

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | No. 10-0937 |
| | : | |
| PLAINTIFF-APPELLANT, | : | On Appeal from the Franklin |
| | : | County Court of Appeals, |
| v. | : | Tenth Appellate District |
| | : | |
| JEREMY S. DAMRON, | : | |
| | : | |
| DEFENDANT-APPELLEE. | : | Court of Appeals |
| | : | Case No. 09AP-807 |

MEMORANDUM OF DEFENDANT-APPELLEE
JEREMY S. DAMRON OPPOSING JURISDICTION

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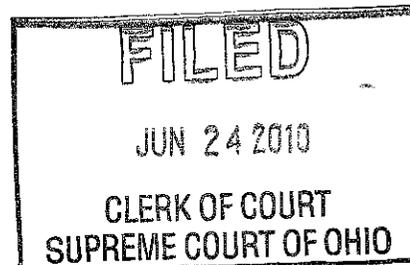


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Without even tendering an objection at sentencing, the State is in the awkward and unfamiliar position of attacking a sentence on allied offense grounds, when the trial court did not even merge the offenses. The State characterizes the sentence the Defendant-Appellee Jeremy S. Damron (“Appellee”) received as accidental, yet even if this is an apt characterization, the sentence was still lawful and is not worthy of this Court’s review. “Accidental” would more fittingly apply to the State’s failure to even object to the specific sentence imposed at trial, and its continued failure-in-kind to litigate the propositions of law asserted herein to the intermediate court of appeals.

The Appellee pled guilty to charges of felonious assault and domestic violence based on a fight between the Appellee and his live-in girlfriend. Even though the trial court commented that it thought the felonious assault and domestic violence counts should merge, the trial court did not merge these offenses but instead imposed separate, maximum and concurrent sentences for the felonious assault and domestic violence counts. The State has no basis to appeal as it argued against merger and the trial court obliged.

Yet, the State did not enter an objection to the trial court’s maximum, concurrent sentences; thus, it waived all but plain error in its direct appeal. With a sole assignment of error challenging only the trial court’s “purported merger”, the State appealed the trial court’s sentence, which the Ohio Court of Appeals rejected by stating:

...because the trial court did not actually merge the two counts, the only error the state can allege is that the trial court imposed concurrent sentences after having stated during the sentencing hearing that it would have imposed consecutive sentences if it were legally authorized to do so. Even if we were to conclude that the court’s decision to

impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing.

State v. Damron, Franklin App. No. 09AP-807, 2010-Ohio-1821, ¶ 11 (“*Damron*”). Now the State carries its meritless quest a step further and requests this Court to now accept its appeal for review. The State also characterizes the trial court as mistaken for assuming that felonious assault and domestic violence counts must merge under the current regime of Ohio's allied offense doctrine. While Appellee contends that felonious assault and domestic violence do indeed merge and that the trial court did not engage in “faulty reasoning”, he also asserts that the answer to this question is irrelevant for purposes of determining whether the trial court's sentence warrants the jurisdiction of this Court. Because the trial court's maximum and concurrent sentences were authorized by the Ohio Felony Sentencing Code, Appellee asks this Court to decline to take jurisdiction of the State's appeal.

In its request for jurisdiction, the State sets forth the obvious that trial courts are to consider the remaining sentencing factors after *Foster* but asserts that the trial court abandoned its consideration of the sentencing factors. See State's Memorandum in Support of Jurisdiction (“Memo.”) at 1-2. A review of the trial court's sentencing entry belies this claim. The trial court did not abandon its discretionary role as it entered maximum sentences within the ranges spelled out in R.C. § 2929.14(A)(2), (3) and considered the sentencing guidelines and factors as it said it did in its sentencing entry. See Entry at 1, *infra* (“The Court considered the purposes and principles of sentencing set forth in R.C. § 2929.11 and the factors set forth in R.C. § 2929.12. In addition, the Court has weighed the factors set forth in the applicable provisions of R.C. § 2929.13 and R.C.

§ 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. § 2929.13(F).” See *State v. Todd*, Franklin App. No. 06AP-1208, 2007-Ohio-4307, ¶ 16 (“Here, the trial court’s sentencing entry expressly states that it “considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12.” This court held such language in a court’s judgment entry belies a defendant’s claim that the trial court failed to consider the purposes of felony sentencing as required in R.C. 2929.11 and 2929.12.”).

Because the record indicates that the trial court considered the sentencing guidelines and factors, and also considered the particular facts of the instant case, the sentence was not contrary to law and does not warrant review by this Court. See e.g., *State v. Heidorn*, Hamilton App. No. C-030700, 2004-Ohio-3749, ¶ 15-16 (finding imposition of two four-year prison sentences concurrently was not contrary to law).

