

ORIGINAL

IN THE SUPREME COURT OF OHIO

Sylvester J. Lawson II,

Appellant,

v.

The State of Ohio,

Appellee.

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

Supreme Court Case No. 2010-1897

Court of Appeals
Case No. C-080877

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SYLVESTER J. LAWSON II

Sylvester J. Lawson II, Pro se
Prison Id. No. 547-160
Chillicothe Corr. Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

Pro se Appellant

Joseph T. Deters
Prosecuting Attorney
Scott Heenan (0075734 P)
Assistant Prosecuting Attorney
230 east Ninth Street, Suite 4000
Cincinnati, Ohio 45202

Counsel for Appellee,
Hamilton County Prosecutor's Office

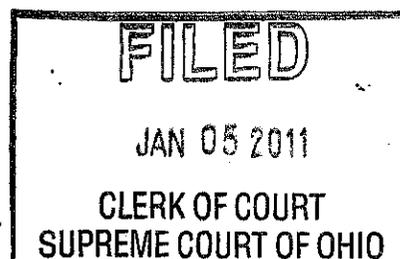


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.	1
STATEMENT OF THE CASE AND FACTS.	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	6
<u>Proposition of Law No. 1:</u> The trial court erred to the prejudice of Appellant by imposing sentences for both rape and kidnapping which were allied offenses of similar import, which denied Appellant the due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2, 10 and 16 of the Ohio Constitution	6
<u>Proposition of Law No. 2:</u> Appellant's recommended sentence is contrary to law in violation of the due process and equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Ohio Constitution, Article 1, Section 2, 10 and 16, because the trial court misinformed the Appellant of the maximum possible sentence Appellant faced upon conviction and Ohio Revised Code Section 2953.08 does not preclude appellate review of jointly recommended sentences imposed contrary to R.C. 2941.25.	10
<u>Proposition of Law No. 3:</u> The trial court erred to the prejudice of Appellant in failing to ensure that Appellant understood the maximum possible penalty as required by Criminal Rule 11(C)(1), in violation of the due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution and Ohio Constitution Article 1, Section 2, 10 and 16.	11
<u>Proposition of Law No. 4:</u> The trial court erred to the prejudice of Appellant in failing to properly inform Appellant of his right to compel, summon, or otherwise require witnesses to appear and testify on his behalf, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2, 10 and 16 of the Ohio Constitution	12
<u>Proposition of Law No. 5:</u> The Appellant was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2, 10 and 16 of the Ohio Constitution	14
CONCLUSION.	15
CERTIFICATE OF SERVICE.	15

APPENDIX

Appx. Page

Decision of the Hamilton County Court of Appeals
||September 3, 2010|| 6

Judgment Entry of the Hamilton County Court of Appeals
||September 3, 2010|| 1

Supreme Court of Ohio ENTRY granting appellant's motion for delayed
appeal. Case No. 2010-1897 ||December 15, 2010) 1

EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents an issue for review regarding whether rape and kidnapping offenses were committed with a separate animus, and are therefore allied offenses of similar import.

In this case, the court of appeals "After a thorough review of the record, [held] ... that the rape and kidnapping offenses were committed with a separate animus" and concluded, therefore, that there existed a separate animus for each offense sufficient to support separate convictions. The court of appeals, in granting Appellant's application to reopen his direct appeal, had initially concluded that the rape and kidnapping were allied offenses of similar import because the record could not "be said to demonstrate a spatial or temporal separation between the two offenses or a separate animus as to each." Then, after "closely reexamining the record, ... determined that [their] initial conclusion was wrong."

The decision of the court of appeals denies Appellant's right to due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 2, 10 and 16 of the Ohio Constitution. First, the trial judge committed "plain error" by failing to merge allied offenses of similar import, to further prejudice Appellant, the trial judge misinformed the Appellant of the maximum sentence that Appellant was subject to upon conviction.

The Supreme Court of Ohio has found that rape and kidnapping are allied offenses of similar import. **State v. Donald**, (1979), 57 Ohio St.2d 73, 74-75, 386 N.E.2d 13 1. In this case, there is no evidence of separate animus as to each offense.

