**[Cite as *State v. Conn*, 2015-Ohio-1766.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| | | CASE NOS. CA2014-04-059 |
| Plaintiff-Appellee, | : | CA2014-04-061 |
| | | CA2014-06-084 |
| | : | |
| - vs - | | O P I N I O N |
| | : | 5/11/2015 |
| ANTHONY CONN, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 2013 CR 29504

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Gray & Duning, Neal W. Duiker, 130 East Mulberry Street, Lebanon, Ohio 45036, for defendant-appellant

**M. POWELL, J.**

**{¶ 1}** Defendant-appellant, Anthony Conn, appeals his conviction and sentence in the Warren County Court of Common Pleas for trafficking in drugs and illegal manufacture of drugs.

**{¶ 2}** Appellant was indicted in September 2013 on 50 separate counts, including counts for trafficking in steroids, possession of steroids, illegal manufacture of steroids, and endangering children. The illegal manufacture of steroids charge was accompanied by a

specification seeking forfeiture of appellant's vehicle, a 2001 Ford F-250 pick-up truck. The charges stemmed from three separate incidents. Specifically, on January 17, 2013, and on February 7, 2013, appellant sold anabolic steroids to a confidential informant. These covert operations were conducted in part by the Warren County Drug Task Force. Then, on March 20, 2013, the Warren County Drug Task Force conducted a third covert operation during which appellant was pulled over while en route to sell anabolic steroids to the confidential informant. Following the traffic stop and appellant's subsequent arrest, a search of appellant's vehicle and home yielded large quantities of steroids as well as items used to manufacture steroids.

**{¶ 3}** On January 29, 2014, appellant pled guilty to eight counts, to wit: two counts of trafficking in drugs in violation of R.C. 2925.03(A)(1), four counts of trafficking in drugs in violation of R.C. 2925.03(A)(2), one count of child endangering in violation of R.C. 2919.22(B), one count of illegal manufacture of drugs, in violation of R.C. 2925.04(A), and the forfeiture specification. A sentencing hearing was held in March 2014.

**{¶ 4}** A few days before the sentencing hearing, appellant filed a sentencing memorandum under seal. Appellant asserted that given the nature of his offenses, his cooperation with the police, and the financial losses he sustained following his resignation as an employee of the Ohio Department of Rehabilitation and Corrections (DRC), he should only be sentenced to two years in prison. Appellant also moved the trial court "for an order suspending any mandatory fines for the reason that the Defendant has lost his retirement, and will be spending time in prison and will not have the funds to pay any fines upon his release." On March 24, 2014, the trial court sentenced appellant to an aggregate prison term of five years, three of which was mandatory, through a combination of concurrent and consecutive sentences. The trial court also imposed an aggregate mandatory fine of

$42,500 and ordered the forfeiture of appellant's vehicle.

**{¶ 5}** Appellant appeals, raising five assignments of error.

**{¶ 6}** Assignment of Error No. 1:

**{¶ 7}** APPELLANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO FILE AN AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING PURSUANT TO [R.C.] 2929.18(B)(1) IN ORDER TO COMPEL THE TRIAL COURT NOT TO IMPOSE FINES; TRIAL COUNSEL'S ASSISTANCE IN THIS REGARD WAS IN VIOLATION OF THE APPELLANT'S SIXTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AS WELL AS SECTION 10 OF ARTICLE 1 OF THE OHIO CONSTITUTION.

**{¶ 8}** Appellant argues he received ineffective assistance of counsel because his trial counsel failed to file an affidavit of indigency with the trial court regarding mandatory fines. Appellant asserts the trial court would have been precluded from imposing any fines upon him had the affidavit of indigency been filed. In support of his assertion, appellant notes that the trial court found him to be indigent for purposes of this appeal and consequently appointed appellate counsel and granted transcripts at state expense.

