IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MARQUIS HAIRSTON,

Defendant-Appellant

Case No. 07-394

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 06AP-420

MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO OPPOSING MOTION FOR RECONSIDERATION

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MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO OPPOSING MOTION FOR RECONSIDERATION

Having been imprisoned twice before, defendant pleaded guilty to eleven first-degree felonies, three third-degree felonies, and multiple firearm specifications, all arising out of three home invasions in the autumn of 2005 in Columbus. The trial court imposed maximum, consecutive sentences totaling 134 years. The Court of Appeals affirmed.

In an opinion rendered on May 21, 2008, this Court rejected defendant's claim of cruel and unusual punishment and affirmed the sentences. This Court adopted the following syllabus: "Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

Defendant has now filed a motion for reconsideration. Defendant does not contend that some legal error was involved in this Court's decision. Instead, defendant argues, for the first time, that he was abused as a child and that such abuse "could have impacted the sentence imposed at the trial court."

This Court's Rules provide that "[a] motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, [and] shall not constitute a reargument of the case * * *." S.Ct.Prac.R. XI(2)(B). "The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been."

Matthews v. Matthews (1982), 5 Ohio App.3d 140, 143.

Defendant's motion for reconsideration is frivolous under these standards. Defendant concedes that the purported abuse is an entirely new issue in the case, since it was not raised in the lower courts and since it was not raised in the present Supreme Court appeal (until now). Defendant is not seeking "reconsideration" but rather is seeking a second consideration based on information new to the case. In terms of the test for reconsideration, defendant cannot claim that this Court committed some obvious error or that it failed to consider something it should have considered. This Court had no reason to consider anything related to purported child abuse, and therefore there are no grounds for defendant to seek "reconsideration" now.

Defendant errs in attaching an affidavit to the motion and in seeking "reconsideration" on that basis. It is well established that "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. "[T]here must be sufficient basis *in the record* * * * upon which the court can *decide* that error." *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342 (emphasis sic). Defendant cannot show error in the trial-court or appellate-court proceedings by attempting to add improper matter to the record in this Court several months after those proceedings concluded in April 2006 and January 2007 respectively.

Defendant's motion is also flawed because it goes beyond the limited review accepted by this Court. This Court granted review solely of the legal question of whether defendant's sentences were cruel and unusual punishment. See Opinion, at ¶ 1 ("The sole issue before this court * * *."); id. at ¶ 10 ("we agreed to consider" Eighth Amendment claim). Now, defendant is attempting to go beyond this limited grant of review to present a claim that he was abused as a child. Such abuse was never heretofore an issue in this case, and this Court did not accept the case for review on that basis. Again, defendant points to no legal error in this Court's ruling.

Finally, at this late date, defendant's claims of child abuse are dubious at best. As someone who was imprisoned for felonies on two previous occasions, and as someone who now stands convicted of eleven first-degree felonies and other offenses in the present case, defendant's tardy claims of child abuse are naturally suspect and lack credibility. And, even if those allegations were true, there is little doubt that defendant is cherry-picking in his unilateral, one-sided attempt to expand the appellate record. A true and full inquiry into defendant's background and history would also include a detailed analysis of defendant's prior crimes, prior prison stints, and whatever other criminal history that may exist. As a result, even if this Court were inclined to undertake the unprecedented measure of accepting new evidence at this late date, the State would be entitled to a similar latitude to supplement the record with other information regarding defendant. One suspects that the end result of such a broad inquiry into defendant's past would not be good for defendant.

For all of the foregoing reasons, defendant's "motion for reconsideration" should be denied.

Respectfully submitted,

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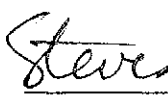
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 4th day of June, 2008, to Toki M. Clark, Clark Law Office, 233 South High Street, 3rd Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellant.



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