[Cite as *State v. Damron,* 2010-Ohio-1821.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 09AP-807
v.	:	(C.P.C. No. 08CR05-4804)
Jeremy S. Damron,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 27, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins*, *IV*, for appellant.

Keith O'Korn, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, state of Ohio ("state"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas imposing sentence on defendant-appellee, Jeremy S. Damron ("defendant"), after his convictions on one charge of felonious assault and one charge of domestic violence. For the reasons that follow, we affirm the trial court's judgment.

{¶2} On June 27, 2008, defendant was indicted by the Franklin County Grand Jury on one count of felonious assault, a second-degree felony; two counts of domestic violence, each a third-degree felony; and one count of rape, a first-degree felony. On

May 5, 2009, defendant entered pleas of guilty to the felonious assault count and to one of the domestic violence counts. Nolle prosequis were entered on the rape count and on the second count of domestic violence.

{¶3} On July 27, 2009, the trial court held a sentencing hearing. At the hearing, defendant's counsel argued that the felonious assault count and the domestic violence count were allied offenses of similar import, and therefore had to be merged for purposes of sentencing, citing the decision by the Supreme Court of Ohio in *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. The state argued that felonious assault and domestic violence are not allied offenses of similar import, and that the circumstances of the case made imposition of consecutive sentences on the two counts appropriate.

{¶4} After hearing argument from both sides on the issue of merger, the trial court stated:

> And I have to be real frank with you, Mr. Damron. This is probably the worst domestic violence/felonious assault I've seen since I've been on the bench; okay? I mean, nobody deserves that. If you love somebody, they don't deserve that. I know you're not justifying it. That rage, and there's, what, three other incidents where this has happened before? This is clearly the worst situation I've seen.
>
> Based upon that, it will be an eight-year sentence on count one; a five-year sentence on count two.[1]
>
> I do agree with [defense counsel] in State vs. Harris, needs to merge. I would have found, if I did not think that Harris dictated that, that those would run consecutive to each other. By appeal, I feel I have no alternative but to run them

[1] Although the trial court referred to the domestic violence charge set forth in count two of the indictment during the sentencing hearing, at the May 5, 2009 hearing, and in the court's judgment entry imposing sentence, the domestic violence count to which defendant pleaded guilty was the one set forth in count three of the indictment, which alleged the same date of offense as the felonious assault count set forth in count one.

> concurrent. That's pursuant to the State vs. Harris 2009-Ohio-3323.

(July 27, 2009 Tr., 15-16.)

{¶5} The state filed this appeal, and asserts a single assignment of error:

> THE COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT AND DOMESTIC VIOLENCE.

{¶6} The statute governing multiple criminal counts, 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.

{¶7} Determining whether two offenses are allied offenses of similar import for purposes of R.C. 2941.25 requires a two-step process. In the first step, it is necessary to consider whether the elements of the offenses, compared in the abstract, correspond to such a degree that commission of one necessarily results in commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14, 26; *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291. If the first step is satisfied, in the second step, it is necessary to consider the defendant's conduct in order to determine whether the two offenses were committed separately or with a separate animus. *Cabrales* at ¶14.

{¶8} For purposes of R.C. 2941.25, a conviction consists of both a finding of guilt and a sentence. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶12. Where a defendant has been found guilty of offenses that are allied offenses, R.C. 2941.25

prohibits the imposition of multiple sentences. Id. at ¶18. This requires the trial court to effect a merger of the offenses at sentencing. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548. In effecting this merger, the trial court must give the prosecution the opportunity to identify which of the offenses to pursue at sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶43.

{¶9} In this case, the state argues that the trial court erred by concluding that it was required to merge defendant's convictions in this case because felonious assault and domestic violence are allied offenses of similar import. The case upon which the trial court relied for its conclusion that the two offenses were allied offenses, *State v. Harris*, involved an application of the "elements" portion of the *Rance-Cabrales* test to felonious assault as set forth in two separate sections of R.C. 2903.11(A), and therefore does not control application of the "elements" test to felonious assault and domestic violence. In fact, there is some authority for the proposition that the elements of the offense of felonious assault and the offense of domestic violence are not so similar that commission of one necessarily results in commission of the other, and thus the two are not allied offenses. *State v. Craycraft*, 12th Dist. No. CA2009-02-013, 2010-Ohio-596; *State v. Bosley*, 1st Dist. No. C-090330, 2010-Ohio-1570.

{¶10} However, we need not reach the issue of whether the trial court erred by concluding that it was required to merge the counts of felonious assault and domestic violence because, notwithstanding its conclusion that it was required to merge the two counts, it did not do so. In order to effect a proper merger, the trial court would have to have given the state the opportunity to elect which offense it would pursue sentencing for, and then impose a sentence only on the offense selected by the state. *Brown*. Instead,

the court imposed separate sentences on each of the two counts, but ordered the sentences to be served concurrently. Imposition of concurrent sentences is not the equivalent of merging allied offenses of similar import. *State v. Carter*, 8th Dist. No. 90504, 2009-Ohio-5961.[2]

{¶11} In this case, because the trial court did not actually merge the two counts, the only error the state can allege is that the trial court imposed concurrent sentences after having stated during the sentencing hearing that it would have imposed consecutive sentences if it were legally authorized to do so. Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing.

{¶12} Accordingly, the state's assignment of error is overruled. Having overruled the single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH, J., concurs.
TYACK, P.J., concurring separately.

TYACK, P.J., concurring separately.

{¶1} I reach the same result in this case, but for slightly different reasons. I, therefore, concur separately.

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[2] If we were to conclude that the trial court was correct that felonious assault and domestic violence are allied offenses, the court would have erred in its subsequent sentencing, and the imposition of concurrent sentences would not have rendered this error harmless. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶30 ("[E]ven when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.").