

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **93427**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC R. WILSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502057

BEFORE: Boyle, J., Gallagher, A.J., and Dyke, J.

RELEASED: June 3, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Eric Wilson, appeals his sentence. He raises two assignments of error for our review:

{¶ 2} “[1.] The trial court erred as a matter of law by imposing multiple, consecutive terms of imprisonment for three-year firearm specifications given that the felonies underlying these specifications were committed as part of the same act or transaction.

{¶ 3} “[2.] The trial court violated appellant[']s rights to equal protection and due process of law under the United States and Ohio Constitutions when it resentenced him contrary to the mandates of R.C. 2929.11.”

{¶ 4} Finding merit to his first assignment of error, we vacate his sentence and modify it from 28 years to 25 years pursuant to our authority in R.C. 2953.08(G)(2).

Procedural History

{¶ 5} In 2007, Wilson was charged with murder, attempted murder, two counts of felonious assault, two counts of aggravated robbery, kidnapping, rape, and two counts of attempted rape. Each count was accompanied by a one- and three-year firearm specification, and the kidnapping count additionally contained a sexual-motivation specification. Wilson was also charged with having a weapon while under a disability. Before trial, the state dismissed the two counts of aggravated robbery.

{¶ 6} A jury convicted Wilson of the lesser included offense of involuntary manslaughter with the firearm specifications, two counts of felonious assault with gun specifications, and having a weapon while under a disability. He was acquitted of all other charges.

{¶ 7} The trial court sentenced Wilson to a total of 35 years in prison: nine years in prison for involuntary manslaughter, plus three years for the firearm specification attached; eight years for one count of felonious assault (serious physical harm), plus three years for the attached firearm specification; seven years for the other count of felonious assault (deadly weapon), but it merged the firearm specification attached to this felonious assault with the other firearm specification attached to the other felonious assault; and five years for having weapons while under a disability.

{¶ 8} Wilson appealed his conviction and sentence. See *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133. This court affirmed his convictions, but reversed his sentence, determining that Wilson's two felonious assault convictions were allied offenses and should therefore merge. *Id.* at ¶52. We remanded the case for resentencing and instructed the state to elect which offense of felonious assault should merge into the other. *Id.* at ¶54.

{¶ 9} Upon remand, the state elected to merge the felonious assault for using a deadly weapon into the felonious assault causing serious physical harm, leaving Wilson with eight years for the merged counts of felonious assault, plus the three-year firearm specification. The trial court further imposed the same

prison terms it did at the original sentencing hearing on the remaining offenses, for an aggregate sentence of 28 years in prison.

Standard of Review

{¶ 10} We review sentences pursuant to a two-prong standard set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the court held that:

{¶ 11} “In applying *Foster* [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470] to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.” *Id.* at ¶4.

Merging Firearm Specifications

{¶ 12} Wilson claims that the trial court erred when it sentenced him to two consecutive prison terms for the three-year firearm specifications, one that was attached to the involuntary manslaughter and one that was attached to the merged felonious assault convictions. He argues that the trial court should have merged them because they were committed as part of the same act or transaction.

A. Res Judicata

{¶ 13} Before we get to the merits of Wilson’s claim, we must address the state’s sole argument to Wilson’s first assignment of error. The state maintains that because Wilson did not raise this specific issue in his direct appeal, where the trial court sentenced him to the same, that res judicata bars him from raising it now. We disagree.

{¶ 14} This court remanded for resentencing. The trial court held a de novo sentencing hearing. Wilson is not collaterally attacking his sentence. He is directly appealing the sentence he received upon resentencing. “[N]o court has the authority to substitute a different sentence for that which is required by law.” See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Thus, if Wilson is correct, then his sentence is contrary to law and the trial court acted without authority in imposing it.

{¶ 15} Thus, we will address the merits of Wilson’s first assignment of error.

B. “Same Act or Transaction”

{¶ 16} If a defendant is convicted of a firearm specification under R.C. 2941.145, then R.C. 2929.14(D)(1)(a)(ii) requires the sentencing court to impose a three-year mandatory prison term. But the court is not permitted to impose more than one such term for multiple firearms specification convictions, if the underlying felonies were “committed as part of the same act or transaction.” R.C. 2929.14(D)(1)(b).

