

ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Case No. 2011-1127

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District.

-vs-

CHAZ WHITE,

Court of Appeals
Case No. 10AP-34

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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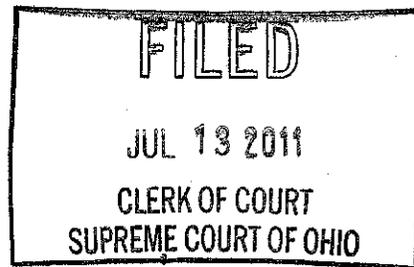


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is therefore respectfully submitted that jurisdiction should be declined.

The defendant's first and second propositions of law are related, as they challenge trial counsel's handling of, and the trial court's denial of, the defendant's meritless motion to suppress his statements to the police. In this Court, the defendant for the first time also mentions a purported Fourth Amendment basis for excluding evidence, but the defendant has never previously raised a Fourth Amendment issue in this case. And this Court does not review issues that were not raised in the lower courts. *State v. Cornely* (1978), 56 Ohio St.2d 1, 4. More importantly, there was no unconstitutional search or seizure in this case, as demonstrated by the appellate court's thorough analysis of each of the defendant's claims. See generally *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364. The procedural issue contained in the first and second propositions of law, challenging the trial court's exercise of its discretion in denying the defendant's motion to suppress his statements, as well as trial counsel's handling of potential *Miranda* issues, raises case-specific, fact-laden claims, and involve well-settled legal standards. These fact-intensive inquiries and case-specific issues would be unlikely to provide law of statewide interest that would be helpful to the bench and bar.

Similarly, the allied offenses claim contained in the third proposition of law was thoroughly analyzed and correctly resolved by the appellate court. This case is analogous to and governed by this Court's decision in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147. No further review of the defendant's third proposition of law is warranted. Again, no substantial constitutional question or question of great public interest is presented, and this Court should decline to review this case.

STATEMENT OF THE CASE AND FACTS

Sometime around 10:00 p.m. during the evening of January 13, 2009, the defendant shot his friend, Christopher Butler, twice, striking him in the back and in the face. *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶¶2, 50. The defendant then stole the victim's wallet and car, and fled from the scene. *Id.* at ¶50. Police and medical personnel arrived at the scene, and the victim identified the defendant as the person who had shot him.

Columbus Police Officer William Lang and his partner, Officer Clark, were the first officers to arrive at the scene. They arrived within 20 to 30 seconds of the first 911 call. Officer Lang indicated that there are frequent instances of gunfire reported in this particular area of Columbus. When Officer Lang and Officer Clark arrived at the scene, Mr. Butler was lying on the ground, and there was a great deal of blood under his head and body and coming from his mouth. Persons at the scene had covered the victim with a blanket. The victim's wallet was missing, and he did not have any identification on him. Mr. Butler indicated that he owned the silver vehicle seen leaving the area, and Mr. Butler immediately identified the defendant, Chaz White, as the person who had shot him. Mr. Butler was transported to the hospital, and remained hospitalized for 4½ months. As a result of the shooting, Mr. Butler was permanently paralyzed from his chest down.

Mr. Butler indicated that he and the defendant had been friends for a couple of years; that they hung out together, drinking and partying; and that the defendant's grandmother lived near the victim on Columbus' north side. The day before the shooting, the defendant showed the victim a small, black handgun. The defendant was bragging about having the gun.

The next night, January 13th, the defendant came over to Mr. Butler's home to hang out. Sometime after 9:00 p.m., Mr. Butler and the defendant left the victim's home to drive around before the victim was to drive the defendant home. The victim admitted that he was curious

about the defendant's gun, as he did not grow up around guns, and when the defendant asked if the victim would like to shoot the gun, Mr. Butler indicated that he would. The defendant directed the victim to drive to an area off Westerville Road, where there was a field where the defendant thought they could shoot his gun. The victim parked his car in front of an apartment building on Charlotte Drive, and the men got out of the car. As Mr. Butler and the defendant were walking toward the field, the victim heard a loud shot, felt a bullet hit him, spun around, and actually saw the defendant shooting directly at him. The defendant then ran up to the victim as he was lying on the ground, yanked on his wallet chain, reached into his pockets, and fled from the scene driving the victim's car.

The police recovered two spent 9 millimeter casings and one live 9 millimeter bullet from the scene. One of the casings was recovered from the sidewalk near the victim, while the second casing was found under a white Blazer parked at the scene. The white Blazer arrived at the scene just before Officers Lang and Clark. The driver of the white Blazer was the first person to call 911 to report the shooting.

The victim's car was discovered later that night, at approximately 11:45 p.m., with the lights on and the engine running, in a parking lot at the corner of S.R. 161 and Forest Hills Drive. There were burrs discovered in the victim's car, but no weapon was recovered.

The defendant's grandmother testified that her grandson called her twice during the evening of January 13th and asked her to pick him up. In the first conversation, the defendant indicated that he was at the corner of Westerville and Morse Roads. He later called to tell her he was at a Blockbuster store on S.R. 161 and Cleveland Avenue. She picked him up on S.R. 161 and took him to his home on the east side of Columbus, where the police were waiting for him.

The defendant was immediately detained. The defendant had burrs on his clothing. His grandmother consented to a search of her vehicle, and, again, no weapon was recovered.

Columbus Police Detective George Robey proceeded to the corner of Westerville and Morse Roads, and followed footprints in the snow into a wooded area behind the business located at that street corner. Approximately ten yards behind the business in the wooded area, Detective Robey found a cell phone and holder. The cell phone was registered to Charles White, with a fictitious address. The defendant was visible in one of the videos saved on the cell phone, and Mr. Butler's cell phone number was found in the list of contacts.

The defendant made several inconsistent statements regarding his involvement in the shooting. When first detained by the police at his home, the defendant claimed that he and the victim had gone to the apartment complex on Charlotte Drive to meet another guy; that when they arrived at the apartment complex, the victim got out of his car and spoke to another person, when suddenly they both started shooting at each other. The defendant claimed that when the shots were fired, he took off running through a wooded area; that he ran to Morse Road where he called his grandmother; and that he tried several times to call Mr. Butler, but never reached him.

In his second statement made later that night, the defendant claimed that the victim and the defendant were drug dealers, and that the defendant had accompanied the victim to Charlotte Drive for a drug deal, as the victim planned to sell narcotics to someone known as either "Nemo" or "Emo." In this version, the defendant claimed that when they arrived at the apartment complex, Mr. Butler instructed the defendant to hide by a trash dumpster at the end of the street. The defendant claimed that three men in a white Blazer walked up, after which the defendant heard gunshots and heard the victim yelling, "Go, go, go," prompting the defendant to take off running. In this version, the defendant claimed that he saw the victim running from the scene.

He also claimed that he called Mr. Butler's girlfriend, Lauren Mann, to come and pick him up, which she did, driving him from Morse Road to S.R. 161. Ms. Mann contradicted the defendant's claim in this regard, as she testified that she did not see the defendant or the victim on January 13th, and that she did not have a car or a valid Ohio driver's license. In this second statement to the police, the defendant claimed that after Ms. Mann dropped him off on S.R. 161, his grandmother picked him up and drove him home. According to the defendant, on the night of the shooting, the victim was extremely high on drugs and alcohol. Also, in this statement, the defendant denied driving the victim's car after the shooting.

In his third statement, the defendant admitted that he drove the victim's car away from the scene of the shooting, stopping first at a business on Morse Road, where he left the car and fled on foot into a wooded area behind the business, but later returned to Mr. Butler's car. He acknowledged that he later abandoned Mr. Butler's car at the corner of S.R. 161 and Forest Hills Road. In this statement, the defendant claimed that, during the shooting, he was hiding by the dumpster, so he did not actually see the shooting.

A gunshot residue test performed on the cuffs of the defendant's jacket tested positive for gunshot residue particles. Neither the victim's wallet nor the gun was ever recovered.

On January 22, 2009, the Franklin County Grand Jury issued a six-count indictment against the defendant, charging him with attempted murder, in violation of R.C. 2903.01 and 2923.02; aggravated robbery, a violation of R.C. 2911.01; felonious assault, a violation of R.C. 2903.11; two counts of robbery, violations of R.C. 2911.02(A)(2) and (A)(3); and one count of theft, a violation of R.C. 2913.02. With the exception of the theft count, all of the counts in the indictment contained firearm specifications, pursuant to R.C. 2941.145. The trial court conducted numerous pretrial hearings before the matter proceeded to trial before a jury,

beginning on November 16, 2009. On that date, the trial court denied the defendant's motion to suppress statements, because it was not timely filed and because it was ambiguous.

On November 23, 2009, the jury returned verdicts finding the defendant guilty of all of the charges and specifications. The trial court immediately proceeded to sentencing and imposed an aggregate 27½-year prison term. The defendant filed an appeal, and on May 17, 2011, the Tenth District Court of Appeals issued its decision affirming the defendant's convictions, but remanding for resentencing to allow the merger of the sentences imposed for the defendant's robbery convictions. *State v. White*, 2011-Ohio-2364, ¶90. The defendant now brings this appeal seeking a granting of jurisdiction. The defendant's request should be denied.

RESPONSE TO PROPOSITION OF LAW NO. ONE:

NO ABUSE OF DISCRETION IS DEMONSTRATED WHEN THE TRIAL COURT DENIES A DEFENDANT'S UNTIMELY AND VAGUE MOTION TO SUPPRESS.

At the outset, for the first time, in this Court, the defendant alludes to some nebulous Fourth Amendment basis for excluding evidence, but the defendant has never previously raised a purported Fourth Amendment issue in this case. More importantly, there was no unconstitutional search or seizure in this case, as demonstrated by the appellate court's thorough analysis of each of the defendant's claims. See generally *State v. White*, 2011-Ohio-2364. Instead, this case raises procedural issues grounded in the defendant's Fifth Amendment claims challenging the admission into evidence of his statements to the police.

This Court has held that the failure to move to suppress evidence within the time specified in Crim.R. 12(D) based on an alleged illegality in obtaining evidence constitutes a waiver of the error. *State v. Wade* (1978), 53 Ohio St.2d 182, paragraph three of the syllabus, death penalty vacated (1978), 438 U.S. 911. "Constitutional rights may be lost as finally as any

others by a failure to assert them at the proper time. *State v. Davis*, 1 Ohio St.2d 28, 203 N.E.2d 357.” Id. at 190. “But a trial court may grant relief from the waiver where the defendant demonstrates good cause for his failure to file a timely motion.” *State v. Shelton*, 1st Dist. Nos. C-060789, C-060790, 2007-Ohio-5460, ¶4 (footnote omitted).

“A trial court’s decision to deny an untimely filed motion to suppress will not be disturbed absent an abuse of discretion.” *Columbus v. Koczka*, 10th Dist. No. 02AP-953, 2003-Ohio-1660, ¶9. Similarly, the decision to grant leave to file an untimely motion to suppress is within the trial court’s sound discretion. *State v. Pelsozy*, 9th Dist. No. 23297, 2007-Ohio-148, ¶6. The term abuse of discretion “connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

In this case, the defendant argues that the trial court erred when it denied the defendant’s untimely motion to suppress, and further that the trial court should have suppressed the defendant’s statements to the police. In the trial court, the defendant only challenged the admission of his first statement to the police, made when he was arrested. The defendant cannot demonstrate that the trial court acted unreasonably, arbitrarily, or unconscionably, when it denied the defendant’s untimely and vague motion to suppress, and this proposition of law is devoid of merit.

The defendant was indicted on January 22nd; defense counsel entered an appearance in the case on January 23rd, and the defendant was arraigned on January 26th. Initial discovery was provided on March 10, 2009, which was supplemented in May, July, September, and November 2009. Yet, the defendant did not file his motion to suppress until June, nearly five months after his arraignment. Also, the defendant’s motion was a generic, vague motion, failing to

specifically identify the evidence the defendant sought to exclude and the bases for exclusion. As noted, the defendant made three different statements to the police, but only challenged the admissibility of his first statement in the trial court. See *State v. White*, 2011-Ohio-2364, ¶¶5-29.

The defendant failed to provide an adequate explanation for his failure to file a motion to suppress in a timely manner, and failed to seek leave to file an untimely motion to suppress. See *Shelton*, 2007-Ohio-5460, ¶11. Without an acceptable justification for his failure to timely file his motion to suppress, the trial court's decision to deny the defendant's motion does not amount to an abuse of discretion. See *id.* at ¶13.

Also, the defendant filed a vague motion to suppress, which utterly failed to identify what evidence he sought to exclude, as well as the reasons for exclusion. As noted, the defendant made three statements to the police, but he only challenged the admission of his first statement to the police in the trial court. *State v. White*, 2011-Ohio-2364, ¶18. The defendant's failure to specifically identify the pertinent evidence he sought to exclude also supported the trial court's decision to deny the defendant's motion. See *State v. Palicki* (1994), 97 Ohio App.3d 175, 182 (citations omitted).

[A] motion to suppress statements on the grounds that the statements were taken in violation of *Miranda* warning rights must be supported with factual allegations to support the claim with particularity. * * * The failure to provide any specific factual basis for the motion to suppress, despite the trial court's request for clarification justifies the denial of the motion to suppress without an evidentiary hearing.

Id. (citations omitted). Accordingly, the defendant's failure to file his motion to suppress in a timely manner, coupled with his failure to provide an adequate explanation for his dilatory filing, and the lack of specificity in his motion support finding that the trial court soundly exercised its discretion when it determined that the interests of justice did not support proceeding with a hearing on the defendant's motion and denied the defendant's motion to suppress.

Moreover, the appellate court thoroughly reviewed the merits of the defendant's claims challenging the admission of his statements to the police, and the appellate court correctly determined that no error occurred in the admission into evidence of all of the defendant's statements. *State v. White*, 2011-Ohio-2364, ¶¶25-29. The defendant's first statement to the officers at his home was admissible, as there had been no interrogation of the defendant. *Miranda* warnings are only required when the defendant is subjected to custodial interrogation, and interrogation is defined as express questioning or its functional equivalent. *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-301. The defendant's first statement to the police was not made in response to any questioning by the police officers, *id.*, and was therefore admissible into evidence. *Miranda* does not apply to statements that are freely and voluntarily given. *State v. Dennis*, 10th Dist. No. 05AP-364, 2006-Ohio-2046, ¶19. Because the defendant's first statement was not made in response to express questioning or its functional equivalent, but was in fact voluntarily made, the defendant's first statement to the police was admissible into evidence, as the court of appeals found. *State v. White*, 2011-Ohio-2364, ¶21.

The defendant claims that his second statement was inadmissible, because he requested counsel. He claims that his question to the investigating detective during the explanation of his *Miranda* rights, inquiring about calling an attorney, constituted an invocation of his right to counsel. However, an invocation of the right to counsel must be clear and unequivocal. *Davis v. United States* (1994), 512 U.S. 452, 459; *State v. Wellman*, 10th Dist. No. 05AP-386, 2006-Ohio-3808, ¶¶23-26. The defendant's question to the officer inquiring what would happen if he called his attorney did not constitute a clear and unequivocal assertion of his right to counsel. Therefore, he never properly invoked his right to counsel. See *State v. Henness* (1997), 79 Ohio St.3d 53, 62-63. Because the defendant's question to the detective inquiring about calling an

attorney was not a clear and unequivocal invocation of the right to counsel, both of the defendant's statements at police headquarters were admissible. The defendant was advised of his rights and waived those rights in writing before answering the detective's questions. *State v. White*, 2011-Ohio-2364, ¶28. The defendant's statements were properly admitted, under *Miranda* and its progeny, and there was no tainted evidence admitted at the defendant's trial. This Court should decline to review this proposition of law.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS NOT DEMONSTRATED BASED ON TRIAL COUNSEL'S FAILURE TO FILE A SPECIFIC AND TIMELY MOTION TO SUPPRESS, WHEN THE DEFENDANT CANNOT DEMONSTRATE THAT THE TRIAL COURT WOULD HAVE GRANTED THE MOTION.

To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690. In assessing the competence of counsel, every effort must be made to avoid the distorting effects of hindsight. *Id.*

Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

When counsel’s alleged ineffectiveness involves the failure to pursue a motion, the prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion “is meritorious,” and, second, the defendant must show that there is a reasonable probability that the verdict would have been different if the motion had been granted. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 175 (“Lott has not demonstrated that the trial court would have granted such a motion”). In this case, the defendant cannot meet this burden, as the court of appeals correctly found. *State v. White*, 2011-Ohio-2364, ¶83. Indeed, the appellate court fully reviewed all of the defendant’s claims challenging the admission of his statements to the police. The court of appeals correctly determined that all of the defendant’s challenges were without merit, and that there existed no meritorious bases on which to exclude any of the defendant’s statements. *Id.* at ¶¶25-29. Furthermore, there is no reasonable probability of a different result. Mr. Butler survived and identified the defendant as the person who shot him, then stole his wallet and his car. Defendant cannot demonstrate prejudice, under *Strickland*, and this Court should decline to review this proposition of law.

RESPONSE TO PROPOSITION OF LAW NO. THREE:

**THE TRIAL COURT PROPERLY IMPOSED SENTENCES FOR
THE DEFENDANT'S ATTEMPTED MURDER AND
FELONIOUS ASSAULT CONVICTIONS.**

Attempted murder and felonious assault are allied offenses of similar import. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147. But that does not end the inquiry, as the defendant must prove that he is entitled to application of the merger doctrine. *State v. Mughni* (1987), 33 Ohio St.3d 65, 67. Additional steps of the analysis require the court to determine whether the offenses were committed separately or with a separate animus. *Williams*, 2010-Ohio-147, ¶24. In this case, the appellate court correctly determined that the facts of this case supported the trial court's determination that the offenses of attempted murder and felonious assault did not merge, based on the number of shots fired, the fact that the victim was shot twice, and the discovery of an unfired 9 millimeter bullet near the victim. *State v. White*, 2011-Ohio-2364, ¶67. Firing multiple gunshots constitutes separate offenses, under *Williams*, supra. See, also, *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-4732. Moreover, in this case, the defendant's actions in shooting the victim in the back, then shooting him in the face, at close range, establish that he acted separately and with a separate animus. *State v. Clark* (April 29, 1982), 8th Dist. No. 44015, *7-8. The trial court correctly imposed multiple sentences for the defendant's convictions for attempted murder and felonious assault in this case, and the court of appeals correctly affirmed that decision. This Court should decline to review this proposition of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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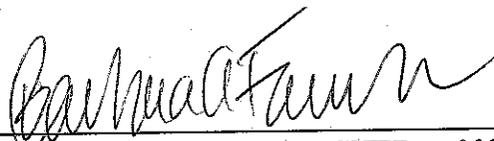


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