

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee

v.

Kenny Phillips,

Appellant

On appeal from the
Cuyahoga County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 12-98487

13-0847

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT KENNY PHILLIPS

Matthew M. Nee (0072025)
NEE | BITTINGER, LLC
27476 Detroit Rd., Ste. 104
Westlake, OH 44145
(216) 440-7824 | (216) 835-4133 (f)
matt@neebittinger.com

Attorney for Appellant Kenny Phillips

Cuyahoga County Prosecutor's Office
1200 Ontario St., 9th Fl.
Cleveland, OH 44113

Attorney for Appellee State of Ohio

RECEIVED
MAY 28 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 28 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF JURISDICTION1

This case involves a substantial constitutional question and a question of public or great general interest.

This case involves a felony pursuant to Article IV, Section 2(B)(2)(b) of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS.....2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....7

Proposition of Law I: A single course of conduct without specific intent to injure multiple victims requires merger of charges related to the victims.7

Proposition of Law II: Mr. Phillips’s 65-year de facto life-sentence is disproportionate to his co-defendant’s 41 ½-year sentence and, therefore, violates Ohio’s requirement of consistency in felony sentencing.10

CONCLUSION.....11

CERTIFICATE OF SERVICE.....11

APPENDIX

Journal Entry and Opinion of the Cuyahoga County Court of Appeals (April 11, 2013)Appx. p. 1

EXPLANATION OF JURISDICTION

Substantial Constitutional Question—Double Jeopardy

When a lower court's error infringes on a constitutional right or indicates instability in an area of law, this Court's review is necessary. That is the case here.

The area of law at issue here—merger—has been and remains in such a state of flux that district courts of appeal routinely grapple with unpredictable results. And each time a court engages in a merger analysis, federal and state constitutional prohibitions against double jeopardy come into play.

R.C. 2941.25 (the merger statute) embodies the Double Jeopardy clauses of the Fifth Amendment to the U.S. Constitution and Section 10, Article I of the Ohio Constitution. *State v. Johnson*, 2010-Ohio-6314, 128 Ohio St.3d 153, at ¶ 45 (“R.C. 2941.25 is a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions.”)

Here, the court of appeals subjected Mr. Phillips to double jeopardy by affirming his sentence to four counts of attempted murder, all stemming from a single act. By doing so, the court violated Mr. Phillips's constitutional double jeopardy rights. This Court's exercising jurisdiction is necessary to redress that constitutional violation.

Felony Sentencing Error—Grossly Disproportionate Sentencing

Mr. Phillips's sixty-five year sentence is grossly disproportionate to the severity of his offenses and to the sentence imposed upon Mr. Sutton, Mr. Phillips's co-defendant, who received a 41 1/2-year sentence. Mr. Phillips urges this Court to accept jurisdiction to determine that these co-defendants' sentences should more closely align to comply with Ohio's felony sentencing guidelines.

STATEMENT OF THE CASE AND FACTS

Mr. Phillips, at the time of his alleged offence, was an eighteen-year-old kid and a high school graduate who had never been to prison. Mr. Phillips is now twenty-four years old. And, barring this court's accepting jurisdiction to address a constitutional double jeopardy violation and a grossly unfair and disproportionate de facto life sentence, Mr. Phillips likely will spend the remainder of his life in prison.

On June 7, 2007, a jury found Kenny Phillips guilty on the following counts:

- counts one through four, attempted murder with one-, three-, and five-year firearm specifications;
- counts five through eight, felonious assault with a firearm;
- counts nine and ten, felonious assault with one-, three-, and five-year gun specifications;
- counts eleven and twelve, attempted felonious assault with one- and three-year firearm specifications and a peace officer specification;
- count sixteen, felonious assault with one- and three-year firearm specification and a peace officer specification;
- count seventeen, attempted felonious assault with one- and three-year firearm specifications and a peace officer specification; and
- counts eighteen and nineteen, inducing panic; count twenty-one, resisting arrest.

