**[Cite as *State v. Davis*, 2009-Ohio-5079.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, | ) | |
| | ) | CASE NO. 08 MA 152 |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| - VS - | ) | O P I N I O N |
| | ) | |
| WILLIE DAVIS, | ) | |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from Common Pleas Court, Case No. 07CR571. |
| JUDGMENT: | Affirmed in part; Reversed in part; Remanded. |

APPEARANCES:

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| For Plaintiff-Appellee: | Attorney Paul Gains<br>Prosecuting Attorney<br>Attorney Gabriel Wildman<br>Assistant Prosecuting Attorney<br>21 West Boardman Street, 6th Floor<br>Youngstown, Ohio 44503 |
| For Defendant-Appellant: | Attorney Gary Van Brocklin<br>P.O. Box 3537<br>Youngstown, Ohio 44513-3537 |

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 25, 2009

VUKOVICH, P.J.

**¶{1}** Defendant-appellant Willie Lee Davis appeals after being convicted of multiple offenses in a jury trial before the Mahoning County Common Pleas Court. Appellant presents four main arguments on appeal.

**¶{2}** First, appellant argues that the repeat violent offender specifications should be deleted because they are the result of unconstitutional fact-finding. This specific argument is without merit. However, the trial court erroneously sentenced appellant on the repeat violent offender specifications because not all of the statutory requirements existed for penalty enhancement. As such, the penalty enhancement of four years is reversed.

**¶{3}** Second, appellant contends that the third degree felony failure to comply conviction should be reduced to a first degree misdemeanor due to a deficient verdict form. This deficiency in the verdict form is conceded by the state, but the state urges that we should only reduce the conviction to a fourth degree felony. We agree with appellant and hereby reduce the third degree felony failure to comply conviction to a first degree misdemeanor failure to comply conviction. This matter is remanded for resentencing on the first degree misdemeanor.

**¶{4}** Third, appellant alleges that the state's peremptory challenge of the only remaining African-American panel member was racially discriminatory. This argument is without merit as the trial court could rationally believe the state's reasons were not pretextual.

**¶{5}** Lastly, appellant complains that the trial court overruled his motion to disclose grand jury testimony where he believed that a superseding indictment was vindictive. This argument is without merit as the trial court could have reasonably found that the mere addition of repeat violent offender specifications in a superseding indictment did not show a particularized need for grand jury transcripts where the prosecutor explained that he added the specifications after discovering appellant's criminal record.

## STATEMENT OF THE CASE

**¶{6}** On April 22, 2007, a Youngstown State University student was approached in a dormitory parking lot by an African-American man holding a gun and wearing a blue and white striped shirt. He threatened to kill her, forced her into her car and tried to drive away but was thwarted by the standard transmission. He then robbed her of $20 and fled. An hour later, three females were similarly threatened in a Y.S.U. parking lot by an African-American man in a white hat with a gun. The man robbed them of $10 and absconded in the vehicle they had been entering.

**¶{7}** A Youngstown police officer noticed the stolen car being driven by an African-American man in a white hat and attempted to initiate a traffic stop. A chase ensued until the vehicle reached a dead end. The driver exited the vehicle and ran into the woods. The officer caught the driver and apprehended him after an intense physical struggle. The driver was identified as appellant Willie Lee Davis. Besides the white hat, which fell off during the chase but was recovered by police, appellant was also wearing a blue and white striped shirt, which shirt was described and later identified by the first victim. A realistic-looking black toy gun was found in his pocket.

**¶{8}** Appellant was indicted on six counts. Count one was for failing to comply with the order or signal of a police officer, a third degree felony due to the allegation that the operation of a motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property. See R.C. 2921.331(B), (C)(5)(a)(ii). The second count was for assault on a peace officer, a fourth degree felony. See R.C. 2903.13(A)(3), (C). Appellant was then indicted for one count of second degree felony robbery for each of the four victims as a result of his threatening to inflict physical harm in attempting or committing a theft offense. See R.C. 2911.02(A)(2), (B). The four robbery counts contained repeat violent offender specifications as a result of appellant's 1995 conviction for aggravated burglary.

