

ORIGINAL

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

CHAD BARNETTE

DEFENDANT-APPELLANT

CASE NO.: 2013-1281

ON APPEAL FROM CASE NO. 02 MA 65
BEFORE THE COURT OF APPEALS FOR
THE SEVENTH APPELLATE DISTRICT

APPELLEE-STATE OF OHIO'S RESPONSE TO
DEFENDANT'S MOTION FOR RECONSIDERATION

STEPHEN P. HARDWICK, 0062932
ASSISTANT PUBLIC DEFENDER

OFFICE OF THE OHIO PUBLIC DEFENDER
250 E. BROAD STREET, SUITE 1400
COLUMBUS, OH 43215
PH: (614) 466-5394
FX: (614) 752-5167
stephen.hardwick@opd.ohio.gov

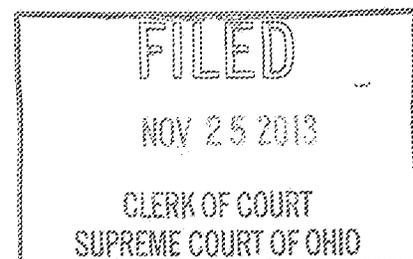
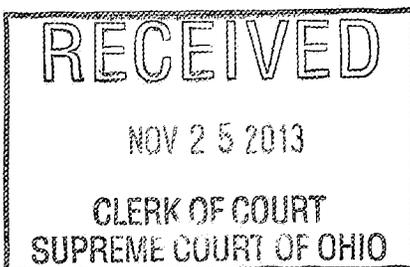
COUNSEL FOR DEFENDANT-APPELLANT

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR

RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

OFFICE OF THE MAHONING COUNTY
PROSECUTOR
21 W. BOARDMAN ST., 6TH FL.
YOUNGSTOWN, OH 44503
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

COUNSEL FOR PLAINTIFF-APPELLEE



Memorandum in Support

Now comes the State of Ohio and hereby Opposes Appellant-Defendant Chad Barnette's Application for Reconsideration.

Here, Defendant contends that the trial court's sentence of eighty-five and one-half (85 ½) years violated the Eighth Amendment's prohibition against cruel and usual punishment. In support, Defendant cited to two recent U.S. Supreme Court opinions. *See Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

Here, Defendant was sentenced to eighty-five and one-half (85 ½) years after he and his co-defendant James Goins "decided to wreak mayhem on their Youngstown neighborhood." *State v. Barnette*, 7th Dist. No. 06 MA 135, 2007 Ohio 7209, ¶ 2. Defendant and Goins were sixteen years old when they attacked, robbed, and assaulted three elderly persons in their neighborhood:

First, they attacked William Sovak, age 84, who had alighted from his home to retrieve his newspaper. Appellant and Goins repeatedly pushed and hit Mr. Sovak; each time they pushed him or he fell to the ground, they kicked him. They also hit Mr. Sovak on the head with his telephone as they stole a set of keys from the kitchen.

After this initial beating, they threw Mr. Sovak down the basement stairs, causing him to lose consciousness. Appellant and Goins then beat Mr. Sovak with a mallet and dragged him to a fruit cellar storage room. They used a screwdriver as a lock to bar his escape and left him there to die. Luckily, a neighbor telephoned a relative to report that there was blood all over Mr. Sovak's house and a trail leading to the basement. Mr. Sovak was then discovered in the fruit cellar. Mr. Sovak sustained a concussion, a spinal cord contusion, fractured vertebrae, a punctured lung, broken ribs and multiple external wounds.

That same night, appellant and Goins donned scarves over their faces and kicked their way into the home of Louis and Elizabeth Luchisan. Mr. Luchisan was sixty-four years old and was nearly confined to a chair on wheels due to medical infirmities. One of

the two intruders entered with a sawed-off shotgun. They both demanded money and dragged Mrs. Luchisan around her house looking for cash. Mrs. Luchisan surrendered approximately \$167, and Mr. Luchisan handed over \$20. The assailants hit Mr. Luchisan over the head with plates and other objects causing severe head contusions and profuse bleeding. Mrs. Luchisan was hit in the head and legs with the shotgun. The assailants also hit her with a telephone and threatened to kill her. Her head trauma later had to be remedied with staples.

As they fled the house, the assailants stopped to take a 27-inch television set and the keys to the Luchisan's vehicle in which they absconded. The police spotted the stolen car as they were later inspecting the two crime scenes. A police officer stood in the road with his weapon drawn while officers in cruisers caused other obstacles. The car veered from the armed officer and crashed into a tree. There were four people in the car. Goins, who was in the front passenger seat, fled from the crash but was soon captured.

Appellant was in the back seat. Citing his position in the vehicle, appellant later claimed that he was not involved in the intrusions and beatings. However, Mr. Sovak positively identified appellant as one of his attackers. Moreover, the tread of appellant's shoes matched shoe tread marks that were left at the crime scene. Officers discovered a sawed-off shotgun in the vehicle and found Mr. Sovak's keys in Goins' residence.

Id. at ¶¶ 2-6.

Defendant was indicted for and convicted of the following offenses: Attempted Aggravated Murder of Mr. Sovak; Aggravated Burglary of Mr. Sovak; Aggravated Robbery of Mr. Sovak; Kidnapping of Mr. Sovak; Aggravated Burglary of the Luchisans; Aggravated Robbery of Mr. Luchisan; Aggravated Robbery of Mrs. Luchisan; Kidnapping of Mr. Luchisan; Kidnapping of Mrs. Luchisan; Felonious Assault of Mrs. Luchisan; Receiving Stolen Property (the Luchisans' automobile); and Four Firearm Specifications. *See id.* at ¶¶ 7-8. The Seventh District affirmed Defendant's sentence of eighty-five and one-half (85 ½) years. *See id.* at ¶ 50.

Here, Defendant's Application for Reconsideration must be Denied, because his application did not justify such a delayed application, and the trial court's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment as stated in *Graham* and *Miller*.

"Generally, an application for reconsideration must call to the attention of the appellate court an obvious error in its decision or point to an issue that had been raised but was inadvertently not considered." *State v. Himes*, 7th Dist. No. 08 MA 146, 2010 Ohio 332, ¶ 4, citing *Juhasz v. Costanzo*, 7th Dist. No. 99 CA 294, unreported (Feb. 7, 2002). "Reconsideration motions are rarely considered when the movant simply disagrees with the logic used and conclusions reached by an appellate court." *Himes*, supra at ¶ 4, citing *Victory White Metal Co. v. N.P. Motel Syst.*, 7th Dist. No. 04 MA 245, 2005 Ohio 3828, ¶ 2, and *Hampton v. Ahmed*, 7th Dist. No. 02 BE 66, 2005 Ohio 1766, ¶ 16.

Further, "[a] motion for reconsideration can be entertained even though it was filed beyond the ten-day limitation on motions for reconsideration if the motion raises an issue of sufficient importance to warrant entertaining it beyond the ten-day limit." *State v. Boone*, 114 Ohio App.3d 275, 277 (7th Dist. 199), citing *Carroll v. Feiel*, 1 Ohio App.3d 145 (8th Dist. 1981).

First, Defendant's application did not justify the delay of more than five (5) years after conviction and sentence was affirmed following a remand pursuant to *Foster*. See *Barnette*, supra. In support, Defendant cited to the U.S. Supreme Court's recent decisions in *Graham v. Florida* and *Miller v. Alabama*. But *Graham* was decided on May 17, 2010, and *Miller* was decided on June 25, 2012. Defendant could have sought reconsideration several years ago after *Graham* was decided. Thus, the delay is not justified.

Second, Defendant's argument is nevertheless meritless.

In *Graham v. Florida*, the juvenile was sentenced to life in prison without the possibility of parole under Florida law after he committed armed burglary and attempted armed robbery. The Court concluded that due to "the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences * * * the sentencing practice under consideration is cruel and unusual." *Graham*, at 130 S.Ct. at 2030.

More recently in *Miller v. Alabama*, the Court concluded that a mandatory life in prison without the possibility of parole was cruel and unusual punishment under the Eighth Amendment. *See State v. Long*, 1st Dist. No. C-110160, 2012 Ohio 3052, ¶ 52, citing *Miller*, supra.

In *Long*, the First District applied *Miller* and concluded that a juvenile's sentence of life in prison without the possibility of parole under Ohio law was not cruel and unusual, because Ohio's sentencing statute allows the trial court wide discretion when imposing a sentence, and the life in prison without parole is not mandatory like it was in *Miller* and *Graham*. *See id.* Thus, Defendant's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Furthermore, nothing in *State v. Nztll*, 836 N.W.2d 41, 45, 70-71 (Iowa 2013), should change this conclusion.

Here, Defendant simply disagrees with the trial court's sentence and this Court's denial of jurisdiction.

Therefore, Defendant's Application for Reconsideration must be Denied.

Respectfully Submitted,

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR BY:



RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Floor
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rivera@mahoningcountyoh.gov
Counsel for Appellant-State of Ohio

Certificate of Service

I certify that a copy of the State of Ohio's Response to Defendant's Motion for Reconsideration was sent by ordinary U.S. mail to counsel for Defendant, **Stephen P. Hardwick, Esq.**, at the Office of the Ohio Public Defender, 250 W. Broad Street, Suite 1400, Columbus, OH 43215, on November 22, 2013.

So Certified,



Ralph M. Rivera, 0082063
Counsel for Appellant-State of Ohio