[Cite as *State v. Johnson*, 2014-Ohio-1558.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-13-022

Appellee — Trial Court No. 13-CR-039

v.

Timothy T. Johnson — **DECISION AND JUDGMENT**

Appellant — Decided: April 11, 2014

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

JENSEN, J.

{¶ 1} After entering a plea of guilty to three counts of possession of drugs, defendant-appellant, Timothy Johnson, appeals the August 12, 2013 judgment of the Ottawa County Court of Common Pleas sentencing him to 12 months' incarceration on

each count, with the sentences to run consecutively. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} On January 9, 2013, Johnson was searched during a traffic stop. Although nothing was discovered during this search, the officer informed Johnson that there was a warrant for his arrest and that he would be taken to the county jail. The officer further informed him that bringing narcotics into the jail would result in additional charges and that it would be in his best interest to turn over any narcotics that may be in his possession. Johnson then surrendered heroin, oxycodone, and cocaine.

{¶ 3} Johnson entered a guilty plea on three counts of possession of drugs and was sentenced to a prison term of twelve months on each count, to be served consecutively. He now appeals that sentence and assigns the following error for our review:

I. THE APPELLANT'S SENTENCE IS CONTRARY TO LAW.

Specifically, Johnson urges that the trial court erred by sentencing him to consecutive terms of incarceration on allied offenses of similar import that should have been merged.

II. Analysis

{¶ 4} The single issue presented for our review is whether convictions on three separate counts for possession of three distinct drugs—cocaine, heroin, and oxycodone—constitute allied offenses of similar import such that the convictions should have been merged for purposes of sentencing. Under R.C. 2941.25:

(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.

{¶ 5} In *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court of Ohio set forth the analysis to be applied by courts in determining whether offenses are allied and should be merged. Ultimately, the intent of the legislature is controlling. *Id.* at ¶ 46. The court set forth the following test for making the determination:

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. * * * 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.

> 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." * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. (Internal citations omitted.) *Id.* at ¶ 48-51.

{¶ 6} The court recognized that "this analysis may be sometimes difficult to perform" and that there may be varying results for the same set of offenses in different cases. But, it explained, "different results are permissible because the statute instructs courts to examine a defendant's conduct, which is inherently a subjective determination." *Id.* at ¶ 52.

{¶ 7} This court applied the *Johnson* analysis in a case involving facts similar to the ones before us today. In *State v. Heflin*, 6th Dist. Lucas No. L-11-1173, 2012-Ohio-3988, ¶ 1, the defendant was convicted of possession of cocaine and possession of heroin. His convictions arose from a single incident during which he offered to sell drugs to an undercover police officer. *Id.* at ¶ 9. Both drugs were kept in the same bag. *Id.* Citing the Ohio Supreme Court's decision in *State v. Delfino*, 22 Ohio St.3d 270, 490 N.E. 884 (1986), and the Second District Court of Appeals decision in *State v. Huber*, 2d Dist.

Clark No. 2010-CA-83, 2011-Ohio-6175, we held that "convictions for simultaneous possession of cocaine and heroin are not subject to merger as allied offenses of similar import under R.C. 2941.25." *Heflin* at ¶ 13-14. We reasoned that "possession of different drug groups constitutes different offenses under R.C. 2925.11" and "possession of either cocaine or heroin will never support a conviction for possession of the other." *Id.* at ¶ 13-14.

{¶ 8} The Fourth District has ruled similarly. In *State v. Williams*, 4th Dist. Scioto No. 11CA3408, 2012-Ohio-4693, ¶ 85, the court held that the defendant's convictions for trafficking in oxycodone, heroin, and marihuana did not merge. It reasoned that the Supreme Court had reviewed the legislative intent of R.C. 2925.11 in *Delfino* and had concluded that the simultaneous possession of different types of controlled substances can constitute multiple offenses under that statute. *See also State v. Pippen*, 4th Dist. Scioto No. 11CA3412, 2012-Ohio-4692, ¶ 101 (holding that defendant's convictions for trafficking and possession of oxycodone, heroin, and marihuana did not merge with one another).

{¶ 9} Applying *Heflin, Delfino, Huber, Williams, and Pippen,* we must reach the same conclusion here. Johnson's simultaneous possession of heroin, cocaine, and oxycodone—all recognized as different drugs under R.C. 2925.11—do not constitute allied offenses of similar import for purposes of sentencing. Therefore, the trial court did not err in sentencing Johnson to consecutive prison terms for each of his convictions. Johnson's assignment of error is not well-taken.

III. Conclusion

{¶ 10} We find Johnson's assignment of error not well-taken and affirm the August 12, 2013 judgment of the Ottawa County Court of Common Pleas. The costs of this appeal are assessed to Johnson pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE