[Cite as *State v. Luong*, 2012-Ohio-4520.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-06-110
	:	O P I N I O N
- vs -		10/1/2012
	:	
PHUC KY LUONG,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-11-1794

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Phuc Ky Luong, appeals from his conviction in the Butler County Court of Common Pleas for possession of marijuana, illegal cultivation of marijuana and possession of criminal tools, following his no contest plea to those charges. For the reasons that follow, we disagree with appellant's argument that the trial court erred in overruling his motion to suppress evidence, since exigent circumstances existed in this case that justified the decision of both firefighters and police to make a warrantless entry and/or

search of his residence.

{¶ 2} Nevertheless, we conclude that the trial court committed plain error in failing to merge, for purposes of sentencing, appellant's convictions for possession of marijuana, illegal cultivation of marijuana, and possession of criminal tools, because under R.C. 2941.25, those offenses are allied offenses of similar import, committed at the same time and with the same animus, in light of the allied-offenses test set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. We further conclude that the trial court committed plain error in failing to conduct a "proportionality review," as required by R.C. 2981.09(A), before ordering the forfeiture of certain items of appellant's personal property that he used in committing the offenses for which he was convicted. Therefore, we reverse and vacate appellant's sentence, as well as the trial court's forfeiture order with respect to appellant's personal property, and remand this cause to the trial court for a new sentencing hearing and a new forfeiture proceeding, but affirm the trial court's judgment in all other respects.

{¶ 3} On October 27, 2010, appellant's neighbors called Duke Energy and reported that an "unknown" odor was coming from appellant's house and that they had seen individuals enter the house but not leave. Duke Energy contacted the Liberty Township Fire Department, which dispatched a company of firefighters and one ambulance crew to appellant's residence. Upon arrival, the firefighters noticed an unfamiliar odor coming from appellant's residence and became concerned that a methamphetamine laboratory or "meth lab," or some other chemical was inside the residence, which in turn led them to become concerned about the possibility of a fire and/or explosion, or a malfunctioning furnace that may have been emitting carbon monoxide. As a result, they called for an additional company of firefighters and another ambulance crew.

{¶ 4} The firefighters from the second unit arrived at the scene wearing full protective firefighting gear, including self-contained breathing apparatus, and carrying both a multi-gas

meter to detect the presence of methane, carbon monoxide, oxygen and hydrogen sulfide, and a thermal imaging camera to detect any fire. The firefighters contacted appellant's neighbors and blocked off the street in the immediate vicinity of appellant's residence to prevent any civilians from wandering into the area. The firefighters advised the residents of the houses on either side of appellant's house to stay in their homes until the fire department could determine whether or not there was any hazard.

{¶ 5} The firefighters walked around the perimeter of appellant's house, inspecting it for gas. As they walked to the rear of the house, they noticed a warm, moist air flow coming from a basement window that had an air-conditioning unit in it. The firefighters deemed the warm air flow to be highly unusual, since normally, any heat in a house, or any excess heat from properly functioning devices, would be coming out of proper vents. As a result, the firefighters suspected that the warm air flow could be an indication of a smoldering fire or a malfunctioning furnace that might be exposing anyone inside the residence to carbon monoxide.

{¶ 6} Because of their suspicions, the firefighters attempted to obtain readings through a basement window of the residence by pushing on an air-conditioning unit that was in the window with a 12-foot pole to see if the unit could be moved just enough to allow them to insert the multi-gas meter through the window. When the firefighters pushed on the unit with the pole, the unit did move, providing them with a 15 or 20-second view of the basement interior, at which time they saw an individual and "tables or trays with what appeared to be a green leafy plant." The individual pushed the air-conditioning unit back into place to block the firefighters' view. The firefighters then informed the police that they believed there were persons inside the residence, though they did not know how many.

