

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

CASE NO. 12-1917

APPELLEE,

**On Appeal from the Fairfield
County Court of Appeals,
Fifth Appellate District**

vs.

BRANDON D. MOWERY,

**Court of Appeals
Case No. 11-CA-61**

APPELLANT.

MEMORANDUM IN RESPONSE

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FILED
DEC 19 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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

This case does not involve a substantial constitutional question, presents no new questions of law to this Court, and does not involve a matter of great general or public interest.

Appellant's Proposition of Law One is barred by res judicata. Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant, who was represented by counsel, from raising and litigating in any proceeding, other than an appeal from that judgment, any defense or claim that could have been raised by the defendant at the trial that resulted in that judgment or conviction or on an appeal from that judgment. *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 143, 652 N.E.2d 710. Accord *State v. Gillard* (1997), 78 Ohio St.3d 548, 549, 679 N.E.2d 276 (on appeal after remand, "new issues" are barred by res judicata) and *State v. Fischer* (2010), 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶ 33.

In the present case, the issues Appellant raises in Proposition of Law One were capable of being raised on direct appeal but were not. Appellant never argued to the trial court or the appellate court that the State's argument regarding allied offenses was limited to the facts or theories of criminal liability advanced in the indictment or the bill of particulars. This argument was available to Appellant at the time of the initial appeal, on remand to the trial court, and on appeal from the hearing, but was not raised. Because res judicata bars consideration of this issue, this case does not involve a matter of great general

interest, a substantial constitutional question, and presents no new questions of law to this Court.

Appellant's Proposition of Law Two does not raise a matter of great general interest, a substantial constitutional question, or a new question of law because this Court has already distinguished between void sentences, those imposed by a court lacking authority to act or subject-matter jurisdiction, and voidable sentences, which are imposed by a court with jurisdiction but are irregular or erroneous. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶ 27. In the present case, the trial court had both the authority and subject-matter jurisdiction to sentence Appellant. Both the trial court and the appellate court in the present case have determined that the sentence was not irregular or erroneous. Appellant's sentence was neither void nor voidable. This proposition does not raise a matter of great general interest, a substantial constitutional question, or a new question of law.

Appellant's Proposition of Law Three does not raise a matter of great general interest or a substantial constitutional question because the authority of appellate courts to limit the scope of remand is well recognized. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, at ¶ 15. The rationale authorizing a reviewing court to order a limited remand implicitly recognizes the need for an appellate court to exercise discretion in determining the appropriate scope of the remand. *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 523 N.E.2d 489 at paragraph two of syllabus. In the present case, the appellate remand "was for the purpose of reviewing the issue of allied offenses in light of the Ohio Supreme Court's new guidance in *Johnson*." *State v. Mowery (Mowery I)*, Fifth Dist. No. 11-CA-61, 2011-Ohio-4532, at ¶ 27. The trial court in the present case was prohibited

from conducting a *de novo* sentencing hearing. The appellate court found no error in the trial court's decision to limit the review to the offenses challenged in *Mowery I* and no error in the trial court's decision not to apply the statutory amendments made by H.B. 86. *State v. Mowery (Mowery II)*, Fifth Dist. No. 11-CA-61, 2012-Ohio-4532.

The present case does not involve a matter of great general or public interest because this case affects only Appellant. The lower courts' decisions rest on the factual findings made by those courts pursuant to the analysis set forth by this Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 48. This analysis was fact-specific. The decision that Appellant's conduct did not constitute allied offenses of similar import affects only him.

This case does not involve a matter of great general or public interest.

This felony case does not involve a substantial constitutional question, presents no new questions of law to this Court, and does not involve a matter of great general or public interest. The State respectfully requests that this Court deny leave to appeal.

