in sections 2929.14 to 2929.18 of the Revised Code.*^{FN1}

FN1. R.C. 2929.13(A) additionally provides that “if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court * * * may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.”

(Emphasis added.) R.C. 2929.14 details permissible prison terms, whereas R.C. 2929.15 through 2929.18 discuss community control sanctions.

{¶ 50} Once an offender is committed to the prison system, the legislature has authorized the director of rehabilitation and correction or his or her designee to assume legal custody of the offender. R.C. 5120.01. In addition, the legislature has provided that “[a]ll duties conferred on the various

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divisions and institutions of the department by law or by order of the director shall be performed under the rules and regulations that the director prescribes and shall be under the director's control." R.C. 5120.01. Unsurprisingly, the Ohio Administrative Code contains provisions regulating inmate conduct. *See, e.g.*, Ohio Adm.Code 5120-9-06(C).

{¶ 51} If the trial court sentences an offender to nonresidential community control pursuant to R.C. 2929.17, the trial court is charged with doing several things. For instance, the trial court is required to "impose as a condition of the sanction that, during the period of the nonresidential sanction, the offender shall abide by the law and shall not leave the state without the permission of the court or the offender's probation officer." *See* R.C. 2929.17. Additionally, the trial court is required to

notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

*12 R.C. 2929.19(B)(4).

{¶ 52} As the majority points out, no-contact orders are not specifically mentioned in the felony sentencing statutes. However, R.C. 2929.17 provides a list of possible penalties that are prefaced with the language that the sanctions that may be placed upon an offender under nonresidential community control "include, but are not limited to," those in the list. Accordingly, it is reasonable to place a no-contact order in the category of nonresidential community control sanctions. *See, e.g.*, *State v. Miller*, 12th Dist. Butler No.

CA2010-12-336, 2011-Ohio-3909, ¶ 21; *State v. Walton*, 3d Dist. Wyandot Nos. 16-12-13, 16-12-14, 2013-Ohio-2147, ¶ 7. Further, I cannot locate any other category of penalty in the felony sentencing statutes under which it would seem appropriate to place no-contact orders.

{¶ 53} Thus, I would conclude that, in imposing a no-contact order on Mr. Anderson, the trial court imposed a nonresidential community control sanction pursuant to R.C. 2929.17. Starting with that premise, the next question is whether the trial court, after sentencing Mr. Anderson to prison for both offenses, could also impose a community control sanction pursuant to R.C. 2929.17.

{¶ 54} Notably, as discussed above, R.C. 2929.13(A) does provide in part that,

[e]xcept as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code.

Thus, on its face, that section would appear to authorize a trial court to sentence a defendant to both prison under R.C. 2929.14 and impose a no-contact order under R.C. 2929.17, provided the prison term is non-mandatory. *See* R.C. 2929.13(A). However, given the nature and scheme of the felony sentencing statutes, it appears that the legislature did not intend to authorize the imposition of nonresidential community control sanctions for any offenders who are in prison. *See State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, ¶ 20 ("[W]e read all statutes relating to the same general subject matter together and interpret them in a reasonable manner that give[s] proper force and effect to each and all of the statutes.") (Internal quotations and citations omitted.) Furthermore, if the legislature had intended to allow individuals sentenced to non-

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mandatory prison time to be simultaneously subject to community control sanctions, the result would be particularly anomalous when an offender is sentenced for offenses that include both a mandatory prison term and a non-mandatory prison term.^{FN2} Under that scenario, a trial court would be precluded from imposing any nonresidential sanction provided in R.C. 2929.17 in connection with the mandatory prison sentence, yet at the same time could impose that same prohibited sanction in connection with the non-mandatory prison sentence.

FN2. Such would be the case for Mr. Anderson given that he was sentenced to mandatory and non-mandatory prison terms. *See* R.C. 2929.13(F).