{¶ 7} Deputy Blume of the Butler County Sheriff's Office, who had responded to the scene to assist the fire department, and who knows the smell of marijuana from his past

experience as a narcotics officer, walked up to appellant's residence and knocked on the front door, but no one answered. Deputy Blume detected "a heavy chemical smell and a heavy marijuana smell" outside the residence while he was standing at the front door. Deputy Blume called his supervisor, Sergeant Todd Langmeyer, and told him that the firefighters had observed "what they thought was a bunch of plants growing in the basement" and that he believed there was "some type of marijuana grow operation" in the residence.

{¶ 8} Sergeant Langmeyer gathered several officers from the department's vice-squad and came to appellant's residence. Upon arriving at the scene, Sergeant Langmeyer decided to make a warrantless entry of appellant's residence because of the possible existence of chemicals there and the "health hazard" created thereby, as well as the possible destruction of evidence that could occur in the 30 minutes it would take to obtain a search warrant.

{¶ 9} Upon entering appellant's residence, the officers made a protective sweep of the house to determine if anyone was inside. When the officers walked upstairs to the second floor and called for anyone who was in the attic to come out, appellant and his brother, A Bay Luong, came down from the attic. The officers made a final protective sweep of the house to confirm that no other persons were inside the residence, and then permitted fire department personnel to inspect the house for safety concerns. Once the fire department determined that no imminent danger existed, the police waited outside appellant's residence for a search warrant to arrive. When the warrant arrived, the police conducted a thorough walk-through of appellant's residence and discovered more than 1,000 marijuana plants inside.

{¶ 10} Appellant and A Bay were indicted on one count each of possession of marijuana, a third-degree felony, illegal cultivation of marijuana, also a third-degree felony, and possession of criminal tools, a fifth-degree felony. The charges of possession of

marijuana and illegal cultivation of marijuana against appellant and A Bay were accompanied by a specification seeking forfeiture of their various tools and equipment that they had used in conducting their marijuana grow operation.

{¶ 11} Appellant and A Bay moved to suppress the evidence seized by police from their residence, on the ground that the decision of the firefighters and police to enter and search their home without a warrant violated their Fourth Amendment rights. The trial court overruled the motion. Appellant and A Bay then pled no contest to the charges. The trial court accepted their no contest pleas and found them guilty as charged. The trial court sentenced each of them to three years in prison and ordered each of them to pay a $4,500 fine. The trial court also issued an order declaring forfeited appellant's various tools and equipment that he used in conducting the marijuana grow operation.

{¶ 12} Appellant now appeals, assigning the following as error:[1]

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN DENYING HIS MOTION TO SUPPRESS EVIDENCE.

{¶ 15} Assignment of Error No. 2:

{¶ 16} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT IN IMPOSING MULTIPLE SENTENCES FOR ALLIED OFFENSES.

{¶ 17} Assignment of Error No. 3:

{¶ 18} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT IN ENTERING A FORFEITURE ORDER, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTION 9, ARTICLE I OF THE OHIO CONSTITUTION AND R.C. 2981.09(A).

---

1. A Bay filed a separate appeal from his conviction. *See State v. A Bay Luong*, 12th Dist. No. CA2011-06-101. Nevertheless, both appeals were orally argued together.

{¶ 19} In his first assignment of error, appellant argues the trial court erred when it overruled his motion to suppress the evidence seized by police as a result of their warrantless entry and search of his residence, because neither the firefighters nor the police had "an objective, reasonable belief" that an immediate entry into the residence was necessary in order to protect any persons or property inside. Appellant also argues there were no circumstances present that would have led a reasonable police officer to believe that evidence inside the residence was about to be destroyed. We disagree with both of these arguments.

{¶ 20} When reviewing a trial court's denial of a motion to suppress, this court accepts the trial court's factual findings as correct so long as they are supported by competent, credible evidence. *State v. Kelly*, 188 Ohio App.3d 842, 2010-Ohio-3560, ¶ 13 (12th Dist.). A trial court's legal determinations, however, are reviewed *de novo* and no deference is given to the trial court's decision on such matters. *Id*.

{¶ 21} The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

{¶ 22} The text of the Fourth Amendment expressly imposes two requirements: (1) "all searches and seizures must be reasonable," and (2) "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 1856 (2011), citing *Payton v. New York,* 445 U.S. 573, 584, 100 S.Ct. 1371 (1980). A warrantless entry and search of a home is "presumptively unreasonable." *Id.* at 586. However, "this presumption may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth

Amendment is "reasonableness."'" *King*, citing *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943 (2006). "Accordingly, the warrant requirement is subject to certain reasonable exceptions." *King*, citing *Brigham City* at 403.

{¶ 23} "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *King*, quoting *Mincey v. Arizona,* 437 U.S. 385, 394, 98 S.Ct. 2408 (1978). One such exigency involves the "emergency aid" exception, which allows law enforcement officers to '"enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *King*, quoting *Brigham City*. Another such exigency is the need by law enforcement to prevent "the imminent destruction of evidence." *King* at 1856-1857. *See also State v. Moore*, 90 Ohio St. 3d 47, 52-53 (2000).

{¶ 24} As stated in *King*, "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement[,]" and therefore, "the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense." *King* at 1858. Where "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed. [Footnote omitted.]" *Id*.

{¶ 25} In this case, the decision of the firefighters and police to make a warrantless entry and/or search of appellant's residence was justified by exigent circumstances, including the need to protect life and property at appellant's residence and to prevent the imminent destruction of evidence. Moreover, the actions of the firefighters and police were objectively reasonable under the circumstances of this case.

{¶ 26} In particular, the firefighters' decision to use a 12-foot pole to push aside the air-

conditioning unit in the basement window just enough to allow them to insert their multi-gas meter through the window to detect the presence of harmful gases was justified by exigent circumstances. The firefighters needed to determine where the unusual odor was coming from and what was causing it. The firefighters' actions provided them with a 15 to 20-second view of the basement's interior, at which time they saw an individual and tables or trays with what appeared to be a green leafy plant, which the firefighters suspected may have been marijuana. These things came into the firefighters' plain view from a vantage point at which the firefighters clearly had a right to be. *See King*, 131 S.Ct. at 1858. Thus, the firefighters' actions did not violate the Fourth Amendment.

{¶ 27} The actions of Deputy Blume were also justified by exigent circumstances. Deputy Blume knocked on the front door of the residence after learning from the firefighters that there were numerous plants growing in the basement and that they had seen an individual close the basement window to prevent the firefighters from looking inside. When Deputy Blume knocked on the front door, he smelled a strong odor of marijuana, which he has been trained to detect. Compare *State v. Birdsong*, 5th Dist. No. 2008 CA 00221, 2009-Ohio-1859, ¶ 16 (trial court erred in denying motion to suppress where state failed to present any evidence of officer's training or experience in detecting the odor of marijuana to justify officer's warrantless search of defendant's vehicle). The heavy marijuana smell came into the deputy's "plain smell" at a time and place where the deputy had a right to be. *See Birdsong* and *King*.

{¶ 28} Sergeant Langmeyer's decision to enter appellant's residence without a search warrant was also justified by exigent circumstances, including the need to protect any person or property inside the residence, as well as the need to prevent the imminent destruction of any evidence of criminal activity. Sergeant Langmeyer and his fellow officers entered appellant's residence and conducted a sweep of its ground floor to locate any person who

may have been inside the house, in order to check on their physical condition. The officers also entered the residence to ensure that no evidence was being destroyed.

{¶ 29} Two of the officers went to the second floor of the residence, at which time they discovered appellant and his brother. The officers then permitted personnel from the fire department to enter the house to inspect it for safety concerns. Once the fire department personnel determined that no imminent danger existed, the officers waited outside appellant's residence for a search warrant to be issued. Upon obtaining the warrant, the police conducted a thorough walk-through of the residence and found more than 1,000 marijuana plants inside.