**{¶ 9}** Appellant pled guilty to seven drug-related offenses. Five of the offenses were felonies of the second degree, one was a felony of the third degree, and one was a felony of the fourth degree. R.C. 2929.18(B)(1) imposes a mandatory fine upon all first, second, and third-degree drug offenders. However, the mandatory fine will not be imposed if the offender "alleges in an affidavit filed with the [trial] court prior to sentencing that [he] is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine[.]" R.C. 2929.18(B)(1).

**{¶ 10}** This court and other Ohio courts have held that the failure to file an affidavit of

indigency only constitutes ineffective assistance of counsel when the record shows a reasonable probability that the trial court would have found the defendant indigent and unable to pay the fine had the affidavit been filed. *State v. Russia*, 12th Dist. Butler No. CA2013-01-003, 2013-Ohio-4125, ¶ 8. *See, e.g., State v. Hubbard*, 8th Dist. Cuyahoga No. 99093, 2013-Ohio-1994; *State v. McDowell*, 11th Dist. Portage No. 2001-P-0149, 2003-Ohio-5352; *State v. Powell*, 78 Ohio App.3d 784 (3d Dist.1992).

**{¶ 11}** The filing of an affidavit of indigency by a defendant does not automatically entitle the defendant to a waiver of the mandatory fine. *State v. Bolden*, 12th Dist. Preble No. CA2003-03-007, 2004-Ohio-184, ¶ 35. The burden is upon the defendant opposing the mandatory fine to demonstrate that he is indigent *and* unable to pay the fine. *State v. Gipson*, 80 Ohio St.3d 626, 635 (1998); *State v. Johnson*, 12th Dist. Butler No. CA2011-11-212, 2014-Ohio-3776, ¶ 11. In addition, a determination that a criminal defendant is indigent for purposes of appointed counsel is separate and distinct from a determination of being indigent for purposes of paying a mandatory fine. *Bolden* at ¶ 35. Thus, the determination that a defendant is indigent for purposes of appointing counsel does not prohibit the trial court from imposing a mandatory fine. *State v. Rice*, 12th Dist. Butler No. CA2006-04-091, 2007-Ohio-1367, ¶ 7.

**{¶ 12}** Nonetheless, before a trial court imposes a mandatory fine under R.C. 2929.18, the court is required to "consider the offender's present and future ability to pay the amount of the * * * fine." R.C. 2929.19(B)(5); *Johnson* at ¶ 12. There are no express factors that must be considered or specific findings that must be made on the record. *Johnson* at *id*. Compliance with R.C. 2929.19(B)(5) can be shown when the trial court considers a Presentence Investigation Report (PSI) which typically provides financial and personal information. *Id.* In the case at bar, the trial court ordered a PSI which detailed appellant's

age, education, physical and mental health, and employment history. The record indicates that the trial court reviewed the PSI before sentencing appellant.

**{¶ 13}** In imposing the $42,500 mandatory fine, the trial court found that "[e]ven though at this time you couldn't possibly pay that fine[,] you're young enough and healthy enough to work once you're released from custody and in the future I can't find that you would not ever have the ability to pay towards these mandatory fines."[1] The trial court further stated, "The legislature has quite clearly chosen to try to take the financial gains out of drug trafficking. They've imposed mandatory fin[e]s on many levels of drug trafficking and you fall within the clear ambit of those so I am imposing those fin[e]s."

**{¶ 14}** When evaluating the indigency of a defendant opposing the mandatory fine, a trial court is not limited to the indigency status of the defendant at the time the fine was imposed. *McDowell*, 2003-Ohio-5352 at ¶ 69; *Johnson*, 2014-Ohio-3776 at ¶ 19. A trial court is not precluded from imposing a fine on an able-bodied defendant who is fully capable of work but who happens to be indigent and unemployed at the moment of sentencing. *Gipson*, 80 Ohio St.3d at 636.

**{¶ 15}** In the case at bar, the record shows that appellant, age 42 at the time of his sentencing, has a GED, earned an "Associates of Applied Science" degree from a community college, and subsequently attended additional classes in two other universities. Appellant also honorably served in the U.S. Army and National Guard and reached the grade of Captain during his career with the DRC. The record further shows that appellant had an auto shop side business before his promotion to Captain in 2005, but that lower back issues

1. Appellant takes issue with the trial court's following comments: "I don't consider only present ability, I have to look at your future ability to pay. You could inherent [sic] money, you could win the lottery, there are ways that people can come into funds[.]" We note that these comments were made during the plea hearing and were not reiterated when the trial court imposed the mandatory fine during the sentencing hearing. During the plea hearing, the trial court also noted that appellant was "a young man, you look physically healthy, you should be able to work in the future."

prevented him from reopening it a few years later.

**{¶ 16}** In light of the foregoing, we find that the record is insufficient to show a reasonable probability that appellant would have been found indigent for purposes of paying the mandatory fine had the affidavit of indigency been filed. *See State v. Botos*, 12th Dist. Butler No. CA2004-06-145, 2005-Ohio-3504. The record supports the trial court's finding that appellant has future earning capabilities that would allow him to pay the mandatory fine. Appellant, therefore, did not receive ineffective assistance of trial counsel with regard to the mandatory fine. *Id.*

**{¶ 17}** Appellant's first assignment of error is overruled.

**{¶ 18}** Assignment of Error No. 2:

**{¶ 19}** THE APPELLANT'S SENTENCE IS CONTRARY TO LAW UNDER [R.C.] 2953.08, THE OHIO CONSTITUTION, AND THE U.S. CONSTITUTION.

**{¶ 20}** Appellant challenges his five-year prison sentence on the grounds that (1) the trial court abused its discretion in sentencing him to consecutive nonminimum prison terms, (2) his sentence is disproportionate to sentences imposed for similar crimes committed by similar offenders in similar circumstances, and (3) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

**{¶ 21}** We no longer review felony sentences under an abuse of discretion standard. *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 9. Rather, we review felony sentences under the standard of review set forth in R.C. 2953.08(G)(2) to determine whether those sentences are clearly and convincingly contrary to law. *Id.* A sentence is not clearly and convincingly contrary to law where the trial court makes the required findings under R.C. 2929.14(C)(4) and the record supports those findings, and where the trial court considers the purposes and principles of R.C. 2929.11, as well as the

factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Id.*; R.C. 2953.08(G)(2).

**{¶ 22}** Appellant first challenges the trial court's imposition of nonminimum prison terms. Appellant asserts the trial court failed to properly consider the factors under R.C. 2929.12, when it failed to properly consider the fact "he was a first-time offender who cooperated with the police and showed sincere remorse for his actions," and the fact "there were no actual victims as [he] was the subject of a police sting operation."

**{¶ 23}** Appellant does not dispute that the trial court sentenced him within the statutory range, nor does he dispute that the trial court properly applied postrelease control in this case. The judgment entry of conviction specifically states that the trial court considered "the principles and purposes of sentencing under R.C. §2929.11, and has balanced the seriousness and recidivism factors under R.C. §2929.12."

**{¶ 24}** We find that the trial court did not err in sentencing appellant to more than the minimum prison term on each of the eight counts to which he pled guilty. When sentencing a defendant, a trial court is not required to consider each sentencing factor, "but rather to exercise its discretion in determining whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *State v. Oldiges*, 12th Dist. Clermont No. CA2011-10-073, 2012-Ohio-3535, ¶ 17. Factors set forth in R.C. 2929.12 are nonexclusive, and R.C. 2929.12 explicitly permits a trial court to consider any relevant factors in imposing a sentence. *State v. Birt*, 12th Dist. Butler No. CA2012-02-031, 2013-Ohio-1379, ¶ 64.

**{¶ 25}** In sentencing appellant to more than minimum prison terms, the trial court acknowledged appellant's prior spotless criminal record, his service in the military, his former employment with DRC, his cooperation with the police, and the fact he took responsibility for his actions. However, the trial court also found that appellant did not simply take steroids for

himself but also "distributed this poison to other people." In fact, the "behavior ha[d] gone on for quite some time. There were a large number of people that were on the receiving end of your distribution of these drugs[.]" The trial court noted that while steroids were different from "street drugs," they nevertheless had dangerous and harmful side effects. The trial court found that once appellant started selling steroids to other people, "you're really no different th[a]n the person trafficking in heroin, cocaine, marijuana." Consequently, the trial court found that appellant "deserve[d] something far less th[a]n the maximum sentence but deserve[d] more than the minimum sentence at the same time."

**{¶ 26}** In light of the foregoing, we find that the trial court did not err in sentencing appellant to more than the minimum prison term for each of the eight counts to which he pled guilty. Appellant's nonminimum sentences are therefore not clearly and convincingly contrary to law.

**{¶ 27}** Appellant next asserts his sentence is disproportionate to and inconsistent with the four-year prison sentence his co-defendant received.[2]

**{¶ 28}** A "defendant has no substantive right to a particular sentence within the statutorily authorized range." *State v. Isreal*, 12th Dist. Butler No. CA2010-07-170, 2011-Ohio-1474, ¶ 70. "A consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines." *State v.*

2. In his brief, appellant alleges that throughout the plea negotiations, both his trial counsel and the state essentially told him he would only be sentenced to two years in prison. However, "at the sentencing hearing, the state reneged" by asking that appellant be sentenced to a greater prison term than the co-defendant's sentence. In his reply brief, appellant further states that he "operated under the belief that * * * an agreed upon two year sentence was recommended." Appellant fails to cite any case law or to the record in support of his allegation. We find there is no evidence in the record supporting appellant's allegation. To the contrary, at the plea hearing, the trial court expressly told appellant it was required to sentence him to at least two years in prison, otherwise made no indication or promises regarding the length of the sentence it ultimately planned to impose, and told appellant it would sentence him of its own accord. In addition, even in cases where the state and a defendant have negotiated a plea and the state agrees to a recommended sentence, the trial court is not bound by such a recommendation. *See State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674; *State v. Sheet*, 12th Dist. Clermont No. CA2006-04-032, 2007-Ohio-1799.

*Graham*, 12th Dist. Warren No. CA2013-07-066, 2014-Ohio-1891, ¶ 14. "In other words, a defendant claiming inconsistent sentencing must show the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12." *Id.* "When sentencing an offender, each case stands on its own unique facts." *State v. Mannarino*, 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶ 58.

**{¶ 29}** Although appellant's co-defendant received a shorter prison sentence than appellant, that fact alone does not require a finding that the trial court erred in its sentencing decision. *Graham* at ¶ 15; *State v. Lee*, 12th Dist. Butler No. CA2012-09-182, 2013-Ohio-3404, ¶ 13 (a sentence is not contrary to law because the trial court failed to impose an identical sentence to that of another offender who committed similar acts). As stated earlier, the trial court properly considered all relevant statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 before sentencing appellant, and imposed a sentence within the statutory range for the offenses. *Isreal*, 2011-Ohio-1474 at ¶ 73.

**{¶ 30}** In addition, although appellant claims his sentence is disproportionate to and inconsistent with his co-defendant's prison sentence, appellant does not provide any facts about his co-defendant's case, such as the offense or offenses his co-defendant was charged with and convicted of, and whether the co-defendant pled guilty or was tried to a jury. Appellant does not even provide the co-defendant's name. Consequently, we do not know whether the co-defendant was similar to appellant, and the mere fact the co-defendant was sentenced to four years in prison is of no use to this court. *See Mannarino*, 2013-Ohio-1795 at ¶ 61. Appellant, therefore, failed to show his sentence is inconsistent with other similarly situated offenders, including his co-defendant.

