

ORIGINAL

IN THE SUPREME COURT OF OHIO

15-0728

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Ademilson J. Smith

Defendant-Appellant.

Case No. _____

On Appeal from the Trumbull
County Court of Appeals
Eleventh Appellate District

C.A. Case No. _____

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT Ademilson J. Smith

Ademilson J. Smith #642-906
NAME AND NUMBER

Trumbull Correctional Institution
INSTITUTION

P.O. Box 901
ADDRESS

Leavittsburg, Ohio, 44430
CITY, STATE & ZIP

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DEFENDANT-APPELLANT, PRO SE

Dennis Watkins and LuWane Annos
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COUNSEL FOR APPELLEE, STATE OF OHIO

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Judgment Entry and Opinion, Court of Appeals, <u>Trumbull</u> County, <u>March 23, 2015</u> <u>3-23-15</u> (DATE)	A-6-19

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION.

Honorable Judges, The reason the court should grant review in my case is because Judge Mary, Judge Colleen Mary O'Toole, J., dissents with a dissenting Opinion.

{9149} Based on the facts in this case, burglary and receiving stolen property are allied offenses of similar import, were committed with the same animus, and should have merged. Therefore, I disagree with the outcome reached by the majority as I believe the trial court erred in stacking appellant's offenses.

{9150} I respectfully dissent.

STATEMENT OF THE CASE AND THE FACTS

On November 16, 2011, the Trumbull County Grand Jury indicted the Defendant-Appellant, Ademilson J. Smith, on three counts: Count one, for burglary, a second degree felony under R.C. 2912.12(A)(C); and count two, for receiving stolen property, a credit card, a fifth degree felony under R.C. 2913.51(A)+(C); and count three, also for receiving stolen property, a vehicle, a fourth degree felony under R.C. 2913.51(A)+(C). (Sentencing Entry, Td. 53).

The case was tried before a jury on March 25th, resulting in verdicts against Smith on all three counts. (Sentencing Entry, p. 1).

The sentencing hearing was held on May 30, 2013, at which time the court sentenced Smith to eight years on count one for burglary. The court then merged counts two and three and sentenced Smith to eighteen months, to be served consecutively with count one, for a total of nine and a half years. (Sentencing Hearing, T.p. 19, Sentencing Entry, p. 2).

On July 22, 2014 the court of Appeals issued a judgment entry found that there was no merit to the defendant's appeal of the trial court's ruling on the defendant's Motion to suppress and that the previous appellate counsel had satisfied the duty under *Anderis*. However, upon an independent review of the record the court did find that there was an appealable issue in regards to whether Defendant was properly sentenced pursuant to R.C. 2941.25 and R.C. 2929.11. This appeal was affirmed on March 23, 2015.

PROPOSITION OF LAW

As claim of "Ineffective assistance of appellate counsel" for failing to raise issues that were not raised in my original appeal, the defendant shows that a "genuine issue" exists, that he was deprived of effective assistance of appellate counsel. State v. Spivey (1998) 84 Ohio St. 3d 24, 1998 Ohio 704, 701 NE. 2d 695. Neither attorney did as asked of defendant.

1 - During the suppression hearing the court allowed the evidence to be used at trial when the defendant was unlawfully stopped. The fourth Amendment to the United States constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures.

Issue NO. 1 - The officers in question were Brian Cononica and Michael Edwards, who were in the same car. (T.p. 28) The victim call was at 3:58:02. and the dispatched information to the officers went out at 3:58:48 (T.p. 28). The officers had already radioed in that they "have vehicle at Hamps. One in custody." at 3:58:32. They did not know any crime had been committed till 16 seconds after already having Smith in custody. (Exhibit 2).

2 - Dispatcher Sandy Placanica-Frazenkos ("Placanica") committed perjury during trial. Issue NO. 2 - The prosecuting attorney Michael Burnett testifying perjury caused by Placanica. He said "If you look at the input that attorney Dimartino has made such fuss about, the one that says that he [Smith] was arrested 17 seconds earlier, that input wasn't even done by our dispatcher who came and testified earlier." (T.p. 127). He continue to say: "You will notice our dispatcher, Placanica. And I apologized for mutilating her name. But there's another dispatcher that's also listed on here by the name of Rachilla. So ladies and gentlemen, we don't know what she was thinking. We didn't hear from her. We don't know how accurate her time keeping was. And to be honest with you. It's not the best of evidence anyway." (T.p. 127-128)

3 - The police officers violates the defendant's 4th amendment by placing him in custody before a dispatch call, without probable cause. (Exhibit 2).