{¶ 30} Contrary to what appellant alleges, the actions of the firefighters and police in this case were "objectively reasonable," particularly when those actions are viewed from the standpoint of a reasonably prudent law enforcement officer and without the distorting effects of hindsight. The intrusion was minimal and limited to the exigent circumstances that were present, including the immediate need to protect the life and property of anyone inside the residence and appellant's neighbors who lived near his residence, as well as the need to prevent the imminent destruction of evidence.

{¶ 31} Furthermore, the evidence established that the police had an objectively reasonable basis to believe that appellant and his brother were aware that the police were "on their trail" and that, therefore, the destruction of evidence was imminent. The second crew of firefighters called to appellant's residence wore full protective gear; the street on which appellant's residence is located was blocked off; and nearby residents had been instructed to remain in their homes, with the windows closed. The firefighters observed an individual in the basement who tried to prevent them from looking inside. This information was relayed to the police. It was objectively reasonable for the police to infer from the facts available to them that anyone inside the residence was aware that someone was outside and

knocking on their door, and that their criminal activity had been spotted.

{¶ 32} In light of the foregoing, the trial court did not err in finding that the warrantless entry and search of appellant's residence by firefighters and police was justified on the basis of exigent circumstances, including the immediate need to protect lives and property, and to prevent the imminent destruction of evidence.

{¶ 33} Therefore, appellant's first assignment of error is overruled.

{¶ 34} In his second assignment of error, appellant argues the trial court committed plain error by imposing multiple sentences on him for his convictions for possession of marijuana, illegal cultivation of marijuana, and possession of criminal tools, because under R.C. 2941.25 and *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, those offenses are allied offenses of similar import, which were committed at the same time and with the same animus. We agree with this argument.

{¶ 35} Initially, appellant failed to raise this issue at trial, and thus has waived all but plain error. *State v. Seymore*, 12th Dist. Nos. CA2011-07-131, CA2011-07-143, 2012-Ohio-3125, ¶ 18. Plain error exists where there is an obvious deviation from a legal rule that affected the outcome of the proceeding or the defendant's substantial rights. *Id*.; *State v. Palacio*, 12th Dist. No. CA2005-06-049, 2006-Ohio-1437, ¶ 7. *See also* Crim.R. 52(B) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court").

{¶ 36} The Ohio Supreme Court has said the imposition of multiple sentences for allied offenses constitutes plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31-33. The state requests that we not follow *Underwood* since it is a progeny of *State v. Rance*, 85 Ohio St.3d 632 (1999), which was overruled in *Johnson*. However, *Johnson* overruled *Rance* merely "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Id*. at ¶ 44. Until the Ohio Supreme Court states

otherwise, we will continue to follow the rule stated in *Underwood* that the imposition of multiple sentences for allied offenses constitutes plain error. *See State v. Lewis*, 12th Dist. No. CA2008-10-045, 2012-Ohio-885, ¶ 15 (imposition of multiple sentences for allied offenses of similar import is plain error, even after *Johnson*).

{¶ 37} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. The statute 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.

{¶ 38} In *Johnson*, the court established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25, thereby overruling *Rance,* 85 Ohio St.3d 632. 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. It is not necessary that the commission of one offense will always result in the commission of the other. *Id.* Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct. *Id.* Conversely, if the commission of one offense will never result in the commission of the other, the offenses will not merge. *Id.* at ¶ 51.

{¶ 39} If the multiple offenses can be committed with the same conduct, the court must then determine whether the offenses were, in fact, committed by a single act, performed with a single state of mind. *Id.* at ¶ 49. If the answer to both questions is yes, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. On the other hand, if the offenses were committed separately or with a separate animus, the offenses will

not merge. *Id.* at ¶ 51. "Animus" is defined for purposes of R.C. 2941.25(B), as '"purpose or, more properly, immediate motive.'" *State v. Simmonds*, 12th Dist. No. CA2011-05-038, 2012-Ohio-1479, ¶ 20, quoting *State v. Logan*, 60 Ohio St.2d 126, 131 (1979). "If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses." *Simmonds*, citing *State v. Lewis*, 12th Dist. No. CA2008-10-045, ¶ 13.

