

NO. 10-1257

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 93427

STATE OF OHIO

Plaintiff-Appellant

-vs-

ERIC R. WILSON

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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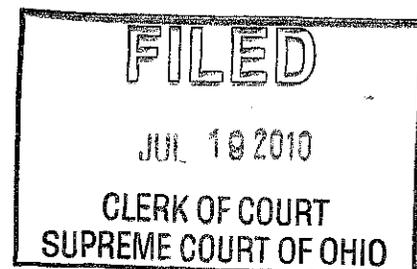


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State v. Wilson, Cuyahoga App. No. 93427, 2010-Ohio-2466

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT PUBLIC INTEREST

This case is important because the Eighth District Court of Appeals (“Eighth District”) has violated appellate procedure by ignoring the doctrines of *res judicata* and law of the case. The State of Ohio respectfully petitions this Honorable Court to accept jurisdiction and summarily reverse the Eighth District Court of Appeal’s opinion in *State v. Wilson*, Cuyahoga App. No. 93427, 2010-Ohio-2466, Gallagher, A.J., concurring, (*Wilson II*) which addressed the merits of a procedurally barred claim.

In *Wilson II*, the Eighth District held that the trial court erred when it failed to merge Wilson’s two firearm specifications despite that issue having not been raised in his first appeal. In 2008, Wilson was convicted of involuntary manslaughter with firearm specifications for killing 12-year-old Asteve “Cookie” Thomas, one count of felonious assault for causing serious physical harm to James Yhonquea, one count of felonious assault for causing physical harm to James Yhonquea by means of a deadly weapon, and having a weapon while under disability. The trial court merged the firearm specifications for the felonious assault counts and sentenced Wilson to 35 years in prison. The Eighth District affirmed Wilson’s convictions but remanded solely for merger of the felonious assault counts. *State v. Wilson*, 182 Ohio App.3d 171, 912 N.E.2d 133, 2009-Ohio-1681 (*Wilson I*).

Pursuant to the Eighth District’s mandate, Wilson was then sentenced to involuntary manslaughter with a firearm specification, one count of felonious assault with a firearm specification, and having a weapon while under disability. Wilson appealed his sentence. The Eighth District then found that the specifications arose out

of the same act or transaction and that the trial court erred by not merging the firearm specifications pursuant to R.C. 2929.14(D)(1)(b). *State v. Wilson II*, 2010-Ohio-2466, ¶¶ 27-28. By addressing the merits of Wilson's appeal, the Eighth District ignored *res judicata*.

The lower court's decision disregards the well-established doctrines of law of the case and *res judicata*. The State of Ohio requests this Honorable Court summarily reverse the Eighth District's opinion as it is procedurally flawed. In the event this Court does not summarily reverse the Eighth District's opinion, the State respectfully requests that jurisdiction be accepted and this Court consider whether a defendant may argue merger for the first time on a resentencing appeal. The Eighth District's decision essentially abrogates the doctrine of *res judicata* and sets a precedent to allow defendants to piecemeal appellate issues. Such a ruling has broad implications and is a matter of great public interest.

The State respectfully submits that this case is worthy of Supreme Court review and summary reversal pursuant to *Nolan v. Nolan*, *infra*, and *State v. Saxon*, *infra*, or review to consider whether *res judicata* and the law-of-the-case doctrine prevent a defendant from arguing merger on a resentencing appeal.

For these reasons, the State requests this Court accept the following Proposition of Law:

A Defendant is Barred by Res Judicata and the Law of the Case Doctrine From Raising Issues that could have been Raised in a Prior Appeal after the Defendant was Re-sentenced Pursuant to a Limited Remand from the Court of Appeals.

The proposition of law is necessary as finality in judgment is paramount to criminal cases.

This proposition is also essential as the Eighth District's decision is contrary to this Court's opinions in *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 2, 462 N.E.2d 410, which holds that a trial court is without authority to extend or vary a mandate given by an appellate court, and *State v. Saxon*, 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1235, which holds that a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by *res judicata* from appealing that sentence following a remand for resentencing on other offenses. The Eighth District's opinion is also inconsistent with *State v. Dillard*, Jefferson App. No. 08 JE 35, 2010-Ohio-1407; *State v. Howard*, Clark App. No. 2008 CA 87, 2009-Ohio-3432; *State v. Lariva*, Franklin App. No. 08AP-413, 2008-Ohio-5499; *State v. Craig*, Licking App. No. 2005CA16, 2005-Ohio-5300 which held that a defendant may not argue merger in a resentencing appeal.

As the doctrines of law of the case and *res judicata* are of vital importance to both criminal and civil cases, the State requests this Honorable Court summarily reverse the Eighth District's decision in *Wilson II* or grant jurisdiction address whether a defendant has the right to piecemeal appellate issues.

STATEMENT OF THE CASE

In 2007, Eric Wilson ("Wilson") was indicted with murder, attempted murder, two counts of felonious assault, two counts of aggravated robbery, kidnapping, rape, and two counts of attempted rape. Each count contained one and three-year firearm specifications, and the kidnapping count additionally contained a sexual-motivation specification. Wilson was also charged with having a weapon while under disability. Before trial, the state dismissed the two counts of aggravated robbery.

A jury convicted Wilson of involuntary manslaughter with firearm specifications for killing 12-year-old Asteve “Cookie” Thomas, one count of felonious assault for causing serious physical harm to James Yhonquea, one count of felonious assault for causing physical harm to James Yhonquea by means of a deadly weapon, and having a weapon while under disability. Wilson was acquitted of all other charges.

In total, the court sentenced Wilson to 35 years in prison: nine years for involuntary manslaughter for killing 12-year-old Asteve “Cookie” Thomas, plus three years for the firearm specifications; eight years for one count of felonious assault against James Yhonquea, plus three years for the firearm specifications; seven years for the other count of felonious assault against James Yhonquea , plus three years for the firearm specifications; and five years for having a weapon while under disability. The trial court merged the firearm specifications attached to the felonious assault counts.

Wilson appealed and the Eighth District affirmed his convictions but reversed a portion of his sentence. *State v. Wilson*, 182 Ohio App.3d 171, 912 N.E.2d 133, 2009-Ohio-1681 (*Wilson I*). The Eighth District held that the trial court should have merged the felonious assault counts and “remanded for the state to elect which of Wilson’s felonious assault charges will merge into the other for purposes of his conviction and sentence, and correction of the conviction entry accordingly.” *Id.* at ¶54.

On remand, the state elected to merge the count of felonious assault with a deadly weapon into the felonious assault for causing serious physical harm. The trial court merged the two counts and sentenced Wilson to an aggregate sentence of 28 years in prison.

Wilson then appealed his resentencing; arguing that the firearm specification from his felonious assault conviction for causing serious physical harm to James Yhonquea should merge with the firearm specification from his involuntary manslaughter conviction for killing 12-year-old Asteve Thomas. *State v. Wilson II*, Cuyahoga App. No. 93427, 2010-Ohio-2466. The Eighth District held that, while there were two victims, Wilson's actions amounted to one continuous action. The Eighth District held that the trial court erred by not merging the firearm specifications pursuant to R.C. 2929.14(D)(1)(b) and modified Wilson's sentence accordingly. *Id.* at ¶ 27-29.¹

STATEMENT OF THE FACTS

In its opinion affirming Wilson's convictions, the Eighth District provided a summary of the facts presented at trial as follows:

"On September 1, 2006, Wilson, a drug trafficker, was in his car driving around the area of East 59th Street and Francis Avenue selling drugs. He stopped his car to meet with some buyers when James Yhonquea ("Yhonquea") walked up, pulled out his gun, and put it against Wilson's head. Yhonquea took Wilson's drugs, money, and cell phone and started to run down East 59th Street. Wilson jumped out of his car and started to run after Yhonquea. Wilson began shooting at Yhonquea and fired off eight rounds, hitting a parked car and a house. Yhonquea returned fire, hitting Wilson's car.

Asteve "Cookie" Thomas, a twelve-year old girl who lived in the neighborhood, was walking home from the corner store with her friends when one of the bullets shot from Yhonquea's gun struck her in the chest. She managed to walk to a neighbor's house, collapsed, and died

¹ Effective September 9, 2008, R.C. 2929.14(D)(1)(b) was amended to include an exception to merger when a defendant is convicted of two or more felonies with firearm specifications, at least one of which is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape. If the defendant is convicted of one of the above-described offenses the trial court must impose prison terms for each of the two most serious firearm specifications of which the defendant is convicted, and may impose sentences for any other remaining specification. R.C. 2929.14(D)(1)(g).

approximately thirty minutes later. Police recovered multiple bullets and casings from the scene.

Wilson eventually caught up with Yhonquea and shot him in the back. Wilson then recovered his drugs, money, and cell phone. Wilson proceeded back up East 59th Street and, as an onlooker testified, appeared calm—"He was calm. Just calm. He was like ice." The onlooker also testified that Wilson told him "I got my s* * * back." When Wilson reached his car, he told his passenger, April Macon ("Macon"), that "if the dude would [have] never took my phone, I wouldn't have chased him down."

Wilson fled the scene with Macon, who testified that she told Wilson as they were leaving that a little girl had been shot. Wilson drove Macon to a friend's house and turned on the news. Macon testified that shortly after Wilson found out that the little girl had died, he forced Macon to perform oral sex on him and also attempted to perform anal sex on her. Wilson then fled Cleveland.

Ten days later, police in Montana tried to effectuate a traffic stop on Wilson; he led police on a high speed chase that ended when he ran a red light and crashed into two cars. He jumped out of the vehicle, ran, and threw his gun to the ground. Police were able to apprehend him and discovered that the recovered gun was the same one Wilson used in the shootout

Yhonquea recovered from the gunshot wound and was charged separately from Wilson. *State v. Yhonquea*, Cuyahoga C.P. No. CR-502058."

State v. Wilson, 182 Ohio App.3d 171, 912 N.E.2d 133, 2009-Ohio-1681, ¶4-9.

LAW AND ARGUMENT

PROPOSITION OF LAW I: A Defendant is Barred by Res Judicata and the Law of the Case Doctrine From Raising Issues that could have been Raised in a Prior Appeal after the Defendant was Re-sentenced Pursuant to a Limited Remand from the Court of Appeals.

I. A trial court lacks authority to modify a sentence that has been affirmed by a reviewing court.

It is well-settled that a "trial court is divested of jurisdiction until the case is remanded to it by the appellate court except where the retention of jurisdiction is not inconsistent with that of the appellate court to review, affirm, modify or reverse the

order from which the appeal is perfected.” *State v. Taogaga*, Cuyahoga App. No. 79845, 2002-Ohio-5062; see *Yee v. Erie Cty. Sheriff’s Dept.* (1990), 51 Ohio St.3d 43, 44, 553 N.E.2d 1354.

The law of the case doctrine prevents trial courts from modifying the mandate of an appellate court. The doctrine “ ‘provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.’ ” *State v. Banks*, Cuyahoga App. No. 93880, 2010-Ohio-3206, ¶9, citing *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 2, 462 N.E.2d 410. “[T]he doctrine functions to compel trial courts to follow the mandates of reviewing courts. Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court’s determination of the applicable law.” (Citations omitted.) *Nolan*, 11 Ohio St.3d at 3-4, 462 N.E.2d 410. “A trial court may not vary the mandate of an appellate court, but is bound by that mandate on the questions of law decided by the reviewing court.” *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 323, 649 N.E.2d 1229 citing *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 160, 519 N.E.2d 390, 394.

In his first appeal, Wilson did not allege error that he would serve consecutive terms on the firearm specifications. Wilson only argued that the two counts of felonious assault were allied offenses. The Eighth District agreed and remanded the matter to the trial court for the limited purpose of allowing the state to elect which of Wilson’s felonious assault charges should merge:

“The judgment is affirmed in part and reversed in part, and the cause is remanded for the state to elect which of Wilson’s felonious assault charges will merge into the other for purposes of his conviction and sentence, and

correction of the conviction entry accordingly. See *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 43.” *Wilson I*, supra, at ¶54.

Upon remand, the state elected to merge the count of felonious assault with a deadly weapon into the felonious assault for causing serious physical harm. The trial court merged the two counts and sentenced Wilson to an aggregate sentence of 28 years in prison. Wilson’s sentence included consecutive three-year firearm specifications; one attached to his conviction for involuntary manslaughter and one attached to his merged conviction for felonious assault.

In Wilson’s appeal following his resentencing, Wilson argued the following: 1) that the trial court erred by imposing consecutive terms of imprisonment for the three-year firearm specifications where the underlying felonies were committed as part of the same act or transaction, and 2) that the trial court violated his rights to equal protection and due process of law when it resentenced him contrary to R.C. 2929.11.

The Eighth District found that the trial court erred by failing to merge Wilson’s firearm specifications despite Wilson never having raised this argument in his first appeal. The Eighth District’s opinion disregarded the fact that the trial court was without authority to consider merger of the firearm specifications because it was beyond the scope of the remand, which was solely for merger of the felonious assault counts. Everything except for the merger of the felonious assault counts had become the law of the case.

Because the trial court was bound by the law of the case to follow the Eighth District’s decision, the trial court lacked authority to merge Wilson’s firearm specifications. See *State v. Martin*, Montgomery App. No. 21697, 2007-Ohio-3585, ¶15 (had the trial court purported to further merge the offenses of which Martin had already

been convicted, it would have erred, since to do so would have been outside the scope of its mandate from the Ohio Supreme Court). As the trial court could not err in failing to act where it was unauthorized to do so, the State respectfully requests this Honorable Court summarily reverse the Eighth District's decision.

II. Res judicata bars a defendant from raising merger of firearm specifications for the first time in a resentencing appeal.

The Eighth District has now found finality in sentencing to be irrelevant. This Court has long recognized that “any issue that could have been raised on direct appeal and was not is *res judicata* and not subject to review in subsequent proceedings.” *State v. Saxon*, 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1245, ¶16 citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 37; *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 143, 652 N.E.2d 710. *Res judicata* “promotes principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard.” *Id.* at ¶18.

In *Saxon*, this Court held “a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by *res judicata* from appealing that sentence following a remand for resentencing on other offenses.” *Id.* at ¶19. As this Court explained, “[t]o hold otherwise would essentially abrogate the doctrine of *res judicata* for multi-count sentences and precludes finality in sentencing.” *Id.*

Wilson's merger argument in a resentencing appeal is contrary to this Court's ruling in *Saxon*. In his direct appeal, Wilson argued that the trial court erred when it failed to merge the two counts of felonious assault. Wilson did not argue merger of the firearm specifications. The Eighth District remanded solely for merger of the felonious

assault counts. When Wilson appealed his resentencing, he argued for the first time that the firearm specifications should merge. The Eighth District found that Wilson's claim was not barred because the trial court held a de novo sentencing hearing and that the trial court could not impose a sentence that was contrary to law. *State v. Wilson*, 2010-Ohio-1201, ¶14.

Following *Wilson II*, the Eighth District has limited the scope of appeal after resentencing in *State v. Banks*, Cuyahoga App. No. 93880, 2010-Ohio-3206. In *Banks*, the Eighth District applied the doctrine of *res judicata* to bar review of an issue raised for the first time in a defendant's fourth appeal. Banks argued that his convictions for drug trafficking and drug possession should have merged pursuant to *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625. Banks' appeal raised an issue of settled law. In contrast, Wilson's merger argument is substantively unsettled and incorrect. See *State v. Moore*, Cuyahoga App. No. 92898, 2009-Ohio-6643. In *Moore*, the Eighth District refused to merge firearm specifications where, as in Wilson, there were two victims. In denying Moore's argument, the Eighth District explained that "[t]his court has previously held that even where the charged offenses occur during the same course of conduct, when each charge specifies a different victim, a separate animus exists for each of the charged offenses." *Id.* at ¶16. Effective September 9, 2008 the legislature amended R.C. 2929.14(D)(1)(b) to require that firearm specifications run consecutively in situations similar to the instant case. R.C. 2929.14(D)(1)(g). The legislature clearly intends that defendants who cause or attempt to cause serious physical harm to other individuals be punished accordingly.

As previously discussed, the trial court only had authority to sentence Wilson pursuant to the specific remand by the Eighth District. Numerous other appellate districts have correctly applied the principles of *res judicata* and law of the case and held that the doctrines bar a defendant from raising merger in a resentencing appeal. *State v. Dillard*, Jefferson App. No. 08 JE 35, 2010-Ohio-1407; *State v. Howard*, 2nd Dist No. 2008 CA 87, 2009-Ohio-3432; *State v. Lariva*, Franklin App. No. 08AP-413, 2008-Ohio-5499 (10th Dist.); *State v. Craig*, 5th Dist. No. 2005CA16, 2005-Ohio-5300 .

The doctrine of *res judicata* prevents defendant from bringing piecemeal appeals in an effort to promote judicial economy and finality. The Eighth District's decision essentially abrogates the doctrine of *res judicata* contrary to this Court's ruling in *State v. Saxon*. As such, the State respectfully requests this Honorable Court summarily reverse the Eighth District's decision. In the event this Court does not summarily reverse the Eighth District's opinion, the State respectfully requests that jurisdiction be accepted and this Court consider whether a defendant may argue merger of firearm specifications for the first time in an appeal after a limited remand.

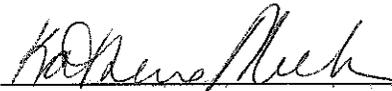
Conclusion

The State respectfully submits that the Eighth District's failure to apply *res judicata* and the law of the case doctrine requires summary reversal as being contrary to this Court's opinions in *Nolan v. Nolan* and *State v. Saxon*. In the event summary reversal is not granted, the State respectfully requests that this Court accept jurisdiction to consider whether a defendant is barred from arguing merger of firearm specifications for the first time in an appeal after a limited remand. The doctrine of *res judicata* is an important principle that promotes finality and judicial economy. The essential

abrogation of the doctrine of *res judicata* has broad implications and is a matter of great public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93427

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC R. WILSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502057

BEFORE: Boyle, J., Gallagher, A.J., and Dyke, J.

RELEASED: June 3, 2010

JOURNALIZED: JUN 14 2010



VALU 706 P80299

MARY J. BOYLE, J.:

Defendant-appellant, Eric Wilson, appeals his sentence. He raises two assignments of error for our review:

“[1.] The trial court erred as a matter of law by imposing multiple, consecutive terms of imprisonment for three-year firearm specifications given that the felonies underlying these specifications were committed as part of the same act or transaction.

“[2.] The trial court violated appellant[']s rights to equal protection and due process of law under the United States and Ohio Constitutions when it resentenced him contrary to the mandates of R.C. 2929.11.”

Finding merit to his first assignment of error, we vacate his sentence and modify it from 28 years to 25 years pursuant to our authority in R.C. 2953.08(G)(2).

Procedural History

In 2007, Wilson was charged with murder, attempted murder, two counts of felonious assault, two counts of aggravated robbery, kidnapping, rape, and two counts of attempted rape. Each count was accompanied by a one- and three-year firearm specification, and the kidnapping count additionally contained a sexual-motivation specification. Wilson was also charged with having a weapon

while under a disability. Before trial, the state dismissed the two counts of aggravated robbery.

A jury convicted Wilson of the lesser included offense of involuntary manslaughter with the firearm specifications, two counts of felonious assault with gun specifications, and having a weapon while under a disability. He was acquitted of all other charges.

The trial court sentenced Wilson to a total of 35 years in prison: nine years in prison for involuntary manslaughter, plus three years for the firearm specification attached; eight years for one count of felonious assault (serious physical harm), plus three years for the attached firearm specification; seven years for the other count of felonious assault (deadly weapon), but it merged the firearm specification attached to this felonious assault with the other firearm specification attached to the other felonious assault; and five years for having weapons while under a disability.

Wilson appealed his conviction and sentence. See *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133. This court affirmed his convictions, but reversed his sentence, determining that Wilson's two felonious assault convictions were allied offenses and should therefore merge. *Id.* at ¶52. We remanded the case for resentencing and instructed the state to elect which offense of felonious assault should merge into the other. *Id.* at ¶54.

Upon remand, the state elected to merge the felonious assault for using a deadly weapon into the felonious assault causing serious physical harm, leaving Wilson with eight years for the merged counts of felonious assault, plus the three-year firearm specification. The trial court further imposed the same prison terms it did at the original sentencing hearing on the remaining offenses, for an aggregate sentence of 28 years in prison.

Standard of Review

We review sentences pursuant to a two-prong standard set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the court held that:

“In applying *Foster* [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470] to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.” *Id.* at ¶4.

Merging Firearm Specifications

Wilson claims that the trial court erred when it sentenced him to two consecutive prison terms for the three-year firearm specifications, one that was

attached to the involuntary manslaughter and one that was attached to the merged felonious assault convictions. He argues that the trial court should have merged them because they were committed as part of the same act or transaction.

A. Res Judicata

Before we get to the merits of Wilson's claim, we must address the state's sole argument to Wilson's first assignment of error. The state maintains that because Wilson did not raise this specific issue in his direct appeal, where the trial court sentenced him to the same, that res judicata bars him from raising it now. We disagree.

This court remanded for resentencing. The trial court held a de novo sentencing hearing. Wilson is not collaterally attacking his sentence. He is directly appealing the sentence he received upon resentencing. "[N]o court has the authority to substitute a different sentence for that which is required by law." See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Thus, if Wilson is correct, then his sentence is contrary to law and the trial court acted without authority in imposing it.

Thus, we will address the merits of Wilson's first assignment of error.

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B. "Same Act or Transaction"

If a defendant is convicted of a firearm specification under R.C. 2941.145, then R.C. 2929.14(D)(1)(a)(ii) requires the sentencing court to impose a three-year mandatory prison term. But the court is not permitted to impose more than one such term for multiple firearms specification convictions, if the underlying felonies were "committed as part of the same act or transaction." R.C. 2929.14(D)(1)(b).

The Ohio Supreme Court defined "transaction" as "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills* (1994), 69 Ohio St.3d 690, 691, 635 N.E.2d 370. The appropriate test is "whether the defendant 'had a common purpose in committing multiple crimes' and engaged in a 'single criminal adventure.'" *State v. Like*, 2d Dist. No. 21991, 2008-Ohio-1873, ¶40, quoting *State v. Adams*, 7th Dist. No. 00CA211, 2006-Ohio-1761, ¶54-57. The focus of the inquiry is "on the defendant's overall criminal objectives." *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶45. This is a highly fact-specific inquiry. *Id.* at ¶46.

We find this case to be analogous to *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio-5775, 900 N.E.2d 1037. In *Stevens*, the defendant, unknown to any of his victims, "burst into [a] home and pulled out a gun; he demanded drugs and

money from everyone inside; then he approached three people, one after the other, to demand everything each had.” *Id.* at ¶6. There was no evidence that the criminal objective of entering the home was to rob any particular victim.

The Second Appellate District explained:

“Despite the multiple victims here, this case is analogous to those cases in which the evidence revealed a defendant with a single objective. In each of those cases, the firearms-specification convictions were merged under R.C. 2929.14(D)(1)(b). For example, in *State v. Hughley* (1984), 20 Ohio App.3d 77, 20 OBR 97, 484 N.E.2d 758, the defendant walked into a bar brandishing a gun and robbed the bartender and most customers. Without analysis, the court found that his offenses were part of one criminal objective. Similarly, in [*State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85], the defendant ran up to a car as it pulled into a driveway. Upon reaching the car, he shoved a gun in the driver’s face and demanded money from both the driver and the passengers. The court rejected the state’s argument that he had separate objectives — first to rob the driver, then to rob the passengers. Instead, while acknowledging that separate victims could indicate separate objectives, the court found that the evidence in the case did not support such a conclusion. Rather, the evidence pointed to a single criminal objective of robbing all the passengers. Finally, in *State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271, the defendant

robbed a store clerk and several customers. All the offenses were part of the same transaction, said the court, because “[t]hey were a series of continuous acts bound together by time, space and purpose, and directed toward a single objective — to rob the store.’ Id. at ¶32.” *Stevens* at ¶8.

The Second District went on to explain:

“Conversely, the cases with multiple victims in which the court found distinct criminal objectives contained evidence that the defendants had targeted those specific victims individually. Consequently, these courts properly refused to merge the firearms-specification convictions. A few cases will suffice to illustrate that these cases are distinguishable from the first group of cases and from the instant case. In *State v. Hughes* (Jan. 21, 1999), 8th Dist. No. 73279, the defendant was convicted of murdering one police officer and attempting to murder a second during a shootout. The court said that there was no error in finding two separate objectives to kill two different men. Id. at 7. Similarly, the court in [*State v. Herring*, 7th Dist. No. 0JE37, 2002-Ohio-2786] refused to merge the firearms specifications on two kidnapping and two aggravated-murder convictions because it found that each of these four crimes involved a distinct objective that concerned a specific individual. Finally, the defendant in *State v. Gary* (Feb. 14, 2002), 8th Dist. No. 79224, a case from this court, raped two women at gunpoint within moments of each other. We found that the rapes of

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the two victims were not part of the same transaction because the defendant had distinct objectives of raping each victim.” *Stevens* at ¶9.

The *Stevens* court concluded:

“The defendants in these cases had criminal objectives that focused on specific victims: raping this victim; murdering that victim; kidnapping that other victim. In contrast, the defendants in the former group of cases had criminal objectives that were not focused on any particular victim but were more abstract. Their objective was to rob this bar or that car, regardless of who was inside. While the pursuit of their objectives resulted in multiple victims, their objectives would have been met even if there had been only one patron in the bar or no passengers in the car. The same cannot be said about the objectives of the defendants in the latter group of cases. For instance, had the defendant in *Gary* not raped these particular two women, he would have been frustrated in trying to reach his criminal objective. Here, the evidence does not reveal that [the defendant] had any particular victim in mind. Rather, it appears that he embarked on a ‘criminal adventure’ to rob whomever was in [the] home.” *Id.* at ¶10.

In the case sub judice, the pertinent facts established at trial were that Wilson was driving around East Cleveland selling drugs. He stopped his car to meet with some buyers when James Yhonquea (“Yhonquea”) walked up, pulled

out his gun, and put it against Wilson's head. Yhonquea took Wilson's drugs, money, and cell phone and started to run. Wilson started to run after Yhonquea and began shooting at Yhonquea, firing eight rounds, hitting a parked car and a house. Yhonquea returned fire, hitting Wilson's car and a 12-year-old girl who lived in the neighborhood. She managed to walk to a neighbor's house, collapsed, and died approximately 30 minutes later.

Wilson eventually caught up with Yhonquea and shot him in the back. Wilson then recovered his drugs, money, and cell phone. When Wilson reached his car, he told his passenger, "[I]f the dude would never took my phone, I wouldn't have chased him down." (Yhonquea recovered from the gunshot wound and was charged separately from Wilson. *State v. Yhonquea*, C.P. No. CR-502058.)

It is clear from these facts that although there were two victims, Yhonquea and the young girl, Wilson's actions amounted to one continuous assault against Yhonquea. He had one purpose, i.e., one criminal objective, when he chased Yhonquea down the street, firing eight rounds at him, and finally shooting him in the back.

Therefore, we find that the trial court erred by not merging the firearm specifications, as R.C. 2929.14(D)(1)(b) requires. The two consecutive three-year

prison sentences for the firearm specifications are clearly and convincingly contrary to law.

Because this portion of the sentence was statutorily imposed, we find it expedient to modify his sentence with the ability granted us by R.C. 2953.08(G)(2) rather than remand to the trial court for resentencing.¹ Accordingly, we modify that portion of Wilson's sentence imposed for the firearms-specification convictions by merging these convictions into a single three-year term.² Consequently, his total sentence should be 25 years.

Wilson's first assignment of error is sustained.

R.C. 2929.11

Wilson also argues that the trial court did not comply with the mandates of R.C. 2929.11 when it resentenced him to 28 years. Specifically, he maintains that the trial court did not sentence him proportionately to the crimes committed

¹R.C. 2953.08(G)(2) provides in pertinent part that:

"The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. *** The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

"(b) That the sentence is otherwise contrary to law."

²*State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E. 2d 182 (where the Ohio Supreme Court held the state retains the right to elect), is not implicated here. In *Whitfield*, the Ohio Supreme Court specifically addressed the allied offenses statute (R.C. 2941.25), not R.C. 2929.14(D)(1)(b), which is at issue in this case.

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or proportionately to similarly situated offenders. Nor did it, he claims, engage in the analysis required by R.C. 2929.11. We disagree.

R.C. 2929.11(B) states: "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

This court has held that in order to support a contention that his or her sentence is disproportionate, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v. Breeden*, 8th Dist. No. 84663, 2005-Ohio-510, ¶80, citing *State v. Woods*, 8th Dist. No. 82789, 2004-Ohio-2700. Wilson did not raise this issue with the trial court, nor did he present any evidence to the trial court. Thus, there is nothing in the record to indicate that his sentence is impermissibly disproportionate.

We further find no merit to Wilson's contention that the trial court did not consider R.C. 2929.11. He argues that the trial court failed to indicate that it considered the statute, "either orally in the resentencing transcript or in written form in the subsequent resentencing entry." It is well settled, however, that

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“where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.” *Kalish*, supra, at ¶18, fn. 1.

Accordingly, Wilson’s second assignment of error is overruled.

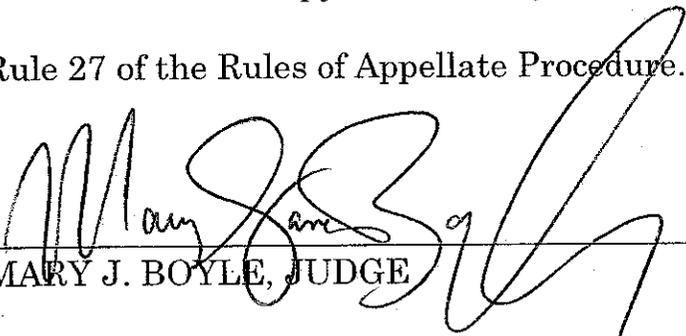
Judgment affirmed in part, reversed in part, and remanded. Upon remand, the trial court is ordered to modify Wilson’s sentence in accordance with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MARY J. BOYLE, JUDGE

ANN DYKE, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS WITH SEPARATE OPINION

SEAN C. GALLAGHER, A.J., CONCURRING:

I concur fully with the majority opinion.

I recognize that pursuant to R.C. 2929.14(D)(1)(b) a trial court may not impose more than one prison term for multiple firearm specifications if the underlying felonies were “committed as part of the same act or transaction.” As the majority decision reflects, Ohio courts have refused to merge firearm specifications when there is a distinct objective concerning the victims involved, as opposed to a random or more abstract intent. I believe there is a disconnect in the law that allows a person to be convicted for separate crimes when multiple victims are involved, but yet requires the merger of firearm specifications that are said to be committed as part of the same act or transaction.

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