

[Cite as *State v. McBride*, 2017-Ohio-9068.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO) CASE NO. 16 MA 0002

PLAINTIFF-APPELLEE)

VS.) OPINION AND

CHRISTOPHER McBRIDE)

DEFENDANT-APPELLANT)

CHARACTER OF PROCEEDINGS: Appellant's Motion to Certify a Conflict.

JUDGMENT: Overruled.

APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503
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For Plaintiff-Appellee:

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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

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Hon. Gene Donofrio
Hon. Carol Ann Robb

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Dated: December 12, 2017

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PER CURIAM.

{¶1} On June 9, 2017, we released our Opinion in *State v. McBride*, 7th Dist. No. 16 MA 0002, 2017-Ohio-4281. On July 5, 2017, Appellant Christopher McBride filed a motion to certify a conflict to the Ohio Supreme Court, pursuant to App.R. 25(A). For the following reasons, no conflict exists between our Opinion and the cases cited by Appellant in his motion. Accordingly, Appellant’s motion to certify a conflict is overruled.

{¶2} Motions to certify a conflict are governed by Section 3(B)(4), Article IV of the Ohio Constitution. It provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

{¶3} Under Ohio law, “there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032 (1993), paragraph one of the syllabus. We have adopted the following requirements from the Supreme Court:

[A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its

judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must be* “upon the same question.” Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. at 596.

{¶4} Appellant alleges that our Opinion conflicts with *State v. Taylor*, 4th Dist. No. 07CA29, 2008-Ohio-484 and *State v. Manus*, 8th Dist. No. 94631, 2011-Ohio-603. Appellee contends that the respective courts of appeal held in these two cases that the failure to have determined whether the offenses in question should be merged prior to accepting the defendant’s guilty plea rendered the pleas invalid and the pleas were vacated.

{¶5} In his appeal, Appellant alleged that he was sentenced on multiple counts which should have merged as allied offenses of similar import pursuant to R.C. 2941.25(A). Appellant claims that our determination that the trial court informed Appellant about his other nonconstitutional rights, including the maximum potential penalty and fine that could be imposed, conflicts with the law in *Taylor* and *Manus*.

{¶6} In our holding we noted, “if neither the parties nor the trial court raise the issue of allied offenses of similar import and the court does not find that the convictions should merge for purposes of sentencing, the imposition of separate sentences is not contrary to law.” *McBride, supra*, at ¶ 29, citing *State v. Rogers*, 143

Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860. As Appellant failed to raise the issue of allied offenses of similar import at trial, we conducted a plain error analysis and concluded that as the trial court made no finding regarding merger and Appellant failed to file a direct appeal, his claim was precluded by *res judicata*. See *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, ¶ 26.

{¶7} The cases cited by Appellant in his motion do not establish a conflict. The Ohio Supreme Court has thoroughly addressed the issue of waiver of an allied offense argument in *Rogers* and *Williams*. Any conflict which may appear to exist with our Opinion and the law as stated in *Taylor* and *Manus* has been clarified by the Supreme Court in its later cases.

{¶8} Our Opinion is clearly not in conflict with any decision of the Ohio Supreme Court. As the Ohio Supreme Court has fully addressed the issue cited by Appellant in his motion there can be no actual conflict between districts on this issue.

{¶9} For the above reasons, there is no conflict in our June 9, 2017 Opinion that may be certified to the Ohio Supreme Court pursuant to App.R. 25. Appellant's motion to certify a conflict is hereby overruled.

Waite, J., concurs.

Donofrio, J., concurs.

Robb, P.J., concurs.