

IN THE SUPREME COURT OF OHIO

State of Ohio : S. Ct. Case No. 2012-1401
Appellee : C.A. Case No. E-93-072
v. : C.P. Case No. 1989-CR-119
Steven W. Yee :
Appellant :

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APPEAL FROM THE SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

MEMORANDUM IN OPPOSITION OF JURISDICTION

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TABLE OF CONTENTS

Page

Why Leave to Appeal Should be Denied.....1

Statement of the Case and Facts.....1

ARGUMENT:

PROPOSITION OF LAW NO. ONE: RES JUDICATA BARS FURTHER LITIGATION IN A CRIMINAL CASE OF ISSUES WHICH WERE RAISED PREVIOUSLY OR COULD HAVE BEEN RAISED PREVIOUSLY IN AN APPEAL. State v. Szefcyk (1996), 77 Ohio St.3d 93, syllabus.

.....3

Authorities Cited in Support of Proposition of Law

State v. Szefcyk (1996), 77 Ohio St.3d 93.....3

State v. Perry (1967), 10 Ohio St.2d 175.....3

State v. Dehler (1995), 73 Ohio St.3d 307.....3

State v. Terrell (1995), 72 Ohio St.3d 247.....3

Ohio Rules of Criminal Procedure, Rule 52(B).....3, 4

State v. Marshall, 2007 Ohio App. LEXIS 5958,
2007-Ohio-6830 (Ohio App. 8 Dist.).....4

State v. Yee, Case No. E-93-72,
1994 Ohio App. LEXIS 5142 (Ohio App. 6 Dist. Nov. 18, 1994).....4, 5

State v. Underwood, 124 Ohio St.3d 365, 2010-Ohio-1,
recon. denied, 124 Ohio St.3d 1494, 2010-Ohio-670.....4, 5

State v. Yarbrough, 104 Ohio St.3d 1, 2004-Ohio-6087.....5

PROPOSITION OF LAW NO. TWO: AGGRAVATED MURDER AND AGGRAVATED ROBBERY ARE NOT ALLIED OFFENSES UNDER State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314.

.....5

Authorities Cited in Support of Proposition of Law

State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314.....5, 6, 7, 8

Ohio Revised Code Ann. §2941.25.....6

State v. Gray, 2005 Ohio App. LEXIS 4127,
2005-Ohio-4563 (Ohio App. 10 Dist.).....6

State v. Rance (1999), 85 Ohio St.3d 632,
overruling **Newark v. Vazirani** (1990), 48 Ohio St.3d 81.....6

State v. Fields (1994), 97 Ohio App.3d 337.....7

State v. Coley, 93 Ohio St.3d 253, 2001-Ohio-1340.....8

Conclusion.....8

Certification.....9

WHY LEAVE TO APPEAL SHOULD BE DENIED

Appellant has failed to demonstrate in his Memorandum in Support of Jurisdiction that this case involves a substantial constitutional question or that this case is one of public or great general interest. The Sixth District Court of Appeals properly found that appellant's application for reconsideration was not timely filed. Even though the application was not timely filed, the reviewing court did address other issues and found that appellant failed to raise the issue of allied offenses of aggravated murder and aggravated robbery on his first appeal. Instead, appellant argued the whether the felonies and firearm specifications were part of the same transaction. The reviewing court properly remanded the case to the trial court. The Sixth District Court of Appeals found that appellant failed to appeal the resentencing based on the case being remanded. Therefore, as recognized by the appellate court, appellant failed to establish a valid cause for reopening, and his arguments are barred by *res judicata*. **See Decision and Judgment journalized July 11, 2012.** Ergo, appellant's Memorandum in Support of Jurisdiction fails to establish a substantial constitutional question or that this case is of public or great general interest.

STATEMENT OF THE CASE AND FACTS

On August 30, 1993, appellant, Steven W. Yee, entered pleas of "guilty" to Aggravated Murder under Count One of the indictment and Aggravated Robbery under Count Six. Defendant further entered pleas of guilty to two firearm specifications. As part of the plea agreement, the trial court imposed concurrent sentences for the aggravated murder and aggravated robbery offenses which were to run consecutive to the sentences imposed for the firearm specifications. Two sentences were imposed for the firearm specifications, which

sentences were to run consecutive to each other as evidenced by the judgment entry filed September 17, 1993.

Appellant filed a timely notice of appeal in the Sixth District Court of Appeals for Erie County, Ohio, on the judgment entry filed September 17, 1993. The Sixth District Court of Appeals vacated the sentence which imposed two consecutive terms of actual incarceration for the firearm specification, as evidenced by the judgment entry filed November 18, 1994. The court further remanded the case to the trial court, which ordered sentences on the firearm specifications to be served concurrently with each other but consecutive to the underlying sentences. Furthermore, the court expressly stated that “[t]he trial court properly held the plea colloquy in conformity with Crim.R. 11.” **State v. Yee**, Case No. E-93-72, 1994 Ohio App. LEXIS 5142, 5 (Ohio App. 6 Dist. Nov. 18, 1994).

On July 27, 2004, appellant filed a motion for leave to withdraw guilty plea or, in the alternative, to vacate and set aside the judgment of conviction, which the trial court denied because appellant failed to demonstrate the existence of manifest injustice. The court also found that “the trial court conducted a proper plea colloquy in conformity with Crim.R. 11 on August 30, 1993.” **See Judgment Entry journalized July 21, 2005.**

Appellant again filed a motion to vacate his conviction or withdraw his guilty plea on April 8, 2011. Appellant’s motion was denied by the trial court without a hearing by judgment entry journalized May 10, 2011. In its judgment entry, the trial court found that appellant’s motion was “barred by the doctrine of res judicata.” **Id.**

On February 29, 2012, appellant filed a Motion for De Novo Resentencing based upon **State v. Johnson**, 128 Ohio St.3d 153, 2010-Ohio-6314. Appellant argued that under **Johnson**, the trial court was required to merge the sentences for aggravated murder and aggravated

robbery. Said motion was denied by the trial court. **See Judgment Entry journalized March 26, 2012.**

Appellant filed a notice of appeal with the Sixth Appellate District Court of Appeals for Erie County, Ohio, on April 18, 2012, in Case No. E-12-017, from the judgment entry of the trial court denying appellant's motion for de novo resentencing based upon the same argument that **Johnson** required the merging of appellant's sentences for aggravated murder and aggravated robbery, which case is currently pending.

Appellant filed Appellant's Application for an Enlargement of Time and for a Delayed Reconsideration with the appellate court on April 24, 2012, on its decision filed November 18, 1994. Said application was denied by Decision and Judgment journalized July 11, 2012.

On August 15, 2012, appellant filed his notice of appeal with this Honorable Court from the decision of the appellate court journalized July 11, 2012.

ARGUMENT

PROPOSITION OF LAW NO. ONE: RES JUDICATA BARS FURTHER LITIGATION IN A CRIMINAL CASE OF ISSUES WHICH WERE RAISED PREVIOUSLY OR COULD HAVE BEEN RASIED PREVIOUSLY IN AN APPEAL. State v. Szefcyk (1996), 77 Ohio St.3d 93, syllabus.

Appellant's claim that the trial court failed to merge allied offenses is barred by *res judicata*. It is well established that the principles of *res judicata* may be applied to bar further litigation in a criminal case of issues which were raised previously or could have been raised previously in an appeal. **State v. Szefcyk** (1996), 77 Ohio St.3d 93, syllabus, citing **State v. Perry** (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. **See also State v. Dehler** (1995), 73 Ohio St.3d 307; **State v. Terrell** (1995), 72 Ohio St.3d 247. However, pursuant to Rule 52(B) of the Ohio Rules of Criminal Procedure (hereinafter "Crim.R."), "[p]lain errors or

defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

As recognized in State v. Marshall, 2007 Ohio App. LEXIS 5958, 2007-Ohio-6830, 2-3, ¶5 (Ohio App. 8 Dist.):