Issue NO. 3 - The officers received the dispatch call at 3:58:48, exactly 16 seconds after they radioed in that they "have vehicle at Hamps... One in custody." at 3:58:32 (T.p. 28).

4 - The prosecuting attorney Michael Burnett violates the defendant's 14th amendment by admitting error in trial and concluding that it does not matter that there was error.

Issue NO. 4 - The prosecutor admittedly said: "You'll notice our dispatcher, Placanica. And I apologized for mutilating her name. But there's another dispatcher that's also listed on here by the name of Rachilla. And if you look at that input, that input was put in by Rachilla. So ladies and gentlemen, we don't know what she was thinking. We didn't hear from her. We don't know how accurate her time keeping was. And to be honest with you. it's not the best of evidence anyway." (T.p. 127-128).

5 - Ademilson J. Smith was deprived of Due Process of the law when the trial court abused it's discretion by allowing dispatcher Placanica to commit perjury during trial while the prosecuting attorney acknowledges the error.

Issue NO. 5 - Honorable Judge Ronald J. Rice (Trial court case NO. 2011-CR-0618). Ignore and denied every error against the defendant, Ademilson J. Smith. Everything that was allowed as evidence is from an illegal stop. The defendant is left without counsel. The state still has not shown an argument against the fact that the defendant is in illegal custody before a dispatch call.

4690	PSO	Arrive	4:45:59	
4690	PSO	Rpt Writng	4:46:15	HOLMES, BRYAN, OFFI
	SCND LOCN:	HQ		HOLMES, BRYAN, OFFI
4690	PSO	Rpt Writng	4:46:23	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFI
4692	PSO	Unit Notes	4:56:15	
	SCND LOCN:	HQ		CONONICO, BRIAN, OFI
	UNIT NOTE:	MCT Log off confirmed		
4690	PSO	Unit Notes	4:58:54	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFIC
	UNIT NOTE:	MCT Log on confirmed		
4690	PSO	Unit Notes	4:59:12	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFIC
	UNIT NOTE:	MCT Log on confirmed		
4690	PSO	Unit Notes	4:59:20	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFICI
	UNIT NOTE:	MCT Log off confirmed		
4690	PSO	Unit Notes	4:59:52	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFICE
	UNIT NOTE:	MCT Log on confirmed		
4690	PSO	Unit Notes	5:24:30	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFICE
	UNIT NOTE:	MCT Log off confirmed		
4690	PSO	Unit Notes	5:31:08	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFICE
	UNIT NOTE:	MCT Log on confirmed		
4690	PSO	Unit Notes	6:05:10	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFICE
	UNIT NOTE:	MCT Log off confirmed		
4690	PSO	Unit Notes	6:07:13	
	SCND LOCN:	HQ RPTF		HOLMES, BRYAN, OFFICE
	UNIT NOTE:	MCT Log on confirmed		
4690	PSO	Clear Call	6:15:04	HOLMES, BRYAN, OFFICE

DOCUMENTS:

Dispatch Narrative ✓

Information on the units assigned to the call follows.

Unit: 4692	Radio:	Ofcr 1:	4692	Ofcr 2:
DSP: 09/25/11 03:58		ARV: 09/25/11 03:58	CLR: 09/25/11 04:34	
Unit: 4698	Radio:	Ofcr 1:	4698	Ofcr 2:
DSP: 09/25/11 03:58		ARV: 09/25/11 03:58	CLR: 09/25/11 04:34	
Unit: 4690	Radio:	Ofcr 1:	4690	Ofcr 2:
DSP: 09/25/11 04:01		ARV: 09/25/11 04:08	CLR: 09/25/11 06:15	

Information on the units assigned to the call follows.

Unit: 4692	Radio:	Ofcr 1:	4692	Ofcr 2:
DSP: 09/25/11 03:58		ARV: 09/25/11 03:58	CLR: 09/25/11 04:34	
Unit: 4698	Radio:	Ofcr 1:	4698	Ofcr 2:
DSP: 09/25/11 03:58		ARV: 09/25/11 03:58	CLR: 09/25/11 04:34	
Unit: 4690	Radio:	Ofcr 1:	4690	Ofcr 2:
DSP: 09/25/11 04:01		ARV: 09/25/11 04:08	CLR: 09/25/11 04:27	

4698, 4692 HAVE VEH IN HAMPS ..

ONE IN CUSODY

92 C 4// OK

98 TV IN BACK

MRASCHILLA	3:58:32	✓
MRASCHILLA	3:58:35	✓
MRASCHILLA	3:59:06	
MRASCHILLA	3:59:25	

DATE 8/13/2012
TIME 14:21:32

INCIDENT REPORT

PAGE
PL1190
JMARHULI

ADEMILSON J SMITH 5 26 82
RQ262691 BELEIVE THIS IS VIC OF BURGULARY STOLEN MRASCHILLA 4:00:10
VEH MRASCHILLA 4:01:23
VIC WALLET ID AND COAT FOR THE LOG MRASCHILLA 4:01:24
98 GOT TV TOO MRASCHILLA 4:02:17
MAYS EN RT MRASCHILLA 4:03:09
4690 OUT ON ATLANTIC SPLACANICA 4:04:11
PER 4568 TO 92 WE WILL WAVE FEE OWNER IS VIC IN SPLACANICA 4:09:01
BURGULARY MRASCHILLA 4:13:39
92 MAYS HAS VEH.. ENR HQ FOR PIC // OTHER SUBJ MRASCHILLA 4:13:41
ENR CO MRASCHILLA 4:15:08
4698 OUT AT CO MRASCHILLA 4:15:08
4690 CLR WITH INFO .. VIC WAS ADV .. COMING DOWN MRASCHILLA 4:20:01
IN THE MORNING .. SPLACANICA 4:27:45
UNIT: 4692 HQ MRASCHILLA 4:27:48
UNIT: 4690 HQ 4:43:48
UNIT: 4690 HQ RPTF 4:46:15
CAD System Narrative 4:46:23
SPLACANICA CHANGED ADDITIONAL INFORMATION FROM 3:58:57
284 76 1460

Incident Recalled From: 2011-00030257 OH0780733 on 09/25/11 @ 4:43:39

NAMES:
Caller : TIMOTHY SEKELA,,,

CONCLUSION

For the above stated reasons, this court should accept jurisdiction.
Respectfully submitted,

Ademilson J. Smith
SIGNATURE

Ademilson J. Smith # 642-906
NAME AND NUMBER

Trumbull Correctional Institution
INSTITUTION

P.O. Box 901
ADDRESS

Leawittsburg, Ohio 44430
CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to Lu Wayne Annos, Prosecuting Attorney, Trumbull County, 160 High Street N.W., 4th floor Warren, Ohio 44481, this 30 day of April, 2015.

Ademilson J. Smith
SIGNATURE

Ademilson J. Smith # 642-906
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Ademilson J. Smith,

Defendant-Appellant.

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Case No. _____

On Appeal from the Trumbull
County Court of Appeals
Eleventh Appellate District

C.A. Case No. 2013-T-0071

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT Ademilson J. Smith

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

MAR 23 2015

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2013-T-0071
ADEMILSON JEFFREY SMITH, :
Defendant-Appellant. :

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2011 CR 618.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Andrew R. Zellers, 3810 Starrs Centre Drive, Canfield, OH 44406 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Trumbull County Court of Common Pleas. Appellant, Ademilson Jeffrey Smith, appeals from the final judgment sentencing him for burglary and receiving stolen property following a jury trial. On appeal, he maintains that the trial court failed to merge offenses. For the following reasons, we affirm.

{¶2} On November 16, 2011, appellant was indicted by the Trumbull County Grand Jury on three counts: count one, burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2) and (C); count two, receiving stolen property, a felony of

the fifth degree, in violation of R.C. 2913.51(A) and (C); and count three, receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.51(A) and (C).

{¶3} Patrolman Edwards, with the Warren City Police Department ("WCPD"), indicated that from midnight to 4:00 a.m. on September 25, 2011, he was working a side security job with a fellow officer, Brian Cononico, at the Hampshire House Apartments located on Fifth Street.¹ The officers were in uniform and sitting in a marked cruiser. While parked, they received information of a home burglary on Atlantic Street. In addition to items stolen from inside the residence, a purple Toyota RAV4 was stolen from the driveway. A description of the stolen vehicle, including the license plate number, was part of the dispatch.

{¶4} Within two to five minutes of receiving the dispatch, a vehicle matching the description passed in front of the officers and pulled into a parking space at the apartment complex. At that point, Patrolman Edwards positioned the cruiser behind the purple RAV4. The officers approached the driver, identified as appellant. Patrolman Edwards recognized appellant from prior arrests. The officers observed a flat screen television inside the vehicle. Patrolman Edwards confirmed that the purple RAV4 driven by appellant was the purple RAV4 stolen from the Atlantic Street residence.

{¶5} In the course of a search incident to arrest, Patrolman Edwards discovered on appellant's person a wallet belonging to the victim, Timothy Sekela, the occupant of the burglarized residence and the owner of the purple RAV4. The wallet contained Sekela's identification card and three credit cards.

1. Patrolman Edwards explained that a "side job" is extra employment in which a business requires police protection or assistance to help fight local crime. He stated that they were working in almost a security capacity but technically on duty as a Warren police officer.

{¶6} Sekela testified that he was awakened before 4:00 a.m. on September 25, 2011, when he heard his car starting in his driveway. When he looked out the window, he noticed his car was gone. Sekela went downstairs and noticed his television was missing in addition to his wallet. He called 9-1-1 and reported this information.

{¶7} As to the timeline of the 9-1-1 dispatch and arrest, Patrolman Edwards testified again that the arrest occurred between two and five minutes after he and Officer Cononico had received the dispatch.

{¶8} Officer Brian Holmes, with the WCPD, testified that he was working the midnight shift on the night at issue. He was sent to Sekela's residence after the burglary was reported. Officer Holmes and Sekela walked through the house and discovered that a sliding glass door at the rear of the residence was unlocked. Outside were footprints in the wet grass. Officer Holmes surmised that the sliding glass door was the burglar's point of entry.

{¶9} On June 12, 2013, the trial court sentenced appellant to a total of nine and one-half years in prison. The trial court merged the two counts of receiving stolen property. However, it did not merge those counts with the burglary count. Specifically, the court imposed an eight-year term for burglary to be served consecutively to an 18-month sentence for receiving stolen property.

{¶10} This appeal followed.

{¶11} Appellant raises the following assignment of error:

{¶12} "The trial court erred when it elected not to merger (sic) the offenses committed by the Defendant-Appellant for the purpose of sentencing as the offense (sic) were allied offenses of similar import under R.C. 2941.25."

{¶13} In his sole assignment of error, appellant argues the trial court erred by failing to merge all three counts for the purpose of sentencing as all three counts are allied offenses of similar import arising from the same conduct.

{¶14} Our review of an allied offenses question is de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶12.

{¶15} R.C. 2941.25 states:

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

{¶17} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶18} "R.C. 2941.25(A) clearly provides that there may be only *one conviction* for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense. * * * [A]llied offenses of similar import are to be merged at sentencing. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, * * * ¶43; *State v. McGuire*, 80 Ohio St.3d 390, 399 * * * (1997). Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. * * * Both R.C. 2941.25 and the Double Jeopardy Clause prohibit multiple convictions for the same conduct. For this reason, a trial court is required to merge allied offenses of similar import at sentencing." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶26-27. (Emphasis sic.) (Parallel citations omitted.)

{¶19} “Under Crim.R. 52(B), ‘(p)lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.’ * * * [I]mposition of multiple sentences for allied offenses of similar import is plain error. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087 * * * ¶96-102.” *Underwood*, *supra*, at ¶31. (Parallel citation omitted.)

{¶20} According to a plurality of the Ohio Supreme Court, “[w]hen 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; *State v. May*, 11th Dist. Lake No. 2010-L-131, 2011-Ohio-5233. The *Johnson* court provided the new analysis as follows:

{¶21} “In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is 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. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶22} “If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., ‘a single act, committed with a single state of mind.’ * * *.

{¶23} “If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶24} “Conversely, if 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 [a] separate animus for each offense, then,

according to R.C. 2941.25(B), the offenses will not merge.” *Id.* at ¶¶48-51. (Citations omitted.) (Emphasis sic.)

{¶25} This court went on to state in *May, supra*, at ¶¶50-51:

{¶26} “In departing from the former test, the court developed a new, more context-based test for analyzing whether two offenses are allied thereby necessitating a merger. In doing so, the court focused upon the unambiguous language of R.C. 2941.25, requiring the allied-offense analysis to center upon the defendant’s conduct, rather than the elements of the crimes which are charged as a result of the defendant’s conduct.’ [*State v.*] *Miller* [, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161,] at ¶47, citing *Johnson* at ¶¶48-52.

{¶27} “The (*Johnson*) court acknowledged the results of the above analysis will vary on a case-by-case basis. Hence, while two crimes in one case may merge, the same crimes in another may not. Given the statutory language, however, this is not a problem. The court observed that inconsistencies in outcome are both necessary and permissible “* * * given that the statute instructs courts to examine a defendant’s conduct - an inherently subjective determination.” *Miller* at ¶52, quoting *Johnson* at ¶52.”

{¶28} The issue here is whether appellant’s convictions are allied offenses of similar import subject to merger for purposes of sentencing, which we review de novo. *Williams, supra*, at ¶12.

{¶29} R.C. 2911.12(A)(2), burglary, states: “[n]o person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is

present or likely to be present, with purpose to commit in the habitation any criminal offense[.]”

{¶30} R.C. 2913.51(A), receiving stolen property, states: “[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.”

{¶31} Applying the first step of *Johnson*, it is possible to commit burglary and receiving stolen property with the same conduct. See *State v. Blackburn*, 4th Dist. Pickaway No. 10CA46, 2011-Ohio-4624 (burglary, theft, and receiving stolen property are allied offenses of similar import subject to merger); *State v. Fair*, 2d Dist. Montgomery No. 24120, 2011-Ohio-3330 (burglary and receiving stolen property are allied offenses subject to merger).

{¶32} Under the second step, the specific facts of this case must be reviewed to determine whether appellant committed the charged offenses separately or with a separate animus so as to permit multiple punishments. Appellant relies on *Blackburn*, *supra*, in support of his position that all three of his offenses should merge. In *Blackburn*, the appellant and his co-defendant broke into the victim’s home, removed a television, and left with it. *Id.* at ¶2. The victim’s son was home and witnessed the two men getting into a small, red car and leaving the scene. *Id.* Thereafter, police later spotted the vehicle. *Id.* at ¶3. Despite the cruiser’s overhead lights, the appellant continued driving for nearly two miles before stopping. *Id.* at ¶4. The appellant was charged and sentenced for burglary, failure to comply with an order or signal of a police officer, theft, and receiving stolen property. *Id.* at ¶6.

{¶33} On appeal, appellant in *Blackburn* claimed the trial court should have merged his convictions for burglary, theft, and receiving stolen property. *Id.* at ¶8. The Fourth District agreed reasoning that “it is possible to commit the offenses of burglary,

theft, and receiving stolen property with the same conduct. One can trespass in an occupied structure with the intent to commit a theft (burglary), actually commit the theft (theft), and retain the stolen property (receiving stolen property)." *Id.* at ¶15. The Fourth District found the appellant committed the offenses with the same conduct and with a single state of mind and, thus, sustained his assignment of error regarding merger. *Id.* at ¶16, 18.

{¶34} In this case, the state alleges that appellant's reliance on *Blackburn* regarding merger is misplaced. The state maintains that the only way appellant could have committed burglary and receiving stolen property with a single act and with the same animus would be if the victim, Sekela, had parked his RAV4 in his living room rather than his driveway. We agree with the State. The facts show different sets of conduct for the separate offenses. A burglary occurred once appellant entered the house with the purpose to commit a crime *inside* the house. Unlike *Blackburn*, the burglary was not ancillary to the completion of the receiving stolen property offense; rather, it is only upon appellant's exit from the house that he received stolen property, that being the RAV4. Thus, appellant committed burglary by entering the house and after the burglary was complete decided to steal the car. These separate sets of conduct thereby preclude merger.

{¶35} The sole assignment of error is without merit.