Section 2941.25 of the Ohio Revised Code provides:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

"(B) Where the defendant conduct constitutes two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

In applying R.C.2941.25, the Supreme Court of Ohio has provided a two-tiered test in determining whether two offenses are allied offenses of similar import. In **State v. Logan** 1979, 60 Ohio St.2d 126, 397 N.E.2d 1345, the Ohio Supreme Court adopted the following guidelines: "(a) where the restraint or movement of the victim is merely incidental to separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions; (b) where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support convictions.

The court of appeals, after conducting a thorough review, held that, in this case the rape and kidnapping offenses were committed with a separate animus. Specifically concluding that "Lawson's act of sexually attacking the victim while in a moving vehicle subjected her to a substantial increase in the risk of harm she faced. Further, the fact that the victim was forced into a car and driven away from where she had been abducted demonstrated substantial movement of the victim that was not merely incidental to the rape. Accordingly, we hold that there exists a separate animus for each offense sufficient to support separate convictions."

The decision of the court of appeals is contrary both to the statutory

scheme of R.C. 2941.25 and to this Court's legal authority. The significance of this misapplication of statutory mandates is that the court of appeals decision violates Appellant's right to due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2, 10 and 16 of the Ohio Constitution.

Moreover, Appellant's guilty plea is not knowingly, intelligently or voluntarily entered because the trial court failed to merge the allied offenses, as required under O.R.C. 2941.25 Multiple Count Statute, and misstated the maximum penalty Appellant faced upon conviction to induce the Appellant to plead guilty, which also violated Appellant's rights to Due Process and equal Protection of the Law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2, 10 and 16 of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS

1- STATEMENT OF THE CASE.

Appellant, Sylvester Lawson II was charged in a two count indictment. On January 18, 2008, Appellant, was indicted as follows:

Count 1: Rape R.C. 2907.02(A)(2) With specifications [F1]
Count 2: Kidnapping R.C. 2905.01(A)(4) With Specifications [F1]

Appellant entered pleas of not guilty to each count of the indictment at arraignment.

On August 15, 2008, Appellant withdrew his pleas of not guilty and entered into a plea agreement with the assistant prosecuting attorney. Appellant agreed to plead guilty to both counts in the indictment with specifications in exchange for an agreed upon sentence of fifteen years in the Ohio Department of Corrections.

The Court advised Appellant that he was facing 23 years in prison. The Court accepted Appellant's guilty pleas and sentenced him to six years of

confinement on Count One (Rape) plus three years in the Department of Corrections on Specification 2 to Count 1, with the sentence on Count 1 to run consecutively. Appellant was also sentenced to six years on Count 2 with the sentence to run consecutive to Count 1.

Appellant timely filed a notice of appeal. Appellant was appointed counsel for his appeal. Appellant's original appellate counsel filed an Anders brief in the matter. Appellant filed a supplemental brief. On June 17, 2009, the First District Court of Appeals affirmed the decision of the trial court. On September 14, 2009, Appellant filed an Application to Reopen Direct Appeal pursuant to Appellate Rule 26(B). On February 17, 2010, the First District Court of Appeals granted Appellant's Application to Reopen Direct Appeal and appointed counsel.

On September 3, 2010, the court of appeals entered its decision affirming the judgment of the trial court. Upon consideration of Appellant's motion for a delayed appeal, by the Supreme Court of Ohio, this Court granted Appellant's motion for delayed appeal. Appellant now timely appeals the court of appeals decision to this Honorable Court.

2- STATEMENT OF THE FACTS.

Sylvester Lawson II, Appellant, is a high school graduate and Gulf War veteran. In the summer of 2004, Appellant met Cherelle Dukes. Appellant and Dukes became acquainted and had consensual relations. Appellant and Dukes celebrated Duke's birthday in March, 2005.