On June 28, 2007, the trial court sentenced Mr. Phillips to 92 years in prison.

Mr. Phillips appealed his convictions and sentence. The Eighth District Court of Appeals of Ohio dismissed the appeal for lack of a final appealable order, because the judgment of conviction did not include restitution. *State v. Phillips*, Cuyahoga App. No. 90124, 2008-Ohio-5101. Upon remand, the trial court held a restitution hearing and entered an order granting restitution. R. at 65.

On April 13, 2009, Mr. Phillips filed a notice of appeal. *Id.* at 68. The Court of Appeals, sua sponte, dismissed Mr. Phillips's appeal for lack of a final appealable order, pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. This Court wrote, "In order to constitute a final judgment, that is reviewable by this Court, the trial court must issue a sentencing journal that contains the means of conviction for all counts and specifications, the sentence imposed for each count and specification, and the amount of restitution to be paid by the defendant." On December 1, 2010, the trial court entered an order that complies with this Court's dismissal order and *Baker*.

Mr. Phillips again appealed. On February 9, 2012, the appeals court affirmed Mr. Phillips's convictions in part, reversed his convictions in part, vacated his sentence, and remanded. *State v. Phillips*, Cuyahoga App. No. 96329, 2012-Ohio-473. The appeals court (1) affirmed the convictions for attempted murder, felonious assault, and attempted felonious assault, (2) reversed Mr. Phillips's convictions for felony inducing panic, (3) vacated Mr. Phillips's multiple sentences on the firearm specifications in counts 1-4, (4) vacated Mr. Phillips's 92-year sentence, and (5) remanded the matter for the trial court to enter a conviction of misdemeanor inducing panic, to resentence Mr. Phillips after merging the specifications, to elect among the felonious assault on a police officer and attempted felonious assault on a police officer charges, and to elect among the attempted murder, felonious assault with a firearm, and felonious assault counts as to each of the four victims (*viz.* Kenneth Tolbert, Christopher Lovelady, and Leonard Brown).

The trial court resented Mr. Phillips to 65 years in prison plus a mandatory five years of postrelease control, another *de facto* life sentence. Mr. Phillips again appealed, but the appeals court affirmed the trial court's resentencing order in all respects.

This case stems from events of May 29, 2007. Kenneth Tolbert was driving Kevin Tolbert, Leonard Brown, and Christopher Lovelady home from a night out in Cleveland. On their way home they stopped by a Marathon gas station at the East 55th Street, Kinsman, and Woodland intersection. Shortly after getting to the Marathon, they decided to call it a night and began heading up Woodland to go home.

At the same time, Patrolman Michael Keane and his partner, Patrolman Daniel Lentz, were heading towards the intersection in response to a call for backup related to the number of cars and people gathered at the intersection. As they approached the intersection, Keane and Lentz saw a Chevrolet make a U-turn to head northbound on East 55th then turn right onto Woodland. Keane and Lentz began following the Chevrolet, but did not turn their lights on while trying to close in on the car. As they turned right onto Woodland, they heard a gunshot. When they rounded the corner, they saw Kenneth's car, the Chevrolet, and a gold car. According to Lentz, when the second round of shooting began, the gold car sped up to nearly 100 mph.

Once on Woodland, the officers saw the Chevrolet pull up to, and the occupants start shooting at, the left side of Kenneth's car. At that point, Keane turned on his lights and sirens and sped up. Neither officer could identify the shooter or state whether the shots came from the front or rear windows of the Chevrolet, but both testified with certainty that the shots came from inside the Chevrolet. *Id.* at 645:1-4.

The Tolberts, Lovelady, and Brown all agreed the shots came from the left, and that they were shot at multiple times. The Tolberts, Brown, and Lovelady could not identify the shooters, but Brown and Lovelady both testified that they saw a light-skinned brown hand outside the car.

