ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO. 2013-0711
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT, CASE NO. L-11-1279
v.	:	
JEFFERY BELEW,	:	
	:	
DEFENDANT-APPELLANT.	:	

REPLY BRIEF OF APPELLANT JEFFERY BELEW

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INTRODUCTION

The State makes three fundamental errors. On the standard of review, the State claims that this Court must affirm as long as the trial court cited the correct statutes, regardless of how poorly the trial court applied those statutes. On the merits, the State confuses a finding that Mr. Belew did not qualify for a plea of not guilty by reason of insanity (which was made) with a finding with a finding (which was never made) that Mr. Belew did not suffer from post-traumatic stress disorder. And the State still does not understand that combat can turn small problems in to large problems.

STATEMENT OF THE FACTS

In its brief, the State cites to Mr. Belew's subsequent weapons conviction of Mr. Belew while at the Mansfield Correctional Institution. Brief at 11. The State also draws an inference as to how that incident should affect this Court's review of this case. *Id.* Of course, this is not in the record. However, if this Court considers that information, it should do so in context.

When Mr. Belew entered prison, he refused to join the Aryan Brotherhood or any other gang.[1] As a result, the Aryan Brotherhood let other prison gangs know that Mr. Belew was unprotected. Gang members attacked Mr. Belew in areas of the prison that they knew were poorly monitored. After several attacks, he made a small knife to protect himself. He carried the knife when going to lunch one day because he felt

[1] Unless otherwise specified, Mr. Belew's trial counsel in the Richland County case conveyed the information in this section to undersigned counsel.

threatened. A corrections officer stopped him and told him not to move. Mr. Belew complied, and the officer found the knife without further incident. Mr. Belew never used or brandished the knife, and was never accused of doing so.

Frequently, prisoners who are found with weapons are sent to the Southern Ohio Correctional Institution in Lucasville. But the Columbus office of the Department of Rehabilitation and Correction ("DRC") decided that Mr. Belew's conduct was not sufficiently dangerous to merit such a transfer. Instead, he was transferred to the Toledo Correctional Institution, which is closer to his family.

Further, according to DRC's Departmental Offender Tracking System, Mr. Belew's security level was not increased due to the incident. Upon his arrival to DRC, Mr. Belew was initially classified with a security level of 3 out of a potential 5, and his level has never been increased. Mr. Belew's DOTS report shows that he is currently a level 3A inmate, which means that he is at the "less restrictive privilege level associated with [his] security level." DRC Policy No. 53-CLS-02, 1 (10/19/12).[2] He is now eligible to be reviewed to have his security level reduced to 2. *Id.* at 2. Mr. Belew's current institution has special housing for Level 3A offenders to "reward positive behavior[.]"Adam Jackson, *Correctional Institution Inspection Committee Report, Toledo Correctional Institution* (Apr. 16, 19, 20, and 24, 2012), at 112 (viewed Dec. 12, 2013). Mr.

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[2] Available at http://www.drc.ohio.gov/web/drc_policies/documents/53-CLS-02.pdf (viewed, Dec. 12, 2013).

Belew reports to undersigned counsel that he is in such housing—in his case, a pod that's specifically designated for veterans.

Mr. Belew created no problems while in Richland County for court. He was consistently polite and respectful, including when he was invited to chambers to participate in a pre-trial discussion. He received the minimum prison term of two years, and the Richland County Prosecutor's Office agreed that, absent a new incident, it would not oppose a timely judicial release motion.

Mr. Belew was wrong to make a knife to protect himself. But that action was significantly mitigated by the surrounding circumstances, his later actions, DRC's reaction to the incident, and the lenient plea agreement and minimum prison term he received from the prosecutor and trial court.

ERRATA

On pages 14-15 of Mr. Belew's Merit Brief in this case, Mr. Belew quoted from *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6, but failed to include the citation. Counsel for Mr. Belew noticed the error on October 22, 2013, and immediately sent the correct citation to opposing counsel via email.

ARGUMENT

I. The standard of review matters.

A. The General Assembly expected vigorous appellate review of sentences.

A lack of vigorous appellate review, as the State proposes, would thwart the General Assembly's purpose to "assure proportionality, uniformity and other fairness in criminal sentencing." R.C. 181.24(A) (duties of the Ohio Sentencing Commission). To achieve those goals, in 1995, the General Assembly passed Amended Substitute Senate Bill 2 ("S.B. 2"), which was the result of reforms proposed by the Sentencing Commission in 1993. In determining how to set forth such a system, the Commission was left with a key question: How to give judges discretion to be wise without giving discretion to be capricious? The Commission had three answers: state clear purposes, use sentencing presumptions to guide judges, and monitor sentences through appellate review. A Plan for Felony Sentencing in Ohio: A Formal Report of the Ohio Criminal Sentencing Commission (July 1, 1993), 19.

