[Cite as *State v. Johnson*, 2018-Ohio-2465.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-T-0091**
- vs -	:	
KEVIN DESHAWN JOHNSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas.
Case No. 2016 CR 00204.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor; *LuWayne Annos*, *Michael A. Burnett*, and *Ashleigh Musick*, Assistant Prosecutors, Administration Building, 160 High Street, N.W., Fourth Floor, Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Kevin Deshawn Johnson, appeals from the August 26, 2016, entry on sentence of the Trumbull County Court of Common Pleas. For the following reasons, the trial court's judgment is affirmed.

{¶2} On May 18, 2016, appellant was indicted by the Trumbull County Grand Jury on the following charges: Count 1, Possession of Cocaine, a first-degree felony in violation of R.C. 2925.11(A) & (C)(4)(e); Count 2, Trafficking in Cocaine, a first-degree

felony in violation of R.C. 2925.03(A)(2) & (C)(4)(f); Count 3, Possession of Heroin, a second-degree felony in violation of R.C. 2925.11(A) & (C)(6)(d); Count 4, Trafficking in Heroin, a second-degree felony in violation of R.C. 2925.03(A) & (C)(6)(e); Count 5 & Count 6, Having Weapons While Under Disability, third-degree felonies in violation of R.C. 2923.13(A)(2) & (B); and Count 7, Endangering Children, a first-degree misdemeanor in violation of R.C. 2919.22(A) and (E)(1) & (2)(a).

{¶3} Appellant initially entered a plea of not guilty to the charges in the indictment. On June 23, 2016, appellant entered into a written plea agreement with appellee, the state of Ohio. Appellant agreed to enter a guilty plea on all counts as listed in the indictment and to waive a Presentence Investigation ("PSI"). The "State and [appellant] [agreed] to a jointly recommended prison sentence of 4 years on each count for Counts 1-4; 36 months on each count for Cts. 5 & 6, and 6 months in the Trumbull County Jail on Count 7, sentences to be served concurrently to each other for a total prison sentence of 4 years."

{¶4} Appellant appeared for a change of plea hearing on June 23, 2016. At the hearing, appellant indicated he was able to read and write the English language and was not under the influence of alcohol or drugs. The trial judge reviewed the plea agreement with appellant. Appellant indicated that no one had promised him anything if he entered into the agreement, he had read the agreement and had no questions, and he was satisfied with his attorney. The trial court reviewed the elements of each count in the indictment, explained that entering a guilty plea meant making a complete admission to the allegations contained in the indictment, and explained that the court could proceed to sentencing upon acceptance of the plea. The court reviewed the jointly recommended

sentence with appellant. Further, the court explained the recommended sentence was not binding on the court and reviewed the possible penalties for all counts in the indictment, including the maximum penalty and the applicable term of post-release control for each count. The trial court also reviewed the constitutional rights appellant would waive by entering a guilty plea. Appellant indicated an understanding of everything the trial court explained and answered all questions affirmatively. Finally, appellant stated he wanted to enter a plea of guilty to Counts 1 through 7 in the indictment. The prosecutor presented the factual basis for the charges. The court accepted appellant's guilty plea and ordered a PSI.

{¶5} Appellant appeared for sentencing on August 18, 2016. The following discussion took place:

> **Court:** Does the state have anything to present in the way of sentencing?
>
> **Prosecutor:** Your honor, just that the state would concede that under the circumstances the traffickings and possessions on Count One [Possession of Cocaine] and Count Two [Trafficking in Cocaine] and Count Three [Possession of Heroin] and Count Four [Trafficking in Heroin] would merge for purposes of sentencing. So Count Two would merge with Count One, Count Four would merge with Count Three. Essentially other than that, they're independent and you can run concurrent or consec on all other charges.
>
> **Court:** You wish to sentence on Count One and Count Three?
>
> **Prosecutor:** Yes
>
> **Court:** [Addressing defense counsel] Counsel, is there anything you like to say on behalf of [appellant]? First, would you agree with the state as to the merger of Count Two into One and Count Four to Three?
>
> **Defense counsel:** Yes.
>
> **Court:** Anything you would like to say on behalf of [appellant]?

Defense counsel: Nothing, Your Honor.

The court then stated it reviewed the PSI and sentenced appellant to a mandatory prison sentence of six years and a $10,000.00 fine on Count 1; a mandatory prison sentence of four years and a $7,500.00 fine on Count 3, to be served consecutive to Count 1; thirty-six months in prison on each of Count 5 and Count 6, to be served concurrent to each other and consecutive to Count 1 and Count 3; and six months in the Trumbull County Jail on Count 7, to be served concurrent to Count 1, Count 3, Count 5, and Count 6, for an aggregate prison sentence of thirteen years. After appellant's sentence was pronounced, the following discussion took place:

> **Defense counsel:** What was the total time on that Your Honor?
>
> **Court:** 13 years.
>
> **Appellant:** Your Honor, I signed a plea deal for four years, Your Honor.
>
> * * *
>
> **Defense counsel:** That was the offer presented by the State, Your Honor, was four years.
>
> **Court:** Which is rejected by the Court. Take care.

The trial court entered its judgment on sentence on August 26, 2016.

{¶6} Appellant filed a motion to withdraw his guilty plea on September 1, 2016. Appellee filed a brief in opposition on September 21, 2016. No judgment was entered on the motion and it is therefore deemed to have been denied. *Vogias v. Ohio Farmers Ins. Co.*, 11th Dist. Portage No. 2007-P-0099, 2008-Ohio-3605, ¶45 (citation omitted). ("It is well settled that when a motion is not ruled on by a trial court, it is deemed to be denied.")

{¶7} On September 26, 2016, appellant filed an appeal from the trial court's August 26, 2016 judgment entry. Appellant asserts four assignments of error on appeal.

{¶8} With leave of this court, appellant's original appellate counsel withdrew as counsel on March 8, 2017. Appellant was appointed new counsel and was granted leave to file a supplemental brief. Appellant asserts two additional assignments of error in his supplemental brief.

{¶9} Appellant's first and second assignments of error pertain to the knowing, intelligent, and voluntary nature of his guilty plea:

> [1.] The appellants' [sic] guilty plea was not entered into knowingly, intelligently and voluntarily when the terms of the agreement underlying the plea were breached subsequent to entering the guilty plea.
>
> [2.] The appellants' [sic] guilty plea was not entered into knowingly, intelligently and voluntarily when the underlying agreement was altered subsequent to entering his guilty plea.

{¶10} Pursuant to Crim.R. 11(C)(2), a trial court shall not accept a plea of guilty in a felony case 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 * * *, 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.

{¶11} When the guilty plea is entered pursuant to a negotiated plea agreement, "the underlying agreement upon which the plea is based shall be stated on the record in open court." Crim.R. 11(F).

{¶12} "An inquiry into the voluntariness of a plea does not end with the determination as to whether the trial judge complied with Crim.R. 11(C). '[A] defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. * * * The test is whether the plea would have otherwise been made.'" *State v. Robinson*, 8th Dist. Cuyahoga Nos. 89222 & 89223, 2008-Ohio-224, ¶10, quoting State v. Nero, 56 Ohio St.3d 106, 108.

{¶13} Under his first assignment of error, appellant argues the prosecutor's statement at the sentencing hearing that the trial court could run appellant's sentences concurrently or consecutively was a breach of the plea agreement.

{¶14} Under his second assignment of error, appellant argues the merger of Count 2 with Count 1 and Count 4 with Count 3 altered his plea agreement, and the trial court should have conducted a new plea colloquy after the merger.

{¶15} We review for plain error because appellant failed to object to the prosecutor's statement and the merger either at the sentencing hearing or in his motion to withdraw his guilty plea. *See State v. Adams*, 7th Dist. Mahoning No. 13 MA 54, 2014-Ohio-724, ¶23, citing *State v. Hansen*, 7th Dist. Mahoning No. 11 MA 63, 2012-Ohio-4574, ¶15, citing *Puckett v. United States*, 556 U.S. 129 (2009) ("[W]here a defendant fails to object at sentencing to the state's recommendation, the appellate court proceeds

under a plain error review"). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error exists when a defendant's sentence would have been different absent a prosecutor's breach of a plea agreement. *See Adams*, *supra*, at ¶25, citing *Hansen*, *supra*, at ¶15.

