

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO

Plaintiff-Appellee,  
v.

WILLIAM A. DEMBIE, JR.

Defendant-Appellant.

An Appeal from the Ninth District Court of  
Appeals, Lorain County 14CA010527

Lorain County Common Pleas Case No.  
11CR083428

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**APPELLANTS MEMORANDUM IN SUPPORT OF JURISDICTION**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

    EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS ..... 2

    A. Background ..... 2

    B. The Court of Appeal's Decision ..... 5

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW ..... 6

Proposition of Law: A trial court’s sentencing on separate charges is precluded as a violation of defendant's due process right to notice and an opportunity to present his case when the trial court concluded defendant was not on notice before trial that the separate charges involved disparate acts and were not allied offenses..... 6

CONCLUSION ..... 13

CERTIFICATE OF SERVICE ..... 13

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Notice of issues in dispute is indispensable to due process.

On the morning of his murder trial, Appellant William Dembie's counsel orally renewed their demand for a bill of particulars and the State obliged – stipulating that both felonious assault charges in the indictment were “all lesser included” and the “same behavior”. Acknowledging Mr. Dembie's demands for notice, the trial court concluded that “*the defense was not on notice* that the separate charges of felonious assault in Counts Four and Five were related to events that transpired within the house as opposed to outside the house.” (Emphasis added). In reasonable reliance on both the State's stipulation and the trial court's conclusion that Mr. Dembie and his counsel had not received proper notice that the felonious assault charges were separate acts, defense counsel did not present a case to rebut any allegation that Mr. Dembie committed separate acts with separate animus. Despite the State's stipulation and the trial court's conclusion that the defense had no notice, the trial court proceeded to sentence Mr. Dembie to an additional 5 years after finding one of the felonious assault charges was a separate act committed with a separate animus.

Mr. Dembie was deprived of his fundamental right of sufficient notice. If defense counsel had been notified that the State and the trial judge were contemplating separate acts with separate animus on the felonious assault charges, trial counsel would have advanced arguments to address those circumstances.

## STATEMENT OF THE CASE AND FACTS

### A. Background

William A. Dembie, Jr. is a forty-five (45) year old male, father of four, and former corrections officer at the Lorain County Jail. On August 11, 2011, at around 1:30 A.M., Mr. Dembie placed a call to the Lorain County Sheriff's Department that was answered by Joi Sanchez. Mr. Dembie stated that he had killed his wife at their residence on Cowley Road in Grafton, Ohio ("Dembie Residence"). Ms. Sanchez dispatched several Lorain County Sheriff deputies to the Dembie Residence. Deputies noticed the body of Holly Dembie lying below a window, with extensive wounds to her neck and a pool of blood beneath her head. The deputies noticed Mr. Dembie coming from the west of the house, where Mr. Dembie stated that he just wanted to say goodbye to his son, and Deputy Hudson took Mr. Dembie into custody.

Mr. Dembie agreed to talk to detectives, and they began to interview him. "I snapped, I seen red" was the first thing that Mr. Dembie stated when he met with the detectives. Mr. Dembie started the interview by telling the detectives historical information about his rocky relationship with his wife, dating back several years.

Mr. Dembie stated to the detectives that, on the night in question, Mrs. Dembie came home and told Mr. Dembie that she had seen a divorce attorney about seeking a divorce and they were discussing child and spousal support matters when they began to engage in a heated verbal argument. As the fight escalated, Mr. and Mrs. Dembie were in Mrs. Dembie's upstairs bedroom and Mrs. Dembie told Mr. Dembie to get out of the house and that she no longer loved him. She then pushed him off of the bed. Then Mr.

Dembie hit Mrs. Dembie in the face. Mr. and Mrs. Dembie go to the downstairs level of the house and, at this point, Mr. Dembie has a knife. The fight continued from the downstairs level of the house, where Mr. Dembie ripped Mrs. Dembie's shirt off. Then, Mrs. Dembie ran back to the upstairs level of the house and into the bathroom, slamming the door. Mr. Dembie, still with the knife in his hand, pursued Mrs. Dembie and kicked open the door to the bathroom where he found Mrs. Dembie dangling half out of the bedroom window. Mr. Dembie grabbed Mrs. Dembie's pant leg and her pants came off as she was dangling out of the window. Mr. Dembie stabbed Mrs. Dembie and then let go of her leg. Immediately, Mr. Dembie proceeded to the backyard where he stabbed Mrs. Dembie several more times.