On January 18, 2008, Appellant was indicted for one count of Rape with Specifications and one count of Kidnapping with Specifications, for an incident which allegedly occurred with Ms. Dukes on March 15, 2005. The conduct allegedly originated at the same time. Appellant denied the

allegations and plead not guilty to both charges and related specifications. Although subpoenas for witnesses were issued by the defense and returned, Appellant was informed that his witnesses could not be found. Additionally, Appellant was told that he would face an additional indictment for Aggravated Robbery if he did not enter a plea to the Rape and Kidnapping charges. Appellant was encourage dte waive his right to a trial by jury and enter a plea of guilty to both charges in exchange for an agreed sentence of incarceration. Without witnesses and with the possible additional indictment looming, Appellant agreed to waive his right to a trial by jury. Appellant entered pleas of guilty to the charges in the indictment and agreed with the prosecutor to accept a term of fifteen years in the Ohio Department of Corrections.

The trial judge accepted the plea agreement. At sentencing, the trial judge informed Appellant that "Count 1 and Count 2 a ref elonies of the first degree which means I can sentence you to three, four, five, six, seven, eight, nine, up to ten years in prison and a fine up to \$20,000. And then there is also a three-year gun specification which means I have to sentence you to three years actual incarceration to be served consecutively with and prior to the sentence on the particluar count." The trial judge continued, "Now, the sentences on Counts 1 and 2 could be made by me to run concurrently, that means at the same time, or consecutively, that is one after the other as I see fit." Essentially, Appellant was informed by the trial judge that he was facing a maximum of twenty-three years in prison for the indicted offenses. Based on that information, Appellant agreed to enter guilty pleas and agreed to serve fifteen years on the charges. The trial judge accepted the pleas and sentenced Appellant to six years of confinement on Count 1 (Rape) plus three years in the department of Corrections on Specifications 2 to Count 1, with sentences on Count 1 to run consecutively. Appellant was also sentenced to

six years on Count 2 with the sentence to run consecutive to Count 1. An appeal was timely filed.

The court of appeals erred in ruling that the rape and kidnaping were committed with a separate animus; that his sentence was authorized by law; that his guilty pleas were knowingly, voluntarily and intelligently entered. In support of its position on these issues, the Appellant present the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No.1: The trial court erred to the prejudice of Appellant by imposing sentences for both rape and kidnaping which are allied offenses of similar import, which denied Appellant the Due Process and Equal Protection of the Law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2, 10 and 16 of the Ohio Constitution.

The record reflects that the prosecution entered into a plea agreement with the Appellant for the offenses of Kidnaping in violation of R.C. 2905.01 (A)(4), "for the purpose of engaging in sexual activity", and Rape in violation of R.C. 2907.02 (A)(2), both with gun specifications, and that the offenses are allied offenses of similar import committed with a single animus. The Appellant was convicted and sentenced for both offenses, violating R.C. 2941.25(A), and the subsequent sentence is contrary to law, in violation of the **Double Jeopardy and Due Process of law guaranteed by the Constitution of Ohio and the United States.**

The court of appeals erred to the prejudice of the Appellant when the court held "we conclude that Lawson's act of sexually attacking the victim while in a moving vehicle subjected her to a substantial increase in the risk of harm she faced. Further the fact that the victim was forced into a car and driven away from where she had been abducted demonstrated substantial movement of the victim that was not merely incidental to the rape. Accordingly we hold that there existed a separate animus for each offense sufficient to support

separate convictions. Decision, at p.4 ¶ 7.

Contrary to the court of appeals' decision one of the facts presented in the indictment, a fact plead to by the Appellant, and agreed to by the prosecution in the plea agreement is that Appellant was charged with violating R.C. 2905.01(A)(4), Kidnapping, "for the purpose of engaging in sexual activity."

The Bill of particulars states "On or about March 5, 2005, at approximately 2:15 a.m., at 7809 Dawn Road, victim CD was retrieving a book bag from her aunts car, when two suspects pulled up in a vehicle. Defendant poited a handgun at her and stated, 'where's the money". The victim told the Defendant she had no money. The defendant made CD get into the back seat of the vehicle. Defendant got into the back seat also, while the co-defendant got into the drivers seat and began to drive the car. Defendant told her to take her clothes off. He grabbed the victim by the haie and forced her to perform felatio while he had the gun pointed at her. He ejaculated in her mouth.

All the events happened simultaneously, therefore, the victim was not subjected to a substantial increase in the risk of harm she faced beyond that of the initial order at gunpoint to get in the car for the purpose of facilitating the rape.

The surrounding circumstances that prompted the State to indict the Appellant with a violation of R.C. 2905.01 (A)(4), is because the State alleged that the victim was forced in to the backseat of the vehicle for the purpose of sexual activity.

"R.C. 2941.25(B), by its use of the term "animus", requires us to examine the defendant's mental state in determining whether two or more offenses may be chiseled from the same criminal conduct. In this sense, we believe that

the General Assembly intended the term 'animus' to mean purpose or, more properly, immediate motive." **State v. Logan**(1979), 60 Ohio St.2d 126, at 131, 397 N.E.2d 1345, 1349. "[A]nimus [...] must be inferred from the surrounding circumstances." **Logan**, supra, Ohio St.2d at 131, N.E.2d at 1349 citing **State v. Robinson**(1975), 48 Ohio App.2d 197, 205, 356 N.E.2d 725.

"Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime." **Logan**, supra, O.St.2d 131, 397 N.E.2d 1350.

In the case at bar the restraint and movement of the victim had no significance apart from facilitating the rape.

The record in the instant case reflects that the detention was brief, the movement was slight, and the victim was released immediately following the commission of the rape near where she was abducted.

"The detention was brief, the movement was slight, and the victim was released immediately following the commission of the rape. In such circumstances we cannot say that Appellant had a separate animus to commit kidnapping." **Logan**, supra, 60 O.St.2d at 135, 397 N.E.2d at 1352.

Further, the record is devoid of any evidence of secret confinement, such as in the trunk of a vehicle, an abandoned building, or non-trafficked area. See **Logan**, supra.

In light of these surrounding circumstances Kidnapping R.C. 2905.01(A)(4) and Rape, "by their very nature are committed for the same purpose", see **State v. Donald**(1979), 57 Ohio St.2d 73.

Therefore the plea agreement between the State and the Appellant, which subsequently convicted and sentenced the Appellant with Kidnapping R.C. 2905.01 (A)(4) and Rape R.C. 2907.02 (A)(2), was not knowingly, voluntarily

and intelligently entered into. The convictions and sentences are not authorized by law, in violation of both the Ohio and United States Constitutions and must be reversed.

Where offenses involve the same conduct and consist of single animus, the Appellant may be convicted and sentenced for only one charge.

In applying R.C. 2941.25, the Supreme Court of Ohio has provided a two-tiered test in determining whether two offenses are allied offenses of similar import. In **State v. Logan**, the Ohio Supreme Court adopted the following guidelines: "(a) where the restraint or movement of the vehicle is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions; (b) where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support convictions. See **Logan**, supra. 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. **State v. Blankenship**, (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

The Supreme Court of Ohio has found that rape and kidnapping are allied offenses of similar import. **State v. Donald** (1979), 57 Ohio St.2d 73, 74-75, 386 N.E.2d 1341, syllabus; accord **State v. Adams**, 103 Ohio St.3d 508, 2004-Ohio-5485, 817 N.E.2d 29, 189-95; See also **State v. Logan**, supra. In the current case, there was no evidence of separate animus as to each offense. Additionally, the court of appeals has previously determined that the "record

of proceedings below cannot be said to demonstrate a spatial or temporal separation between the two offenses or a separate animus as to each. T.d. The Supreme Court of Ohio has prohibited trial courts from imposing individual sentences for counts that constitute allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1. In *State v. Underwood*, the court cautioned trial courts, noting that "a defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." *Id.* Therefore, because the offenses in the current case were allied offenses and there was not a separate animus as to each, the trial court was under a duty to merge the allied counts at sentencing. The trial court committed plain error in sentencing Appellant for both offenses.

Proposition of Law No.2: Appellant's recommended sentence is contrary to law in violation of the Due Process and Equal Protection of the Law guaranteed by the Fourteenth Amendment of the United States Constitution and Ohio Constitution, Article 1, Section 2, 10, and 16, because the trial court misinformed the Appellant of the maximum possible sentence Appellant faced upon conviction and Ohio revised Code Section 2953.08(D)(1) does not preclude appellate review of jointly recommended sentences imposed contrary to R.C. 2941.25.

