

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	)	Case No. 2011-0244
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
MICHAEL T. SWIDAS	)	
	)	Court of Appeals Case No. 2009-L-104
Defendant-Appellant.	)	

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**MEMORANDUM IN RESPONSE OF APPELLEE  
STATE OF OHIO**

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**FILED**  
MAR 11 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE  
A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A  
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

On February 11, 2011, Appellant Michael Swidas filed a Notice of Appeal and Memorandum in Support of Jurisdiction in which he challenges the Eleventh District Court of Appeals's judgment in *State v. Swidas*, 11<sup>th</sup> Dist. No. 2009-L-104, 2010-Ohio-6436. In *Swidas*, Appellant raised nine assignments of error resulting from a jury trial in the Lake County Court of Common Pleas. The Court of Appeals rejected all nine of Appellant's assignments of error and affirmed Appellant's multiple convictions. Appellant now reiterates all nine assignments of error as corresponding propositions of law. The Court of Appeals fully considered all of the arguments now raised, and while Appellant may disagree with the result reached by the Court of Appeals, he has not highlighted any issue that necessitates review by this Court.

Appellant's case does not present a substantial constitutional question nor a question of public or great general interest. Appellant's first two propositions of law purport to raise constitutional issues, but these issues are specific to this case. Moreover, these issues were fully considered and correctly decided by the Court of Appeals. Appellant's third through ninth propositions of law deal with well-settled areas of the law. Many of the questions raised by Appellant are specific to the facts of this case and, thus, not questions of public or great general interest. As such, jurisdiction should be declined.

## **STATEMENT OF THE CASE AND FACTS**

A concise statement of the facts in this case can be found in the Court of Appeals's decision. *Swidas* at ¶1-7.

## **ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

### **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I**

R.C. 2941.146 is unconstitutionally vague as applied to a defendant who discharges a firearm while standing outside of a motor vehicle.

For his first proposition of law, Appellant recycles his first assignment of error raised before the Court of Appeals. He claims that the phrase "from a motor vehicle" contained in R.C. 2941.146 was unconstitutionally vague as applied to this case. The Court of Appeals fully considered Appellant's argument and correctly rejected it. No further review by this Court is necessary, and jurisdiction should be declined.

R.C. 2941.146 creates an additional mandatory prison term "for committing a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by discharging a firearm from a motor vehicle \* \* \*."

Appellant argues that R.C. 2941.146 is inapplicable to this case because "[t]he vehicle was not the starting point or the source of the shots. This was not the case of what one imagines to be a 'drive-by' shooting where one drives to a victim and shoots from inside of the car, or stops the car just long enough to fire a gun." (Appellant's Mem. at 5). But the Court of Appeals correctly found that this argument was

fundamentally flawed: “The statute is plain on its face—all that is required for the enhancement is that the firearm is discharged ‘from a motor vehicle.’ The term ‘drive-by’ does not appear in the statute nor does the statute require the vehicle to be the starting point of the shooting.” *Swidas* at ¶21.

Ultimately, the Court of Appeals found that the trial court correctly allowed the jury to consider the specification even though Appellant was not directly inside of the vehicle when he fired the weapon:

If there is evidence that the discharge of the firearm occurred when the defendant was in physical contact with the vehicle and used the vehicle to facilitate the discharge of the firearm, then it is appropriate to instruct the jury on the specification contained in R.C. 2941.146. The statute clearly gives great weight to the mobile nature of the vehicle. If the legislature wanted to limit the application of the specification to circumstances where the defendant was “within” or “while riding in” the motor vehicle, it could have easily done so. The term “from” encompasses a much broader range of activity.

*Swidas* at ¶27. The Court of Appeals determined that facts existed in this case that permitted the jury to consider the specification:

Under the facts of the instant case, it was appropriate to allow the jury to consider whether appellant was subject to the firearm specification of R.C. 2941.146. Here, the evidence introduced at trial reveals that appellant's vehicle was running, the headlights were on to illuminate where the victims were located, the driver's door was open, and appellant was standing within the framed area of the door and the vehicle, leaning on the vehicle as he discharged his weapon.

*Swidas* at ¶26. Appellant notes that “[i]n all of the situations in which one might rationally imagine a person firing a weapon ‘from’ a motor vehicle, the vehicle is used as an instrument of the offense, and is very near in both proximity and immediacy.”

