

IN THE SUPREME COURT OF OHIO

08-0624

STATE OF OHIO,

Plaintiff-Appellee,

-VS-

Wrahsuan Barringer,

Defendant-Appellant,

On appeal from the Portage  
County Court of Appeals, 11<sup>th</sup>,  
Appellate District, Case No.

Court of Appeals  
Case Number 2007-P-0002

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

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Wrahsuan Barringer #462-428

Trumbull, C. I.

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Leavittsburg, Ohio 44430

DEFENDANT-APPELLANT, PRO SE

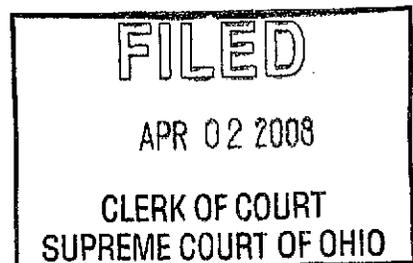
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**EXPLANATION WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

I, Wrasaan Barringer, feel that leave to appeal should be granted because the state failed to disclose evidence favorable to me upon request constitutes a violation of the Fourteenth Amendment's due process guarantee of a fair trial.

The court abused its discretion in failing to grant a mistrial and protect my due process rights. As a result of the court's actions, I was sentenced to 17 years in prison. I was sentenced under the guidelines of *State v. Foster* when I was convicted of this charge prior to the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio st. 3d1, 2006-Ohio-856.

The Ohio Supreme Court has stated, every defendant is entitled to the unqualified right to have the prosecution prove every element of the offense charged beyond a reasonable doubt.

If the state is unable to do so, the accused is entitled to an acquittal. I filed a Motion for Discovery, Bill of Particulars, and it was violated when the prosecution failed to provide all evidence. Some of the evidence and photo arrays were not produced to me until the day of trial. Furthermore, I was indicted with (4) counts of Felonious Assault; Having Weapon Under Disability and Illegal Possession of Firearm in a Liquor Permit Premises. The jury convicted me of two counts of Felonious Assault and acquitted me of two counts of Felonious Assault. The fact is that the jury acquitted me of two Felonious Assault charges, that indicates that they did not believe I was the shooter. It is factually impossible for me to have committed only two of the four counts. The verdicts are inconsistent and therefore, violates my due process rights to a fair trial.

## STATEMENT OF THE CASE

### PROCEDURAL POSTURE

On April 27, 2004, the Grand Jury returned a True Bill on an Indictment against Mr. Barringer with Four (4) Counts of Felonious Assault; Having Weapon Under Disability and Illegal Possession of Firearm in a Liquor Permit Premises. (T.d. 1) On May 3, 2004, Mr. Barringer was arraigned on the charges and entered a plea of Not Guilty. (T.d. 4)

The matter was set for a first Pretrial on June 11, 2004 and Trial on June 15, 2004. (T.d. 6) On May 17, counsel for the Defendant entered an appearance in the case and on May 17, 2004, filed a Motion for Discovery. (T.d. 8-9) Defendant also filed a Motion for a Bill of Particulars on May 17, 2004. (T.d. 10) On May 17, 2004, Defendant also filed a Motion to Examine Exculpatory and Mitigatory Material. (T.d. 11)

The State of Ohio also filed a Motion for Discovery on May 25, 2004. (T.d. 14) The State of Ohio filed its Witness List on May 25, 2004. (T.d. 15) On June 11, 2004, Defendant filed a Motion for Appointment of Expert at State's Expense. (T.d. 24) On June 14, 2004, the Court ordered the Grand Jury testimony of LeShaun Sanders released to Defendant. (T.d. 25)

Defendant filed a Second Amended Witness List on June 30, 2004 and a Third Amended Witness List on June 30, 2004. (T.d. 36-37) The trial commenced on June 29, 2004. On July 2, 2004, the court ordered Jonathan Caples to be taken into custody and brought before the court for failing to appear pursuant to subpoena. (T.d. 44) This order was subsequently vacated after Mr. Caples appeared in court. (Id.)