Jointly recommended sentences imposed contrary to R.C.2941.25 are not "authorized by law" for purposes of R.C. 2953.08(D)(1) and thus are not exempt from appellate review.

Under Section 2953.08(D)(1) of the Ohio revised Code, jointly recommended sentences are exempted from appellate review where the sentence "is authorized by law, has been jointly recommended by the defendant and the prosecution in the case, and is imposed by the sentencing judge." R.C. 2953.08(D)(1). Previously, when a sentence was contrary to R.C.2945.21, the appellate court held that it was precluded from review of the agreed or jointly recommended sentence under R.C. 2953.08(D)(1). However, the Ohio Supreme Court recently clarified the issue of whether a sentence contrary to R.C. 2941.25 is

"authorized by law for purposes of R.C.2953.08(D)(1). See **State v. Underwood**, supra. In **State v. Underwood**, the Ohio Supreme Court held that "when a sentence fails to include a mandatory provision, it may be appealed because such a sentence is 'contrary to law' and is not 'authorized by law.'" **Id.** at ¶ 21.

Appellant was not properly informed of the maximum possible sentence. As a result, the sentence is contrary to law, thus permitting Appellant to appeal the jointly recommended sentence.

Proposition of Law No.3: The trial court erred to the prejudice of Appellant in failing to ensure that Appellant understood the maximum possible penalty as required by Criminal Rule 11(C)(1)(a), in violation of the Due Process and Equal Protection of the Law as guaranteed by the Fourteenth Amendment of the United States Constitution and Ohio Constitution Article 1, Section 2, 10 and 16.

Under Criminal Rule 11(C)(1)(a), a trial court must ensure that a Defendant understands the maximum possible penalty involved before the trial court accepts guilty pleas to allied offenses.

Criminal Rule 11 provides that a court shall not accept a plea of guilty without first addressing the defendant and determining that "the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved" and that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence." Crim.R.11. In order to substantially comply with the requirements of Crim.R. 11, the trial court must advise the defendant of the maximum possible penalty. **State v. Calvillo** 1991, 76 Ohio App.3d 716. A plea is rendered involuntary where the maximum penalty is misstated by the trial court. **State v. Caplinger** 1995, 205 Ohio App.3d 567.

Appellant was not adequately informed of the maximum penalties involved in the pending case. Specifically, the trial court informed Appellant that

each count of the indictment could carry a prison term of up to 10 years. T.p. Vol. III, p.42. Additionally, the court informed Appellant that the gun specification carried a 3 year prison term. *Id.* The trial court judge stated that the "sentences on Counts 1 and 2 could be made to run ... consecutively, that is, one after the other as I see fit." *Id.* at 42. Based on the representations of the trial court, his attorney and the plea form, Appellant believed that he was facing up to 23 years in the Ohio Department of Corrections. Relying on those representations, Appellant chose to waive his constitutional rights and enter a plea of guilty to both charges. In exchange for his plea, Appellant understood that the prosecutor would recommend a sentence of six years on each count plus a three year gun specification, for a total of 15 years of incarceration.

At the time of his plea, Appellant was not aware, nor was he made aware by trial counsel or the trial court, that rape and kidnapping are allied offenses of similar import as contemplated by R.C. 2941.25 and, therefore, he could not constitutionally be sentenced on both counts. Instead of facing a maximum penalty of 23 years in the Department of Corrections, Appellant actually faced only 13 years. Without accurate information regarding maximum possible sentences, Appellant was not able to enter knowing, voluntary or intelligent pleas. The trial court committed plain error as it did not substantially comply with Crim.R.11 when accepting Appellant's pleas.

Proposition of Law No.4: The trial court erred to the prejudice of Appellant in failing to properly inform Appellant of his right to compel, summon, or otherwise require witnesses to appear and testify on his behalf, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 10 and 16 of the Ohio Constitution.

A trial court violates a Appellant's constitutionally protected rights when it fails to properly inform appellant of his constitutional right to compel, summon or otherwise require witnesses to appear and testify on his

behalf.

The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution provide protection for the right to compulsory process. **U.S. Const. Amend. 6; Ohio Const. Art. I § 10; State v. Nero**||1990||, 56 Ohio St. 3d 106. The trial court's explanation of the right to compulsory process should be reviewed for strict compliance. **State v. Higgs**||1997||, 123 Ohio App.3d 400. Merely advising the appellant that he has the right to have subpoenaed witnesses to testify in your favor" is insufficient to apprise that appellant of his constitutional right to a compulsory process. **State v. Senich**||Sept.25, 2003||, Cuya. App.No. 82851. The trial court must inform an appellant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the appellant's behalf. Otherwise, the logical import of the court's notice is that the appellant could present such witnesses as he could only secure through his own efforts. **Id. at ¶ 33.**

In the instant matter, the trial court used insufficient language to inform the appellant of his constitutional right to compulsory process. The trial court did not properly inform the appellant of his constitutional right to compel, summon, or otherwise require witnesses to appear and testify on his behalf. Appellant was aware that subpoenas had been issued in his case; however, he was informed by his attorney that the witness could not be located. Appellant was not made aware until after the plea that the subpoenas were actually served on potential witnesses for the defense. If the court had properly informed the appellant that the court could require the subpoenaed witnesses to appear and testify, appellant would have proceeded to trial. Appellant could not make a knowing, voluntary and intelligent waiver of his rights.

The trial court did not properly inform the appellant of his constitutional right of compulsory process, causing the resulting guilty plea to be invalid.

Proposition of Law No. 5: The Appellant was denied effective assistance of counsel, in violation of the Sixth And Fourteenth Amendments to the United States Constitution and Article 1, Section 2, 10 and 16 of the Ohio Constitution.

In **Strickland v. Washington**, the United States Supreme Court enunciated the two-prong standard for evaluating claims of ineffective assistance of counsel. **Strickland v. Washington**¹⁹⁸⁴, 466 U.S. 668, 104 S.Ct. 2052 at 687-638. To sustain a claim of ineffective assistance of counsel, an appellant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that he was prejudiced as a result of counsel's actions or inaction. *Id.* In **Lockhart v. Fretwell**, the United States Supreme Court held that showing of prejudice does not depend solely on whether the outcome of the trial would have been different but for counsel's error. It is rather an inquiry into whether "counsel's performance renders the result of the trial unreliable or the proceedings fundamentally unfair." *Id.* at 371. When reviewing trial counsel's performance, courts must indulge "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." **Strickland**, 466 U.S. at 689. See also, **State v. Bradley**(1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

Appellant's trial counsel's representation fell below an objective standard of reasonableness. Specifically, despite Appellant's desire to proceed to a trial on the matter, Appellant's trial counsel failed to perform a rudimentary investigation of facts provided to him by Appellant. Appellant provided trial counsel with names of witnesses favorable to the defense. Trial counsel failed to investigate and interview promising witnesses. Although trial counsel issued subpoenas for Appellant's witnesses, he did not

make an effort to have the court enforce the served subpoenas. Appellant's trial counsel failed to fully advise Appellant of his constitutional right to compel, summon, or otherwise require witnesses to appear and testify. Trial counsel's inaction prejudiced the outcome of Appellant's case.

Additionally, trial counsel encouraged Appellant to plead guilty as charged to two offenses and agree to a recommended sentence which exceeded the maximum sentence by two years. Trial counsel also failed to object when the trial court did not comply with Crim.R. 11 when accepting Appellant's guilty pleas. Trial counsel also failed to object to the imposition of two sentences for allied offenses of similar import.

Trial counsel's deficient performance prejudicially affected the outcome of Appellant's case. Clearly, Appellant would not have entered the plea if he had been properly informed of his constitutional rights and had been properly informed of the maximum possible sentence he faced.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,


Sylvester Lawson II, Pro se

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Joseph T. Deters, Hamilton County prosecutor, Appellate Division, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on the 30th day of DECEMBER, 2010.


Sylvester Lawson II, Pro se

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SYLVESTER LAWSON, II,
Defendant-Appellant.

FILED
COURT OF APPEALS

SEP - 3 2010:

PATRICIA M. CLANCY
CLERK OF COURTS
HAMILTON COUNTY

APPEAL NO. C-080877
TRIAL NO. B-0710273

DECISION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

SEP 03 2010

Criminal Appeal From: Hamilton County Court of Common Pleas
COURT OF APPEALS

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 3, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Robertson, Geiser & Longano, LLC, and *Bernadette M. Longano*, for Defendant-
Appellant.

