

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 08-1348  
Plaintiff-Appellee/Cross- : On Appeal from the Hamilton County  
Appellant : Court of Appeals, First Appellate  
vs. : District  
CHRISTOPHER SMITH : Court of Appeals  
Defendant-Appellant/Cross- : Case Number C-060991  
Appellee :

**MEMORANDUM IN SUPPORT OF JURISDICTION FOR CROSS APPEAL &  
MEMORANDUM IN RESPONSE**

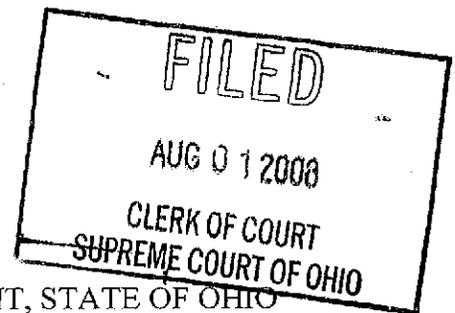
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DEFENDANT-APPELLANT/CROSS-APPELLEE, CHRISTOPHER SMITH



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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AS TO THE CROSS-APPEAL BUT NOT THE REMAINING ISSUES

The First District Court of Appeals applied this Court's recent decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, and reduced the defendant-appellant Christopher Smith's sentence by eighteen years. In a one-man crime spree Smith robbed two citizens and engaged in a shoot-out with the police that left an officer shot. The trial court fashioned a sentence that totaled thirty years for the police officer who was actually shot, eighteen years for the other police officer who was shot at but not hit, eleven years for each of the robbery victims, and five years for the firearms offenses.

Relying on this Court's decision in *Cabrales*, the court of appeals held that Smith could only be sentenced for one form of felonious assault for the officer who was shot. The court of appeals also held that Smith could only be sentenced for one crime against each of the robbery victims. This Court should grant jurisdiction in this case to establish the proper application of *Cabrales* with regard to offenses other than those at issue in *Cabrales*.

Smith requests this court to exercise its jurisdiction in this case based on the denial of his motion to withdraw his plea, the claim of various constitutional violations in his sentence, and the ineffective assistance of counsel. The State of Ohio submits that these issues were properly decided by the First District Court of Appeals. As these issues are not of public or great general interest and do not involve a substantial constitutional question, jurisdiction as to those issues should be denied.

## STATEMENT OF THE CASE AND FACTS

The Hamilton County Grand Jury issued an eleven-count-indictment against Smith. This instrument charged Smith with two counts of Attempt Murder in violation of R.C. 2923.02(A) (Counts 1 and 2), three counts of Felonious Assault in violation of R.C. 2903.11(A)(1) and (2) (Counts 3, 4, and 5), one count of Having Weapons While Under Disability in violation of R.C. 2923.13(A)(2) (Count 6), one count of Carrying Concealed Weapons in violation of R.C. 2923.12(A)(Count 7), two counts of Aggravated Robbery in violation of R.C. 2911.01(A)(1) (Counts 8 and 10), and two counts of Robbery in violation of R.C. 2911.02(A)(2) (Counts 9 and 11). Counts 1 through 5 included three firearm specifications indicating that Smith had a firearm, that he used it, and that he discharged it at police officers. Counts 8 through 11 included two firearm specifications indicating that Smith had a firearm and that he used it.

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

All of the offenses occurred on December 29, 2005 near the campus of the University of Cincinnati. The factual summaries provided below are presented in the order in which the events took place.

### (1) Counts 8 and 9

At approximately 11:30 P.M., John Varvados had just finished working on his car on Parker Street when Smith approached him. Smith demanded that Varvados hand over anything he had on

him. Varvados noticed that Smith was making movements with his clothing to indicate that he had a gun. Varvados was afraid that Smith would shoot him if he did not comply. Varvados gave Smith his cell phone and a small amount of cash.

(2) Counts 10 and 11

Smith then went down the street in the area of Murphy's Pub in the 2300 block of West Clifton Avenue. Smith approached Dennis Taylor in the same manner in which he had approached Varvados. Smith made gestures in his clothing to indicate that he had a gun. Smith told Taylor to hand over his property. Taylor immediately ran into the street and yelled "I'm being robbed." Smith ran down the street.

(3) Counts 1, 2, 3, 4, and 5

Cincinnati Homicide Detectives Brian Trotta and Jennifer Luke happened to be driving on West Clifton Avenue and noticed Smith acting peculiar. Detectives Trotta and Luke watched Smith follow a young woman into the walkway of an apartment building. Concerned for the young woman, the detectives exited their car and Detective Luke said something to the effect of "hey, we're the police, we need to talk to you." Smith then pulled a firearm from his waistband and fired a shot at the detectives. The shot actually hit Detective Trotta in the knee. Both detectives returned fire as Smith continued to attempt to fire additional shots. Fortunately for the detectives, Smith's gun jammed after the first shot. Unable to unjam his gun, Smith eventually fled through the backyards of homes on West Clifton Avenue.

A canine unit was used to track Smith. He was found hiding under a truck parked in a driveway on Sauer Street. Smith still had a loaded .45 caliber handgun in his possession. The gun

was analyzed by ballistics experts who determined that the gun was in a "double jam," a condition that occurs when a gun is fired in rapid succession. The gun was otherwise fully operable.

Detective Trotta was taken to University Hospital. The bullet was recovered from his knee. Although the bullet was not in a condition suitable for ballistics experts to make a positive match to a specific gun, they were able to conclude that of the guns they knew had been fired in the area that night (Smith's, Detective Trotta's, and Detective Luke's), the bullet could have only been fired from Smith's gun.

(4) Counts 6 and 7

At the time that Smith committed all of these offenses, he was under a legal disability as the result of an adjudication in juvenile court for an offense of violence (intimidation of a witness). All of the witnesses indicated that Smith had a gun concealed on his person.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Cross-Appellant's Proposition of Law No. 1: Robbery in violation R.C. 2911.02(A)(2) and Aggravated Robbery in violation of R.C. 2911.01(A)(1) are not allied offenses of similar import. When their elements are compared in the abstract, without requiring an exact alignment of the elements, it is possible to commit one offense without also committing the other.**

In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, this Court clarified the *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, test for allied

offenses. This Court held that when determining if two offenses are allied offenses of similar import that the elements should be compared in the abstract, but that an exact alignment of the elements is not required. *Cabrales* at ¶ 27.

Smith was convicted of committing, amongst other things, Robbery in violation of R.C. 2911.02(A)(2) and Aggravated Robbery in violation of R.C. 2911.01(A)(1). Robbery prohibits a person from inflicting, attempting to inflict, or threatening to inflict physical harm on another while committing or attempting to commit a theft offense or in fleeing immediately thereafter. Aggravated Robbery prohibits a person from having a deadly weapon on or about their person or other their control and either displaying, brandishing, indicating possession of, or using the deadly weapon.

It is possible to commit Robbery without also committing Aggravated Robbery and vice versa. For example, one would be guilty of Robbery for inflicting physical harm by punching the victim while committing a theft offense, but would be not guilty of Aggravated Robbery. Likewise, one would be guilty of Aggravated Robbery for having a gun sticking out of the front of the waistband while committing a theft offense, but without the use or threat to use the gun to inflict physical harm would not be guilty of Robbery.

Under this Court's allied offense analysis explained in *Cabrales*, the forms of Aggravated Robbery and Robbery that are at issue here are distinctly different offenses worthy of separate convictions and sentences. Therefore, the State of Ohio respectfully requests that this Court accept jurisdiction in this matter.

**Cross-Appellant's Proposition of Law No. 2: The Ohio Legislature expressed an intent to protect two different societal interests when it enacted separate Felonious Assault**

**statutes under R.C. 2911.03(A)(1) and R.C. 2911.03(A)(2), and separate punishments should be allowed for the commission of one act that results in a violation of both offenses.**

The decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, was also applied by the First District Court of Appeals to hold that although both Felonious Assault statutes under which Smith was convicted have elements that do not align, he may only be sentenced on one of the charges when one victim is involved. This holding does not take into account the fact that the Felonious Assault statute proscribes different crimes for different societal interests. The legislature wrote R.C. 2911.03(A)(1) to prohibit the infliction of serious physical harm to another. R.C. 2911.02(A)(2) prohibits the use of a deadly weapon to cause or attempt to cause physical harm to another. When an offender causes serious physical harm to a victim by shooting the victim, the offender has violated both statutes and should be sentenced on both.