{¶36} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶37} I respectfully dissent.

{¶38} The majority holds that appellant committed burglary by entering the house and, after the burglary was complete, decided to steal the car. Thus, the majority contends that those "separate sets of conduct" preclude merger. For the following reasons, I disagree.

{¶39} Appellant was charged with, convicted of, and sentenced on three counts: count one, burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2); count two, receiving stolen property, a felony of the fifth degree, in violation of R.C. 2913.51(A); and count three, receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.51(A).

{¶40} R.C. 2911.12(A)(2), burglary, states: "[n]o person, by force, stealth, or deception, shall * * * [t]respas in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]"

{¶41} R.C. 2913.51(A), receiving stolen property, states: "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶42} Applying *Johnson*, burglary and receiving stolen property are allied offenses of similar import, as it is possible to commit one offense and commit the other with the same conduct. See *Blackburn, supra* (burglary, theft, and receiving stolen

property are allied offenses of similar import subject to merger); *Fair, supra* (burglary and receiving stolen property are allied offenses subject to merger).

{¶43} Under R.C. 2941.25, Ohio's multiple-count statute, if a defendant's conduct results in allied offenses of similar import, the defendant may ordinarily be convicted of only one of the offenses. R.C. 2941.25(A). However, if the defendant commits each offense separately or with a separate animus, then convictions may be entered for both offenses. R.C. 2941.25(B).

{¶44} Thus, although burglary and receiving stolen property are allied offenses, the specific facts of this case must be reviewed to determine whether appellant committed the charged offenses separately or with a separate animus so as to permit multiple punishments.

{¶45} As stated, appellant was charged and convicted with one count of burglary and two counts of receiving stolen property. At sentencing, the trial court merged the two counts of receiving stolen property. However, it did not merge those counts with the burglary count. Thus, based on the facts presented, I believe the trial court erred in not merging all three counts for sentencing.

{¶46} This case involves only one victim. The facts do not support that appellant committed a burglary offense, then decided separately to commit a receiving stolen property offense, then decided separately to commit another receiving stolen property offense. Rather, the manner of appellant's actions supports a single "purpose" that should lead to merger. The evidence reveals that appellant, in order to support his drug addiction, broke into the victim's home, stole his television, credit cards, and car keys, took the RAV4 which was parked in the driveway, and left the scene before he was apprehended by police. There were no signs of forced entry into the RAV4 and/or no signs that the vehicle was hot-wired.

{¶47} The record does not reveal any temporal break which would make merger inapplicable. Rather, the record establishes that the incident occurred simultaneously. Also, appellant evidenced the same animus in committing the offenses. Looking to appellant's conduct, this was a single act with a single state of mind against a single victim. The test under *Johnson* is not whether the elements line up, which is the essence of the overruled analysis in *State v. Rance*, 85 Ohio St.3d 632 (1999). Rather, the test is whether the crimes were committed by the same conduct and with the same animus. In this case, I believe they were.

{¶48} “[T]he purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence.” *State v. Helms*, 7th Dist. Mahoning No. 08 MA 199, 2012-Ohio-1147, ¶68, quoting *Johnson, supra*, at ¶43, citing *Maumee v. Geiger*, 45 Ohio St.2d 238, 242 (1976). In this case, multiple sentences have been improperly “heaped” on appellant, pursuant to the principles and purposes of sentencing under R.C. 2929.11, which under H.B. 86 now provides: “[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.*” R.C. 2929.11(A). (Emphasis added.) Thus, the legislature has given us the tools as well as a mandate to address the issues of keeping dangerous criminals off the street, while balancing Ohio’s financial deficits and an already overcrowded prison system.

{¶49} Based on the facts in this case, burglary and receiving stolen property are allied offenses of similar import, were committed with the same animus, and should

have merged. Therefore, I disagree with the outcome reached by the majority as I believe the trial court erred in stacking appellant's offenses.

{¶50} I respectfully dissent.

STATE OF OHIO)
COUNTY OF TRUMBULL)SS.

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

CASE NO. 2013-T-0071

ADEMILSON JEFFREY SMITH,
Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Costs are taxed against appellant.


JUDGE THOMAS R. WRIGHT

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

FILED
COURT OF APPEALS
MAR 23 2015
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK