COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2012 CR 00798**
vs.	:	**Judge McBride**
JAMES SHANNON PEARCE	:	**DECISION/ENTRY**
Defendant	:	

Scott C. O'Reilly, assistant prosecuting attorney for the State of Ohio, 123 North Third Street, Batavia, Ohio 45103.

Schuh & Goldberg, LLP, Brian Goldberg, appointed public defender for the defendant James Shannon Pearce, 2662 Madison Road, Cincinnati, Ohio 45208.

On November 15, 2012, the defendant James Shannon Pearce entered pleas of guilty to (1) one count of possessing criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree; (2) one count of forgery in violation of R.C. 2913.31(A)(3), a felony of the fifth degree; and (3) one count of telecommunications fraud in violation of R.C. 2913.05(A), a felony of the fifth degree.

At the plea hearing, as the court reviewed the charges to which the defendant intended to enter pleas of guilty, the court inquired of the prosecutor as to the facts underlying each charge. The prosecutor explained that the possession of criminal tools

charge was based on the defendant being found at a Red Roof Inn motel room in possession of several fraudulent gift cards, as well as a manufacturing device used to make the fraudulent gift cards. He further explained that the charge of telecommunications fraud was based on the defendant aiding and abetting co-defendant Amanuel Tesfazgi in obtaining credit card data from overseas in order to further the scheme to create the fraudulent gift cards.

As to the forgery charge, the prosecutor stated this charge was based on falsified credit card information as well as receipts containing fraudulent information that were found at the Red Roof Inn motel room where police located the defendant and his co-defendants. In response to an inquiry from the court, the prosecutor stated that this charge was based on possessing a forged writing with the intent to utter it. At the end of the discussion regarding the forgery charge, the prosecutor stated "I can indicate that two of the co-defendants actually uttered one of these false gift cards at the Speedway and that's ultimately how this came to light."

Later in the plea hearing, the prosecutor set forth the following specific facts, to which the defendant indicated his agreement:

> "On or about October 15, 2012, in Clermont County, State of Ohio, with respect to Count One, again, the defendant aided and abetted the other co-defendants in this matter possessed or had under the defendant's control any device or instrument with purpose to use it criminally, and the circumstances indicted that it would be used for a felony.
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> With respect to Count Two, the defendant again aiding and abetting, did with purpose to defraud or knowing that the defendant was facilitating a fraud did utter or possess with purpose to utter any writing the defendant knew to have been forged.

> And finally, with respect to Count Three, again aiding and abetting, did have a device (*sic*), scheme to defraud, knowingly disseminate, transmit or cause to be disseminated or transmitted by means of a satellite, telecommunication, telecommunications service, any writing, data, particularly in this case, sign, picture, sound or image, with purpose to execute or otherwise further the scheme to defraud.
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> And that, specifically, the defendant and co-defendants attempted to use a fraudulent gift card at a Speedway located in Union Township, Clermont County, State of Ohio. Officers were able to trace through cab contacts and cab drivers the location of the defendant, as well as the co-defendants. Officers arrived at the motel, the Red Roof Inn. Once there, the officers discovered all the defendants in possession of computers as well as devices that could be used to manufacture fraudulent gift cards. Additionally, officers found a number of these completed fraudulent gift cards that had been obtained through obtaining credit card information from unsuspecting victims overseas."

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.
>
> (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 *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 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 of that standard.

The Ohio Supreme Court most recently revisited the issues of merger and allied offenses of similar import in *State v. Johnson* (2010), 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, in which the court overruled *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

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[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.

[3] Id., quoting *Rance* at 638-639.

[4] *Johnson* at ¶¶ 44-52.

> 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.
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> 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.
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> 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]

Pursuant to R.C. 2923.24(A), "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

R.C. 2913.31(A)(3) defines the crime of forgery as it is charged in this case and states that "[n]o person, with purpose to defraud, or knowing that the person is

[5] Id. at ¶¶ 47-52.

facilitating a fraud, shall * * * [u]tter, or possess with purpose to utter, any writing that the person knows to have been forged."

Telecommunications fraud is codified by R.C. 2913.05(A) which states that "[n]o person, having devised a scheme to defraud, shall knowingly disseminate, transmit, or cause to be disseminated or transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud."

First, the court finds that it is unclear from the state's recitation of the basis of the forgery charge whether the attempted utterance at the Speedway was part of that charge in this case. After stating during the plea hearing that the forgery charge was based on possession of receipts and falsified credit card information, the prosecutor mentioned the attempted utterance at the Speedway by two co-defendants and stated that this attempted use of one of the fraudulent gift cards is how the whole scheme came to light. Later in the plea hearing, the prosecutor did state that "the defendant and co-defendants attempted to use a fraudulent gift card at a Speedway." However, earlier in the plea hearing the prosecutor made it clear that James Pearce was not one of the individuals who went to the Speedway and there was no mention of complicity or aiding and abetting during the discussion of the basis for the forgery charge.

The court went through each charge in detail with the prosecutor near the beginning of the plea hearing in order to ensure that the defendant understood what he was being charged with. Based on the substance of that discussion, the court finds that the defendant did not knowingly enter a plea of guilty to a forgery charge based on

aiding and abetting the two co-defendants who went to the Speedway gas station and attempted to utter one of the fraudulent gift cards. Instead, the defendant's plea of guilty was knowingly entered to the charge of forgery based on the possession of falsified gift card information and receipts that also contained fraudulent information.

The court finds that it is possible to commit the offenses of forgery and possessing criminal tools with the same conduct.[6] Therefore, the court must consider whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind, under the facts of the present case.

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.[7] The defendant was convicted before the trial court of robbery and possession of criminal tools, the criminal tool being the note handed to the teller.[8] The appellate 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."[9] 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.[10]

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[6] See, *State v. Gibson* (Nov. 1, 2011), 10th Dist. No. 10AP-1047, 2011-Ohio-5614, ¶ 51, citing *State v. Willis*, 192 Ohio App.3d 579, 949 N.E.2d 1042, 2011-Ohio-797, ¶ 35.
[7] *State v. Clay* (Oct. 3, 2011), 12th Dist. No. CA2011-02-004, 2011-Ohio-5086*Clay* at ¶ 2.
[8] Id. at ¶ 24.
[9] Id.
[10] Id. at ¶ 25.

The defendant in *State v. Simmonds* (April 2, 2012), 12th Dist. No. CA2011-05-038, 2012-Ohio-1479, was charged with theft and possession of criminal tools.[11] The defendant approached a church with the intent to use certain tools, such as a wrench and wire cutters, to steal an air conditioner.[12] The court found that the defendant "acted with the same animus, i.e., the same purpose, intent, or motive, in committing the offenses of possession of criminal tools and theft, namely, to obtain the air conditioning unit from the church."[13]

In *State v. Gibson* (Nov. 1, 2011), 10th Dist. No. 10AP-1047, 2011-Ohio-5614, "the possession of criminal tools and forgery counts were each based on a counterfeit check he [the defendant] presented to the dealership[;]" and "[b]y presenting the check to the dealership, he necessarily possessed the exact same check."[14]

In the case sub judice, the defendant was discovered at a Red Roof Inn motel room where all of the criminal tools listed above were located. According to the statement by the prosecutor when questioned by the court, the forgery charge is based on the possession of fraudulent receipts and the falsified gift cards which were located in that motel room. The defendant's possession of these items was established when he was found in the motel room with these items and, as such, these offenses occurred simultaneously by the same conduct, namely the defendant's possession of these items while he was present in the motel room. As a result, the possessing criminal tools and forgery counts are allied offenses of similar import under the facts of the present case and shall be merged for the purposes of sentencing.

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[11] *Simmonds* at ¶¶ 14-15.
[12] Id. at ¶ 21.
[13] Id. at ¶ 23.
[14] *Gibson* at ¶ 51.

As to the charge of telecommunications fraud, the court finds that it is possible to commit telecommunications fraud and possession of criminal tools with the same conduct as one would likely need to use a computer or other device criminally in order to commit telecommunications fraud. The court finds it is also possible to commit forgery and telecommunications fraud with the same conduct as one could cause a forged writing to be transmitted by means of a telecommunications device for the purpose to further a scheme to defraud. Having determined that these offenses can be committed with the same conduct, the court must now determine if the offenses in this particular case were, in fact, committed by the same conduct.

The telecommunications charge in the case at bar is based on the defendant aiding and abetting co-defendant Amanuel Tesfazgi in obtaining credit card data from overseas in order to further the scheme to create fraudulent gift cards. The credit card information was obtained via a computer and that computer is not serving as the basis of the possession of criminal tools charge. The telecommunications fraud was completed once the defendant and his co-defendants illegally procured the credit card data to which they had no legal right of access or control. The forgery charge in the present case is rooted in the fact that the defendant and his co-defendants used this illegally-obtained credit card information to make fraudulent gift cards and the defendant was found to be in possession of these gift cards and fraudulent receipts. The act of obtaining credit card information to which the defendant had no right of access or control and the act of being in possession of receipts and falsified gift cards constitute two separate acts and separate conduct. As such, the court finds that the

telecommunications offense shall not merge with the forgery and possession of criminal tools offenses for the purposes of sentencing.

CONCLUSION

Based on the above analysis, the court finds that the possession of criminal tools and forgery offenses are allied offenses of similar import in the present case and shall merge for the purposes of sentencing. The state shall elect which offense the defendant shall be convicted of based on his pleas of guilty to both charges. The court finds that the offense of telecommunications fraud is not an allied offense of similar import to the possession of criminal tools or forgery offenses and shall not merge with either of these offenses.

IT IS SO ORDERED.

DATED:______________________ __________________________________
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 20th day of December 2012 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride