

NO. 14-1677

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 100500

STATE OF OHIO,

Plaintiff-Appellee

-vs-

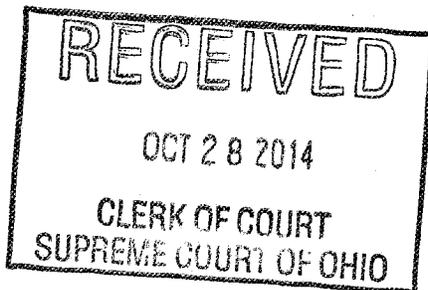
DAVID ADAMS

Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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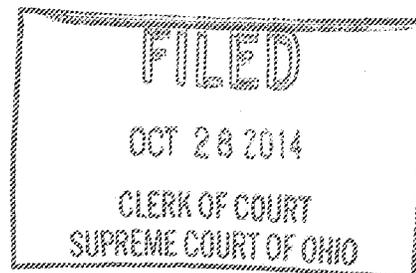


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WHY THIS COURT SHOULD NOT ACCEPT JURISDICTION

Ohio law relevant to this case is well established and was properly applied by the juvenile and appellate courts. No substantial constitutional question and no matter of public or great general interest is presented, therefore, the State respectfully requests this Supreme Court decline jurisdiction.

STATEMENT OF THE CASE

On April 18, 2013, the Cuyahoga County Grand Jury returned a 7 count indictment against the appellant, David James Adams, hereinafter "Appellant." Count one was a charge of Murder, pursuant to R.C. 2903.02(A), inclusive of one and three year firearm specifications in accordance with R.C. 2941.1451(A) and 2941.141(A); Count two Murder pursuant to R.C. 2903.02, also including one and three-year firearm specifications. Count three: Felonious Assault pursuant to R.C. 2903.11(A)(2), including one and three-year firearm specifications. Count four: Felonious Assault pursuant to R.C. 2903.11(A)(1), including one and three-year firearm specifications. Count five: Reckless Homicide, pursuant to R.C. 2903.041(A), including one and three-year firearm specifications. Count six: Tampering with Evidence, pursuant to R.C. 2921.12(A)(1). Count seven: Grand Theft, pursuant to R.C. 2913.02(A)(1).

On July 8, 2013, Appellant withdrew his previously entered plea of not guilty and entered a plea of guilty to the following: Involuntary Manslaughter, a felony of the first degree, with the three year firearm specification; Felonious Assault, a felony of the second degree; Tampering with Evidence, a low-tier felony of the third degree; and grand theft, a felony of the fourth degree. It was part of the plea agreement that the sentence imposed would be a definite term of incarceration of at least 15 years, not to exceed twenty-five years. The State of Ohio and the appellant agreed

on the record at the time of the plea that the offenses of Involuntary Manslaughter and Felonious Assault would NOT merge. (Tr. 8)

The trial court conducted a sentencing hearing on August 7, 2013. The State of Ohio addressed the court as did counsel for the Appellant. The trial court sentenced the Appellant to a period of 25 years at Lorain Correctional Institution. (Tr. 75)

Despite the plea agreement between appellant and the State that the offenses to which appellant pled guilty were not allied, appellant filed an appeal in the Eighth District Court of Appeals and raised one assignment of error alleging that the trial court erred when it did not merge the offenses for involuntary manslaughter for felonious assault, alleging that they were allied offenses of similar import. The Court of Appeals affirmed the appellant's sentence pursuant to this Court's holding in *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1124, 922 N.E. 2d 923, which specifically holds that such plea agreements, specifying that offenses are not allied, are permissible and constitute a waiver of an allied offenses claim. Appellant is now before this Honorable Court seeking jurisdiction.

STATEMENT OF FACTS

On April 13, 2013, the victim Kyle Kelley rented a room at the Best Western Hotel on Snow Road in Brookpark, Ohio. His guests included the appellant and two young women, Latisha Hernandez and Victoria Menardi. The group was due to check out on the morning of April 17, 2013.

On the morning of April 17, 2013, the appellant shot and killed Kyle Kelley. When the appellant woke, he wanted to smoke some marijuana. The victim wanted to save it for later. The victim told the appellant the marijuana was in the car. The appellant grabbed his gun, a .38 revolver, and the victim's car keys and proceeded out the hotel room door to retrieve the marijuana.

