[Cite as *State v. Tesack*, 2015-Ohio-5601.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 15 JE 4
V.	)	
	)	OPINION
THERESA A. TESACK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 14 CR 136
JUDGMENT:	Affirmed. Remanded in part.
APPEARANCES: For Plaintiff-Appellee	Jane M. Hanlin Prosecutor Frank J. Bruzzese Assistant Prosecutor 16001 S.R. 7 Steubenville, Ohio 43942
For Defendant-Appellant	Attorney Donald Gallick 190 North Union Street #102 Akron, Ohio 44303

JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 31, 2015

[Cite as *State v. Tesack*, 2015-Ohio-5601.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Terrie Tesack, appeals from a Jefferson County Common Pleas Court judgment sentencing her to six months of community control followed by probation and ordering her to pay $500 in restitution after her guilty plea to charges of obstruction of justice, theft, falsification, and attempted theft by deception.

{¶2} In July 2014, the Wietfelds hired appellant to house sit for them while they were on vacation. During the time she was house sitting, appellant invited others to the house, which ultimately led to a theft and damage to the house.

{¶3} On October 1, 2014, a Jefferson County Grand Jury indicted appellant on one count of obstructing justice, a fifth-degree felony in violation of R.C. 2921.32(A)(5); one count of falsification, a first-degree misdemeanor in violation of R.C. 2921.13(A)(3) and (F)(1); one count of theft, a first-degree misdemeanor in violation of R.C. 2913.02(A)(1) and (B)(2); and one count of attempted theft by deception, a second-degree misdemeanor in violation of R.C. 2923.02(A)[1].

{¶4} Appellant initially entered a not guilty plea. But she later changed her plea to guilty to all counts of the indictment pursuant to a plea agreement with plaintiff-appellee, the State of Ohio. Per the terms of the plea agreement, appellant and the state agreed to a recommended community control sentence of six months in the Eastern Ohio Correction Center (EOCC) in Lisbon for the fifth-degree felony with 90 days concurrent for each of the three misdemeanors and no fines.

{¶5} The trial court held a sentencing hearing. It found that community control was required. It imposed the jointly-recommended sentence of six months at EOCC on the obstructing justice count and 90 days in jail on each of the three misdemeanors to run concurrent to the term at EOCC. The court further ordered, as the parties jointly recommended, that appellant be placed on intensive supervised probation for 12 months, the first six months being the term at EOCC, followed by 24 months of basic probation. The court also ordered appellant to pay an agreed-upon amount of $500 in restitution to the victims.

---

1 While the indictment only listed the attempt statute for the attempted theft by deception charge, the guilty plea also included the theft by deception statutory section, R.C. 2913.02(A)(3).

{¶6} Appellant filed a timely notice of appeal on March 4, 2015. On appellant's motion, the trial court stayed her sentence pending this appeal. Appellant now raises three assignments of error.

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

> THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING A FIRST-TIME OFFENDER TO RESIDENTIAL SANCTIONS ON A FIFTH-DEGREE FELONY.

{¶8} Appellant argues that the trial court abused its discretion in imposing six months of "incarceration" and three years of "community control." She points out that her convictions are for non-violent offenses and only one offense is a felony. And she notes that the felony is only a fifth-degree felony. Finally, appellant points out that she is a first-time offender with only a seatbelt violation in her past.

{¶9} A defendant may not appeal his or her sentence when "(1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law." *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶16; R.C. 2953.08(D)(1).

{¶10} In this case, the trial court stated that it would accept the sentence agreed to by appellant and the state. (Tr. 21, 22-23). In accordance with the agreed sentence, the trial court sentenced appellant to six months at EOCC. (Tr. 23). It also sentenced her to one year of intensive probation, to begin with the six months at EOCC, and two years of basic probation, for a total of three years of community control sanctions. (Tr. 23). Additionally, appellant and the state agreed on the amount of restitution and the court ordered appellant to pay the agreed-upon amount of $500. (Tr. 30-31). Thus, as long as the sentence is authorized by law, appellant cannot now appeal her sentence.

{¶11} In sentencing a felony offender on a felony for which the court is not required to impose a prison term, the court may impose a sentence that consists of one or more community control sanctions authorized pursuant to section R.C.

2929.16, R.C. 2929.17, or R.C. 2929.18. R.C. 2929.15(A)(1). The total duration of community control sanctions shall not exceed five years. R.C. 2929.15(A)(1).

{¶12} When the trial court imposes a sentence for a felony on an offender who is not required to serve a mandatory prison term, it may impose any community residential sanction or combination of community residential sanctions. R.C. 2929.16(A). Community residential sanctions include a term of up to six months at a community-based correctional facility. R.C. 2929.16(A)(1). Additionally, the court may impose any nonresidential sanction or combination of nonresidential sanctions authorized by statute. R.C. 2929.17. Finally, the court may impose financial sanctions such as restitution. R.C. 2929.18(A)(1).