Even relative uniformity in sentencing is not possible if appellate courts give total deference to trial judges as long as the judges refer to the proper statutes or remain silent about their sentencing decisions. Any sentence within the statutory range would almost automatically be affirmed on appeal. Sentencing judges would become autonomous General Assemblies with complete discretion to consider certain facts as aggravating even if a judge across the hall would consider the same facts as mitigating.

And automatic affirmance is incompatible with a uniform, statewide system of sentencing.

B. The General Assembly intended to limit trial court discretion to impose consecutive sentences.

This Court expressly recognized that "S.B.2 appears to evidence a policy decision to limit a trial court's ability to impose consecutive sentences to specific situations." *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶ 16. This Court explained that the "recommendations made by the Ohio Criminal Sentencing Commission prior to the passage of S.B. 2 also evince an intent that trial courts be permitted to impose consecutive sentences only in certain specified circumstances." *Id.* at ¶ 15, citing Diroll, Felony Sentencing Manual (Aug. 1, 1996) 24, P 7a and b; former R.C. 2929.14(E)(4)(a), (b), and (c). The recommendation was in contrast to the post-*Foster* law then in effect, which allowed judges to impose consecutive terms on any multiple offender for any reason within the trial court's discretion. A Plan for Felony Sentencing in Ohio: A Formal Report of the Ohio Criminal Sentencing Commission (July 1, 1993) 29.

Under the language that House Bill 86 reinstated into the Ohio Revised Code, judges are "guided to give concurrent sentences unless circumstances argue that consecutive sentences are more appropriate." *Bates* at ¶ 18, quoting Diroll, A Decade of Sentencing Reform, A Sentencing Commission Staff Report (Mar.2007) 19.

C. Appellate courts retain the power and duty to exercise independent judgment when reviewing sentences.

The clear and convincing standard requires that the reviewing court exercise its own judgment. That standard states that a sentence should be reversed where the reviewing court "clearly and convincingly finds" that either the record does not support the findings needed to impose consecutive sentences or the sentence is "otherwise contrary to law." R.C. 2953.08(G)(2). The statute expressly gives reviewing courts the authority to make findings.

Accordingly, the State is incorrect in asserting that the clear and convincing standard in R.C. 2953.08 is "extremely deferential[.]" Brief at 14, n.10, citing *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, ¶ 19-22. But the State's argument is consistent with its assertion that trial courts have unfettered discretion to apply any sentence within the statutory range without appellate review so long as the trial court cites to the correct statutes or remains silent:

> So long as the trial court properly considered all mitigating factors, it was within her discretion to weigh them in any manner that she saw fit and to assign such weight to each factor as she thought appropriate.

State's Brief at 15. The State's proposed standard is nothing but an attempt to apply the abuse of discretion standard that the General Assembly expressly repudiated in R.C. 2953.08(G)(2): "The appellate court's standard for review is not whether the sentencing court abused its discretion."

II. The State's arguments fail on the merits.

A. The State attempts to graft alternative rationales onto the trial court's sentence.

The State's attempt to retrospectively impose multiple alternative rationales on the trial court's sentence demonstrates that the trial court's reasoning does not support the sentence. In a single sentence in its merit brief, and without any citation to the record, the State proposes three inconsistent reasons for the trial court's sentence:

> Here, the trial court concluded that defendant had service connected emotional and mental conditions, but determined that they were [1] not a contributing factor, *or* [2] that they were not a substantial contributing factor[,] *or* [3] that the aggravated circumstances of defendant's crimes outweighed such mitigating factors in favor of a severe sentence. (Emphasis added.)

Brief at 11. Based on the record, the State can't decide whether the trial court found that Mr. Belew's service-related mental illness was not a contributing factor to the crime, was not a *substantial* contributing factor, or that the illness was a substantial contributing factor, but that it was outweighed by aggravating factors.

