

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 107038
	:	
v.	:	
	:	
RODNEY A. HARDNETT,	:	
	:	
Defendant-Appellant.	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: APPLICATION FOR REOPENING  
GRANTED; SENTENCE VACATED IN PART AND  
REMANDED FOR RESENTENCING  
RELEASED AND JOURNALIZED: July 31, 2019**

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Cuyahoga County Court of Common Pleas  
Case No. CR-17-624230-A  
Application for Reopening  
Motion No. 526365

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney and Mary M. Frey, Assistant Prosecuting  
Attorney, *for appellee*.

Mark A. Stanton, Chief Public Defender, and Cullen  
Sweeney, Assistant Public Defender, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Rodney Hardnett has filed a timely application for reopening pursuant to App.R. 26(B). Hardnett is attempting to reopen the appellate judgment, rendered in *State v. Hardnett*, 8th Dist. Cuyahoga No. 107038, 2019-Ohio-105, that affirmed his plea of guilty and the sentence of incarceration imposed with regard to the offenses of attempted felonious assault (R.C. 2923.02/2903.11(A)(2)) with a three-year firearm specification (R.C. 2941.145(A)) and discharge of a firearm on or near prohibited premises (R.C. 2923.162(A)(3)) with a three-year firearm specification (R.C. 2941.145(A)). We grant the appellant's application for reopening, reopen the original appeal, and vacate the sentence in part and remand for resentencing.

{¶ 2} An application for reopening, pursuant to App.R. 26(B), provides a means to raise a claim of ineffective assistance of appellate counsel in a criminal appeal. The analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for ineffective assistance of counsel, is the appropriate standard to assess whether Hardnett has raised a "genuine issue" as to the ineffectiveness of appellate counsel in his request to reopen under App.R. 26(B)(5). *See State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). To establish ineffective assistance, Hardnett must demonstrate that his counsel was deficient in failing to raise the issues he now presents and that there was a reasonable probability of success had the claims been presented on appeal. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

**{¶ 3}** In support of his application for reopening, Hardnett raises two proposed assignments of error that shall be considered simultaneously:

Rodney Hardnett's sentence was contrary to law because the trial court erroneously imposed multiple three-year sentences for firearm specifications attendant to felonies that were committed in the same act or transaction.

Rodney Hardnett received the ineffective assistance of counsel when his trial counsel failed to argue that the trial court could not impose multiple three-year sentences for firearm specifications attendant to felonies that were committed in the same act or transaction.

**{¶ 4}** Hardnett, through his two proposed assignments of error, argues that he was prejudiced by the failure of appellate counsel to argue on appeal a sentencing error. Specifically, Hardnett argues that the trial court erred by imposing consecutive three-year terms of incarceration as a result of two firearm specifications. We agree.

**{¶ 5}** Herein, Hardnett entered a plea of guilty to the offenses of attempted felonious assault with a three-year firearm specification and discharge of a firearm on or near prohibited premises with a three-year firearm specification. The trial court imposed upon Hardnett a cumulative sentence of seven years:

DEFENDANT IN COURT. COUNSEL [FOR HARDNETT] PRESENT.  
COURT REPORTER PRESENT.

ON FORMER DAY OF COURT THE DEFENDANT [PLED] GUILTY TO ATTEMPTED, FELONIOUS ASSAULT 2923.02/2903.11A(2) F3 WITH FIREARM SPECIFICATION(S) — 3 YEARS (2941.145) AS AMENDED IN COUNT(S) 1 OF THE INDICTMENT.

ON FORMER DAY OF COURT THE DEFENDANT PLED GUILTY TO DISCHARGE OF FIREARM ON OR NEAR PROHIBITED PREMISES

**2923.162 A(3) F3 WITH FIREARM SPECIFICATION(S) 3 YEARS (2941.145) AS CHARGED IN COUNT(S) 3 OF THE INDICTMENT.**

**COUNT(S) 2, 4 WAS/WERE NOLLED.**

**DEFENDANT ADDRESSES THE COURT, PROSECUTOR JONATHAN BLOCK ADDRESSES THE COURT, VICTIM/REP ADDRESSES THE COURT.**

**THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.**

**THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R.C. 2929.11.**

**THE COURT IMPOSES PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 7 YEAR(S). DEFENDANT SENTENCED AS FOLLOWS:**

**COUNT 1 (F3): 3 YEARS ON THE 3 YEAR FRM SPEC; 1 YEAR ON THE BODY.**

**COUNT 3 (F3): 3 YEARS ON THE 3 YEAR FRM SPEC; 1 YEAR ON THE BODY.**

**THE 3 YEARS ON THE FRM SPECIFICATIONS IN COUNTS 1 AND 3 DO NOT MERGE.**

**THE BODIES OF COUNTS 1 AND 3 DO NOT MERGE.**

**THE 3 YEAR FRM SPECIFICATIONS IN COUNTS 1 AND 3 ARE TO BE SERVED CONSECUTIVE TO EACH OTHER FOR A TOTAL OF 6 YEARS ON THE FRM SPECS.**

**THE TOTAL SENTENCE OF 6 YEARS ON THE FRM SPECS IS TO BE SERVED PRIOR TO AND CONSECUTIVE TO THE SENTENCES ON THE BODIES OF COUNTS 1 AND 3.**

**THE SENTENCES ON THE BODIES OF COUNTS 1 AND 3 ARE TO BE SERVED CONCURRENT TO EACH OTHER FOR TOTAL OF 1 YEAR.**

DEFENDANT ADVISED HIS SENTENCE IS MANDATORY TIME  
DUE TO THE GUN SPECIFICATIONS.

