ORIGINAL

NO. 2013-0847

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
EIGHTH APPELLATE DISTRICT
NO. 98487

STATE OF OHIO
Plaintiff-Appellee

-vs-

KENNY PHILLIPS
Defendant-Appellant

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 2

LAW AND ARGUMENT 5

PROPOSITION OF LAW NO. 1:
The Discretionary Jurisdiction of the Supreme Court of Ohio is Not Warranted Where A Reviewing Court Rejected Appellant's Claimed Errors Upon the Application of Established Case Law.

CONCLUSION 10

CERTIFICATE OF SERVICE 10

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

Appellant Kenny Phillips seeks to invoke this Honorable Court's discretionary jurisdiction to consider an issue this Court has fully considered and resolved – may a defendant who commits the same offense against different victims during the same course of conduct, and the offense is defined in terms of conduct toward another, be sentenced for each offense?

This Court and the Eighth District Court of Appeals have repeatedly answered this question in the affirmative and held that there is a dissimilar import for each person subjected to the harm or risk of harm, such that the offenses are not allied offenses and do not merge for sentencing. See *State v. Franklin* (2002), 97 Ohio St.3d 1, 776 N.E.2d 26, 2002 -Ohio- 5304; *State v. Jones* (1985), 18 Ohio St.3d 116, 117, 18 OBR 148, 480 N.E.2d 408, *State v. Chaney,* 8th Dist. No. 97872, 2012–Ohio–4933, ¶ 25–26; *State v. Dix,* 8th Dist. No. 94791, 2011–Ohio–472, ¶ 22, and *State v. Jordan,* 8th Dist. No. 91869, 2009–Ohio–3078.

Phillips raised this claim for the first time on appeal from the trial court's resentencing order. The Eighth District found Phillips' issue was barred by res judicata. *State v. Phillips*, 8th Dist. No. 98487, 2013-Ohio-1443, ¶ 7.

The Eighth District also found the claim to be without merit, holding that, "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." *Id.*, ¶¶ 8, 10.

Phillips' argument that the Eighth District subjected him to double jeopardy by affirming his sentence to four counts of attempted murder should be summarily rejected. Phillips was not

tried twice for the same offense; he was tried once for multiple offenses involving multiple victims. Two victims suffered permanent injuries as a result of being shot in the head.

Also, the Eighth District properly rejected Phillips' claim that his 65 year prison sentence was a life sentence and disproportionate to the severity of his offenses. The Eighth District noted that unlike his co-defendant, Phillips was convicted and sentenced for felonious assault of a police officer, which carries a seven-year consecutive sentence for the firearm specification. *Id.*, ¶ 14. After reviewing the trial court's findings, the Eighth District found that "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." *Id.*, ¶ 19.

The Eighth District properly applied this Court's precedent in affirming the trial court's resentencing order. Consequently, the State respectfully submits that leave to appeal should not be granted, as no substantial constitutional question is involved, nor is this case one of public or great general interest.

STATEMENT OF THE CASE AND THE FACTS

Phillips challenged his convictions and sentence on direct appeal. The Eighth District set forth a statement of the facts in *State v. Phillips,* 8th Dist. No. 96329, 2012-Ohio-473, which the State adopts, as follows:

> Phillips's convictions resulted from an early morning incident on May 26, 2006 at the intersection of East 55th Street, and Kinsman and Woodland Avenues. Phillips, Michael Sutton, Deante Creel, and Akeem Tidmore were together in a tan Chevrolet Caprice heading southbound on East 55th Street. The Chevrolet was "boxy" and had "84" printed on its side ("Chevy 84"). Officers Michael Keane and Daniel Lentz were heading northbound on East 55th Street when Keane observed Chevy 84 make a reckless u-turn. Keane, weaving through traffic to catch up, saw Chevy 84 turn right and head east on Woodland.

Keane and Lentz heard a gunshot as they turned right on Woodland. They saw Chevy 84 moving alongside a Lincoln Mark VIII ("Lincoln"). Keane and Lentz heard more gunshots and saw muzzle flashes between Chevy 84's passenger side and the Lincoln's left side. Lentz described the muzzle flashes as cone-shaped strobing, meaning the gunshots were coming from Chevy 84.

Keane activated his lights and siren and pursued Chevy 84. Chevy 84 first slowed down, but accelerated and turned south on East 65th Street. Keane followed Chevy 84. As Chevy 84 pulled over, four passengers exited and ran. Keane chased the driver, Michael Sutton, and took him into custody.

Lentz saw two males exit the passenger side. They both wore white t-shirts and carried handguns. The two men ran toward a nearby house. A third male, dressed in black, also exited the passenger side and ran in a different direction.

Since they carried handguns, Lentz followed the first two men behind the house. When attempting to retrieve his flashlight, Lentz heard three gunshots from two different caliber weapons, and observed strobing and star-patterned muzzle flashes. He turned back and nearly collided with one of the men, who took off running. As Lentz chased him, Lentz saw him throw something into a field. Lentz tackled the man, Deante Creel, and took him into custody.

Meanwhile, Officer Keane also heard gunshots coming from the direction where Lentz chased the two men. He saw Lentz tackle Creel. Seeing Lentz had Creel under control, Keane continued searching for the other two men who exited from Chevy 84.

Keane saw a man running on East 61 st or 63rd Street. Keane exited his cruiser and chased the man until Keane fell and tore his calf muscle. Lentz saw Keane fall to the ground, and thought Keane was shot. After a zone car picked up Creel, Lentz chased and apprehended the man, Kenny Phillips, as he attempted a return to Chevy 84.

Both Phillips and Creel wore light-colored shirts at the time of their arrest. A zone car picked up the fourth male, Akeen Tidmore, who wore dark clothing.

As a result of the shooting, Kenneth Tolbert, the driver of the Lincoln, suffered paralysis to one side of his face from a gunshot wound to the head. Christopher Lovelady, who was behind Kenneth, suffered blindness to one eye from a gunshot wound to the head. Kevin Tolbert, the front passenger, and Leonard Brown, seated in the back passenger seat, were not injured. Bullet holes were located on the Lincoln's left side.

Phillips's hands and the passenger door window area of Chevy 84 tested positive for gunshot residue. Phillips denied, however, having a weapon when exiting Chevy 84. The hands of Creel, Sutton, and Tidmore all tested negative.

> Phillips, Creel, and Sutton collectively maintained that a gold car pulled up beside the black Lincoln, and an arm exited the gold car's window and fired gunshots into the Lincoln. According to them, the Lincoln stopped, the gold car left, and Chevy 84 pulled to the side to allow the police to chase after the gold car. Officers Keane and Lentz both testified, however, that they did not follow the gold car because the muzzle flashes came from Chevy 84.

State v. Phillips, 2012-Ohio-473, ¶¶ 4-14.

Phillips' instant appeal is from the 8th District's opinion affirming the trial court's resentencing order. The Eighth District set forth a statement of the case in *State v. Phillips,* 8th Dist. No. 98487, 2013-Ohio-1443, which the State adopts, as follows:

> 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.[FN1]
>
> FN1. 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.
>
> 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 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.

State v. Phillips, 2013-Ohio-1443, ¶¶ 2-3.

In his appeal from the trial court's resentencing order, Phillips claimed for the first time that the trial court erred by imposing multiple sentences for four counts of attempted murder.

Phillips also claimed that his sentence was grossly disproportionate to the severity of his offenses. The Eighth District affirmed the trial court's resentencing order. *Id.*

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1:
The Discretionary Jurisdiction of the Supreme Court of Ohio is Not Warranted Where A Reviewing Court Rejected Appellant's Claimed Errors Upon the Application of Established Case Law.

1. **The Eighth District properly held Phillips' claim was barred by res judicata.**

While the Eighth District addressed the merits of Phillips' claim, the Court initially noted that the issue was barred by res judicata because Phillips failed to claim on direct appeal that the four attempted murder offenses should have merged between the victims.

> 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.
>
> 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.

Id., ¶¶ 6-7.

