[Cite as *State v. Bowlin*, 2010-Ohio-1635.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-227
	:	O P I N I O N
- vs -		4/12/2010
	:	
TRACY LYNNE BOWLIN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR-2009-01-0037 & CR-2009-03-0396

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BRESSLER, P.J.

{¶1} Defendant-appellant, Tracy Lynne Bowlin, appeals her convictions in the Butler County Court of Common Pleas following her guilty pleas to multiple felony counts of theft, receiving stolen property and forgery. We reverse the trial court's decision and remand the matter for resentencing.

{¶2} On March 18, 2009, appellant was indicted on two fourth-degree felony counts of theft in violation of R.C. 2913.02(A)(1), two fifth-degree felony counts of

receiving stolen property in violation of R.C. 2913.51(A), and two fourth-degree felony counts of forgery in violation of R.C. 2913.31(A)(3). The charges stemmed from allegations that on or about December 22, 2008, appellant stole two social security checks in the amounts of $923 and $931 made payable to Donald D. Hatten from his Middletown home. The record indicates that over the course of the next four days, appellant endorsed Hatten's name on both checks and also endorsed the checks with her name. Appellant did not cash the checks.

{¶3} Appellant pled guilty to the charges on July 7, 2009, and the trial court sentenced her to an aggregate 34 months in prison. The court imposed consecutive, 17-month prison sentences as to the theft counts (Counts 1 and 4), 11 months as to each of the receiving stolen property counts (Counts 2 and 5), and 17 months as to each forgery count (Counts 3 and 6). The sentences imposed for the receiving stolen property and forgery counts were ordered to be served concurrently with the theft sentences.

{¶4} Appellant appeals her convictions, raising a single assignment of error for our review:

{¶5} "THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF ALLIED OFFENSES OF SIMILAR IMPORT."

{¶6} Appellant initially argues that the trial court erred in convicting and sentencing her on two counts each of receiving stolen property and theft. Appellant contends that the two crimes were allied offenses of similar import and that the trial court should have merged the receiving stolen property counts with the corresponding theft counts at the time of sentencing.

{¶7} Ohio's multiple-count statute, R.C. 2941.25, guards against "multiple punishments for the same criminal conduct." *State v. Carroll*, Clermont App. Nos.

CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶91. R.C. 2941.25 provides as follows:

{¶8} "(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.

{¶9} "(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."

{¶10} The Ohio Supreme Court has set forth a two-step analysis for determining whether offenses are of similar import under R.C. 2941.25. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. The first step requires a reviewing court to compare the elements of the offenses in the abstract, without considering the evidence in the case. Id. at paragraph one of the syllabus. If the court finds that the elements of the offenses are so similar "that the commission of one offense will necessarily result in commission of the other," the court must proceed to the second step, which requires it to review the defendant's conduct to determine whether the crimes were committed separately or with a separate animus. Id. at ¶14. If the court finds that the offenses were committed separately or with a separate animus, the defendant may be convicted of both offenses. Id.

{¶11} It is well-established that receiving stolen property and theft of the same property are allied offenses of similar import, because "one who commits theft ends up committing the offense of receiving stolen property." *State v. Clark*,

Mahoning App. No. 08 MA 15, 2009-Ohio-3328, ¶39, citing *Cabrales* at ¶30. See, also, *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, at ¶99, 101. In this case, the parties do not dispute that the offenses are of similar import, and it appears from the record that the trial court also recognized that the offenses were allied. After the parties raised the issue at the July 7, 2009 plea hearing, the court indicated that it would merge the two counts of receiving stolen property with the corresponding theft counts. However, the court's August 20, 2009 judgment entry of conviction sentenced appellant on all four counts.

{¶12} We note that appellant failed to object at the August 18, 2009 sentencing hearing when the trial court sentenced her on both offenses. In failing to object, appellant has waived all but plain error. See Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. The imposition of multiple sentences for allied offenses of similar import constitutes plain error on the part of the trial court. *Yarbrough*, 2004-Ohio-6087 at ¶102. "If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶25. The state retains the right to elect which allied offense to pursue on sentencing following a remand to the trial court. Id. at paragraph one of the syllabus.

{¶13} Based on the foregoing, we conclude that the trial court committed plain error in failing to merge appellant's sentences for theft and receiving stolen property. Pursuant to *Whitfield*, the trial court's judgment of conviction must be reversed and

the matter remanded to the trial court for a new sentencing hearing, at which the state must elect which allied offense it will pursue against appellant.

{¶14} Appellant further contends that her convictions and sentences on two counts of theft and two counts of forgery should have been merged into a single count for each offense. Appellant failed to raise any objection to the trial court at the sentencing hearing regarding these issues, and has waived all but plain error on appeal.

{¶15} With regard to the theft offenses, appellant was convicted twice under R.C. 2913.02(A)(1). Both theft counts involve the same statutory elements, making them allied offenses of similar import under the first step of the *Cabrales* analysis. However, in applying the second step, we find that the offenses were committed separately and with a separate animus, as different checks were involved in the commission of each crime. See *Cabrales* at ¶14. As such, the two counts of theft cannot be considered allied offenses.

{¶16} Appellant was also convicted twice under R.C. 2913.31(A)(3). Although both counts of forgery involve the same statutory elements, we similarly find that under the second step of the *Cabrales* analysis, the offenses were committed with a separate animus, as each count was based on a different check. Accordingly, we conclude that the two counts of forgery were not allied offenses of similar import and, therefore, appellant was properly sentenced on both counts.

{¶17} Appellant's sole assignment of error is sustained, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

{¶18} Judgment reversed and remanded.

POWELL and HENDRICKSON, JJ., concur.