

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2012 CR 00797**  
vs. : **Judge McBride**  
**JOSHUA LEE COOLEY** : **DECISION/ENTRY**  
Defendant :

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

D. Vincent Faris, assistant public defender for the defendant Joshua Lee Cooley, 40 South Third Street, Batavia, Ohio 45103.

On November 27, 2012, defendant Joshua Lee Cooley 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 and (2) one count of forgery in violation of R.C. 2913.31(A)(3), also a felony of the fifth degree.

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

defendant being found in possession of several fraudulent gift cards, as well as a manufacturing device and computer used to make the fraudulent gift cards. The prosecutor then explained that the forgery charge was based on the defendant and a co-defendant attempting to use a fraudulent gift card at a Speedway gas station. Defense counsel stated that this was his understanding of the facts as well.

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

“In that, specifically, the defendant and co-defendants attempted to use a fraudulent credit card at a Speedway located in Union Township, Clermont County, Ohio. Officers were able to trace that, through a cab driver, the location of the group. Once there, officers found the defendants in the possession of a computer, or several computers, as well as another device used to manufacture fraudulent gift cards. Officers also obtained and discovered a number of these gift cards in the hotel room.”

## **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.”<sup>1</sup> 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.’”<sup>2</sup> “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.”<sup>3</sup> The *Rance* standard was modified and revised by the court at various times in the years subsequent to the announcement of that decision.

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

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<sup>1</sup> *State v. May* (Oct. 7, 2011), 11<sup>th</sup> 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.

<sup>2</sup> *Id.* at ¶ 38, quoting *Rance* at 636.

<sup>3</sup> *Id.*, quoting *Rance* at 638-639.

offenses of similar import and should be merged for the purposes of sentencing.<sup>4</sup> 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.

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.

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) \* \* \*<sup>5</sup>

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<sup>4</sup> *Johnson* at ¶¶ 44-52.

<sup>5</sup> *Id.* at ¶¶ 47-52.

First, the court finds that it is possible to commit the offenses of forgery and possessing criminal tools with the same conduct.<sup>6</sup> 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), 12<sup>th</sup> 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.<sup>7</sup> The defendant was convicted of robbery and possession of criminal tools, the criminal tool being the note handed to the teller.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup>

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

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<sup>6</sup> See, *State v. Gibson* (Nov. 1, 2011), 10<sup>th</sup> 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.

<sup>7</sup> *Clay* at ¶ 2.

<sup>8</sup> *Id.* at ¶ 24.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 25.

<sup>11</sup> *Simmonds* at ¶¶ 14-15.

<sup>12</sup> *Id.* at ¶ 21.

offenses of possession of criminal tools and theft, namely, to obtain the air conditioning unit from the church.”<sup>13</sup>

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

The case at bar differs from the facts of cases such as *Clay*, *Simmonds* and *Gibson* in that the possession of the criminal tools did not occur by virtue of the same conduct as the forgery offense. The defendant possessed devices used to manufacture fraudulent gift cards and produced several such gift cards. Later that day, the defendant took a fraudulent gift card to Speedway and attempted to utter that gift card. These two offenses were not committed by the same conduct and, instead, these two offenses constitute two separate acts.

Based on the above analysis, the possessing criminal tools and forgery counts are not allied offenses of similar import and shall not be merged for the purposes of sentencing.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

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<sup>13</sup> Id. at ¶ 23.

<sup>14</sup> *Gibson* at ¶ 51.

