[Cite as *State v. Polachek*, 2010-Ohio-5421.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-41
ANDREW POLACHEK	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2009-CR-810H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 4, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. RICHLAND COUNTY PROSECUTOR 38 South Park Street Mansfield, OH 44902	JEFFEREY R. STIFFLER DAVID C. BADNELL CO., L.P.A. 21 North Walnut Street Mansfield, OH 44902

Gwin, P.J.

{¶1} Appellant Andrew Polachek appeals the sentence rendered by the Richland County Court of Common Pleas upon his plea of guilty to three counts of possession of a controlled substance. The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} The Richland County Grand Jury indicted appellant on one (1) count of possession of controlled substances (Heroin), in violation of R.C. 2925.11(A) and 2925.11(C)(6)(a), a felony of the fifth degree (Count I); one (1) count of possession of controlled substances (Suboxone), in violation of R.C. 2925.11(A) and 2925.11(C)(2)(a), a felony of the fifth degree (Count II); and one (1) count of possession of controlled substances (Alprazolam), in violation of R.C. 2925.11(A) and 2925.11(C)(2)(a), a felony of the fifth degree (Count III). Forfeiture specifications were attached to each count.

{¶3} On February 17, 2010, appellant pled guilty to all counts and received a suspended eight-month prison sentences for each count, to be served consecutively. Appellant was ordered to forfeit the $1,626.00 and to pay $80 in restitution to the Mansfield Police Department Crime Lab. Appellant received three (3) years of Community Control.

{¶4} Appellant has timely appealed raising as his sole assignment of error,

{¶5} "I. THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES FOR THE THREE (3) COUNTS OF POSSESSION OF DRUGS, AS THOSE COUNTS WERE COMMITTED WITH A SINGLE ANIMUS AND THEREFORE, ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MUST MERGE FOR SENTENCING PURPOSES."

I.

{¶6} In his sole assignment of error appellant argues that his convictions for three counts of possession of controlled substances should have merged for purposes of sentencing. We disagree.

{¶7} The entry of a plea of guilty is a grave decision by an accused to dispense with a trial and allow the state to obtain a conviction without following the otherwise difficult process of proving his guilt beyond a reasonable doubt. See *Machibroda v. United States* (1962), 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473. A plea of guilty constitutes a complete admission of guilt. Crim. R. 11 (B) (1). "By entering a plea of guilty, the accused is not simply stating that he did the discreet acts described in the indictment; he is admitting guilt of a substantive crime." *United v. Broce* (1989), 488 U.S. 563, 570, 109 S.Ct. 757, 762.

{¶8} Although appellant did not assert this allied offense argument in the trial court, 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." Indeed, the Ohio Supreme Court has held that imposition of multiple sentences for allied offenses of similar import constitutes plain error. *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1, 922 N.E. 2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102.

{¶9} R.C. 2941.25 provides:

{¶10} "(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.

{¶11} "(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."

{¶12} Recently, the Supreme Court of Ohio in *State v. Cabrales*, 118 Ohio St.3d 54, 57, 2008-Ohio-1625, 884 N.E.2d 181, instructed as follows:

{¶13} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import."

{¶14} Nonetheless, even though the offenses are of similar import under R.C. 2941.25(A), Subsection (B) permits convictions for two or more similar offenses if the offenses were either (1) committed separately, or (2) committed with a separate animus as to each. See *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph five of the syllabus.

{¶15} The statute at issue here is R.C. 2925.11. That statute provides, in pertinent part, the following:

{¶16} “(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶17} " * * *

{¶18} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶19} (1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

{¶20} (a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

{¶21} "* * *

{¶22} "(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

{¶23} (a) Except as otherwise provided in division (C) (2) (b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree."

{¶24} In the case at bar, appellant pled guilty to three counts of possession of three different controlled substances, not simply a single count. Appellant pled guilty to possession of heroin, a Schedule I controlled substance which is a felony of the fifth

degree in violation of R.C. 2925.11(C)(6)(a), one count of possession of Suboxone, a Schedule III controlled substance which is a felony of the fifth degree in violation of R.C. 2925.11(C)(2)(a); and one count of possession of Alprazolam, a Schedule IV controlled substance which is a felony of the fifth degree in violation of R.C. 2925.11(C)(2)(a).