On September 15, 2011, Mr. Dembie was indicted in the Lorain County Common Pleas Court on six counts: 1) aggravated murder, a violation of R.C. 2903.01(A); 2) murder, a violation of R.C. 2903.02(A); 3) murder, a violation of R.C. 2903.02(B); 4) felonious assault, a violation of R.C. 2903.11(A)(1); 5) felonious assault, a violation of R.C. 2903.11(A)(2); and 6) domestic violence, a violation of R.C. 2919.25(A).

Before the trial began, Mr. Dembie's counsel requested a written bill of particulars from the State. The State refused to issue a written bill of particulars, but voluntarily gave the defense a preview of the argument. Assistant Prosecuting Attorney Tony Cillo stated "I'll be happy to sit here and tell [Mr. Dembie's counsel] some of the things I will be arguing, but they are all lesser includeds, with the exception of maybe the domestic violence because of the additional element of a spouse." A.P.A. Cillo also stated, "the

felonious assault resulting in death and the felonious assault is underlying. *So it's all the same behavior.*" (Emphasis added).

On December 3, 2013, Mr. Dembie appeared in Lorain County Common Pleas Court with counsel, J. Anthony Rich and Brian J. Darling, and voluntarily waived his constitutional right to a trial by jury, opting instead to have a bench trial. The State presented four (4) witnesses over two (2) days of testimony. No witnesses were called on behalf of the Defendant. On December 4, 2013, the bench trial concluded.

On December 6, 2013, Judge Mark Betleski found Mr. Dembie not guilty of aggravated murder, a violation of R.C. 2903.01(A) but convicted Mr. Dembie of the following charges: murder, a violation of R.C. 2903.02(A); murder, a violation of R.C. 2903.02(B); felonious assault, a violation of R.C. 2903.11(A)(1); felonious assault, a violation of R.C. 2903.11(A)(2); and domestic violence, a violation of R.C. 2919.25(A).

On Monday, December 16, 2013, a sentencing hearing was held. The Court sentenced Mr. Dembie to life in prison with no chance of parole for at least fifteen (15) years, per statute, on count two (murder under 2903.02(A)). The Court imposed no sentence for counts three (murder under 2903.02(B)) and four (felonious assault) and instead merged them with count two. Germane to this appeal and over the objection of defense counsel, the Court proceeded to impose a five (5) year sentence on count five (felonious assault) consecutive to the fifteen (15) years imposed on count two and merged, again per statute, count six (domestic violence, a first degree misdemeanor) with count five.

Mr. Dembie appealed to the Ninth District Court of Appeals arguing five assignments of error, all relating to the sentence imposed by the trial court.

**B. The Court of Appeal's Decision**

The court of appeals upheld the trial court's decision by overruling all five of Appellant's assignments of error.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law: A trial court’s sentencing on separate charges is precluded as a violation of defendant’s due process right to notice and an opportunity to present his case when the trial court concluded defendant was not on notice before trial that the separate charges involved disparate acts and were not allied offenses.**

Defense counsel’s demands for a bill of particulars seeking the requisite due process to establish a proper defense for Mr. Dembie was validated by the trial court *after* the trial during Mr. Dembie’s sentencing hearing:

“I am also, though, reminded of the Defendant’s arguments . . . , the very first morning of trial, of the fact that there was no bill of particulars provided by the State with regard to this matter. And so *the defense was not on notice* that the separate charges of felonious assault in Counts Four and Five were related to events that transpired within the house as opposed to outside the house.” (Emphasis added).

The trial court judge admitted that he anticipated almost from the very first day of trial that this [allied offenses] was going to be an issue that the Court was going to have to address because the indictment did not specify [and the State refused to provide a bill of particulars] as to where the alleged felonious assault charges occurred. As a premonition, the trial court concluded “[I] think I’m right factually. I’m not sure whether I’m right legally, but.”