**{¶ 31}** While we find that the trial court did not err in imposing the individual prison terms, we sua sponte find it improperly imposed consecutive sentences. *Stamper*, 2013-

Ohio-5669 at ¶ 21. After reviewing the record, we find that the consecutive sentences are clearly and convincingly contrary to law and must be reversed because the trial court failed to make the required statutory findings.

**{¶ 32}** Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Smith*, 12th Dist. Clermont No. CA2014-07-054, 2015-Ohio-1093, ¶ 7. Specifically, the trial court must find that (1) the consecutive sentence is necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender

R.C. 2929.14(C)(4); *Smith* at *id*.

**{¶ 33}** "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 37. While the trial court is not required to give reasons explaining these findings, it must be clear from the record that the trial court actually made the required

statutory findings. *Smith* at ¶ 8.

**{¶ 34}** The record shows that the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) during the sentencing hearing prior to imposing consecutive sentences. The sentencing entry likewise fails to set forth the required statutory findings under R.C. 2929.14(C)(4). Accordingly, and as conceded by the state, appellant's consecutive sentences are contrary to law and must be reversed. *Smith*, 2015-Ohio-1093 at ¶ 11.

**{¶ 35}** Finally, appellant argues that given his former employment with DRC for 19 years, his five-year prison sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution because it will put him in serious danger of retaliation, physical harm, or even death while incarcerated. However, given our decision to remand this case for resentencing, we find that this issue is moot and we decline to address it. *Smith* at ¶ 15.

**{¶ 36}** Having found that appellant's individual prison terms were proper, but that the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) during the sentencing hearing at the time it imposed consecutive sentences, and did not incorporate the required findings into its sentencing entry, we find that the trial court's imposition of consecutive sentences is contrary to law. *Smith*, 2015-Ohio-1093 at ¶ 11. We therefore vacate appellant's consecutive sentences and remand this matter to the trial court for resentencing. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing and incorporate its findings into a sentencing entry. *Bonnell*, 2014-Ohio-3177 at ¶ 29, 37.

**{¶ 37}** Appellant's second assignment of error is overruled in part and sustained in

part.

**{¶ 38}** Assignment of Error No. 3:

**{¶ 39}** THE APPELLANT'S CHARGES, CONVICTIONS AND SENTENCES VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES, AS WELL AS THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, WHEN COMPARED TO FEDERAL LAW AND THAT OF OTHER STATES.

**{¶ 40}** Appellant argues his five-year prison sentence must be reduced because the Ohio statutory definition of "bulk amount" and "unit ester" under R.C. 2925.01 is void for vagueness, especially when compared to federal law, and thus, the statute violates his rights to due process and equal protection as well as the prohibition against cruel and unusual punishment.[3] Appellant spends a great deal of time under this assignment of error comparing Ohio guidelines and requirements with their federal counterparts.

**{¶ 41}** We first note that "we need not resort to federal law, or a federal court's interpretation of a federal statute for that matter, to construe our own * * * statute. At issue here is state law and, absent a clear pronouncement from Congress preempting the field, it will be given independent construction." *State v. Hill*, 70 Ohio St.3d 25, 30 (1994) (addressing defendant's reliance on federal statute to construe Ohio's criminal forfeiture statute).

**{¶ 42}** More importantly, appellant failed to raise either argument before the trial court. It is well-established that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected." *State v.*

3. Appellant also broadly asserts that Ohio law governing prosecution of anabolic steroids-related offenses is "grossly inconsistent with law developed under * * * other states." However, appellant does not identify the states in question.

*Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15. "[T]he constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). Thus, the failure to raise the issue of the constitutionality of a statute or its application, which issue is apparent at the trial court level, constitutes a waiver of that issue and need not be heard for the first time on appeal. *Id.* at syllabus; *State v. Myers*, 12th Dist. Madison No. CA2012-12-027, 2014-Ohio-3384, ¶ 12.