(Appellant's Mem. at 4). As highlighted by the Court of Appeals, Appellant's vehicle was used as an instrument of the offense, being very near in both proximity and immediacy to the attack on the victims.

This Court has repeatedly recognized "that all statutes enjoy a strong presumption of constitutionality." See, e.g., *State v. Singleton*, 124 Ohio St.3d. 173, 2009-Ohio-6434, 920 N.E.2d 958, at ¶21. The Court of Appeals correctly determined that Appellant has not proven beyond a reasonable doubt that R.C. 2941.146 is void-for-vagueness as applied to him in this case. Thus, Appellant's first proposition of law is without merit, and jurisdiction on this issue should be declined.

#### **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. II**

R.C. 2941.146 creates a separate class of offenders, subject to greater punishment, without a rational relationship to a legitimate state purpose.

For his second proposition of law, Appellant recycles his second assignment of error raised before the Court of Appeals. He claims that R.C. 2941.146 violates the Equal Protection Clause in that it "creates a separate class of offenders, subject to greater punishment, without a rational relationship to a legitimate state purpose." (Appellant's Mem. at 5). The Court of Appeals fully considered Appellant's argument and correctly rejected it. No further review by this Court is necessary, and jurisdiction should be declined.

Appellant makes no claim that there is a fundamental right to use a motor vehicle in the commission of a criminal offense, nor does Appellant claim that individuals who use a motor vehicle in the commission of a criminal offense are a

protected class. Thus, the Court of Appeals applied the 'rational-basis' test to Appellant's challenge. *Swidas* at ¶31.

This Court has outlined the appropriate analysis to determine if a statute is rationally related to a legitimate governmental interest:

[L]aws passed by virtue of the police power will be upheld if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable. \* \* \* The federal test is similar. To determine whether such statutes are constitutional under federal scrutiny, we must decide if there is a rational relationship between the statute and its purpose.

*State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-Ohio-264, 664 N.E.2d 926 (citations omitted). Stated another way, "As in all equal protection cases, \* \* \* the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Department of the City of Chicago v. Mosley* (1972), 408 U.S. 92, 95, 92 S.Ct. 2286.

"Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, at ¶91. Rather, "the challenger to the validity of the statute must negate every conceivable basis which might support it." *Lyons v. Limbach* (1988), 40 Ohio St.3d 92, 92, 532 N.E.2d 106.

In this case, the Court of Appeals approvingly cited to a California Court of Appeals's analysis of a similar statute:

"[F]iring a gun from a motor vehicle is an especially treacherous and cowardly crime. It allows the perpetrator to take the victim by surprise

and make a quick escape to avoid apprehension \* \* \*. The Legislature could rationally have determined that the foregoing considerations justify imposing an increased sentence on the perpetrator.”

*Swidas* at ¶35, quoting *People v. Bostick* (Cal.App.1996), 46 Cal.App.4th 287, 292. The Court of Appeals then went on to further highlight the legitimate purpose to which this statute is rationally related, noting that “[t]he statute provides protection of public safety. In enacting such a statute, the legislature gave great weight to the mobile nature of the vehicle, as it provides a rapid escape from the scene of the crime. Further, a vehicle may provide the offender with additional coverage or concealment.” *Swidas* at ¶36.

The governmental interest at issue in R.C. 2941.146 is clear: the protection of public safety. There is no question that the protection of public safety is a legitimate government interest. See *Toledo v. Wacenske* (May 27, 1994), 6<sup>th</sup> Dist. No. L-93-298. R.C. 2941.146 achieves this goal by deterring the firing of weapons from motor vehicles and thereby the associated evils of cover, concealment, and the ability for rapid approach and exit. This statute does not run afoul of the equal protection guarantee, and further review by this Court is not needed. As such, jurisdiction should be declined.

### **APPELLEE’S POSITION REGARDING PROPOSITION OF LAW NO. III**

R.C. 2941.145 is a lesser included offense of R.C. 2941.146.

For his third proposition of law, Appellant recycles his third assignment of error raised before the Court of Appeals. He claims that the firearm specification of R.C. 2941.145 is a lesser included offense of the motor-vehicle specification of R.C. 2941.146.

The Court of Appeals fully considered Appellant's argument and correctly rejected it. No further review by this Court is necessary, and jurisdiction should be declined.

The Court of Appeals correctly held that "R.C. 2929.14(D)(1)(c) provides that if the offense at issue is properly accompanied by a firearm specification under R.C. 2941.146 and R.C. 2941.145, the firearm specifications do not merge." Appellant has raised no new argument to counter this holding, nor even acknowledged the existence of R.C. 2929.14(D)(1)(c).

The Tenth District Court of Appeals has outlined the effect of R.C. 2929.14(D)(1)(c):

Under this provision, if an offense is properly accompanied with a specification under R.C. 2941.146 and another under 2941.145, there is no merger of the specifications, and the court must impose a sentence for each. And, according to R.C. 2929.14(E)(1)(a), an offender must serve consecutive prison terms for these specifications.

*State v. Coffman*, 10<sup>th</sup> Dist. No. 09AP-727, 2010-Ohio-1995, at ¶11 (internal citations omitted). Moreover, "the constitutional double jeopardy provisions, which prohibit multiple punishments for the same offense (\* \* \*), do not apply when the legislature has authorized the imposition of both punishments." *City of Columbus v. Tyson* (10<sup>th</sup> Dist., 1983), 19 Ohio App.3d 224, 226, 484 N.E.2d 155, citing *Missouri v. Hunter* (1983), 459 U.S. 359, 368-369, 103 S.Ct. 673; and *State v. Moss* (1982), 69 Ohio St.2d 515, 433 N.E.2d 181. Both of the punishments in this case are specifically authorized by statute.

Because the legislature has specifically set forth separate punishments for violations of R.C. 2941.145 and R.C. 2941.146, the question of whether R.C. 2941.145 is a lesser included offense of R.C. 2941.146 is irrelevant. The statutorily authorized punishments do not offend Appellant's rights against double jeopardy, and Appellant's third proposition of law is without merit. Jurisdiction should be declined.

#### **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. IV**

A trial court errs by failing to declare a mistrial where a jury states that it is hopelessly deadlocked and that no amount of time would change their decision.

For his fourth proposition of law, Appellant recycles his fourth assignment of error raised before the Court of Appeals. He claims that the trial court should have been required to declare a mistrial when the jury initially indicated that it may be deadlocked. But the Court of Appeals fully considered Appellant's argument and correctly rejected it. No further review by this Court is necessary, and jurisdiction should be declined.

The situation during the jury deliberations and the trial court's actions in this case was concisely summarized by the Court of Appeals:

The jury in this case heard testimony from 16 witnesses spanning three days. After initially indicating that it was deadlocked, the trial court instructed the jury using a *Howard* charge, as that charge is "intended for a jury that believes it is deadlocked, so as to challenge them to try one last time to reach a consensus." *State v. Robb* (2000), 88 Ohio St.3d 59, 81. After receiving the *Howard* charge, the jury was able to continue its deliberations and reach a verdict. While the jury did make a further inquiry, they never informed the trial court that they continued to be deadlocked. In fact, the jury informed the trial court that they were able

to reach a verdict. Consequently, we do not find the trial court abused its discretion in finding that the jury was not irreconcilably deadlocked.

*Swidas* at ¶57.

This Court has noted that “[t]here is no bright-line test to determine what constitutes an irreconcilably deadlocked jury.” *State v. Brown*, 100 Ohio St.3d 51, 2003 -Ohio- 5059, 796 N.E.2d 506, at ¶37. Therefore, “[i]n making such a determination, the court must evaluate each case based on its own particular circumstances.” *Id.*, citing *State v. Mason* (1998), 82 Ohio St.3d 144, 167, 694 N.E.2d 932. The trial court properly instructed the jury based on the particular circumstances of this case. Simply because the jury thought itself to be hung does not require the trial court to accept that determination. Ultimately, the jury was able to reach a verdict in this case. Thus, Appellant’s fourth proposition of law is without merit and jurisdiction should be declined.

#### **APPELLEE’S POSITION REGARDING PROPOSITION OF LAW NO. V**

A trial court’s instructing the jury that the defendant fled the scene of an offense, and that such flight might indicate consciousness or awareness of guilt, constitutes an unconstitutional comment upon the evidence.

For his fifth proposition of law, Appellant recycles his fifth assignment of error raised before the Court of Appeals. He claims that the consciousness-of-guilt instruction in Ohio Jury Instructions 409.13 constitutes an unconstitutional comment by the trial court upon the evidence. But the Court of Appeals fully considered Appellant’s argument and correctly rejected it. No further review by this Court is necessary, and jurisdiction should be declined.

The jury instruction used in this case is the jury instruction set forth in the Ohio Jury Instructions. It has long been accepted by various courts. This Court has found that consciousness of guilt can be used as evidence of guilt itself: “ ‘It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.’ ” *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 249 N.E.2d 897, vacated on other grounds (1972), 408 U.S. 935, 92 S.Ct. 2857, quoting 2 Wigmore, Evidence (3 Ed.) 111, Section 276, holding reaffirmed by *State v. Williams* (1997), 79 Ohio St.3d 1, 11.

Therefore, as the Ninth District Court of Appeals noted, “It is well established that flight is admissible as evidence that tends to show consciousness of guilt. Further, a jury instruction on flight is appropriate if there is sufficient evidence in the record to support the charge.” *State v. Davilla*, 9<sup>th</sup> Dist. No. 03CA008412, 2004-Ohio-4448, at ¶12 (internal citations omitted), citing *Sibron v. New York* (1968), 392 U.S. 40, 66; and *United States v. Dillon* (C.A.6, 1989), 870 F.2d 1125. The Eighth District Court of Appeals has also found that the argument raised by Appellant was without merit:

We have carefully reviewed the challenged instructions and conclude that the comment upon the evidence regarding the appellant's alleged flight after the commission of the crime was not improper in that the trial judge specifically stated, “If you find the said Defendant did flee” as part of the comment. This statement clearly indicates that the trial judge was not instructing the jury that they should find as a fact that the appellant did flee.

*State v. Pope* (Aug. 11, 1977), 8<sup>th</sup> Dist. No. 36156. Additionally, the Eleventh District Court of Appeals had previously rejected the claims now asserted by Appellant: "This court has repeatedly upheld a flight instruction similar to the one used by the trial court in the case *sub judice*. The Supreme Court of Ohio agrees." *State v. Wagner* (July 14, 2000), 11<sup>th</sup> Dist. No. 99-L-043 (internal citations omitted), citing *State v. Williams* (1997), 79 Ohio St.3d 1, 11, 679 N.E.2d 646; *State v. Martin* (Apr. 28, 1995), 11<sup>th</sup> Dist. No. 93-L-015; *State v. Owens* (June 28, 1996), 11<sup>th</sup> Dist. No. 95-L-078; and *State v. Davis* (Apr. 24, 1998), 11<sup>th</sup> Dist. No. 96-L-167.

Appellant has raised no new issues regarding this instruction that requires further review by this Court. Thus, jurisdiction should be declined on this matter.

#### **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. VI**

A trial court's instruction to the jury that the defendant fled the scene of a criminal offense is an abuse of discretion where the facts do not support such an instruction.

For his sixth proposition of law, Appellant recycles his sixth assignment of error raised before the Court of Appeals. He claims that the facts of this case did not support a consciousness-of-guilt instruction to the jury. But this case-specific factual issue has been fully considered and correctly rejected by the Court of Appeals. No further review by this Court is necessary, and jurisdiction should be declined.

Appellant raises no new propositions as to when a jury instruction should be used. Instead, Appellant is simply unhappy with the decision reached by the trial court

and confirmed by the Court of Appeals to issue a consciousness-of-guilt instruction in this case.

As the Court of Appeals noted the issuance of a jury instruction is reviewed for abuse of discretion. *Swidas* at ¶64, citing *State v. Williams*, 8<sup>th</sup> Dist. No. 90845, 2009-Ohio-2026, at ¶ 50. Moreover, “ [i]t has long been recognized that it is not an abuse of discretion for a trial court to provide a jury instruction on flight if there is sufficient evidence presented at trial to support that the defendant attempted to avoid apprehension.’ ” *Swidas* at ¶64, quoting *State v. Kilpatrick*, 8<sup>th</sup> Dist. No. 92137, 2009-Ohio-5555, at ¶ 16.

In this case, the Court of Appeals determined that sufficient evidence was provided at trial to support a consciousness-of-guilt instruction:

We find no abuse of discretion in the trial court's instruction. The evidence in this case revealed that immediately after firing five shots, appellant left the scene of the incident in his motor vehicle. An eyewitness testified that appellant's “car went squealing out right after [the shooting].” Further, appellant testified that he threw the firearm out of his vehicle's window upon observing a police cruiser begin to follow him.

*Swidas* at ¶66. Because the facts of this case indicate that Appellant fled the scene due to a consciousness of guilt, the consciousness-of-guilt jury instruction was proper. The trial court did not abuse its discretion by giving this instruction to the jury. Appellant has raised no new issues regarding this instruction that requires further review by this Court. Thus, jurisdiction should be declined on this matter.

## **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. VII**

A criminal defendant's convictions are not supported by sufficient evidence, where the record reveals that the state fails to present any evidence of one or more of the elements of the charges.

## **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. VIII**

A criminal defendant's convictions are against the manifest weight of the evidence, where the record reveals that the jury clearly lost its way in relying upon unproven, unreliable, uncertain, conflicting, and contradictory evidence.

Appellant's seventh and eighth propositions of law recycle his seventh and eighth assignments of error raised before the Court of Appeals. In these propositions of law, Appellant challenges the sufficiency and weight of the evidence supporting his convictions. These propositions of law present fact-specific issues based on well-settled principles of law.

The Court of Appeals fully considered the challenges to the sufficiency and manifest weight of the evidence that Appellant raises herein. The Court of Appeals found that sufficient evidence existed to allow the jury to decide the case. *Swidas* at ¶83. The Court of Appeals also determined that his convictions were not against the manifest weight of the evidence. *Swidas* at ¶97. Thus, these issues, having been fully considered, present no substantial constitutional questions nor questions of public or great general interest. They are fact specific and do not warrant further review by this Court. Jurisdiction should be declined.

## **APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. IX**

A trial court errs by sentencing a criminal defendant to serve a term greater than the minimum term, the maximum, and consecutive terms of incarceration based upon certain factual findings where such findings were not made by the jury nor admitted by the defendant.

For his ninth proposition of law, Appellant recycles his ninth assignment of error raised before the Court of Appeals. He claims that the Court of Appeals made factual findings before imposing consecutive sentences upon Appellant in contravention of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. But any findings made by the trial court had no prejudicial effect on Appellant. Thus, no further review by this Court is necessary, and jurisdiction should be declined.

Initially, it must be noted that Appellant made no objection to the trial court's 'findings' at the sentencing hearing and thus has waived any error. Nonetheless, in this case, the trial court clearly stated that it had considered the purposes and principles of felony sentencing pursuant to R.C. 2929.11 and also the relevant seriousness and recidivism factors set forth in R.C. 2929.12. After considering all of the statutes and materials necessary for sentencing and actually sentencing Appellant, the trial court went on to make some findings in the event that the United States Supreme Court's very recent, at that time, decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, 172 L.Ed.2d 517, had any impact on Ohio's sentencing landscape. Since the Court of Appeals's decision, this Court has held that *Ice* does not revive Ohio's former consecutive-sentencing statutory provisions and that "[t]rial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the

General Assembly enacts new legislation requiring that findings be made.” *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, at paragraphs two and three of the syllabus.

Despite the fact that the trial court made findings for the record (actually after Appellant was sentenced), these findings had no prejudicial impact on Appellant. Thus, the outcome of the sentencing hearing would have been no different without the findings. The lack of any prejudicial effect on Appellant is evinced by the fact that, at the time the trial court noted the findings, the trial court had already pronounced Appellant's sentence. Thus, Appellant's ninth proposition of law is without, merit and jurisdiction should be declined.

### **CONCLUSION**

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

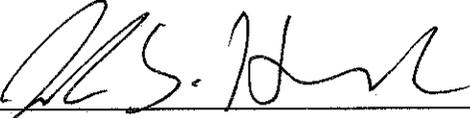
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**PROOF OF SERVICE**

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Michael A. Partlow, Esquire, Morganstern, MacAdams & DeVito, 623 West St. Clair Avenue, Cleveland, OH 44113, on this 10<sup>th</sup> day of March, 2011.

  
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