2. **The Eighth District properly held Phillips could be sentenced for each attempted murder conviction as the offenses were not allied offenses of similar import.**

The Eighth District properly rejected Phillips' claim that his four convictions for attempted murder should have merged as allied offenses of similar import because his 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. In its opinion, the Eighth District relied on this Court's precedent, as follows:

> 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).
>
> 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.
>
> 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.

Id., ¶¶ 8-10.

Phillips' claim that the four attempted murder convictions should have merged should be summarily rejected as it is wholly unsupported by case law.

Phillips represents his actions of firing multiple times into a moving vehicle as a single act or transaction. Citing *State v. Goldsmith*, 8th Dist. No. 90617, 2008-Ohio-5990, ¶ 37, Phillips claims the Eighth District has held that "firing multiple shots in rapid succession does not create a separate animus." (Memorandum, pg. 9). *Goldsmith* is wholly inapplicable to this case. In

Goldsmith, the Eighth District found that "felonious assault pursuant to R .C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import as well. *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469. This is so because Goldsmith fired multiple shots at *one* victim in rapid succession and did not have a separate animus for each count of felonious assault." *Id.* (Emphasis added). Citing *State v. Kaszas* (Sept. 10, 1998), Cuyahoga App. Nos. 72546 and 72547, Phillips claims the Eighth District has applied this "single transaction rule" where the defendant fired five shots into a house containing multiple victims. *Kaszas* is also inapplicable, as the holding was limited to sentencing the defendant to only one prison term for multiple firearm specifications. *Id.*, *16.

Phillips also claims that the car into which he shot multiple times was unlit, and there was no evidence he knew the car was occupied by anyone other than the driver. Attempted murder is defined in terms of conduct toward a human being, not a vehicle. Phillips asserts a "cheaper by the dozen" argument; the car was dark so he only knew there was a driver inside, so he cannot be held responsible for the other three victims inside the car. This argument has no basis in law or reason.

As set forth by the Eighth District, similar claims have been considered and consistently rejected by this Court. Phillips has failed to raise any claim that warrants this Court's jurisdiction.

3. The Eighth District properly affirmed Phillips' prison sentence.

The Eighth District properly affirmed Phillips' 65 year prison term. The appellate court conducted a thorough review of the trial court's record on resentencing, and found the trial court did not abuse it discretion.

Initially, Phillips claimed his sentence was disproportionate to the severity of his offenses and inconsistent with that of his co-defendant. In rejecting this claim, the Eighth District noted that while the co-defendant's initial sentence of 46 and ½ years was found disproportionate to the severity of his offenses, the co-defendant's subsequently imposed prison term of 41 ½ years was affirmed. *State v. Phillips,* 2013-Ohio-1443, ¶ 14, citing *State v. Sutton,* 8th Dist. No. 97132, 2012–Ohio–1054. The appellate court further noted that unlike his co-defendant, "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." *State v. Phillips,* 2013-Ohio-1443, ¶ 14.

The Eighth District applied the R.C. 2929.11(B) with respect to consistency of sentences, and considered the trial court's findings, as follows:

> 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.
>
> 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.
>
> 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.

Id., ¶¶ 16-18.

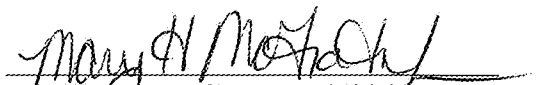
The Eighth District properly found the trial court did not abuse its discretion in imposing a 65 year prison term on Phillips. As noted by the trial court, but for Phillips being a poor shot, five individuals would be dead. As it is, two of the victims have suffered permanent injuries; one has permanent facial paralysis, the other blindness in one eye, ending a professional football career.

CONCLUSION

The State of Ohio respectfully submits that this Honorable Court's discretionary jurisdiction is not warranted, as no substantial constitutional question is involved, nor is this case one of public or great general interest.

Respectfully submitted,

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee State of Ohio has been sent by regular U.S. Mail this 14TH day of June, 2013, to Matthew M. Nee, attorney for appellant Kenny Phillips, 27476 Detroit Road, Suite 104, Westlake, Ohio 44145.

Assistant Prosecuting Attorney