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BARBARA A. WELLS  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH

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

**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2012 CR 00591**  
vs. : **Judge McBride**  
**LESLIE W. PERRY** : **DECISION/ENTRY**  
Defendant :

Carol A. Rowe, assistant prosecuting attorney, 76 S. Riverside Drive, 2<sup>nd</sup> Floor, Batavia, Ohio 45103.

Daniel B. Startzman, III, assistant public defender for the defendant Leslie W. Perry, 302 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of the issue of merger.

The court ordered the parties to brief the issue and held oral argument as to the issue of possible merger on March 24, 2015. At the conclusion of that oral argument, the court took the issue under advisement.

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 August 30, 2012, the defendant Leslie Perry entered pleas of guilty to the four charges in the indictment of Non-Support of Dependents in violation of R.C. 2919.21(B), felonies of the fifth degree.<sup>1</sup> However, the court withheld making a finding of guilty; found that the defendant had knowingly, intelligently, and voluntarily waived his speedy trial rights; stayed the proceedings; and ordered the defendant's participation in the diversion program in accordance with the diversion agreement entered into by him on August 7, 2012.

Counts One and Two of the indictment state that the defendant committed two offenses of nonsupport of a dependent on or about September 1, 2009 through August 31, 2011. Counts Three and Four of the indictment state that the defendant committed two offenses of nonsupport of dependent on or about September 1, 2011 through July 11, 2012. The defendant agrees in his memorandum that one count for each time period pertained to a support order for his minor child Jaelyn and that the other count for each time period pertained to a support order for his minor child Tre.

Furthermore, the defendant indicated that he had no disagreement with statement of facts read by the state at his plea hearing which included the following: "Specifically, the defendant was ordered to pay support for the minor children Jaelyn Perry (d.o.b. 8/6/04) and Tre Perry (d.o.b. 6/2/98) in the amount of \$788.80 per month, effective October 10, 2008. The order was modified to \$476.35 per month, effective June 11, 2009. There is an arrearage of \$15,142.64 on the account and the defendant

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<sup>1</sup> Written Plea of Guilty, filed August 30, 2012.

has failed to provide support for 26 weeks out of 104 consecutive weeks for both of those time periods for both dependents.”

On January 5, 2015, the state filed a motion to terminate the defendant's participation in the diversion program. On March 10<sup>th</sup>, the court found that the defendant had violated the conditions of his diversion agreement and terminated his participation in the diversion program.

The defendant now argues that Counts One and Two should merge, as should Counts Three and Four.

### **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."<sup>2</sup>

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."<sup>3</sup>

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."<sup>4</sup>

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<sup>2</sup> *State v. Crosby* (Sept. 26, 2011), 12<sup>th</sup> Dist. Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, ¶¶ 18-19, quoting *Johnson* at ¶¶ 48-51.

<sup>3</sup> *Johnson* at syllabus.

<sup>4</sup> *State v. Snyder*, 12<sup>th</sup> 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).

The Twelfth District Court of Appeals has held that “\* \* \* where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each offense. \* \* \* ‘Nothing in *Johnson* alters that conclusion.’”<sup>5</sup>

Recently, the Ohio Supreme Court revisited the issue of allied offenses of similar import and modified its holding in *Johnson*. The court held that “[i]n determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors – the conduct, the animus, and the import.”<sup>6</sup> The court also held that “[t]wo or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant’s conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.”<sup>7</sup> Finally, the court held that “[u]nder R.C. 2941.25(B), defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.”<sup>8</sup>

The court noted during its discussion that “[w]hen a defendant’s conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts.”<sup>9</sup> The court also

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<sup>5</sup> *State v. Lung*, 12<sup>th</sup> Dist. Brown No. CA2012-03-004, 2012-Ohio-5352, ¶ 16, quoting *State v. Young*, 2<sup>nd</sup> Dist. Montgomery No. 23642, 2011-Ohio-747, ¶ 39.

<sup>6</sup> *State v. Ruff*, 2015-Ohio-995, paragraph one of the syllabus.

<sup>7</sup> *Id.* at paragraph two of the syllabus.

<sup>8</sup> *Id.* at paragraph three of the syllabus.

<sup>9</sup> *Id.* at ¶ 26.

emphasized that “[r]ather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant’s conduct to determine whether one or more convictions may result because an offense may be committed in a variety of ways and the offenses committed may have different import.”<sup>10</sup>

The defendant in the present case argues that the counts should merge because there was a single support order that covered the support owed to each of the children and, as such, the offenses were committed via the same conduct and with the same animus. However, the single support order was composed of specific amounts that were ordered to be paid as to each dependent. Furthermore, each pair of offenses from the two time periods involves two different victims. The defendant failed to pay support as ordered from September 1, 2009 through August 31, 2011 for both Jaelyn and Tre and he also failed to pay support as ordered from September 1, 2011 through July 11, 2012 for both Jaelyn and Tre. The harm for each child is separate and distinct and, as such, the defendant can be convicted of multiple counts pursuant to the recent holding in *State v. Ruff*.

## CONCLUSION

Due to the fact that the subject offenses were committed during two distinct time periods against two separate victims, the offenses do not merge in the present case and

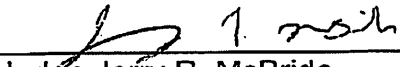
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<sup>10</sup> Id. at ¶ 30.

the defendant shall be convicted of all four offenses to which he entered pleas of guilty.

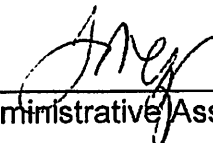
**IT IS SO ORDERED.**

DATED: 4-10-15

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were e-mailed on this 10th day of April 2015 to Carol A. Rowe, assistant prosecuting attorney, at crowe@clermontcountyohio.gov, and to Daniel B. Startzman III, assistant public defender for the defendant Leslie W. Perry, at dstartzman@clermontcountyohio.gov.

  
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Administrative Assistant to Judge McBride