

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	
)	CASE No. 2012-1070
Plaintiff-Appellant,)	
)	
v.)	
)	APPEAL FROM NINTH DISTRICT
)	COURT OF APPEALS,
DAVID T. WASHINGTON,)	LORAIN COUNTY COURT
Defendant-Appellee)	OF APPEALS
)	CASE NO. 11CA010015
)	

REPLY BRIEF OF APPELLANT THE STATE OF OHIO

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REPLY TO INTRODUCTION

Washington argues that this Court's decision in *State v. Williams*, Slip Op. 2012-Ohio-5699, resolves this case. Washington's argument is without merit. In *Williams*, this Court held that the standard of review of a trial court's decision whether one or more offenses are allied offenses is *de novo*. *Id.* at ¶¶ 1, 26. Contrary to Washington's assertion, *Williams* does not resolve the State's sole proposition of law in this case. The Ninth District Court of Appeals did review the trial court's decision under the *de novo* standard of review, however, the issue before this Honorable Court is whether the trial court is constrained to consider only the theories proffered by the prosecution at trial. The decision of the Ninth District Court of Appeals, constraining trial courts to consideration of theories of guilt presented at trial, contravenes R.C. 2941.25 and is a misapplication of that statute and this Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Thus, this Court's decision will clarify the proper constitutional application of R.C. 2941.25 to determining whether two offenses are allied offenses and will clarify this Court's decision in *Johnson*.

Washington's claim that the Ninth District Court of Appeals applied the facts as found by the jury is incorrect. In the case at bar, Washington asserts that the jury rejected the State's argument that the Obstructing Official Business occurred during the car chase when it acquitted Washington of the Felonious Assault charge for swerving at the officer. As the jury allegedly rejected this theory, they certainly could have inferred from the evidence presented at trial that Washington created a risk of harm during the foot pursuit. Thus, Washington's claim that the Ninth District Court of Appeals based its decision on the facts found by the jury is without merit.

As this Court's decision in *Williams* does not resolve the issue raised in this appeal this Court should reject Washington's argument that this case should be dismissed as having been improvidently allowed.

REPLY TO STATEMENT OF FACTS

Washington has presented arguments in his statement of facts. The State of Ohio hereby responds to the improper arguments presented by David Washington, Appellee, in his statement of facts.

Washington asserts that the State presented facts rejected by the jury. Washington claims that the State did not identify specific witnesses in its statement of facts and that since the jury acquitted him of some offenses, the jury necessarily disbelieved some of the State's witnesses. Washington claims that since he was acquitted of some offenses, the State was somehow required to identify which witnesses the jury believed or disbelieved for purposes of the allied offense determination. Although the jury acquitted Washington of some offenses, it is entirely possible that the jury believed all of the witnesses, but felt that, as to certain offenses, there simply was not proof beyond a reasonable doubt. Frequently after a trial, jurors indicate that they believed the witnesses and they believed that the offense occurred, but they just couldn't say that the offense was proven beyond a reasonable doubt. Just because the jury acquitted Washington of certain offenses does not automatically mean the jurors disbelieved some of the State's witnesses.

The jury acquitted Washington of Felonious Assault for swerving at a police officer during the car chase, but still convicted him of Obstructing Official Business in violation of R.C. 2921.31(A), a felony of the fifth degree. The jury was required to find that Washington caused a risk of physical harm to any person for the offense of Obstructing Official Business to be

enhanced to a felony of the fifth degree. Since the jury acquitted Washington of the Felonious Assault charge during the car chase, the jury could have drawn the inference that Washington caused a risk of physical harm to the officers during the foot pursuit. Often when attorneys speak with jurors after a trial the jurors indicate that they convicted the defendant based on an alternate theory of their own that was not argued by either side. Since the jury acquitted Washington of Felonious Assault, the jury was free to infer, as the trial court did at the re-sentencing hearing, that Washington caused a risk of physical harm during the foot pursuit.

Washington argues that the State told the jury one thing and the appellate courts another. This allegation is untrue. The Statement of Facts presented by the State to the Ninth District Court of Appeals and to this Honorable Court contains the facts that were presented to the jury and are supported by citations to the trial transcript. Theories argued at trial are not evidence and are not the “facts” of the case. The purpose of the Statement of Facts in an appeal is to provide the reviewing court with the evidence presented to the jury. The arguments of counsel are not evidence and are not the facts of the case, they are simply the lawyers’ view of what they believe the evidence has shown. In fact, juries in criminal cases are specifically instructed that opening and closing statements of counsel are not evidence. See *OJI CR 205.01*.

Washington correctly notes that the State did not offer a citation to the allegation that Washington’s trial counsel argued the foot chase was separate from the failure to comply. The State would like to correct the record and any misapprehension the State’s erroneous argument may have created. During the Crim. R. 29 argument, defense counsel asserted that the indictment was defective as to one of the counts because it stated that the offense of Felonious Assault occurred in Lorain, County, when in fact the evidence showed that the offense actually occurred in an adjacent county. Tr. 383-384. The State acknowledges that trial counsel’s arguments were

misconstrued and, in fact, trial counsel stated that he conceded the offenses were a continuous course of conduct. The State hereby withdraws its assertion that Washington's trial counsel argued the foot chase and the car chase were separate acts. Notwithstanding this error, the State of Ohio re-asserts that neither party should be constrained during an allied offense hearing to arguments raised during trial. If defense counsel had argued that venue was improper because the offenses were not part of a continuous course of conduct and occurred separately in different counties, it would not be fair to hold defense counsel to that argument at the allied offense hearing, just as it was not proper for the Ninth District Court of Appeals to hold the State to a responsive argument during the Crim. R. 29 hearing.

LAW AND ARGUMENT

Washington argues that the State is challenging the *de novo* findings of fact made by the Ninth District Court of Appeals. Washington misconstrues the issue raised in this appeal and attempts to re-characterize the State's argument as a challenge to the standard of review used by the Ninth District Court of Appeals. Washington attempts to fit this case into the holding of this Court in *Williams*, supra. This appeal is not based on the factual determinations by the trial court or the Ninth District Court of Appeals for purposes of the allied offense determination, or of the standard of review employed by the Court of Appeals. Rather, the issue raised in this appeal is whether the Ninth District Court of Appeals incorrectly held that at the allied offense hearing the State is constrained to the theories of guilt argued at trial.

In *State v. Williams*, Slip Op. No. 2012-Ohio-5699, this Court addressed the appellate standard of review to be applied to allied offense merger decisions and held that such decisions are to be reviewed *de novo*. *Id.* Contrary to Appellee's assertion, this Court's decision in *Williams* does not resolve the question before this Court in the present case. In fact, this Court

specifically noted in *Williams*, that the only issue upon which the state sought reversal was that the appellate court should have applied an abuse-of-discretion standard of review. This Court did not address whether the trial court is constrained to consider the legal arguments espoused by the parties at trial. The decision of the Ninth District Court of Appeals, constraining trial courts to consideration of theories of guilt presented at trial contravenes R.C. 2941.25 and is a misapplication of that statute and this Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Thus, this Court's decision in this case will clarify the proper constitutional application of R.C. 2941.25 to determining whether two offenses are allied offenses and will clarify this Court's decision in *Johnson*. As *Williams* does not address the question before this Court in the present appeal, Appellee's request that this case be dismissed as improvidently allowed should be rejected.

Washington asserts that under the doctrine of *judicial estoppel* the State should not have been permitted to argue a different theory at the sentencing hearing than the theory of guilt argued at trial. This claim is without merit. The doctrine of judicial estoppel prohibits a party from prevailing on a theory in one phase of a criminal case and then arguing a different theory during a separate phase of the case, to the detriment of the other party. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). In *New Hampshire v. Maine*, the United States Supreme Court identified factors for determining whether to apply the doctrine of *judicial estoppel*, and held that:

* * * First, a party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior

proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See *Hook*, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939.

Id. at 749.

In the case at bar, the State did not prevail on the theory that Washington created a risk of physical harm during the car chase as Washington was acquitted of Felonious Assault based on the theory that he swerved at an officer. Because the State did not prevail on this theory, the doctrine of *judicial estoppel* did not bar the State from arguing at the allied offense hearing that Washington created a risk of physical harm during the foot pursuit. *New Hampshire v. Maine*, citing *United States v. C. I. T. Constr. Inc.* The jury found Washington guilty of Obstructing Official Business, a felony of the fifth degree. As Washington was acquitted of the Felonious Assault charge during the car chase, the only other basis for his conviction of a felony five Obstructing Official Business charge was the risk of harm created during the foot pursuit. The logical conclusion is that the jurors convicted Washington on an alternate theory of guilt, which the State was permitted to argue during the allied offense hearing. Thus, as the State did not prevail on the theory that Washington created a risk of physical harm during the car chase, the doctrine of *judicial estoppel* did not bar the State from arguing at the allied offense hearing the alternate theory found by the jury.

Washington claims that the State's theory "descends" into improper sentencing packaging by not looking at the conduct the jury actually convicted him of committing. This argument is without merit. Washington ignores the proposition of law argued by the State and accepted for review by this Honorable Court. The issue raised in this appeal is not whether the trial court or the court of appeals properly reviewed the factual basis for the allied offense determination. The proposition of law accepted by this Court for review is whether the parties

are constrained to the legal theories argued during the guilt phase or whether the trial court may base its allied offense determination on any grounds supported by the evidence. *Johnson* has clearly established that the focus of the allied offense determination is the defendant's conduct. Instead of addressing the issue accepted for review in this case, Washington attempts to distort the issue into a question of sufficiency of the evidence because of the mixed verdicts on certain counts. The State is not engaging in sentence packaging, but rather, is asking this Court to determine that a trial court may base its allied offense determination on any grounds supported by the evidence.

Washington argues that the State's change of theory changes the offense of conviction. This is not true. Washington's argument is really a challenge to the sufficiency of the evidence, not whether the offenses of Obstructing Official Business and Failure to Comply with the Order or Signal of a Police Officer are allied offenses. As Washington already had the benefit of a direct appeal, any argument about the sufficiency or manifest weight of the evidence is barred by the doctrine of *res judicata*. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, (1967) paragraph nine of the syllabus.

Moreover, the jury was free to draw inferences and find guilt based on theories presented by the parties or based on their own theories. Juries do not have to accept a theory of guilt argued at trial in order to find a defendant guilty. Juries are free to consider the evidence and render guilty verdicts based on their own theories, independent of any theories argued by the parties

Washington again improperly attempts to challenge the sufficiency of the evidence regarding his Obstructing Official Business conviction. Washington claims that the State forfeited any argument regarding the risk of harm during the foot chase because the State failed to make this argument in the Court of Appeals or before this Court. This assertion is without

merit. The Ninth District Court of Appeals specifically noted in its opinion that “the state argued that Washington's failure to comply count arose from the high speed chase while his obstructing official business count arose from his decision to engage in a foot chase with officers after stopping the car.” *State v. Washington*, 9th Dist. No. 11CA010015, 2012-Ohio-2117, ¶ 14. Since the Court of Appeals found that the State was constrained to the legal arguments raised during the trial, the issue which forms the basis of this appeal, the State is not precluded from raising this argument before this Court. Moreover, the jury clearly rejected the State’s theory that the Obstructing Official Business charge stemmed from the risk of harm during the car chase but convicted Washington of felony five Obstructing Official Business based on the evidence presented. Obviously the jury inferred that Washington obstructed officers from their official duties by fleeing on foot after he sideswiped a parked car, jumped out and fled on foot. Since the jury convicted Washington of the felony five level of that offense, they obviously inferred from the evidence that the condition of the terrain in the woody area that the foot pursuit created a risk of physical harm to the officers. Thus, the State cannot be constrained to the legal theories presented at trial where the jury rejected the State’s theory of guilt and convicted based on their own theory of guilt.

Additionally, Washington argues that this Court’s decision in *Johnson* is not helpful in resolving the issue in the current appeal. The State disagrees with this assertion. In the case at bar, the decision of the Ninth District Court of Appeals, constraining trial courts to consideration of theories of guilt presented at trial, contravenes R.C. 2941.25 and is a misapplication of that statute and this Court’s decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. The test provided by this Court in *Johnson* merely requires the trial court to consider the conduct of the defendant when determining whether two offenses are allied

offenses, and does not prohibit a sentencing court from considering additional arguments offered by the prosecution. The opinion in *Johnson* makes no mention of the need to restrict the trial court's analysis to theories proffered during trial and clearly intends for the inquiry conducted by the trial court to occur independently from theories or argument of either party at trial. Moreover, then Justice O'Connor's opinion, which is misconstrued by the Ninth District Court of Appeals, does not suggest that allied offense analysis must be limited to theories offered at trial. Rather, the then Justice indicated that this Court was constrained by the legal theories advanced in the briefs. The then Justice's comment about restrictions on legal theories was clearly directed at the process of appellate review, and not the initial allied offense analysis conducted by the trial court.

Fundamentally, *Johnson* allied offense analysis concerns the defendant's conduct, not the theories proffered by the prosecution at trial. Therefore, the State of Ohio respectfully requests that this Honorable Court hold that the *Johnson* allied offense analysis is only triggered subsequent to findings of guilt as to criminal offenses by a judge or jury, and thus, the trial court may base its allied offense decision on any grounds supported by the evidence. By so holding, this Court will resolve the issue of whether the inquiry conducted by the trial court into the defendant's conduct to determine if two offenses are allied offenses should be restricted by the theories presented by the prosecution at trial or can be conducted independent of the prosecution's theories within the discretion of the trial court and based upon the evidence presented to the jury. Thus, this Court's decision will clarify the proper constitutional application of R.C. 2941.25 to determining whether two offenses are allied offenses and will clarify this Court's decision in *Johnson*. Therefore the State of Ohio strongly urges this Court to

reverse the decision of the Ninth District Court of Appeals and affirm the decision of the trial court.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court reverse the decision of the Ninth District Court of Appeals and affirm the decision of the trial court.

Respectfully Submitted,

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