

Motion to Reconsider of Appellant Keith Ramey

I. Introduction

This Court should reconsider its July 6, 2011 decision declining to hear Mr. Ramey's pro se appeal to this Court. *State v. Ramey*, --- Ohio St.3d ---, 2011-Ohio-3244 (Lundberg Stratton and Lanzinger, JJ., dissent). The court of appeals' decision incorrectly mixes two distinct parts of the speedy trial statute to create a new tolling rule not permitted by statute. Further, the rule makes it impossible for a defendant to obtain a speedy trial if a co-defendant chooses to file multiple motions.

Mr. Ramey, pro se, submitted the following proposition of law:

Defendant was denied his constitutional and statutory rights to a speedy trial.

But this Court may choose to accept the proposition of law more precisely framed as follows:

The filing of a motion to suppress by a co-defendant does not, by itself, automatically toll the other co-defendant's speedy trial time.

II. This case is a good vehicle to decide the issue.

The inartful pro se proposition of law may have masked the strong issue that this case presents. This case is ideal to decide whether a co-defendant's motion tolls speedy trial for the other because:

1. The court of appeals found that the co-defendant waiver issue made the difference between winning and losing the appeal, so the issue is cleanly presented.
2. There is no evidence that the co-defendant's motion had any effect on the prosecutor's ability to prepare to try Mr. Ramey;

3. The State, not Mr. Ramey, asked that the cases be tried together, so the joint trial was a matter solely in the control of the State; and
4. The co-defendant who filed the motion was out on bond, while Mr. Ramey remained in jail, so the two co-defendants had conflicting interests.

This Court should reconsider its decision, accept this case, and reverse the decision of the court of appeals.

III. Procedural and Factual History

A. Trial Court Proceedings

The court of appeals correctly summarized the trial court proceedings:

[¶2] On October 13, 2009, Ramey was jointly indicted with co-defendant Jonathan Keeton in Case No. 09-CR-0869 for one count of aggravated robbery (deadly weapon), one count of aggravated robbery (serious physical harm), one count of felonious assault (deadly weapon), one count of felonious assault (serious physical harm), and one count of breaking and entering. The aggravated robbery and felonious assault charges each contained a firearm specification. Subsequently, on December 21, 2009, Ramey and Keeton were indicted on an additional charge in Case No. 09-CR-1051 for having a weapon while under disability.

[¶3] All of the charges against Ramey and Keeton stem from incidents which occurred on October 6, 2009, wherein the defendants were accused of breaking and entering into and stealing from “Nasty N8’s” tattoo parlor located at 805 East Main Street in Springfield, Ohio. The owner of the tattoo parlor reported that tattoo equipment, ink, a laptop computer, a printer, and cell phones were missing after the break-in.

[¶4] Ramey and Keeton were also accused of beating and robbing an individual named Howard Fannon. The robbery and assault of Fannon also occurred on October 6, 2009, shortly after Ramey and Keeton were alleged to have broken into the tattoo parlor. During the assault, Ramey allegedly shocked Fannon multiple times with a taser while Keeton hit him over the head with the butt of a handgun before they stole his watch and two gold necklaces. Fannon immediately called 911 to report the robbery, and Ramey was arrested a short time later at his home located at 106 N.

Greenmount Avenue in Springfield, Ohio. Keeton was arrested the next day on October 7, 2009, at his father's house also located in Springfield. During the course of their investigations, Springfield police were able to recover almost all of the items alleged to have been stolen by Ramey and Keeton.

[¶5] At his arraignment on October 16, 2009, Ramey pled not guilty to the charges in the indictment. Ramey's bond was set at \$50,000.00. Ramey did not post bond and, therefore, remained incarcerated pending trial. Keeton's bail was also set at \$50,000.00 by the trial court, but he posted that amount on October 30, 2009, and was released from jail until the trial.

[¶6] Due to a conflict of interest, Ramey's appointed counsel filed a motion to withdraw on October 16, 2009. On October 20, 2009, the trial court granted the motion to withdraw, and Ramey was appointed new counsel. The case was also reassigned to Judge Richard P. Carey of the Clark County Court of Common Pleas, Probate Division, on November 10, 2009.