{¶ 40} In this case, appellant was charged with possession of marijuana in violation of R.C. 2925.11(A). That statute prohibits any person from knowingly obtaining, possessing or using a controlled substance." "Possession" is defined as "having control over a thing or substance." R.C. 2925.01(K). "Controlled substance" is defined to include marijuana. *See* R.C. 2925.01(A) ("controlled substance" has same meaning as in R.C. 3719.01, which defines term as meaning a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V), and R.C. 3719.41(C)(19) (listing "marijuana" as a schedule I "Hallucinogen").

{¶ 41} Appellant was also charged with illegally cultivating a controlled substance, namely, marijuana, in violation of R.C. 2925.04(A), which provides that "[n]o person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." "Cultivate" is defined to include "planting, watering, fertilizing, or tilling." R.C. 2925.01(F).

{¶ 42} Finally, appellant was charged with possessing criminal tools in violation of R.C. 2923.24(A), which provides that "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 43} Applying *Johnson* to this case, we conclude that (1) it is possible to commit the offenses of possession of marijuana, illegal cultivation of marijuana, and possession of criminal tools with the same conduct, and (2) appellant did, in fact, commit these offenses by

a single act, performed by a single state of mind, rather than separately or with a separate animus. *Id.* at ¶ 49, 51.

{¶ 44} Here, the facts alleged in the indictment and bill of particulars show that appellant was maintaining a marijuana grow operation in his residence, using the equipment and tools that formed the basis of the charge of possession of criminal tools. Moreover, by carrying out the marijuana grow operation, appellant was necessarily in possession of the marijuana. Additionally, it is apparent from the facts alleged in the indictment and the bill of particulars that appellant did not commit these offenses separately or with a separate state of mind; rather, he committed the offenses at the same time and with the same animus or immediate motive, which was to further his highly profitable marijuana grow operation. *See Simmonds*, 2012-Ohio-1479 at ¶ 24; *State v. Clay*, 196 Ohio App.3d 305, 2011-Ohio-5086, ¶ 23.

{¶ 45} Furthermore, the trial court's decision to impose concurrent, rather than consecutive, sentences on appellant for the three offenses for which he was convicted does not render harmless the trial court's failure to merge those offenses for purposes of sentencing under R.C. 2941.25. The Ohio Supreme Court has held that "even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1 at ¶ 31.

{¶ 46} The state points out, correctly, that a defendant bears the burden of proving that the offenses for which he has been convicted and sentenced constitute allied offenses of similar import under R.C. 2941.25. *State v. Mughni*, 33 Ohio St.3d 65, 67 (1987), superseded on other grounds, *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285. The state also points out that in its statement of facts at appellant's plea acceptance hearing, it alleged that appellant possessed over 1,000 marijuana plants, which would have weighed

between 1,000 and 5,000 grams and that the cultivation charge had been premised on these facts. The state acknowledges that it is unclear from the record whether the amount of marijuana that formed the basis of appellant's convictions could have supported separate convictions for cultivation and possession, but posits that if 500 plants weighed 1,000 grams, then appellant could have been convicted separately for possession and cultivation, since half of the plants would support the cultivation charge and half the possession charge. However, we find this argument unpersuasive, since the state itself has, at least implicitly, acknowledged that its argument involves some speculation, and since the indictment and bill of particulars show that the state relied on the same marijuana plants to prove all three offenses for which appellant was convicted.

