

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
v.	:	No. 11AP-809 (C.P.C. No. 10CR-7531)
	:	
Julius C. Carson,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on September 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee/cross-appellant.

Todd W. Barstow, for appellant/cross-appellee.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant/cross-appellee, Julius C. Carson ("Carson"), appeals from a judgment of the Franklin County Court of Common Pleas imposing prison sentences for his convictions on two counts of felonious assault with firearm specifications, one count of discharging a firearm over a public road (the "firearm discharge conviction") with a firearm specification, and one count of having a weapon while under disability. Carson argues that the trial court erred by not merging the firearm discharge conviction with the felonious assault convictions and that he received ineffective assistance of trial counsel. Plaintiff-appellee/cross-appellant, State of Ohio ("the state"), cross-appeals from the judgment arguing that the trial court erred by

merging Carson's two felonious assault convictions and by imposing only one prison term for the three firearm specifications. We conclude that Carson did not receive ineffective assistance of counsel but that the trial court erred by merging his two felonious assault convictions, by failing to merge the firearm discharge conviction with one of the felonious assault convictions, and by imposing only one three-year term of imprisonment on the three firearm specifications; accordingly, we reverse and remand for re-sentencing.

{¶ 2} On December 21, 2010, Carson was involved in an altercation with Taykela Banks ("Banks"). Carson and Banks had previously been involved in a relationship, which did not end amicably. On the day of the incident, Banks drove to Carson's house, together with her cousins, Langston Garrett ("Garrett") and Lamona Marshall ("Marshall"). After arriving at Carson's house, Banks got out of the car and began arguing with Carson, which led to a physical altercation between the two of them. Garrett then got out of the car to break up the fight and pulled Banks back into the car. Banks, Garrett, and Marshall then drove away from Carson's house.

{¶ 3} At some point during these events, Carson retrieved a gun from inside or near his house. Two shots were fired from this gun; after the incident was reported, the police recovered two shell casings near Carson's house. One shell casing was located in the front yard of the house, and the second shell casing was located in the alley behind the house. Carson later admitted to the police that he fired one shot into the air in an attempt to frighten Banks away. Carson also admitted that he pointed the gun at the car as it drove away from his house and that he knew Banks and Garrett were in the car. However, Carson claimed that he did not intentionally fire the second shot but, rather, that the gun went off when he slipped and fell on the snowy ground. Marshall later claimed that, after hearing the second shot as the car drove away, she looked back and saw Carson standing in the alley behind his house. After Banks, Garrett, and Marshall reported the incident, the police identified a bullet hole on the driver's side of the car between the driver's door and the rear wheel. Marshall later testified at trial that it was her car and that the hole was not present prior to the incident at Carson's house.

{¶ 4} Carson was arrested and charged with three counts of felonious assault with firearm specifications, one count for each occupant of the car. He was also charged with one count of discharging a firearm over a public road with a firearm specification, and

with one count of having a weapon while under disability. Carson waived his right to a jury trial on the charge of having a weapon while under disability; the remaining charges were tried before a jury. The jury found Carson guilty of felonious assault against Banks and Garrett along with the two firearm specifications associated with those charges but found him not guilty of felonious assault against Marshall. The jury also found Carson guilty of discharging a firearm across a public road and the associated firearm specification. The trial court found Carson guilty of the charge of having a weapon while under disability.

{¶ 5} In its sentencing memorandum, the state argued that Carson's two felonious assault convictions should not merge and that the trial court should impose separate prison sentences on those convictions. The state also argued that Carson should receive multiple prison sentences on the firearm specifications. Carson's trial counsel did not submit a written sentencing memorandum but, at the sentencing hearing, he argued for merger of the convictions. The trial court concluded that the felonious assault convictions merged for the purposes of sentencing and imposed a four-year prison term on those convictions. The court sentenced Carson to a one-year prison term on the firearm discharge conviction, to be served concurrently with the prison term for the felonious assault convictions. The court also concluded that the firearm specifications merged and sentenced Carson to a three-year prison term to be served consecutively to the prison term for the felonious assault conviction. Finally, the court sentenced Carson to a one-year prison term on the charge of having a weapon while under disability, to be served consecutively to all other counts.

{¶ 6} Carson appealed from the trial court's judgment, asserting two errors for this court's review:

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPOSING SENTENCES FOR FELONIOUS ASSAULT AND DISCHARGE OF A FIREARM ON OR NEAR A PROHIBITED PREMISES AS THOSE OFFENSES WERE ALLIED OFFENSES OF SIMILAR IMPORT COMMITTED WITH A SINGLE ANIMUS. THE TRIAL COURT FURTHER ERRED TO THE PREJUDICE OF APPELLANT BY NOT DIRECTING THE STATE TO ELECT ON WHICH OFFENSE CONVICTION WOULD BE ENTERED AND SENTENCE PRONOUNCED.

II. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE, THEREBY DENYING HIM HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

{¶ 7} The state cross-appealed, assigning two errors for this court's review:

FIRST CROSS-ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN MERGING THE FELONOUS [sic] ASSAULT COUNTS INVOLVING DIFFERENT VICTIMS.

SECOND CROSS-ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN REFUSING TO IMPOSE AT LEAST TWO THREE-YEAR FIREARM TERMS AND IN REFUSING TO EXERCISE ITS DISCRETION TO DETERMINE WHETHER TO IMPOSE A THIRD THREE-YEAR FIREARM TERM.

{¶ 8} We begin with the state's second assignment of error, which challenges the sentence imposed on the firearm specifications because the parties agree, in part, that the trial court erred in imposing that portion of Carson's sentence. In its second assignment of error, the state asserts that the trial court erred in sentencing Carson to only one three-year prison term for the three firearm specifications. The state argues that the trial court was required by statute to sentence Carson to at least two three-year prison terms on the firearm specifications and to exercise its discretion in determining whether to sentence him to a third three-year prison term. Carson concedes that the trial court was required to impose two three-year prison terms but asserts that the trial court did not err by not imposing a third three-year sentence.

{¶ 9} As the state correctly asserts, the relevant sentencing statute required a trial court to impose multiple sentences for firearm specifications in certain situations:

If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the

offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

R.C. 2929.14(D)(1)(g).¹ R.C. 2929.14(D)(1)(a) specified the prison term to be imposed when an offender was convicted of or pled guilty to certain firearm specifications. For a firearm specification under R.C. 2941.145, the trial court was required to impose a prison term of three years. R.C. 2929.14(D)(1)(a)(ii).

{¶ 10} Carson was convicted of multiple felony charges, and two of the convictions were for felonious assault. Carson was also convicted of three firearm specifications under R.C. 2941.145. Accordingly, pursuant to the sentencing statute, the trial court was required to impose a three-year prison term "for each of the two most serious specifications" of which Carson was convicted. R.C. 2929.14(D)(1)(g). The trial court was also required to exercise its discretion in determining whether to impose an additional three-year prison term on the third firearm specification conviction. In the sentencing entry, the trial court merged the firearm specifications for purposes of sentencing and imposed only one three-year prison term. The trial court erred by failing to impose a second three-year prison term, as required by the sentencing statute. It also appears that the trial court did not exercise its discretion in considering whether to impose a third three-year prison term because Carson was convicted of three firearm specifications.

{¶ 11} Accordingly, the state's second assignment of error is sustained. On remand, the trial court must impose an additional three-year prison term for the second

¹ The trial court entered Carson's sentence on August 26, 2011. On September 30, 2011, legislation amending R.C. 2929.14 went into effect. This legislation deleted the former divisions (B) and (C) of R.C. 2929.14, and re-designated the contents of former division (D) of the statute as division (B). The amendment made no material changes to the applicable portion of the statute. 2011 Am.Sub.H.B. No. 86. For purposes of this decision, we refer to the sentencing statute as it existed at the time of Carson's sentencing, but we note that the result would be the same under the current version of the statute.

firearm specification conviction and should consider whether, in its discretion, a third three-year prison term should be imposed for the third firearm specification conviction.

{¶ 12} We now turn to the state's first assignment of error and Carson's first assignment of error, each of which asserts that the trial court erred in applying Ohio's allied offenses statute. In its first assignment of error, the state argues that the trial court erred by merging Carson's two felonious assault convictions. Conversely, in his first assignment of error, Carson argues that the trial court erred by refusing to merge the firearm discharge conviction with the felonious assault convictions. Because both of these assignments deal with merger issues arising from the same incident, we will address them together.

{¶ 13} Ohio's allied offenses statute, R.C. 2941.25, "protects against multiple punishments for the same criminal conduct and is a codification of the common law doctrine of merger." *In re B.O.J.*, 10th Dist. No. 09AP-600, 2010-Ohio-791, ¶ 21. Under the allied offenses statute, "[w]here 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." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B).

{¶ 14} The Supreme Court of Ohio most recently addressed the test for determining whether two crimes are allied offenses of similar import in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. There was no majority opinion in *Johnson*, but the plurality opinion and concurring justices emphasized the importance of considering the defendant's conduct. *State v. Hopkins*, 10th Dist. No. 10AP-11, 2011-Ohio-1591, ¶ 5. "Under the holding [of the plurality opinion] in *Johnson*, '[i]n determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting

commission of one offense constitutes commission of the other, then the offenses are of similar import.' " *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶ 62, quoting *Johnson* at ¶ 48.

{¶ 15} If the offenses can be committed by the same conduct, then we must " 'determine whether the offenses *were* committed by the same conduct, i.e., "a single act, committed with a single state of mind." * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.' " (Emphasis sic.) *Id.* at ¶ 63, quoting *Johnson* at ¶ 49-50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Johnson* at ¶ 51.

{¶ 16} The state argues that only the syllabus of *Johnson* is binding precedent and that we should not consider the plurality opinion as persuasive authority. Despite the state's insistence that we must return to the pre-*Johnson* decisions that focused on whether the commission of one offense "will necessarily result" in another offense in determining whether the two offenses have similar import, this court has repeatedly applied the test set forth in the *Johnson* plurality opinion in analyzing merger issues. *See, e.g., State v. Vance*, 10th Dist. No. 11AP-755, 2012-Ohio-2594, ¶ 8-9; *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 74-80; *State v. Gibson*, 10th Dist. No. 10AP-1047, 2011-Ohio-5614, ¶ 49-50; *State v. Griffin*, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶ 81-82; *State v. Taylor*, 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶ 36-38; *Hopkins* at ¶ 5; *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶ 57 (10th Dist). Further, we note that the Seventh District Court of Appeals recently concluded that 11 of the 12 appellate districts in this state have followed the holding of the *Johnson* plurality. *State v. Helms*, 7th Dist. No. 08 MA 199, 2012-Ohio-1147, ¶ 26. Accordingly, we will once again consider the plurality opinion from *Johnson* in analyzing the state's first assignment of error and Carson's first assignment of error.

{¶ 17} Under *Johnson*, we must begin by determining whether it was possible for Carson to commit the felonious assault offenses through the same conduct and whether it was possible for him to commit the felonious assaults and the firearm discharge offense

through the same conduct. *White* at ¶ 62. If the offenses can be committed through the same conduct, then we must determine whether the offenses actually were committed by a single act with a single state of mind. *Id.* at ¶ 63.

{¶ 18} The evidence presented at trial demonstrated that Carson fired two gunshots during the incident. Carson admitted to firing the first shot into the air. At trial, the state focused on the second shot, which was fired at the car as it was driven away from the house. This second, single gunshot formed the basis for both of the felonious assault convictions and for the firearm discharge conviction. In relevant part, R.C. 2903.11(A) defines felonious assault as knowingly causing or attempting to cause harm to another by means of a deadly weapon. R.C. 2923.162(A)(3) provides that no person shall discharge a firearm upon or over a public road or highway. Carson admitted that he knew Banks and Garrett were in the car, but he denied knowing that anyone else was in it. By firing the gun at the car, Carson attempted to cause physical harm to Banks and Garrett through the use of a deadly weapon, thus committing felonious assault against each of them. Further, because the gunshot was fired at the car while it was being driven away from the house, Carson discharged the firearm over a public road. We conclude that Carson could have committed both of the felonious assaults and the firearm discharge offense through the same conduct and that, considering the facts of this case, he did commit these three offenses through the same act of firing the gun at the car as it was driven away from his house.

{¶ 19} Having concluded that these three offenses could be and were committed through the same act, we must consider whether Carson committed the offenses with a single state of mind. *White* at ¶ 63. First, we will consider whether the felonious assaults were committed with a single state of mind. We have previously held that "[w]hen a defendant commits offenses against different victims during the same course of conduct, the offenses do not merge because a separate animus exists for each [offense]." *State v. Coffman*, 10th Dist. No. 09AP-727, 2010-Ohio-1995, ¶ 8. In this case, there was no direct evidence of Carson's state of mind with respect to the second gunshot because he denied firing it and claimed that the gun went off when he slipped and fell. However, Carson admitted to pointing the gun at the car. He also admitted that he knew Banks and Garrett were in the car. The bullet struck the driver's side of the car between the driver's door and

the rear tire. By firing the gun at the car, Carson created a risk of harm to both Banks and Garrett. The bullet could have struck either one or both of them. The shot also could have resulted in the car crashing, which could have injured either one or both of them. By convicting Carson of one count of felonious assault against Banks and one count of felonious assault against Garrett, the jury concluded that he knowingly attempted to cause physical harm to each of them. Under these circumstances, we conclude that Carson had a separate animus as to each of the potential victims that he knew was in the car. Therefore, although both felonious assault convictions arose from the single act of shooting at the car, we conclude that Carson had a separate state of mind as to each victim. Therefore, under R.C. 2941.25(B), Carson could be convicted of both felonious assault offenses and the trial court erred by merging these offenses for purposes of sentencing.

{¶ 20} Accordingly, the state's first assignment of error is sustained.

{¶ 21} With respect to the felonious assault offenses and the firearm discharge offense, the firearm discharge offense resulted from the fact that the car was traveling on a public road when Carson fired at it. Carson knowingly fired at the car, but there was no evidence to support a conclusion that he had a separate state of mind regarding the fact that, by shooting at the car, he was also firing the gun across a public road. Therefore, in this case, the firearm discharge was an allied offense of similar import to the felonious assaults. The trial court erred by not merging the firearm discharge conviction with one of the two felonious assault convictions. On remand, pursuant to *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, "the trial court must hold a new sentencing hearing for the offenses that remain after the state selects which allied offense or offenses to pursue." *Id.* at paragraph one of the syllabus.

{¶ 22} Accordingly, Carson's first assignment of error is sustained.

{¶ 23} Finally, we turn to Carson's second assignment of error, in which he asserts that his trial counsel provided ineffective assistance by failing to object to the admission into evidence of a compact disc containing a video of Carson's police interview after his arrest. During the state's case, the jury was shown a video of the interview of Carson conducted by Detective Lawrence Gauthney ("Detective Gauthney") of the Columbus Police Department. Carson's trial counsel did not object to the admission into evidence of

the compact disc containing the video. Subsequently, after each side made closing arguments but before the jury began its deliberations, Carson's counsel attempted to object to the introduction of the compact disc, but the trial court denied the objection.

{¶ 24} The compact disc contains a video that is just over 53 minutes long. The first 33 minutes and 45 seconds of the video consists of Detective Gauthney's interview with Carson. This portion of the video was partially redacted by agreement of the parties to exclude potentially inadmissible statements. The remainder of the video, which is slightly less than 20 minutes long, depicts what occurred after Detective Gauthney left the interview room (the "post-interview portion of the video"). Carson became emotional and began making disparaging comments about Banks and acting out physically, including striking his head against the wall. After a few moments, a uniformed police officer entered the room and attempted to calm Carson. Carson and the officer had a conversation that included Carson's description of the incident, Carson's description of the history of his troubled relationship with Banks and several alleged actions she took against him, and references to the criminal pretrial process. During this conversation, Carson also made a reference to recently having been released from jail on a probation violation.

{¶ 25} Although the trial transcript is not conclusive, it appears that the jurors were only shown the portion of the video containing Detective Gauthney's interview with Carson. On appeal, Carson claims that his trial counsel was ineffective by allowing the compact disc containing the video to be introduced into evidence because he asserts that the post-interview portion of the video contains inadmissible statements, including the comments related to the criminal pretrial process and the history of Carson's relationship with Banks, as well as the reference to Carson's probation violation.