FILED
2010 SEP - 3 AM 15
PATRICIA M. CLANCY
CLERK OF COURTS
HAMILTON COUNTY OHIO

Please note: This case has been removed from the accelerated calendar.



D89824733

OHIO FIRST DISTRICT COURT OF APPEALS

Per Curiam.

{¶1} In August 2008, following the entry of a guilty plea, defendant-appellant Sylvester Lawson, II, was convicted of rape,¹ kidnapping,² and an accompanying gun specification. The trial court imposed an agreed prison term of six years each for the rape and kidnapping and three years for the firearm specification, and it ordered that the sentences be served consecutively for an aggregate prison term of 15 years. Lawson appealed his conviction, and appellate counsel was appointed. Lawson's appellate counsel filed a no-error brief, and this court affirmed Lawson's convictions and sentences.³ A few months later, Lawson filed an application to reopen his direct appeal under App.R. 26(B), and we granted the application.

{¶2} In the reopened appeal, Lawson brings forth four assignments of error. For the following reasons, we affirm his convictions and sentences.

{¶3} In his first assignment of error, Lawson argues that the trial court erred when it convicted and sentenced him for both rape and kidnapping in violation of R.C. 2941.25, Ohio's multiple-count statute.

{¶4} Under R.C. 2941.25, if a defendant's conduct results in allied offenses of similar import, the defendant may only be convicted of one of the offenses.⁴ But if the defendant commits each offense separately or with a separate animus, then convictions may be entered for both offenses.⁵

¹ R.C. 2907.02(A)(2).

² R.C. 2905.01(A)(4).

³ See *State v. Lawson* (June 17, 2009), 1st Dist. No. C-080877.

⁴ R.C. 2941.25(A).

⁵ R.C. 2941.25(B).

OHIO FIRST DISTRICT COURT OF APPEALS

{¶5} The Ohio Supreme Court has held that rape and kidnapping were allied offenses of similar import.⁶ But the court has established guidelines to determine whether kidnapping and rape were committed with a separate animus so as to permit separate punishments under R.C. 2941.25(B). In *State v. Logan*, the court held that “[w]here the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions.”⁷ Additionally, the *Logan* court recognized that where the asportation or restraint “subjects the victim to a substantial increase in risk of harm separate and apart from * * * the underlying crime, there exists a separate animus.”⁸

{¶6} After a thorough review of the record, we hold in this case that the rape and kidnapping offenses were committed with a separate animus. The record demonstrates that Lawson and an accomplice had driven up to the victim late at night while she was retrieving a bag from her aunt’s car. Lawson pointed a gun at her and demanded money. After the victim stated that she did not have any money, Lawson forced her into the back seat of the car. Lawson also entered the back seat and ordered the victim to disrobe. At gunpoint, Lawson forced the victim to perform fellatio while Lawson’s accomplice drove the car around town. The victim was later abandoned not far from where she had been abducted.

⁶ See *State v. Donald* (1979), 57 Ohio St.2d 73, 74-75, 386 N.E.2d 1341, syllabus; accord *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶89-95.

⁷ *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, syllabus.

⁸ *Id.*

OHIO FIRST DISTRICT COURT OF APPEALS

{¶7} We conclude that Lawson's act of sexually attacking the victim while in a moving vehicle subjected her to a substantial increase in the risk of harm she faced. Further, the fact that the victim was forced into a car and driven away from where she had been abducted demonstrated substantial movement of the victim that was not merely incidental to the rape. Accordingly, we hold that there existed a separate animus for each offense sufficient to support separate convictions.

{¶8} We note that in our decision granting Lawson's application to reopen his appeal, we concluded that the rape and kidnapping were allied offenses of similar import because the record could not "be said to demonstrate a spatial or temporal separation between the two offenses or a separate animus as to each." But after closely reexamining the record, we have determined that this initial conclusion was wrong.

{¶9} Accordingly, the first assignment of error is overruled.

{¶10} In his second assignment of error, Lawson contends that his agreed sentence was not "authorized by law" and was thus subject to appellate review under R.C. 2953.08(D)(1). We disagree.

{¶11} The Ohio Supreme Court has held that a sentence is "authorized by law" and is not appealable within the meaning of R.C. 2953.08(D) if it comported with all mandatory sentencing provisions.⁹

{¶12} We hold that Lawson's aggregate sentence of 15 years' incarceration was "authorized by law" because it comported with the appropriate sentencing provisions. Each prison term fell within the appropriate statutory range for the corresponding offense, and Lawson was properly notified of postrelease control.

⁹ *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶20.

OHIO FIRST DISTRICT COURT OF APPEALS

Further, based on our resolution of the first assignment of error, Lawson was not unlawfully sentenced on allied offenses of similar import.

{¶13} Therefore, the second assignment of error is overruled.

{¶14} In Lawson's third and fourth assignments of error, he essentially contends that his guilty pleas were rendered involuntary when the trial court failed to properly inform him of the possible maximum prison term he was facing, as well as failing to inform him of his right to compel and summon witnesses on his behalf. These assignments of error are not well taken.

{¶15} The record demonstrates that the trial court informed Lawson that he was facing a total of 23 years in prison: 10 years for rape, 10 years for kidnapping, and a mandatory three-year prison term for the gun specification. Further, a review of the plea hearing demonstrates that the trial court informed Lawson that he was giving up his right "to confront witnesses against you" and "to have subpoenaed witnesses to testify in your favor." Lawson stated on the record that he understood the rights he was waiving by pleading guilty.

{¶16} Because the trial court complied with Crim.R. 11(C), Lawson cannot demonstrate that his guilty pleas were made involuntarily. Accordingly, the third and fourth assignments of error are overruled.

{¶17} In his final assignment of error, Lawson maintains that his trial counsel was ineffective for (1) failing to perform a rudimentary investigation of facts provided to him by Lawson, (2) failing to investigate and interview promising witnesses, (3) failing to advise Lawson of his constitutional right to compel witnesses to appear and testify, and (4) encouraging Lawson to plead guilty to allied offenses of similar import. This assignment of error is not well taken.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶18} To sustain a claim for ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense.¹⁰

{¶19} We hold that Lawson's trial counsel was not ineffective. Lawson has failed to demonstrate that his trial counsel's performance was deficient in view of our holdings that Lawson was properly informed of his right to compel witnesses to appear and testify, and that the rape and kidnapping were committed with a separate animus to justify separate sentences. Further, we can find no evidence in the record, nor can Lawson point to any, that demonstrates that his trial counsel failed to investigate the facts or failed to investigate and interview Lawson's witnesses. In fact, Lawson's trial counsel subpoenaed several witnesses on Lawson's behalf.

{¶20} Because Lawson's trial counsel's performance was not deficient, we overrule the fifth assignment of error.

{¶21} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., HILDEBRANDT and HENDON, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁰ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. McCray*, 1st Dist. No. C-080860, 2009-Ohio-4390.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO, : APPEAL NO. C-080877
Plaintiff-Appellee, : TRIAL NO. B-0710273
vs. : *JUDGMENT ENTRY.*
SYLVESTER LAWSON, II, :
Defendant-Appellant.



This cause was heard upon the appeal, the record, the briefs, and arguments.

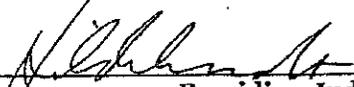
The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

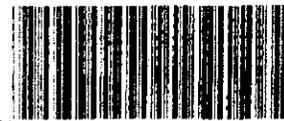
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on September 3, 2010 per Order of the Court.

By: 
Presiding Judge



D89824763

FILED

DEC 15 2010

The Supreme Court of Ohio

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2010-1897

v.

ENTRY

Sylvester Lawson, II

Upon consideration of appellant's motion for a delayed appeal,

It is ordered by the Court that the motion is granted.

It is further ordered by the Court that appellant shall file a memorandum in support of jurisdiction within thirty days from the date of this entry.

(Hamilton County Court of Appeals; No. C080877)



ERIC BROWN
Chief Justice