**{¶ 43}** Appellant's third assignment of error is accordingly overruled.

**{¶ 44}** Assignment of Error No. 4:

**{¶ 45}** THE INDICTMENT IS FATALLY DEFECTIVE REQUIRING THAT THE CONVICTIONS AND SENTENCES BE VACATED AND THE CASE DISMISSED WITH PREJUDICE.

**{¶ 46}** Appellant argues his 50-count indictment was defective and multiplicitous because it "charges multiple offenses that are not punishable as separate offenses," and fails to adequately apprise him of "what he must be prepared to meet." Specifically, appellant argues that the counts related to January 17, 2013 (Counts 1 through 5), and those related to February 7, 2013 (Counts 6 through 10), improperly charge "each particular ester of testosterone * * * as an individual count, which does not comport with either law or fact." With regard to the counts related to March 20, 2013, appellant argues the indictment improperly "charges individual counts for each ester of testosterone" as well as "more than one offense for each [dose] of testosterone" seized that day at his home, and includes "double-counting and even miscounting." In addition, Count 50 (illegal manufacture of drugs) is "a duplicitous offense to nearly all other counts in the indictment related to the events of March 20, 2013." Appellant asserts "a proper indictment would have included only half a

dozen counts instead of fifty."

**{¶ 47}** Appellant, however, "waived any deficiency in the indictment by failing to object to the indictment and by pleading guilty to the offense." *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, ¶ 73. It is well-established that when a defendant enters a guilty plea and thereby admits he is in fact guilty of the charged offenses, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *See State v. Spates*, 64 Ohio St.3d 269, 272 (1992); *State v. Hedgecock*, 12th Dist. Fayette No. CA97-08-022, 1998 WL 233380, *5 (May 11, 1998). There is no evidence in the record that appellant raised the alleged defects in the indictment prior to entering his guilty plea. Additionally, nothing in the record indicates that appellant's guilty plea was not knowingly, intelligently, and voluntarily made. *State v. Fugate*, 12th Dist. Butler No. CA2003-03-074, 2004-Ohio-182, ¶ 6. We also note that 29 of the counts challenged by appellant in this assignment of error were dismissed in exchange for his guilty plea.

**{¶ 48}** Furthermore, the state may charge a defendant with multiple counts for multiple offenses, based upon the criminal conduct of the defendant. *See State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 13. R.C. 2941.25, which codifies the protections of the Double Jeopardy Clause of the United States and Ohio Constitutions, clearly provides that "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." R.C. 2941.25(A). (Emphasis added.) That is exactly what occurred here.

**{¶ 49}** Appellant's fourth assignment of error is accordingly overruled.

**{¶ 50}** Assignment of Error No. 5:

**{¶ 51}** THE FORFEITURE OF THE VEHICLE PURSUANT TO THE SPECIFICATION TO COUNT FIFTY OF THE INDICTMENT WAS CONTRARY TO LAW AND VIOLATES THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

**{¶ 52}** Appellant argues the trial court erred in ordering the forfeiture of his pick-up truck because (1) appellant did not use the vehicle in a manner sufficient to warrant its forfeiture under R.C. 2981.02(B), (2) he is not the owner of the vehicle, rather his wife is, and (3) the forfeiture specification in the indictment was defective as it only applied to illegal manufacture of steroids, and not to trafficking in or possession of steroids.

**{¶ 53}** Forfeiture is generally not favored in Ohio. *See Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526. R.C. Chapter 2981 sets forth procedures that must be followed before seized property may be forfeited. *State v. Eppinger*, 8th Dist. Cuyahoga No. 95685, 2011-Ohio-2404, ¶ 8. Appellant concedes his pick-up truck was an instrumentality under R.C. 2981.02(A)(3) (that is, a property that is otherwise lawful to possess but that is used or intended to be used in the commission or facilitation of a felony offense).

**{¶ 54}** Appellant first argues the trial court erred in ordering the forfeiture of his pick-up truck because his use of the vehicle did not warrant forfeiture under R.C. 2981.02(B). Appellant asserts the case at bar is factually similar to a decision of the Ninth Appellate District, and thus his pick-up truck was not subject to forfeiture. *See State v. Jelenic*, 9th Dist. Medina No. 10CA0024-M, 2010-Ohio-6056.