The victim sent Victoria after the appellant, to let him know he was just joking, the marijuana was still in the room. Upon his return to the room, the appellant told the victim he should “just shoot his ass.” The appellant pointed the gun at the victim’s buttocks and pulled the trigger. The gun just clicked. The appellant told the victim he should just shoot him, the appellant pointed the gun at the victim’s head and pulled the trigger. The gun just clicked.

The victim told the appellant “You are not about that life.” The appellant turned back to the victim, pointed the gun at his forehead and fired, killing Kyle Kelley. The appellant then wiped off the gun and put it in the victim’s hands, staging the scene to look like a suicide. The three left the hotel room on foot.

The appellant then went back to the hotel to get the victim’s car. Minardi and Hernandez used this opportunity to flee to the Brookpark police department where they reported the crime.

The appellant was apprehended later the same day in the state of Kentucky. In a videotaped statement taken by Detective Amil Walentik of the Brookpark Police Department, the appellant outlined in detail how he had purchased the gun a week prior to the shooting and that he KNEW there were 3 live rounds in the gun. (Tr. 45-52)

LAW AND ARGUMENT

Proposition of Law No. I:

Where a defendant and the State negotiate a stipulated plea agreement which specifically states on the record that the offenses to which the defendant pleads guilty are not allied offenses of similar import, the defendant waives any allied offenses claim as provided in *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1124, 922 N.E. 2d 923.

Despite the appellant’s contention to the contrary, the court of appeals specifically applied this Honorable Court’s holding in *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1124, 922

N.E. 2d 923 when it found that appellant waived the issue of allied offenses. *Underwood* specifically addressed situations where the prosecution and a defendant stipulated that offenses would not merge when entering into a plea agreement where this Court stated:

With respect to the argument that the merger of allied offenses will allow defendants to manipulate plea agreements for a more beneficial result than they bargained for, we note that nothing in this decision precludes the state and a defendant from stipulating in the plea agreement that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence. When the plea agreement is silent on the issue of allied offenses of similar import, however, the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense. Nevertheless, if a trial court fails to merge allied offenses of similar import, the defendant merely has the right to appeal the sentence.

Id. at ¶ 29

The circumstances in *Underwood* involved a plea agreement which was silent as to the merger of allied offenses of similar import. In the instant case, the plea agreement was placed on the record and the parties stipulated that the offenses were not allied, which connotes that the offenses were not committed with the same animus. As the court of appeals recognized, the plea agreement satisfied the scenario discussed by this Court in *Underwood*. As the lower court pointed out:

The discussion that occurred in the instant case satisfies the requirements of *Underwood*. The prosecutor and defense counsel discussed the fact that they agreed the offenses would not merge as part of the plea bargain. The trial court explained to Adams the agreement to not merge the counts, and Adams indicated that he understood that they would not merge. Thus, the parties had an agreement the offenses would not merge and Adams got the benefit of the bargain by not having a life-tail imposed at the end of his sentence. *Underwood* does not require the trial court to determine whether the offenses actually merge before accepting the plea when the parties have specifically entered into an agreement that they do not merge. It is when the parties fail to discuss the merger that the trial court is obligated to determine if the offenses are allied offenses.

State v. Adams, 2014-Ohio-3496, Cuyahoga App. No. 100500, ¶ 13.

Aside from the undisputed contention that the parties stipulated that the offenses to which appellant pled guilty were not allied offenses, the facts before the trial court indicated that the offenses were not allied under an analysis pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. It remains the State's position that when Appellant pointed the gun at the victim the first two times, that constituted offenses of Felonious Assault: knowingly causing or attempting to cause serious physical harm by means of a deadly weapon or dangerous ordinance. When the Appellant later shot and killed the victim, appellant committed Involuntary Manslaughter. Aside from the stipulation, the offenses are not allied under R.C. 2941.25, which states:

(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.

CONCLUSION

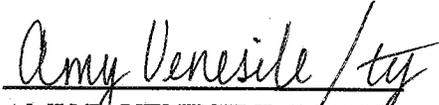
The Eighth District Court of Appeals properly applied the relevant Ohio law to the facts of this case and thoroughly analyzed the errors assigned before affirming the judgment of the trial court.

As no substantial constitutional questions and no matters of public or great general interest have been presented, the State of Ohio respectfully requests this Honorable Court deny jurisdiction.

Respectfully submitted,

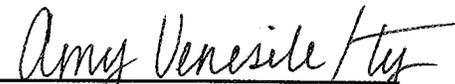
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SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction has been mailed this 27th day of October, 2014, to Jeffrey M. Gamso, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.


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