{¶16} "A plea agreement is an essential part of the criminal justice system. * * * A defendant has a contractual right to enforcement of the prosecutor's obligations under the plea agreement after the plea has been accepted by the court." *Id.* at ¶17 (internal citations omitted), citing *Santobello v. New York*, 404 U.S. 257, 261 (1971). "When the plea agreement is silent on the issue of allied offenses of similar import * * * the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶29.

{¶17} The state did not recommend consecutive sentences and did not violate the agreed sentencing recommendation. When addressing the new issue of merger, the prosecutor conceded under the circumstances that the trafficking counts and the possession counts should merge for purposes of sentencing. Other than that, the charges were independent, and the court could proceed to run concurrent or consecutive sentences. That was a correct statement of the status after the merger. It was not a recommendation. Nowhere in the record did the state withdraw the previous recommendation. In addition, the trial court was aware of the plea agreement and the state's position on sentencing because the court reviewed the agreement and recommended sentence with appellant at his change of plea hearing. The trial court at

three separate times during the change of plea hearing made appellant aware that it was not bound by the plea agreement.

{¶18} Further, it was not error for the trial court to proceed with sentencing appellant without conducting a new plea colloquy after the agreement to merge certain counts. The issue of merger was separate from the terms of the plea agreement. The state conceded to the merger, which benefitted appellant, and defense counsel agreed with the state without stating anything further on behalf of appellant. Appellant also failed to question the merger when the court addressed him.

{¶19} Moreover, the record reflects the trial court complied with the requirements of Crim.R. 11. Appellant's argument that his plea was not knowing, intelligent, and voluntary is not well taken.

{¶20} Appellant's first and second assignments of error are without merit.

{¶21} Appellant's fourth assignment of error states:

{¶22} "The appellant received ineffective assistance of counsel in violation of his rights pursuant to the Sixth Amendment to the United States Constitution and Section 10, Article 1 of the Ohio Constitution."

{¶23} Appellant argues he received ineffective assistance of counsel because trial counsel failed to object when the trial court ordered a PSI and when the state breached the plea agreement.

{¶24} "A properly licensed attorney is presumed to be competent." *State v. Strong*, 11th Dist. Ashtabula No. 2013-A-0003, 2013-Ohio-5189, ¶11, citing *Strickland*, *supra*, at 688.

{¶25} To prevail on an ineffective assistance of counsel claim, an appellant must demonstrate that trial counsel's performance fell "below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus (following *Strickland v. Washington*, 466 U.S. 668 (1984)).

{¶26} In the context of a conviction based on a guilty plea, an appellant must demonstrate that (1) counsel's performance was deficient and (2) but for counsel's error, there is a reasonable probability appellant would not have pleaded guilty. *State v. Xie*, 62 Ohio St.3d 521, 524 (1992), citing *Strickland*, *supra,* at 687 and *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985). "'[T]he ineffective assistance will only be found to have affected the validity of the plea when it precluded the defendant from entering the plea knowingly and voluntarily.'" *State v. Whiteman*, 11th Dist. Portage No. 2001-P-0096, 2003-Ohio-2229, ¶24, quoting *State v. Sopjack*, 11th Dist. Geauga No. 93-G-1826, 1995 WL 869968, *4 (Dec. 15, 1995).

{¶27} "'[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.'" *Bradley*, *supra*, at 143, quoting *Strickland*, *supra*, at 697.

{¶28} Appellant has failed to demonstrate that any alleged error by his trial counsel precluded him from entering his guilty plea knowingly, intelligently, and

voluntarily. Thus, he has not established that he was prejudiced by any alleged deficiencies in his counsel's performance.

{¶29} Appellant's fourth assignment of error is without merit.

{¶30} Appellant's first supplemental assignment of error states:

{¶31} "The trial court deprived [appellant] of Due Process under the Fourteenth Amendment to the United States Constitution when the court breached the 'Written Plea Agreement.'"

{¶32} Appellant's argument that the trial court breached the plea agreement is premised upon contract law principles. Appellant maintains the written plea agreement did not contain any provision indicating the trial court was not bound by the agreement, and the trial court was barred by the parol evidence rule from incorporating such provision through its statements to appellant during the plea hearing.