**{¶ 55}** Pursuant to R.C. 2981.02(B),

> In determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense or an attempt, complicity, or conspiracy to commit an offense in a manner sufficient to warrant its forfeiture, the trier of fact shall consider the following factors the trier of fact determines are relevant:

> (1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;
>
> (2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;
>
> (3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense.

**{¶ 56}** The record shows that the trial court did not consider the foregoing factors before ordering the forfeiture of appellant's vehicle. Rather, the trial court simply ordered the forfeiture of appellant's pick-up truck during the sentencing hearing. However, appellant pled guilty to eight counts of the indictment, including the illegal manufacture of steroids count and its accompanying forfeiture specification.

**{¶ 57}** By pleading guilty, appellant admitted the allegations in the indictment that his vehicle was used as an instrumentality in committing or facilitating the commission of the offenses. *State v. Luong*, 12th Dist. Butler No. CA2011-06-101, 2012-Ohio-4519, ¶ 40; R.C. 2981.02. Therefore, there was no need for the trial court to consider and address the factors under R.C. 2981.02(B). *Luong* at *id*. *See also State v. Deibel*, 3d Dist. Allen No. 1-10-70, 2011-Ohio-3520 (plea agreement calling for the forfeiture of property amounts to a waiver of the statutory requirements that the trial court conduct the analysis under R.C. 2981.02[B]); *Eppinger*, 2011-Ohio-2404 (when a defendant enters a plea agreement calling for the forfeiture of seized property, adherence to the statutory procedures are unnecessary); *State v. Sammor*, 9th Dist. Summit No. 24094, 2008-Ohio-4847 (by entering plea agreement calling for the forfeiture of property, defendant waived application of the statutory provisions governing forfeiture procedure; in addition, defendant's due process rights are not violated).

**{¶ 58}** Likewise, by pleading guilty to the forfeiture specification, appellant waived any alleged defect in the indictment. *Fugate*, 2004-Ohio-182 at ¶ 6. Accordingly, we find no

merit to appellant's assertion that the trial court erred in ordering the forfeiture of appellant's pick-up truck because the forfeiture specification in the indictment was allegedly defective.

**{¶ 59}** Finally, appellant argues the trial court erred in ordering the forfeiture of the pick-up truck as the vehicle belongs to his wife and not to him.

**{¶ 60}** "A person with an interest in seized property may seek its return by means of a motion filed in the criminal case before the prosecuting attorney has filed a charging instrument containing a forfeiture specification, or by means of a petition filed in a civil-forfeiture proceeding." *State v. North*, 1st Dist. No. C-120248, 2012-Ohio-5200, ¶ 10; R.C. 2981.04(E)(1) (as applicable here). "In either case, the trial court must conduct a hearing and must return the property upon proof of an entitlement to the property." *North* at *id*.; R.C. 2981.04(E)(3), (F)(1) (as applicable here).

**{¶ 61}** In the case at bar, three months after appellant's conviction, his wife filed a petition in the trial court for "Remission or Mitigation of Forfeiture" of the forfeited pick-up truck on the ground she was the sole legal owner of the vehicle. A hearing on the petition was scheduled to be held on July 28, 2014. On July 29, 2014, the trial court dismissed appellant's wife's petition for failure to prosecute her claim. The trial court found that "the petitioner was notified of [the] hearing date and contacted the Court and advised the court that she wanted to drop the petition, and would not appear for the hearing[.]" Accordingly, we find no merit to appellant's argument.

**{¶ 62}** Appellant's fifth assignment of error is overruled.

**{¶ 63}** Judgment affirmed in part, reversed in part, and cause remanded to the trial court for further proceedings consistent with this opinion.

PIPER, P.J., and HENDRICKSON, J., concur.