{¶13} Appellant's sentence complies with these statutory sanctions. The court was authorized to impose residential community control sanctions, which it did. The total amount of community control sanctions is three years, so it does not exceed the maximum term allowed by statute of five years. And restitution was permitted by statute.

{¶14} Thus, because appellant's sentence was agreed to by the parties, was imposed by the court, and was authorized by law, she cannot now argue that the court abused its discretion in sentencing her.

{¶15} Another issue exists, however, that we must address.

{¶16} At the sentencing hearing, the court stated that it accepted the parties' agreed-to sentence. (Tr. 22). Therefore, the court sentenced appellant to "one year of intensive supervised probation, with two years of basic probation following, for a total of three years community control sanction with six - - to begin with six months at E.O.C.C." (Tr. 23). But in its judgment entry of sentence, the trial court stated that appellant "shall serve up to six months at the Eastern Ohio Correction Center." It went on to state in its entry that, "Upon release from E.O.C.C. Defendant shall be placed on intensive supervised probation for a period of 12 months." Finally in its entry, the court stated, "Upon completion of Intensive Supervised Probation: (1) the Defendant shall be on regular probation for a period of 41 months."

{¶17} There are obvious discrepancies between the court's sentence at the sentencing hearing and the judgment entry of sentence. At the sentencing hearing, the court sentenced appellant to a total of three years of community control sanctions with the first six months being served at EOCC. This was the sentence agreed to by the parties. In the sentencing entry, however, the court stated that appellant's sentence consisted of "up to" six months at EOCC, followed by 12 months of intensive supervised probation and 41 months of "regular" probation. Thus, the judgment entry of sentence does not accurately set out the sentence imposed by the court at the sentencing hearing.

{¶18} This matter will be remanded so that the trial court can enter a nunc pro tunc entry reflecting the sentence that it handed down at the sentencing hearing. A nunc pro tunc entry is the proper method for the trial court to correct the sentencing judgment entry to reflect the sentence the court actually imposed at the sentencing hearing. See, *State v. Pagan*, 8th Dist. No. 99935, 2014-Ohio-1510; *State v. Dotson*, 5th Dist. No. 2013CA00024, 2013-Ohio-3716; *State v. Hall*, 1st Dist. No. C-100097, 2011-Ohio-2527; *State v. Hundzsa*, 11th Dist. No. 2008-P-0012, 2008-Ohio-4985,; *State v. Stevens*, 9th Dist. No. 16998, 1995 WL 464721, *3 (Aug. 2, 1995).

{¶19} Accordingly, appellant's first assignment of error is without merit.

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

> IT WAS PLAIN ERROR FOR THE TRIAL COURT TO FAIL TO DETERMINE IF ANY CONVICTIONS SHOULD MERGE.

{¶21} Here appellant contends the trial court committed plain error by failing to analyze if any of her offenses should merge for sentencing purposes. She contends that her two theft convictions should have merged and it is possible that her falsification and obstruction of justice convictions should have merged.

{¶22} As discussed above, the trial court imposed the sentence agreed to by appellant and the state. Thus, it might seem she cannot now raise an issue of merger. But, as this Court discussed in *State v. Peck*, 7th Dist. No. 12 MA 205,

2013-Ohio-5526, ¶¶14-15, appellant is still entitled to a plain error review of this issue:

> The Ohio Supreme Court has recognized that the failure of the trial court to account for allied offenses, when it is clear from the record that multiple offenses are allied offenses of similar import under R.C. 2941.25, is 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. In *Underwood*, the defendant entered a no contest plea to two counts of aggravated theft and two counts of theft. He agreed to serve up to two years in prison. The prosecutor filed a sentencing recommendation with the trial court that noted that two of the charges were allied offenses. The court imposed sentences for all four counts, but ordered them to be served concurrently for a total of two years in prison. The defendant did not object to the sentence, but did file an appeal raising the issue of allied offenses. The Ohio Supreme Court held that the requirement to merge allied offenses is mandatory, occurs at sentencing, is reviewable on appeal even pursuant to a Crim.R. 11 jointly agreed-upon sentence, and may be reviewed for plain error even when no allied offense objection is raised at trial. *Id*. at ¶20, 26, 31.
>
> The *Underwood* case allows for plain error review of possible allied offenses even if the sentence was imposed as part of a Crim.R. 11 plea agreement and was agreed to by the defendant. Prior to *Underwood*, it was often the practice of this Court and many others to apply the waiver doctrine where Crim.R. 11 agreed-upon sentences were involved, and to deny any further review of allied offenses, even review for plain error. *State v. Logsdon*, 7th Dist. No. 09CO8, 2010-Ohio-2536. The rationale for this holding was that R.C. 2953.08(D)(1) does not allow for review of agreed-upon sentences that are authorized

> by law. *Underwood*, though, held that a sentence that does not comport with the allied offense statute is not authorized by law and is reviewable for plain error. In light of *Underwood*, it is now possible in many cases involving Crim.R. 11 plea agreements for a defendant to get a plain error review of an allied offense issue. *Underwood*, though, did not change how the plain error rule actually operates. While plain error may be reviewed by an appellate court, plain error must still be demonstrated by the record.

{¶23} Plain error is one in which but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶24} In this case, appellant does not assert that the theft and attempted theft by deception charges are allied offenses of similar import that must merge or that the obstruction of justice and falsification charges are allied offenses of similar import that must merge. She only asserts that they are possible allied offenses that should merge. Thus, appellant has not asserted a plain error.

{¶25} Moreover, there are enough facts in the record to establish that the offenses are not allied offenses of similar import.

{¶26} When the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment may contain counts for all of the offenses, but the defendant may be convicted of only one. R.C. 2941.25(A). But when 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, the defendant may be convicted of all counts. R.C. 2941.25(B).

{¶27} "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus. Therefore, we must consider the defendant's conduct and the facts of each case in

order to determine whether the offenses are of similar import. *State v. Gardner*, 7th Dist. No. 10 MA 52, 2011-Ohio-2644, ¶23.

{¶28} First, the offenses of theft and attempted theft by deception in this case are not allied offenses of similar import. The indictment makes clear that the two theft offenses are separate and distinct crimes. Count III of the indictment states it is for "THEFT of NECKLACE" and asserts that appellant, with purpose to deprive the owner of the property, did knowingly obtain or exert control over an "Origami Necklace." On the contrary, Count IV of the indictment states it is for "ATTEMPTED THEFT of MONEY BY DECEPTION" and asserts that appellant engaged in conduct that, if successful, would constitute theft with the purpose to deprive the victim of "Money charged for 'house-sitting', by deception." Therefore, the two offenses were committed separately and are not allied offenses. One offense was for theft of a necklace while the other count was for the attempted theft of money.

{¶29} Second, the offenses of obstruction of justice and falsification in this case are not allied offenses of similar import. The obstruction of justice count specifically alleges that appellant, with the purpose to hinder discovery, apprehension, prosecution, conviction, or punishment of Joseph Walenciej, Jr., and/or Tyler Pesta, and/or Chelsea Beveridge, for a crime did communicate false information to Jefferson County Sheriff's Department Chief Deputy John Parker and Detective Dave Wojtas. The falsification count alleges that appellant knowingly made a false statement with the purpose to mislead a public official in performing an official function. The Bill of Particulars provides that appellant's false report to police of a breaking and entering at the victims' home (1) hindered the apprehension of Walenciej, Pesta, and Beveridge, and (2) hindered the effort to find and retrieve the items stolen from the home, including guns (one of which was later used in a shooting). Thus, the obstruction of justice and falsification counts are not allied offenses of similar import. The obstruction of justice count dealt with hindering the apprehension of appellant's co-defendants. The falsification count, however, dealt with making a false statement to police that misled them in their search for the co-

defendants as well as their search for the stolen items.

{¶30} In sum, none of the offenses are allied offenses of similar import. Therefore, the trial court did not commit plain error in failing to hold a hearing on the issue of allied offenses and merger.

{¶31} Accordingly, appellant's second assignment of error is without merit.

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

> IT WAS PLAIN ERROR FOR THE TRIAL COURT TO IMPOSE RESTITUTION AFTER ANNOUNCING THE COMPLETE SENTENCE AND ADJOURNING.

{¶33} The trial court held a hearing and sentenced appellant to EOCC and probation. At the beginning of the sentencing hearing, appellant's counsel requested that the court hold a hearing on restitution. (Tr. 4). The court agreed. (Tr. 4). After sentencing appellant, the court stated that it would move on to the issue of restitution. (Tr. 28). The court then took a brief recess and stated that it would reconvene in twenty minutes. (Tr. 30). The court never adjourned. When the court came back on the record, it stated that the parties had reached an agreement as to the value of restitution. (Tr. 30). The prosecutor stated that the victims informed him they had been reimbursed for their losses by their insurance carrier with the exception of a $500 deductible. (Tr. 31). Appellant agreed to pay restitution in that amount. (Tr. 31).

{¶34} In her final assignment of error, appellant asserts it was plain error for defense counsel to fail to object to the court imposing restitution after it had already imposed a sentence and adjourned.

{¶35} Appellant cannot take issue with the imposition of restitution. As was the case with the imposition of community control, appellant and the state agreed to restitution in the amount of $500. (Tr. 30-31). And appellant was the party who requested a restitution hearing. (Tr. 3-4). She cannot now argue on appeal that the court erred in holding the hearing she requested and in imposing restitution in an

amount she agreed to with the state.

{¶36} Accordingly, appellant's third assignment of error is without merit.

{¶37} For the reasons stated above, the trial court's judgment is hereby affirmed. It is remanded solely for the trial court to enter a nunc pro tunc judgment entry of sentence reflecting the sentence it imposed at the sentencing hearing of 12 months of intensive supervised probation beginning with six months at EOCC followed by two years of basic probation, for a total of three years of community control sanctions.

DeGenaro, J., concurs.

Robb, J., concurs.