{¶33} "We recognize a plea agreement is considered a contract between the state and a criminal defendant * * * [and] such an agreement is subject to the general law of contracts." *State v. Ettenger*, 11th Dist. Lake No. 2008-L-054, 2009-Ohio-3525, ¶62, citing *State v. Butts*, 112 Ohio App.3d 683, 685-686 (8th Dist.1996). However, "trial courts may reject plea agreements and * * * are not bound by a jointly recommended sentence." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶28, citing *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, ¶6. "'A trial court does not err by imposing a sentence greater than "that forming the inducement for the defendant to plead guilty when the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor." *Duran*, *supra*, at ¶6, quoting *State v. Buchanan*, 154 Ohio App.3d 250, 2003-Ohio-4772,

¶13, quoting *State v. Pettiford*, 12th Dist. Fayette No. CA 2001-08-014, 2002 WL 652371, *3 (Apr.22, 2002).

{¶34} At the plea hearing, the trial court addressed appellant and informed him of the maximum penalties for all counts. The trial court also stated multiple times that it was not bound by the plea agreement.

{¶35} Appellant's first supplemental assignment of error is without merit.

{¶36} Appellant's third assignment of error states:

{¶37} "The trial court erred when it failed to merge two counts of Having a Weapon Under Disability."

{¶38} Because appellant failed to object when the trial court did not merge Count 5 and Count 6, we review for plain error. *See State v. Mitchell*, 2d Dist. Montgomery No. 25976, 2014-Ohio-5070, ¶23 (citation omitted).

{¶39} R.C. 2941.25 "incorporates the constitutional protections against double jeopardy. These protections generally forbid successive prosecutions and multiple punishments for the same offense." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶7. "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." R.C. 2941.25(A). "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." R.C. 2941.25(B).

{¶40} "The determination whether an offender has been found guilty of allied offenses of similar import 'is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct,' and 'an offense may be committed in a variety of ways.'" *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, ¶18, quoting *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, ¶26, ¶30.

{¶41} "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[.]" *Ruff*, *supra*, at ¶24, citing R.C. 2941.25(B). "As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses:

> (1) Were the offenses dissimilar in import or significance?
> (2) Were they committed separately? and
> (3) Were they committed with separate animus or motivation?

Id. at ¶31; *see also id.* at ¶13, citing *State v. Moss*, 69 Ohio St.2d 515, 519 (1982). "An affirmative answer to any of the above will permit separate convictions." *Id.* at ¶31.

{¶42} R.C. 2923.13(A)(2) provides, in pertinent part, that "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence[.]"

{¶43} "[T]he simultaneous, undifferentiated possession of weapons by a person under a disability constitutes *only one offense* and not separate offenses for each weapon" because the language of R.C. 2923.13 "does not evince an intent to make each weapon the relevant unit of prosecution rather than the transaction of having the

weapons." *State v. Pitts*, 4th Dist. Scioto No. 99 CA 2675, 2000 WL 1678020, *13 (citations omitted); *see also State v. Creech*, 4th Dist. Scioto No. 09CA3291, 2010-Ohio-2553, ¶24-26; and *State v. English*, 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759, ¶44. However, multiple convictions are appropriate if there is evidence the weapons were stored in different locations. *See Pitts*, *supra*, at *13 and *Creech*, *supra*, at ¶25.

{¶44} The record in the instant case is limited regarding the underlying facts supporting Count 5 and Count 6. The indictment states the following:

> Count 5 * * * [appellant], having not been relieved from disability under operation of law or legal process, did knowingly acquire, have, carry or use any firearm or dangerous ordnance, to-wit: a Taurus 9mm handgun with serial number scratched off, when [appellant] is under indictment for or has been convicted of any felony offense of violence[.]
>
> Count 6 * * * [appellant] having not been relieved from disability under operation of law or legal process, did knowingly acquire, have, carry, or use any firearm or dangerous ordnance, to-wit: a Cobra .380 handgun, Serial No. FS094425, when [appellant] is under indictment for or has been convicted of any felony offense of violence[.]

At appellant's plea hearing the state provided the following factual basis for Count 5 and Count 6:

> Your Honor, the defendant was also in possession of a Taurus 9-millimeter handgun with a serial number scratched off, and a Cobra .380 handgun with a serial number of FS094425. He was prohibited from possessing those weapons based on prior criminal convictions of a felony nature that caused him to be under disability.

