[Cite as *State v. Cotton*, 2017-Ohio-8238.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102581

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SYLVESTER COTTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584941-B

BEFORE: Jones, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: October 12, 2017

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ON RECONSIDERATION[1]

LARRY A. JONES, SR., J.:

{¶1} Upon review, this court sua sponte reconsiders its decision in this case. After reconsideration, the opinion as announced by this court on July 13, 2017, *State v. Cotton*, 8th Dist. Cuyahoga No. 102581, 2017-Ohio-5807, is hereby vacated and substituted with this opinion.

Procedural History

{¶2} Defendant-appellant Sylvester Cotton ("Cotton") and his codefendant, Michael Brooks ("Brooks"), were tried in a joint jury trial for numerous crimes associated with the armed robbery of Michael Ewart, Jr.[2] The jury and court convicted the defendants on all the charges, which included convictions for aggravated burglary. Cotton and Brooks were sentenced to prison terms of 78 years and 75 years, respectively. Both defendants appealed, and the cases, although not consolidated, were heard before the same panel of judges.

{¶3} In Cotton's appeal, appellate counsel contended, among other things, that the evidence was insufficient to sustain Cotton's attempted murder and felonious assault convictions. *State v. Cotton*, 2015-Ohio-5419, 55 N.E.3d 573, ¶ 8 (8th Dist.) ("*Cotton*

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[1]The original decision in this appeal, *State v. Cotton*, 8th Dist. Cuyahoga No. 102581, 2017-Ohio-5807, released July 13, 2017, is hereby vacated. This opinion, issued upon sua sponte reconsideration, is the court's journalized decision in this appeal. *See* App.R. 22(C); *see also* S.Ct.Prac.R. 7.01

[2]Both defendants were charged with having weapons while under disability, notices of prior convictions and repeat violent offender specifications, which were tried to the bench.

I"). We agreed as to one of the attempted murder counts and sustained the assignment of error relative to that count, but disagreed as to the other attempted murder and felonious assault counts and affirmed those convictions. Appellate counsel in *Cotton I* did not assign any error regarding Cotton's aggravated burglary conviction.

{¶4} In Brooks's appeal, appellate counsel contended, among other things, that the evidence was insufficient to sustain his aggravated burglary conviction. In a split decision, we agreed and sustained his assignment of error relative to that count. *State v. Brooks*, 2016-Ohio-489, 56 N.E.3d 357, ¶ 20 (8th Dist.), *discretionary appeal not allowed*, 146 Ohio St.3d 1428, 2016-Ohio-4606, 52 N.E.3d 1204.

{¶5} After this court's opinion in Brooks's case was issued, Cotton sought to reopen his appeal, contending that his appellate counsel was ineffective by failing to raise the issue of the sufficiency of the aggravated burglary conviction. We granted his request to reopen, found appellate counsel ineffective for not challenging the aggravated burglary conviction and, therefore, vacated the aggravated burglary conviction. *State v. Cotton*, 8th Dist. Cuyahoga No. 102581, 2017-Ohio-5807 ("*Cotton II*").

Facts

{¶6} Relative to the aggravated burglary, in *Cotton I*, we described the facts as follows:

> the victim testified that on the night of April 25, 2014, he returned home to his apartment in the city of Euclid to find three males hiding in the back entrance to his apartment building. Two of the males were later identified as Cotton and Michael Brooks. The victim testified that all three males were armed with guns and that they demanded the victim's wallet.

Cotton, 2015-Ohio-5419, 55 N.E.3d 573, at ¶ 3.

{¶7} In *Brooks*, we described the events surrounding the aggravated burglary as follows:

> Ewart testified that generally no one could enter his apartment building complex through the front door because it was locked. Therefore, Ewart customarily entered through the back door, which, presumably, was unlocked. Ewart testified that on the evening of the crimes, "I got to the back door, he came out the back; and I saw a guy, and around the back. And he came out the basement with another guy. I saw him around the back." As he was testifying, Ewart was pointing to Brooks and Cotton. Therefore, the assistant prosecuting attorney followed up with questions as to who "he" referred to. Ewart testified that Brooks was the first "he" Ewart referred to, meaning that Brooks was the one who "came out the back."
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> In reference to Cotton, Ewart testified that "[h]e came around the back. When I was coming in the hallway, but when them two ran out the basement, he came running back, coming out the door. When I turned to the right, I saw him standing there."

Brooks, 2016-Ohio-489, 56 N.E.3d 357, at ¶ 37-38.

