

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 08-1348
-vs- : 1st. Dist. No. C-060991
CHRISTOPHER SMITH, :
Defendant-Appellant. :

MEMORANDUM IN SUPPORT OF JURISDICTION

Hamilton County Common Pleas Case No. B-0600007

FOR APPELLANT:

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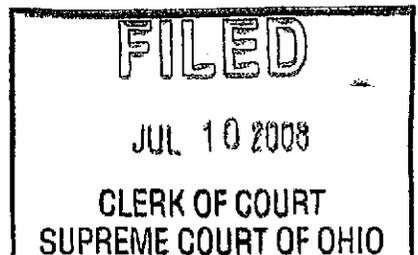


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JURISDICTIONAL STATEMENT

This case presents several constitutional questions that begin with the jurisdiction of the trial court to accept a plea of no contest. The failure of the trial court to follow Due Process in the plea process, the withdraw of a guilty plea hearing, and during the sentencing phases of the proceedings. And ending with additional convictions by the trial court at sentencing that the trial court did not possess jurisdiction of due to the fact that the elements were not presented by way of a charging instrument.

This case also addresses a defendant's right to be sentenced according to the law at the time that the offense was committed, the affects of the Ex Post Facto Clause upon judicial decree, and the effects of judicial severance rendered by *State v. Foster* 109 Ohio St.3d 1, on consecutive sentences.

This Court should accept jurisdiction to correct this manifest injustice, correct the structural defect in this case and unify the lower courts, permitting full briefing on these issues.

STATEMENT OF THE CASE

The Hamilton County Grand Jury issued an eleven-count-indictment as outlined in the statutes against Mr. Smith. The instrument charged Mr. Smith wit two counts of attempted murder, three counts of felonious assault, one count of carrying concealed weapon, two counts of aggravated robbery, and two counts of robbery. Counts 1 through 5 included three firearm specifications, (that he had a firearm, that he used it, and that he discharged it at police officers) counts 8 through 11 included two firearm specification, (that he had a firearm and that he used it).

Mr. Smith entered a plea of no contest on the date scheduled for trial, to all eleven counts and their respective specifications as charged in the indictment. The trial court accepted the no contest plea and found Mr. Smith guilty of all eleven counts and the specifications. At the sentencing hearing, but prior to the imposition of sentence, Mr. Smith made an oral motion to withdraw his no contest plea. The trial court held a partial hearing, denied the motion, and imposed a term of incarceration of eighty-five years.

Mr. Smith timely sought an appeal to the First District Court of Appeal that affirmed in part, reversed in part and cause.

This timely appeal follows.

STATEMENT OF THE FACTS

In this case, all eleven offenses occurred on December 29, 2005. The first incident, relating to counts 8 and 9, allegedly involved the Appellant telling witness Varvados that he had a gun, demanding that Varvados give his property to Appellant, and ordering Varvados to run from the area. (T.p. 46,47)

The second incident occurred moments later, and related to counts 10 and 11, involve witness Taylor. Again, the witness alleged that Appellant indicated that he had a weapon, and demanded that Taylor give his property to Appellant. Witness Taylor refused causing Appellant to flee. (T.p. 47,48)

The third incident involved two plainclothes police officers, Trotta and Luke, who observed the Appellant following a female into an apartment building. The officers approached the Appellant as he exited the apartment building and the Appellant fired one shot at the officers at which time his gun jammed. Officer Trotta was shot

in the knee. (T.p. 48-54).

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I:

WHERE A PLEA OF NO CONTEST IS NOT ENTERED INTO INTELLIGENTLY AND VOLUNTARILY, DEFENDANT'S CONSTITUTIONAL RIGHTS ARE VIOLATED.

LAW AND ARGUMENT

For a guilty plea to pass constitutional scrutiny, it must be entered into knowingly, voluntarily, and intelligently, **Parke v. Raley** (1992) 506 U.S. 20, and with the advise of competent counsel. **Tollett v. Henderson** (1973) 411 U.S. 258; **Brady v. U.S.** (1970) 397 U.S. 742. The voluntariness of a defendant's plea can be determined only by considering all the relevant circumstances surrounding it. **Haynes v. Washington** (1963) 373 U.S. 503; **Leyra v. Denno** (1954) 347 U.S. 556.

In the instant case, the trial court failed in its mandated duty under Crim. R. 11(C)(2)(a) to inform the Defendant that the allegations contained in count 3, a violation of R.C. 2903.11(D)(1) required a mandatory prison term for the offense.

The trial court further violated Crim. R. 11(C)(2)(a) when it informed the Defendant that he was not eligible for probation on the specifications, but did not inform him that he was not eligible for probation concerning count 3, nor was he advised that the 3 years would be consecutive, in fact, the Defendant was ill-advised to a sentence of 13 years, when in fact, it was a mandatory sentence of 16 years. (T.p. 8-10,19).

Finally, and what makes this plea even more unintelligently entered into, is the fact that, not only did the trial court lead the Defendant into believing that it was only the state's position that the firearm

specification of seven, three, and three years respectively, had to run consecutive to each other, but defense counsel also lead the Defendant to believe this to be true. (T.p. 19).

Therefore, in examining the circumstances surrounding the plea of no contest, it can be said that the trial court violated the Defendant's right to due process, that the plea could not have been entered into with a sufficient awareness of the relevant circumstances and likely consequences, and that defense counsel was not competent in his endeavor to inform the Defendant of the consequences of a no contest plea. *State v. Farley*, 2002-Ohio-1142, and mandates a reversal.

PROPOSITION OF LAW NO II:

WHERE A TRIAL COURT VIOLATES DUE PROCESS AND REFUSES TO ALLOW A DEFENDANT TO WITHDRAW HIS NO CONTEST PLEA BEFORE SENTENCING, THE TRIAL COURT ABUSES ITS DISCRETION AND VIOLATES THE DEFENDANT CONSTITUTIONAL RIGHTS.

LAW AND ARGUMENT

A breach is presented under the aegis of a motion to withdraw the plea, and this Court has consistently held that motion made to withdraw pleas, prior to sentencing should be freely allowed. *State v. Peterseim* (1980) 68 Ohio App.2d 211; *Santobello v. New York* (1971) 404 U.S. 257; *U.S. v. Barnes* (CA 6, 2002) 278 F.3d 644.

In *State v. Fish*, 104 Ohio App.3d 236, the First District Court of Appeals identified factors to be considered by a court when a defendant request to withdraw his plea prior to sentencing:

For the sake of brevity, the factor of whether the accused was represented by highly competent counsel will be addressed in his ineffective assistance of trial counsel argument.

Also for the sake of brevity, the factor of Crim. R. 11 is addressed in Appellant's first proposition of law.

Was a full hearing held on the motion: While the court did conduct a partial hearing prior to sentencing, it did not allow a full hearing on the matter, when it failed to directly engage the Defendant.

This also makes the fourth factor an issue-Did the Trial Court give full and fair consideration to the motion: Because the defendant himself was not engaged by the trial court, and because he was not offered an opportunity to address the court on his motion, neither a full hearing was held, nor full consideration given to Appellant on his motion.

The fifth **Fish** factor is whether the motion was made within a reasonable time. It was, prior to sentencing.

Did the motion set out specific reasons for the withdrawal: Appellant's motion was oral, made spontaneously by counsel prior to sentencing. And, in the motion specific reasons were offered. Appellant believed that he should not have been convicted on the no-contest pleas; that Appellant believed that he had acted in self-defense; and Appellant did not understand that the offenses required a mandatory sentence.

Did the accused understand the nature of the charges and the possible penalties: For the sake of brevity this factor is addressed in both the First Proposition of Law and the Ineffective Assistance of Counsel argument below, however, if the Appellant realistically expected to prevail substantively on a no-contest plea and be acquitted, then it's clear that he did not understand the nature of the charges or the practical effects of a no-contest plea.

Was the accused perhaps not guilty or did he have a complete defense to the charges: The Trial Court expressed a great deal of skepticism to the validity of a self-defense argument with respect to counts 1 through 7. The Trial Court, upon giving this assessment,

had not heard live testimony from any witness or from the Defendant himself. It is obvious that the Trial Court believed that a self-defense argument, when police officers are the victims, is a ludicrous argument on its face. It is not province of the Trial Court, without a full evidentiary hearing, to simply consider allegations and to determine the validity of an asserted trial defense. The defense in this case may or may not have succeeded. Regardless, Appellant had a defense. As to the remaining counts, the Trial Court did not even inquire upon counsel or defendant as to the defense.

Finally, there is the issue of prejudice to the State--Would the granting of this motion have prejudiced the State: The prosecutor presented no evidence, nor argued that the State would be prejudiced.

The Trial Court should had allowed Defendant to withdraw his guilty plea, and this Court should accept jurisdiction to standardize the factors allowing a withdraw of a no-contest plea prior to sentencing.

PROPOSITION OF LAW NO. III:

WHERE A TRIAL COURT IMPOSES EFFECTIVELY A LIFE SENTENCE FOR AN OFFENSE THAT DOES NOT INVOLVE A LOSS OF LIFE, A DEFENDANT'S PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS VIOLATED.

LAW AND ARGUMENT

Cruel and unusual punishment is prohibited under both Article I, Section §9, of the Ohio Constitution and the 8th Amendment of the United States Constitution. *State v. Weitbrecht*, 86 Ohio St.3d 368.

In the instant case, Appellant was 21 at the time of the offense. He did not have a significant criminal history as an adult (the disability in question for the weapons charge arose from a juvenile adjudication). Although his conviction involved several serious offenses, there is nothing in the record to suggest that any of his victims

were permanently injured let alone killed. Under Ohio Law, an individual convicted of murder generally will see the Parole Board within 15 years of his or her prison sentence. An individual convicted of even aggravated murder offense may be sentenced to a life sentence with the possibility of parole after as few as 20 years.

Appellant received a life sentence from the Trial Court in this case. He is not eligible for parole or judicial release. This sentence, particularly when compared with those imposed in non-death penalty homicides, is so disproportional as to shock the conscience.

PROPOSITION OF LAW NO IV:

A SENTENCE TO A TERM OF INCARCERATION THAT EXCEEDS THE MAXIMUM PENALTY AVAILABLE UNDER THE STATUTORY FRAMEWORK AT THE TIME OF THE OFFENSE, VIOLATES DUE PROCESS AND THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION.

LAW AND ARGUMENT

Our system of justice mandates through due process, by way of a written law that a person have prior notice of what constitutes a crime and the penalties that may be imposed for the commission of that crime.

The Ex Post Facto Clause prohibits the Ohio General Assembly from retroactively increasing the penalty for a crime which has already been committed. *Stronger v. California* (2003) 539 U.S. 607,612 (quoting *Calder v. Bull* (1798) 3 U.S. 386.391). If the Ohio General Assembly had passed a law repealing the statutory maximum which were held unconstitutional and severed in *State v. Foster* (2006) 109 Ohio St.3d 1, the Ex Post Facto Clause would have prohibited the application of any increased penalty upon the Appellant. *Id.*

The Ex Post Facto Clause of the U.S. Constitution clearly does

not permit a patently unlawful penalty to be imposed merely because the increased statutory maximum resulted from judicial severance instead of legislative action. **Rogers v. Tennessee** (2001) 532 U.S. 451; **Miller v. Florida** (1987) 482 U.S. 423.

In contrast, the unilateral judicial severance of a statute has nothing to do with "the incremental and reasoned development of precedent that is the foundation of the common law system." Retroactive judicial severance if a statute places the accused in exactly the same circumstances that he would be in, if the legislature enacted an unlawful ex post facto law. The mere fact that the statute is changed by judicial decree rather than legislative act is irrelevant; the statute itself is what has been changed, not merely the prevailing judicial interpretation of the meaning of the statute. See **State v. Waddel** (N.C. 1973) 194 S.E.2d 19,29-30. abrogated on other grounds, **Woodson v. North Carolina** (1976) 428 U.S. 280. Because judicial severance changes the actual terms of the statute, not only is due process offended because a person no longer has had notice of the penalty for the commission of a crime, but also the Ex Post Facto Clause must be applied, because the Ex Post Facto Clause prohibits the State of Ohio from retroactively increasing a criminal penalty. This Court must accept jurisdiction and permit full briefing to cure the manifest injustice in this case.

PROPOSITION OF LAW NO. V:

WHERE A PLEA OF NO-CONTEST IS PREDICATED ON INEFFECTIVE ASSISTANCE OF COUNSEL, THE PLEA IS VOIDABLE AS A VIOLATION OF THE SIXTH AMENDMENT.