[¶7] On December 10, 2009, co-defendant Keeton filed a motion to suppress physical evidence seized by police, as well as statements made by Keeton after his arrest. As previously stated, the State filed a second indictment on December 21, 2009, charging Ramey and Keeton with having a weapon while under disability. On December 29, 2009, Keeton filed a supplemental motion to suppress in which he argued that the photo lineups used by the police to identify him were inherently suggestive. A hearing was held on Keeton's motion to suppress on January 5, 2010. On January 6, 2010, the trial court issued a decision and entry overruling the motion to suppress in its entirety. The court also set a date for Ramey and Keeton's trial on February 1, 2010.

[¶8] On February 1, 2010, Ramey filed a motion to dismiss for violation of his right to a speedy trial. After a brief hearing during which the court heard arguments from both parties, the court overruled Ramey's motion. The trial court also moved the trial date to February 2, 2010, explaining that the courtroom was being used by the Second District Court of Appeals for oral arguments.

[¶9] After a three-day jury trial, Ramey was found guilty of two counts of aggravated robbery with firearm specifications, one count of felonious assault (deadly weapon), and one count of having a weapon while under disability. The jury acquitted Ramey of felonious assault (serious physical harm) and breaking and entering. At the sentencing hearing on February 8, 2010, the court

merged the two counts of aggravated robbery and sentenced Ramey to three years on the firearm specification, eight years for the aggravated robbery, five years for felonious assault, and one year for having a weapon while under disability. The court ordered that the three-year term for the firearm specification was to be served consecutively and prior to the other sentences, which were to be served concurrently to one another, for an aggregate prison sentence of eleven years.

B. Court of Appeals Proceedings

The court of appeals found that 87 speedy trial days had passed when the State brought Mr. Ramey to trial. Opinion at ¶25. Accordingly, the 27 days during which the motion to suppress was pending is dispositive of Mr. Ramey's speedy trial claim.

The State asserted in the court of appeals that the time was also tolled because Mr. Ramey "agreed" to the trial date, but the court of appeals implicitly rejected the claim by reviewing it on the merits. Opinion at ¶23-5. Mr. Ramey contested the claim. The court granted Mr. Ramey relief as to the second indictment (weapon under disability) because it held that the tolling time for the motion did not apply to that case. The trial court had sentenced Mr. Ramey to concurrent time for the weapons under disability charge, so the partial reversal did not change his term of imprisonment.

IV. Discussion: The court of appeals mixes two provisions in the speedy trial statute to create a result that the statute did not intend.

The Court of held that a defendant's speedy trial is tolled merely because his co-defendant files a motion:

Ramey's speedy trial time was tolled again on December 10, 2009, when his co-defendant Keeton filed a motion to suppress. In *State v. Smith*, Clark App. No. 03-CA-93, 2004 Ohio 6062, we held that pursuant to 2945.72(H), a co-defendant's motion for a continuance

served as a tolling event and extended the speedy trial time of the other defendant.

The court correctly summarizes R.C. 2945.72(H), but then incorrectly conflates a motion for continuance with any other motion. The difference is critical because R.C. 2945.72(H) only applies to motions *for continuances*. The paragraph tolls time for “the period of any reasonable continuance granted other than upon the accused’s own motion[.]” (Emphasis supplied.) By contrast, the paragraph that applies to motions other than motions for continuances is limited to motions filed by the defendant. R.C. 2945.72(E). That paragraph tolls time for “[a]ny period of delay necessitated by reason of a . . . motion . . . *made or instituted by the accused*[.]” (Emphasis supplied.)

The distinction makes sense. A defendant controls the motions he or she files. A defendant who wants a speedy trial can make that happen by foregoing motion practice and proceeding to trial. But sometimes, courts must continue a trial for reasons beyond a defendant’s control. In those circumstances, a court can continue the case as needed. But the record must show that the continuance was “reasonable.” Trial courts have wide latitude to enter such continuances because their decisions on reasonableness are review only for an abuse of discretion. See, e.g., *State v. Adkins* (2001), 144 Ohio App.3d 633, 640.

So the mere fact that one defendant files a motion does not forfeit a co-defendant’s speedy trial time. If the trial court determines that the motion necessitates a delay in the trial schedule, the trial court can grant a continuance either sua sponte or on the motion of a party. That continuance

will be review only under a highly deferential abuse of discretion standard. But defense counsel does not have the power of the court. Counsel for a co-defendant cannot toll time for all defendants merely by filing a motion to suppress (or any other motion, for that matter).

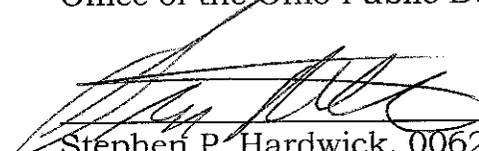
This Court should accept this case even if it suspects that the State may have a defense not addressed by the court of appeals. The court of appeals created the any-co-defendant's-motion rule to dispose of this case. That rule is wrong, and could lead trial courts to skip over their authority and responsibility to consider whether a continuance is needed in any given case. If this Court determines that the State should have another chance to make a different argument, this Court should reverse the decision of the court of appeals and remand this case back to that court for further review.

V. Conclusion

A defendant sitting in prison should not forfeit his right to a speedy trial merely because a free-on-bond co-defendant engages in vigorous motion practice. If that co-defendant's motion practice actually affects the flow of the case, a trial court has two options. It can continue the case or it can sever the trials. But it must affirmatively act because a co-defendant's motion to suppress, by itself, does not toll a defendant's speedy trial time.

Respectfully Submitted,

Office of the Ohio Public Defender,

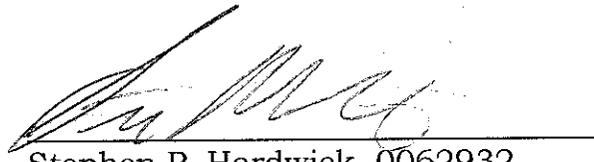

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served by regular U.S. Mail upon, Andrew R. Picek, Assistant Clark County Prosecuting Attorney, 50 E. Columbia Street, Springfield, Ohio 45502, on this 18th day of July, 2011.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Appellant, Keith Ramey

#347793

[Cite as *State v. Ramey*, 2011-Ohio-1288.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 19
v.	:	T.C. NO. 09CR1051
	:	09CR869
KEITH RAMEY	:	(Criminal appeal from
Defendant-Appellant	:	Common Pleas Court)

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OPINION

Rendered on the 18th day of March, 2011.
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DONOVAN, J.

{¶ 1} Defendant-appellant Keith Ramey appeals his conviction and sentence for one count of aggravated robbery (deadly weapon), in violation of R.C. 2911.01(A)(1), a felony of the first degree; one count of aggravated robbery (serious physical harm), in

violation of R.C. 2911.01(A)(3), a felony of the first degree; one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony of the second degree; and one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(3). Both counts of aggravated robbery contained firearm specifications. After a jury trial held on February 2, 3, & 4, 2010, Ramey was found guilty of the above offenses and sentenced to an aggregate prison term of eleven years. Ramey filed a timely notice of appeal with this Court on February 16, 2010.

I

{¶ 2} On October 13, 2009, Ramey was jointly indicted with co-defendant Jonathan Keeton in Case No. 09-CR-0869 for one count of aggravated robbery (deadly weapon), one count of aggravated robbery (serious physical harm), one count of felonious assault (deadly weapon), one count of felonious assault (serious physical harm), and one count of breaking and entering. The aggravated robbery and felonious assault charges each contained a firearm specification. Subsequently, on December 21, 2009, Ramey and Keeton were indicted on an additional charge in Case No. 09-CR-1051 for having a weapon while under disability.

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named Howard Fannon. The robbery and assault of Fannon also occurred on October 6, 2009, shortly after Ramey and Keeton were alleged to have broken into the tattoo parlor. During the assault, Ramey allegedly shocked Fannon multiple times with a taser while Keeton hit him over the head with the butt of a handgun before they stole his watch and two gold necklaces. Fannon immediately called 911 to report the robbery, and Ramey was arrested a short time later at his home located at 106 N. Greenmount Avenue in Springfield, Ohio. Keeton was arrested the next day on October 7, 2009, at his father's house also located in Springfield. During the course of their investigations, Springfield police were able to recover almost all of the items alleged to have been stolen by Ramey and Keeton.

{¶ 5} At his arraignment on October 16, 2009, Ramey pled not guilty to the charges in the indictment. Ramey's bond was set at \$50,000.00. Ramey did not post bond and, therefore, remained incarcerated pending trial. Keeton's bail was also set at \$50,000.00 by the trial court, but he posted that amount on October 30, 2009, and was released from jail until the trial.

{¶ 6} Due to a conflict of interest, Ramey's appointed counsel filed a motion to withdraw on October 16, 2009. On October 20, 2009, the trial court granted the motion to withdraw, and Ramey was appointed new counsel. The case was also reassigned to Judge Richard P. Carey of the Clark County Court of Common Pleas, Probate Division, on November 10, 2009.

{¶ 7} On December 10, 2009, co-defendant Keeton filed a motion to suppress physical evidence seized by police, as well as statements made by Keeton after his arrest. As previously stated, the State filed a second indictment on December 21, 2009, charging

Ramey and Keeton with having a weapon while under disability. On December 29, 2009, Keeton filed a supplemental motion to suppress in which he argued that the photo lineups used by the police to identify him were inherently suggestive. A hearing was held on Keeton's motion to suppress on January 5, 2010. On January 6, 2010, the trial court issued a decision and entry overruling the motion to suppress in its entirety. The court also set a date for Ramey and Keeton's trial on February 1, 2010.

{¶ 8} On February 1, 2010, Ramey filed a motion to dismiss for violation of his right to a speedy trial. After a brief hearing during which the court heard arguments from both parties, the court overruled Ramey's motion. The trial court also moved the trial date to February 2, 2010, explaining that the courtroom was being used by the Second District Court of Appeals for oral arguments.

{¶ 9} After a three-day jury trial, Ramey was found guilty of two counts of aggravated robbery with firearm specifications, one count of felonious assault (deadly weapon), and one count of having a weapon while under disability. The jury acquitted Ramey of felonious assault (serious physical harm) and breaking and entering. At the sentencing hearing on February 8, 2010, the court merged the two counts of aggravated robbery and sentenced Ramey to three years on the firearm specification, eight years for the aggravated robbery, five years for felonious assault, and one year for having a weapon while under disability. The court ordered that the three-year term for the firearm specification was to be served consecutively and prior to the other sentences, which were to be served concurrently to one another, for an aggregate prison sentence of eleven years.

{¶ 10} It is from this judgment that Ramey now appeals.

II

{¶ 11} Because it is partially dispositive of the instant appeal, Ramey's second assignment of error will be discussed out of order as follows:

{¶ 12} "DEFENDANT WAS DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL."

{¶ 13} In his second assignment, Ramey argues that the trial court erred when it overruled his motion to dismiss the indictment against him in its entirety because he was denied his constitutional and statutory rights to a speedy trial.

{¶ 14} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. Ohio's speedy trial statutes, R.C. 2945.71 et seq., constitute a rational effort to implement the constitutional right to a speedy trial and will be strictly enforced. *State v. Pachay* (1980), 64 Ohio St.2d 218.

{¶ 15} R.C. 2945.71(C)(2) requires that a person against whom a charge of felony is pending be brought to trial within two hundred and seventy days after his arrest. Each day the accused is held in jail in lieu of bail on the pending charges shall be counted as three days. R.C. 2945.71(E). Pursuant to R.C. 2945.73, Defendant is entitled to a discharge if he is not brought to trial within the time required by R.C. 2945.71, subject to any extension authorized by R.C. 2945.72. That section provides, in relevant part:

{¶ 16} "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

{¶ 17} ** * *

{¶ 18} “(C) Any period of delay necessitated by the accused’s lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

{¶ 19} “* * *

{¶ 20} “(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

{¶ 21} “* * *

{¶ 22} “(H) The period of any continuance granted on the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion.”

A. First Indictment - 2009-CR-0869

{¶ 23} Ramey was arrested and jailed on October 7, 2009. On October 13, 2009, Ramey was jointly indicted with co-defendant Jonathan Keeton in Case No. 09-CR-0869 for one count of aggravated robbery (deadly weapon), one count of aggravated robbery (serious physical harm), one count of felonious assault (deadly weapon), one count of felonious assault (serious physical harm), and one count of breaking and entering. As previously noted, Ramey remained incarcerated on these charges pending trial. Thus, each day he remained in jail counted as three days, and the State had 90 days from the date of his arrest to bring him to trial.

{¶ 24} On October 16, 2009, Ramey’s appointed counsel filed a motion to withdraw based on a conflict of interest. The court granted counsel’s motion and appointed new counsel on October 20, 2009. The pendency of the motion to withdraw tolled Ramey’s

speedy trial time pursuant to R.C. 2945.72. *State v. Wallace* (November 2, 1990), Greene App. No. 90-CA-02. Thus, nine days had passed from the date on which Ramey was arrested and jailed until the motion to withdraw was filed. Time began to run again on October 20, 2009, when the court granted the motion to withdraw and appointed new counsel.

{¶ 25} Ramey's speedy trial time was tolled again on December 10, 2009, when his co-defendant Keeton filed a motion to suppress. In *State v. Smith*, Clark App. No. 03-CA-93, 2004-Ohio-6062, we held that pursuant to 2945.72(H), a co-defendant's motion for a continuance served as a tolling event and extended the speedy trial time of the other defendant. Between October 20, 2009, and December 10, 2009, 51 days had passed, for a total of 60 days to be credited to Ramey for speedy trial purposes. The court issued its decision overruling the motion to suppress on January 6, 2010, on which date time began to run again. When the trial began on February 2, 2010, only 27 additional days had passed, for a total of 87 days for speedy trial purposes. Thus, because of the tolling events which extended the time in which to bring Ramey to trial, his right to a speedy trial was not violated with respect to the charges in the first indictment filed on October 13, 2009.

B. Second Indictment - 2009-CR-1051

{¶ 26} As previously noted, Ramey and Keeton were both charged with having a weapon while under disability in a second indictment filed on December 21, 2009. Because the new charge arose out of the same facts as the original charges in the first indictment, the time to bring Ramey to trial on the charge in the second indictment ran from the date of his initial arrest on October 7, 2009. *State v. Jones*, Montgomery App. No. 20862,

2006-Ohio-2640. Additionally, the State also points out that any speedy trial tolling event which occurred prior to the new indictment does not operate to extend the time to bring the defendant to trial on the new indictment. *Id.*; *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212 (overruled on other grounds).

{¶ 27} Accordingly, in Case No. 09-CR-1051, Ramey's speedy trial time ran from October 7, 2009, until December 29, 2009, when his co-defendant Keeton filed a supplemental motion to suppress. At that point, 83 days had elapsed which counted towards Ramey's speedy trial time. Time began to run again on January 6, 2010, when the trial court overruled Keeton's motion to suppress. From January 6, 2010, until February 2, 2010, when the trial began, another 27 elapsed, for a total of 110 days, which is clearly in excess of the 90 days allowable under R.C. 2945.71.

{¶ 28} The State argues that because Ramey's counsel "agreed" to the February 1, 2010, trial date when that date was set by the court in its January 6, 2010, entry, the time to bring Ramey to trial on the weapons under disability charge in Case No. 09-CR-1051 was tolled again and extended under R.C. 2945.72(H) until the trial date of February 2, 2010. Therefore, the State argues that Ramey's right to speedy trial in Case No. 09-CR-1051 was not violated.

{¶ 29} The entry filed by the court on January 6, 2010, however, only refers to Case No. 09-CR-869. One day later, on January 7, 2010, the State filed a motion to consolidate Case No. 09-CR-869 with Case No. 09-CR-1051, and the trial court did not grant the State's motion until January 13, 2010. Since the entry filed on January 6, 2010, only refers to Case No. 09-CR-869, it could not act to toll the speedy trial time in Case No. 09-CR-1051 as the

State claims, and the court erred when it overruled Ramey's motion to dismiss the weapons under disability charge against him in Case No. 09-CR-1051 because well over 90 days had passed before he was brought to trial in that case.

{¶ 30} Ramey's second assignment of error is sustained as to the weapons while under disability charge but overruled as to all other counts.

III

{¶ 31} Ramey's first assignment of error is as follows:

{¶ 32} "THE TRIAL COURT ERRED AND VIOLATED DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND ABUSED ITS DISCRETION WHEN IT SENTENCED DEFENDANT, AND DEFENDANT IS ENTITLED TO AN APPEAL AS OF RIGHT BECAUSE THE MAXIMUM WAS IMPOSED ON THE HIGHEST OFFENSE."

{¶ 33} In his first assignment, Ramey contends that the counts of felonious assault and having a weapon while under disability should have been merged with the aggravated assault counts because they are allied offenses of similar import. Ramey also argues that the trial court erred when it sentenced him to the maximum term for the merged aggravated robbery count and the felonious assault count.

{¶ 34} R.C. 2941.25, concerning allied offenses of similar import, provides:

{¶ 35} "(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.

{¶ 36} "(B) Where the defendant's conduct constitutes two or more offenses of

dissimilar import, or where his conduct results in 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.”

{¶ 37} “R.C. 2941.25 codifies the double jeopardy protections in the federal and Ohio constitutions, which prohibit courts from imposing cumulative or multiple punishments for the same criminal conduct unless the legislature has expressed an intent to impose them. R.C. 2941.25 expresses the legislature’s intent to prohibit multiple convictions for offenses which are allied offenses of similar import per paragraph (A) of that section, unless the conditions of paragraph (B) are also satisfied.” *State v. Barker*, 183 Ohio App.3d 414, 2009-Ohio-3511, ¶22, citing *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, overruled on other grounds by *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314.

{¶ 38} In *Johnson*, the Ohio Supreme Court recently clarified the process by which courts determine whether offenses are allied offenses of similar import. *Johnson* overruled *Rance* “to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25.” *Johnson* at ¶44. Now, “[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.” *Id.*

{¶ 39} *Johnson* states that “the intent of the General Assembly is controlling.” *Id.* at ¶46. “We determine the General Assembly’s intent by applying R.C. 2941.25, which expressly instructs courts to consider the offenses at issue in light of the defendant’s

conduct.” *Id.* The trial court must determine prior to sentencing whether the offenses were committed by the same conduct. The court no longer must perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger. *Id.* at ¶47 “In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.” *Id.* at ¶48 (internal citation omitted).

{¶ 40} “If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., ‘a single act, committed with a single state of mind.’” *Id.* at ¶49 (citation omitted). “If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.” *Id.* at ¶50. “Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.” *Id.* at ¶51.

{¶ 41} We have recently held that felonious assault, pursuant to R.C. 2903.11, and aggravated robbery, pursuant to R.C. 2911.01, are not allied offenses of similar import. *State v. Smith*, Clark App. No. 08CA0060, 2009-Ohio-5048; citing *State v. Preston* (1986), 23 Ohio St.3d 64; *State v. Walker* (June 30, 2000), Montgomery App. No. 17678; *State v. Sherman* (May 7, 2001), Clermont App. No. CA99-11-106; *State v. Kelly* (Aug. 22, 2000),

Franklin App. No. 99AP-1302; *State v. Gonzalez* (Mar. 15, 2001), Cuyahoga App.No. 77338. That line of cases, however, analyzed whether aggravated robbery and felonious assault were allied offenses pursuant to *Rance*. Nevertheless, aggravated robbery under R.C. 2911.01(A)(1) & (3) requires an individual in attempting or committing a theft offense shall have and brandish a deadly weapon and inflict or attempt to inflict serious physical harm on another. Felonious assault, pursuant to R.C. 2903.11(A)(2) merely requires an individual to cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance.

{¶ 42} According to *Johnson*, the question is whether it is possible to commit one offense *and* commit the other with the same conduct (not whether it is possible to commit one *without* committing the other). *State v. Moore*, Greene App. No. 2010-CA-13, 2010-Ohio 636. The conduct required for the commission of an aggravated robbery could also result in the commission of a felonious assault. In the instant case, however, the evidence adduced during the trial established that the aggravated robbery was committed with a separate animus from the felonious assault. Specifically, when Ramey and Keeton initially exited the vehicle and chased down Fannon, their intention was to assault him, i.e. Ramey shocked him repeatedly with the taser and Keeton hit him with the butt of the handgun. It was only after they had assaulted and subdued Fannon that Ramey and Keeton decided to rob him of his jewelry, as well. Thus, the trial court properly concluded that the offenses were not allied offenses of similar import and did not err when it refused to merge the aggravated robbery with the felonious assault for the purposes of sentencing.

{¶ 43} Since the count for having a weapon while under disability should have been

dismissed on speedy trial grounds, we need not address whether the charge was an allied offense of either aggravated robbery or felonious assault.

{¶ 44} A trial court has broad discretion in sentencing a defendant and a reviewing court will not interfere with the sentence unless the trial court abused its discretion. *State v. Reese*, Mont. App. No. 21825, 2007-Ohio-6696; *State v. Durham*, Mont. App. No. 21589, 2007-Ohio-6262; *State v. Rose*, Mont. App. No. 21673, 2007-Ohio-4212; *State v. Slone*, Greene App. No. 2005 CA 79, 2007-Ohio-130. The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 54. A court will not typically be found to have abused its discretion in sentencing if the sentence it imposes is within the statutory limits. *State v. Muhammad*, Cuyahoga App. No. 88834, 2007-Ohio-4303; *State v. Burge* (1992), 82 Ohio App.3d 244, 249.

{¶ 45} Contrary to Ramey's assertion, the trial court did not abuse its discretion when it sentenced him to eight years for aggravated robbery and five years for felonious assault with both sentences to run concurrently. First, the trial court did not sentence Ramey to the maximum allowable term for aggravated robbery nor felonious assault. Aggravated robbery is a felony of the first degree, punishable by up to ten years in prison. R.C. 2911.01; 2929.14. Further, felonious assault is a felony of the second degree, punishable by up to eight years imprisonment. R.C. 2903.11; 2929.14. Clearly, Ramey's respective sentences were not the maximum allowable under Ohio law. Nor were the sentences ordered to be served consecutively, but rather concurrent to one another.

{¶ 46} Lastly, Ramey argues that the court failed to consider any mitigating factors

before sentencing him. Specifically, Ramey points out that the evidence established that Fannon brandished a knife during the robbery which “forced Ramey to defend himself.” Ramey also asserts that he was somehow justified in his actions because Fannon was alleged to have stolen money or food stamps from him.

{¶ 47} After *Foster*, trial courts are not required to make any findings or give reasons before imposing any sentence within the authorized statutory range, including maximum, consecutive, or more than minimum sentences, *Foster*, syllabus at ¶ 7. Courts, nevertheless, are still required to comply with the sentencing laws unaffected by *Foster*, such as R.C. 2929.11 and 2929.12 which require consideration of the purposes and principles of felony sentencing and the seriousness and recidivism factors. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855. However, a sentencing court does not have to make any specific findings to demonstrate its consideration of those general guidance statutes. *Foster* at ¶ 42; *State v. Lewis*, Greene App. No. 06 CA 119, 2007-Ohio-6607. And, where the record is silent, a presumption exists that the trial court has considered the factors. *State v. Adams* (1988), 37 Ohio St.3d 295, 297. Further, where a criminal sentence is within statutory limits, an appellate court should accord the trial court the presumption that it considered the statutory mitigating factors. *State v. Taylor* (1992), 76 Ohio App.3d 835, 839; *State v. Crouse* (1987), 39 Ohio App.3d 18, 20. Consequently, the appellant has an affirmative duty to show otherwise.

{¶ 48} In the instant case, based upon the record before us, we presume that the trial court considered the appropriate statutory factors. At the sentencing hearing, the court afforded both defense counsel and the prosecuting attorney the opportunity to speak prior to

sentencing. The court then allowed Ramey to make a statement to the court. After this, the court, prior to imposing sentence, noted for the record that it considered the evidence in the case, as well as Ramey's voluminous criminal record. The court also noted that the attack on Fannon was unprovoked and questioned the extent of Ramey's remorse in that regard. In the judgment entry of conviction, the court stated that it had "considered the record, oral statements, any victim impact statements and pre-sentence report ***, as well as the principles and purpose of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors [under] Ohio Revised Code Section 2929.12."

{¶ 49} In light of the foregoing, we find that the trial court did not abuse its discretion when it sentenced Ramey to eight years for aggravated robbery and five years for felonious assault, both sentences to run concurrently.

{¶ 50} Ramey's first assignment of error is overruled.

IV

{¶ 51} Ramey's third assignment of error is as follows:

{¶ 52} "DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 53} In his third assignment, Ramey argues that he received ineffective assistance when his counsel failed to file a motion to sever his case from that of his co-defendant, Keeton. Ramey also asserts that his counsel was deficient for failing to object to his case being transferred to and heard by a trial judge in the probate division.

{¶ 54} "When considering an allegation of ineffective assistance of counsel, a

two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 55} For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, at 694.

{¶ 56} Initially, Ramey argues that defense counsel provided ineffective assistance of counsel for failing to file a motion to sever his case from his co-defendant's case. Specifically, Ramey asserts that he was prejudiced by the failure to file a motion to sever because Keeton's motion to suppress extended the time in which the State had to bring him to trial.

{¶ 57} Joinder is governed by R.C. 2945.13, which states in pertinent part:

{¶ 58} "When two or more persons are jointly indicted for felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, orders one or more of said defendants to be tried separately."

{¶ 59} The law favors joinder because a single trial will conserve time and expense and may minimize the potentially disparate outcomes that can result from successive trials before different juries. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 86-87; *State v. Torres* (1981), 66 Ohio St.2d 340, 343. However, the interest in joint trials is not unrestricted. A defendant requesting severance “has the burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant’s right to a fair trial.” *Torres*, 66 Ohio St.2d at 343. Crim. R. 14 permits a defendant to sever his case from his co-defendant’s if consolidation will result in prejudice. The rule states in pertinent part:

{¶ 60} “If it appears that a defendant or the state is prejudiced by a joinder of *** defendants in an indictment, *** or by such joinder for trial together of indictments, ***, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.”

{¶ 61} Upon review, Ramey has failed to establish that his counsel’s failure to file a motion to sever would have changed the outcome of the trial. The charges in both indictments involved Ramey and Keeton acting in concert with each other. There is nothing in the record which establishes that joinder of the defendants’ case was prejudicial to either Ramey or Keeton. Accordingly, Ramey’s counsel was not ineffective for failing to file a motion to sever.

{¶ 62} Ramey also asserts that his counsel was ineffective for failing to object to the Common Pleas Court presiding judge’s assignment of his case to a judge in the probate court, rather than to another judge in the general criminal division. In *State v. Bays* (1999),

87 Ohio St.3d 15, 28, the defendant argued that his counsel should have objected to the presence of a probate judge on the panel in a capital case. The Ohio Supreme Court in *Bays* held that “counsel had no duty to object to the presence of the probate judge, for ‘[i]t is not ineffective assistance for a trial lawyer to maneuver within the existing law, declining to present untested or rejected legal theories.’ ” *Id.*, citing *State v. McNeill* (1998), 83 Ohio St.3d 438, 449. It should also be noted that the presiding judge of a court of common pleas can assign a judge of one division of the same court to another division. *Knoop v. Knoop*, Montgomery App. No. 22037, 2007-Ohio-5178. Thus, we find that Ramey’s counsel was not ineffective for failing to object to the appointment of the probate judge to preside over his case.

{¶ 63} Ramey’s third assignment is overruled.

V

{¶ 64} Ramey’s fourth and final assignment of error is as follows:

{¶ 65} “IT WAS ERROR TO DENY THE DEFENDANT’S MOTION TO DISMISS THE WEAPONS UNDER DISABILITY CHARGE; AND THE OVERALL VERDICTS AND ESPECIALLY THE FIREARMS SPECIFICATION[S] WERE BASED UPON INSUFFICIENT EVIDENCE AND/OR WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 66} In his fourth and final assignment, Ramey contends that the trial court erred when it denied his motion to dismiss the weapons under disability charge in Case No. 09-CR-1051. Ramey also argues that his convictions for aggravated robbery, with the attendant firearm specification, as well as felonious assault were not supported by sufficient

evidence and were against the manifest weight of the evidence. Since we have previously found that the court erred when it failed to dismiss the weapons under disability charge on speedy trial grounds, the issue is moot and need not be discussed in this assignment.

{¶ 67} “A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence.” *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046. “In reviewing a claim of insufficient evidence, ‘[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ (Internal citations omitted). A claim that a jury verdict is against the manifest weight of the evidence involves a different test. ‘The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’” *Id.* (Internal citations omitted).

{¶ 68} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

“Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder’s determinations of credibility. The decision whether, and to what extent, to

credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 69} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 70} After a thorough review of the record, we find that the State adduced sufficient evidence at trial to support Ramey’s convictions for aggravated robbery and felonious assault. Daniel Miller and Amber Miller testified that they observed Ramey, along with Keeton, chase Fannon down. They also testified that Ramey was in possession of a taser, and Keeton had a handgun. Once Ramey caught up with Fannon, he stunned him repeatedly with a taser, and robbed him of his jewelry. Daniel Miller testified that during the assault he also observed Keeton strike Fannon with the butt of the handgun. An individual indicted for and convicted of violating R.C. 2911.01, aggravated robbery, and of a firearm specification under R.C. 2941.141, is subject to the sentencing enhancement regardless of whether he or she was the principal offender or the unarmed accomplice. *State v. Hanning*, 89 Ohio St.3d 86, 92, 2000-Ohio-436. Accordingly, there was sufficient evidence to find Ramey guilty of aggravated robbery with the firearm specification and felonious assault.

{¶ 71} Lastly, Ramey’s conviction is also not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve. Ramey testified on his own behalf, and he simply

maintained that he approached Fannon on the street to ask him about food stamps he had allegedly stolen from Ramey. Ramey testified that Fannon pulled out a knife and attacked him and Keeton. Ramey testified that he was simply defending himself from Fannon. The jury did not lose its way simply because it chose to believe the State's witnesses, namely Daniel Miller and Amber Miller, that Ramey and Keeton were the aggressors. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 72} Ramey's fourth assignment of error is overruled.

VI

{¶ 73} In light of our disposition with respect to Ramey's second assignment of error, his conviction for having weapons while under disability is reversed and vacated. In all other respects, the judgment of the trial court is affirmed.

.....

GRADY, P.J. and FAIN, J., concur.

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