

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	CASE NO. 2015-728
Plaintiff-Appellee,)	
)	On Appeal from Trumbull County
-vs-)	Court of Appeals No. 2013-T-0071
)	
ADEMILSON JEFFREY SMITH,)	Trumbull County Common Pleas
Defendant-Appellant.)	Court Case No. 2011-CR-618

MEMORANDUM IN OPPOSITION TO JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT ONE OF GREAT GENERAL
OR PUBLIC INTEREST AND DOES NOT CONCERN A SUBSTANTIAL
CONSTITUTIONAL ISSUE**

Defendant-Appellant Ademilson Smith (“Appellant”) urges this Court to accept jurisdiction in this matter after the Eleventh District Court of Appeals affirmed the judgment of the Trumbull County Court of Common Pleas. The sole assignment of error raised by Appellant below was the trial court’s improper failure to merge offenses, which the Eleventh District found to be without merit. The Plaintiff-Appellee, the State of Ohio (“State”), opposes jurisdiction.

Appellant’s Memorandum in Support of Jurisdiction is glaringly devoid of any substantial constitutional question. Nevertheless, Appellant claims that this case is of great general or public interest for two equally unpersuasive reasons: first, because the Eleventh District’s opinion was not unanimous, and second, because Appellant “disagree[s]” with the decision reached by that court. Appellant offers neither an articulable argument nor any authority to support his contention that the Eleventh District ruled in error. Furthermore, Appellant makes no manifest weight claim that the jury lost its way to support this Court’s acceptance of jurisdiction.

The State asserts that the only issue of great general or public importance in this matter is assuring that Appellant serves the sentence he earned through his multiple deliberate criminal acts. There is no public interest served by permitting criminals to commit several crimes but serve only a single punishment. Appellant victimized his community by committing the serious offenses of burglary and receiving stolen property, and now urges this Court to reduce his punishment simply because he “disagree[s]” with his sentence and the Eleventh District’s well-reasoned decision. Accordingly, the State agrees with Judge Thomas Wright’s opinion that merger of offenses in this case is precluded due to “separate sets of conduct,” and maintains that

Appellant's case does not introduce a substantial constitutional issue or issue of great general or public importance that merits this Court's acceptance of jurisdiction. *State v. Smith*, 11th Dist. No., 2013-T-0071, 2015-Ohio-1063, ¶34. As such, this Court should decline jurisdiction in this case.

Statement of the Case

On November 16, 2011, the Trumbull County Grand Jury indicted Defendant-Appellant Ademilson Jeffrey Smith ("Appellant") 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 in the fifth degree, in violation of R.C. 2913.51(A) and (C); and count three, receiving stolen property, a felony in the fifth degree, in violation of R.C. 2913.51(A) and (C). *Smith*, 11th Dis. No., 2013-T-0071, ¶2. Appellant entered a plea of not guilty to all counts, and the matter proceeded to jury trial on March 25, 2013. Appellant was found guilty on all counts on March 27, 2013. *Id.* at ¶1, ¶9. On June 12, 2013, the trial court sentenced Appellant to an aggregate of nine and one-half years in prison; an eight year term for burglary to be served consecutively to an 18-month term for receiving stolen property. The trial court merged the two counts of receiving stolen property, but it did not merge those counts with the burglary count. *Smith*, 11th Dis. No., 2013-T-0071, ¶9.

Following his sentencing by the Trumbull County Court of Common Pleas, Appellant filed a timely appeal with the Eleventh District Court of Appeals, and on June 14, 2013 Attorney Jay Blackstone was appointed to represent Appellant. (11th Dist. Ct. Judgment Entry ¶8, July 22, 2014.) However, on October 16, 2013, Attorney Blackstone filed a brief on Appellant's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967) and a motion to withdraw, stating that after review of the trial court record and transcript of proceedings he could not find any

prejudicial error committed by the trial court, and that an appeal would be frivolous. (11th Dist. Ct. Judgment Entry ¶9, July 22, 2014.) On July 22, 2014, the Eleventh District granted Attorney Blackstone’s motion to withdraw, but appointed Attorney Andrew R. Zellers, noting that Appellant was entitled to an appeal as a matter of right and that there existed one potential issue of arguable merit. *Id.* at ¶16, ¶21. Appellant’s counsel raised the single assignment of error: ““The trial court erred when it elected not to merger (sic) the offenses committed by Defendant-Appellant for the purposes of sentencing as the offenses (sic) were allied offenses of similar import under R.C. 2941.25.”” *Smith*, 11th Dis. No., 2013-T-0071, ¶12. The Eleventh District reviewed the allied offenses question de novo, found the assignment of error to be without merit, and affirmed the trial court’s judgment on March 23, 2015. *Id.* at ¶14. Appellant now seeks review of that decision by this Court. The State opposes.

Statement of Facts

On September 25, 2011 Timothy Sekela was awakened before 4:00 a.m. at his residence on Atlantic Street in Warren, Ohio when he heard his vehicle starting in his driveway. *Id.* at ¶6. When Sekela looked out the window, he saw that his vehicle was gone. Sekela then went downstairs, and noticed that his wallet and flat-screen television were also missing. Sekela then called 9-1-1 and reported this information. *Id.*

On the same date, September 25, 2011, Patrolman Michael Edwards, Jr. and Patrolman Brian Cononico, both with the Warren City Police Department, were working a “side job”¹ from midnight to 4:00 a.m. at the Hampshire House Apartments located on Fifth Street in Warren, Ohio. *Id.* at ¶3. During that time the officers were both in uniform, and sitting inside a marked

¹ A “side job” is extra employment in which a business requires police protection or assistance to help fight local crime. Patrolmen Edwards and Cononico were working in essentially a security capacity, but were still technically on duty as Warren City police officers. *Smith*, 11th Dist. No., 2013-T-0071, ¶3 n.2.

Warren City police cruiser. *Id.* While parked, the officers received information over the police dispatch radio of a home burglary on Atlantic Street. In addition to items stolen from inside the residence, the burglar also stole a purple Toyota RAV4 from the driveway. *Id.* Patrolmen Edwards and Cononico received a description of the stolen vehicle, including the license plate number, as part of the radio dispatch. *Id.* at ¶3.

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. *Id.* at ¶4. Patrolman Edwards positioned the cruiser behind Sekela's purple Toyota RAV4, which was already stopped, and the officers approached the driver, identified as Appellant. *Id.* The officers observed a flat-screen television inside the RAV4. *Id.* Patrolman Edwards recognized Appellant from prior arrests, and once he ascertained Appellant's identity, he learned that Appellant was wanted on multiple outstanding capiases. *Id.* Patrolmen Edwards then arrested Appellant, and in the course of the search incident to arrest discovered a wallet containing Mr. Sekela's identification card and three credit cards, as well as a crack pipe. *Id.* at ¶5.

Though not referred to in the Eleventh District's opinion, the State considers it necessary to discuss, on a limited basis, facts in the trial court transcript because of issues raised by Appellant. In the courts below, Appellant repeatedly and unsuccessfully attempted to argue that Patrolmen Edwards and Cononico improperly "stopped" him because based on the written dispatch log, the dispatcher did not announce the stolen vehicle report until 16 seconds after Appellant was detained. (Trial T.p.p 60.) The trial court found the small temporal discrepancy to be a jury question, and stated: "There is definitely a mixup [sic] on the time line, only because [of] the dispatcher. The testimony I heard, the dispatcher was confused and went back and put times in ... The cop did clearly testify that they got the call and then they did see the vehicle and

pull him over. As far as that time line, or the State and whatever the dispatcher might have said, I think that's still a factual question for the jury.***" (Trial T.p. 94-95.) Appellant's trial counsel argued the time line issue; nevertheless, the jury convicted Appellant of all three counts in less than two hours. (Trial T.p.p 114-117, 149.)

ARGUMENTS IN OPPOSITION TO JURISDICTION

APPELLANT'S PROPOSITION OF LAW NO. I: None stated.

Although convoluted and nearly indecipherable, in his 'Proposition of Law' Appellant does not actually state any legal proposition, but instead attempts to argue an ineffective assistance of appellate counsel claim. Appellant's "argument" is misguided and ineffective for several reasons. Foremost, Appellant has chosen the improper forum; while Appellant is entitled to effective assistance of counsel on his first appeal as of right, any claim he may make on that point is not cognizable in a petition for jurisdiction to this Court, because the proper vehicle to raise that issue is an application to reopen appeal pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). See *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948; See, also *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

App. R. 26(B)(1) states, "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the *court of appeals where the appeal was decided* within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." (Emphasis added.) Subsequent to filing his petition for jurisdiction, on May 15, 2015, Appellant did in fact file an application to reopen pursuant to App.R. 26(B) with the Eleventh District Court of Appeals. Thus, Appellant's sole 'Proposition of Law' is a claim that this Court cannot properly entertain. Furthermore, even were this the correct forum, as a housekeeping matter the State respectfully suggests that Appellant's memorandum is improvidently filed as it is significantly noncompliant with this Court's Rules of Practice. Appellant's memorandum is nearly illegible because it is poorly handwritten and

single-spaced with cramped margins in violation of S. Ct. Prac. R. 3.09(B)(1)(a) and (b), S. Ct. Prac. R. 3.09(B)(3), and S. Ct. Prac. R. 3.09(B)(2)(c).