{¶ 17} The Ohio Supreme Court defined “transaction” as “a series of continuous acts bound together by time, space and purpose, and directed toward

a single objective.” *State v. Wills* (1994), 69 Ohio St.3d 690, 691, 635 N.E.2d 370. The appropriate test is “whether the defendant ‘had a common purpose in committing multiple crimes’ and engaged in a ‘single criminal adventure.’” *State v. Like*, 2d Dist. No. 21991, 2008-Ohio-1873, ¶40, quoting *State v. Adams*, 7th Dist. No. 00CA211, 2006-Ohio-1761, ¶54-57. The focus of the inquiry is “on the defendant’s overall criminal objectives.” *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶45. This is a highly fact-specific inquiry. *Id.* at ¶46.

{¶ 18} We find this case to be analogous to *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio-5775, 900 N.E.2d 1037. In *Stevens*, the defendant, unknown to any of his victims, “burst into [a] home and pulled out a gun; he demanded drugs and money from everyone inside; then he approached three people, one after the other, to demand everything each had.” *Id.* at ¶6. There was no evidence that the criminal objective of entering the home was to rob any particular victim.

{¶ 19} The Second Appellate District explained:

{¶ 20} “Despite the multiple victims here, this case is analogous to those cases in which the evidence revealed a defendant with a single objective. In each of those cases, the firearms-specification convictions were merged under R.C. 2929.14(D)(1)(b). For example, in *State v. Hughley* (1984), 20 Ohio App.3d 77, 20 OBR 97, 484 N.E.2d 758, the defendant walked into a bar brandishing a gun and robbed the bartender and most customers. Without analysis, the court

found that his offenses were part of one criminal objective. Similarly, in [*State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85], the defendant ran up to a car as it pulled into a driveway. Upon reaching the car, he shoved a gun in the driver's face and demanded money from both the driver and the passengers. The court rejected the state's argument that he had separate objectives — first to rob the driver, then to rob the passengers. Instead, while acknowledging that separate victims could indicate separate objectives, the court found that the evidence in the case did not support such a conclusion. Rather, the evidence pointed to a single criminal objective of robbing all the passengers. Finally, in *State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271, the defendant robbed a store clerk and several customers. All the offenses were part of the same transaction, said the court, because '[t]hey were a series of continuous acts bound together by time, space and purpose, and directed toward a single objective — to rob the store.' *Id.* at ¶32." *Stevens* at ¶8.

{¶ 21} The Second District went on to explain:

{¶ 22} "Conversely, the cases with multiple victims in which the court found distinct criminal objectives contained evidence that the defendants had targeted those specific victims individually. Consequently, these courts properly refused to merge the firearms-specification convictions. A few cases will suffice to illustrate that these cases are distinguishable from the first group of cases and from the instant case. In *State v. Hughes* (Jan. 21, 1999), 8th Dist. No. 73279, the defendant was convicted of murdering one police officer and attempting to murder

a second during a shootout. The court said that there was no error in finding two separate objectives to kill two different men. *Id.* at 7. Similarly, the court in [*State v. Herring*, 7th Dist. No. 0JE37, 2002-Ohio-2786] refused to merge the firearms specifications on two kidnapping and two aggravated-murder convictions because it found that each of these four crimes involved a distinct objective that concerned a specific individual. Finally, the defendant in *State v. Gary* (Feb. 14, 2002), 8th Dist. No. 79224, a case from this court, raped two women at gunpoint within moments of each other. We found that the rapes of the two victims were not part of the same transaction because the defendant had distinct objectives of raping each victim.” *Stevens* at ¶9.

{¶ 23} The *Stevens* court concluded:

{¶ 24} “The defendants in these cases had criminal objectives that focused on specific victims: raping this victim; murdering that victim; kidnapping that other victim. In contrast, the defendants in the former group of cases had criminal objectives that were not focused on any particular victim but were more abstract. Their objective was to rob this bar or that car, regardless of who was inside. While the pursuit of their objectives resulted in multiple victims, their objectives would have been met even if there had been only one patron in the bar or no passengers in the car. The same cannot be said about the objectives of the defendants in the latter group of cases. For instance, had the defendant in *Gary* not raped these particular two women, he would have been frustrated in trying to reach his criminal objective. Here, the evidence does not reveal that [the defendant] had any

particular victim in mind. Rather, it appears that he embarked on a ‘criminal adventure’ to rob whomever was in [the] home.” Id. at ¶10.