The State wrongly characterizes the trial court’s sentencing error as a “merger error” when the trial court, in fact, did not even merge the offenses. The State also argues that the Ohio Court of Appeals did not correct the “obvious legal error” of imposing concurrent sentences when merger was required (even though it conversely asserts that merger was not lawful). Memo. at 2. This contention is not persuasive because the description of such an alleged error depends on the status and perspective of the appealing party. Imposing concurrent sentences for offenses that should merge is an error in the eye of the defense not the State. Appellee chose not to assert this “obvious legal error” because he did not desire to challenge his eight-year sentence, and the Ohio Court of Appeals rightly did not view the court’s sentence through the eyes of a defendant, given that he did not appeal the sentence. The State, with an ulterior motive,

has focused on the alleged error of imposing “concurrent sentences for allied offenses” is to achieve a remand where it can argue for consecutive sentences.

The State also relies on case law holding that consecutive sentences are not required under R.C. § 2929.13(F), a provision setting forth mandatory prison terms for particular offenses. See *State v. Johnson* (2008), 116 Ohio St.3d 541. The State’s reliance on this case is misplaced, because *Johnson* deals with the application of a particular sentence statute, which the State has not pointed to herein. Plus, trial courts are no longer required to even make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, ¶ 100.

The State frames the *Damron* opinion as setting a “dangerous precedent” because the Ohio Court of Appeals will subsequently apply “a different standard of review to State sentencing appeals”, “finding that they deserve neither review nor correction unless the sentence exceeds the statutory limit.” Memo. at 3. This characterization is also untrue. The Ohio Court of Appeals in *Damron* reviewed this sole assignment of error:

THE COURT ERRED BY PURPORTING TO MERGE
DEFENDANT’S CONVICTIONS FOR FELONIOUS
ASSAULT AND DOMESTIC VIOLENCE.

Damron, ¶ 5. And in its disposition of that error, the Ohio Court of Appeals merely determined that the concurrent sentences handed down by the trial court were lawful. No precedent was set and nothing of great interest was either created or established that in any way will inhibit the State from this point forward.

The State also continues to assert that the trial court violated R.C. § 2941.25 even though the trial court separately sentenced offenses the State argues are not allied; thus,

the allied offense statute is inapposite. The only party to this case that *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, benefits is Appellee, and Appellee choose not to appeal the sentence. The State continues to assert that the sentence was not lawfully imposed but it cannot provide the Court with one sentencing statute or even one case that the trial court violated in its sentence. For these reasons, the Ohio Court of Appeals rejected the State's appeal, and Appellee asks this Court to decline to exercise jurisdiction over this case.

The State's entreaty for this Court to use this particular case as a platform to declare that felonious assault and domestic violence are not allied offenses is a red herring. Whether these offenses are allied, which Appellee asserts they are, is of no importance, because the trial court did not merge the offenses in compliance with the State's wishes, which rendered the disposition not contrary to law from the State's perspective under R.C. § 2953.08(B)(2). However, this Court currently has a ripe case before it from the First District Court of Appeals, *State v. Bosley*, No. 2010-0919, wherein the defendant-appellant has appealed the Ohio Court of Appeals' holding that he was properly convicted of felonious assault and domestic violence. See *State v. Bosley*, Hamilton App. No. C-090330, 2010-Ohio-1570, ¶ 31. The *Bosley* case presents the Court with an opportunity to directly address the lawfulness of merger of felonious assault and domestic violence counts, without it being an advisory opinion.

STATEMENT OF THE CASE AND FACTS

The State issued a four-count indictment against Appellee stemming from an alleged incident that occurred on June 21, 2008, wherein the State accused Appellee of assaulting the alleged victim, Michelle Haley. The Indictment consisted one count of

felonious assault pursuant to Ohio Rev. Code § 2903.11, a felony of the second degree, two counts of domestic violence pursuant to R.C. § 2919.25, felonies of the third degree, and one count of rape pursuant to R.C. § 2907.02, a felony of the first degree.

The Appellee pled guilty to one count of felonious assault and one count of domestic violence, and the State nolleed the other count of domestic violence and the rape count. See May 5, 2009 Plea Transcript of Proceedings (“Pt.”) and Entry of Guilty Plea (“Plea Form”). Neither the trial court nor the prosecutor stated that the Appellee was prevented from arguing for either concurrent sentences or for merger. See Pt. generally and Plea Form. And the Appellee did not stipulate to the facts as read at the plea and reserved mitigation statements until sentencing. Pt. at 17.