More importantly, Appellant has woefully failed to offer authority or argument as to why this Court should declare the sound judgment of the Eleventh District Court of Appeals to be in error. On October 16, 2013 in appellate counsel Attorney Blackstone's *Anders* brief, he requested the Eleventh District to review whether the trial court had erred in overruling a suppression motion. (11th Dist. Ct. Judgment Entry, ¶9, July 22, 2014.) The Eleventh District identified a single issue of arguable merit, which Appellant's counsel raised on appeal: whether Appellant's offenses were properly merged pursuant to R.C. 2941.25 and R.C. 2929.11. *Id.* at ¶16. Nevertheless, Appellant misspends a significant portion of his memorandum on the acutely deficient argument that he was unlawfully stopped and detained in violation of the Fourth Amendment, which the Eleventh District declined to review in Attorney Blackstone's *Anders* brief, and which was therefore precluded by the doctrine of res judicata on appeal. Nowhere in the entirety of his cryptic 'Proposition of Law' does Appellant actually address, or even mention, the issue of improper merger. Instead, Appellant squanders his memorandum, and this Court's time, doing nothing more than crudely rehashing anemic trial court assertions.

Notwithstanding Appellant's nonexistent argument in regard to improper merger, should this Court decide to review the issue, the State agrees with the Eleventh District's well-reasoned opinion that merger of offenses in this case is precluded due to "separate sets of conduct." *Smith*, 11th Dist. No., 2013-T-0071, ¶34. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d this Court established a two-part test to determine proper merger of offenses pursuant to R.C. 2941.25. "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. 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.’ * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. 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.)

Following the *Johnson* two-part test, the Eleventh District first found that Appellant’s charges of burglary in violation of R.C. 2911.12(A)(2) and (C) and receiving stolen property in violation of R.C. 2913.51(A) and (C) could be committed with the same conduct, and were therefore subject to merger. *Smith*, 11th Dist. No. 2013-T-0071, ¶31. Applying the second prong of the *Johnson* test, the appellate court held that “[A]ppellant committed burglary by entering the house and after the burglary was complete decided to steal the car,” and that “these separate sets of conduct thereby preclude merger.” *Id.* at ¶34.

Two days after the Eleventh District issued judgment in this case, this Court handed down its decision in *State v. Ruff*, No. 2015-Ohio-995, slip op., 2015 WL 1343062 (Ohio, March 25, 2015) clarifying the plurality holding of *State v. Johnson*. The State submits that this Court’s decision in *State v. Ruff* does not compel reversal of the Eleventh District’s decision in the case at bar. In *Ruff*, this Court held that to determine “whether offenses are allied offenses of similar

import within the meaning of R.C. 2941.25, courts must evaluate three separate factors – the conduct, the animus, and the import.” *Ruff, supra*; syllabus. This Court explained that “two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant’s conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.” *Id.* at ¶23. *Ruff* holds that “[u]nder R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.” *Id.*; syllabus.

Here, the application of *Ruff* does not imperil the well-grounded reasoning of the Eleventh District, as its decision rested upon Appellant’s separate acts and separate animus. The State agrees with the Eleventh District that this case is distinguishable from *State v. Blackburn*, 4th Dist. Pickaway No. 10CA46, 2011-Ohio-4624 where the defendant broke into the victim’s home, took a television, and left. There, the Fourth District Court of Appeals reasoned 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 intent to commit a theft (burglary), actually commit the theft (theft), and retain the stolen property (receiving stolen property).” *Id.* at ¶15. The State maintains, and the Eleventh District agreed, that in this case “the only way [A]ppellant 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.” *Smith, supra*, at ¶34. Thus, the State’s position is in accord with the Eleventh District that “[a] burglary occurred once [A]ppellant entered the house with the purpose to commit a crime *inside* the house. Unlike *Blackburn*, the burglary was not ancillary to the

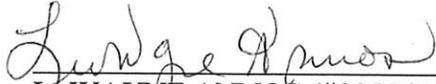
completion of the receiving stolen property offense; rather, it is only upon [A]ppellant's exit from the house that he received stolen property, that being the RAV4." *Id.* at ¶34. Accordingly, the State contends that Appellant's separate sets of conduct and separate animus preclude merger under both *Johnson* and *Ruff*, and that Appellant was properly sentenced by the trial court.

For the reasons thus stated, Appellant's 'Proposition of Law' is entirely bereft of merit. Appellant's ineffective assistance of counsel claim is misplaced, and his belabored contentions of unlawful arrest are moot. On the merits of the merger issue, the sound decision of the Eleventh District is consistent with this Court's holdings in both *Johnson* and *Ruff*.

CONCLUSION

The State urges this Court to reject jurisdiction in this case. Appellant may disagree with his sentence, but he does not present a substantial constitutional question or a case of public or great general interest.

Respectfully submitted by:
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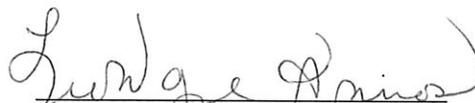

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PROOF OF SERVICE

I do hereby certify that a copy of the foregoing memorandum was sent by ordinary mail to Ademilson Jeffrey Smith, Appellant Pro-Se, Inmate #642-906, Trumbull Correctional Institution, P.O. Box 640 Leavittsburg, Ohio 44430 on this 3rd Day of June, 2014.


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