

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

RICHARD L. UNDERWOOD, JR.

Defendant-Appellee.

CASE NO. 08-2133 & 08-2228

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

COURT OF APPEALS
CASE NO. 22454

APPELLANT'S REPLY BRIEF

MATHIAS H. HECK, JR.

PROSECUTING ATTORNEY

By KELLY D. MADZEY (COUNSEL OF RECORD)

REG. NO. 0079994

Assistant Prosecuting Attorney

Montgomery County Prosecutor's Office

Appellate Division

P.O. Box 972

301 W. Third Street, Suite 500

Dayton, Ohio 45422

(937) 225-4117

COUNSEL FOR APPELLANT, STATE OF OHIO

CLAIRE R. CAHOON (COUNSEL OF RECORD)

Assistant State Public Defender

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

COUNSEL FOR APPELLEE, RICHARD L. UNDERWOOD, JR.

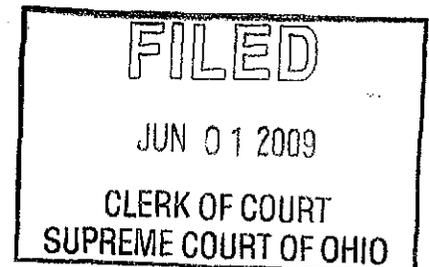
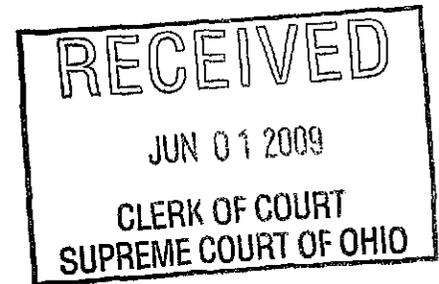


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
REPLY TO UNDERWOOD'S ARGUMENTS ON APPEAL	1-3
CONCLUSION	4
CERTIFICATE OF SERVICE	5

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Blakely v. Washington</i> (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403	1
<i>State v. Adams</i> , Montgomery App. No. 22493, 2009-Ohio-2056	3
<i>State v. Comen</i> (1990), 50 Ohio St.3d 206, 553 N.E.2d 640	3
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642	1, 2, 3
<u>OTHER:</u>	
Crim.R. 52(B)	1
R.C. 2941.25	1, 2, 3
R.C. 2953.08	2
R.C. 2953.08(D)	1, 2, 3, 4

REPLY TO UNDERWOOD’S ARGUMENTS ON APPEAL

Underwood validly bargained away his right to claim that his convictions are in error.

Underwood cites this Court’s decision in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, for the proposition that a defendant may not bargain away a statutory requirement such as that found in the allied offenses statute, R.C. 2941.25. However, it was in *Payne* that this Court also made the critical distinction between the knowing waiver of a right and the forfeiture of a right by failure to object at the trial court level. *Id.* at ¶¶23-24. Where *Payne* had merely failed to object to his sentence pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, this Court found that he had forfeited his right to object to the sentence and proceeded to conduct a plain error review. *Id.* at ¶¶24-25. However, this Court also explained that “if *Payne* had knowingly waived his rights, barring a finding that the error is structural, we would conclude our analysis.” *Id.* at ¶24. “[W]aiver of a right ‘cannot form the basis of any claimed error under Crim.R. 52(B).’”

Unlike *Payne*, Underwood did not merely fail to preserve an objection to his convictions. Instead, he specifically bargained for them. His actions are more akin to the knowing waiver of a right than the mere failure to preserve an objection. As such, pursuant to *Payne* and the specific exception from appellate review of a jointly recommended sentence in R.C. 2953.08(D), an appellate court’s analysis of Underwood’s challenge is at an end.

“Authorized by law” vs. “Contrary to law”

Underwood further argues that the phrase “authorized by law” is the logical inverse of the phrase “contrary to law,” and that any sentence which contains un-merged allied offenses is illegal. Taking Underwood’s argument to its ultimate end, if “contrary to law” is the logical inverse of “authorized by law,” then a jointly recommended sentence which is authorized by law,

could *never* be contrary to law. Such an interpretation ignores the Legislature's intentional use of the two distinct phrases and renders R.C. 2953.08(D) meaningless. Pursuant to Underwood's suggested construction, R.C. 2953.08 would effectively create grounds for appeal of a sentence which is contrary to law, and then create an exception for a jointly recommended sentence which is not contrary to law. Why create an exception for a sentence that is perfectly legitimate? Arguing that a jointly recommended sentence is in compliance with all statutory guidelines is a defense to a sentencing challenge, not an exception from appellate review. In contrast to Underwood's interpretation, the General Assembly did recognize that a sentence may be contrary to law, and yet still authorized by law, and created a specific exception for agreements under such circumstances.