*13 {¶ 55} The basic assumption underlying the imposition of a nonresidential community control sanction is that the offender is out in the community. Accordingly, the trial court has discretion to impose a variety of sanctions designed to proscribe certain conduct and encourage or even mandate other conduct. This becomes apparent when one considers that, in imposing a nonresidential community control sanction, the trial court is *mandated* to require the offender not to leave the state absent permission of the offender's probation officer. *See* R.C. 2929.17. If the legislature intended to authorize the imposition of nonresidential community control sanctions when imposing a prison sentence, then this mandatory requirement makes no sense because, if an offender is in prison, it would be impossible for him or her to leave the state (absent escaping from prison). Moreover, offenders who are in prison do not have probation officers, and, thus, they cannot obtain permission to leave the state from a probation officer. Further, in imposing a community control sanction, the trial court must also inform the offender of the penalties for violating the sanction, which could include prison. *See* R.C. 2929.19(B)(4). However, if the offender is in prison to begin with this would make no sense. It is also apparent that advising an already imprisoned offender that the violation will result in

prison does not pose much of an incentive to the offender to not violate the community control sanction. Accordingly, if a trial court was able to impose a prison term along with a community control sanction simultaneously, it does not appear there would be any real penalty for the offender failing to abide by the community control sanction.

{¶ 56} Thus, if a portion of R.C. 2929.13(A) is read in isolation, it appears that an offender with a non-mandatory prison term could receive both prison and a nonresidential community control for the same offense. However, it is evident that any attempt to apply R.C. 2929.17 to an offender sentenced to prison leads to absurd results. Thus, reading the felony statutory scheme as a whole, it is apparent that the legislature did not authorize the imposition of nonresidential community control sanctions when sentencing an offender to a term of prison. Accordingly, I would conclude that when a trial court sentences a defendant to prison for a felony offense, the trial court lacks authority to additionally impose a no-contact order as part of the sentence for that offense.

{¶ 57} While I share the majority's concern for the mental well-being of the victim, I also reach this conclusion given that the legislature has enacted statutes pertaining to the establishment and operation of the state correctional system and there are many avenues for protection of the victim. *See generally* R.C. 5120.01 et seq. As part of this system, there is a great deal of oversight concerning a prison inmate's conduct. As noted above, once the offender is in prison there are rules in place to regulate the individual's conduct. *See* Ohio Adm.Code 5120-09-06. There is already a provision within the Ohio Administrative Code that indicates it is a violation of the inmate rules of conduct to "[u]se [] telephone or mail to threaten, harass, intimidate, or annoy another." Ohio Adm.Code 5120-9-06(C)(55). Punishments for violations of the inmate rules of conduct are detailed in Ohio Adm.Code 5120-9-07 and 5120-9-08. *See* Ohio Adm.Code 5120-9-06(B). However, they are not

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limited to those penalties. Both Ohio Adm.Code 5120-9-07 and 5120-09-08 indicate that nothing in either rule "shall preclude department staff from referring such inmate conduct to law enforcement for prosecution as a criminal offense, or the state from prosecuting such conduct as a criminal offense." See Ohio Adm.Code 5120-9-07, 5120-9-08. Thus, the mere fact that the trial court cannot issue a no-contact order as part of a sentence in these particular circumstances does not mean that the victim would be unprotected from harassment by the imprisoned offender.

*14 {¶ 58} Because I can find no authority for the trial court to sentence Mr. Anderson to prison and impose a no-contact order simultaneously, I would sustain Mr. Anderson's eighth assignment of error and vacate the no-contact order from his sentence.

{¶ 59} In light of the resolution of Mr. Anderson's eighth assignment of error, his ninth assignment of error would be moot, and I would decline to address it.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
STATE of Ohio, Plaintiff–Appellee
v.
Eric HOLLY, Defendant–Appellant.

No. 95454.
Decided May 12, 2011.

Criminal Appeal from the Cuyahoga County Court
of Common Pleas, Case No. CR–536604.

Robert L. Tobik, Cuyahoga County Public Defend-
er, by Erika B. Cunliffe, Assistant Public Defender,
Cleveland, OH, for appellant.

William D. Mason, Cuyahoga County Prosecutor,
by Jeffrey S. Schnatter, Assistant County Prosec-
utor, Cleveland, OH, for appellee.

Before BOYLE, J., BLACKMON, P.J., and E.
GALLAGHER, J.

MARY J. BOYLE, J.

*1 {¶ 1} Defendant-appellant, Eric Holly, ap-
peals his conviction and sentence. We affirm his
conviction and vacate his sentence in part.

Procedural History and Facts

{¶ 2} In June 2010, the grand jury indicted
Holly on five counts: two counts of felonious as-
sault in violation of R.C. 2903.11(A)(1) and (A)(2);
kidnapping in violation of R.C. 2905.01(A)(3); do-
mestic violence in violation of R.C. 2919.25(A);
and violating a protective order in violation of R.C.
2919.27(A)(1). The allegations giving rise to the
charges were that, on April 14, 2010, Holly
rammed his vehicle several times into a Dodge

Caravan that his wife was driving, “trying to run
her off the road.” Once the van was stopped, he
jumped through the broken window of the van,
grabbed his wife by her hair, and then punched her
five to six times.

{¶ 3} Holly initially pleaded not guilty to the
charges but subsequently withdrew his guilty plea
after reaching an agreement with the state. He pled
guilty to a single count of felonious assault, a
second degree felony, and misdemeanor charges of
domestic violence and violating a protection order.
The remaining counts were dismissed. The trial
court accepted Holly's guilty plea and ultimately
sentenced him to a total of six years in prison,
ordered restitution to the victim, and permanently
barred Holly from having any contact with the vic-
tim. The trial court also notified Holly that he is
subject to a mandatory term of three years
postrelease control when he is released from prison.

{¶ 4} Two days following sentencing, Holly,
pro se, filed a motion to vacate his guilty plea. He
further requested the appointment of appellate
counsel to represent him on appeal. The trial court
denied his motion to withdraw his plea but appoin-
ted counsel for a direct appeal.

{¶ 5} Holly timely filed this direct appeal, rais-
ing the following two assignments of error:

{¶ 6} “[1.] Mr. Holly's guilty plea was not
entered knowingly and intelligently because it was
conditioned on the promise that he would first re-
ceive an evaluation by TASC prior to sentencing
and that evaluation never took place.

{¶ 7} “[II.] The sentence imposed is contrary to
law, violates Mr. Holly's right to due process, and
must be vacated.”

Direct Appeal

{¶ 8} Initially, we address the state's contention
that Holly's assignments of error are barred on the
grounds that he should have raised these in a direct

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appeal. Relying on this court's decision in *State v. Muldrew*, 8th Dist. No. 85661, 2005-Ohio-5000, the state argues that Holly is improperly "bootstrapping" arguments in an appeal of a post-sentence motion to vacate a guilty plea—arguments that it maintains should have been raised in a direct appeal. But our review of the record reveals that Holly timely commenced this appeal within 30 days of the trial court's sentencing of him. And although he included the trial court's judgment denying his motion to vacate his guilty plea, he additionally attached the final sentencing journal entry to his notice of appeal and specifically stated that he was appealing his conviction. We therefore find that Holly's arguments are not barred and have been properly raised in a direct appeal.

*2 {¶ 9} We now turn to the merits of each assignment of error.

Crim.R. 11 and Voluntariness of the Plea

{¶ 10} In his first assignment of error, Holly argues that his guilty plea should be vacated because the plea was not entered knowingly, intelligently, or voluntarily. We disagree.

{¶ 11} Crim.R. 11(C)(2) provides that "[i]n felony cases the court may refuse to accept a plea of guilty * * *, and shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following:

{¶ 12} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 13} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of * * * no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 14} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 15} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115. "The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review." *State v. Cardwell*, 8th Dist. No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. "It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C)." *Id.*

{¶ 16} The gravamen of Holly's argument is that his plea was conditioned on him receiving a TASC evaluation, which he never received. TASC is an acronym for a program known as "Treatment Alternatives to Street Crime"; the program provides community-based treatment for drug or alcohol dependent offenders. According to Holly, he entered his plea with the understanding that he would undergo a TASC evaluation and the failure to provide one negates the voluntariness of his plea.

{¶ 17} We find no evidence in the record to support Holly's contention. While the trial court noted that there had been a request for a TASC referral at the plea hearing, there was absolutely no representation made that one would be provided or that his plea was conditioned on receiving one. Our review reveals that the trial court fully complied with the requirements of Crim.R. 11. The trial court engaged in a colloquy with Holly prior to accepting his plea, fully informing him of all his constitution-

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al and nonconstitutional rights. Holly expressly represented that he was entering the plea voluntarily and that he had not been promised any sentence or any other specific promises.

*3 {¶ 18} We further note that, aside from there being no evidence in the record that Holly was promised a TASC assessment as a condition of changing his plea, we find no basis to conclude that a TASC assessment did not occur. The docket reflects that on June 1, 2010, the same day as Holly's change of plea hearing, the trial court journalized Holly's plea and referred him "for TASC drug/alcohol assessment." At the sentencing hearing, approximately three weeks later, Holly never indicated that the TASC evaluation did not occur. Nor did his defense counsel raise any objection prior to sentencing. We, therefore, find no basis to conclude that the referral did not occur.

{¶ 19} We find no merit to Holly's claim that his plea was not voluntary and overrule the first assignment of error.

Sentence

{¶ 20} In his second assignment of error, Holly argues that his sentence is contrary to law because the trial court had no authority to order the additional sanction of permanently barring him from having any contact with the victim. Holly contends that the imposition of an indefinite "no contact" order renders the entire sentence void and that he is entitled to a new sentencing hearing.

{¶ 21} It is well settled that a trial court may only impose a sentence as provided for by law. *State v. Bruno*, 8th Dist. No. 77202, 2001-Ohio-4227, citing *State v. Eberling* (Apr. 9, 1992), 8th Dist. No. 58559. While a "no contact" order may be properly imposed as a sanction pursuant to R.C. 2929.25 when a trial court places a defendant on community controlled sanctions, we find no authority in Ohio sentencing law to allow for such a penalty when imposing a prison term, nor does the state cite to any authority. Once the trial court imposed a prison term and executed Holly's

sentence, the authority to impose any "no contact" order following Holly's release from prison lies with the Adult Parole Board. Indeed, Holly faces a mandatory term of three years of postrelease control following his release from prison.

{¶ 22} Contrary to Holly's assertion, however, this unlawful part of his sentence does not render his entire sentence void, entitling him to a new sentencing hearing. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. Instead, consistent with our authority under R.C. 2953.08(G), we vacate this portion of Holly's sentence that includes an indefinite "no contact" order. The remainder of his sentence, which includes the imposition of six years in prison and a restitution order, that has not been challenged, we affirm in its entirety.

{¶ 23} The second assignment of error is sustained in part and overruled in part.

{¶ 24} Conviction is affirmed, sentence is modified, and case remanded. Upon remand, the trial court is instructed to correct the sentencing entry to eliminate the indefinite "no contact" order.

It is ordered that appellee and appellant share the costs herein taxed.

*4 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, P.J., and EILEEN A. GALLAGHER, J., concur.

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EXHIBIT 3.p.4

Westlaw

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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eighth District, Cuyahoga County.
 STATE of Ohio, Plaintiff--Appellee

v.

Billy ROGERS, Defendant--Appellant.

Nos. 97093, 97094.
 Decided June 7, 2012.

Criminal Appeal from the Cuyahoga County, Court
 of Common Pleas, Case Nos. CR--543805 and
 CR--548840.

Nancy E. Schieman, Mentor, OH, for Appellant.

William D. Mason, Cuyahoga County Prosecutor
 by Scott Zarzycki, James Hofelich, Assistant Pro-
 secuting Attorneys, Cleveland, OH, for Appellee.

Before ROCCO, J., STEWART, P.J., and E.
 GALLAGHER, J.

KENNETH A. ROCCO, J.

*1 ¶ 1 Defendant-appellant Billy Rogers ap-
 peals from his convictions and portions of the sen-
 tences imposed after he entered guilty pleas to
 charges of attempted burglary, breaking and enter-
 ing, and theft in two cases that were consolidated in
 the trial court.

¶ 2 Rogers presents seven assignments of er-
 ror. He claims the trial court acted improperly in
 accepting his pleas, because the court did not first
 ascertain whether he understood that his pleas con-
 stituted a complete admission of guilt and whether
 they were knowingly, intelligently, and voluntarily
 made. He claims the trial court erred in failing to
 conduct a hearing on his "request to withdraw" his

pleas. He claims his trial counsel rendered ineffect-
 ive assistance. He asserts that his offenses in one of
 his cases were allied pursuant to R.C. 2941.25(A).
 He claims the trial court should have held a hearing
 before ordering restitution. Finally, he asserts the
 trial court exceeded its authority in forbidding him
 to have contact with the victims.

¶ 3 Upon a review of the record, this court
 finds that the trial court committed no error in
 either accepting Rogers's guilty pleas, failing to
 conduct additional hearings, imposing sentence on
 each count, or ordering restitution. Moreover, Ro-
 gers's claim of ineffective assistance of counsel is
 unsupported. The trial court, however, lacked au-
 thority to impose a "no contact" order; therefore,
 that portion of Rogers's sentence is vacated. Other-
 wise, Rogers's convictions and sentences are af-
 firmed.

¶ 4 Rogers originally was indicted in
 November 2010 in case number CR--543805 on two
 counts, viz., burglary and theft of property in an
 amount less than \$500.00. Rogers entered pleas of
 not guilty and received the services of assigned
 counsel. After two months, however, Rogers filed a
 pro se motion complaining that his assigned coun-
 sel was not representing him to his satisfaction. The
 trial court permitted Rogers's original counsel to
 withdraw from the case and appointed a new attor-
 ney. The court also referred Rogers to the psychiat-
 ric clinic to determine his eligibility for transfer to
 the "mental health" court docket. Rogers's case was
 transferred the following month.

¶ 5 In April 2011, Rogers was indicted with
 a codefendant in case number CR--548840. Rogers
 was charged with two counts of breaking and enter-
 ing and one count of theft, with the value of the
 stolen property placed at between \$5000.00 and
 \$100,000.00. After he pleaded not guilty to these
 new charges, the case was assigned to the same trial
 court that was presiding over Rogers's prior case.
 Consequently, Rogers's assigned counsel represen-

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ted Rogers in the new case, as well.

{¶ 6} On May 23, 2011, the parties notified the trial court that a plea agreement had been reached. As outlined by the prosecutor, in exchange for Rogers's guilty plea to Count 1 in CR-543805, the state would amend the charge to include the attempt statute and would dismiss Count 2. In exchange for Rogers's guilty pleas to Counts 2 and 3 in CR-548840, the state would dismiss the first count. The plea agreement with respect to CR-548840 included restitution; Rogers and his codefendant jointly would owe \$11,058.00 to the victim in that case. Rogers's defense attorney concurred with the prosecutor's statements.

*2 {¶ 7} The trial court proceeded to address Rogers. Rogers indicated that, although he was taking "psych medication," he responded "yes, ma'am, I am" when the court asked if he were "thinking clearly today?" The trial court made sure that Rogers was "medication compliant" and that the medications were "helping" Rogers before continuing with the Crim.R. 11(C) colloquy.

{¶ 8} After a thorough explanation of the constitutional rights Rogers would be waiving in entering his pleas and the potential penalties involved, the trial court accepted Rogers's guilty pleas to the amended indictments. The trial court referred Rogers for both presentence and "mitigation of penalty" reports before concluding the hearing.

{¶ 9} Rogers's cases were called for sentencing on June 28, 2011. At the outset of the hearing, the trial court noted Rogers had been diagnosed with "schizoeffective [sic] disorder, poly-substance dependence, borderline intellectual functioning," and a "mental illness marked by psychotic symptoms," so he had been transferred to the mental health court docket. The trial court then permitted the victim in case number CR-548840 to place comments on the record. The prosecutor provided a recitation of the facts surrounding case number CR-543805.

{¶ 10} After Rogers's defense attorney spoke

on his behalf, Rogers told the trial court he was "sorry" for "doing what [he] did" to the victims and promised "to make payments" to atone for his crimes. He asked the trial court to "give [him] help, some kind of chance to get some kind of treatment" for his drug addiction.

{¶ 11} The trial court prefaced its decision with respect to Rogers's sentences in these cases by reciting his criminal history. The court also asked if the parties agreed concerning the restitution amounts in both cases. The court then imposed a four-year prison term in case number CR-543805, to be served consecutively with concurrent terms of eighteen months and one year in case number CR-548840, ordered Rogers to pay restitution in the agreed amounts, and further ordered Rogers to have "no contact, directly or indirectly, with anyone [he] victimized."

{¶ 12} Rogers appeals from his convictions and sentences with the following assignments of error.

" I. The trial court erred by accepting Appellant's plea of guilty without first informing Appellant that a plea of guilty constituted an admission of guilt.

" II. The trial court erred by accepting Appellant's guilty plea without first ensuring the plea was knowingly, intelligently, and voluntarily made.

" III. The trial court abused its discretion by not holding a hearing on Appellant's request to withdraw his guilty plea made prior to the imposition of sentence.

" IV. Appellant was deprived of his constitutional right to effective assistance of counsel in the plea proceedings.

" V. The trial court erred by failing to determine that grand theft and breaking and entering are allied offenses of similar import and by imposing separate sentences for the offenses.

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*3 “ VI. The trial court erred by not determining whether the amount of restitution ordered was reasonable and supported by competent, credible evidence.

“ VII. The trial court exceeded its authority by ordering Appellant to have no contact with the victims.”

{¶ 13} Rogers's first and second assignments of error present challenges to the propriety of the trial court's actions at his plea hearing; therefore, they will be addressed together. Rogers argues that, prior to accepting his guilty pleas, the trial court did not adequately either describe the effect his pleas would have, or ensure his mental state allowed knowing, intelligent, and voluntary pleas.

{¶ 14} Crim.R. 11(C) states in pertinent part:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

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

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence;

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable

doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 15} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts make a distinction between constitutional and nonconstitutional rights. *State v. Higgs*, 123 Ohio App.3d 400, 704 N.E.2d 308 (11th Dist.1997); *State v. Gibson*, 34 Ohio App.3d 146, 517 N.E.2d 990 (8th Dist.1986). The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Stewart*, 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163 (1977); *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus (1981).

{¶ 16} For nonconstitutional rights, the trial court must “substantially comply” with the rule's requirements. *Stewart*. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 17} Moreover, a defendant who challenges his guilty plea on the basis that it was not knowingly, voluntarily, and intelligently entered must show a prejudicial effect. *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484. The test for prejudice is whether the plea would have otherwise been made. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.

*4 {¶ 18} In this case, the record reflects the trial court complied literally with Crim.R. 11(C)(2) with respect to the constitutional requirements. The trial court also correctly advised Rogers of the potential penalties involved.

{¶ 19} Although the trial court did not specifically tell Rogers that his guilty plea constituted a complete admission of his guilt, this court does not find the omission constituted error. Rogers had no questions for the court, made no protest that he was

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innocent, and did not give any indication that he was unaware of this consequence; certainly, the word "guilty" implies an acknowledgment of guilt. *State v. Rodgers*, 8th Dist. No. 95560, 2011-Ohio-2535, ¶ 28, citing *State v. Taylor*, 8th Dist. No. 94569, 2010-Ohio-5607, ¶ 5; *State v. Freed*, 8th Dist. No. 90720, 2008-Ohio-5742.

{¶ 20} Similarly, although Rogers argues that the trial court should have more thoroughly determined whether his mental state interfered with his understanding of the plea proceeding, in view of the trial court's careful compliance with Crim.R. 11(C)(2), this court disagrees. The record reflects the trial court asked Rogers about his medications and the clarity of his thinking before beginning the colloquy. *State v. Stokes*, 8th Dist. No. 95488, 2011-Ohio-2531, citing *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064. Rogers's assurances and the appropriateness of his responses during the colloquy demonstrated that, under the totality of the circumstances, he understood the implications of his pleas. *Stokes*.