The Supreme Court of Ohio has stated that under the doctrine of res judicata, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 1995 Ohio 331, ... syllabus. Res judicata promotes the principle of finality of judgments by requiring plaintiffs to present every possible ground for relief in the first action. Natl. Amusements, Inc. v. Springdale (1990), 53 Ohio St.3d 60, 62....” Kirkhart v. Keiper, 101 Ohio St.3d 377, 378, 2004 Ohio 1496.... Moreover, res judicata prevents repeated attacks on a final judgment and applies to issues that were or might have been previously litigated. State v. Sneed, Cuyahoga App. No. 84964, 2005 Ohio 1865; State v. Brown, Cuyahoga App. No. 84322, 2004 Ohio 6421.***

In the case at bar, appellant previously appealed his sentence to the Sixth District Court of Appeals in State v. Yee, Case No. E-93-72, 1994 Ohio App. LEXIS 5142 (Ohio App. 6 Dist. Nov. 18, 1994). In Yee, the appellate court reviewed the trial court’s failure to improperly merge firearm specifications. However, the court expressly stated:

The effect of this decision is not to set aside appellant’s conviction or his sentence beyond a temporary vacation of one firearm specification. Rather, again following the analogous allied offenses example, see State v. Kent, supra, at 156; State v. Mangrum (1993), 86 Ohio App.3d 156, 158...we remand the matter to the trial court to either conduct an evidentiary hearing or accept a stipulated statement of facts and from such facts determine whether or not the felonies and firearm specifications of which appellant was convicted were part of the same transaction or act. See State v. Wills, supra. (Emphasis added)

Yee at 8. While reviewing petitioner’s sentence, the appellate court could have taken notice of the trial court’s failure to merge appellant’s offenses under Crim.R. 52(B), if merger was indeed warranted, as “the imposition of multiple sentences for allied offenses of similar import is plain error.” State v. Underwood, 124 Ohio St.3d 365, 2010-Ohio-1, 372, ¶31, recon. denied, 124

Ohio St.3d 1494, 2010-Ohio-670, citing State v. Yarbrough, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶¶96-102.

This argument was recently recognized by the appellate court in the case at bar in response to appellant's "Application for Enlargement of Time and for a Delayed Reconsideration." In its Decision and Judgment journalized July 11, 2012, the court specifically noted that "[i]n his appeal from his convictions, appellant did not claim that the two underlying felonies of aggravated murder and aggravated robbery merged." Id. at 2, citing Yee, supra. The court also stated:

Moreover, appellant did not appeal from the determinations made or the decision issued by the trial court on remand when he was resentenced. Therefore, any arguments regarding his sentencing for the two firearm specifications which could have been raised in an appeal from that judgment entry are res judicata, and no reconsideration, delayed or otherwise is proper. See State v. Harris, 2d Dist. No. 24739, 2011-Ohio-1853. See also State ex rel. Martin Russo, 130 Ohio St.3d 269, 2011-Ohio-5516... (holding that defendant's claims of sentencing error via writ of mandamus, including allied-offense claim, barred by res judicata). Contrary to appellant's claims, he has failed to establish a valid cause for granting his motion for reconsideration.

Id. at 3. As recognized by the appellate court, appellant's argument is barred by *res judicata* and, therefore, is not properly before this Honorable Court.

PROPOSITION OF LAW NO. TWO: AGGRAVATED MURDER AND AGGRAVATED ROBBERY ARE NOT ALLIED OFFENSES UNDER. State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314.

Appellant argues that the recent case of State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, presents a new constitutional argument regarding merger and the applicable test to be applied in determining the merger issue. Appellant's argument is without merit because aggravated murder and aggravated robbery are not allied offenses of similar import under the test set forth in Johnson.

§2941.25 of the Ohio Revised Code governs whether an individual may be convicted and sentenced on multiple counts and states that:

§2941.25: Multiple counts

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

(B) Where the defendant'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.

Previously, it was held that “[u]nder an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*.” State v. Gray, 2005 Ohio App. LEXIS 4127, 2005-Ohio-4563, 13, ¶17 (Ohio App. 10 Dist.), quoting State v. Rance (1999), 85 Ohio St.3d 632..., paragraph one of the syllabus, overruling Newark v. Vazirani (1990), 48 Ohio St.3d 81. “Courts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes ‘correspond to such a degree that the commission of one crime will result in the commission of the other.’***And if the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus.***” Rance, 85 Ohio St.3d at 638-639.

More recently, in State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, this Honorable Court overruled its decision in Rance and held that:

Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

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. **Blankenship**, 38 Ohio St.3d at 119,...(Whiteside, J., concurring) (“It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.” [Emphasis sic]). 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.

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.” **Brown**, 119 Ohio St.3d 447, 2008-Ohio-4569,...at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

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.

Johnson, 128 Ohio St.3d at 162-163, ¶47-51. Additionally,

Regarding separate conduct, when two allied offenses are committed at separate times, at separate locations, *or against different victims, the offender may be sentenced for two crimes.* **State v. Campbell** (1983), 13 Ohio App.3d 338...(times); **State v. Valvano** (Dec. 30, 1992), Hamilton App. Nos. C-920227, C-920228, unreported, 1992 WL 393196; **State v. Ragan** (Aug. 1, 1990), Hamilton App. No. C-890137, unreported, 1990 WL 107455 (locations); **State v. Jones** (1985), 18 Ohio St.3d 116...(victims). (Emphasis added)

State v. Fields (1994), 97 Ohio App.3d 337, 346. Furthermore,

The basic thrust of R.C. 2941.25, regarding allied offenses of similar import, is to prevent “shotgun” convictions. For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue. On the other hand, a thief who commits theft on three separate occasions or steals different property from three separate victims in the space, say, of 5 minutes, can be charged with and convicted of all three thefts. In the first instance the same offense is committed

three different times, and in the second instance the same offense is committed against three different victims, i.e. with a different animus as to each offense. *Similarly, 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.* (Emphasis added)

Johnson, 128 Ohio St.3d at headnote 4.

The holding in **Johnson** regarding aggravated murder and aggravated robbery is consistent with prior holdings by this Honorable Court. In **State v. Coley**, 93 Ohio St.3d 253, 2001-Ohio-1340, 264-265, this Honorable Court stated that:

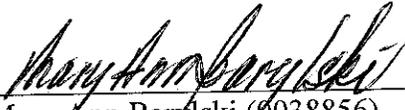
*Also, the constitutional protection against double jeopardy does not preclude a defendant from being separately punished for an aggravated murder and for felonies involved in that murder. In order to commit murder, neither aggravated robbery nor kidnapping need be committed. This court has repeatedly rejected similar double-jeopardy claims and held that aggravated murder is not an allied offense of similar import to an underlying aggravated robbery. **State v. Reynolds** (1998), 80 Ohio St.3d 670...; **State v. Smith** (1997), 80 Ohio St.3d 687...; See, also, **State v. Bickerstaff** (1984), 10 Ohio St.3d 61..., syllabus.* (Emphasis added)

Even if *res judicata* is not applicable to the case at bar, aggravated murder and aggravated robbery are not allied offenses based on the prior rulings of this Honorable Court.

CONCLUSION

Because appellant has failed to demonstrate that this Honorable Court has original or appellate jurisdiction, or why this case involves a substantial constitutional question, or that this case is one of public or great general interest, appellee respectfully moves that appellant's memorandum in support of jurisdiction be dismissed.

Respectfully submitted,


Mary Ann Baryliski (0038856)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing response to Appellant's Memorandum in Support of Jurisdiction was mailed to Steven W. Yee, Inmate No. A424573, GCI, 2500 S. Avon Belden Rd., Grafton, Ohio 44044, this 11th day of September, 2012, by regular U.S. Mail.



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Assistant Prosecuting Attorney