This incident occurred on the night of June 21, 2008 at 7700 Havens Corner Road in Franklin County in Gahanna, Ohio. The Appellee and Ms. Haley lived together, had 2 children together, and had a 10-year relationship together. Both were extremely intoxicated during the night in question. See July 27, 2009 Sentencing Transcript of Proceedings (“St.”) at 11. Ms. Haley described their long relationship as “rocky”, where they both have hurt each other a lot. Sentencing Memorandum, Ex. 2. Ms. Haley thought that Appellee had cheated on her, and as he was getting dressed to leave the house, an argument ensued, and Appellee and Ms. Haley began to fight. St. at 11. Ms. Haley has even been charged in the past for domestic violence against the Appellee. Id.

The Appellee, through counsel, explained at the sentencing hearing that Ms. Haley had contacted his trial counsel several times during the pendency of the case. St. at 11. Ms. Haley explained that no rape occurred during the incident. Id. Ms. Haley even told hospital personnel that no rape occurred. See Sentencing Memorandum, Ex. 2, 3. In

the end, it is clear that Appellee was wrongly accused of rape. Ms. Haley also spoke highly of Appellee, even though acknowledging that they both have mental health and substance abuse issues. *Id.* Appellee also had employment waiting for him upon his release. *Id.*, Ex. 4. Appellee attended anger management classes and AA and NA meetings while the case was pending. *St.* at 14, and Sentencing Memorandum, Ex. 5.

The trial court sentenced the Appellee to eight years of imprisonment on the felonious assault count and five years of imprisonment on the domestic violence count. *St.* at 16 and July 29, 2009 Judgment Entry (“Entry”). The trial court ran the sentences concurrent with each other and cited *State v. Harris*, 2009-Ohio-3323. The State did not object to trial court’s concurrent sentence at the sentencing hearing or the trial court’s alleged failure to merge. *St.* at 16-17. The State appealed the trial court’s Entry to the Franklin County Court of Appeals, which affirmed the sentence. *Damron*, ¶ 11-12.

ARGUMENT AGAINST PROPOSITIONS OF LAW

Response to Proposition of Law No. 1: Concurrent sentences for unmerged offenses do not equate to an unauthorized sentence under the Ohio Felony Sentencing Code.

Response to Proposition of Law No. 2: The State has failed under R.C. § 2953.08(B)(2) to establish that the sentence was contrary to law, and thus, an appeal of said sentence is meritless.

Appellee notes that the State now brings three propositions of law in its offensive against the trial court sentence, when it only litigated one assignment of error before the Ohio Court of Appeals; thus, these two propositions have been waived. In its November 16, 2009 brief to the lower court, the State focused on merger and little else.

With that said, the State argues in these propositions of law that the *Damron* opinion licenses trial courts in the Tenth District to ignore mandatory sentencing

provisions such as mandatory imprisonment (R.C. § 2929.13(F)) or post-release control notification (R.C. § 2929.19(B)(3)(c)). This simply is not true because the *Damron* court merely found that the trial court complied with the State's request not to merge the offenses and that the sentence did not violate any statutes governing sentencing; the *Damron* court did not determine that a sentence was lawful simply *because it falls within the statutory range*. Memo. at 7 (emphasis added). The State did not point to one mandatory sentencing provision that the trial court did not comport with in its sentence.

The State did not object to the trial court's imposition of maximum, concurrent sentences at the sentencing hearing. St. at 16-17. Thus, the State waived all but plain error on review. Evid. R. 103(A)(1), (D). It is well-settled that failure to raise the issue of merger of allied offenses of similar import before the trial court constitutes a waiver of the issue on appeal absent a showing of plain error. *State v. Comen* (1990), 50 Ohio St.3d 206, 211. "To be plain within the meaning of Crim.R. 52(B), an error must be an obvious defect in the trial proceedings." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. "Plain error(s) or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error is to be used with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *Barnes*, 94 Ohio St.3d at 27. The error must have affected substantial rights. *Id.*

In order to reverse a criminal judgment based upon plain error, an appellate court must determine the following: 1) whether there was an error; 2) whether the error was plain error; and 3) whether the defendant was prejudiced by the error. *State v. Adams*,

Montgomery App. No. 22493, 2009-Ohio-2056, ¶ 12 (citing *U.S. v. Olano* (1992), 507 U.S. 725).

There was no error as the trial court sentenced the Appellee to prison terms within the ranges spelled out for each offense and did not offend any other portion of the sentencing code. R.C. § 2929.14(A). Any alleged error relating to failing to merge the felonious assault and domestic violence offenses did not affect the State's substantial rights; thus, it was not plain. The State cites *Underwood* for the proposition that the failure to merge allied offenses of similar import constitutes plain error. However, as the *Underwood* Court said "even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *Underwood*, 2010-Ohio-1, ¶ 31 (emphasis added).

The analysis contained in *Underwood*, though, is inapplicable to the case sub judice, because *Underwood* involved a defendant appealing his sentence, not the State appealing a sentence herein. See e.g., *State v. Russell*, Richland App. No. 06 CA 12, 2006-Ohio-4450, ¶ 13 (noting that analysis of sentencing error from a prior case was inapplicable to the current case because the prior case involved a defendant appealing his sentence, while the current case involved a state appeal challenging the validity of a sentence).

As this Court is also aware, an error related to merger affects a defendant's right to protection from double jeopardy, as set forth in the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibit a defendant from being subjected to cumulative punishments for the same offense. The same concerns are not present in the instant case as the State

does not have a Double Jeopardy protection or any other substantial right present in the this analysis. See *State v. Dunham*, Scioto App. No. 04CA2931, 2005-Ohio-3642, ¶ 55 (“Violation of double jeopardy violates *an offender's substantial rights and constitutes plain error.*”) (emphasis added).

In the end, the State seeks to challenge the trial court’s alleged failure to merge felonious assault and domestic violence counts, yet it argues contradictory that those very offenses are not allied. The State cannot have it both ways, which should result in the rejection to even review this flawed appeal.

Response to Proposition of Law No. III: Although the Court does not need to reach this issue, felonious assault and domestic violence are allied offenses of similar import, and the trial court did not plainly err from the State’s perspective when it relied on *Harris* to impose concurrent sentences.

Because he committed only one act on the night of the incident with only one animus, Appellee maintains that consecutive sentences for both domestic violence and felonious assault would violate his double jeopardy protections. Appellee also contends that the felonious assault (“FA”) count pursuant to R.C. § 2903.11(A)(1) and domestic violence (“DV”) count pursuant to R.C. § 2919.25(A) are allied offenses of similar import. These arguments only further the Appellee’s stance that the trial court did not plainly err from the State’s perspective or prejudice the State.

As the *Damron* court held, this Court need not review the issue of whether the trial court erred by concluding that it was required to merge the FA and DV counts, because it ultimately did not even merge them. Thus, even though the sentence was not contrary to law and the trial court did not merge the FA and DV offenses, the State still persists in asserting that FA and DV are not allied offenses of similar import. Even

though Appellee chose not to appeal the sentence, Appellee disagrees with the State's contention. Under the current and evolving state of Ohio's allied offense doctrine, Appellee asserts that the elements of FA and DV are similar enough to constitute allied offenses. A FA committed on a protected person under the DV statutes constitutes DV. Subjecting Appellee to double punishment for the same act against a protected person under the DV statutes is exactly what the Double Jeopardy clause sought to prevent, regardless of what the Ohio Legislature may have intended when it drafted the assault statutes.

It is well-settled that "[t]he Double Jeopardy Clause of the United States Constitution prohibits ...multiple punishments for the same offense." *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 10 (citing *U.S. v. Halper* (1989), 490 U.S. 435, 440). "These double-jeopardy protections apply to the states through the Fourteenth Amendment." *Id.* (citing *Benton v. Maryland* (1969), 395 U.S. 784, 786). In addition, Section 10, Article I of the Ohio Constitution provides that "[n]o person shall be twice put in jeopardy for the same offense."

More generally, the U.S. Supreme Court has held that the test for determining whether two offenses are the same for double jeopardy purposes is "whether each offense requires proof of an element that the other does not." *State v. Rance* (1999), 85 Ohio St.3d 632, 634-635 (citing *Blockburger v. U.S.* (1932), 284 U.S. 299, 304). However, "the Blockburger test does not require identical elements of proof." Thomas Hagel, *Ohio Criminal Practice and Procedure*, (LexisNexis 2005), Double Jeopardy, § 17.105 (citing *Blockburger; Brown v. State* (1972), 432 U.S. 161). In applying the multiple-count statute, R.C. § 2941.25, this Court has long followed a two-tiered test to determine

whether two offenses constitute allied offenses of similar import. *See State v. Cabrales* (2008), 118 Ohio St.3d 54, 2008-Ohio-1625 ¶ 14.

In the first step, the elements of the two crimes are compared. 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 and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.

Id. (citations and internal quotation marks omitted) (emphasis added). In *Cabrales*, the Court acknowledged that prior precedent had produced inconsistent, unreasonable, and, at times, absurd results. *Brown*, 2008-Ohio-4569, ¶ 20-21 (citations omitted). Thus, in *Cabrales*, this Court clarified the two-tiered test, but qualified it, holding:

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 in the abstract without considering the evidence in the case, *but are not required to find an exact alignment of the elements*. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.

