COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2011 CR 722**
vs.	**:**	**Judge McBride**
DAVID ANDREW HIGGINS	**:**	**DECISION/ENTRY**
Defendant	**:**	

Lara A. Molnar, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

Ronald A. Mason, assistant public defender for the defendant David Andrew Higgins, 10 South Third Street, Batavia, Ohio 45103.

This cause is before the court for consideration of the issue of merger raised by the defendant in advance of sentencing. The court gave counsel the opportunity to brief the merger issue subsequent to the defendant's plea hearing on October 5, 2011.

Upon consideration of the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On October 5, 2011, the defendant David Andrew Higgins entered pleas of guilty to Count 1 of the indictment as amended, the crime of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree, and Count 2 of the indictment, the crime of grand theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the third degree.

At the plea hearing, the state set forth the following statement of facts:

> "On or about June 27, 2011, in Clermont County, state of Ohio, the defendant by force, stealth or deception did trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is the permanent or temporary habitation of any person with purpose to commit in the habitation any criminal offense. As to Count Two, same date and county and state, with purpose to deprive the owner of property or services, the defendant did knowingly obtain or exert control over either the property or the services without the consent of the owner or person authorized to give consent, and the stolen property was a firearm or dangerous ordinance.
>
> Specifically, your honor, the defendant and co-defendant Kimberlee Moore entered the victim's residence. The victim is Paul Moore, the co-defendant's father. They removed five guns from the victim's bedroom closet to sell for drugs without permission. Defendant did admit to these actions."

After the statement of facts set forth above was read into the record, the defendant entered his pleas of guilty to Counts 1 (as amended) and 2 of the indictment as amended and the court found the defendant guilty of these two charges.

The defendant now argues that the two counts to which he entered guilty pleas should be merged and that the defendant should only be convicted of and sentenced on one of the offenses. The defendant is scheduled to be sentenced on November 9, 2011.

LEGAL ANALYSIS

Pursuant to R.C. 2941.25:

> "(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.
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> (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."

The analysis of allied offenses of similar import and whether different counts should be merged for the purposes of sentencing has evolved over time in Ohio jurisprudence. " 'The concept of merger originates in the prohibition against cumulative punishments as established by the Double Jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.' "[1] In the case of *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, the Ohio Supreme Court held that "that offenses are of similar import if they 'correspond to such a degree that the commission of one crime will result in the commission of the other[,]' and '[t]o determine whether two offenses met this test, the court determined that the statutory elements of the offenses should be objectively compared in the abstract.' "[2] "If the elements of the crime so correspond that the offenses are of similar import, the

[1] *State v. May* (Oct. 7, 2011), 11th Dist. No. 2010-L-131, 2011-Ohio-5233, ¶ 33, quoting *State v. Miller* (March 11, 2011), 11th Dist. No. 2009–P–0090, 2011–Ohio–1161, ¶ 35, citing *State v. Williams,* 124 Ohio St.3d 381, 384, 2010–Ohio–147.
[2] Id. at ¶ 38, quoting *Rance* at 636.

defendant [could] be convicted of both to the extent the offenses were committed separately or with a separate animus."[3] The *Rance* standard was modified and revised by the court at various times in the years subsequent to the announcement that decision.

Recently, the Ohio Supreme Court revisited the issues of merger and allied offenses of similar import in the case of *State v. Johnson* (2010), 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, in which the court overruled *State v. Rance* and set forth a new analysis for Ohio courts to undertake when considering whether two or more counts are allied offenses of similar import and should be merged for the purposes of sentencing.[4] The *Johnson* holding directs Ohio courts as follows:

> "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
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> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'
>
> If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

[3] Id., quoting *Rance* at 638-639.
[4] *Johnson* at ¶¶ 44-52.

> Conversely, if the court determines that 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. We recognize that this analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct—an inherently subjective determination. (citations omitted) * * * "[5]

Due to the fact that the *Johnson* case was decided less than one year ago, the appellate courts have only just recently begun to render decisions utilizing the *Johnson* analysis and applying it to various sets of facts. Given the *Johnson* holding's disapproval of the *Rance* analysis, Ohio case law on the issue of allied offenses of similar import issued prior to the *Johnson* case has little to no precedential value and, consequently, this court will examine only relevant cases decided after the *Johnson* holding was rendered when examining the issue raised in the case at bar.

This trial court falls within Ohio's Twelfth Appellate District. The Twelfth District Court of Appeals has recently issued several decisions applying the Ohio Supreme Court's holding in the *Johnson* case.

In *State v. Ayers* (Sept. 19, 2011), 12th Dist. Nos. CA2010-12-119 and CA2010-12-120, 2011-Ohio-4719, the defendant was convicted of multiple offenses emanating from three different store robberies. The defendant entered pleas of guilty to the crimes of breaking and entering and grand theft for breaking into a jewelry store and taking jewels from the display counter.[6] After examining the statutes setting forth the elements for the crimes of breaking and entering and grand theft, the court concluded that,

[5] Id. at ¶¶ 47-52.
[6] *Ayers* at ¶ 33.

although the offenses were "intertwined" because it was necessary for the defendant to break into the jewelry store to steal the jewels, those two offenses could never be committed with the same conduct and, consequently, cannot be merged.[7] The defendant also committed a robbery at a different store where he broke into the store, ordered two employees to open the store safe at gunpoint, and stole approximately $10,000.[8] The court found that aggravated robbery and grand theft can be committed with the same conduct and that the defendant committed those two crimes with the same conduct, i.e. single act, committed with a single state of mind.[9] As a result, the appellate court held these were allied offenses of similar import and that the trial court erred in failing to merge those two counts.[10]

In the case of *State v. Crosby* (Sept. 26, 2011), 12th Dist. Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, the defendant forced his way through a basement window into the victims' home and, once in the basement, he pried open a gun safe and took various firearms.[11] The defendant was ultimately convicted of safecracking, grand theft, and burglary.[12] Applying *Johnson* to those facts, the court found that the offenses were committed separately and that the defendant had a separate animus for each offense.[13] In discussing this holding, the court noted as follows:

> "Similarly, Crosby committed burglary with different conduct and a separate animus from safecracking and grand theft because in order to violate R.C. 2911.12(A)(1), Crosby had

[7] Id. at ¶ 34.
[8] Id. at ¶ 37.
[9] Id.
[10] Id.
[11] *Crosby* at ¶ 2.
[12] Id. at ¶ 3.
[13] Id. at ¶ 21.

> to, by force, stealth, or deception, trespass in an occupied structure with the purpose to commit any criminal offense. While Crosby chose to carry out the theft offense, he could have entered the residence with any criminal purpose and abandoned it before actually completing the criminal act. For example, Crosby could have entered the Alvarado home with the purpose to steal something, but then fled when he saw that Alvarado and her children were present. Obviously, once Crosby was inside the home, he had an opportunity to commit various criminal offenses, without attempting to break into the safe or steal guns. Although he ultimately stole the guns, Crosby knowingly tampered with the safe, in an effort to enter it, and then took the guns without consent of the owner, and therefore had a separate animus for each crime he committed."[14]

In *State v. Clay* (Oct. 3, 2011), 12th Dist. No. CA2011-02-004, 2011-Ohio-5086, the defendant entered a bank, gave the teller a handwritten note which stated that he would kill everyone if his demands were not met, received money from the teller and fled the bank.[15] The defendant was convicted of robbery and possession of criminal tools, the criminal tool being the note handed to the teller.[16] The court concluded that the defendant "used the handwritten note to commit the robbery; the note was also the subject of the possession of criminal tools charge[,]" and that it was "evident the state relied upon the same conduct (presenting the note to a bank teller) to support appellant's conviction for robbery and possession of criminal tools."[17] As a result, the court found that the trial court's failure to merge robbery and possession of criminal tools at sentencing was plain error.[18]

Several other Ohio courts have applied the *Johnson* holding to factual situations which are relatively similar to the facts of the case at bar.

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[14] Id. at ¶ 22.
[15] *Clay* at ¶ 2.
[16] Id. at ¶ 24.
[17] Id.
[18] Id. at ¶ 25.

Similar to the facts of the *Clay* case, the defendant in *State v. Bridgeman* (June 3, 2011), 2nd Dist. No. 2010CA16, 2011-Ohio-2680, entered a bank, pointed a gun at a teller, demanded and was given money, and fled the scene.[19] The court found that the charges of aggravated robbery, aggravated burglary and grand theft were allied offense of similar import.[20] The court found that "* * * all of the charges stem from Bridgeman's conduct of entering the bank to conduct a robbery, threatening the employees with a firearm, demanding money, and leaving the bank with $8,218[,]" and, therefore, the defendant committed multiple offenses through a single course of conduct with a single state of mind.[21]

In *State v. Blackburn* (Sept.2, 2011), 4th Dist. No. 10CA46, 2011-Ohio-4624, the defendant entered the victim's residence and stole a television; he was ultimately convicted of burglary, theft and receiving stolen property.[22] The court first found that it was possible to commit those three crimes with the same behavior in that "[o]ne can trespass in an occupied structure with the intent to commit a theft (burglary) actually commit the theft (theft), and retain the stolen property (receiving stolen property)."[23] The court then found that the crimes were committed by a single act with a single state of mind because "[t]he theory of the state's case was [the defendant] trespassed inside the [victim's] residence with the intent to steal the television, stole the television, and retained it[,]" and, therefore, the counts should be merged.[24]

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[19] *Bridgeman* at ¶ 13.
[20] Id. at ¶ 54.
[21] Id.
[22] *Blackburn* at ¶¶ 2 and 8.
[23] Id. at ¶ 15.
[24] Id. at ¶ 17.

In *State v. Ruby* (Sept. 23, 2011), 6th Dist. No. S-10-028, 2011-Ohio-4864, the defendant broke into the victims' home, beat the victims severely, and stole money and firearms from the residence.[25] The defendant entered pleas of guilty to several of the counts of the indictment, including aggravated burglary and grand theft of a firearm.[26] The court found, and the state conceded, that the offenses of aggravated burglary and grand theft should be merged as allied offenses of similar import because "[t]he theft of firearms and money was the purpose and grand incidence of the burglary, and only those items were taken from the residence."[27]

In the case at bar, the defendant has been found guilty of burglary and grand theft of a firearm. Burglary is codified as R.C. 2911.12, which states in relevant part as follows:

> "(A) No person, by force, stealth, or deception, shall do any of the following:
>
> * * *
>
> (3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense."

R.C. 2913.02, the statute addressing grand theft of a firearm, states in pertinent part as follows: "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * (1) Without the consent of the owner or person authorized to give consent."

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[25] *Ruby* at ¶ 1.
[26] Id. at ¶ 4.
[27] Id. at ¶ 59.

The majority of the cases above find that when one enters a residence or place of business and steals money or items from that residence or place of business, charges stemming from that behavior should be merged because the crimes were committed with the same conduct and the same animus.

However, the case from this court's appellate district which most closely mirrors the facts in the case at bar is *State v. Crosby*. The court in *Crosby* reasoned that, in order to commit the crime of burglary, the defendant had only to, by force, stealth, or deception, trespass in an occupied structure with the purpose to commit any criminal offense and that once in the occupied structure he could have, for various reasons, chosen not to carry out the theft offense. This analysis suggests that the crime of burglary is complete once the defendant enters the occupied structure by force, stealth or deception with the intent to commit a criminal offense; whether the offense is committed thereafter is irrelevant and represents separate conduct with a separate animus. While this analysis appears to be contrary to the vast majority of cases with similar facts applying the *Johnson* holding, this court will follow its appellate court's holding until and unless that holding is clarified or distinguished from these facts. As a result, the court finds that the charges of burglary and grand theft in the case at bar were committed with different conduct and a separate animus and will not be merged for the purposes of sentencing.

CONCLUSION

Based on the above analysis, the court finds that the counts of burglary and grand theft of a firearm two which the defendant entered pleas of guilty are not allied offenses of similar import and shall not be merged for the purposes of sentencing in the case sub judice. The defendant finds that the defendant is guilty of both offenses and shall be sentenced accordingly.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Entry were sent via Facsimile this 9th day of November 2011 to all counsel of record and unrepresented parties.

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