In the Chevrolet were Michael Sutton (driver) Deante Creel (front passenger) Akeem Tidmore (behind Creel) and Kenny Phillips (behind Sutton). When Lentz and Keane pulled up behind the Chevrolet, Sutton slowed the car and appeared to be stopping, but then quickly sped up to 60 mph and turned the corner at East 65th.

Lentz testified that there were a lot of furtive movements in Sutton's car when Keane turned on the lights and sirens, but he did not see anyone switch seats. Just after turning the corner, Sutton pulled onto a driveway apron and stopped the car. All four doors opened and the passengers ran, while Sutton got down on the ground. According to Keane, despite all four doors opening at the same time, all of the passengers got out on the passenger-side of the car. But Phillips testified that he got out on the drivers side.

Lentz radioed in that the passengers had run away and that the first two, who he later identified as Creel and Phillips, had guns. When asked at trial about the guns, Lentz claimed that it was dark and all he could see was the silhouette of guns in the first two passengers' hands, both running in the same direction, while the third ran in the opposite direction.

Lentz chased the first two males around a house. Once Lentz was behind the house, he turned on his flashlight and immediately saw strobing and heard shots that he claimed came from separate guns. Believing someone was shooting at him, Lentz ran in the opposite direction. But within a short time, Lentz, Keane, and their backup had caught each of the passengers. Lentz testified that just before he tackled Creel, he saw Creel toss what he believed was a weapon into the field.

Shortly after being arrested, each suspect was swabbed for gunpowder residue, at which time Phillips admitted that he had been shooting a gun the day before. The police also had Sutton's car swabbed for gunpowder residue. Sutton, Creel, and Phillips told the police the shots

came from the gold car. Lentz told Detective Hartman that the occupants of the gold car would make great witnesses, but Hartman never ran down the lead because he said his discussions with officers at the scene left him believing the gold car was inconsequential.

The crime scene was cordoned off and the police began searching Sutton's car and the surrounding area. Neither the police on the scene nor Detective Hartman found any physical evidence, not even the "gun" Lentz saw Creel toss within three feet of him.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: A single course of conduct without specific intent to injure multiple victims requires merger of charges related to the victims.

The single course of conduct here was the firing of a gun into another car. It was nighttime and dark. The other car was unlit and there was no evidence that Mr. Phillips knew that the car was occupied by anyone other than the driver. The only specific intent that might be found was a specific intent to harm the driver.

This is not a situation of a madman bombing a building, a crowded street, or an airplane, where multiple victims are certain. This is a shooting into a car with only one known occupant. There was no specific intent to harm anyone other (allegedly) than the driver.

As the appeals court held in Mr. Phillips's first appeal and in his co-defendant Michael Sutton's appeal, Mr. Phillips's four convictions for attempted murder stem from the alleged act of shooting multiple shots into a car. *State v. Phillips*, Cuyahoga App. No. 96329, 2012-Ohio-473, at ¶¶ 41 and 50; see, also, *State v. Sutton*, Cuyahoga App. No. 90172, 2011-Ohio-2249, at ¶¶ 79, 81, and 94 (the act of shooting into the car was one act).

R.C. 2941.25 provides:

(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.

R.C. 2941.25 (emphasis added).

In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court redefined the test for determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. The *Johnson* court expressly overruled *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, which required an abstract comparison of statutory elements to determine 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. *Johnson*, at ¶ 68.

According to *Johnson*, rather than compare elements of crimes in the abstract, courts must consider a defendant's conduct. See, generally, *Johnson*. The *Johnson* court held:

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 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."

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.

Id. at ¶¶ 48–50.