The United States Supreme Court cases relied on by this Court in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, have a common thread - a discussion of what the legislature intended when it enacted the statutes for criminal conduct. In *Missouri v. Hunter* (1983), 459 U.S. 359, 365, 103 S.Ct. 673, 678., the U.S. Supreme Court emphasized that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter* involved the issue of cumulative punishments for the crimes of armed criminal action and first degree robbery. As the Court simply put it, "Legislatures, not courts, prescribe the scope of punishments."

Similarly, in *Albernaz v. United States* (1981), 450 U.S. 333, 101 S.Ct. 1137, the U.S. Supreme Court held that the importation of marijuana and the distribution of that drug "impose diverse societal harms," and that Congress has in effect decided that a conspiracy to both import and distribute is twice as serious as a conspiracy to do either singly. "[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." *Id.* at 344. The U.S. Supreme Court further explained that a statute's silence on whether cumulative punishments can be imposed does not equate with an intent to impose only one prison term.

Here, the Ohio General Assembly saw fit to enact R.C. 2911.03(A)(1), which prohibits the infliction of serious physical harm to another. It also enacted R.C. 2911.03(A)(2), which prohibits the use of a deadly weapon when one attempts or does cause physical harm. Clearly, the legislature intended to punish offenders for causing serious physical harm, regardless of the means, and also to punish offenders who use deadly weapons against victims. The fact that the statutes do not specifically state that separate punishments are intended cannot be the basis of an argument to the contrary. As stated in the cases cited above, silence does not indicate an intent to disallow cumulative punishment.

The two forms of Felonious Assault that are at issue here are distinctly different offenses worthy of separate convictions and sentences. Therefore, the State of Ohio respectfully requests that this Court accept jurisdiction in this matter.

**Appellant's Proposition of Law No. 1: There is substantial compliance with Crim.R. 11 (C)(2)(a) when the trial court informs the defendant of the potential sentence, informs him that he is going to prison, but does not mention probation.**

Smith argues that his conviction must be reversed because his plea was not a voluntary and informed one as required by Crim.R. 11(C). Specifically, Smith claims that the trial court did not properly inform him of the mandatory prison term associated with Count 3. He also claims that he was not informed that he was ineligible for probation as to Count 3 and that the gun specifications could be run consecutively. These claims are without merit.

Crim.R. 11(C)(2)(a) provides in pertinent part: "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and: (a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge, and of the maximum penalty involved, and if applicable, that he is not eligible for probation." In accepting pleas of guilty and no contest, trial courts must "substantially comply" with Crim.R.11. *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and rights he is waiving." *Id.* at 108.

The trial court in the case at bar did substantially comply with the requirements of Crim.R. 11(C)(2)(a). At the very beginning of what was a lengthy plea hearing, the trial court reviewed all of the maximum penalties with Smith and specifically told him "you will not be getting probation in this case, you will not be getting community control, you will not be going home, you will be going to the state penitentiary for at least seven years." After informing Smith of the maximum

sentences for each of the eleven counts and the various firearm specifications, the trial court said, "As I add these up, the maximum penalty you face if I run everything consecutive to one another here is a hundred and five and a half years in the state penitentiary." Smith also signed three separate forms entitled "Entry Withdrawing Plea of Not Guilty and Entering Plea of No Contest" and the trial court reviewed each one with him. These entries list the potential sentence range associated with each offense and also includes a notation of "yes" in the mandatory prison term column for every count except Count 7. As to Count 3, although R.C. 2903.11(D)(1) and R.C. 2929.13(F)(4) require a mandatory prison term, those statutes do not indicate what that term must be. Smith indicated that he understood the plea forms and said that he signed them voluntarily. The trial court further explained to Smith all of the constitutional rights he waived by entering a no contest plea.