{¶ 47} In light of the foregoing, we conclude that under the facts of this case, the offenses of possession of marijuana, illegal cultivation of marijuana, and possession of criminal tools are allied offenses of similar import under R.C. 2941.25, and therefore the trial court committed plain error by not merging appellant's convictions for those offenses for purposes of sentencing. On remand, the state will have the right to choose which of appellant's three convictions for which it wishes to have appellant sentenced, and the trial court will be bound by the state's election. *State v. Whitifield*, 124 Ohio St.3d 319, 2010-Ohio-319, paragraphs one, two, and three of the syllabus.

{¶ 48} Therefore, appellant's second assignment of error is sustained.

{¶ 49} In his third assignment of error, appellant argues the trial court committed plain error by ordering forfeiture of certain items of his personal property that he used in committing the offenses for which he was convicted, without conducting a "proportionality review" as required under R.C. 2981.04(B) and 2981.09(A).[2] We agree with this argument.

2. The items included a drill, miter saw, multi-tool, two fiberglass ladders, three air conditioners, 12 portable heaters, all electronics, and all growing equipment.

{¶ 50} R.C. 2981.04 (B) provides that if person is convicted of an offense and the indictment charging the offense contains a specification covering property subject to forfeiture under R.C. 2981.02, the trier of fact must determine whether the person's property shall be forfeited. Property subject to forfeiture under R.C. 2981.02 includes "an instrumentality that is used in or intended to be used in the commission or facilitation of" certain enumerated offenses, including felonies or attempted felonies. R.C. 2981.02(A)(3). If the state proves by a preponderance of the evidence that the property is in whole or part subject to forfeiture under R.C. 2981.02, after a proportionality review under R.C. 2981.09 "when relevant," the trier of fact must return a verdict of forfeiture that specifically describes the extent of the property subject to forfeiture.

{¶ 51} R.C. 2981.09(A) prohibits property from being forfeited as an "instrumentality" of an offense "to the extent that the amount or value of the property is disproportionate to the severity of the offense." R.C. 2981.09(A) imposes on the owner of the property "the burden of going forward with the evidence and the burden to prove by a preponderance of the evidence that the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense." R.C. 2981.09(C) provides a non-exhaustive list of factors a court must consider in determining "the severity of the offense," including "[t]he seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused or intended by the person whose property is subject to forfeiture[,]" and "[t]he extent to which the person whose property is subject to forfeiture participated in the offense." R.C. 2981.09(C)(1) and (2).

{¶ 52} The proportionality review required by R.C. 2981.04(B) and 2981.09(A) is mandated by the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution, because the forfeiture of property is a form of punishment for a specified offense and thus is a "fine" for purposes of

the United States and Ohio Constitutions. *State v. Hill*, 70 Ohio St.3d 25, 32-35 (1994).

{¶ 53} The factors set forth in R.C. 2981.09(C) that a trial court must consider in determining the seriousness of the offense for purposes of R.C. 2981.09(A) closely follow the factors a court must consider in determining whether forfeiture "is grossly disproportionate to the seriousness of the offense," and therefore constitutes an "excessive fine" within the meaning of the Eighth Amendment. *See Hill* at 33, quoting *United States v. Sarbello*, 985 F.2d 716, 724 (3rd Cir.1993) ("lower court's proportionality analysis '* * * must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction.'") Moreover, "forfeitures are not favored in law or equity," and "forfeiture statutes must be strictly construed against the state." *State v. King*, 12th Dist. No. CA2008-10-035, 2009-Ohio-2812, ¶ 12.

{¶ 54} In *King* at ¶ 19, this court found that when a person is convicted of a felony drug offense, the sentencing court is required under R.C. 2981.04(B) to hold "a separate proceeding" to determine whether any property is subject to forfeiture. We also stated that if there is property subject to forfeiture and such property is an instrumentality of the offense, the sentencing court must then conduct a proportionality review under R.C 2981.09(A) to determine whether the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense. *Id*. This court determined in *King* that while there was evidence in the record to establish that the appellant's vehicle was an instrumentality subject to forfeiture under RC. 2981.02(A)(3), there was nothing in the record to indicate that the trial court conducted the required proportionality review prior to ordering the forfeiture of the vehicle, and therefore the trial court erred by declaring the vehicle to be forfeited. *Id*.