In *State v. Howard*, Franklin App. No. C-020389, 2003-Ohio-1365, a defendant robbed a store with three employees, and he was charged with one offense per employee. The court stated that it was well-settled that when an offender robs different victims of different property in a short period of time, he can be convicted of each robbery because there is a separate animus for each offense. *Id.* at ¶ 15. The court concluded, however, that the defendant should be sentenced

on only one robbery because his intent was to rob the store; the defendant's actions did not constitute separate acts separated by time or conduct. *Id.*

Similarly, in *State v. Smith*, Cuyahoga App. No. 95243, 2011-Ohio-3051, the court stated, “[A] fact pattern where an individual fires a gun into a crowd of people. . . arguably could create allied offenses of similar import in the event the offender is charged with multiple counts of felonious assault for each victim.” *Smith*, at ¶ 79, citing *State v. Sutton*, Cuyahoga App. No. 90172, 2011-Ohio-2249.

The Eighth District Court of Appeals has applied this single transaction rule where the defendant fired five shots into a house containing multiple victims (see *State v. Kaszas*, Cuyahoga App. Nos. 72546 and 72547 (Sept. 10, 1998) and has held that firing multiple shots in rapid succession does not create a separate animus (see, e.g., *State v. Goldsmith*, Cuyahoga App. No. 90617, 2008-Ohio-5990, at ¶ 37, *aff'd*, 123 Ohio St.3d 162, 2009-Ohio-4906, 914 N.E.2d 1052).

The shootings in this case were the result of a single act or transaction. See *Phillips*; *Sutton*. The firing of multiple shots at the automobile in rapid succession of the automobile involved only a single course of conduct. See *Id.* Though the incident happened to affect multiple victims, the conduct was not separately directed at each of the victims; i.e., with a separate animus toward each victim. See *Id.*

This Court should accept jurisdiction to determine whether the merger doctrine applies to multiple victims of a single course of conduct and a single animus.

Proposition of Law II: Mr. Phillips's 65-year de facto life-sentence is disproportionate to his co-defendant's 41 ½-year sentence and, therefore, violates Ohio's requirement of consistency in felony sentencing.

Mr. Sutton received a 46-year sentence, which the appeals court reduced to 41 ½ years. Mr. Phillips received 65 years. The appeals court noted that Mr. Phillips's conviction (and therefore his sentence) differed because Mr. Phillips was convicted of felonious assault on a police officer, which prompted a sentence of an additional seventeen years (ten years on the charge plus a seven-year specification). *State v. Phillips*, Cuyahoga App. No. 98487, 2013-Ohio-1443, at ¶ 17. Thus, based on the court's rationale, Mr. Phillips should have received no more than 58 ½ years—41 ½ years (the same as Mr. Sutton) plus seventeen additional years. But Mr. Phillips received 65 years.

In *State v. Smith*, Cuyahoga App. No. 95243, 2011-Ohio-3051, the appeals court stated:

A felony sentence should be proportionate to the severity of the offense committed, so as not to "shock the sense of justice in the community." *State v. Chaffin* (1972), 30 Ohio St.2d 13, 17, 282 N.E.2d 46. See, also, R.C. 2929.11(B). A defendant alleging disproportionality in felony sentencing has the burden of producing evidence to "indicate that his sentence is directly disproportionate to sentences given to other offenders with similar records who have committed these offenses * * *." *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510, ¶ 81.

Smith, at ¶ 66.

Accordingly, the relevant comparison is how Mr. Phillips's sentence stacks-up against another offender with a similar record who committed similar offenses. The Court needs to look no farther than to Mr. Sutton.

Mr. Phillips and Mr. Sutton were in the same car at the same time shots were fired into the victims' car, and the results of their alleged conduct are the same—two surviving victims who were wounded in their heads and two unharmed victims. Moreover, like Mr. Sutton, Mr. Phillips was an eighteen-year-old high school graduate who had never been to prison. And while

Mr. Phillips has a juvenile record, the most severe sanctions he received were house arrest and probation. Trans. at p. 1176. Yet, the trial court sentenced Mr. Phillips to sixty-five years, twenty-three and one-half years more than Mr. Sutton's sentence. Mr. Phillips's sentence is grossly disproportionate to the sentence received by his co-defendant. Moreover, Mr. Phillips's sentence is a de facto life sentence that shocks any sense of justice. This court should accept jurisdiction to determine that similarly situated co-defendants' sentences should comport with Ohio's goal of consistency in felony sentencing.

