

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

JEFFERY D. BELEW,

Defendant-Appellant.

* S.C. No. 13-0711
* On Appeal from the
* Lucas County Court
* of Appeals, Sixth Appellate
* District
* Court of Appeals
* Case No. L-11-1279
*

STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO JURISDICTION

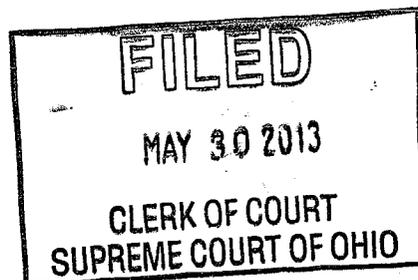
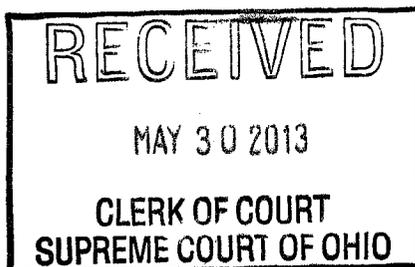
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EXPLANATION OF WHY THIS IS NOT A CASE INVOLVING A SUBSTANTIAL CONSTITUTIONAL QUESTION, DOES NOT INVOLVE PUBLIC OR GREAT GENERAL INTEREST, AND WHY LEAVE TO APPEAL SHOULD BE DENIED

The record establishes that the U. S. Marines made a serious mistake in allowing defendant-appellant, Jeffery Belew ("defendant") to enlist. His pre-existing alcoholism and character defects simply could not be overcome by the discipline and training that defendant received in the military, especially because defendant rejected multiple efforts to treat his substance abuse. Moreover, sanctions for his increasingly serious misconduct were ineffective short of imprisonment by the military and a Bad Conduct Discharge.

The trial court was well aware of defendant's many problems, and of his military service because he was examined by two psychologists in connection with a not guilty by reason of insanity plea which he later withdrew as unsupported by the evidence. Defendant committed serious crimes with an enormous potential to cause harm to others besides himself. His guilty pleas resulted in a tough sentence, but a sentence well below the maximum that could have been imposed.

In fashioning defendant's sentence, the trial court conducted a full and comprehensive Crim. R. 32 hearing, permitting defendant to call one of the psychologists to testify about defendant's many problems including his service based post traumatic stress disorder. The trial court considered defendant's military record in selecting what she believed to be an appropriate sentence based upon all of the evidence this case presented, including, to the extent that it was appropriate, the mitigating effect of defendant's military service and service connected psychological problems.

There is no reason for this court to accept jurisdiction in this case because the proposition of law that defendant advocates, that a sentencing court must consider service related disabilities as a mitigating factor in sentencing, was fully accepted by the trial court and is not in dispute.

What is in dispute is the length of defendant's sentence, which defendant, his counsel and amici believe should have been more lenient. But the trial court, as correctly determined by the court of appeals, considered all proper mitigating factors and did not abuse its discretion in imposing the sentence that defendant received. An appellate court may disagree with the sentencing decision of a trial court, but it may not disturb such sentencing unless it is unreasonable, arbitrary or unconscionable. *State v. Kalish*, *infra*.

This is not a case of public or great general interest. The trial courts of this state do not need guidance from this court with respect to sentencing defendants who have served in the military. This case does not pose any substantial constitutional question that would affect the public. Rather, this case involves only the interests of the parties.

Discretionary review is not appropriate.

STATEMENT OF THE CASE AND FACTS

On April 10, 2011, Oregon Police responded to a domestic disturbance call at an apartment complex located in Oregon, Lucas County, Ohio. As the officers drove their squad cars through the parking lot toward the disturbance, defendant charged toward them firing his 9 mm. semi-automatic pistol. Some of those projectiles struck the police cars. After taking defensive positions, the officers demanded that defendant cease fire and stand down. He disobeyed their commands and kept advancing towards them firing his weapon. He was only subdued after police shot him in the chest. He was arrested and rushed to the hospital to treat his gunshot wound.

Defendant was indicted by the Lucas County Grand Jury on April 20, 2011 for two counts of Attempted Aggravated Murder, and two counts of felonious assault. Each count contained firearm specifications that defendant displayed a firearm¹ and that defendant discharged his firearm at police officers². Appellant retained counsel and entered pleas of not-guilty by reason of insanity to all charges and specifications. After two psychologists had examined defendant and found that he did not qualify for a not guilty by reason of insanity defense, defendant withdrew his insanity plea and entered guilty pleas to counts one and two charging felonious assault, and their respective firearm specifications.

A full Criminal Rule 32 hearing was held on October 20, 2011, during which defendant called one of the examining psychologists, Dr. Wayne Graves, who opined, as he had in his report on the issue of defendant's claim of insanity, that defendant

¹ R. C. 2941.145

² R. C. 2941.1412

suffered from post traumatic stress, major depression and alcohol dependence. The other examining psychologist had diagnosed malingering and a personality disorder.

Prior to enlistment in the military, defendant had been convicted of several misdemeanor crimes as an adult and was adjudicated a delinquent child for several misdemeanor-level offenses.

Defendant joined the Marine Corps after high school when he was about 18 and served for three and one half years. His career was cut short in 2008 when he was convicted of Attempt to Wrongfully Appropriate Government Property. After a court martial defendant received six months confinement, reduction to private status, loss of pay and a Bad Conduct Discharge. Defendant established a significant record of misconduct in the military, including serious substance abuse, assaulting another recruit while in artillery school, and stealing and wrecking the car of a fellow Marine. The crime resulting in his discharge from the Marines involved breaking into and stealing things from a barracks and trying to steal a HumVee.

While in the service defendant was sent to treatment for his substance abuse on five occasions but did not take such offers to help seriously. In the three years after discharge defendant held only two jobs which he quit after very brief periods of employment, choosing instead to support himself by "selling drugs".

Defendant admitted that he intended to shoot the police officers who tried to restrain him on the evening of the incident. Noting the severity of the crimes, his prior disciplinary record in the Marine Corps, and his rampant use of drugs and alcohol, the court sentenced him to a total of 27 years in the Ohio Department of Rehabilitation and Corrections. The remaining counts and specifications were dismissed by the state.

Defendant appealed in *State v. Belew*, 6th Dist. No. L-11-1279, 2013-Ohio-1078, alleging in his first assignment of error, that the trial court's sentence constituted an abuse of discretion and a manifest injustice due to "extraordinary circumstances". Defendant claimed in the merit appeal that his sentencing presented extraordinary circumstances because he suffers from severe service related post-traumatic stress, depression and an aggravation of his pre-existent substance abuse which were of sufficient severity to cause him to attempt "suicide by cop".

The court of appeals rejected this argument, noting that defendant conceded that his sentence satisfied the first prong of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, in that the trial court had fully complied with all applicable rules and statutes in imposing sentence. This left only the second *Kalish* prong, in which an abuse of discretion standard is applied by the reviewing court. The court found that defendant's sentence did not constitute an abuse of discretion, stating:

Appellant argues that extraordinary circumstances are presented in this case, first, by matters to be considered in mitigation of sentence and, second, application of the purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12 in determining sentence. Appellant centers his argument on the fact that he suffers from mental illness—severe post-traumatic stress syndrome and severe depression, both related to his military service in Iraq. Appellant also argues in mitigation that the incident on which prosecution is based was an attempt by him to commit suicide.

The state responds that the trial court specifically stated that it had reviewed the presentence investigative report, the reports by both psychologists (Dr. Cassel and Dr. Graves), and letters from appellant's mother. The court also stated that it listened carefully to the testimony by Dr. Graves at sentencing and arguments by counsel offered in mitigation of sentence. The court also stated that it had considered the principles and purposes of sentencing under R.C. 2929.11 and seriousness and recidivism factors under R.C. 2929.12 in imposing sentence.

The trial court stated at sentencing that appellant was continually in trouble in the military. The record reflects that appellant, while in the service, stole and wrecked his roommate's car for which he was "busted in rank." He was discharged from the service after he was court martialed for stealing government property.

Evaluations by Dr. Cassel and Dr. Graves concluded that appellant knew the wrongful nature of his conduct when he chose to shoot a firearm at police. Physical evidence demonstrates that he discharged his weapon four times. In two of those instances, he hit a police car as a police sergeant exited the vehicle upon arriving at the scene.

The court stated at sentencing that the crimes were extremely serious and that appellant could have killed police officers who had responded to the scene in performance of their duties. The court concluded that appellant was a danger to the community despite having a minimal criminal history. The record supports these conclusions. The record also demonstrates that the trial court considered the principles and purposes of felony sentencing under R.C. 2929.11 and seriousness and recidivism factors in felony sentencing under R.C. 2929.12 in determining sentence.

In our view the trial court acted within its discretion with respect to the weight it gave, in mitigation of punishment, to evidence that appellant suffered from war related post-traumatic stress syndrome and depression and had a history of substance abuse in determining sentence. The trial court imposed sentences within the authorized statutory range of sentences for the offenses committed by appellant. In our view, no extraordinary circumstances are presented in this case to make the trial court's decision as to sentence an abuse of discretion.

State v. Belew, 2013 Ohio 1078, ¶¶36-41.

Upon affirmance of his conviction and sentence in the court of appeals, defendant has sought discretionary review in this court.

RESPONSE TO DEFENDANT'S PROPOSITION OF LAW

ALTHOUGH A TRIAL COURT MUST CONSIDER SERVICE RELATED DISABILITIES AS MITIGATION WHEN IMPOSING SENTENCE ON A MILITARY VETERAN, THE EXTENT OF SUCH MITIGATION LIES WITHIN THE SOUND DISCRETION OF THE COURT

Defendant received a tough sentence because he committed very serious crimes which had a great potential to harm his intended victims, the two police officers that he fired upon, as well as other innocent members of the public. We disagree with defendant's contention, however, that he received the maximum, or near maximum, available sentence. In accordance with R. C. 2929.14(B)(1)(f), defendant could have been ordered to serve mandatory consecutive terms of seven years of incarceration for each of the two specifications charged under R. C. 2941.142 (firing upon a police officer). In that event, defendant would have been sentenced to a total consecutive term of 14 years for the two firearms specifications in R. C. 2941.142, plus the 20 year consecutive terms for the two felonious assaults. Defendant therefore, could have been sentenced to 34, not 27 years in prison.

The trial judge made it very clear that she did consider defendant's military service and his military related post traumatic stress in determining the sentence. She simply did not find that these mitigating factors outweighed the aggravating circumstances of defendant's crime.

As noted by defendant, R. C. 2929.12(F) was effective in March, 2012, after defendant's sentencing, and was thus not binding upon the trial court. The new sentencing provision states that: "The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United

States and that was a contributing factor in the offender's commission of the offense or offenses.”

Although the statute was not then in effect, the trial court did in fact: (1) consider defendant's military service record. His military service record was very bad; (2) consider whether defendant had an emotional, mental or physical condition that is traceable to his service in the armed forces of the United States and that was a contributing factor in his commission of the offense. Here, the trial court concluded that defendant had service connected emotional and mental conditions, but exercised her sound discretion in determining that they were not a contributing factor, or at least not a substantial contributing factor in defendant's crimes.

It almost goes without saying that, although defendant may well have been attempting “suicide by cop,” such a motivation did not justify defendant's attempt to kill police officers in order to accomplish his own death nor did it provide any mitigation whatsoever in ascertaining an appropriate sentence. After all, defendant could have just as surely gotten himself shot by the police, at substantially less risk to public safety, by simply threatening them with a revolver known only to him to be unloaded. That defendant's plan sought to maximize mayhem and death justified a severe penalty.

CONCLUSION

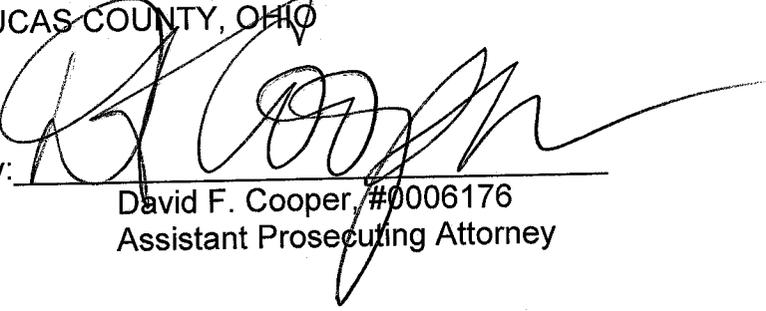
This case does not involve any issue of public or great general interest, nor any substantial constitutional questions. The court of appeals correctly found that the trial court properly considered defendant's background and military service and did not abuse her discretion in sentencing defendant.

The court of appeals applied well established legal principles. Therefore, there are no issues which need to be clarified by this court. No public interest is involved here, only the interests of the parties.

For these reasons, this case is inappropriate for this court's exercise of its discretionary jurisdiction.

Respectfully submitted,

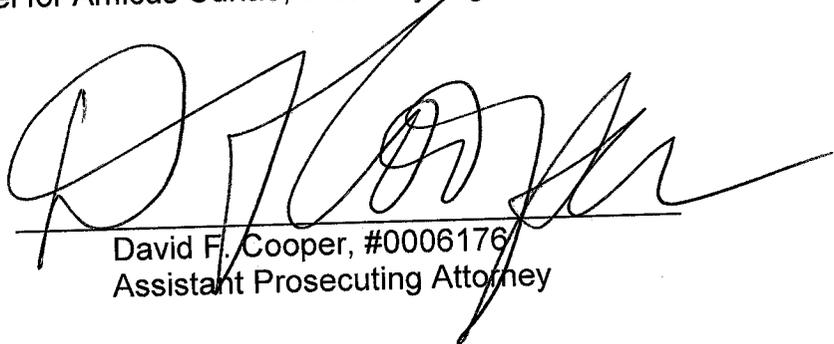
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By: 

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CERTIFICATION

This is to certify that a copy of the memorandum in opposition was sent via ordinary U.S. Mail this 29th day of May, 2013 to Stephen P. Hardwick, Assistant Public Defender, Ohio Public Defender's Office, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Defendant-Appellant, Jeffrey D. Belew, to Laurie J. Pangle, Spengler Nathanson P. L. L., Four SeaGate, Suite 400, Toledo, Ohio 43604, Counsel for Amicus Curiae, The Arms Forces, to R. Jeffrey Pollock, McDonald Hopkins LLC, 600 Superior Ave., East, Ste. 2100, Cleveland, Ohio 44114, Counsel for Amicus Curiae, Ohio Suicide Prevention Foundation, and to Kristen Henry, Ohio Disability Rights Law and Policy Center, Inc., Disability Rights Ohio, 50 W. Broad St., Ste. 1400, Columbus, Ohio 43215, Counsel for Amicus Curiae, Disability Rights Law and Policy Center, Inc.



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