Brown, ¶ 21 (quoting *Cabrales* at paragraph one of the syllabus) (emphasis added). R.C. § 2919.25(A), the DV statute, requires the State to show that an individual did knowingly cause physical harm to a family or household member, while the first prong of the FA statute, R.C. § 2903.11(A)(1), requires the State to show that an individual did knowingly cause serious physical harm to another person. Accordingly, DV requires proof that a defendant (1) knowingly, (2) caused (3) physical harm, (4) to a family or household

member. FA requires proof that a defendant (1) knowingly, (2) caused, (3) serious physical harm, (4) to another.

Appellee asserts that violating the FA statute would necessitate a violation of the DV statute. The fact that the DV statute requires the harm to be visited upon a family or household member is a delimiting or restrictive factor, not an additional element of the crime. Thus, a FA upon a household or family member will necessarily result in a DV too. Even though there is not an exact alignment of elements, the FA and DV statutes correspond to *such a degree* that they should be considered allied offenses under state statutory law and state and federal constitutional law. Indeed, the commission of any assault offense under R.C. §§2903.11, 2903.12, or 2903.13 against a family or household member will result in the commission of DV. In other words, implicit in every act of DV under R.C. §2919.25(A) is an assault. Common sense and logic dictate that DV and assault (here FA) go hand-in-hand and constitute allied offenses of similar import even though the elements do not align exactly.

A panel of the Franklin County Court of Appeals recently assumed that the crimes of FA, pursuant to R.C. § 2903.11(A)(2), and DV, pursuant to § R.C. 2919.25(A), were allied offenses of similar import under the test enunciated in *Cabrales*, see *State v. Ryan*, Franklin App. No. 08AP-481, 2009-Ohio-3235, ¶ 25, but it ultimately expressed no opinion on this precise issue. *Id.*, n.2. In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶ 18-20 the Supreme Court of Ohio held that FA under R.C. § 2903.11(A)(1) and FA under R.C. § 2903.11(A)(2) were allied offenses of similar import, and that a defendant could not be convicted of both offenses when both are committed with the same animus against the same victim. FA under subsection (A)(1) requires serious

physical harm while FA under (A)(2) requires physical harm by means of a deadly weapon. *Harris* again set forth the current interpretation of R.C. § 2941.25(A) as “not requir[ing] an exact alignment of elements.” *Id.*, ¶ 12. *Harris* found the FA charges to be allied in spite of the physical harm elementary differences and the deadly weapon component in subsection (A)(2).

In the instant case, there is less of a difference in the statues than in *Harris*. FA under subsection (A)(1) requires serious physical harm upon another while DV requires physical harm to household or family members. The holding in *Harris* compels a finding that FA and DV are also allied offenses under the new regime that started with *Cabralas*.

Overall, the old precedent “lent itself to overly-mechanistic applications because the courts were told to compare the elements of charged offenses in the ‘abstract’ without considering the facts of the case.” *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, at ¶ 27 (citation omitted). As recently stated by the Eighth District Court of Appeals, “if *either crime* is wholly subsumed within the other, then the offenses are of similar import.” *State v. Miniffee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶ 88 (citing *Cabrales*, ¶ 39 (Fain, J., concurring in judgment)). Appellee contends that the DV count is wholly subsumed by the FA count as the DV count contains a lesser physical harm element and a restriction on the type of eligible victim. The State’s reliance on *Bosley* is misplaced because it incorrectly applied *Brown* by initially examining the supposed legislative intent behind the FA and DV offenses, without initially conducting the analysis Appellee engaged in above. See *State v. Journey*, Scioto County App. 09CA3270, 2010-Ohio-2555, ¶ 16 (explaining that the *Brown* Court only examined the legislative intent of the offenses after it compared the elements of the offenses).

For these reasons, Appellee maintains that the trial court did not plainly err, particular from the State's perspective, when it cited the *Harris* decision in support of its concurrent sentences for the FA and DV offenses.

CONCLUSION

Appellee respectfully submits that the State's appeal, which consists of a challenge to a sentence on merger grounds, when the trial court did not even affect a merger, does not present questions of public or great general interest as would warrant further review from this Court. Review is also not warranted upon leave just because of the felony convictions involved.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was served personally on June 24, 2010 to counsel for appellants, Ronald O'Brien, Franklin County Prosecuting Attorney, and John H. Cousins IV, Assistant Franklin County Prosecutor, Franklin County Prosecutor's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215.


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