[Cite as *State v. Roy*, 2011-Ohio-1992.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-290
	:	O P I N I O N
- vs -		4/25/2011
	:	
DEANA M. ROY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-06-0984

Michael T. Gmoser, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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RINGLAND, J.

{¶1} On remand from the Ohio Supreme Court, this court is directed to apply *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, to the case at bar. Upon application of the high court's decision in *Johnson*, we reverse in part and remand.

{¶2} On August 4, 2009, defendant-appellant, Deana M. Roy, was charged with six counts of trafficking in cocaine in violation of R.C. 2925.03(A)(1), and four counts of possession of cocaine in violation of R.C. 2925.11(A). Following a four-day jury trial,

appellant was found guilty on all counts and sentenced to serve a total of six years in prison.

{¶3} On appeal, this court upheld appellant's convictions and sentence in *State v. Roy*, Butler App. No. CA2009-11-290, 2010-Ohio-4405 (*Roy I*). Appellant subsequently appealed to the Ohio Supreme Court, which vacated this court's decision relating to appellant's sixth assignment of error and remanded the matter for application of *Johnson*. See *State v. Roy*, 128 Ohio St.3d 340, 2011-Ohio-544, reconsideration denied by 128 Ohio St.3d 1449, 2011-Ohio-1618. Appellant's sixth assignment of error stated as follows:

{¶4} "THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN FAILING TO MERGE, FOR SENTENCING PURPOSES ALLIED OFFENSES OF SIMILAR IMPORT."

{¶5} In her sixth assignment of error, appellant argues that the trial court erred by failing to merge her convictions for possession as found in "[c]ounts four, six, eight and ten * * * for sentencing purposes." Upon application of *Johnson* to the case at bar, we agree.

{¶6} Initially, just as this court stated in *Roy I*, because appellant failed to raise an objection with the trial court challenging whether the offenses were allied offenses of similar import, appellant has waived all but plain error. Id. at ¶50. Pursuant to Crim.R. 52(B), plain error exists where there is an obvious deviation from a legal rule that affected the outcome of the proceeding. *State v. Blanda*, Butler App. No. CA2010-03-050, 2011-Ohio-411, ¶20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. The imposition of multiple sentences for allied offenses of similar import amounts to plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶7} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. *State v. Brown*, Butler App. No. CA2009-05-142, 2010-Ohio-324, ¶7. The statute provides for the following:

{¶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} In *Johnson*, the Ohio Supreme Court established a new two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. Id., 2010-Ohio-6314 at ¶46-52; *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2011-Ohio-413, ¶11. Under this new test, the first inquiry focuses on "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Johnson* at ¶48; *State v. McCullough*, Fayette App. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶14. In making such a determination, it is not necessary that the commission of one offense would *always* result in the commission of the other, but instead, the question is whether it is *possible* for both offenses to be committed with the same conduct. *Craycraft* at ¶11, citing *Johnson* at ¶48; *State v. Lanier*, Hamilton App. No. C-080162, 2011-Ohio-898, ¶14.

{¶11} If it is found that the offenses can be committed by the same conduct, the court must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Blanda*, 2011-Ohio-411 at ¶15, citing *Johnson* at ¶50. However, if 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." *Johnson* at ¶51; *Craycraft* at ¶11-12; *Blanda* at ¶14-15; *McCullough* at ¶14-15.

{¶12} Applying the *Johnson* analysis to the case at bar, we must first determine if it is possible for trafficking in violation of R.C. 2925.03(A)(1), and possession in violation of R.C. 2925.11(A), to be committed with the same conduct. Id. at ¶48.

{¶13} To be guilty of trafficking under R.C. 2925.03(A)(1), the offender must knowingly "[s]ell or offer to sell a controlled substance." To be guilty of possession under R.C. 2925.11(A), the offender must "knowingly obtain, possess, or use a controlled substance." In turn, while the offender need not possess the controlled substance in order to sell it, nor does the offender need to intend to sell the controlled substance in order to possess it, it is certainly possible for both offenses to be committed with the same conduct.

{¶14} Having found that it is possible for trafficking and possession to be committed with the same conduct, the *Johnson* analysis now requires this court to determine whether appellant committed the offenses by way of a single act and with a single state of mind. Id. at ¶49; R.C. 2941.25(B).

{¶15} As this court outlined in *Roy I*, appellant was involved in six undercover drug deals between March 27, 2009 and May 29, 2009 that ultimately resulted in her being convicted for six counts of trafficking and four counts of possession. See Id. at ¶2-9. After a thorough review of the record, including the transcript of the four-day jury trial, it is apparent that the state relied upon the same conduct to support appellant's convictions for trafficking as charged in counts three, five, seven, and nine, as that of her convictions for possession as charged in counts four, six, eight and ten. *Johnson* at ¶56; *Craycraft*, 2011-Ohio-413 at ¶20. Therefore, under the facts and circumstances of this case, and in applying the *Johnson* analysis to the case at bar, we find these offenses to be allied offenses of similar import.

Accordingly, because appellant's convictions for trafficking as charged in counts three, five, seven, and nine, and possession as charged in counts four, six, eight, and ten, are allied offenses of similar import, the trial court's failure to merge them at sentencing amounted to plain error. See *Blanda* at ¶23, citing *Johnson* at ¶50.

{¶16} As far as this court can discern, upon remand, the state retains the right to elect which allied offense to pursue at sentencing, and the trial court is bound by such election. *Craycraft* at ¶21, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶24; *Bland*, 2011-Ohio-411 at ¶25. Therefore, insofar as the trial court erred by failing to merge appellant's convictions, appellant's sixth assignment of error is sustained, the judgment of the trial court is reversed as to sentencing only, and this matter is remanded for further proceedings according to law and consistent with this opinion.

{¶17} Judgment reversed in part and remanded.

POWELL, P.J., and HENDRICKSON, J., concur.

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