The First District Court of Appeals previously held based upon a record of a plea similar to that in the case at bar that "the trial court substantially complied with the requirements of Crim.R. 11 (C) and the trial court's failure personally to advise the appellant that he was ineligible for probation was not prejudicial error." *State v. Lunsford* (Dec. 18, 1985), 1st Dist. No. C-850057. A defendant who challenges the validity of his plea of guilty or no contest must demonstrate that he was prejudiced by the court's acceptance of the plea and the issue is "whether the plea would otherwise have been made." *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474.

The record in no way demonstrates that Smith would not have entered the no contest plea if he had been specifically informed that he was not eligible for probation, that Count 3 carried a mandatory prison term, and that the firearm specifications could be served consecutively. Based upon the "totality of the circumstances," it is apparent that Smith subjectively understood the

implications of his plea and the rights he waived. The trial court substantially complied with the requirements of Crim.R. 11 and this issue was properly decided by the court of appeals.

**Appellant's Proposition of Law No. 2: A defendant does not have an absolute right to withdraw a guilty or no contest plea prior to sentencing. The decision to grant or deny a pre-sentence motion to withdraw a guilty or no contest plea is within the sound discretion of the trial court.**

Smith contends that the trial court abused its discretion in denying his pre-sentence motion to withdraw his no contest plea. This assignment of error is without merit and must be overruled.

Crim.R. 32.1 specifically provides:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, the Ohio Supreme Court cited *State v. Pertorseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, and held that a defendant does not have an absolute right to withdraw his guilty plea prior to sentence. Furthermore, an appellate court should apply an abuse of discretion standard when reviewing a trial court's ruling on a motion to withdraw a guilty plea. *Xie* at 526. To find an abuse of discretion, a reviewing court must find more than an error of judgment; it must find that the trial court's ruling was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, 149.

In evaluating whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, a reviewing court may look at the following factors: (1) whether the accused was represented by highly competent counsel, (2) whether the accused was afforded a full hearing pursuant to Crim.R. 11, before he entered his plea, (3) whether, after the motion to withdraw is filed, the accused was given a complete and impartial hearing on the motion, and (4) whether the record reveals that the court gave full and fair consideration to the plea withdrawal request. *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863. A reviewing court is not to conduct a *de novo* review of the trial court's decision on the motion. *Xie* at syllabus paragraph two.

In the present case, Smith was represented throughout by highly competent counsel.

Secondly, the trial court conducted a full Crim.R. 11 hearing at the time Smith entered his plea. Smith expressed his understanding throughout the plea hearing.

Finally, after Smith made an oral motion to withdraw his guilty plea, the trial court afforded him an impartial hearing and gave full and fair consideration to his request. In its entry overruling Smith's oral motion, the trial court specifically noted that Smith did not adequately support his reliance on the affirmative defense of "self-defense" as the reason supporting his motion to withdraw and pointed out that such a defense was not even applicable to Counts 6 through 11.

Furthermore, the trial court relied on the First District Court of Appeals' decision in *State v. Fish* (1995), 104 Ohio App.3d 240, 661 N.E.2d 788, in finding that the evidence of Smith's guilt on all of the charges in the indictment was overwhelming.

There is no evidence that the trial court acted unreasonably, arbitrarily, or unconscionably when it determined that there was not a reasonable, legitimate basis for withdrawal of the plea. See, *Xie*, supra. As such, the state submits that this issue was properly decided by the court of appeals.

**Appellant's Proposition of Law No. 3: When a sentence imposed on a defendant falls within the terms of a valid statute, the sentence does not constitute cruel or unusual punishment and a reviewing court must defer to the discretion of the trial judge.**

Smith claims that the eighty-five-year-sentence he received for robbing two different people at gunpoint and for shooting at two police officers, all while he was under a disability from even possessing a firearm, constitutes cruel and unusual punishment. His claim is entirely without merit.

Both the United States and Ohio Constitutions prohibit the infliction of cruel and unusual punishments. Eighth Amendment, United States Constitution; Section 9, Article 1, Ohio Constitution. "A punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Chaffin* (1972), 30 Ohio St.2d 13, 282 N.E.2d 46, paragraph three of the syllabus. "Generally, when a sentence imposed on a defendant falls within the terms of a valid statute, the sentence does not constitute cruel or unusual punishment, and a reviewing court must defer to the discretion of the trial judge." *State v. Hunter* (Feb. 26, 1997), 1<sup>st</sup> Dist. No. C-960431, citing *McDougle v. Maxwell, Warden* (1964), 1 Ohio St.2d 68, 69, 203 N.E.2d 334.

