IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

STATE OF OHIO	**:**	**CASE NO. 16-CR-00167**
Plaintiff,	**:**	
vs.	**:**	**Jonathan P. Hein, Judge**
PAYTON M. OTT	**:**	
		JUDGMENT ENTRY -
Defendant.	**:**	**Defendant's Motion to Dismiss Count II**

This matter came before the Court upon the Defendant's Motion to Dismiss Count II as filed February 6, 2017. The State of Ohio has filed a response in opposition. The State of Ohio is represented by Assistant Prosecuting Attorney Deborah S. Quigley. The Defendant is represented by H. Steven Hobbs, Esq.

Summary of Case Facts

The parties have agreed to submit this matter for decision based on the pleadings, which include various attachments filed by the State on February 6, 2017.

Generally stated, the Defendant was northbound on State Route 726 approaching New Madison. He went left of center while passing a southbound motor vehicle which resulted in a scraping of the two cars; since the Defendant did not stop, the other driver turned around and followed the Defendant northbound into New Madison. While following the vehicle, it was observed to be driving erratically. This conduct was reported to the 9-1-1 call center and a Sheriff's Deputy was dispatched.

The Defendant eventually crashed into a guard rail on the north side of New Madison. The Defendant was observed to be dazed but conscious. Dep. Didier from the Sheriff's Department arrived and rescue personnel responded. Mr. Ott was administered Narcan several times to counter the apparent effects of an opiate overdose. Two empty gel capsules and two intact gel capsules with a brown substance alerted Dep. Didier to the possibility Mr. Ott was abusing heroin. Mr. Ott admitted inhaling three capsules of heroin which may have contained other narcotic substances.

Mr. Ott was indicted as follows: Count I - Possession of Heroin, contrary to R.C. 2925.11(A),(C)(6)(a), a fifth degree felony, and Count II - Driving Under the Influence of a Drug of Abuse, contrary to R.C. 4511.19(A)(1)(a), a first degree misdemeanor. During the pre-trial process, Mr. Ott's motion for Intervention in Lieu of Conviction was granted as to Count I. The state refused the Defendant's request to dismiss Count II (which is not eligible for Intervention). Thereafter, the Defendant filed his motion to dismiss.

The Doctrine of Merger and Principles of Double Jeopardy

The Defendant's motion is based on the provisions of R.C. 2941.25 and case jurisprudence regarding the "double jeopardy" clauses of the Ohio and United States constitutions. R.C. 2941.25 provides as follows:

> § 2941.25. Allied offenses of similar import - multiple counts
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> (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.
>
> (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.
> Effective Date: 01-01-1974 .

This statute has undergone extensive interpretation in the many Courts of this State in recent years. In fact, the Supreme Court of Ohio has issued substantive decisions on the subject each year since at least 2008.

The purposes of this statute were stated in *State v. Williams,* 134 Ohio St.3d 482, 983 N.E.2d 1245, 2012-Ohio-5699 as follows:

> {¶ 13} R.C. 2941.25 "codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. At the heart of R.C. 2941.25 is the judicial doctrine of merger; merger is "the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime." *State v. Botta*, 27 Ohio St.2d 196, 201, 271 N.E.2d 776 (1971).

Further understanding of R.C. 2941.25 can be gleaned from *State v. Johnson,* 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, which held:

> {¶ 43} We have consistently recognized that the 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. *Geiger*, 45 Ohio St.2d at 242, 74 O.O.2d 380, 344 N.E.2d 133. This is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes. When "in substance and effect but one offense has been committed, " the defendant may be convicted of only one offense. Botta, 27 Ohio St.2d at 204, 56 O.O.2d 119, 271 N.E.2d 776.
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> {¶ 47} Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
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> {¶ 48} 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. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). 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.

{¶ 49} 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." Brown, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

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

The current definitive "test" for analyzing merger was announced in *State v. Ruff,* 143 Ohio St.3d 114, 34 N.E. 3d 892, 2015-Ohio-995, which set forth the principles to be applied to this case, as follows:

Syllabus: 1. In determining 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.

2. 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.

3. Under 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.

{¶ 20} * * * But R.C. 2941.25(B) states that the *same conduct* can be separately punished if that conduct constitutes offenses of *dissimilar* import. R.C. 2941.25(B) sets forth three categories in which there can be multiple punishments: (1) offenses that are dissimilar in import, (2) offenses similar in import but committed separately, and (3) offenses similar in import but committed with separate animus.

{¶ 22} We have previously cautioned that the inquiry should not be limited to whether there is separate animus or whether there is separate conduct. Courts must also consider whether the offenses have similar import. State v. Baer, 67 Ohio St.2d 220, 226, 423 N.E.2d 432 (1981).

{¶ 24} When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).

{¶ 25} A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses

committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

Analysis

Neither counsel has provided citation to any case where the facts were similar to those in this case: possession of drugs and driving under the influence of drugs. The Court's own research of over 140 cases also found no factually similar case authority.

However, two cases in support of the Defendant's position were discovered. In *City of Parma Heights v. Owca,* 2017-Ohio-179 (8th Dist.), the trial court merged convictions under R.C. 4511.19(A)(1)(a) and R.C. 4511. 19(A)(1)(j), where the impaired operation was caused by the same drugs. In *State v. Britt,* 2015-Ohio-3605 (2nd Dist.), the trial court merged convictions under R.C. 4511.19(A)(1)(a) and R.C. 4511. 19(A)(1)(h). The Courts of Appeals agreed. Also, by analogy, see also *State v. Clark,* 2016-Ohio-1560 (2nd Dist.) where merger was appropriate under the facts of the case for the offenses of Possessing a Weapon Under disability and Improper Handling of a Firearm in a Motor Vehicle.

In support of the State's position are various cases where convictions and separate sentences were upheld where there were different drugs involved in similar, simultaneous conduct. For example, see *State v. Huber,* 2011-Ohio-6175 (2nd Dist.); *State v. Westbrook,* 2010-Ohio-2692 (4th Dist.); *State v. Kendall*, 2012-Ohio-1172 (9th Dist.).

Conclusion

In this case, different drugs are involved in each of the two charges: Heroin, a Schedule I drug, and Fentanyl, a Schedule II drug. Accordingly, the Legislature expressed its

intentions to treat these drugs differently; therefore, there can be no"double jeopardy" argument which implicates the merger doctrine. The same conduct is not being used by the State to seek imposition of multiple sentences.

Based on the facts presented in this case, the Court finds that the offense of Driving Under the Influence of Drugs of Abuse (Fentanyl) is not an allied offense to the offense of Possession of Heroin. The Defendant's motion to dismiss is not well taken.

This Court is not ruling that there should never be a merger of sentences when there are convictions for both Possession of Drugs and Driving Under the Influence of Drugs. The outcome here could be inconsistent with other situations which have the same charges with the same drug accounting for both the possession charge and the reason for the impaired operation. Each case must be decided upon its particular facts. As stated in *Ruff, supra.:*

> {¶ 32} * * * "We recognize that this analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct—an inherently subjective determination." Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 52 (plurality opinion per Brown, C.J.).

IT IS, THEREFORE, ORDERED AND DECREED that the Defendant's Motion to Dismiss Count II is denied. This matter will be scheduled for trial by separate Entry to be filed herein.

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JONATHAN P. HEIN, Judge

cc: Deborah S. Quigley, Assistant Prosecuting Attorney (hand delivery)
H. Steven Hobbs, Attorney for Defendant (via email)

jph/research/criminal/merger