LAW AND ARGUMENT

In **Strickland v. Washington** (1984) 466 U.S. 668,687, the United States Supreme Court held that a criminal defendant is entitled to

the effective assistance of trial counsel. This right extends to all stages of criminal proceedings, including plea hearings. *State v. Xie* (1992) 62 Ohio St.3d 521,524. In the instant case, Appellant did not receive effective assistance of counsel and his conviction must be reversed.

There are four instances in which counsel was ineffective. First, counsel was unprepared to go to trial, and, because of that lack of preparation, he misled the Appellant as to the likely sentence that he would have received. (Affidavit of Christopher Smith, Petition for Post-Conviction Relief).

Second, counsel allowed Appellant to plead to a lengthy indictment with no charges or specifications to be dismissed; with no commitment from the Court as to sentencing; and with a recommendation from the Prosecutor for the maximum sentence even on a plea (State's Sentencing Memorandum).

Appellant could have reached an equally successful "plea bargain" by himself, without benefit of counsel at all.

Third, counsel did not apparently understand applicable Ohio Law, with respect to the firearm specifications. There were three separate alleged "transactions" where Appellant is accused of using the firearm to commit: the first transaction including Counts 8 and 9, which was a robbery; the second transaction included Counts 10 and 11, a separate robbery with a separate victim; and the third transaction involved the alleged shooting at police officers, in Counts 1 through 7. Trial Counsel believed (incorrectly) that the sentences on the firearm specification would not be consecutive. (T.p. 19). The Trial Court suggested that he prepare a memorandum on that issue.

Counsel did not prepare a memorandum and did not present an argument at sentencing on this issue. Counsel was ineffective for misunderstanding the law on this issue with respect to "same transaction". But even assuming he was correct on the issue, he was ineffective for failing to present an argument on this issue.

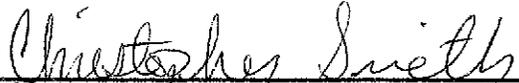
Forth, counsel was ineffective for misleading the Appellant into believing that the no-contest plea would preserve his right to argue whether or not the Appellant was guilty. Counsel informed the Trial Court that he intended to "raise some questions as to whether I should find him guilty or not". (T.p. 38). (While this prior statement to the Court was off the record, the Trial Court referred to it, on the record, and counsel did not dispute the Court.) There is nothing in the facts as read by the prosecutor that would give any reason whatsoever for a competent attorney to believe that a no contest plea would support a finding of not guilty. And the Appellant was unequivocally prejudiced, nor could the no contest plea have been intelligently entered into, where instead of preparing a defense for trial, a defense attorney convinces his client that he can argue the factual predicates for the offenses were insufficient to establish guilt on all counts and specification, (T.p.38) and then fails to argue these points when given the opportunity by the Trial Court. (T.P. 54). Instead, trial counsel simply rested upon the prosecution's recitation, without argument.

In summary, trial counsel was ineffective, the plea of no contest was at best obtained through a series of misleading attempts to avoid going to trial, and this Court should accept jurisdiction to correct the manifest injustice.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction, permit full briefing and, ultimately reverse, and Appellant so prays.

Respectfully submitted,

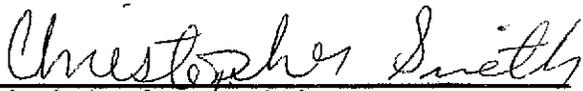


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SERVICE

I certify that a true copy of the foregoing was sent via regular U.S. Mail to the Office of the Hamilton County Prosecutor at 230 E, Ninth St., Cincinnati, Ohio 45202, on this 7 day of July, 2008.



Christopher/Smith
Appellant, in pro se

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-060991
	:	TRIAL NO. B-0600007
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
CHRISTOPHER SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: May 30, 2008

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Paula E. Adams*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Edward C. Perry, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

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RALPH WINKLER, Judge.

{¶1} Defendant-appellant Christopher Smith approached John Varvados and demanded that Varvados “hand over” anything he had. Smith made movements indicating that he had a gun hidden in his clothes. Varvados handed Smith a cellular phone and some money. Smith then approached Dennis Taylor in the same manner, making gestures to indicate that he had a gun in his clothing. Smith told Taylor to “hand over” his property. When Taylor ran into the street and yelled that he was being robbed, Smith ran off.

{¶2} Cincinnati plainclothes homicide detectives driving on West Clifton Avenue noticed Smith “acting peculiar” and following a young woman. The detectives, concerned for the young woman’s safety, exited from their car, approached Smith, and identified themselves as police officers. Smith pulled a gun from his waistband and fired at the officers, striking one in the knee. Smith’s gun then jammed. The officers saw Smith attempt to unjam his gun and continue to fire at them. Smith fled and was later arrested hiding under a truck with a loaded, operable handgun in his possession.

{¶3} Smith was charged with two counts of attempted murder, three counts of felonious assault, one count of having a weapon under a disability, one count of carrying a concealed weapon, two counts of aggravated robbery, and two counts of robbery. Various counts also included specifications that Smith had had a firearm, that he had used the firearm, and that he had discharged the firearm at police. Smith pleaded no contest to all counts and specifications. The trial court accepted Smith’s pleas. Prior to sentencing, Smith moved to withdraw his no-contest pleas. The court

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denied Smith's motion and sentenced him to an aggregate term of 85 years' incarceration.

{¶4} Smith's first assignment of error alleges that the trial court erred in accepting his no-contest pleas because the trial court's failure to comply with Crim.R. 11 rendered the pleas involuntary.

{¶5} Smith argues that the trial court failed to comply with Crim.R. 11(C)(2)(a) in accepting his plea of no contest to felonious assault on a peace officer in count three because the court did not inform Smith that he faced a mandatory term of imprisonment for that offense.¹ Smith also argues that the court did not adequately inform Smith that the sentences on the gun specifications were to be served consecutively.

{¶6} Crim.R. 11(C)(2)(a) provides that "[i]n felony cases the court * * * shall not accept a plea of * * * no contest without first addressing the defendant personally and * * * [d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶7} When dealing with the nonconstitutional advisements under Crim.R. 11(C)(2), including the nature of the charges, the maximum possible sentence, and the eligibility of the defendant for probation or community control, the trial court need only substantially comply with the rule.² "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the

¹ See R.C. 2903.11(D)(1).

² See *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163; *State v. Yanez*, 150 Ohio App.3d 510, 2002-Ohio-7076, 782 N.E.2d 146; *State v. Farley*, 1st Dist. No. C-0100478, 2002-Ohio-1142.

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implications of his plea and the rights he is waiving.”³ A defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect.⁴ “The test is whether the plea would otherwise have been made.”⁵

{¶8} The Ohio Supreme Court held in *State v. Nero*⁶ that where the circumstances indicated that Nero knew he was ineligible for probation, he was not prejudiced when the trial court accepted his guilty plea to rape without personally advising Nero that he was not eligible for probation, and that, therefore, the trial court had substantially complied with Crim.R. 11(C).

{¶9} At the beginning of the plea hearing, the trial court in this case reviewed with Smith the maximum sentences on all counts, including the sentences for the firearm specifications. The court told Smith that if the court accepted the no-contest pleas and found him guilty, “[Y]ou will not be getting probation in this case, you will not be getting community control, and you will not be going home, you will be going to the state penitentiary for at least seven years.” The court also informed Smith that the maximum sentence he faced was 105 years’ incarceration. The plea forms that Smith signed indicated that, with the exception of count seven, all counts carried mandatory prison terms.

{¶10} The record reveals that, at the plea hearing, defense counsel’s position was that the sentences for the firearm specifications did not have to be served consecutively. The trial court warned Smith that the state’s position was that consecutive sentences were required and that the imposition of consecutive

³ See *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474.

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

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sentences on the firearm specifications would result in actual incarceration of 13 years. The trial court asked the parties to submit sentencing memoranda. The court told Smith that it would decide the issue after receiving the memoranda. The court ultimately imposed consecutive sentences for the firearm specifications.

{¶11} The record shows that Smith knew that he faced mandatory prison time and that he was ineligible for community-control sanctions. Smith also knew that if the trial court accepted the state's argument, he would have to serve the sentences for the gun specifications consecutively. Smith clearly understood the implications of his pleas and the rights he was waiving. The record demonstrates no prejudice to Smith. The trial court substantially complied with Crim.R. 11(C)(2)(a). The first assignment of error is overruled.

{¶12} The second assignment of error alleges that the trial court erred in refusing to allow Smith to withdraw his pleas.

{¶13} A defendant does not have an absolute right to withdraw a plea before sentencing.⁷ The trial court must hold a hearing to determine whether there is a reasonable and legitimate basis for withdrawing the plea.⁸ The decision to grant or deny a presentence motion to withdraw a plea is within the sound discretion of the trial court and will not be reversed in the absence of an abuse of discretion.⁹ In exercising its discretion, the trial court should consider all relevant factors, including (1) whether the accused has been represented by highly competent counsel; (2) whether the court, in accepting the plea, fully complied with Crim.R. 11; (3) whether the accused otherwise understood the nature of the charges and possible penalties;

⁷ See *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715; *State v. Sykes*, 1st Dist. No. C-060277, 2007-Ohio-3086; *State v. Spurling*, 1st Dist. No. C-060087, 2007-Ohio-858.

⁸ See *id.*

⁹ See *id.*

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(4) whether the accused moved to withdraw his plea within a reasonable time and with sufficient specificity; (5) whether the hearing on the motion has afforded the accused a full and fair opportunity to present his case for withdrawal; (6) whether the accused is possibly not guilty of, or can offer a complete defense to, the charges; and (9) whether allowing the accused to withdraw his plea would prejudice the state.¹⁰

{¶14} In its entry overruling Smith's motion to withdraw his pleas, the trial court properly considered and addressed the applicable factors. The court found that Smith had been represented by competent counsel; that Smith had been fully advised of the nature of the charges and the possible penalties in accordance with Crim.R. 11; that Smith had been afforded a full hearing on the merits of the motion to withdraw his pleas; that there was no possibility that Smith was not guilty of the charges; and that Smith had not adequately demonstrated that had he gone to trial he would have been entitled to rely on the affirmative defense of self-defense for the counts involving the police officers. The record shows that the trial court gave full and fair consideration to Smith's motion to withdraw his pleas. We hold that the court did not abuse its discretion in denying Smith's motion. The second assignment of error is overruled.

{¶15} Smith's third assignment of error alleges that his sentences, amounting to an aggregate term of 85 years' incarceration, constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution.

¹⁰ See *State v. Sykes*, supra, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 661 N.E.2d 788.

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{¶16} Generally, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.¹¹ “[R]eviewing courts should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes.”¹² A sentence does not violate the constitutional prohibition against cruel and unusual punishment if it is not so greatly disproportionate to the offense as to shock the sense of justice of the community.¹³

{¶17} Smith robbed two victims at gunpoint. He was apparently following his intended third victim when the police spotted him. Smith fired at the police officers, hitting one of them. Smith stopped firing only because his gun jammed. The officers saw Smith attempt to continue firing at them. In light of Smith’s crime rampage, we hold that the sentences imposed were not so disproportionate to his offenses as to shock the community’s sense of justice. The sentences imposed by the trial court fell within the ranges of permissible prison terms for the crimes that Smith committed, and the trial court had the discretion to impose them. The third assignment of error is overruled.

{¶18} We note that the record contains what are clearly clerical errors on two of the trial court’s entries. The indictment and Smith’s written plea form list the charge in count ten as aggravated robbery in violation of R.C. 2911.01(A)(1). Specifically, the count referred to the aggravated robbery of Dennis Taylor. The transcript of the proceedings shows that Smith pleaded no contest to, was found guilty of, and was sentenced for aggravated robbery in count ten. But the trial court’s

¹¹ See *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 203 N.E.2d 334; *State v. Thomas*, 1st Dist. No. C-010724, 2002-Ohio-7333.

¹² See *State v. Weitbrecht*, 86 Ohio St.3d 368, 1999-Ohio-113, 715 N.E.2d 167.

¹³ See *State v. Chaffin* (1972), 30 Ohio St.2d 13, 282 N.E.2d 46; *State v. Barnett*, 1st Dist. No. C-060950, 2007-Ohio-4599.

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entry captioned “court finding on plea of no contest” and the court’s entry captioned “judgment entry: sentence: incarceration” list count ten as robbery in violation of R.C. 2911.02(A)(2). Therefore, this case must be remanded to the trial court for correction of its entries to reflect a charge of, a plea of no contest to, and a guilty finding for aggravated robbery in count ten.

{¶19} The fourth assignment of error, alleging that the trial court erred in failing to sentence Smith under the statutes that were in place at the time he committed his crimes, is overruled on the authority of *State v. Foster*,¹⁴ which held that the statutes requiring judicial factfinding in the imposition of sentence were unconstitutional. Under *Foster*, the trial court had the discretion in this case to impose any sentence that was within the applicable statutory range.¹⁵ Sentencing a defendant pursuant to *Foster* does not violate either the constitutional ban on ex post facto and retroactive laws or the rule of lenity in statutory interpretation.¹⁶

{¶20} The fifth assignment of error alleges that the trial court erred in failing to merge allied offenses of similar import.¹⁷

{¶21} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses.¹⁸ “If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.”¹⁹ Upon finding that particular crimes are allied offenses of similar

¹⁴ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

¹⁵ See *State v. Hart*, 1st Dist. No. C-060686, 2007-Ohio-5740, at ¶65; *State v. Jones*, 1st Dist. No. C-060512, 2007-Ohio-5458, at ¶50.

¹⁶ See *State v. Bruce*, 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44; *State v. Lockett*, 1st Dist. No. C-060404, 2007-Ohio-308.

¹⁷ See R.C. 2941.25.

¹⁸ See *State v. Cabrales*, 2008-Ohio-1625, syllabus, clarifying *State v. Rance* (1999), 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

¹⁹ See *id.*, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816.

import, the court must review the defendant's conduct to determine whether the crimes were committed separately or with a separate animus.²⁰ If the court finds that the defendant committed the crimes separately or with a separate animus, he may be convicted of both offenses.²¹

{¶22} Smith argues that the trial court erred in failing to merge the felonious assaults charged in counts three and four. Count three alleged that Smith had caused serious physical harm in violation of R.C. 2903.11(A)(1). Count four alleged that Smith had knowingly caused or attempted to cause physical harm by means of a firearm in violation of R.C. 2903.11(A)(2). Both counts involved the same victim, the police officer shot by Smith. We hold that felonious assault in count three and felonious assault in count four, involving the same victim and the same conduct, were allied offenses of similar import.²² Therefore, the trial court should have imposed only one felonious-assault sentence for counts three and four.²³

{¶23} Smith next argues that the trial court erred in failing to merge the aggravated robbery of Varvados in count eight with the robbery of Varvados in count nine, and the aggravated robbery of Taylor in count ten with the robbery of Taylor in count eleven.

{¶24} Smith was charged in counts eight and ten with the aggravated robberies of Varvados and Taylor in violation of R.C. 2911.01(A)(1). R.C. 2911.01(A)(1) states that "no person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly

²⁰ See *id.*

²¹ See *id.*; R.C. 2941.25(B).

²² See *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469.

²³ See *id.*

weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

{¶25} Smith was charged in counts nine and eleven with the robberies of Varvados and Taylor in violation of R.C. 2911.02(A)(2). R.C. 2911.02(A)(2) provides that "no person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another."

{¶26} Smith had approached each victim, had made "movements" or "gestures" to indicate that he had a gun hidden in his clothing, and had demanded that each victim "hand over" his property. Smith's conduct "indicating that he possessed a deadly weapon in committing a theft offense" constituted aggravated robbery in violation of R.C. 2911.01(A)(1). The same conduct constituted "threatening to inflict physical harm on another in committing a theft offense" in violation of R.C. 2911.02(A)(2), the robbery statute.

{¶27} In *State v. Smith*,²⁴ we stated that, under the clarification of the *Rance*²⁵ test set forth in *State v. Cabrales*,²⁶ it is "absurd to insist" that a defendant "could constitutionally be sentenced" for two crimes when there was only one act and one victim. In this case, Smith committed one act against Varvados and one act against Taylor. Therefore, he could have been sentenced for only one crime against each victim.²⁷ The trial court should have merged count eight and count nine for the purposes of sentencing. Likewise, the court should have merged for sentencing purposes counts ten and eleven.

²⁴ See *supra*.

²⁵ See *State v. Rance*, *supra*.

²⁶ See *State v. Cabrales*, *supra*.

²⁷ See *State v. Smith*, *supra*.

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{¶28} Smith also argues that the trial court should have merged the attempted murders, in violation of R.C. 2923.02(A) and R.C. 2903.02, as charged in counts one and two. Counts one and two referred to the attempted murders of the two police officers. Smith argues that because he fired only one shot in the direction of both officers, he acted with one animus and therefore the counts should have merged. Smith also argues, applying the same logic, that the trial court should have merged the felonious assaults of the two police officers as charged under R.C. 2903.11(A)(2) in counts four and five. Smith argues that he fired one shot; therefore, he had only one animus.