{¶ 26} The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶ 12, citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989). "First, the defendant must show that counsel's performance was

deficient." *Strickland* at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

{¶ 27} The state argues that Carson has failed to establish that his trial counsel's performance was deficient, arguing that most of the statements made in the post-interview portion of the video would have been admissible at trial and that they were harmless. The state admits that the reference to Carson's probation violation would normally have been inadmissible but argues that Carson's trial counsel could have welcomed the introduction of the comment because it came in the context of a negative portrayal of Banks.

{¶ 28} We conclude that in this context most of the statements contained in the post-interview portion of the video would have been harmless, if not admissible evidence. Generally, the failure to object to admissible evidence does not establish ineffective assistance of counsel. *See State v. Tyler*, 10th Dist. No. 05AP-989, 2006-Ohio-6896, ¶ 40. However, the Supreme Court of Ohio has stated that "[i]t is well settled that evidence of prior convictions is prohibited except under narrow circumstances." *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 172. Accordingly, we will assume for purposes of analysis that Carson's trial counsel was deficient in allowing the post-interview portion of the video to be admitted into evidence because Carson's comment about his probation violation suggests that he had a prior criminal conviction. Therefore, we must consider whether trial counsel's performance prejudiced Carson's defense.

{¶ 29} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 686. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at paragraph three of the syllabus. " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 142, quoting *Strickland* at 694.

{¶ 30} Although the Supreme Court has held that evidence of prior convictions is prohibited except in narrow circumstances, the court also has stated that such evidence is not necessarily unfairly prejudicial. Thus, in *Trimble*, the court found that "[t]he mere

mention of Trimble's conviction, without more, did not unfairly prejudice [him]," and there was no likelihood that he was prejudiced by the mention of the prior conviction because of the overwhelming evidence establishing his guilt. *Trimble* at ¶ 175. Similarly, in this case, we conclude that Carson's comment regarding his probation violation did not by itself rise to the level of being unfairly prejudicial. There is no evidence that the jury viewed the post-interview portion of the video and, therefore, no evidence that they heard the statement. If the jury did not view the post-interview portion of the video, then it could not have affected the verdicts. Consequently, there would be no probability that the result of the trial would have been different had that portion of the video not been admitted into evidence.

{¶ 31} Further, even if the jury did hear the statement, we conclude that it was not unfairly prejudicial. The statement was a passing reference to Carson having been released from "jail" on a probation violation, which he made in the context of explaining his ongoing disputes with Banks. Carson did not indicate the nature of his prior crime. We find that Carson has failed to demonstrate a reasonable probability that the result of the trial would have been different if the post-interview portion of the video had been excluded from evidence. The jury would still have heard Carson's admissions during the interview with Detective Gauthney. Carson admitted to possessing the gun and to firing the first shot in the air in an effort to frighten Banks. He also admitted to pointing the gun at the car as it fled and admitted that he knew there were two people in the car. Carson claimed that the gun went off the second time after he slipped and fell on the snowy ground. However, the jury heard testimony from Detective Gauthney that there were no signs of someone falling or slipping in an attempt to maintain balance in the area near where the second shell casing was found. Marshall also contradicted Carson's claim that he slipped and fell, testifying that, after hearing the gunshots, she turned and saw Carson standing in the alley.

{¶ 32} Based on the physical evidence, Carson's admissions, and the testimony of Marshall and Detective Gauthney, the jury could conclude that Carson fired a shot at the car as it traveled away from his house, which would support the convictions for felonious assault and discharging a firearm over a public road. In light of this evidence, which did not depend on introduction of the post-interview portion of the video, Carson

has failed to establish a reasonable probability that the jury would have acquitted him on those charges. With respect to the charge of having a weapon while under disability, which was tried to the bench, we note "the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *See State v. White*, 15 Ohio St.2d 146, 151 (1968); *State v. Austin*, 52 Ohio App.2d 59, 70 (10th Dist.1976). Carson has failed to overcome this presumption and failed to demonstrate a reasonable probability that the trial court would have acquitted him on this charge without the introduction of the post-interview portion of the video.

{¶ 33} Accordingly, Carson's second assignment of error is without merit and is overruled.

{¶ 34} For the foregoing reasons, Carson's first assignment of error is sustained and his second assignment of error is overruled. Both of the state's assignments of error are sustained. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for re-sentencing in accordance with law and consistent with this decision.

Judgment reversed; cause remanded with instructions.

BROWN, P.J., and FRENCH, J., concur.