{¶ 21} Rogers's first and second assignments of error, accordingly, are overruled.

{¶ 22} In his third assignment of error, Rogers argues that the trial court should have addressed his request to withdraw his pleas before proceeding with the sentencing hearing. However, Rogers's "request" was presented only in a letter addressed to the trial court that Rogers dated "6/10/11."

{¶ 23} At the June 28, 2011 sentencing hearing, Rogers neither made a formal motion to withdraw his guilty pleas nor even mentioned his letter. Under these circumstances, the trial court had no duty to conduct a hearing on his request. *Rodgers*, 8th Dist. No. 95560, 2011-Ohio-2535, ¶ 34.

{¶ 24} Rogers's third assignment of error also is overruled.

{¶ 25} Rogers claims in his fourth assignment of error that his second assigned trial counsel

"induced" him to plead guilty to the charges by trickery. Regarding an argument such as Rogers makes in this case, the court made the following observations in *State v. Barnett*, 73 Ohio App.3d 244, 596 N.E.2d 1101 (2d Dist.1991):

In determining whether counsel was constitutionally ineffective, the central issue in any case is whether an accused had a fair trial and substantial justice was done. *State v. Hester* (1976), 45 Ohio St.2d 71, 74 O.O.2d 156, 341 N.E.2d 304. An accused is denied his right to a fair trial if his counsel fails to play the role necessary to ensure that the accused enjoys the benefits of the adversarial process which the law affords him for testing the charges brought by the state. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

*5 * * * [D]etermination of th[e] issue [appellant presents] necessarily depends on matters not in the record before us. We decline to accept appellant's statement of them, * * * as they concern appellant's private conversations with counsel and could not be a part of the trial record in this case. They may be made in a proper motion for postconviction relief pursuant to R.C. 2953.21.

{¶ 26} For the foregoing reason, Rogers's fourth assignment of error also is overruled. *State v. Devine*, 8th Dist. No. 92590, 2009-Ohio-5825.

{¶ 27} In his fifth assignment of error, Rogers argues that the two offenses to which he pleaded guilty in case number CR-548840 were allied offenses pursuant to R.C. 2941.25(A).

{¶ 28} According to the holding in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, a court of appeals should review, even in the context of a plea agreement, whether multiple counts in the plea agreement constitute allied offenses, or whether those offenses were committed with separate animus that may be punished separately. However, this court recently stated in *State v.*

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Snuffer, 8th Dist. Nos. 96480-83,
 2011-Ohio-6430, ¶ 9-11:

Snuffer did not object to his sentence, so we review for plain error. See *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31. Plain error exists only when it is obvious on the record. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Snuffer pleaded guilty to the indictment, thus admitting the facts as charged in the indictment and obviating the need for any factual basis for the plea. *State v. Kent* (1980), 68 Ohio App.2d 151, 156, 428 N.E.2d 453. As he concedes, he offered no other facts at sentencing, so the record on appeal is such that we cannot say that plain error in failing to merge the sentences was "obvious."

We are aware that in *State v. Masters*, 8th Dist. No. 95120, 2011-Ohio-937, a panel of this court cited to *Underwood* for the proposition that the "trial court should have inquired into the facts when accepting Masters's plea to all charges in order to determine whether any of the offenses were allied." *Id.* at ¶ 9. The holding that the court must inquire into the facts during a plea hearing cannot be reconciled with Crim.R. 11(C), which does not require a factual basis for a guilty plea. Implicit within Crim.R. 11(C), is the idea that a guilty plea constitutes a full admission of factual guilt that obviates the need for a fact-finding trial on the charges. *State v. Wilson* (1979), 58 Ohio St.2d 52, 388 N.E.2d 745, paragraph one of the syllabus. Moreover, *Masters* failed to grasp that merger of offenses is a sentencing issue, not a plea issue, see *Cleveland v. Scott* (1983), 8 Ohio App.3d 358, 359, 457 N.E.2d 351, so even if a factual inquiry had to be made, it could only occur during sentencing, not during the plea hearing. Masters assumed the existence of plain error despite acknowledging that "there are insufficient facts in the record for this court to [find whether offenses are allied] in the instant case." *Id.* As noted, plain error exists only when it is "obvious" in the record. *Masters* found the opposite—that the absence of facts raised an is-

