

[Cite as *State v. Day*, 2009-Ohio-7046.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 70
v.	:	T.C. NO. 2008 CR 0271/ 2008 CR 0370
CHAD DAY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

**OPINION**

Rendered on the 30<sup>th</sup> day of December, 2009.

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FROELICH, J.

Chad Lee Day pled guilty in the Greene County Court of Common Pleas to aggravated burglary, burglary, domestic violence and abduction. Greene C.P. No. 2008 CR 271. The court sentenced him to an aggregate term of twelve years in prison. In exchange

for the plea, the State dismissed a charge of rape in Greene C.P. No. 2008 CR 370.

Day appeals from his conviction and sentence, claiming that the trial court erred in failing to merge the aggravated burglary and burglary convictions. We agree. For the following reasons, Day's conviction for burglary will be vacated. In all other respects, the judgment will be affirmed.

## I

On April 11, 2008, Day was indicted for aggravated burglary, burglary, domestic violence, and abduction. Greene C.P. No. 2008 CR 271. In May 2008, Day was indicted for rape in Greene C.P. No. 2008 CR 370. The two cases were subsequently consolidated. Shortly after the trial court overruled a motion to suppress that Day had filed, Day pled guilty to the four charges in Greene C.P. No. 2008 CR 271; the State dismissed the rape charge in Case No. 2008 CR 370.

During the July 21, 2008, plea and sentencing hearing, the prosecutor recounted the factual bases underlying the four offenses, as follows:

“On March 30<sup>th</sup>, 2008, the Defendant broke into the residence occupied by the victim in this case, [T.W.], by kicking in a door. Once in that residence, the Defendant proceeded to spend several hours beating the victim about the face and body area with his fists causing numerous injuries to the victim.

“Subsequently, when the victim attempted to leave the residence to summon for help, the Defendant held the victim and restrained her for several hours keeping her from leaving the residence to get help.

“As a result of these acts, the Defendant is charged with one Count of aggravated

burglary; one Count of burglary; one Count of domestic violence; and one Count of abduction, felonies of the 1<sup>st</sup>, 4<sup>th</sup>, 3<sup>rd</sup>, and 3<sup>rd</sup> degree, respectively.

“These acts all occurred in Greene County.”

Day and the State had agreed to a twelve-year sentence. However, after the court accepted Day’s plea and prior to sentencing, Day’s counsel argued to the court that the facts underlying the aggravated burglary and burglary counts were the same and, therefore, those offenses were allied offenses of similar import. Counsel stated: “If the Court is going to accept his guilty plea on both, at least for the purposes of sentencing \*\*\* those would merge together.”

The court did not merge the convictions for aggravated burglary and burglary. It sentenced Day to ten years in prison for aggravated burglary to be served consecutively to two years for domestic violence. Day was further sentenced to eighteen months for burglary and two years for abduction, to be served concurrently with the aggregate twelve-year sentence for aggravated burglary and domestic violence.

## II

In his sole assignment of error, Day contends that the trial court “erred when it failed to merge the aggravated burglary and burglary convictions.” Day argues that burglary is a lesser included offense of aggravated burglary, and that the two offenses should have been merged as allied offenses of similar import. The State agrees with Day’s argument.

At the outset, we note that Day’s appeal is not barred by R.C. 2953.08(A)(1)<sup>1</sup>, even

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<sup>1</sup>R.C. 2953.08(D)(1) provides: “A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case,

though the court imposed an agreed sentence. R.C. 2953.08(D)(1) does not bar an appeal of an agreed sentence when the court failed to merge counts that are allied offenses of similar import. *State v. Underwood*, Montgomery App. No. 22454, 2008-Ohio-4748, appeal allowed, 120 Ohio St.3d 1486, 2009-Ohio-278.

R.C. 2941.25 provides:

“(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.”

Day was charged with aggravated burglary, in violation of R.C. 2911.11(A)(1), and burglary, in violation of R.C. 2911.12(A)(4). The State concedes that burglary is a lesser included offense of aggravated burglary, and that two offenses are allied offenses of similar import. The prosecutor’s statement of underlying facts during the combined plea and sentencing hearing reflects that the same conduct supported the charges for burglary and aggravated burglary and that the offenses were committed with the same animus. R.C. 2941.25 thus required that the convictions for aggravated burglary and burglary be merged. We have held that the failure to merge allied offenses of similar import constitutes plain

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and is imposed by a sentencing judge.”

error, even when the defendant received concurrent sentences. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-2.

The assignment of error is sustained. However, the correction of this error will not shorten the amount of prison time that Day must serve, because the eighteen-month sentence for burglary was ordered to be served concurrently with the aggregate twelve-year sentence for aggravated burglary and domestic violence.

### III

Since a defendant cannot be convicted of both the greater and lesser offense, the convictions are merged, and Day's conviction for burglary will be vacated. In all other respects, the judgment will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. J. Timothy Campbell