Fair notice is the bedrock of any constitutionally fair procedure. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L.Ed. 817 (1951). It is repugnant for the State of Ohio to stipulate to facts so as to eliminate the need to address matters not in dispute at the genesis of trial, only to have the trial court permit the State to argue for consecutive sentences based on separate conduct after the trial court admitted

that “the defense was not on notice that the separate charges were related to events that transpired within the house as opposed to outside the house.” This stipulation, and the trial court’s acquiescence of same, reasonably led the defense to assume that there was no reason to present argument or evidence directed at the question of whether the two (2) felonious assault charges related to events inside or outside the house. The notice of allied offenses is critical given the defendant’s burden. With regard to the determination of whether two or more offenses are allied offenses under R. C. 2941.25, the Supreme Court of Ohio has stated “that ‘[t]he defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act.’” *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18, citing *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987); *see also State v. Logan*, 60 Ohio St.2d 126, 128, 397 N.E.2d 1345 (1979) (“the defendant ... must show that the prosecution has relied upon the same conduct to support both offenses charged”); *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, ¶ 20 (“an offender must demonstrate the state’s reliance on the same conduct to prove multiple charges before gaining the protection of R.C. 2941.25”).

The State, through A.P.A. Cillo, the morning of trial and before opening statements, confirmed that, “they are all lesser includeds [sic], with the exception of maybe the domestic violence because of the additional element of a spouse.” APA Cillo continued, “The felonious assault resulting in death and the felonious assault is underlying. So it’s all the same behavior.” Since the State had affirmatively declared its position on this issue, the defense should have been able to rely on this representation.

As Justice Frankfurter articulated in *Joint Anti-Fascist Refugee Comm.*, “[s]ecrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. *Id.* at 127. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.” *Id.* at 171-172. Justice Frankfurter appears clairvoyant when one reviews Mr. Dembie’s case. In order to understand the State’s position with regard to the charges against Mr. Dembie, and, therefore, properly prepare for trial in order to provide Mr. Dembie the best representation they could, Mr. Dembie’s counsel served a written demand for a bill of particulars the day of his arraignment. The State refused to provide a bill of particulars, referring counsel to the open file discovery provisions of Ohio Criminal Rule 16. On the morning of trial, because counsel anticipated and raised the question of allied offenses as an issue, Dembie’s counsel orally renewed their demand for a bill of particulars and the State obliged – stipulating that both felonious assault charges in the indictment were the “same behavior”. Reasonably relying on this representation that the State did not view the two (2) felonious assault charges as separate acts, defense counsel did not present a case to rebut any allegation that Mr. Dembie committed separate acts with separate animus.

The trial court later addressed this notice issue. Acknowledging Mr. Dembie’s demands for notice prior to trial commencement, the trial court agreed that “*the defense was not on notice* that the separate charges of felonious assault in Counts Four and Five were related to events that transpired within the house as opposed to outside the house.” (Emphasis added). If defense counsel had been notified that the State and the trial judge

were contemplating separate acts with separate animus on the felonious assault charges, I can assure you as trial counsel we would have advanced arguments to address those circumstances.

I direct your attention to the United States Supreme Court's logic in the parallel case of *Lankford v. Idaho*, 500 U.S. 110, 111, 127 S.Ct. 1723, 114 L.Ed.2d 173 (1991). Bryan Lankford and his brother, Mark Lankford, were charged and convicted in Idaho for the beating deaths of Robert and Cheryl Bravence. Prior to Bryan Lankford's sentencing hearing and in response to his counsel's request, the trial court issued an order requiring the State to notify the court and Mr. Lankford's counsel whether it would ask for the death penalty, and if so, to file a statement of the aggravating circumstances on which it intended to rely. The State responded by filing a notice that it would not be recommending the death penalty. At Lankford's sentencing hearing, there was no discussion of the death penalty as a possible sentence. The prosecutor offered no evidence, simply relying on the trial record, and recommended a life sentence with parole eligibility after twenty (20) years. The defense offered testimony from several witnesses in mitigation, and urged the court to impose a life sentence with parole eligibility after ten (10) years. After the presentation of evidence, the trial court judge advised the parties that he had several sentencing options, including death, which conclusion was not met by an objection from defense counsel. After further announcing his findings, the trial court judge sentenced Mark Lankford to death. *State v. Lankford*, 113 Idaho 688, 697, 747 P.2d 710 (1987). Mr. Lankford appealed and the Idaho Supreme Court affirmed the sentence, concluding that the notice given at his arraignment that the death penalty was

the maximum punishment, together with the terms of the statute that permitted such a sentence, were sufficient notice. *State v. Lankford*, 116 Idaho 279, 283, 775 P.2d 593 (1989). The U.S. Supreme Court granted certiorari (twice) to consider the question whether inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made. *Lankford*, 500 U.S. 110 at 124, 127 S.Ct. 1723, 114 L.Ed.2d 173. The Supreme Court held Mr. Lankford's due process rights were violated because he did not receive adequate notice that his sentencing hearing could result in the death penalty and reversed the Idaho Supreme Court's judgment.

The Supreme Court was tasked with determining if defendant's counsel had adequate notice of the critical issue the judge was debating: the imposition of the death penalty. *Id.*, 500 U.S. 110 at 120, 127 S.Ct. 1723, 114 L.Ed.2d 173. The trial judge concealed from the parties the principal issue of the death penalty when he failed to provide the parties with notice that he was considering the death penalty. *Id.*, 500 U.S. 110 at 126, 127 S.Ct. 1723, 114 L.Ed.2d 173. The Court resolved the issue by explaining the importance of fair notice in the adversarial process. Justice Stevens, writing for the majority, explained "fair notice is the bedrock of any constitutionally fair procedure. *Id.*, 500 U.S. 110 at 121, 127 S.Ct. 1723, 114 L.Ed.2d 173. The Supreme Court affirmed in *Lankford* that "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Id.*, 500 U.S. 110 at 126, 127 S.Ct. 1723, 114 L.Ed.2d 173.

Mr. Dembie was denied this fundamental characteristic of fair procedure when the State, similar to the trial judge in *Lankford*, concealed the real issue of sentencing until Mr. Dembie's counsel could no longer make arguments to persuade the trial judge to impose a different sentence. The duplicitous actions of the State persuaded Mr. Dembie and his counsel that the issue of allied offenses would not be argued by either party because they were, in the words of APA Cillo, "all lesser included[s.]" and "[t]he felonious assault resulting in death and the felonious assault is underlying. So it's all the same behavior." If we follow to its logical end the United States Supreme Court's holding that notice of issues in dispute is indispensable to due process, then we must accept the trial court's holding in Mr. Dembie's case that "*the defense was not on notice* that the separate charges of felonious assault in Counts Four and Five were related to events that transpired within the house as opposed to outside the house." (Emphasis added). This was the basis for the additional five (5) year sentence imposed and it is patently unconstitutional.

The violation of Mr. Dembie's due process rights in this matter is especially egregious since the State made an affirmative and unambiguous representation to the defense on the first day of trial that it was not pursuing the two (2) felonious assault charges as separate offenses. This is not a situation where the defense incorrectly assumed that the State would not treat the two (2) charges separately and then failed to defend against a possible theory of the case. Rather, in this instance, the defense specifically considered the possibility that the State might treat the two (2) felonious assault charges separately, asked the State to confirm its position on the issue, and then

presented a defense tailored to what the State set forth on the record to be its theory of the case. Moreover, Ohio R.C. 2941.25 codifies the protections granted to citizens under the double jeopardy clauses of the Fifth Amendment of the United States Constitution and Article 1, Section 10 of the Ohio Constitution, which clauses prohibit citizens from incurring multiple punishments for a single offense. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). Mr. Dembie was deprived of his fundamental right of sufficient notice. Incredibly the trial court herein acknowledged Mr. Dembie did not have notice of the nature of the two (2) felonious assault charges.

What more concerns the general public than the State’s failure to uphold a guarantee of citizenship? Due process is a guarantee - to reduce the power of the state to a comprehensible, rational, and principled order, and to ensure that citizens are not deprived of life, liberty, or property except for good reason. The purpose of due process is to insure that parties are given a meaningful opportunity to present their case. *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Leery is the citizen who enters the courtroom trusting all parties to honor his constitutional rights only to find

out he was the only party not on notice of the real issue that should have been debated during the procedure.

### **CONCLUSION**

Appellant respectfully urges this Court to accept jurisdiction of this appeal.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on Appellee by sending a copy of it to the Lorain County Prosecutor, 225 Court Street, 3<sup>rd</sup> Floor, Elyria, Ohio 44035 by first class U.S. Mail, postage prepaid, the 3<sup>rd</sup> day of September, 2015.

/s/ Brian J. Darling  
Brian J. Darling (# 0078427)