B. The elements of an offense are not aggravating factors.

The State correctly asserts that Mr. Belew's offense is more serious because the Ohio Revised Code makes an assault on a peace officer significantly more serious than other assaults. Because the victims were peace officers, Mr. Belew's assaults were a first-degree felonies instead of second-degree felonies. R.C. 2903.11(D)(1)(a). Likewise, the offenses involved seven-year firearm specifications, rather than three-year specifications, because the victims were officers. 2929.14(B)(1)(a)(ii) and (f). But the

elements of an offense are what make an action a crime. Elements are not aggravating factors. So the fact that the victims in this case were peace officers does not aggravate Mr. Belew's first-degree felony charges and his seven-year firearm specifications.

The lower courts have correctly and unanimously held that an element of an offense does not make any given commission of that offense more serious. For example, the Fourth District explained that creating a risk of harm to firefighters was an element of aggravated arson, so the creation of that risk did not make the offense more serious:

> Because the risk of harm to the firefighters was an element of the offense [of aggravated arson], we find that the trial court could not properly consider it as a factor justifying a greater than minimum sentence without explaining why the danger was something more than a required element of the offense. To hold otherwise would create a presumption that, all forms of aggravated arson constitute the worst form of the offense because they place firefighters in harm's way.

State v. Clagg, 4th Dist. Washington No. 04CA30, 2005-Ohio-4992, ¶26. *See also, State v. Stroud,* 7th Dist. Mahoning No. 07MA91, 2008-Ohio-3187, ¶ 51-2 (causing death does not aggravate manslaughter); *State v. Schlecht,* 2d Dist. Champaign No. 2003-CA-3, 2003 Ohio 5336, ¶ 52 (the fact that a defendant sold drugs cannot be used to elevate the offense of selling drugs); *State v. De Amiches,* 8th Dist. Cuyahoga No. 77609, 2001 Ohio App. LEXIS 768, *8 (Mar. 1, 2001) (age of victim is not an aggravating factor when age is an element).

Here, the victims' status as peace officers was an element of both the offenses and specification to which Mr. Belew pleaded guilty. And elements are not aggravating factors.

C. Mr. Belew does not argue that his service-related PTSD excused or justified his offense.

The State also attempts to explain the trial court's irrelevant finding that Mr. Belew's service-related illness does not "excuse" the crimes by citing to *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88. But in *Noling*, this Court affirmed a death sentence because that trial court didn't have to give any weight at all to the mitigating evidence. As a result, the trial court's finding, by itself, that the evidence did not "justify" an offense did not show error. By contrast, here, Mr. Belew does not merely claim that the trial court failed to consider his military service as mitigating. He shows that the trial court considered it an insult to other service members for Mr. Belew to even mention his posttraumatic stress disorder. Here, the trial court considered mitigating evidence as aggravating.

D. More than 10,000 veterans with PTSD and less-than-honorable discharges must face their illnesses alone.

The State, like the trial court, tries to distinguish Mr. Belew from his fellow service members. But he is far from alone. "In the past decade of war, more than 100,000 men and women left the military with less than honorable discharges, many due to bad

conduct related to post traumatic stress disorder."[3] But a "bad discharge disqualifies them from most veteran's benefits and heath care, including treatment for PTSD."[4] It "means no VA assistance, no disability compensation, no GI Bill, and it's a red flag on any job application. Most veterans service organizations don't welcome bad paper vets, and even many private sector jobs programs for vets accept honorable discharge only."[5] "[T]he Pentagon and, in most cases, the Department of Veterans Affairs wash their hands of these veterans."[6]

Given that about 14% of veterans returning from Iraq and Afghanistan have PTSD, more than 10,000 veterans are likely dealing with their service-related illnesses without help. *See* Brief of Amicus Ohio Suicide Prevention Foundation, et al, 6. As a result, one expert explained that she sees "a deluge" of cases of veterans with bad conduct discharges and service-related illnesses entering the criminal justice system.[7]