Underwood likens an agreement to allied convictions to an agreement to a sentence outside the statutory range. (Appellee Brief, p.3). However, this Court has distinguished between the two. *Payne* at ¶27-28. While a sentence outside the statutory range would be void, a sentence on multiple allied offenses would merely be voidable. See *id.* "A void sentence is one that a court imposes despite lacking subject matter jurisdiction or the authority to act." *Id.* at ¶27. "Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously." *Id.*

In making this distinction, this Court recognized that a sentence may be within the court's jurisdiction, or "authorized by law," and yet still imposed in violation of some statutory rule, or "contrary to law." Such recognition is in harmony with the State's position in this case; that a jointly recommended sentence that is within the statutory range is "authorized by law," and therefore removed from appellate review pursuant to R.C. 2953.08(D), regardless of whether it would be in violation of R.C. 2941.25 and therefore otherwise "contrary to law." A sentence

imposed in violation of R.C. 2941.25 would not be void, but merely voidable under the appropriate circumstances. A voidable sentence can be set aside “only if successfully challenged on direct appeal.” *Payne* at ¶28. R.C. 2953.08(D), however, creates a specific bar to the successful appeal of a jointly recommended sentence that is within the statutory range.

Underwood’s argument ignores the well settled proposition that a party may validly forfeit a challenge to the merger of allied offenses. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640; *State v. Adams*, Montgomery App. No. 22493, 2009-Ohio-2056. Admittedly, Ohio courts have found that such waiver *may* amount to plain error where it is shown that the offenses should have merged. However, the fact that a party may forfeit such a challenge is further evidence that such convictions may be considered voidable, but not void. If a party may validly waive such a defect, it is only logical that he may specifically bargain for such defect as well.

Legislative intent

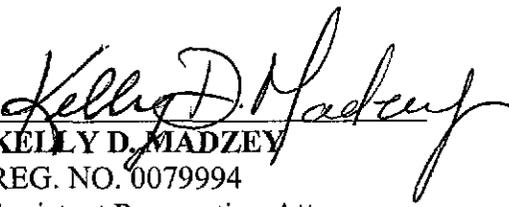
Finally, Underwood argues that the Legislature’s failure to limit the language of R.C. 2941.25 to jury verdicts represents an intention to require merger in every case. The State does not argue that R.C. 2941.25 was intended to be limited to jury verdicts. Pleas of guilty or no contest with no agreements to sentencing are open to merger challenges. The State only argues that a defendant may intentionally bargain for the detriment of un-merged convictions in exchange for the benefit of an agreed sentence. Further, Underwood’s argument cuts both ways. The Legislature could similarly be said to have intentionally failed to include language which would have limited the exception in R.C. 2953.08(D) to exclude convictions “in violation of R.C. 2941.25.”

CONCLUSION

This Court has previously distinguished between sentences which are not “authorized by law,” and those which are “contrary to law,” and the State respectfully requests that this Court do so again, finding the plain language of R.C. 2953.08(D) to bar appellate review of jointly recommended sentences within the statutory range.

Respectfully submitted,

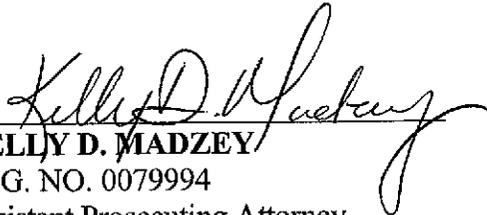
MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 
KELLY D. MADZEY
REG. NO. 0079994
Assistant Prosecuting Attorney
APPELLATE DIVISION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was sent by first class mail on this 29th day of May, 2009, to Opposing Counsel: Claire R. Cahoon, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

By:


KELLY D. MADZEY

REG. NO. 0079994

Assistant Prosecuting Attorney

APPELLATE DIVISION