STATEMENT OF THE CASE AND FACTS

In 2008, Alisha Snoke was a caseworker working for Fairfield County Job and Family Services. On December 14, 2008, Appellant and his co-defendant, Tara Casto, convinced a man named Guy Luttrell to commit serious crimes against Ms. Snoke and her family. With the assistance and urging of Appellant and Ms. Casto, Mr. Luttrell threw a brick through the window of Ms. Snoke's vehicle and then threw a milk carton filled with gasoline through the hole in the window. As a result, a large fire ensued and the family car was destroyed. Appellant and his co-defendant wanted revenge against Ms. Snoke

because she had been involved as a caseworker and witness in a case involving Appellant and Tara Casto's children that had been heard in the Juvenile Court less than ten days before the firebombing.

In August of 2009, the Grand Jury of Fairfield County, Ohio indicted Appellant for Aggravated Arson, Arson, Retaliation, Intimidation, Trafficking in Drugs and Aggravated Menacing. In March of 2010, the Appellant entered pleas of guilty to Arson, Retaliation, and Aggravated Menacing in violation of R.C. 2903.21. On April 19, 2010, Appellant was sentenced to serve eighteen months in prison for Arson, five years in prison for Retaliation, and six months in prison for Aggravated Menacing. The trial court ordered that the sentences be served consecutively and that the Appellant pay restitution to Ms. Snoke.

After sentencing, the Appellant filed an appeal raising the issue of whether Retaliation and Aggravated Menacing should merge but failed to raise the issue of whether Arson should merge. Fifth Dist. No. 10-CA-26, Brief of Defendant-Appellant, Oct. 29, 2010. The Appellate Court remanded the case to the trial court for a factual hearing to be conducted under the framework of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. *Mowery I*, Fifth Dist. No. 10-CA-26, 2011-Ohio-1709.

On October 24, 2011, the trial court held a factual hearing regarding Appellant's conduct in order to analyze that conduct in light of this Court's decision in *State v. Johnson*. During this hearing, the trial court considered the appellate court's mandate, statutory and case law, as well as the testimony of the investigating officer and Appellant. The trial court then found that the offenses were not allied offenses because they were committed with separate conduct and with a separate animus.

On September 26, 2012, the Fifth District Court of Appeals affirmed the trial court's judgment. *Mowery II*, Fifth Dist. No. 11-CA-61, 2012-Ohio-4532. The appellate court explained that, in the previous appeal, it had limited its remand for a new sentencing hearing to an analysis of the conduct at issue in that appeal - the offenses of aggravated menacing and retaliation - and would not consider an "allied offense" argument regarding the remaining count. *Id.* at ¶ 10. The appellate court concluded that, based on the facts of the case, the trial court did not err in convicting and sentencing Appellant on both counts. *Id.* at ¶ 22-23.

ARGUMENT

RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Proposition of Law No. 1- A trial court's determination of allied offenses under R.C. 2941.25 may not be based on facts or theories of criminal liability which were not advanced in either the indictment or the bill of particulars

A. This Proposition of Law is Barred by Res Judicata

This Proposition of Law is barred by the doctrine of res judicata. In the present case, Appellant has never argued to the trial court or the appellate court that the State's argument regarding allied offenses was limited to the facts or theories of criminal liability advanced in the indictment or the bill of particulars.

A final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169

(1982); *State v. Perry* (1967), 10 Ohio St.2d 175, 181, 226 N.E.2d 104. A defendant is barred from appealing issues that could have originally been, but were not raised on direct appeal. See, e.g., *State v. Fischer* (2012), 128 Ohio St.3d 92, 101, 942 N.E.2d 332 (holding that claims defendant could have raised on direct appeal, but did not, are barred from later being raised under the doctrine of res judicata.).

B. Even if Properly Raised, this Argument Lacks Merit

Even if Appellant had properly raised this argument, it lacks merit. It is well established law that the indictment must make the defendant aware of the “nature and cause of the accusations against him.” *State v. Oliver* (1972), 32 Ohio St.2d 109, 112, 290 N.E.2d 828. The indictment is not required to explain, in detail, to the defendant the theories of culpability to be advanced by the State, such as whether the defendant was complicit in the offense. See *State v. Wilson* (1991), 77 Ohio App.3d 701, 603 N.E.2d 303. The indictment is not required to name the victims of an offense. See *State v. Phillips* (1991), 75 Ohio App.3d 785, 792-793, 600 N.E.2d 825. The indictment may set forth multiple, alternative theories for culpability regarding one act, see *Ohio v. Johnson* (1984), 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 and may include multiple incidents from different events, see *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129. In the indictment, the State is not required to set forth in detail to the Defendant the evidence that will be presented.

Likewise, the purpose of the bill of particulars is not to explain the evidence that the State will present, but to “elucidate and particularize the conduct of the accused.” *State v. Lawrinson* (1990), 49 Ohio St.3d 238, 239, 551 N.E.2d 1261, quoting *State v. Sellards* (1985), 17

Ohio St.3d 169, 171, 478 N.E.2d 781. This Court has previously stated that disclosure of evidence in a bill of particulars does not preclude the State from presenting additional evidence at trial. *State v. Chaffin* (1972), 30 Ohio St.2d 13, 282 N.E.2d 46, at syllabus.

This Court decided the *Johnson* case after Appellant pleaded guilty and was sentenced. This case was initially reversed and remanded to allow the trial court the opportunity to consider Appellant's conduct in light of the *Johnson* decision. *Mowery I*, 2011-Ohio-1709, ¶ 27-28. It would have been difficult for the State to predict the change that the *Johnson* decision brought about and to correctly word an indictment and a bill of particulars to properly set forth the arguments that the State would advance under case law not yet in existence. Appellant's argument is incorrect and would lack merit even if it had been properly raised.

Proposition of Law No. 2- A sentence that does not include the statutorily required determination of allied offenses is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack

A. Appellant's Sentence was neither Void nor Voidable

As with the previous proposition, Appellant never raised this argument before the trial court or the appellate court and is, therefore, barred from raising it now.

Even if Appellant had properly raised it, it lacks merit. This Court has already distinguished between void sentences, those imposed by a court lacking authority to act or subject-matter jurisdiction, and voidable sentences, which are imposed by a court with jurisdiction but are irregular or erroneous. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶ 27.

In the present case, the trial court had both the authority and subject-matter

jurisdiction to sentence Appellant. In his direct appeal, Appellant argued that his sentence had been imposed irregularly or erroneously and the matter was remanded to the trial court for analysis of the sentence pursuant to *Johnson*, which was decided after Appellant was sentenced but while his case was pending. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

As this Court explained, to determine whether the offenses were allied offenses of similar import under R.C. 2941.25(A) and will merge, the trial court must first determine “[i]f the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other.” If the offenses do so correspond, the trial court must then 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 (quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50). The offenses do not merge “if the court determines [that] the offenses are committed separately, or if the defendant has separate animus for each offense.” *Johnson* at ¶ 51. This is an “inherently subjective determination” on the part of the court. *Id.* at ¶ 52.

In the present case, the trial court determined that the defendant had met the first prong of the test and so analyzed Appellant’s conduct. The appellate court found that “the trial court did not err in convicting and sentencing appellant on both *** counts.” *Mowery II*, 2012-Ohio-4532 at ¶ 23. Appellant’s sentence was neither void nor voidable.

Proposition of Law No. 3- On remand for a determination of allied offenses, a trial court is required to conduct a de novo sentencing hearing where R.C. 1.58(B) would apply with respect to any reduced criminal penalties resulting from statutory amendments

A. Appellant was not resentenced and the trial court was not ordered or authorized to conduct a de novo sentencing hearing

Upon remand, a trial court's review is limited by the mandate of the higher court. *See State v. Thrower* (1993), 85 Ohio App.3d 729, 733, 621 N.E.2d 456; and *State v. Maxwell*, Tenth Dist. No. 02AP-1271, 2004-Ohio-5660, ¶ 13. "When a case is remanded to a trial court, that court 'may not consider the remanded case for any other purpose, may not give any other or further relief, may not review for apparent error, and may not otherwise intermeddle with it except to settle so much as has been remanded.'" *Maxwell* at ¶ 13, quoting *State ex rel. Natl. Elec. Contrs. Assn. v. Ohio Bur. Of Emp. Servs.* (Sept. 16, 1999), Tenth Dist. App. No. 97APD07-895, *affirmed* (2000), 88 Ohio St.3d 577, 728 N.E.2d 395. In *State v. Wilson*, this Court recognized that "only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, at ¶ 15. Although an appellate court can order a new sentencing hearing it may narrow the scope of the resentencing through discretionary and mandatory limitations. *Id.*

In the previous appeal, the appellate court specifically limited the review on remand to "analyze appellant's conduct in the offenses at issue pursuant to *Johnson* and, if necessary, to review potential merger of the offenses for sentencing." *Mowery I*, 2011-Ohio-1709, ¶ 28. The Fifth District Court of Appeals explained that "[b]ecause the guilty plea

hearing in this matter predated *Johnson*, the trial court was not afforded the opportunity to review the pertinent issues in the allocution portion of appellant's plea hearing transcript of April 19, 2010." *Id.* at ¶ 27. The remand was limited to developing a factual record regarding Appellant's conduct to determine whether the offenses were allied offenses of similar import. The appellate court did not vacate any portion of Appellant's sentence. The trial court properly conducted a review as limited by that mandate.

B. Appellant's sentence was imposed prior to the effective date of the statutory amendments

The Revised Code states, "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." R.C. 1.58(B). Statutes are presumed to apply only prospectively unless specifically made retroactive. R.C. 1.48. Neither Amended House Bill 86 nor R.C. 1.58(B) specifies that the sentencing amendments are to apply retroactively to those offenders whose sentences have already been imposed. *See*, 2011 Am.Sub.H.B. No. 86; R.C. 1.58.

Appellant's sentence was imposed and Appellant began serving a prison term in April 2010. There is nothing in the statutory language or in the legislative history to suggest that the legislature intended for courts to review sentences imposed prior to the effective date of Amended House Bill 86 and apply the amended provisions. The sentence was not vacated and the appellate court did not order the trial court to resentence Appellant. "[T]he prior appellate remand for a new sentencing hearing was for the purpose of reviewing the issue of allied offenses in light of the Ohio Supreme Court's new guidance in *Johnson*." *Mowery II*, 2012-Ohio-4532 at ¶ 27. The provisions of Amended

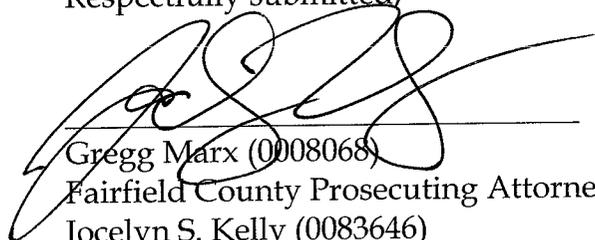
House Bill 86 do not apply.

The trial court properly followed the mandate of the appellate court, which specifically limited the trial court's review on remand to developing a factual record regarding Appellant's conduct to determine whether the offenses were allied offenses of similar import. The trial court's decision was not unreasonable, arbitrary, or unconscionable and it was affirmed by the appellate court. Appellant's sentence was not vacated or subject to change. That sentence was imposed prior to the effective date of the statute and remained in place after the initial appeal and so it is not subject to the amended provisions of the sentencing statutes.

CONCLUSION

For the reasons discussed above, this felony case does not involve a matter of public or great general interest, a new question of law, or present a substantial constitutional question. We respectfully request that this Court deny leave to appeal.

Respectfully submitted,

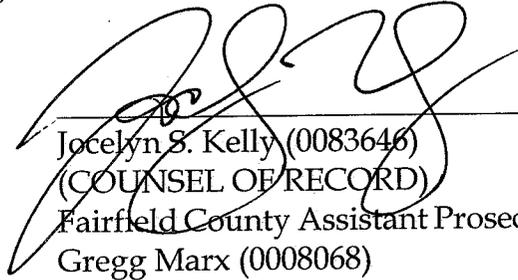


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Response was served upon Thomas R. Elwing, Counsel for Appellant, by hand-delivery to his courthouse mailbox at the Hall of Justice in Lancaster, Ohio, this 13th day of December, 2012.



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