\* \* \*

{¶ 6} Thus, Hardnett was sentenced to a total of seven years of incarceration based upon one year with regard to each of the principal offenses that were ordered to run current with each other and six years with regard to the two three-year firearm specifications that were ordered to be served consecutive to each other and consecutive to the one year concurrent sentence of incarceration.

{¶ 7} Multiple firearm specifications may be subject to merger under R.C. 2929.14. Ordinarily, a trial court is prohibited from imposing multiple consecutive prison terms on multiple firearm specifications for “felonies committed as part of the same act or transaction” pursuant to R.C. 2929.14(B)(1)(b). However, R.C. 2929.14(B)(1)(g) permits the imposition of multiple prison terms, with regard to multiple firearm specifications, if the defendant is convicted of or pleads guilty to two or more felonies that include the specific offenses of aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape.

{¶ 8} Attempted felonious assault is not one of the specific felonies enumerated in R.C. 2929.14(B)(1)(g), which prevented the trial court from imposing multiple consecutive prison terms with regard to the two firearm specifications. In addition, the offenses of attempted felonious assault and discharge of firearm on or near prohibited premises were committed as part of the same act or transaction.

*State v. Wills*, 69 Ohio St.3d 690, 635 N.E.2d 370 (1994); *State v. Young*, 2d Dist. Montgomery No. 23642, 2011-Ohio-747.<sup>1</sup>

{¶ 9} It must also be noted that on May 7, 2019, the state was ordered to supplement its response to Hardnett’s application for reopening with a reply to the following question: “whether R.C. 2929.14(B)(1)(g) applies to an offender who is convicted of or pleads guilty to attempted felonious assault?” On May 21, 2019, the state filed its response and stated that:

Now comes Cuyahoga County Prosecutor Michael C. O’Malley, by and through his undersigned assistant, and files its supplemental response to Defendant-Appellant Rodney Hardnett’s Application for Reopening, filed March 7, 2019, pursuant to this Court’s May 7, 2019 order. *The State agrees that R.C. 2929.14(B)(1)(g) does not apply to firearm specifications connected with an attempted felonious assault conviction.*

(Emphasis added.)

{¶ 10} The state has conceded that R.C. 2929.14(B)(1)(g) is not applicable to the facts pertinent to this application for reopening; that the plea of guilty to the offense of attempted felonious assault prohibits the imposition of multiple prison terms with regard to multiple firearm specifications arising from the same act or

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<sup>1</sup>“Same act or transaction” does not have the same meaning as the “course of criminal conduct” test applied to a determination of whether offenses are allied offenses of similar import and should be merged for sentencing. “Same act or transaction” for purposes of R.C. 2929.14(B)(1)(e) means a series of continuous acts bound together by time, space and purpose, and directed toward a single objective. The “same act or transaction” test is a broader concept than the test employed under the allied-offense statute. *Wills, supra*. It was also noted that our prior decision, holding that the offenses of attempted felonious assault and discharge of firearm on or near prohibited premises are not allied offenses, is unchanged through Hardnett’s application for reopening.

transaction. Therefore, we find that the trial court was prohibited from imposing upon Harnett consecutive prison terms with regard to the two firearm specifications and that resentencing is mandated.<sup>2</sup> *State v. Florencio*, 8th Dist. Cuyahoga No. 107023, 2019-Ohio-104; *State v. Newton*, 8th Dist. Cuyahoga No. 104878, 2017-Ohio-7068; *State v. Phillips*, 8th Dist. Cuyahoga No. 96329, 2012-Ohio-473.

{¶ 11} This appeal is remanded to the trial court for resentencing for the sole purpose of vacating the consecutive prison sentences imposed for the multiple three-year firearm specifications and the imposition of only one three-year prison term of incarceration with regard to a single firearm specification. We affirm the trial court's judgment in all other respects.

{¶ 12} Application for reopening is granted, Hardnett's appeal is reopened, the sentence of the trial court is vacated in part, and the appeal is remanded for resentencing.

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SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and  
LARRY A. JONES, SR., J., CONCUR

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<sup>2</sup> Pursuant to this opinion, paragraph 3 of the journal entry and opinion rendered in *Hardnett*, 8th Dist. Cuyahoga No. 107038, 2019-Ohio-105, is vacated and found to be of no precedential value. The remainder of the opinion remains in full force and effect and constitutes the "law of the case."