{¶ 25} In the case sub judice, the pertinent facts established at trial were that Wilson was driving around East Cleveland selling drugs. He stopped his car to meet with some buyers when James Yhonquea (“Yhonquea”) walked up, pulled out his gun, and put it against Wilson’s head. Yhonquea took Wilson’s drugs, money, and cell phone and started to run. Wilson started to run after Yhonquea and began shooting at Yhonquea, firing eight rounds, hitting a parked car and a house. Yhonquea returned fire, hitting Wilson’s car and a 12-year-old girl who lived in the neighborhood. She managed to walk to a neighbor’s house, collapsed, and died approximately 30 minutes later.

{¶ 26} Wilson eventually caught up with Yhonquea and shot him in the back. Wilson then recovered his drugs, money, and cell phone. When Wilson reached his car, he told his passenger, “[I]f the dude would never took my phone, I wouldn't have chased him down.” (Yhonquea recovered from the gunshot wound and was charged separately from Wilson. *State v. Yhonquea*, C.P. No. CR-502058.)

{¶ 27} It is clear from these facts that although there were two victims, Yhonquea and the young girl, Wilson’s actions amounted to one continuous assault against Yhonquea. He had one purpose, i.e., one criminal objective, when he chased Yhonquea down the street, firing eight rounds at him, and finally shooting him in the back.

{¶ 28} Therefore, we find that the trial court erred by not merging the firearm specifications, as R.C. 2929.14(D)(1)(b) requires. The two consecutive three-year prison sentences for the firearm specifications are clearly and convincingly contrary to law.

{¶ 29} Because this portion of the sentence was statutorily imposed, we find it expedient to modify his sentence with the ability granted us by R.C. 2953.08(G)(2) rather than remand to the trial court for resentencing.¹ Accordingly, we modify that portion of Wilson's sentence imposed for the firearms-specification convictions by merging these convictions into a single three-year term.² Consequently, his total sentence should be 25 years. Wilson's first assignment of error is sustained.

R.C. 2929.11

{¶ 30} Wilson also argues that the trial court did not comply with the mandates of R.C. 2929.11 when it resentenced him to 28 years. Specifically, he maintains that the trial court did not sentence him proportionately to the crimes

¹R.C. 2953.08(G)(2) provides in pertinent part that:

"The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. *** The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

"(b) That the sentence is otherwise contrary to law."

²*State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E. 2d 182 (where the Ohio Supreme Court held the state retains the right to elect), is not implicated here. In *Whitfield*, the Ohio Supreme Court specifically addressed the allied offenses statute (R.C. 2941.25), not R.C. 2929.14(D)(1)(b), which is at issue in this case.

committed or proportionately to similarly situated offenders. Nor did it, he claims, engage in the analysis required by R.C. 2929.11. We disagree.

{¶ 31} R.C. 2929.11(B) states: “A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶ 32} This court has held that in order to support a contention that his or her sentence is disproportionate, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v. Breeden*, 8th Dist. No. 84663, 2005-Ohio-510, ¶80, citing *State v. Woods*, 8th Dist. No. 82789, 2004-Ohio-2700. Wilson did not raise this issue with the trial court, nor did he present any evidence to the trial court. Thus, there is nothing in the record to indicate that his sentence is impermissibly disproportionate.

{¶ 33} We further find no merit to Wilson’s contention that the trial court did not consider R.C. 2929.11. He argues that the trial court failed to indicate that it considered the statute, “either orally in the resentencing transcript or in written form in the subsequent resentencing entry.” It is well settled, however, that “where the trial court does not put on the record its consideration of R.C. 2929.11

and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.” *Kalish*, supra, at ¶18, fn. 1.

{¶ 34} Accordingly, Wilson’s second assignment of error is overruled.

{¶ 35} Judgment affirmed in part, reversed in part, and remanded. Upon remand, the trial court is ordered to modify Wilson’s sentence in accordance with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

ANN DYKE, J., CONCURS;

SEAN C. GALLAGHER, A.J., CONCURS WITH SEPARATE OPINION

SEAN C. GALLAGHER, A.J., CONCURRING:

{¶ 36} I concur fully with the majority opinion.

{¶ 37} I recognize that pursuant to R.C. 2929.14(D)(1)(b) a trial court may not impose more than one prison term for multiple firearm specifications if the underlying felonies were “committed as part of the same act or

transaction.” As the majority decision reflects, Ohio courts have refused to merge firearm specifications when there is a distinct objective concerning the victims involved, as opposed to a random or more abstract intent. I believe there is a disconnect in the law that allows a person to be convicted for separate crimes when multiple victims are involved, but yet requires the merger of firearm specifications that are said to be committed as part of the same act or transaction.