

[Cite as *State v. Smith*, 2016-Ohio-7602.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102893

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM SMITH

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION GRANTED

Cuyahoga County Court of Common Pleas
Case No. CR-14-590453-A
Application for Reopening
Motion No. 493603

RELEASE DATE: October 28, 2016

FOR APPELLANT

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} On February 12, 2016, the applicant, William Smith, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Smith*, 8th Dist. Cuyahoga No. 102893, 2015-Ohio-5265, in which this court affirmed Smith's convictions for various drug and firearm offenses. Smith now claims that his appellate counsel should have argued that the trial court erred by imposing an improper sentence on one of the counts. On March 4, 2016, the state filed its response and conceded the error. For the following reasons, this court grants the application to reopen, vacates the sentence for Count 3, and remands the case for resentencing.

{¶2} In *State v. Smith*, Cuyahoga C.P. No. CR-14-590453-A, the grand jury indicted Smith for the following offenses: (1) trafficking in hydrocodone, a third-degree felony; (2) possession of hydrocodone, a third-degree felony; (3) trafficking in marijuana, a fifth-degree felony; (4) carrying a concealed weapon, a fourth-degree felony; (5) improperly handling a firearm in a motor vehicle, a fourth-degree felony; (6) receiving stolen property, a fourth-degree felony; (7) possession of cocaine, a fifth-degree felony; and (8) possession of criminal tools, a fifth-degree felony.¹ The first three counts included one-year firearm specifications. Smith defended on the grounds that the search was improper. After the trial court denied his motion to suppress, he pleaded no contest

¹On October 16, 2014, Cleveland police officers responded to a complaint that a male in a red Ford Fusion had pointed a gun at a woman. When the officers approached Smith's red Fusion, they saw a gun between his feet. They arrested Smith, conducted an inventory search, and had the car towed. The results of the search led to the indictments.

to all the charges. The trial court then sentenced him to four years in prison. It merged the first two counts as allied offenses and imposed an 18-month sentence on Count 1. It imposed an 18-month sentence on Count 3, 12 months on each of Counts 4 and 5, and six months on Counts 6, 7, and 8. The one-year firearm specifications merged but are consecutive to the other sentences. The court further ordered Counts 1 and 3 to be served consecutively, but all the other counts are concurrent sentences.²

{¶3} R.C. 2929.14(A)(5) provides that the penalty for a fifth-degree felony is six to 12 months in monthly increments. However, the trial court imposed an 18-month penalty on Count 3. Therefore, the sentence is contrary to law, and the state concedes this issue.

{¶4} The state asserts, however, that it is clear that the trial court wished to impose the maximum sentence for Count 3. Thus, it asks this court to exercise its power under R.C. 2953.08(G)(2) and reduce the sentence to 12 months and resolve this case immediately. However, this court does not wish to presume what a trial court would do upon a review of the matter.

{¶5} Accordingly, this court grants the application to reopen. This court reinstates the appeal to the court's active docket, vacates the sentence for Count 3 in Case No. CR-14-590453-A, and remands the case for a resentencing on Count 3.

It is ordered that the state of Ohio to pay the costs herein taxed.

²Smith's appellate counsel's sole assignment of error was that the trial court erred in denying the motion to suppress.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

TIM McCORMACK, J., and
SEAN C. GALLAGHER, J., CONCUR