On July 8, 2004, the jury returned a verdict of Guilty on Count One (1), Felonious Assault against Deborah Kelly with a Gun Specification; Guilty on Count Two (2), Felonious Assault against Jonathan Caples, with a Gun Specification. (T.d. 48-49) The jury returned a verdict of Not Guilty on Count Three (3), Felonious Assault against Clemmie L. Perry, and Not Guilty of Count Four (4), Felonious Assault against Rodney Mack. (T.d. 50-51) The Jury also found Mr. Barringer Guilty of Count Five (5) of the Indictment, Having a Weapon While Under Disability and Count Six (6) Illegal Possession of Firearm in a Liquor Permit Premises. (T.d. 52-53)

On July 21, 2004, Defendant filed a Motion for New Trial. (T.d. 63) On August 9, 2004, the Court overruled Defendant's Motion for New Trial. (T.d. 67) The Court sentenced Defendant to seven years imprisonment on each of the Second Degree Felonious Assault Counts, which shall run consecutively, with each sentence to run consecutive to the three (3) year mandatory term for the gun specification. (Id.) Defendant was sentenced to 11 months for Having Weapons Under Disability, and Illegal Possession of Firearm in a Liquor Permit Premises, which were to run concurrently to each other and concurrently to the Felonious Assault charges. (Id.) On September 8, 2004, a Notice of Appeal was filed with this court by Appellate Counsel. (T.d. 74) The record was completed and filed with the court on November 8, 2004. (T.d. 89)

## STATEMENT OF FACTS

On January 25, 2004, a number of people gathered at the Men's Civic Club in Ravenna, Ohio for Karen Sanders' birthday party. (Vol. I, T.p. 137) LeShaun Sanders and Mr. Barringer drove up to the club with Bud Marshall. (Vol. III, T.p. 158) Prior to entering the club and while still in the vehicle, Mr. Sanders removed his gun and left it in the vehicle under the passenger seat of the car. (Vol III, T.p. 159) Mr. Sanders did not see Mr. Barringer with a gun in the car. (Id.) It is club policy to search every person that enters the bar to make sure they do not possess a firearm – the patrons are searched with a metal detection wand. (Vol. I, T.p. 201)

LeShaun Sanders and Wrahsaan Barringer arrived at the club late in the evening. (Vol. III, T.p. 156) They signed the sign-in sheet and proceeded to enter the club. (Vol. III, T.p. 157) They entered the club with Bud Marshall and Louis Fisher. (Id.)

When they entered the club, the parties separated and Mr. Sanders went to see his stepmother and wish her a happy birthday. (Vol. III, T.p. 159) Mr. Sanders proceeded to go downstairs in the club to take a picture. (Vol. III, t.p. 164) It was at this point that Mr. Sanders engaged in a conversation with Jonathan Caples about a prior incident between the parties. (Id.) Mr. Sanders had his picture taken with his sister, and then he and Mr. Barringer went outside to smoke, rode around the block and returned to the club parking lot. (Vol. III, T.p. 167) A fight started inside the bar, and Mr. Sanders and Mr. Barringer returned back to the bar. (Vol. III, T.p. 168) It was a melee inside the bar as security was swinging and hitting a number of people. (Id.) The bouncers were in the process of pushing Mr. Sanders out of the bar, and as this melee was going on, Mr.

Sanders took out his gun and fired into the air. (Vol. III, T.p. 168) At this point, another shooter fired several rounds into the club. (Vol. I, T.p. 192)

Lynn Kelly, who was vice president of the club and was working at the club on the evening in question also witnessed the fight between the two (2) women. (Vol. I, T.p. 184) After the fight started, security was in the process of clearing out the club when the shots were fired. Mr. Kelly was two to three feet from the second shooter as the shots were being fired, and he heard two to three shots fired. (Vol. I, T.p. 186, 201) After the shots were fired, the establishment emptied out and the police appeared. At the scene of the shooting, Mr. Kelly informed the police that if he saw the shooter again, he would be able to identify him. (Vol. I, T.p. 203) Shortly after the shooting, a photo array was prepared by the police and shown to Mr. Kelly, but he was unable to identify the shooter. (Vol. I, T.p. 192) Then, on January 27, 2004, Mr. Kelly identified a person from a photo array presented by Detective Francis of the Ravenna Police Department, and the person he identified was not Mr. Barringer. (Vol. I, T.p. 198)

Prior to this incident, Terrence Ogletree, a convicted felon, purchased a 9 mm Hi-Point gun from Mr. Bill Lewis. (Vol. II, T.p. 56) One day during the summer of 2003, Mr. Ogletree noticed that his gun was missing, shortly after a visit to his house by Mr. Sanders and Mr. Barringer. (Vol. II, T.p. 57) Mr. Ogletree never reported the alleged gun theft to the police. (Vol. II, T.p. 82)

After the shooting incident, in March of 2004, Mr. Ogletree was allegedly contacted and informed that his gun was for sale in Cleveland. (Vol. II, T.p. 60) In a three-way conversation with Joey Fingers and Mr. Barringer, in March, 2004, Mr. Ogletree negotiated the re-purchase of his gun. (Id.) The gun was returned to him,

wrapped in tape. Mr. Ogletree eventually contacted his lawyer and gave the gun to the police. (Vol. II, T.p. 78) Mr. Ogletree was never charged for owning a gun, even though he was convicted of Aggravated Robbery in 1991 and served eight (8) years in prison. (Vol. II, T.p. 69)

Louis King was also working security at the Men's Civic Club on the evening of January 25, 2004. (Vol. II, T.p. 100) Mr. King stated that after the fight started, he pushed LeShaun Sanders and his friend out of the bar. (Vol. II, T.p. 107) He did not have any problems with LeShaun or his friend. (Id.) LeShaun returned to the bar and fired a shot into the ceiling. (Vol. II, T.p. 112) A second shooter then entered the bar and fires several times, only several feet from Mr. King. (Vol. II, T.p. 113, 130)

On March 3, 2004, Mr. King went to the police department to review a photo array of the possible shooters. (Vol. II, T.p. 132) Mr. King viewed a black and white photo array. (Vol. II, T.p. 144) Mr. King was unable to pick Mr. Barringer from the photo array as the shooter.

Detective Francis was one of the Ravenna City Detectives assigned to the case. Detective Francis helped prepare and show many of the photo arrays to various witnesses. On January 26, 2004, he showed a photo line-up to Lynn Kelly. (Vol. III, T.p. 90) Early in the investigation, the Detective had received a report that Mr. Ogletree was one of the shooters, and as a result, Detective Francis prepared a photo array with Mr. Ogletree's picture. (Vol. III, T.p. 94) Detective Francis showed Mr. Kelly a photo array with Mr. Barringer in photo slot #4, but Mr. Kelly picked the person located in photo slot #5. (Vol. III, T.p. 95) Detective Francis also checked on the videotape of the

parking lot from the evening in question, only to discover that the video could not be located. (Vol. III, T.p. 100)

According to Detective Francis, even though Mr. Ogletree had admitted that he possessed a gun, and even though Mr. Ogletree had a prior felony conviction, he was never charged with a crime. (Vol. III., T.p. 101) During the course of the investigation, Detective Francis or other officers and detectives created several different photo arrays. (Vol. III, T.p. 127-31) Detective Francis never recorded in his report that he used different photo arrays and positions when he showed the spread to Mr. Lynn Kelly and Mr. Rodney Mack. (Vol. III, T.p. 133)

Mr. Rodney Mack also worked security at the club. (Vol. III, T.p. 137) Mr. Mack was pushing people out of the bar when he heard the first shot and witnessed LeShaun Sanders freeze by the doorway entrance. (Vol. III, T.p. 144) After that, Mr. Mack heard 3-4 other shots, although he could not see the shooter. (Id.) Mr. Mack did observe a photo array, although he was not sure what photo array he saw, and he was not sure who he picked from the array. (Vol. III, T.p. 146)

On several occasions, LeShaun Sanders informed the police that he did not know who the second shooter was. (Vol. III, T.p. 174) The first time LeShaun was interviewed by the police, they asked him several times who the shooter was, but each time he told them he did not know. (Vol. III, T.p. 185) The police threatened to charge Mr. Sanders with Attempted Murder from the shooting incident. (Vol. III, T.p. 193) It was after this point that Mr. Sanders believed he would be charged with Attempted Murder that he informed the police that the second shooter was Wrahsaan Barringer. (Vol. III, T.p. 193) Mr. Sanders entered a plea offer to Carrying a Concealed Weapon

and A Weapon in a Liquor Establishment, in return for his testimony in the present case. (Vol. III, T.p. 178) This plea offer was after he had insisted strongly that he did not know who the second shooter was.

Prior to trial, Defense counsel raised a discovery issue with the court. Defense counsel had requested all exculpatory evidence be produced, and the State failed to produce various statements from some witnesses who did not pick Mr. Barringer from a photo array. (Vol. I, T.p. 76) Furthermore, during the course of the trial, there were significant issues raised by defense counsel regarding the various, confusing photo arrays that were shown to witnesses. (Vol. II, T.p. 19) Some of the evidence and photo arrays were not even produced for the Defendant until the day of trial. (Vol. II, T.p. 19)

## FIFTH ASSIGNMENT OF ERROR

**THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT CONVICTED HIM OF TWO COUNTS OF FELONIOUS ASSAULT, WEAPON UNDER DISABILITY AND WEAPON IN A LIQUOR ESTABLISHMENT WHEN THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

### First Issue Presented for Review and Argument

**A conviction is against the manifest weight of the evidence where the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.**

A reviewing court shall reverse the decision of the trial court when the judgment is against the manifest weight of the evidence. To determine if the judgment is against the manifest weight of the evidence, the reviewing court must look through the entire record and weigh the evidence, and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trial court lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Martin* (1983) 20 Ohio App.3d 172, 175.

The greater weight of the evidence proves that Mr. Barringer was not the second shooter in the establishment on that night. The uninterested parties, Lynn Kelly and Louis King, who were 2-3 feet away from the shooter, could not identify Mr. Barringer in a photo array shortly after the shooting.

In addition, the original photo array prepared had a picture of Terrance Ogletree in it after the police had received a tip that he may be the shooter. It was unclear whether this photo array was ever shown to Mr. Kelly, but it is apparent that Mr. Kelly picked a photograph of someone in position #5, whether that was the Ogletree array or not is

unclear from the record and the Exhibits. It would be significant if Mr. Kelly did pick Mr. Ogletree out of the lineup since Mr. Ogletree was the owner of gun used in the crime. It must also be noted that Mr. Ogletree is the person who gave the weapon to the police after a story about buying the gun back. Mr. Ogletree testified that he was on a three way conversation with Mr. Barringer and Joey Fingers about the weapons sometime in March 2004. This is surprising because Mr. Barringer was in jail at the time of this alleged conversation.

Dr. Fulero also testified that the photo arrays used in this case were improper. He testified that the proper technique of showing a witness a photo array would consist of showing the pictures one at a time to the witness, instead of all at once. Prior to showing the pictures to the witness, a disinterested officer (an officer with no connection to the case) should inform the eyewitness that the suspect may or may not be in the picture spread. Better yet, Dr. Fulero testified that the instructions for the photo array should be written down for the witness to read so there is no chance of tainting the picture spread with non-verbal cues by the officer.

Dr. Fulero also testified that when weapons are used in a crime, the identification process is even more unreliable. The weapon draws the attention away from the face of the person with the gun and the stress of the event makes it even more difficult to identify the person.

There was ample testimony that everything happened quickly on the night of the shooting. LeShaun Sanders and his family did not implicate Mr. Barringer in this crime until Mr. Sanders thought he was facing Attempted Murder charges. At that point, he needed to give something to the police and he did just that. Mr. Ogletree, a convicted

felon who owned a gun, was never charged with any crime. Mr. Ogletree possessed the gun, alleged it was stolen, re-purchased the gun, and eventually gave it to the police. He alleged that Mr. Barringer confessed to him about the crime when he re-purchased the gun – all of which occurred while Mr. Barringer was in jail. Furthermore, the police never spoke with Joey Fingers, the alleged go-between Mr. Barringer and Mr. Ogletree.

Finally, the jury acquitted Mr. Barringer of two (2) counts of Felonious Assault. This would further bolster the notion that there the jury lost its way and solely reached a compromise verdict. There was a long deliberation and at one point, the jury indicated it was deadlocked. The jury returned inconsistent verdicts. If the jury believed that Mr. Barringer was not the person who shot Rodney Mack and Clemmie Perry, it is not possible that the greater weight of the evidence supports the convictions for the other counts.

Reviewing the entire record and weighing all the testimony and evidence favors Mr. Barringer. There was great confusion regarding the photo arrays, which arrays were shown to whom, when and such information was never memorialized in the police reports. Lynn Kelly and Louis King identified someone other than Mr. Barringer immediately after the incident and Terrance Ogletree possessed the weapon used in the crime. LeShaun Sanders initially informed the police that he did not know the second shooter and continued with those statements up until he thought he would be charged with Attempted Murder, then his story changed. As a result of all this, Mr. Barringer is now serving 17 years in prison for a crime he did not commit.

## SIXTH ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT SENTENCED DEFENDANT-APPELLANT TO A DEFINITE SENTENCE OF SEVEN (7) YEARS FOR FELONIOUS ASSAULT, TO BE SERVED CONSECUTIVELY WITH A SEVEN (7) YEAR DEFINITE SENTENCE FOR FELONIOUS ASSAULT, AND A THREE (3) YEAR SENTENCE FOR THE GUN SPECIFICATION TO BE SERVED CONSECUTIVELY, AND FAILED TO REVIEW ALL OF THE STATUTORY FACTORS ANNOUNCED IN R.C. 2929.12.**

### First Issue Presented for Review and Argument

**The defendant-appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution was violated when the Trial Court sentenced Defendant-Appellant to a definite term of seventeen years incarceration and failed to properly review, as mandated by law, the statutory factors announced in Ohio Revised Code, Section 2929.12.**

R.C. 2929.12 states in pertinent part:

- (A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

The Court did state that there were prior adjudications of criminal convictions, and a failure to respond favorable to the past sanctions imposed. The Court completely failed to review any of the factors announced in R.C. 2929.12 (C), mitigating the conduct of Defendant-Appellant. The Court also found that Mr. Barringer had shot four times into a crowded bar, when in fact, the jury had acquitted Mr. Barringer of two (2) counts of

Felonious Assault, contrary to the court's findings. (Sent. T.p. 7) The Court went so far as to try to sentence Mr. Barringer to two (2) consecutive 3-year gun specifications, until notified by counsel that the sentences had to merge. (Sent. T.p. 8-10) The Court also failed to state that it had reviewed all the factors of R.C. 2929.12 in the Judgment Entry. The Judgment Entry merely states that the court reviewed all of the factors as required by law, but the court did not announce any of its findings about why a consecutive sentence was appropriate.

"R.C. 2929.12(A) requires the sentencing judge to consider the applicable seriousness and recidivism factors outlined in R.C. 2929.12 (B), (C), (D), and (E) as she exercises her discretion to determine the most effective way to comply with the purposes and principles of sentencing outlined in R.C. 2929.11." *State v. Arnett* (2000), 88 Ohio St.3d 208, 214, 724 N.E.2d 793, 798. There is no indication in the record or the judgment entries of the present case that the court properly reviewed all of the factors in R.C. 2929.12 (B), (C), (D), and (E) as required by statute.

The court only focused on the recidivism factors of the statute and completely ignored the fact that the jury acquitted Mr. Barringer of two (2) counts and there was substantial confusion regarding the photo arrays and the identifications. The court also failed to account for the fact that the jury was deadlocked on the case for some time, and did end up acquitting Mr. Barringer on two (2) counts.

The Court summarily sentenced Defendant-Appellant to definite time in prison without properly reviewing all of the statutory factors and the Court's lack of adequately announcing the foundations for the prison sentence leave Defendant-Appellant at a

struggle to determine exactly why the court sentenced Defendant-Appellant to over seventeen (17) years of prison time to be served consecutively.

R.C. 2929.14(E)(4) states the following:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, \* \*

The Court failed to make such a finding in the present case. While the court did find that consecutive sentences were necessary to adequately punish the offender, the court did not state the reasons behind the decision. Also, the court failed to find that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. There was also reasonable doubt as to whether Mr. Barringer was the second shooter, which is why the jury acquitted Mr. Barringer of two (2) counts of Felonious Assault.

## CONCLUSION

This case raises a substantial constitutional question, involves a felon and is one of great public or general interest. Review should be granted in this case.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Memorandum in Support of Jurisdiction has been sent by U.S. mail to the prosecuting attorney of Portage County on this 25 day of March, 2008, at the following address 466 South Chestnut St. Ravenna, Ohio 44266.

Wrahsaan Barringer  
462-428 , # - , pro se

FEB 25 2008

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

STATE OF OHIO, : OPINION  
Plaintiff-Appellee, :  
- vs - : CASE NO. 2007-P-0002  
WRAHSAAN J. BARRINGER, :  
Defendant-Appellant. :

Criminal Appeal from the Court of Common Pleas, Case No. 2004 CR 0165.

Judgment: Affirmed.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Derek Cek*, 2725 Abington Road, Suite 102, Fairlawn, OH 44333 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Wrahsaan J. Barringer, appeals the judgment entered by the Portage County Court of Common Pleas. Upon remand from this court, the trial court sentenced Barringer to an aggregate prison term of 17 years for his convictions for felonious assault, with firearm specifications; having a weapon while under disability; and illegal possession of a firearm in a liquor permit premises.

{¶2} In January 2004, a fight occurred during a birthday party at the Men's Civic Club in Ravenna, Ohio. During the fight, several shots were fired into the crowd.

At trial, Barringer was identified as one of the shooters. Several individuals sustained injuries as a result of the shooting.

{¶3} Barringer was indicted on six counts, including four counts of felonious assault, in violation of R.C. 2903.11(A)(2) and second-degree felonies; one count of having a weapon while under disability, in violation of R.C. 2923.13 and a fifth-degree felony; and one count of illegal possession of a firearm in a liquor permit premises, in violation of R.C. 2923.121 and a fifth-degree felony. All of the felonious assault counts contained firearm specifications, pursuant to R.C. 2929.14(D) and 2941.145.

{¶4} Barringer pled not guilty to the charges, and a jury trial was held. The jury found Barringer guilty on two of the felonious assault counts, as well as the firearm specifications in regard to those counts. In addition, the jury found Barringer guilty of the counts of having a weapon while under disability and illegal possession of a firearm in a liquor permit premises. The jury found Barringer not guilty on the remaining two counts of felonious assault.

{¶5} The trial court merged the firearm specifications for purposes of sentencing. The trial court sentenced Barringer to seven-year prison terms for each of his felonious assault convictions, to be served consecutively to each other. The trial court imposed a three-year term for the firearm specification, to be served consecutively to both of the seven-year terms for the felonious assault convictions. Further, the trial court imposed 11-month sentences for Barringer's convictions for having a weapon while under disability and illegal possession of a firearm in a liquor permit premises. The 11-month terms were ordered to be served concurrently to each other and the

sentences for the felonious assault convictions and the firearm specification. Thus, Barringer's aggregate prison term was 17 years.

{¶6} Barringer appealed his convictions and sentence to this court. *State v. Barringer*, 11th Dist. No. 2004-P-0083, 2006-Ohio-2649. This court affirmed his convictions. *Id.* at ¶88. In addition, this court affirmed Barringer's sentences for having a weapon while under disability and illegal possession of a firearm in a liquor permit premises, as well as his sentence for the firearm specification. *Id.* at ¶84-88. However, this court reversed Barringer's sentences for his felonious assault convictions and remanded the matter for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Id.* at ¶88.

{¶7} In July 2006, the trial court conducted a resentencing hearing. The trial court imposed an identical, aggregate 17-year prison sentence. This aggregate prison sentence included seven-year sentences for each of Barringer's felonious assault convictions and a three-year term for the firearm specification, all to be served consecutively to each other.

{¶8} Barringer has appealed the trial court's resentencing judgment entry to this court. Barringer raises four assignments of error. His first and second assignments of error are:

{¶9} "[1.] The trial court erred when it sentenced appellant under the guidelines of *State v. Foster* since *Foster's* severance provisions operate as an ex post fact law.

{¶10} "[2.] The trial court denied appellant due process when it sentenced appellant under the guidelines of *State v. Foster*."

{¶11} In his first and second assignments of error, Barringer asserts his sentence is unconstitutional because he committed his crimes prior to the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, but was sentenced pursuant to the post-*Foster* version of R.C. 2929.14. This court has addressed Barringer's exact arguments in the case of *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011. In *State v. Elswick*, this court found the arguments that are raised in this appeal to be without merit. *Id.* at ¶¶5-31. See, also, *State v. Marino*, 11th Dist. No. 2006-L-192, 2007-Ohio-2566, at ¶¶8-14; *State v. Nicholson*, 11th Dist. No. 2006-L-210, 2007-Ohio-2058, at ¶¶5-11; and *State v. Schaub*, 11th Dist. No. 2006-L-126, 2007-Ohio-2853, at ¶¶10-17. Additionally, in *State v. Green*, this court found a similar post-*Foster* Ex Post Facto Clause argument to be without merit. *State v. Green*, 11th Dist. Nos. 2005-A-0069 & 2005-A-0070, 2006-Ohio-6695, at ¶¶15-23. Finally, similar arguments have "been consistently rejected by other Ohio appellate districts and federal courts." *State v. Markiewicz*, 11th Dist. No. 2006-L-249, 2007-Ohio-3974, at ¶¶12, citing *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899, at ¶¶15-18; *State v. Moore*, 3d Dist. No. 1-06-51, 2006-Ohio-6860, at ¶¶7-12; and *United States v. Portillo-Quezada* (C.A.10, 2006), 469 F.3d 1345, 1354-1356.

{¶12} Based upon the prior authority of this and other courts, Barringer's first and second assignments of error are without merit.

{¶13} Barringer's third assignment of error is:

{¶14} "The trial court's sentence of appellant was an abuse of discretion."

{¶15} After the *State v. Foster* decision, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make

findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *State v. Foster*, 2006-Ohio-856, at paragraph seven of the syllabus. Thus, this court has held post-*Foster* felony sentencing is generally reviewed for abuse of discretion. *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, at ¶19. “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶16} In this matter, Barringer contends the trial court abused its discretion by imposition of consecutive, seven-year prison terms for the felonious assault convictions. We disagree. Barringer’s felonious assault convictions resulted from his decision to fire a handgun in a crowded nightclub. As this court noted in its opinion of Barringer’s first appeal, one of the witnesses described Barringer’s actions as follows, “and the next thing I know, (Barringer) just starts shooting. As he’s running, he’s shooting, not knowing who he’s shooting at and don’t care who he hits.” *State v. Barringer*, 11th Dist. No. 2004-P-0083, 2006-Ohio-2649, at ¶18. The jury determined that Barringer’s actions injured two people, to wit: Deborah Kelly and Jonathan Caples, who both received gunshot wounds to their right arms. In determining to impose seven-year, consecutive sentences, the trial court most certainly considered the severity of Barringer’s offenses and the fact that the outcome of his actions could have been much more tragic.

{¶17} Barringer directs our attention to several other cases to support his argument that the trial court abused its discretion in imposing consecutive, seven-year prison terms. For the following reasons, all of these cases are distinguishable from the case sub judice. Barringer cites *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-

2216, at ¶3, in which the defendant was sentenced to an aggregate prison term of 19 years for his rape and kidnapping convictions in a case where the defendant's wife was the victim. Since the underlying crimes in *Worrell* are entirely different from those in the case sub judice, this case is immediately distinguishable. Barringer also cites *State v. Burten*, 8th Dist. No. 88395, 2007-Ohio-2641. In *Burten*, the defendant was sentenced to a term of eight years in prison for his felonious assault convictions. *Id.* at ¶10. However, unlike the instant matter, there was only one shooting victim in *Burten*. *Id.* at ¶4. Finally, Barringer cites *State v. Serrano*, 164 Ohio App.3d 103, 2005-Ohio-5606, at ¶1, where the defendant received a four-year prison term for his felonious assault conviction. It is important to note that the attack in *Serrano* was unsuccessful, as the knife actually hit the victim's cell phone and did not enter his body. *Id.* at ¶2.

{¶18} Moreover, none of the cases cited by Barringer outline the criminal history of the respective defendants. In this case, the trial court indicated it reviewed the presentence investigation ("PSI") report. The PSI report indicates Barringer has a significant criminal history. On appeal, Barringer recognizes this fact. In his brief, he concedes that he has "a history of criminal convictions." A defendant's prior criminal record is a critical fact regarding the offender's recidivism potential and is to be considered when imposing a felony sentence. See R.C. 2929.12(D)(2).

{¶19} Considering all of the cases cited by Barringer are factually distinguishable from the case sub judice, none of those cases expand on the defendants' criminal records, and Barringer's own criminal record, we decline to find that the trial court erred in imposing Barringer's sentence based on the cases cited by Barringer.

{¶27} Barringer asserts the trial court did not consider the R.C. 2929.12 factors. If true, the trial court's actions would be contrary to the clear mandates of the statute. Thus, Barringer essentially argues that his sentence is contrary to law. Accordingly, pursuant to R.C. 2953.08(G)(2)(b), we will employ the "clear and convincing" standard of review for this assignment of error.

{¶28} While the trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors [of R.C. 2929.12.]" *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215.

{¶29} R.C. 2929.12(B) contains factors that indicate an offender's conduct is "more serious" than normal conduct associated with the offense. Barringer argues that it is questionable as to whether R.C. 2929.12(B)(2) applied. We strongly disagree. This section provides that "[t]he victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." Both victims were shot with a firearm. As such, R.C. 2929.12(B)(2) pertains to this matter.

{¶30} R.C. 2929.12(C) contains factors that indicate an offender's conduct is "less serious" than normal conduct associated with the offense. In his brief, Barringer concedes that none of these factors pertain to his conduct in the instant matter.

{¶31} R.C. 2929.12(D) contains factors that indicate an offender is "likely to commit future crimes." Barringer acknowledges that "some of [these] factors apply." Specifically, he refers to the fact that he has a history of criminal convictions. See R.C. 2929.12(D)(2).

STATE OF OHIO

COUNTY OF PORTAGE

)  
FILED  
COURT OF APPEALS

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

FEB 25 2008

STATE OF OHIO,

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

Plaintiff-Appellee,

JUDGMENT ENTRY

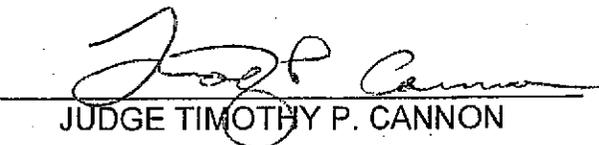
- vs -

CASE NO. 2007-P-0002

WRAHSAAN J. BARRINGER,

Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

  
JUDGE TIMOTHY P. CANNON

DIANE V. GRENDELL, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.