Reports obtained from the Warren Police Department and attached to appellant's PSI state:

> A Taurus 9 MM pistol * * * was located on the top shelf of a closet * * * the serial number had been scratched off. * * * During the search of the master bedroom, a Cobra .380 pistol loaded with a magazine containing live rounds of ammunition * * * was located in a dresser drawer.

{¶45} Here, the record is limited, but it reflects the two weapons were stored in different places and the serial number on one weapon was scratched off, while the serial number on the other remained intact. The evidence therefore indicates appellant's possession of the weapons was not simultaneous and undifferentiated. It was not plain error for the trial court to fail to merge Count 5 and Count 6.

{¶46} Appellant's third assignment of error is without merit.

{¶47} Appellant's second supplemental assignment of error states:

{¶48} "The trial court erred by imposing consecutive sentences upon appellant."

{¶49} Appellant argues the trial court's imposition of consecutive sentences was contrary to law.

{¶50} We generally review felony sentences under the standard of review set forth in R.C. 2953.08(G)(2), which states, in pertinent part:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under * * * [R.C. 2929.14(C)(4)] * * * ;
>
> (b) That the sentence is otherwise contrary to law.

{¶51} Except as provided in, inter alia, R.C. 2929.14(C), prison sentences are to be served concurrently with each other. R.C. 2929.41(A). Pursuant to R.C. 2929.14(C)(4), a court may require an offender to serve multiple prison terms consecutively if it 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.

{¶52} A trial court must make the statutory findings to support its decision to impose consecutive sentences, but the trial court is not required to engage in a "word-for-word" recitation of the statutory findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶29. The trial court is not required to set forth its reasons to support its findings as long as the reasons are discernible from the record. *Id.*

{¶53} "[A] trial court's failure to incorporate the findings required by R.C. 2929.14(C) in the sentencing entry after making those findings at the sentencing hearing does not render the sentence contrary to law." *State v. Aikens*, 11th Dist. Trumbull No. 2014-T-0124, 2016-Ohio-2795, ¶61, citing *Bonnell*, *supra*, at ¶30. While clerical mistakes in the sentencing entry can be corrected via a nunc pro tunc entry, a trial court's failure to make the R.C. 2929.14(C)(4) findings at the sentencing hearing renders the sentence

contrary to law, "requiring the vacation of the sentence and a remand to the trial court for resentencing." *Id.*, citing *Bonnell*, *supra*, at ¶36-37.

{¶54} At appellant's sentencing hearing, the trial court made the following findings prior to imposing consecutive sentences:

> The Court finds the sentence shall be proportional to the defendant's conduct as well as consistent with similarly situated offenders.
>
> Court also takes note of the presentence investigation, incorporates it into this defendant's file by reference.

The trial court then went on to review appellant's extensive criminal history, dating back to age fourteen. The court further stated:

> The court finds that pursuant to Ohio Revised Code Section 2929 it is necessary to protect the public from future crime and consecutive sentences are not disproportionate to the seriousness of the offender's conduct.
>
> Due to the conduct of the defendant and prior criminal history, a single term would not adequately affect [sic] the seriousness of the conduct of the defendant.
>
> Your criminal history clearly demonstrates that consecutive sentences are necessary for the protection of the public.

The trial court's August 26, 2016 judgment entry on sentence provides:

> The Court finds that the Defendant has a lengthy criminal history as a juvenile and adult for prior drug offenses. Further, the Court finds that consecutive sentences are necessary to protect the public from future crime and to punish the Defendant, and that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the Defendant poses to the public. Further, the Court finds that the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶55} The record reflects the trial court considered and made the appropriate factual findings pursuant to R.C. 2929.14(C)(4) and (C)(4)(c) during the sentencing

hearing and in its judgment entry. Appellant has failed to demonstrate his sentence is contrary to law.

{¶56} Appellant's second supplemental assignment of error is without merit.

{¶57} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part with a Dissenting Opinion.

{¶58} I concur with the majority to affirm the trial court's judgment regarding appellant's first, second, and fourth assignments and his supplemental assignments of error as they are not well-taken. However, because this humble writer finds merit regarding appellant's third assignment, I respectfully dissent in part.

{¶59} In his third assignment of error, appellant alleges the trial court erred in failing to merge counts five and six, having weapons while under disability, as both handguns were found in the same place, i.e., his residence, at the time of the search by police.

