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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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

STATE OF OHIO	:	
Plaintiff	:	CASE NO. 2018 CR 00154
vs.	:	Judge McBride
JOSHUA S. JONES	:	DECISION/ENTRY
Defendant	:	

On the 8th day of May 2018, the defendant entered pleas of guilty to theft from a person in a protected class in violation of R.C. 2913.02(A)(1), a felony of the fifth degree; burglary (as amended) in violation of R.C. 2911.12(A)(3), a felony of the third degree; and grand theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the third degree.

After the plea hearing but well in advance of the sentencing hearing, which will be held on the 11th day of July 2018, counsel for the defendant, on June 4, 2018, submitted written argument as to why the burglary and grand theft of a firearm offenses are allied offenses of similar import and why merger should apply. Counsel indicated in making her argument that she was relying on and accepting the statement of facts as to these two offenses as set forth in the state's bill of particulars.

In response, counsel for the state submitted written argument on June 18, 2018 opposing the application of merger on the facts of this case.

Upon consideration of the record of this proceeding, the agreed upon statement of facts, the written arguments of counsel, and the applicable law, the court now renders a decision as to the merger issue which has been raised.

Pursuant to Ohio's multiple count statute, R.C. 2941.25, the imposition of multiple punishments for the same criminal conduct is prohibited. *State v. Back*, 12th Dist. Butler No. CA2015-03-037, 2015-Ohio-4447, ¶ 7, citing *State v. Brown*, 186 Ohio App.3d 437, 2010-Ohio-324, ¶ 7 (12th Dist.). R.C. 2941.25 provides:

"(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 Ohio Supreme Court, in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E. 3d 892, set forth a three-part test to determine whether a defendant can be convicted of multiple offenses. A 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. *Ruff*, at paragraph three of the syllabus. With respect to the first part of the test, "[t]wo or more offenses of dissimilar import exist * * * when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus.

The defendant maintains that he was in the home of his grandmother with her permission, and that it was only while he was in her home that he formed the intent to commit a theft and entered an armoire which contained the firearm and other miscellaneous property which he then stole.

As such, the defendant argues that the offenses are not dissimilar in import, that the burglary was only complete when the defendant was in the house on the facts of this case, that the act of remaining in the home in order to commit the theft offense and then actually committing the offense constitutes a single offense, and that the animus, which was to steal property in the house, was the same with respect to both offenses.

The defendant is correct that burglary is typically completed upon entering the premises. *State v Herring*, 86 N.E.3d 133, 2017 -Ohio- 743, ¶ 20 (8th Dist.), citing *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 129. The facts related by the defendant make this an atypical burglary offense. However, assuming *arguendo* that the defendant did not form the intent to commit the crime of theft until he entered the home, this does not create a material difference, in that the defendant committed the theft offense after completing the act of entering or remaining in the home with the intent to steal the victim's property. *Herring, supra*.

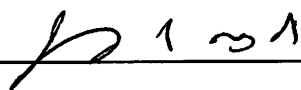
Putting it another way, the two offenses were not committed with the same conduct. The burglary was complete upon the defendant entering or remaining in the residence with the intent to commit a theft offense, and the grand theft of a firearm offense was not complete until the defendant exercised control over the firearm which was taken at some undetermined time after the burglary offense was complete. See *State v. Haller*, 982 N.E.2d 111, 2012-Ohio-5233, ¶ 74 (3rd Dist.); see, also, *State v. Penwell*, 12th Dist. No. CA2016–12–020 and, CA2016–12–021, 2017-Ohio-7465, ¶ 16; *State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999).

"Consequently, 'because one offense was completed before the other offense occurred, the two offenses were committed separately for purposes of R.C. 2941.25(B) notwithstanding their proximity in time and that one was committed in order to commit

the other.’ “ *Back*, supra, at ¶ 12, citing *State v. Lane*, 12th Dist. Butler No. CA2013–05–074, 2014–Ohio–562, ¶ 16, quoting *State v. DeWitt*, 2d Dist. Montgomery No. 24437, 2012–Ohio–635, ¶ 33.

Additionally, as set forth in *State v. Crosby*, 12th Dist. Clermont Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, the defendant could have, once he was in the house with a criminal purpose, abandoned this purpose before he actually completed the criminal act. In this case, the defendant did not abandon his criminal purpose, but rather committed grand theft of a firearm by removing the firearm from the house without the owner’s permission. See *id.*

Accordingly, one part of the three-part test in *Ruff* has not been met, and the court finds that the offenses of burglary and grand theft of a firearm are not allied offenses of similar import. The defendant will be sentenced on both of the offenses at the time of the sentencing hearing.



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing was personally delivered on this 11th day of July 2018 by e-mail to Robert A. Herking, Assistant Prosecuting Attorney for the State of Ohio, and to Lara B. Baron, Attorney for the Defendant.

Judicial Assistant to Judge McBride