In the present case, Smith indicated that he had a firearm in his clothing when he robbed two separate victims on two separate occasions. While hunting for his third victim, Smith was spotted by Detectives Trotta and Luke as they drove through the area. The detectives noticed Smith following a young lady into an apartment entranceway. The detectives were not responding to a particular call but rather engaged in good police work by stopping to investigate what appeared to be a peculiar situation. When the detectives exited their car, Detective Luke immediately identified

herself and Detective Trotta as police officers and told Smith that they wanted to talk to him. Smith blatantly took out his firearm and fired a shot that actually struck Detective Trotta. As the two detectives sought cover and returned fire, Smith went toward the detectives in an attempt to shoot them at closer range. By what can only be explained as the grace of God, Smith's firearm jammed and he was unable to fire those shots. It was then that Smith fled. He was found shortly thereafter cowering underneath a truck with the smoking gun; a gun that he was prohibited from possessing due to an adjudication in juvenile court for intimidation of a witness.

The Second District Court of Appeals analyzed a one-hundred-and-two-year sentence to determine whether it constituted cruel and usual punishment for a defendant who shot at police officers as they were attempting to execute an arrest warrant and then robbed and shot a civilian witness as he made his getaway. *State v. Walker* (June 30, 2000), 2<sup>nd</sup> Dist. No. 17678. The Second District held that the sentence was not grossly disproportionate to the severity of the offense and provided the following analysis: "The use of firearms during the commission of a crime is a serious threat to public safety which the General Assembly has a legitimate interest in preventing. Under Ohio's scheme the penalty for using a firearm increases as the conduct becomes more serious. Merely possessing on one's person a firearm while committing an offense warrants an additional mandatory one year sentence. R.C. 2941.141. Displaying or using a firearm during an offense warrants an additional mandatory three year prison term, R.C. 2941, 145, whereas discharging a firearm from a motor vehicle at or into a habitation, or in such a manner as to purposely or knowingly cause or attempt to cause death or physical harm to another (drive by shootings), warrants an additional mandatory five year prison term. R.C. 2941. 146." *Id.* at 12. Since the Second District's decision in *Walker*, the General Assembly enacted a firearm specification with a mandatory

seven year sentence if the offender discharges a firearm at a peace officer. R.C. 2941.1412, effective 4/7/03.

Therefore, the eighty-five year sentence imposed on Smith falls within the terms of a valid statute and certainly does not even come close to shocking the community's sense of justice.

**Appellant's Proposition of Law No. 4: Pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus and ¶100, trial 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 or more than the minimum sentences.**

Smith claims that the trial court's reliance on the Ohio Supreme Court's decision in *State v. Foster* to sentence him to more than the minimum violates the Ex Post Facto Clause of the United States Constitution. This claim is without merit and must be overruled.

In *State v. Bruce*, 1<sup>st</sup> Dist. No. C-060456, 2007-Ohio-175, the First District Court of Appeals explained that the Ex Post Facto Clause applies to legislative powers as opposed to judicial decision-making. Additionally, the court of appeals "is bound to follow the decision of the Ohio Supreme Court in *Foster*." *Id.* at ¶6. *Foster* does apply to those cases "pending on direct review." *Foster* at ¶ 104. Therefore, this issue was properly decided by the court of appeals.

**Appellant's Proposition of Law No. 5: The presumption of counsel's effectiveness is not overcome unless the defendant demonstrates that counsel's performance fell below an objectively reasonable standard, and that the failure to properly represent the defendant altered the outcome of the trial.**

Smith claims that he was denied his constitutional right to effective assistance of counsel in that his trial counsel was unprepared to go to trial, allowed him to plead to a lengthy indictment, did not "understand" the firearm specifications, and believed that a no contest plea would preserve his right to argue lack of guilt. This argument is unpersuasive and must be overruled.

The Ohio Supreme Court has followed the United States Supreme Court on the issue of ineffective assistance of counsel. In order to have a case reversed based upon such a claim, the defendant-appellant must prove that counsel violated an essential duty to the defendant-appellant and that the defendant-appellant was prejudiced by that violation. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Lytle* (1978), 48 Ohio St.2d 391, 358 N.E.2d 623; see, also, *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Additionally, the reviewing court "should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable professional judgment." *Strickland* at 668. As was discussed more fully in response to Smith's first proposition of law, the existing record reveals that the trial court fully complied with Crim.R. 11 when Smith entered his no contest plea.

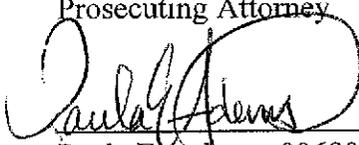
In a case with overwhelming evidence of guilt, Smith pled no contest and threw himself at the mercy of the court for sentencing. There is no indication in the record that Smith received anything but effective assistance of counsel in this matter.

CONCLUSION

The *Cabrales* decision should not be applied to reduce Smith's sentences and this Court should entertain jurisdiction to further explain the application of *Cabrales*. The remaining issues are not of great or public interest and do not involve a substantial constitutional question.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

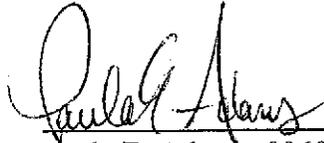


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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Support of Jurisdiction/Memorandum in Response, by United States mail, addressed to Christopher Smith (#536-983), Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036-0056, this 31<sup>st</sup> day of July, 2008.



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Paula E. Adams, 0069036P  
Assistant Prosecuting Attorney

**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,	:	
	:	<i>DECISION.</i>
vs.	:	
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.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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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.<sup>1</sup> 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.<sup>2</sup> "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the

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<sup>1</sup> See R.C. 2903.11(D)(1).

<sup>2</sup> 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.”<sup>3</sup> A defendant who challenges his plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect.<sup>4</sup> “The test is whether the plea would otherwise have been made.”<sup>5</sup>

{¶8} The Ohio Supreme Court held in *State v. Nero*<sup>6</sup> 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

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

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> 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.<sup>7</sup> The trial court must hold a hearing to determine whether there is a reasonable and legitimate basis for withdrawing the plea.<sup>8</sup> 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.<sup>9</sup> 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;

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<sup>7</sup> 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.

<sup>8</sup> See *id.*

<sup>9</sup> 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.<sup>10</sup>

{¶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.

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<sup>10</sup> 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.<sup>11</sup> “[R]eviewing courts should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes.”<sup>12</sup> 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.<sup>13</sup>

{¶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

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<sup>11</sup> 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.

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

<sup>13</sup> 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*,<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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

{¶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.<sup>18</sup> “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.”<sup>19</sup> Upon finding that particular crimes are allied offenses of similar

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

<sup>15</sup> 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.

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

<sup>17</sup> See R.C. 2941.25.

<sup>18</sup> 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.

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

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

{¶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.<sup>22</sup> Therefore, the trial court should have imposed only one felonious-assault sentence for counts three and four.<sup>23</sup>

{¶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

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<sup>20</sup> See *id.*

<sup>21</sup> See *id.*; R.C. 2941.25(B).

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

<sup>23</sup> See *id.*

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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*,<sup>24</sup> we stated that, under the clarification of the *Rance*<sup>25</sup> test set forth in *State v. Cabrales*,<sup>26</sup> 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.<sup>27</sup> 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.

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<sup>24</sup> See *supra*.

<sup>25</sup> See *State v. Rance*, *supra*.

<sup>26</sup> See *State v. Cabrales*, *supra*.

<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> The fifth assignment of error is sustained in part and overruled in part.

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<sup>28</sup> 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.

<sup>29</sup> See *id.*

<sup>30</sup> 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.<sup>31</sup> A jury waiver in a felony case must be in writing, signed by the defendant, and made in open court.<sup>32</sup>

{¶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.<sup>33</sup> Judicial scrutiny of counsel's performance must be highly deferential.<sup>34</sup> There is a strong presumption that counsel's performance falls within the wide range of reasonable

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<sup>31</sup> See *State v. Fish*, *supra*.

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

<sup>33</sup> 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.

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

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

{¶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.

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<sup>35</sup> See *Strickland v. Washington*, supra.

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