sue of fact that the court needed to resolve on remand—thus showing that the error could not have been "plain" on the face of the record. Finally, unlike in *Underwood*, there was no direct concession from the state that the offenses were allied—in *Masters* the state only conceded that "unless a separate animus exists" the charged offenses would be allied. *Id.* The state did not concede that Masters's offenses were allied, only that the offenses might be allied had there been facts showing that Masters committed them with a single animus.

*6 For the foregoing reasons, we find that Snuffer failed to offer any evidence to make an obvious case for plain error in the court's failure to merge the theft and forgery counts in CR-539285.

{¶ 29} See also *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804, ¶ 13; compare, *State v. James*, 2d Dist. No. 11 CAA 05 0045, 2012-Ohio-966 (burglary and theft merged based upon trial evidence).

{¶ 30} At any event, with respect to R.C. 2941.25, the Ohio Supreme Court stated in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at paragraph one of the syllabus, that the following is the appropriate analysis:

When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, overruled.)

{¶ 31} In this case, as described by the victim during the sentencing hearing, the circumstances indicated Rogers entered the victim's garage, broke into her vehicle, and remained inside the vehicle long enough to smoke a cigarette. Before leaving, he took many pieces of the victim's handmade jewelry from the vehicle.

{¶ 32} The circumstances surrounding the crimes, i.e., the length of time involved between the

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breaking and entry into the vehicle and the theft of the particular property therein, thus indicated Rogers had a separate animus for each crime. *State v. Martin*, 8th Dist. No. 95281, 2011-Ohio-222. Consequently, the trial court properly sentenced Rogers on both counts in case number CR-548840. His fifth assignment of error, therefore, also is overruled.

{¶ 33} Rogers argues in his sixth assignment of error that the trial court should have conducted a hearing prior to ordering a specific amount of restitution in each case. However, because the record reflects Rogers agreed to the specific amount of restitution to be paid to the victim in each case, he has waived this argument on appeal. *State v. Williams*, 8th Dist. No. 93625, 2010-Ohio-3418.

{¶ 34} In his seventh assignment of error, Rogers complains that the trial court lacked the authority to order, as part of his sentence, that he have no contact with the victims. This court addressed the same argument in *State v. Holly*, 8th Dist. No. 95454, 2011-Ohio-2284, ¶ 21-22, as follows:

It is well settled that a trial court may only impose a sentence as provided for by law. *State v. Bruno*, 8th Dist. No. 77202, 2001-Ohio-4227, citing *State v. Eberling* (Apr. 9, 1992), 8th Dist. No. 58559. While a "no contact" order may be properly imposed as a sanction pursuant to R.C. 2929.25 when a trial court places a defendant on community controlled sanctions, we find no authority in Ohio sentencing law to allow for such a penalty when imposing a prison term, nor does the state cite to any authority. Once the trial court imposed a prison term and executed Holly's sentence, the authority to impose any "no contact" order following Holly's release from prison lies with the Adult Parole Board. Indeed, Holly faces a mandatory term of three years of postrelease control following his release from prison.

*7 Contrary to Holly's assertion, however, this unlawful part of his sentence does not render his entire sentence void, entitling him to a new sen-

tencing hearing. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. Instead, consistent with our authority under R.C. 2953.08(G), we vacate this portion of Holly's sentence that includes an indefinite "no contact" order. The remainder of his sentence* * * we affirm in its entirety.

{¶ 35} In accord with the foregoing, Rogers's seventh assignment of error is sustained.

{¶ 36} Rogers's convictions are affirmed. His sentence is affirmed in part and vacated only as to the portion that imposes a "no contact" order.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. 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.

MELODY J. STEWART, P.J., and EILEEN A. GALLAGHER, J., concur.

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