

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 07-1842

Plaintiff-Cross-Appellant,

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT

vs.

DAVON WINN

COURT OF APPEALS
CASE NO: 21710

Defendant-Cross-Appellee.

MOTION TO RECONSIDER

MATHIAS H. HECK, JR.

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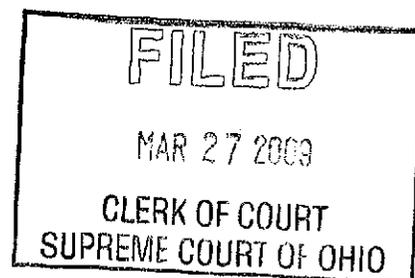
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APPELLANT FOR CROSS-APPELLEE



MOTION TO RECONSIDER

The State of Ohio respectfully requests that this Honorable Court reconsider its decision in *State v. Winn*, Slip Opinion No. 2009-Ohio-1059, decided on March 17, 2009. The entire reason for the State's appeal was to seek guidance in the proper application of the "allied offenses" test set forth in *State v. Rance*, 85 Ohio St.3d 632, 639, 1999-Ohio-291, 710 N.E.2d 699, and further clarified in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶ 14, which test the courts of this state routinely misapplied. However, as Chief Justice Moyer so aptly stated in his dissenting opinion in this case, "[a]fter accurately laying out the test [this Court] developed in *State v. Rance* * * *, the majority misapplie[d] the test to effectively create an unworkable standard." *Winn*, at ¶ 26.

Indeed, in equating the elements of restraint by force, stealth, or deception from the kidnapping statute to the elements of having a deadly weapon and displaying, brandishing, indicating possession or, or using it from the aggravated robbery statute, the majority opinion created an entirely new test based on probability rather than necessity. And in doing so, the majority, in effect, disregarded the thirty years of this state's jurisprudence upon which it claimed to rely. Accordingly, the State of Ohio respectfully asks this Court to reconsider its decision in *Winn*, supra, reverse the decision of the Second District Court of Appeals, and reinstate Cross-Appellee Davon Winn's kidnapping conviction.

Before *Winn*, as far back as the Court's 1979 decision in *State v. Logan* (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1345, the test for determining whether two offenses were allied for purposes of R.C. 2941.25 and the imposition of cumulative punishments was whether the commission of one offense necessarily resulted in the commission of the other. All that *Rance*, supra, and subsequently *Cabrales*, supra, added to that test was a requirement that courts make

that determination based on a common-sense comparison of the elements of the two offenses in the abstract, without regard to the underlying facts of the crimes. Such a comparison between the offenses of aggravated robbery and kidnapping requires a conclusion that the offenses are dissimilar because a kidnapping is not *necessarily* committed when a robbery or aggravated robbery is. In fact, the State can prove beyond a reasonable doubt that a person committed an aggravated robbery without also proving beyond a reasonable doubt that the robber restrained his victim's liberty or freedom of movement for even a millisecond. R.C. 2905.01(A)(2); R.C. 2911.01(A)(1). And that both the State and the dissenting opinion in *Winn* posed multiple scenarios where an aggravated robbery can occur without a kidnapping also occurring demonstrates this point.

In addition, the examples relied upon by both the State and the dissenting justices demonstrate that the majority opinion in *Winn* abandoned the allied offenses test first set forth thirty years ago in *Logan*, *supra* – whether the commission of one offense *necessarily* results in the commission of the other – for a test more akin to whether the commission of one will *probably* result in the commission of the other. This is not the type of functional test that this Court sought to employ in *Rance*. *Rance*, *supra*, at 636.

Finally, the State is not asking the Court to apply the strict textual comparison advocated from *Rance* but rejected in *Cabrales*. Instead, the State's request is for this Court to reconsider its decision in *Winn* and properly apply its own test, first set forth thirty years ago in *State v. Logan* (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1345.

When that test is applied, it is readily apparent that a robbery or aggravated robbery does not *necessarily* result in a kidnapping and that kidnapping and robbery or aggravated robbery are therefore dissimilar offenses.

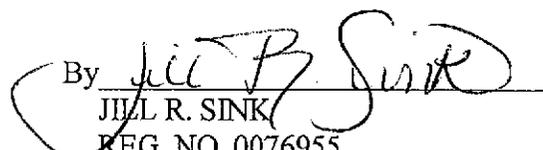
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Reconsider was sent by first class mail on the 27th day of March, 2009 to: Jeremy Masters, Ohio Public Defender Commission, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.

By 
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