Analysis

{¶8} In *Brooks*, we found that the above-mentioned testimony on "exactly where the perpetrators were when Ewart approached the back door [was] minimal and somewhat confusing." *Id.* at ¶ 39. Based on the testimony, this court concluded that although it established that Brooks was, at some point, in the basement of the apartment building, it was not sufficient evidence to sustain an aggravated burglary conviction for the reasons that follow:

> Specifically, there was no testimony that the theft occurred inside the apartment building. The testimony was that the perpetrators were coming out of the building as Ewart approached. Ewart only testified that he was

> "coming in the hallway"; he never testified that he actually made it into the building, or that the theft occurred inside the building. We are not persuaded by the state's contention that Ewart testified that he was in the hallway during the encounter. The testimony that the state points to was Ewart's response to the state's questioning of him as to the layout, in general, of the hallway. Ewart never specifically stated, however, that he was in the hallway when he encountered Brooks or that that was where the theft occurred. Thus, the evidence was insufficient to support the aggravated burglary charge.

Id. at ¶ 40; *but see* ¶ 52-54 (Stewart, J., dissenting) (citing the assistant prosecuting attorney's description of the perpetrators "standing in the apartment," and noting that

> [a]lthough only the victim's responses to the questions — not the questions themselves — constitute evidence, at no time does the victim correct anything referenced in a question that suggests the burglary took place anywhere but inside of his apartment building (or at least in the doorway of his building).

The dissent further contended that even if the evidence was insufficient to prove that the theft took place inside the apartment building, "at a minimum the evidence demonstrated that the armed theft occurred in an occupied structure.")

{¶9} In *Cotton II*, we held that

> [f]or the same reasons that this court articulated in *Brooks*, we likewise find the evidence was insufficient to sustain an aggravated burglary conviction against Cotton, and that, under the circumstances presented here, his appellate counsel was ineffective for not raising the issue in his first appeal.

Cotton, 8th Dist. Cuyahoga No. 102581, 2017-Ohio-5807, ¶ 11.

{¶10} After our decision in *Cotton II*, the state filed an application for en banc consideration, citing *State v. Coleman*, 8th Dist. Cuyahoga No. 102966, 2016-Ohio-297, *discretionary appeal not allowed*, 145 Ohio St.3d 1473, 2016-Ohio-3028, 49 N.E.3d

1314. The *Coleman* decision was issued approximately two weeks prior to our decision in *Brooks* and was, therefore, precedent from this court, but was overlooked by us.

{¶11} The claimed conflict relates to the interpretation of the aggravated burglary statute, R.C. 2911.11(A)(2), which provides in relevant part as follows:

> No person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if the offender has a deadly weapon * * *.

{¶12} In *Coleman*, a police officer returned to his home to find a burglary in progress. The burglar disappeared from the home before the officer entered the house, however. The defendant was convicted of aggravated burglary. On appeal, he contended that the essential element of "when another person is present" was not satisfied because there was no evidence that another person, i.e., an occupant, was present at the time of the offense.

{¶13} This court disagreed, citing *State v. Ramirez*, 12th Dist. Clermont No. CA2004-06-046, 2005-Ohio-2662, wherein the Twelfth Appellate District held that the element of "when another person is present" is satisfied if the state demonstrates the presence of the person inside the structure is "associated in time" with the entry of the offender. *Coleman* at ¶ 15, citing *Ramirez* at ¶ 26. In other words, if the offender's entry and the presence of an occupant inside the structure are "part of one continuous occurrence," the element of "when another person is present" is satisfied. *Coleman* at *id.*, citing *Ramirez* at *id.*

{¶14} In light of the above, we have reconsidered our position in *Cotton II*.

When applying the "one continuance occurrence" view of R.C. 2911.11(A)(2), as *Coleman* and *Ramirez* do, there was sufficient evidence to support the aggravated burglary conviction against Cotton. We recognize that our reconsideration in this case will yield an inconsistent result with our decision in *Brooks*, which is now a final judgment.[3] That being said, the result in *Brooks* is our "mea culpa," but does not bar us from now correcting the mistake here.

{¶15} Accordingly, we overrule the two assignments of error Cotton presented in *Cotton II*, and affirm his aggravated burglary conviction.

{¶16} Judgment affirmed.

It is ordered that appellee recover of appellant 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.

LARRY A. JONES, SR., JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR

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[3]The state did not file a motion to certify *Brooks* as a conflict with *Ramirez*.