CONCLUSION

Mr. Phillips respectfully requests that this Court accept jurisdiction so the issues presented will be reviewed on the merits.

Respectfully submitted,

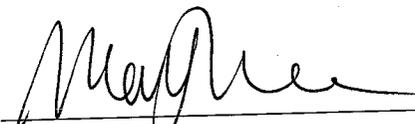


Matthew M. Nee

Attorney for Appellant Kenny Phillips

Certificate of Service

I certify that, on May 24, 2013, I served a copy of this Memorandum in Support of Jurisdiction by ordinary U.S. mail to Cuyahoga County Prosecutor's Office, 1200 Ontario St., 9th Fl., Cleveland, OH 44113.



Matthew M. Nee

Attorney for Appellant Kenny Phillips

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98487

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNY PHILLIPS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-481840

BEFORE: S. Gallagher, P.J., Rocco, J., and McCormack, J.

RELEASED AND JOURNALIZED: April 11, 2013

ATTORNEY FOR APPELLANT

Matthew M. Nee
Nee - Bittinger, L.L.C.
27476 Detroit Road
Suite 104
Westlake, OH 44145

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Kristen L. Sobieski
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 11 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By SMC Deputy

SEAN C. GALLAGHER, P.J.:

{¶1} Appellant, Kenny Phillips, appeals from a resentencing order issued by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm the decision of the trial court.

{¶2} In 2006, appellant was charged under a multi-count indictment. The charges arose from a drive-by shooting incident during which multiple shots were fired into a vehicle containing four occupants, a police chase ensued, and additional shots were fired. After a jury trial, appellant was convicted of four counts of attempted murder, six counts of felonious assault, two counts of attempted felonious assault, one count of felonious assault of a police officer, one count of attempted felonious assault of a police officer, and two counts of inducing panic. The jury also found appellant guilty of firearm specifications that were included on most counts. The trial court initially sentenced appellant to a total prison term of 92 years, plus a mandatory 5 years of postrelease control.¹

{¶3} On direct appeal, this court affirmed in part, reversed in part, and remanded the matter to the trial court. *State v. Phillips*, 8th Dist. No. 96329, 2012-Ohio-473. Appellant's convictions were affirmed in large part, with only the felony convictions for inducing panic being reversed and remanded for the

¹ An initial appeal was dismissed for a lack of a final appealable order because restitution had not been resolved. *State v. Phillips*, 8th Dist. No. 90124, 2008-Ohio-5101, *on reconsideration vacating*, 8th Dist. No. 90124, 2008-Ohio-4367.

trial court to enter the convictions as first-degree misdemeanors. Also, the case was remanded for the merger of allied offenses and for resentencing consistent with the state's elections. *Id.* Upon remand, the trial court resentenced appellant to a total prison term of 65 years, plus a mandatory 5 years of postrelease control.

{¶4} Appellant timely appealed the resentencing order. He raises two assignments of error for our review. His first assignment of error provides as follows:

The trial court erred by imposing multiple sentences for attempted murder, because the evidence established no more than a single act with a single animus.

{¶5} Appellant argues that his four convictions for attempted murder should have merged as allied offenses of similar import. He claims the act of firing multiple shots at an automobile in rapid succession involved only a single course of conduct and that there was no separate animus toward each victim.

{¶6} Initially, we recognize that appellant raised an allied offense claim in the direct appeal from his conviction. In that appeal, appellant claimed that each of the attempted murder offenses were allied offenses of similar import with the corresponding felonious assault and attempted felonious assault offenses, and the state conceded this argument. This court found that the determination of guilt as to each of the subject counts remained intact, but vacated the sentence and remanded the case in order for the state to elect among

the counts as to each of the four victims. *Phillips*, 8th Dist. No. 96329, 2012-Ohio-473. Appellant did not claim, as he does herein, that the four attempted murder offenses should have merged between the victims.

{¶7} This court has previously found that “the issue of whether two offenses constitute allied offenses subject to merger must be raised on direct appeal from a conviction, or res judicata will bar a subsequent attempt to raise the issue.” *State v. Collins*, 8th Dist. No. 97496, 2012-Ohio-3687, ¶ 7; see also *State v. Allen*, 8th Dist. No. 97552, 2012-Ohio-3364, ¶ 20. Therefore, we find appellant’s claim is barred by res judicata.

{¶8} Further, even if it were not barred, we find the claim to be without merit. Where the same act or course of conduct results in offenses committed against multiple victims, a defendant may be separately punished for each person harmed by the conduct. See *State v. Chaney*, 8th Dist. No. 97872, 2012-Ohio-4933, ¶ 25-26; see also *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985).

{¶9} Appellant argues that in his codefendant’s case, the court found the act of shooting into the moving vehicle was one act. *State v. Sutton*, 8th Dist. No. 90172, 2011-Ohio-2249. However, the offenses in that case were considered only as they related to each individual victim. The court found that “the trial court erred in failing to merge the felonious assault and attempted murder convictions as to each of the four victims.” *Id.* at ¶ 10. No challenge was presented as to the

offenses having been committed with a separate animus or being of dissimilar import in regard to multiple victims.

{¶10} Where a defendant commits the same offense against different victims during the same course of conduct and the offense is defined in terms of conduct toward another, then there is a dissimilar import for each person subjected to the harm or risk of harm. *State v. Dix*, 8th Dist. No. 94791, 2011-Ohio-472, ¶ 22; *State v. Jordan*, 8th Dist. No. 91869, 2009-Ohio-3078; *see also State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48. In this case, by firing multiple shots at an occupied vehicle, or acting in complicity with the shooter in this regard, appellant attempted to purposely cause the death of each victim. Appellant created a known risk of harm to four separate individuals, and there was a separate animus as to each victim. Therefore, the offenses at issue are not allied offenses of similar import.

{¶11} Appellant's first assignment of error is overruled.

{¶12} Appellant's second assignment of error provides as follows:

The trial court erred by imposing a sentence that is grossly disproportionate to the severity of [his] offenses.

{¶13} The trial court imposed on appellant a cumulative sentence of 65 years. Appellant claims that his sentence is grossly disproportionate to the severity of his offenses and inconsistent with the sentence imposed on his codefendant, Michael Sutton. He states that his alleged conduct was the same

as Sutton's and, like Sutton, appellant was an 18-year-old high school graduate who had never been to prison.

{¶14} Appellant relies heavily on the original sentence imposed on Sutton of 46½ years that was found disproportionate to the severity of his offenses. *State v. Sutton*, 8th Dist. No. 90172, 2008-Ohio-3677. However, Sutton was resentenced to a total prison term of 41½ years, and that sentence was affirmed. *State v. Sutton*, 8th Dist. No. 97132, 2012-Ohio-1054. Further, unlike Sutton, Phillips was convicted and sentenced for felonious assault of a police officer, and that offense also carried a seven-year consecutive sentence for the firearm specification.

{¶15} R.C. 2929.11(B) states that a felony sentence must be "consistent with sentences imposed for similar crimes committed by similar offenders." The goal of felony sentencing is to achieve consistency not uniformity, and there is no requirement that codefendants receive identical sentences. *See State v. Drobny*, 8th Dist. No. 98404, 2013-Ohio-937, ¶ 7. "[C]onsistency in sentencing does not result from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines." *State v. Dahms*, 6th Dist. No. S-11-028, 2012-Ohio-3181, ¶ 22, citing *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, ___ N.E.2d ___, ¶ 10 (10th Dist.). Also, "[c]onsistency * * * requires a trial court to weigh the same factors for each defendant, which will

ultimately result in an outcome that is rational and predictable.” *Drobny* at ¶ 7, quoting *State v. Georgakopoulos*, 8th Dist. No. 81934, 2003-Ohio-4341, ¶ 26.

{¶ 16} The record reflects that before imposing appellant’s sentence, the trial court considered the testimony and arguments of counsel, the presentence investigation report and mitigating factors, and the appropriate statutory factors and guidelines in R.C. 2929.11 and 2929.12. The court expressed in part:

And this case will never be forgotten by this Court. I recall the details quite clearly because it is the worse case of attempted murder I have ever seen. It was attempted mass murder. But for you and your accomplice not being better shots, we would have had five people dead, including one police officer.

Those shots were fired into that car with a separate animus to cause the murder, to cause the death of certainly all four of those individuals. But for the grace of God, only two individuals were shot in the head. Shot in the head. Resulting in personal, debilitating injuries to each one of those victims, including the ending of a professional football career in Europe where Mr. Lovelady was headed * * *.

And Kenneth Tolbert, again, shot in the head with permanent injuries to his face, permanent paralysis to his face. * * * And but for the grace of God they survived.

And the absolute horror that was witnessed by Kenneth’s brother, Kevin, who sees blood, you know, squirting out of his brother’s head. Mr. Brown, sitting next to his best friend, Mr. Lovelady, hearing the agonizing screams of Christopher Lovelady that he is blind, help me, I’m blind. Shot in the head. All of this done in the presence, witnessed by two police officers.

And then, to make things worse, continuing on in the vehicle running from the police. And when Officer Lentz, trying to apprehend you and your cohorts responsible for this attempted mass murder, I’ll never forget his testimony that he hears the shot, he

sees the star pattern, light in the dark and hears the bullet whistling past his head. And his testimony literally was, he basically had to check his pants; he felt like he was incontinent at that point from fear of his life ending right then and there where he would never be able to see his family because of what you did.

{¶17} The trial court imposed a ten-year prison term on the base charge of attempted murder in Count 1, plus a consecutive eight years on the three- and five-year firearm specifications. The court imposed consecutive ten-year terms for the attempted murder in Counts 2, 3, and 4. A total prison term of 48 years was imposed on Counts 1 through 4. The court imposed a ten-year term for the felonious assault of a police officer, plus a consecutive seven years for the firearm specification, for a total of 17 years to be served consecutive to the 48 years already imposed. On the inducing panic counts, the court imposed six months in county jail concurrent to the other counts. The total cumulative prison term imposed was 65 years. The court also imposed 5 years of mandatory postrelease control and ordered restitution.

{¶18} With regard to consecutive terms, the court specifically found as follows:

The consecutive terms are necessary, a single prison term wouldn't adequately punish this defendant or sufficiently protect our community. It is not disproportionate to the outrageous conduct and devastating serious physical harm occasioned on the victims. There is multiple conduct here, separate conduct of so great — the nature of it is so great in its harm or unusual in its nature that a single prison term would not be appropriate.

{¶19} Upon our review, we find appellant's sentence met the proportionality and consistency objectives. Additionally, appellant has not established that his prison sentence is clearly and convincingly contrary to law or that the trial court abused its discretion by imposing it. Accordingly, we overrule appellant's second assignment of error.

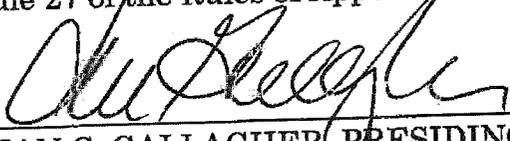
{¶20} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
TIM McCORMACK, J., CONCUR