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[3] Quil Lawrence and Marisa Penaloza, National Public Radio, *For Veterans, 'Bad Paper' Is A Catch-22 For Treatment* (Dec. 10, 2013), http://www.npr.org/2013/12/10/249739845/for-veterans-bad-paper-is-a-catch-22-for-treatment (accessed Dec. 13, 2013).
[4] Quil Lawrence, National Public Radio, *Help Is Hard To Get For Veterans After A Bad Discharge* (Dec. 8, 2013) http://www.npr.org/2013/12/08/249452852/help-is-hard-to-get-for-veterans-after-a-bad-discharge (accessed Dec. 13, 2013).
[5] Quil Lawrence and Marisa Penaloza, National Public Radio, *Other-Than-Honorable Discharge Burdens Like A Scarlet Letter* (Dec. 9, 2013), http://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter (accessed Dec. 13, 2013).
[6] Quil Lawrence and Marisa Penaloza, National Public Radio, *Path To Reclaiming Identity Steep For Vets With 'Bad Paper'* (Dec. 11, 2013), http://www.npr.org/2013/12/11/249962933/path-to-reclaiming-identity-steep-for-vets-with-bad-paper (accessed Dec. 13, 2013).
[7] *Id.*

Amicus, The Arms Forces explains the problem in detail on pages 3-6 of its brief in this case.

III. The State's overreliance on the first, cursory report is misplaced, and exaggerates the scope of the report.

Contrary to the State's assertion, Dr. Cassell, the first psychologist to interview Mr. Belew, never found that he did not suffer from posttraumatic stress disorder. In fact, there is no evidence that she even investigated the possibility that Mr. Belew suffered from service-related PTSD because her report mentions no questions related to PTSD symptoms, "flashbacks, nightmares, or intrusive memories[;] avoidance of thoughts, feelings, or external reminders of the traumatic event; negative alterations in thought or mood; and alterations in arousal and reactivity (such as irritable or aggressive behavior, self-destructive or reckless behavior, hyper-vigilance, or exaggerated startle response)." Brief of Amicus Ohio Suicide Prevention Foundation, et al, at 6. Her failure to consider the possibility of PTSD is noteworthy given that the illness affects about 14% of returning veterans from Iraq and Afghanistan. *Id.*

Also contrary to the State's assertion, Dr. Cassell did not diagnose Mr. Belew with a personality disorder or find that he was malingering. She did find "evidence" of possible malingering, as well as of a personality disorder. Cassell Report at 9. But she did not diagnose either condition. Her review was so casual that she did not even specify a particular personality disorder. And if the State believed that Dr. Cassell would have contradicted anything that Dr. Graves found, the State could have called

her to the stand at sentencing. The State did not. In fact, unlike Dr. Graves, Dr. Cassell *never* testified.

CONCLUSION

You don't have to be perfect to serve your country, and before joining the Marine Corps, Jeffrey Belew certainly had minor scrapes with the juvenile justice system, as well as the beginnings of an alcohol problem. But in the course of serving his country in extraordinarily dangerous and traumatic circumstances, his problems became extraordinarily more dangerous.

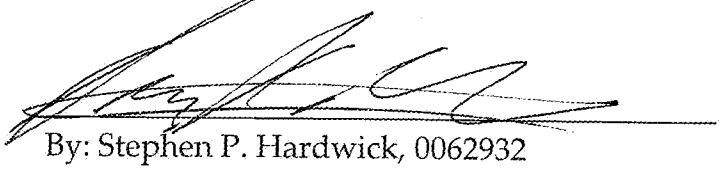
The Jeffrey Belew that entered the Marine Corps was not perfect, but he also was not the kind of person who would shoot at cops while trying to commit suicide. The harsh on-again-off-again structure of military service, coupled with an up-close look at death changed Jeffrey Belew. Small manageable problems became large unmanageable ones.

Jeffrey Belew's actions in this case are inexcusable. But his service was a major factor in bringing him out of his home with a gun on that early April morning. The trial court should have looked at his service-related illness as mitigating, and not criticized him for even raising the issue.

This Court should reverse the decision of the court of appeals, vacate Mr. Belew's sentence, and remand this case for a new sentencing hearing.

Respectfully submitted,

Office of the Ohio Public Defender



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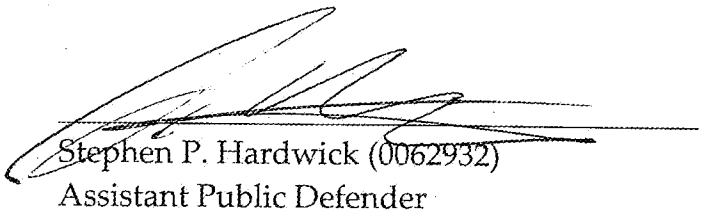
I hereby certify that a true copy of the foregoing was forwarded by electronic mail to, Assistant Prosecuting Attorney David Cooper, dcooper@co.lucas.oh.us, on this 16th of December 2013.



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	:	
DEFENDANT-APPELLANT.	:	

APPENDIX OF

REPLY BRIEF OF APPELLANT JEFFERY BELEW

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Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 38
*** Annotations current through October 21, 2013 ***

TITLE 1. STATE GOVERNMENT
CHAPTER 181. CRIMINAL SENTENCING COMMISSION; CRIMINAL JUSTICE SERVICES
CRIMINAL SENTENCING

Go to the Ohio Code Archive Directory

ORC Ann. 181.24 (2013)

§ 181.24. Recommendation of comprehensive criminal sentencing structure; projections; draft version

(A) No later than July 1, 1993, the state criminal sentencing commission shall recommend to the general assembly a comprehensive criminal sentencing structure for the state that is consistent with the sentencing policy developed pursuant to division (B) of *section 181.23 of the Revised Code* and the conclusions of the study conducted pursuant to division (A) of that section. The sentencing structure shall be designed to enhance public safety, to assist in the management of prison overcrowding and correctional resources, to simplify the sentencing structure of the state that is in existence on August 22, 1990, and to result in a new sentencing structure that is readily understandable by the citizens of the state, to simplify the criminal code of the state, to assure proportionality, uniformity, and other fairness in criminal sentencing, and to provide increased certainty in criminal sentencing.

(B) The comprehensive criminal sentencing structure recommended by the commission shall provide for all of the following:

(1) Proportionate sentences, with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender;

(2) Procedures for ensuring that the penalty imposed for a criminal offense upon similar offenders is uniform in all jurisdictions in the state;

(3) Retention of reasonable judicial discretion within established limits that are consistent with the goals of the overall criminal sentencing structure;

(4) Procedures for matching criminal penalties with the available correctional facilities, programs, and services;

(5) A structure and procedures that control the use and duration of a full range of sentencing options that is consistent with public safety, including, but not limited to, long terms of imprisonment, probation, fines, and other sanctions that do not involve incarceration;

(6) Appropriate reasons for judicial discretion in departing from the general sentencing structure.

(C) The commission shall project the impact of all aspects of the comprehensive criminal sentencing structure upon the capacities of existing correctional facilities. It also shall project the effect of parole release patterns and patterns of release from regional and local jails, workhouses, and other correctional facilities upon the sentencing structure. Additionally, the commission shall determine whether any additional correctional facilities are necessary to implement the sentencing structure.

(D) The commission shall determine whether any special appellate procedures are necessary for reviewing departures from, or the misapplication of, the general sentencing structure recommended pursuant to this section.

(E) The commission shall submit a draft version of the comprehensive criminal sentencing structure to selected judges, prosecuting attorneys, defense attorneys, law enforcement officials, correctional officials, bar associations, and other persons with experience or expertise in criminal sentencing and solicit their comments on the draft.

HISTORY:

143 v S 258 (Eff 8-22-90); 144 v S 273 (Eff 3-6-92); 146 v H 670 (Eff 12-2-96); 148 v S 107. Eff 3-23-2000.

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TITLE XXIX [29] CRIMES--PROCEDURE
CHAPTER 2929: PENALTIES AND SENTENCING

ORC Ann. 2929.14 (Anderson 1996)

§ 2929.14 Imposition of fine for felony; notice to victim of right to apply for reparations award.

(A) In determining whether to impose a fine for a felony and the amount and method of payment of a fine, the court shall consider the nature and circumstances of the offense; the victim impact statement prepared pursuant to section 2947.051 [2947.05.1] of the Revised Code; the history, character, and condition of the offender; any statement by the victim pursuant to section 2930.14 of the Revised Code; and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him.

(B) The court shall not impose a fine in addition to imprisonment for felony, unless a fine is specially adapted to deterrence of the offense or the correction of the offender, or the offense was a violation of section 2923.32 of the Revised Code, or the offense was committed for hire or for purpose of gain.

(C) The court shall not impose a fine or fines for felony that, in the aggregate and to the extent not suspended by the court, exceed the amount that the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making restitution or reparation to the victim of his offense.

(D) At the time of imposing sentence, or as soon as possible after imposing sentence, for a felony, the court shall notify the victim of the offense of his right to file an application for an award of reparations pursuant to sections 2743.51 to 2743.72 of the Revised Code.

HISTORY: 139 v S 199 (Eff 7-1-83); 145 v S 186. Eff 10-12-94.