{¶60} Appellant failed to object to the trial court's failure to merge the offenses so all but plain error has been forfeited. *State v. Lott*, 51 Ohio St.3d 160, 167 (1990).

{¶61} "'"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, (* * *) ¶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 (* * *) (1971)." (Parallel citations omitted.) [*State v.*] *Williams* [134 Ohio St.3d 482, 2012-Ohio-5699] at ¶13.

{¶62} "'R.C. 2941.25 states:

{¶63} "'"(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.

{¶64} "'"(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."

{¶65} "'"To ensure compliance with both R.C. 2941.25 and the Double Jeopardy Clause, 'a trial court is required to merge allied offenses of similar import at sentencing. Thus, when the issue of allied offenses is before the court, the question is not whether a particular sentence is justified, but whether the defendant may be sentenced upon all the

offenses." *Underwood* at ¶27." *Williams, supra,* at ¶15.' (Parallel citations omitted.) *State v. Edwards*, 11th Dist. Lake No. 2012-L-034, 2013-Ohio-1290, ¶49–53.

{¶66} "In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, the Ohio Supreme Court clarified that two or more offenses may result in multiple convictions if any of the following is true: '(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation.' *Id.* at ¶25. '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 paragraph two of the syllabus.

{¶67} "The failure to merge allied offenses is plain error. *Underwood, supra,* at ¶31. Where a trial court fails to merge allied offenses, the appellate court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, ¶25." *State v. Stanifer*, 11th Dist. Geauga No. 2016-G-0085, 2017-Ohio-2721, ¶73-79.

{¶68} "[A] defendant can commit one offense of having weapons while under disability by the possession of multiple weapons." *State v. King*, 2d Dist. Clark Nos. 2012-CA-25 and 2012-CA-26, 2013-Ohio-2021, ¶34, citing *State v. Long*, 9th Dist. Summit No. 26441, 2013-Ohio-251.

{¶69} This writer therefore turns to whether appellant's two offenses of having weapons while under disability were committed separately or with a separate animus.

"Although the simultaneous, undifferentiated possession of multiple weapons can constitute one act of having weapons while under disability, Ohio appellate districts have further held, however, that multiple convictions are appropriate if '"there is evidence that the weapons were stored in different places or acquired at different times."' *King, supra,* at ¶35, quoting *State v. Lowery,* 11th Dist. Trumbull No. 2007-T-0085, 2008-Ohio-1896, * * *, ¶15, quoting *United States v. Dunford,* 148 F.3d 385, 390 (4th Cir.1998). (Parallel citation and accord citations omitted.) "Multiple convictions are also appropriate where the offenses are committed with a separate animus." *King* at ¶36.

{¶70} However, "'the simultaneous, undifferentiated possession of weapons by a person under a disability constitutes *only one offense* and not separate offenses for each weapon.' (Emphasis in original.) [*State v.*] *Pitts*[, 4th Dist. Scioto No. 99 CA 2675, 2000 WL 1678020,] at *13 [(Nov. 6, 2000)]; *see also, e.g., State v. Creech,* 188 Ohio App.3d 513, 2010-Ohio-2553, * * *, ¶24 (4th Dist.); [*State v.*] *English*[, 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759,] at ¶43; *State v. Long,* [*supra*]." *State v. Mitchell*, 2d Dist. Montgomery No. 25976, 2014-Ohio-5070, ¶26, quoting *King, supra,* at ¶32.

{¶71} In the instant matter, whether appellant initially acquired the two guns at different times is not revealed in the record. However, the PSI reveals that the two guns were both located in appellant's residence when it was searched by police. A 9-millimeter Taurus with the serial number scratched off was found on the top shelf of a closet and a .380 Cobra with a serial number of FS094425 was located in a dresser drawer. Accordingly, this writer finds that appellant had simultaneous, undifferentiated possession of both weapons and committed a single act with a single state of mind. Thus, the trial court erred in failing to merge counts five and six, having weapons while under disability,

as allied offenses of similar import, and sentencing appellant to two separate, albeit concurrent, 36-month sentences. *See King, supra,* at ¶41; *Mitchell, supra,* at ¶28.

{¶72} This writer finds appellant's third assignment of error well-taken.

{¶73} For the foregoing reasons, I respectfully concur in part and dissent in part.