**¶{9}** The repeat violent offender specifications were added by way of a superseding indictment filed in September 2007. Believing this addition to have a vindictive motive, defense counsel filed a motion for disclosure of the grand jury proceedings. After the motion was heard, the trial court denied the motion, finding that

the state's reindictment to reflect appellant's prior criminal record was an insufficient reason to reveal the grand jury proceedings.

**¶{10}** The case was tried to a jury in June 2008. The jury found appellant guilty of all six counts. Prior to sentencing, defense counsel asked the court not to consider the repeat violent offender specifications as they required unconstitutional judicial fact-finding. Defense counsel also asked the court to convict and sentence appellant on a misdemeanor failure to comply charge rather than the indicted third degree felony due to a deficient verdict form. The court denied these motions.

**¶{11}** In a July 11, 2008 entry, the court sentenced appellant to maximum, consecutive sentences as follows: five years for failure to comply; eighteen months for assault on a peace officer; and eight years on each of the four robbery counts. On the repeat violent offender specifications, appellant was sentenced to one year for the first robbery and three years for each of the three victims in the second robbery; due to merger of specifications for the second robbery, the add-on was four years. The total sentence was thus forty-two and one-half years. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

**¶{12}** Appellant's first assignment of error contends:

**¶{13}** "IT WAS ERROR TO SENTENCE APPELLANT TO AN ADDITIONAL [FOUR] YEARS IN EXCESS OF THE STATUTORY MAXIMUM SENTENCE ON THE REPEAT VIOLENT OFFENDER SPECIFICATIONS PURSUANT TO O.R.C. 2941.149."

**¶{14}** If an indictment contains a repeat violent offender specification, it is the court that shall determine the issue of whether the offender is a repeat violent offender. R.C. 2941.149(B). A repeat violent offender is a person who: (1) is being sentenced for committing or complicity in committing aggravated murder, murder, a *felony of the* first or *second degree that is an offense of violence*, an attempt to commit any of these offenses if the attempt is a felony of the first or second degree, or a substantially equivalent offense; and, (2) was previously convicted of or pleaded guilty to one of the aforementioned offenses. R.C. 2929.01(DD) (emphasis added), as referenced by R.C. 2941.149(D).

**¶{15}** If the court determines that the person is a repeat violent offender, penalty enhancement is permissible under R.C. 2929.14(D) if other requirements are met. Pursuant to R.C. 2929.14 (D)(2)(a), in addition to the longest prison term authorized for the offense, the sentencing court may impose an additional definite prison term of one, two, three, four, five, six, seven, eight, nine or ten years if all of the following criteria are met:

**¶{16}** "(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

**¶{17}** "(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is * * * any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

**¶{18}** "(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

**¶{19}** "(iv) The court finds that the prison terms imposed * * * are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

**¶{20}** "(v) The court finds that the prison terms imposed * * * are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense."

**¶{21}** In *Foster*, the Ohio Supreme Court found these latter two findings to represent unconstitutional judicial fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶75-78, 83 (previously contained in division (D)(2)(b)(i) and (ii)). However, rather than eliminating penalty enhancements for repeat violent offender

specifications, the Court merely excised the offending provisions. Id. at ¶88, 97-98. "After the severance, judicial fact-finding is not required before imposition of additional penalties for repeat-violent-offender * * * specifications." Id. at ¶99.

**¶{22}** Appellant recognizes that repeat violent offender penalty enhancement is thus still permissible under *Foster* and does not contend that the sentencing court violated this premise in *Foster*. Rather, appellant argues here that the *Foster* Court should have stated that the repeat violent offender enhancement is also unconstitutional because, under R.C. 2941.149(B), a judge rather than a jury decides whether the offender is a repeat violent offender. Appellant argues that the Supreme Court "glibly" stated that judicial findings in R.C. 2929.14(D)(2)(b), now (a), are severed and that the Court should have "given more thought" to the judicial fact-findings required in R.C. 2941.149(B) and 2929.01(DD).

**¶{23}** Contrary to appellant's suggestion, the *Foste*r Court did consider R.C. 2941.149(B). The Court specifically introduced its analysis of the repeat violent offender penalty enhancement by stating:

**¶{24}** "Unlike all other penalty-enhancing specifications, the court, not the jury, makes the necessary factual findings for convicting the offender of being a repeat violent offender * * *." *Foster*, 109 Ohio St.3d 1 at ¶ 71, citing R.C. 2941.149(B).

**¶{25}** The Court then upheld the process of penalty enhancement based upon a court-decided repeat violent offender specification and merely deleted the two factual findings required before enhancement. Id. at ¶88, 97, 99. This basically constituted the upholding of R.C. 2941.149(B).

**¶{26}** Notably, the Foster Court had already set forth the general law on which it was basing its rationale. In pertinent part, the Court stated:

**¶{27}** "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at ¶3, citing *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490.

**¶{28}** Thus, the Court recognized that the fact of a prior conviction can be used to increase the penalty beyond the maximum in the absence of a jury. See id. See, also, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-199, ¶8 (if a prior conviction

transforms the offense by increasing its degree, then it is an essential element required to be proven by the state; however, if the prior conviction simply enhances the penalty, it is not). Cf. *Ring v. Arizona* (2002), 536 U.S. 584, 609 (unconstitutional judicial fact-finding where trial court can impose death only upon finding of aggravating circumstances which act as "functional equivalent" of an element of a greater offense), fn.4 (no argument regarding prior convictions).

**¶{29}** This may explain why the *Foster* Court had no problem excising only the factual findings required for penalty enhancement, upholding the repeat violent offender classification, and maintaining the provisions permitting penalty enhancement. Appellant's argument essentially asks us to alter the *Foster* holding. See *State v. Underdown*, 10th Dist. No. 06AP-676, 2007-Ohio-1814, ¶33-34. This we cannot do. See id. As such, we cannot hold that a repeat violent offender classification by a trial court under R.C. 2941.149(B), prior to penalty enhancement, represents unconstitutional judicial fact-finding.

**¶{30}** Finally, we add that the Supreme Court has recently clarified that repeat violent offender classifications still exist after *Foster* and that the fact of a prior conviction is a finding that can constitutionally be made by the trial court. *State v. Hunter*, Slip Op. No. 2008-0661, 2009-Ohio-4147, ¶27 (*Foster* only excised the portion of the repeat violent offender statute that required judicial fact-finding), ¶35 (noting that *Apprendi v. New Jersey* (2000), 530 U.S. 466, 488 allows judicial consideration of prior convictions at sentencing), ¶38 (repeat violent offender statute does not violate the Sixth Amendment by considering relevant information about offender's prior conviction that is part of the judicial record).

**¶{31}** There is a different problem here however. Although R.C. 2941.149(B) provides that the trial court is to make the repeat violent offender classification and although this is not unconstitutional under *Foster,* the legislature has disallowed enhanced sentencing on the specification found by the court unless certain factors exist. See R.C. 2929.14(D)(2)(a), set forth above. The first factor, subsection (i), is merely whether appellant has been convicted of the specification under R.C. 2941.149. The third factor, subsection (iii), is whether the sentencing court has imposed the maximum term for the underlying offense as here. Thus, if a court did not

sentence the defendant to the maximum on the underlying offense, then the court is precluded from imposing an additional penalty on the specification it found to exist. The last two factors, now subsections (iv) and (v), have been excised by *Foster* as unconstitutional judicial fact-finding.

**¶{32}** The problem here lies in the second factor, subsection (ii), which factor was added by 2006-H-95, effective August 3, 2006, after *Foster*. This mandatory factor provides:

**¶{33}** "(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is * * * any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person."

**¶{34}** Here, the offense underlying the repeat violent offender specification was robbery. There is no dispute that this is a felony of the second degree that is an offense of violence. However, the next part of subsection (ii) does not exist here. In the sentencing statute, the legislature specifically stated that the "trier of fact" had to have found that "the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person."

**¶{35}** Appellant was indicted and tried for robbery, not aggravated robbery. The elements of the robbery here were: in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, the offender recklessly inflicted, attempted to inflict, or threatened to inflict physical harm on another. See R.C. 2911.02(A)(2). Consequently, the jury verdict is based upon "physical harm", but not serious physical harm.

**¶{36}** Although appellant may have in fact threatened to cause serious physical harm to the robbery victims, the jury, who was the "trier of fact" referred to by the legislature in R.C. 2929.14(D)(2)(a)(ii), was not instructed to and did not make such a finding. As such, under the plain language of the statute, the sentencing court was not permitted to sentence appellant on the repeat violent offender specifications which the court found to exist. Due to this glaring error, we vacate the repeat violent offender penalty enhancements and thus decrease appellant's sentence by four years.

ASSIGNMENT OF ERROR NUMBER TWO

**¶{37}** Appellant's second assignment of error provides:

**¶{38}** "THE COURT ERRED WHEN IT ENTERED JUDGMENT AND SENTENCE ON THE JURY VERDICT OF GUILTY OF FAILURE TO OBEY THE ORDER OF A POLICE OFFICER, BECAUSE THE VERDICT FORM WAS INSUFFICIENT TO FIND A FELONY OF THE THIRD DEGREE."

**¶{39}** In count one, appellant was convicted of operating a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop. See R.C. 2921.331(B). Pursuant to R.C. 2921.331(C)(3), a violation of division (B) is a misdemeanor of the first degree unless one of the following applies:

**¶{40}** "(4) Except as provided in division (C)(5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

**¶{41}** "(5)(a) A violation of division (B) of this section is a *felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt*

**¶{42}** "(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

**¶{43}** "(ii) *The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property*." (Emphasis added).

**¶{44}** Here, appellant was indicted for a third degree felony based upon division (C)(5)(a)(ii). The jury was instructed accordingly. However, the verdict form stated only that appellant was guilty of "failure to comply with order or signal of police officer, a felony against the peace and dignity of the State of Ohio."

**¶{45}** Pursuant to R.C. 2945.75(A)(2):

**¶{46}** "When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or

elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

**¶{47}** In one case, a defendant was tried for tampering with governmental records, a third degree felony. *State v. Pelfry*, 112 Ohio St.3d 422, 2007-Ohio-356. The verdict form only mentioned tampering with records without stating the degree of the offense or that the records were governmental; although, the verdict form did state "as charged in the indictment". Id. at ¶17 (O'Connor, J., dissenting). The Supreme Court found that the defendant could only be convicted of the first degree misdemeanor form of tampering with records, regardless of the fact that the jury was instructed properly and even though there was overwhelming evidence that the records were governmental. Id. at ¶1, 14. The Court emphasized that it must read the plain language of the statute and that such plain language required a conviction of the lowest form of the offense if the verdict form does not state the degree of the offense or the additional elements necessary to reach the higher degree. Id. at ¶11, 14.

**¶{48}** Because the verdict form does not state that the operation of the vehicle caused a substantial risk of serious physical harm to persons or property and does not specify the degree of the offense, appellant argues that he should only be convicted of and sentenced for a first degree misdemeanor.

**¶{49}** The state acknowledges that the verdict form was deficient and that the verdict was insufficient to sustain a third degree felony conviction. The state urges, however, that we need not decrease the offense to a first degree misdemeanor because the verdict did state that the jury found him guilty of felony failure to comply. Since the failure to comply statute lists both third and fourth degree felonies, the state argues that we should reduce the offense to a fourth degree felony. The state distinguishes this case from *Pelfry* on the basis that the verdict form here did state that the offense was a felony.

**¶{50}** Although lowering the offense to the lowest felony form of the offense may be logical where the degree of offense provision is only partially complied with, the plain language of the statute requires that the defendant be convicted of the absolute lowest form of the offense where neither the degree of the offense nor the additional elements are stated in the verdict form. Any other holding would be a court-

created exception unwarranted where the statute contains plain language. This assignment of error is sustained. We hereby reduce the failure to comply charge to a first degree misdemeanor and remand for resentencing.

ASSIGNMENT OF ERROR NUMBER THREE

**¶{51}** Appellant's third assignment of error alleges:

**¶{52}** "IT WAS ERROR TO PERMIT THE PROSECUT[OR] TO PEREMPTORILY EXCUSE THE ONLY BLACK JUROR ON THE ENTIRE JURY VENIRE."

**¶{53}** A claim of racially discriminatory use of a peremptory challenge is subject to the three steps set forth in *Batson v. Kentucky* (1986), 476 U.S. 79. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination, which can be accomplished by merely showing that the juror is African-American. Id. at 96-98. Then, the proponent of the challenge must provide a racially neutral explanation for the challenge. Id. If the proponent provides such explanation, the trial court must view all the circumstances and determine whether the explanation is merely pretextual and thus whether there was purposeful discrimination. Id. at 98. Because the decision is largely based upon credibility, we defer to the trial court and do not reverse absent a clearly erroneous decision. See *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶64; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶110.

**¶{54}** Here there were two potential black jurors. One was excused by the court because her husband was a detective for the Youngstown Police Department. This was done with no objection after an off-the-record discussion. (Tr. 161). The state exercised a peremptory challenge on the other. (Tr. 195). The defense lodged a *Batson* objection.

**¶{55}** The state listed several reasons for the challenge. For instance, the juror was a reserve deputy sheriff. A month prior to the voir dire, there was an incident where the juror "took matters into his own hands" and initiated an arrest with a gun. (Tr. 151). The juror provided responses different from the facts as recollected by the prosecutor regarding that incident. (Tr. 196). The prosecutor was concerned about the juror's credibility as a result. (Tr. 196-197). The prosecutor was also concerned

about the juror's tendency to conduct impermissible investigations and to having a desire to solve crimes. (Tr. 197, 199).

**¶{56}** Moreover, appellant's police chase took place one street from the juror's home. (Tr. 197). Appellant and his family live around the corner from the juror. The juror had been a councilman of that district and had lived at his address for a long time. (Tr. 198). The prosecutor disbelieved the juror's statement that he knew nothing about the event. (Tr. 197-198).

**¶{57}** It was noted that the defense had no problem with the court excusing the detective's wife due to concern that he had access to reports. The state then added that their peremptory challenge of a police officer also protected the defendant. When defense counsel stated that this juror was not a real police officer, it was noted that the city paid for the juror's law enforcement training and that he was in fact a true peace officer. (Tr. 202). The court found a combination of factors supportive of the state's decision, including that the juror was a police officer, the juror had been a councilman in the area, and the juror lived where the car and foot chase took place. Thus, the court overruled the objection. (Tr. 203).

**¶{58}** The trial court's decision was based on the prosecutor's credibility and its own determination of reasonableness. See *Batson*, 476 U.S. at 98; *Frazier*, 115 Ohio St.3d 139 at ¶64; *Bryan*, 101 Ohio St.3d 272 at ¶110. The court was in the best position to evaluate the statements of the prosecutor and also those made by the juror during voir dire. The state provided multiple race-neutral reasons. It was not clearly erroneous for the trial court to have found that those reasons were not pretextual and that the prosecutor's decision was not the result of purposeful discrimination. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

**¶{59}** Appellant's fourth assignment of error argues:

**¶{60}** "IT WAS ERROR TO OVERRULE APPELLANT'S MOTION TO DISCLOSE GRAND JURY MATTERS."

**¶{61}** Before trial, appellant filed a motion to disclose grand jury transcripts from the September 2007 superseding indictment, complaining that the prosecutor should have been aware of appellant's criminal history at the time of the May 2007

original indictment and that the addition of repeat violent offender specifications in the superseding indictment were the product of prosecutorial vindictiveness due to appellant's filing of a suppression motion and insistence on taking the case to trial. A hearing was held on the motion on November 27, 2007.

**¶{62}** The prosecutor responded that he received this case at the end of July. He noted that when he discovered the prior conviction for a violent offense, he informed defense counsel at the pretrial that he was going to be seeking a superseding indictment to reflect this fact and that there would thus be no plea offer provided at that pretrial. (11/27/07 Tr. 77, 80; 07/10/08 Tr. 17-20).

**¶{63}** Defense counsel stated that he did not recollect discussing a superseding indictment at the pretrial. (11/27/07 Tr. 79). Defense counsel urged that the timing was suspicious as the repeat violent offender specifications were added after the pretrial and two weeks after the suppression motion. (11/27/07 Tr. 79-80).

**¶{64}** On January 3, 2008, the court denied the motion for grand jury transcripts, finding that the state's reindictment to reflect appellant's prior criminal record was not a sufficient reason to reveal the grand jury proceedings. On appeal, appellant reiterates his arguments presented below concerning the addition of the repeat violent offender specifications and his concern that this addition was vindictive.

**¶{65}** Because grand jury proceedings are secret, a defendant is not entitled to grand jury transcripts unless required by the ends of justice and the defense demonstrates a particularized need for disclosure which outweighs the need for secrecy. *State v. Coley* (2001), 93 Ohio St.3d 253, 261, citing *State v. Greer* (1981), 66 Ohio St.2d 139. Whether a defendant demonstrates a particularized need for disclosure of grand jury testimony is a question of fact and the decision to release grand jury testimony is within the discretion of the trial court. Id.

**¶{66}** In *Coley*, the defendant argued that his non-capital indictment was replaced by a capital indictment only after police officers complained to the newspaper. The trial court denied the defendant's request for disclosure. The Supreme Court affirmed as the trial court could have reasonably found that the superseding indictment was based upon additional investigation and new evidence rather than a desire to placate a newspaper. Id. at 261-262.

**¶{67}** The Court emphasized that the mere fact of an indictment on elevated charges does not show a particularized need. Id., citing *State v. Benge* (1996), 75 Ohio St.3d 136, 145. The Court also held that "a presumption of regularity supports prosecutorial decisions such as the decision in this case to present additional evidence to another grand jury." Id., citing *United States v. Armstrong* (1996), 517 U.S. 456, 464.

**¶{68}** As in *Coley*, additional investigation here provided new evidence that a prior qualifying conviction existed. Notably, the *Coley* Court was not concerned with the fact that the new evidence could have been discovered previously.

**¶{69}** The trial court could rationally believe the prosecutor's statements that upon taking the case, he checked appellant's criminal record and discovered that appellant had a prior conviction for an offense of violence. The court could believe the prosecutor's claim that he informed defense counsel of this at the pretrial where he offered no plea and that the superseding indictment was not the result of a failed plea negotiation or the filing of a motion to suppress.

**¶{70}** Considering the presumption of regularity in such matters, the trial court did not abuse its discretion in finding that appellant failed to demonstrate a particularized need which outweighed the need for secrecy of grand jury proceedings. As such, this assignment of error is overruled.

**¶{71}** For the foregoing reasons, appellant's penalty enhancements for the repeat violent offender specifications are reversed, which reduces his sentence by four years. Appellant's conviction for third degree felony failure to comply is reversed, a conviction is entered for first degree misdemeanor failure to comply instead, and the case is remanded for resentencing. Appellant's other convictions are affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.