{¶25} Proof of possession of heroin will not sustain a conviction for possession of Suboxone or Alprazolam. Therefore, conviction of a felony under R.C. 2925.11(C) (1) requires proof of facts that R.C. 2925.11(C) (2) does not. See, *State v. Delfino* (1986), 22 Ohio St.3d 270, 273, 490 N.E.2d 884, 888. We find therefore, the trial court did not err in sentencing appellant to a prison term for possession of a Schedule I controlled substance separate from that involving the Schedule III and Schedule IV controlled substances. However, our inquiry must continue concerning whether the appellant can be properly sentenced to consecutive prison sentences for simultaneous possession of a Schedule III controlled substance and a Schedule IV controlled substance.

{¶26} The Supreme Court in *Delfino* further explained,

{¶27} "Since different facts are required to be proven to sustain a conviction under the different subsections, we can conclude via the *Blockburger v. United States* (1932), 284 U.S. 299, 52 S.Ct. 180], test that the legislature intended the possession of the different drug groups to constitute different offenses. See *State v. Coleman* [(Dec. 19, 1984), Montgomery App. No. 8623], supra; *State v. Kash (*May 15, 1978), Montgomery App. No. 5815], supra. This court specifically holds that possession of a substance or substances in Schedule I or II, with the exception of marijuana, is a single and separate offense under R.C. 2925.11(C)(1). Possession of a substance or substances included in Schedule III, IV or V is a single and separate offense under R.C.

2925.11(C) (2). Possession of marijuana is a single and separate offense under R.C. 2925.11(C) (3).” 22 Ohio St.3d at 273, 490 N.E.2d at 888.

{¶28} Based upon the Ohio Supreme Court’s reasoning, simultaneous possession of a Schedule III and a Schedule IV controlled substance is a single and separate offense under R.C. 2925.11(C)(2) from the possession of heroin under R.C. 2925.11(C)(1). Additionally, the drugs appellant plead guilty to possessing in Count 2 and Count 3 were two different drug compounds contained on two different drug schedules.

{¶29} In *State v. Pitts*, Scioto App. No. 99 CA 2675, 2000-Ohio-1986, our brethren in the Fourth Appellate District made the following observation,

{¶30} “The relevant subsection here is R.C. 2925.03(C) (2) (a), which provides that a person is guilty of ‘trafficking in drugs,’ a fifth-degree felony, if ‘the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V * * *.’ Significantly, the statutory language defines the offenses in terms of ‘a controlled substance’ and ‘the drug involved,’ indicating an offense based on *one* controlled substance. The statute therefore suggests that each drug, even if in the same schedule as another drug sold at the same time, ‘has a significance independent of every other drug * * *.’ *State v. Jennings* (1987), 42 Ohio App. 3d 179, 182, citing *State v. Jackson* (July 17, 1985), Hamilton App. Nos. C-840799, C-840804, unreported. Under this interpretation, the appellant's sale of two different schedule IV substances constitutes separately committed offenses for which multiple punishments may be imposed. See Id. Our conclusion is bolstered by the rule that the specific identity of controlled substance involved must be alleged in the indictment and is considered an essential element of the

crime. *State v. Rees* (Nov. 27, 1989), Gallia App. No. 88CA17, unreported, citing *State v. Headley* (1983), 6 Ohio St.3d 475, 479; *State v. Gough* (Sept. 23, 1992), Licking App. No. 92-CA-34, unreported. Thus, the state's proof that the appellant sold valium would not have been sufficient to prove that she sold xanax, indicating that the offenses are separate and distinct." See also, *State v. Hearns* (Nov. 27, 1985), Summit App. No. 12093; *State v. Norman* (Aug. 15, 1985), Montgomery App. No. CA8816,

{¶31} In the case at bar, not only are the two drugs involved separately identifiable by name and compound, they are also contained on different drug schedules. We find therefore, the trial court did not err in sentencing appellant to a prison term for possession of a Schedule III controlled substance and a separate prison term for possession of a Schedule IV controlled substance. Further, and in addition, as previously stated, we find the trial court did not err in additionally sentencing appellant to a prison term for possession of a Schedule I controlled substance separate from that involving the Schedule III and Schedule IV controlled substances. Thus, the trial court was correct in sentencing appellant to a separate prison sentence for each of the three counts to which he plead guilty.

{¶32} Accordingly, appellant's sole assignment of error is overruled.

{¶33} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

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[Cite as *State v. Polachek*, 2010-Ohio-5421.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ANDREW POLACHEK	:	
Defendant-Appellant	:	CASE NO. 2010-CA-41

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER