

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

STATE OF OHIO :
Plaintiff : **CASE NO. 2014 CR 00126**
vs. : **Judge McBride**
KENNY RAY NAPIER : **DECISION/ENTRY**
Defendant :

Jason E. Nagel, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Geoffrey W. Pittman, counsel for the defendant Kenny Ray Napier, 810 Sycamore Street, Cincinnati, Ohio 45202-2102.

This cause is before the court for consideration of the issue of merger. The court scheduled and held a hearing on merger on May 9, 2014. At the conclusion of that hearing, the court took the issues raised at the hearing under advisement.

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

FACTS OF THE CASE

On April 22, 2014, the defendant Kenny Ray Napier entered pleas of guilty to two counts of illegal manufacture of drugs, the drug involved being methamphetamine, in violation of R.C. 2925.04(A), felonies of the first degree (counts one and two of the indictment).

The bill of particulars filed in the present case indicates that, on February 24, 2014, five separate “one-pot” methamphetamine labs were discovered at 214 Jeremy Lane, Clermont County, Ohio, and each of the labs were active and in various stages of the manufacturing process.¹ Due to the discovery of five “one-pot” labs on the date in question, the defendant was charged with five counts of illegal manufacture of drugs and, as noted above, he entered pleas to two of those counts.

At the hearing on merger, Investigator Ken Mullis of the Clermont County Narcotics Unit testified that the “one-pot” methamphetamine labs at issue consisted of five 2-liter bottles found in a bag in one of the rooms in the house. Investigator Mullis identified three separate bottles from the bag and indicated that they were in different stages of the manufacturing process of methamphetamine.² Investigator Mullis testified that the manufacturing process in the bottle pictured in State’s Exhibit 1 was nearly complete, the manufacturing process in the bottle in State’s Exhibit 2 was even further along, and the manufacturing process in the bottle in State’s Exhibit 3 was totally complete.³

¹ Bill of Particulars, filed March 11, 2014.

² State’s Exhibit 1-3.

³ Id.

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.”

In *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010–Ohio–6314, the Ohio Supreme Court set forth the following two-part test to determine if offenses are allied offenses of similar import under R.C. 2941.25:

“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.

* * * [I]f 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.”⁴

The *Johnson* decision states that “[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.”⁵

The term “animus” has been discussed as follows:

“ ‘R.C. 2941.25(B), by its use of the term ‘animus,’ requires us to examine the defendant’s mental state in determining whether two or more offenses may be chiseled from the same criminal conduct. In this sense, we believe that the General Assembly intended the term ‘animus’ to mean purpose or, more properly, immediate motive.

* * *

Where an individual’s immediate motive involves the commission of one offense, but in the course of committing that crime he must, A priori [sic], commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.”⁶

R.C. 2925.04(A) provides in pertinent part that “[n]o person shall * * * knowingly manufacture or otherwise engage in any part of the production of a controlled substance.” “Manufacture” is defined as “to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.”⁷

⁴ *State v. Crosby* (Sept. 26, 2011), 12th Dist. Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, ¶¶ 18-19, quoting *Johnson* at ¶¶ 48-51.

⁵ *Johnson* at syllabus.

⁶ *State v. Snyder*, 12th Dist. Butler No. CA2011-02-018, 2011-Ohio-6346 at ¶¶ 28 and 30, quoting *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979).

⁷ R.C. 2925.01(J).

In applying the *Johnson* analysis, the court must first determine whether it is possible for the offenses at issue to be committed with the same conduct. The court finds that it is possible to commit two illegal manufacture of drugs offenses with the same conduct.

Therefore, the court must now determine whether the defendant in the case at bar committed these two offenses by way of a single act, performed with a single state of mind, or whether he had a separate animus for each offense.

In *State v. Harshman*, 3rd Dist. Seneca Nos. 13-12-02, 13-12-03, and 13-12-04, 2012-Ohio-3901, the defendant was convicted of and sentenced for two counts of illegal manufacture of drugs in violation of R.C. 2925.04(A). On appeal, the defendant argued that the offenses at issue were allied offenses and should have merged.⁸ The appellate court found that the defendant committed two separate acts of illegally manufacturing drugs at two separate locations and on two separate dates.⁹ As such, the court found no error in the two convictions and sentences.¹⁰

In the case at bar, the methamphetamine was manufactured at the same location. The indictment, the bill of particulars, and the statement of facts set forth at the plea hearing indicated that both offenses at issue took place on or about February 24, 2014. The only question in this case is whether the fact that five “one-pot” methamphetamine labs were discovered and found to be in different stages of the manufacturing process evidences separate acts committed with a separate animus. The court was unable to locate case law on this distinct issue from Ohio courts or from courts outside of the state of Ohio.

⁸ *Harshman*, supra, at ¶ 7.

⁹ *Id.* at ¶ 9.

¹⁰ *Id.*

The defendant likens this issue to the discovery of marijuana plants growing on one piece of property but separate batches of plants are found to be in different stages of the growth process. The defendant notes that this would result in one charge, not multiple charges. However, the court would note that illegal cultivation of marijuana is charged, and the level of the defense is determined by, the amount of marijuana found.¹¹ The charge for illegally manufacturing methamphetamine is not determined by the amount of methamphetamine recovered.¹²

Regardless, under the facts of this case, the defendant was manufacturing methamphetamine on or about the same date and in the same location. While he had different one-pot labs operating, the court finds that they were not so separated in time or space as to constitute separate acts. Furthermore, the court finds that the animus, meaning the defendant's immediate motive, was to manufacture an amount of methamphetamine represented by the yield expected from the five "one pot" labs and, as such, the court finds the animus for each offense to be the same.

CONCLUSION

The court hereby finds that the two offenses to which the defendant entered pleas of guilty are allied offenses of similar import and must merge for the purposes of conviction and sentencing. Although the offenses as charged are identical, the state

¹¹ R.C. 2925.04(C)(5)(c) through (f).

¹² R.C. 2925.04(C)(3)(a) and (b).

shall elect at the time of the sentencing hearing as to which count it wishes to proceed in terms of conviction and sentencing in this case.

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 this 14th day of May 2014 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride