

NO. 2011-2192

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95958 and 95986

STATE OF OHIO

Plaintiff-Appellee,

-vs-

DAKOTA FLAGG

Defendant-Appellant

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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**WHY THIS FELONY CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST
AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Dakota Flagg has not demonstrated any compelling or meritorious reasons why his propositions of law rise to the level of substantial constitutional questions or issues of great public or general interest.

Flagg pled guilty in two separate cases involving an Aggravated Robbery and Aggravated Murder occurring in a gas station and an Aggravated Robbery occurring at a store on a separate date. During Flagg's first appeal, Flagg successfully argued that his Aggravated Robbery and Kidnapping convictions in both cases were allied offenses of similar import. The Eighth District remanded the case for re-sentencing. Flagg appealed again, in addition to raising assignments of errors that the Eighth District did not address in the first appeal, Flagg raised the argument that his Aggravated Murder and Aggravated Robbery conviction should have merged. During oral arguments Flagg's counsel argued that his allied-offense argument was not barred by res judicata pursuant to *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381. This argument was raised again in Flagg's motion for reconsideration, which was opposed by the State of Ohio. The Eighth District rejected Flagg's motion for reconsideration.¹ Flagg argues that the Eighth District erred by rejecting his allied offenses argument that his concurrent sentences for Aggravated Murder and Aggravated Robbery should have merged at sentencing.

In *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, while holding that a defendant is not barred by res judicata from raising issues addressed in the direct appeal during the resentencing hearing, this Court determined that, "any prior issues

¹ The fact that *Wilson* was discussed during oral argument and was the subject of Flagg's motion for reconsidering is acknowledged in Appellant's memorandum in support of jurisdiction.

not successfully challenged in Wilson's appeal are outside the scope of his resentencing remand and will be precluded from further review under the principles of res judicata." *Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669 at ¶33. However, *Wilson* did not explicitly overrule cases such as *State v. Gillard*, 78 Ohio St.3d 548, 679 N.E.2d 276 (1997) and *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, which barred issues on successive appeals that could have been raised in the first appeal.

Wilson does not convincingly apply in this case. In Flagg's first appeal, the Eighth District, found that his convictions for Kidnapping and Aggravated Robbery were allied and thus should be merged. Flagg did not argue in his first appeal that his conviction for Aggravated Murder and Aggravated Robbery were allied offenses of similar import. As a result, subsequent allied-offense challenges relating to that offense is barred by res judicata.

In his second proposition of law, Flagg argues that his sentence of 39 years to life imprisonment is cruel and unusual punishment. Flagg does not claim that any particular sentence is cruel and unusual, or that any prison term he received is outside the range authorized by the Ohio General Assembly. Any argument that a sentence constitutes cruel and unusual punishment must focus on the individual sentences and not the aggregate sentence. Flagg argues generally that scientific understanding of the juvenile brain and behavior has advanced to the point where they should be afforded special protection under the law as less culpable offenders. Flagg's argument is true to a point but does not compel any legal conclusion with regard to his sentence. Flagg had the opportunity to mitigate the possible life sentence through the discretionary bindover process. But instead of being

found amenable to rehabilitation in the juvenile justice system, Flagg was found not to be amenable and his case was bound over for indictment.

Flagg's sentence is not so greatly disproportionate to his offense as to shock the sense of justice of the community, as is required to find that his sentence is unconstitutionally disproportionate. Nor can Flagg claim his sentence is disproportionate to that of an accomplice not similarly situated.

The State therefore respectfully requests that this Honorable Court decline jurisdiction of the propositions of law raised by Flagg and decline Flagg's request for summary reversal.

STATEMENT OF THE CASE AND FACTS

The Eighth District's opinion in *State v. Flagg*, 8th Dist. Nos. 93248 and 93249, 2010-Ohio-4247 (*Flagg I*), set forth a statement of the case and relevant facts. The following testimony was presented during Flagg's probable cause hearing in juvenile court:

On December 10, 2007, Dakota Flagg robbed a Marathon Gas Station and killed an employee. The surviving employee testified at Flagg's probable cause hearing that Flagg came in and pointed a gun and demanded money. The surviving employee went to the cash register when he heard fighting. He turned around to see Mohammad Khan "down" and observed "smoke". Flagg then turned to the surviving employee demanding money again. 18 days later, Dakota Flagg robbed a Family Dollar store at gunpoint. Flagg pointed a gun at an employee and said, "[Y]ou already know what it is. I want the money." The employee complied, taking money out of a cash register, putting it in a bag and giving it to Flagg. Flagg then demanded money from the safe. When the employee said she did not have access to the safe. Flagg responded, "I'm sorry, I had to do what I had to do. You know, it's

holiday time.” Flagg proceeded to leave the store. Maple Heights Police responded and located Flagg and Flagg’s accomplice. Officers were able to apprehend Flagg and the gun that Flagg used. That gun linked Flagg to the Aggravated Murder of Mohammad Khan.

The juvenile court subsequently found that Flagg was not amenable during the amenability phase of Flagg’s juvenile court proceedings. Flagg was subsequently bound over and indicted as an adult in two separate cases, each case accounting for both crimes.

Flagg was indicted in a seven-count indictment for the murder of Mr. Khan and the robbery of the Marathon Gas station and in a separate indictment Flagg was indicted in a thirteen-count indictment for the robbery of the Family Dollar store. Flagg pleaded guilty to all charges. The trial court sentenced him to an aggregate sentence of 42 years to life. On direct appeal the Eighth District affirmed Flagg’s convictions but vacated his sentences because the trial court failed to merge the Kidnapping and Aggravated Robbery counts. See *Flagg I*, at ¶48. The Eighth District did not consider at that time Flagg’s arguments of error which included the claims of cruel and unusual punishment and disproportionate sentencing. *Id.* at ¶51.

On remand for resentencing, the trial court resentenced Flagg to an aggregate sentence of 39 years to life. In Flagg’s second appeal, the Eighth District rejected Flagg’s assignments of error and affirmed his sentences. *State v. Flagg*, 8th Dist. Nos. 95958 and 95986, 2011-Ohio-5386 (*Flagg II*).

LAW AND ARGUMENT

Response to Appellant's Proposition of Law No. 1: The proper time to raise an allied offense argument is on direct appeal. When an appellate court remands a sentence for merger on the affected counts, res judicata bars a defendant from raising new arguments that unaffected offenses are allied as they could have been raised in the direct appeal. (State v. Wilson, 129 Ohio St.3d 214, 2011-Ohio-2669, syllabus limited and explained)

Dakota Flagg's first proposition of law is a restatement of *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669. Flagg argues that his concurrent sentences for Aggravated Murder and Aggravated Robbery relating to the same victim should merge, an argument Flagg did not raise in his first appeal. *Wilson* should not apply in this case.

Within this first proposition of law, Flagg argues that the Eighth District erred when it concluded that because Flagg's conviction for Aggravated Murder were upheld on direct appeal, that any challenge to the trial court's sentence on the Aggravated Murder conviction under the law of allied offenses was barred by res judicata. Since *Wilson*, the Eighth District has determined that a defendant's allied offense argument continues to be barred by res judicata. *State v. Mayes*, 8th Dist. No. 96052, 2011-Ohio-6260, *State v. Bonnell*, 8th Dist. No. 96368, 2011-Ohio-5837, *State v. Woods*, 8th Dist. No. 96487, 2011-Ohio-5825, and *State v. Valentine*, 8th Dist. No. 96047, 2011-Ohio-5828.

1. This Court has held that res judicata bars consideration of issues that were available for review but not raised in a first appeal in a subsequent appeal.

When this Court issued its holding in *Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, it did not explicitly overrule the holdings in *State v. Gillard*, 78 Ohio St.3d 548, 679 N.E.2d 276 (1997) and *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948.

In *State v. Gillard*, 78 Ohio St.3d 548, 679 N.E.2d 276 (1997) this Court determined that new issues that were not raised during initial appeals were barred under res judicata.

This Court considered additional matters that the defendant *did not have the prior opportunity*, even though they were outside the scope of remand. Likewise, in *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, this Court recognized “where an argument could have been raised on an initial appeal, *res judicata* dictates that it is inappropriate to consider it is inappropriate to consider that same argument on a second appeal following remand.” *Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶37.

This is consistent with appellate court holdings such as in *State v. Nicholson* 8th Dist. No. 85201, 2005-Ohio-4670, which held that, “any issue which was raised or which could have been raised at trial or on direct appeal may not be relitigated at a later date.” See also *State v. Christian*, 7th Dist. No. 05-MA-89, 2006-Ohio-3567 at ¶¶41, 53.

While this Court in *Wilson* held:

A defendant is not barred by *res judicata* from raising objections to issues that arise in a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing.

Wilson, paragraph two of the syllabus.

This Court’s decision in *Wilson* should be read to account for the decisions in *State v. Gillard*, 45 Ohio St.3d 548, 679 N.E.2d 276 and *State v. Hutton*, 100 Ohio St.3d 176, 797 N.E.2d 948. While new issues may arise during an allied-offense remand sentencing hearing, the State maintains that issues and arguments that were available during the first appeal but were not raised cannot be raised in the second appeal. It is perhaps noteworthy to mention that the very issues the State believed were barred by *res judicata* in *Wilson* were very issues that were raised in *Wilson*’s first direct appeal but not addressed by the Eighth District. See *Wilson* at ¶19 (As a secondary issue, the state asserts that the court of appeals erred in its determination that sentencing proportionality and judicial bias could

be raised before the trial court during resentencing proceedings. We disagree with the state.) And compare to *State v. Wilson*, 8th Dist. No. 91971, 2010-Ohio-1196, ¶¶6-7, in which Wilson raised the following issues:

[5.] The trial court failed to make a finding that the appellant's sentence is consistent with similarly situated offenders,

[6.] The appellant was denied due process of law when he was sentenced by a biased court as evidenced by the statements made by the court at the time of sentencing.

This distinguishes *Wilson* from this case as Flagg did not raise the issue of merger with regard to his Aggravated Murder conviction in the direct appeal. The very issues this Court determined were not barred by res judicata are issues that Wilson raised in his first direct appeal. Flagg's broad interpretation of *Wilson*, would lead to "piecemeal litigation, where defendants continuously file post-conviction motions [or appeals] that raise separate arguments concerning different aspects of their sentence." See *State v. Banks*, 10th Dist. No. 05AP-1062, 2006-Ohio-4225, citing *State v. Lemaster*, 4th Dist. No. 02CA20, 2003-Ohio-4557. Such a policy should not be adopted.

2. Any objection to Flagg's conviction for Aggravated Murder not previously raised is barred by res judicata because the conviction was unaffected by the appropriate allied offense remand.

The Eighth District remanded to the trial court in *Flagg I* "for the limited purpose of resentencing, at which time the State has the right to elect which of the allied offenses to pursue in each case." *Flagg I* at ¶ 49, citing *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

In *Wilson*, this Court held, "any prior issues not successfully challenged in Wilson's appeal are outside the scope of his resentencing remand and will be precluded from further review under the principles of res judicata." ¶33. "Only those sentences for the offenses

that were affected by the appealed error are reviewed de novo[.]” *Wilson*, at ¶15. While the trial court imposed a sentence for Aggravated Murder during the remand hearing, *Wilson* dictates that, because the sentence for Aggravated Murder was unaffected by the Eighth District’s determination in *Flagg I* that the Aggravated Robbery and Kidnapping convictions merged, the Aggravated Murder sentence is not reviewable.

The Second District discussing *Wilson* agrees that sentences that a defendant cannot raise new objections with regards to offenses unaffected by the allied-offense remand. See *State v. Wright*, 2nd Dist. No. 24276, 2011-Ohio-4874 (holding “In addition, since the theft and aggravated menacing offenses are outside the scope of this court’s remand, the trial court will not resentence Wright on those offenses, and Wright will not have another opportunity to raise objections relating to those sentences.”).

Flagg raised no allied-offense argument with regard to the Aggravated Murder counts with respect to *Flagg I*. This would be considered an unaffected count under *Wilson*. An appellate court cannot vacate an entire multiple-offense sentence based upon an appealed error in the sentence for a single offense. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, paragraph three of the syllabus. Moreover,

When a defendant fails to appeal the sentence for a certain offense, he cannot take advantage of an error in the sentence for an entirely separate offense to gain a second opportunity to appeal upon resentencing. To hold otherwise would essentially abrogate the doctrine of res judicata for multicounty sentences and precludes finality in sentencing. Accordingly, a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence following a remand for resentencing on other offenses. *Id.* at ¶ 19.

3. Aggravated Murder and Aggravated Robbery Would Not Merge In This Case

In any event the State submits that Aggravated Murder and Aggravated Robbery are not allied offenses of similar import. Support can be found in the legislative notes and in recent appellate decisions. The legislative notes to R.C. 2941.24 clearly indicate that

an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of Aggravated Robbery and of two counts of Aggravated Murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.

Legislative Service Commission Summary of Am.Sub.H.B. 511, The New Ohio Criminal Code (June 1973) 69.

In *State v. Tibbs*, 1st Dist. No. C-100378, 2011-Ohio-6716 found that Aggravated Robbery and Aggravated Murder were not allied offenses of similar import, reasoning that there was a separate animus for the killing apart from the Aggravated Murder.

4. Conclusion

Because these offenses do not merge, Flagg's first proposition of law presents no issue of public or great general interest and does not involve a substantive constitutional question. Further, *Wilson* does not convincingly apply in this case. Flagg's new allied-offense arguments should be barred by res judicata as they were not raised in the first direct appeal and because under *Wilson* a defendant may only raise claims with regards to affected allied-offense counts.

Response to Appellant's Proposition of Law No. II: After a defendant is found to be not amenable to rehabilitation in the juvenile justice system, an aggregate sentence of 39 Years to life does not constitute cruel and usual punishment. A proportionality argument is not appropriate where the defendant compares the sentence with a co-defendant adjudicated in juvenile court.

In order to determine whether Dakota Flagg's sentence of 39 years to life constitutes cruel and unusual punishment, the analysis must begin with the entire juvenile court proceedings. Moreover, any analysis requires this Court to review the individual sentences rather than the aggregate sentence.

The State acknowledges that the United States Supreme Court has granted certiorari in two cases considering whether a mandatory sentence of life without parole is an appropriate sentence for certain juveniles. *Miller v. Alabama No. 10-9649*² and *Jackson v. Hobbs No. 10-9647*³. In both cases, the juvenile faced a mandatory life without parole sentence. One of the arguments raised in these cases is the mandatory-nature of the life sentence which leaves juveniles without an opportunity to mitigate their conduct with their age. The trial courts in those states had no choice but to sentence the juvenile to life without parole.

More recently in *Graham v. Florida*, 560 U.S. ----, 130 S.Ct. 2011, 2030, 176 L.Ed.2d 825 (2010), the United States Supreme Court held that the Eighth Amendment prohibits the states from sentencing juveniles to life imprisonment without possibility of parole for non-homicide offenses. The Court reasoned that,

“while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.” *Id.*

² See <http://www.supremecourt.gov/qp/10-09646qp.pdf> (last accessed January 20, 2012).

³ See <http://www.supremecourt.gov/qp/10-09647qp.pdf> (last accessed January 20, 2012).

But the cases decided by the United States Supreme Court or currently under consideration do not control the outcome here. Under Ohio law, Flagg was not automatically subject to a mandatory life sentence. A fifteen year old charged with Aggravated Murder must be bound over from the juvenile court to the general division through the discretionary bindover process. A fifteen year old who commits murder, can be deemed amenable to rehabilitation in the juvenile justice system and can receive a juvenile disposition. In this case, however, the juvenile court found that Dakota Flagg was not amenable to rehabilitation in the juvenile justice system. Once indicted as an adult, Flagg faced a wide range of sentencing options ranging from 20 years to life to life without parole for Aggravated Murder. See R.C. 2929.03(A)(1). For the remaining felonies of the first degree, Flagg faced a sentence ranging from three to ten years. See R.C. 2929.14(A), 2006 S.B. 281, eff. 4-5-07 (effective at the time of the offense).

Flagg was subsequently sentenced as an adult as follows:

1. Sentencing for CR-509831			
Count	Offense	Sentence Imposed	Maximum Sentence Allowed
1 - 2 (merged)	Aggravated Murder with firearm specifications	30 years to life + 3 years firearm specification	Life without parole
3 - 4 (merged)	Aggravated Robbery with firearm specifications	3 years + 3 years firearm specification	10 years + 3 years firearm specification
5 - 6 (merged)	Aggravated Robbery with firearm specifications	3 years + 3 years firearm specification	10 years + 3 years firearm specification
Total Sentence Imposed: 33 years to life (Aggravated Robbery counts concurrent with Aggravated Murder)			
2. Sentencing for CR-509845			
Count	Offense	Sentence Imposed	Maximum Sentence Allowed

1 - 2 (merged)	Aggravated Robbery with firearm specifications	3 years + 3 years firearm specification	10 years + 3 years firearm specification
3 - 4 (merged)	Aggravated Robbery with firearm specifications	3 years + 3 years firearm specification	10 years + 3 years firearm specification
5 - 6 (merged)	Aggravated Robbery with firearm specifications	3 years + 3 years firearm specification	10 years + 3 years firearm specification
7 - 8 (merged)	Aggravated Robbery with firearm specifications	3 years + 3 years firearm specification	10 years + 3 years firearm specification
13	Carry Concealed Weapon	1 year	5 years
Total Sentence Imposed: 3 years + 3 year firearm specification (all counts concurrent)			

In total, Dakota Flagg received the minimum prison sentence for the charges of Aggravated Robbery and Carrying Concealed Weapons. Flagg was sentenced to 30 years to life for Aggravated Murder. Within each case, the trial court ran the counts concurrently. However, the trial court ran the sentences in both cases consecutively with each other for a total sentence of 39 years to life. Flagg challenges the aggregate sentence without attacking any particular sentence.

1. Legal standard for proportionality of sentences.

Outside of the death penalty context, the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.E.2d 836 (1991). “[T]he penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.” *McDougle v. Maxwell*, 1 Ohio St.2d 68, 203 N.E.2d 334 (1964).

[F]or purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment.”

Flagg, 8th Dist. No. 95958, 95986, 2011-Ohio-5386 citing *State v. Moon*, 8th Dist. No. 93673, 2010-Ohio-4483, at ¶ 25, quoting *Hairston* at ¶ 20.

2. Flagg’s sentence is not cruel and unusual.

Flagg argues that his sentence of 39 years to life imprisonment is unconstitutionally cruel and unusual. With regard to individual sentences, Flagg was sentenced to the minimum term of incarceration for the Aggravated Robbery counts which amount to three years plus three years for the firearm specification and the one year sentence for Carrying Concealed Weapon. These sentences cannot be said to be grossly disproportionate to their respective offenses. The only sentence that deviated from the minimum was the 30 year to life sentence for Aggravated Murder. But Ohio appellate courts have upheld life sentences that have exceeded Flagg’s life sentence. *See State v. Hairston*, 10th Dist. No. 08AP-735, 2009-Ohio-2346, ¶¶ 61-66 (sentence of 58 years to life in prison for 17-year old juvenile was not cruel and unusual punishment). “[I]f a 15-year-old can be sentenced to life in prison for rape, it should go without saying that a 17-year-old can be sentenced to 58 years for murder.” *Id.* at ¶ 65.

Flagg’s argument that there is both a legal and scientific basis for concluding the juvenile offenders are less blameworthy than adults for criminal acts is true but does not render his sentence cruel and unusual. Flagg’s status as a juvenile already provides him with special protections under Ohio law. As noted above, Flagg was subjected to a

discretionary bindover hearing where he had the opportunity to mitigate his offense with factors such as his youth.

3. Flagg's sentence is not disproportionate compared to that of his juvenile accomplice.

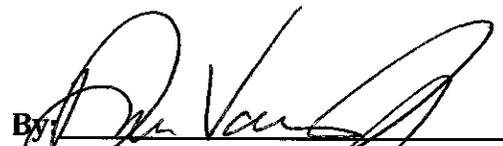
Flagg argues that his sentence violates R.C. 2929.11 because it is disproportionate to that given to his accomplice, whom the trial court sentenced as a juvenile. This Court likewise answered this question in *Warren* when it held that a 15-year old defendant who had been bound over and sentenced as an adult was not "similarly situated" and therefore not comparable to a juvenile defendant who had not been bound over. *Warren* at 211-212.

CONCLUSION

The State of Ohio respectfully submits that Flagg's Memorandum in Support of Jurisdiction fails to present a substantial constitutional question or an issue of public or great general interest. The Eighth District properly rejected Flagg's claims based on the particular facts of this case and reasoned application of established precedent. As such, this Honorable Court's discretionary jurisdiction is not warranted.

Respectfully submitted,

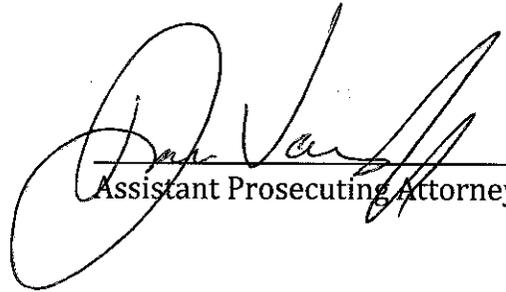
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response has been mailed by regular U.S. mail this 20th day of January, 2012, to John T. Martin, Attorney for Appellant, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.


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