{¶ 55} In the case before us, there is no question that appellant's tools and equipment

constituted property that was subject to forfeiture under R.C. 2981.04(B) and that such property constituted instrumentalities under R.C. 2981.02(A)(3), since the property was used to commit, or to facilitate the commission of, his offenses. Appellant, by pleading no contest, was not admitting his guilt but was admitting the truth of the allegations contained in the indictment. Crim.R. 11(B)(2). Thus, appellant admitted the allegations in the indictment that his tools and equipment were used as instrumentalities in committing, or facilitating the commission of the offenses. R.C. 2981.02(A)(3). Therefore, there was no need for the trial court to hold a separate proceeding on these matters. However, the trial court was still required to conduct a proportionality review under R.C. 2981.09(A) to determine whether the amount or value of his tools and equipment is disproportionate to the severity of the offense.

{¶ 56} The trial court informed appellant at the plea acceptance hearing that as a consequence of his no contest plea, he would be forfeiting his tools and equipment listed in the forfeiture specifications. At the sentencing hearing, the trial court declared appellant's tools and equipment forfeited, but failed to make an express finding on whether the amount or value of his tools and equipment that he used to carry out the marijuana grow operation is disproportionate to the severity of his offenses. The trial court also issued a separate, written forfeiture order regarding appellant's tools and equipment, but the order did not contain an express finding on whether the forfeiture of appellant's property is disproportionate to the seriousness of his offenses. Under these circumstances, we conclude that the trial court failed to comply with the requirements of R.C. 2981.04(B) and 2981.09(A).

{¶ 57} The state points out, correctly, that appellant did not request the trial court to conduct a separate proportionality review, and argues the trial court's failure to hold such a review did not amount to plain error in this case. In support of its argument, the state notes that under R.C. 2981.09(A), appellant would have had the burden of proving, by a preponderance of the evidence, that the amount or value of his property subject to forfeiture

was disproportionate to the severity of his offenses. The state also points out that during the sentencing hearing, the trial court stated that appellant's marijuana grow operation probably resulted in "hundreds * * * of thousands of dollars" in sales, and probably would have resulted in "millions of dollars" in sales had the existence of the operation been extended for years. The state asserts that, by contrast, the value of appellant's property that is subject to forfeiture is relatively modest in comparison.

{¶ 58} The state's arguments are not without force. However, in *King*, this court raised, *sua sponte*, the issue of the trial court's failure to conduct the required proportionality review, and implicitly determined that the trial court's failure to conduct such a review constituted "plain error." In light of our previous decision in *King*, we conclude that the trial court committed plain error in failing to conduct a proportionality review regarding the forfeiture of appellant's tools and equipment, as required by R.C. 2981.04 and 2981.09. Forfeitures are not favored in law and equity, and forfeiture statutes must be interpreted strictly against the state. *King*, 12th Dist. No. CA2008-10-035, 2009-Ohio-2812 at ¶ 12. Moreover, forfeitures implicate a defendant's constitutional right to be free from excessive fines, and therefore a trial court's failure to comply with the mandates of the forfeiture statute clearly affects a defendant's substantial rights. *See Hill*, 70 Ohio St.3d at 33; Crim.R. 52. Consequently, we reverse and remand the trial court's forfeiture order with respect to appellant's tools and equipment, and remand this cause to the trial court with instructions to conduct the proportionality review required under R.C. 2981.04(B) and 2981.09(A) before ordering the forfeiture of appellant's property.

{¶ 59} Accordingly, appellant's third assignment of error is sustained.

{¶ 60} The judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and RINGLAND, J., concur.