{¶29} We first point out that this was not a situation where Smith fired one shot, turned, and fled. Smith attempted to continue firing at the officers even after his gun had jammed.

{¶30} When an offense is defined in terms of conduct towards another, there is a dissimilar import for each person affected by the conduct.²⁸ Attempted murder and felonious assault each contain an element that is defined in terms of conduct towards another. Violations of statutes defined in terms of conduct towards another that involve separate victims are considered to have been committed separately.²⁹ Smith caused separate risks of harm to each police officer. Therefore, he could have been found guilty of and separately sentenced for attempted murder in counts one and two, as well as felonious assault in counts four and five.³⁰ The fifth assignment of error is sustained in part and overruled in part.

²⁸ See *State v. Wilson*, 1st Dist. No. C-061000, 2007-Ohio-6339; *State v. Dixon*, 1st Dist. No. C-030227, 2004-Ohio-2575; *State v. Murray*, 156 Ohio App.3d 219, 2004-Ohio-654, 805 N.E.2d 156; *State v. Roberts* (Nov. 9, 2001), 1st Dist. No. C-000756.

²⁹ See *id.*

³⁰ See *id.*

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{¶31} The sixth assignment of error alleges that the trial court had no jurisdiction to accept Smith's no-contest pleas in the absence of a written jury waiver.

{¶32} An affirmative written document is required to waive the defendant's right to a jury trial in a felony case.³¹ A jury waiver in a felony case must be in writing, signed by the defendant, and made in open court.³²

{¶33} The record in this case contains three written, filed, and recorded forms, each entitled "entry withdrawing plea of not guilty and entering plea of no contest." The plea forms set forth in writing the rights that Smith was waiving by entering pleas of no contest, including the right to trial by jury. Smith's signature appears on each form. In answer to questions by the trial court, Smith acknowledged in open court that he had signed each form and that he understood the rights he was waiving. Smith specifically stated to the trial court that he understood that by pleading no contest he was waiving the right to a jury trial. We hold that the plea forms signed by Smith, acknowledged in open court, and filed in the record fulfilled the jurisdictional requirements of a valid jury waiver. The sixth assignment of error is overruled.

{¶34} Smith's seventh assignment of error alleges that he was denied the effective assistance of counsel. Reversal of a conviction based upon the ineffective assistance of counsel requires a showing by the defendant that his counsel's performance was deficient and that he was prejudiced by the deficiency.³³ Judicial scrutiny of counsel's performance must be highly deferential.³⁴ There is a strong presumption that counsel's performance falls within the wide range of reasonable

³¹ See *State v. Fish*, *supra*.

³² See *State v. Anderson*, 1st Dist. No. C-070098, 2007-Ohio-6218.

³³ See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

³⁴ See *id.*; *State v. Ellison*, 1st Dist. No. C-050553, 2006-Ohio-2620.

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professional assistance.³⁵ A less than perfect performance by counsel does not necessarily result in ineffective assistance.³⁶

{¶35} We have reviewed the record, and we hold that it does not demonstrate either deficient performance or prejudice to Smith. The seventh assignment of error is overruled.

{¶36} The judgment of the trial court is affirmed as to counts one, two, five, six, and seven. The findings of guilt on counts three, four, eight, nine, ten, and eleven are affirmed. The sentences imposed for felonious assault in counts three and four, the sentences imposed for aggravated robbery and robbery in counts eight and nine, and the sentences imposed for aggravated robbery and robbery in counts ten and eleven are vacated, and this case is remanded for resentencing so that only one felonious-assault sentence is imposed for counts three and four, and so that one aggravated-robbery or robbery sentence for each victim is imposed for counts eight and nine and counts ten and eleven. The case is also remanded for correction of the trial court's entries to reflect a charge of, a plea of no contest to, and a guilty finding for aggravated robbery in count ten.

Judgment affirmed in part, sentences vacated in part, and cause remanded.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

³⁵ See *Strickland v. Washington*, supra.

³⁶ See *State v. Patchell*, 1st Dist. No. C-050185, 2005-Ohio-6822.