

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23696
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-1743
v.	:	
	:	(Criminal Appeal from
SEAN POWERS	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 27th day of August, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Sean Powers appeals from his conviction and sentence, following a no-contest plea, for Felonious Assault, Attempted Murder, Discharge of a Firearm Near a Prohibited Premises, Tampering with Evidence, and Having a Weapon Under a Disability. All but the last conviction included firearm specifications.

{¶ 2} Although the trial court merged two Felonious Assault counts, Powers contends that the trial court committed plain error by failing to merge the surviving Felonious Assault conviction with the Attempted Murder conviction. We agree. Consequently, the judgment of the trial court is Reversed, and this cause is Remanded for the State to elect which of the two counts – Felonious Assault and Attempted Murder – shall merge into the other, for the trial court to merge the convictions accordingly, and for re-sentencing.

I

{¶ 3} Because Powers pled no contest before this case was tried, the facts are not well developed. Although there was a hearing on Powers's motion to suppress, the motion was to suppress statements Powers had made to the police, and facts concerning the alleged offenses were not brought out.

{¶ 4} At the plea hearing, the charges were recited in the words of the indictment. Powers was charged with one count of Felonious Assault by having knowingly caused serious physical harm to Deon Ramey, in violation of R.C. 2903.11(A)(1), one count of Felonious Assault by having knowingly caused, or attempted to cause, physical harm to Ramey by means of a handgun, in violation of R.C. 2903.11(A)(2), and one count of Attempted Murder by having purposely or knowingly engaged in conduct that, if successful, would have constituted or resulted in the offense of Murder (of Ramey), a violation of R.C. 2903.02(A), in addition to the other counts that are of no concern in this appeal. There was no further discussion of the facts at the plea hearing.

{¶ 5} In its sentencing memorandum, the State says:

{¶ 6} “The facts in the present case present a similar scenario [to that in *State v. Hanson*, Marion App. No. 9-04-44, 2005-Ohio-4185], in that the defendant fired three shots at Deon Ramey, each striking Deon in a separate part of his body. One gunshot struck Deon in the head and neck; another shot struck Deon in the right chest; another shot struck his right lower forearm. As a result of the multiple gunshots, Deon Ramey suffered paralysis from the neck down.

{¶ 7} “In the case at bar, the defendant fired his gun three separate times at Deon Ramey, an unarmed man. Each time he pointed the gun at Deon, knowing it was loaded, and pulled the trigger. The first time defendant pulled the trigger, which resulted in a bullet being expelled into Deon’s body, the defendant had completed the act of committing felonious assault (deadly weapon). Each additional time that the defendant pulled the trigger thereafter, he was knowingly shooting Deon, causing serious physical harm via the multiple gunshot wounds, thereby committing the offense of felonious assault (serious physical harm).”

{¶ 8} After Powers’s motion to suppress was overruled, he pled no contest to all the counts and specifications. At the sentencing hearing, the trial court merged the two Felonious Assault convictions, noting that it had reviewed the State’s sentencing memorandum, but had concluded that:

{¶ 9} “Based on the Court’s understanding of what the facts are in this case, the Court believes that there is – was one animus here, one purpose or immediate motive.”

{¶ 10} Shortly thereafter, the trial court made the following finding:

{¶ 11} “The Court finds that this was one continuous transaction and occurrence, and I think even the State is in agreement that with regard to the firearm specifications they do merge for sentencing purposes to one[,] three-year firearm specification.”

{¶ 12} In its appellate brief, the State asserts:

{¶ 13} “The charges arose out of an incident in which Powers fired three shots at Deon Ramey as Ramey sat unarmed in a vehicle. One shot struck Ramey in the head and neck, one shot struck him in the chest, and one shot struck Ramey in the lower portion of his right forearm. * * * As a result of the gunshot wounds, Deon Ramey was left paralyzed from the neck down.”

{¶ 14} In its sentencing entry, the trial court merged the Felonious Assault in violation of R.C. 2903.11(A)(1) (serious physical harm) conviction into the Felonious Assault in violation of R.C. 2903.11(A)(2) (deadly weapon) conviction, and also merged all of the firearm specifications into one firearm specification, but did not otherwise merge the convictions. The trial court imposed consecutive sentences of seven years on the surviving Felonious Assault conviction, nine years on the Attempted Murder conviction, five years on the Tampering with Evidence conviction, and three years on the merged firearm specifications, for a total of 24 years. The court imposed concurrent sentences of five years on the Discharge of a Firearm Near a Prohibited Premises conviction, and three years on the Having a Weapon Under a Disability conviction.

{¶ 15} From his conviction and sentence, Powers appeals.

II

{¶ 16} Powers's sole assignment of error is as follows:

{¶ 17} "THE COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO MERGE COUNTS TWO [FELONIOUS ASSAULT] AND THREE [ATTEMPTED MURDER] OF THE INDICTMENT WHEREAS BOTH ARE ALLIED OFFENSES OF SIMILAR IMPORT, COMMITTED WITH A SINGLE ANIMUS."

{¶ 18} The State concedes that Felonious Assault with a deadly weapon and Attempted, purposeful Murder are allied offenses of similar import, but argues that the offenses committed by Powers were committed separately or with a separate animus, citing *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶ 16, and R.C. 2941.25. The State argues:

{¶ 19} "Here, the gunshots to Ramey's head, neck, and chest were obviously life-threatening and left Ramey paralyzed from the neck down. But the gunshot to Ramey's forearm did not amount to serious physical harm and therefore was not immediately life-threatening. * * * Since the gunshot to Ramey's forearm was not a life-threatening injury, it was committed separately or with a separate animus from the attempt to purposely murder Deon Ramey. Therefore, the trial court acted correctly in refusing to merge the felonious assault with a deadly weapon count with the attempted purposeful murder count."

{¶ 20} We can imagine cases with different facts where the State's argument might have merit. A drug dealer attempting to collect moneys owed, for example, tells his victim, "give me the money or I'll shoot." Then, when the victim does not pay, the dealer shoots him in the leg and says, "pay up, or the next bullet is going

through your heart.” As the victim turns and starts to flee, the dealer shoots him twice, once in the back, and once in the neck. In that hypothetical example, a good argument can be made that the first shooting had a different purpose, not just a different result, from the other two.

{¶ 21} In the case before us, by contrast, the trial court found that all three shootings had the same animus, and that they occurred in one continuous transaction and sequence. In this case, the fact that each shot had a different effect was a function of luck and Powers’s marksmanship, not by design.

{¶ 22} In *State v. Williams*, supra, the defendant fired two shots at his victim. One shot seriously wounded the victim; the other shot missed. The defendant was charged with one count of Felonious Assault, in violation of R.C. 2903.11(A)(1), and one count of Attempted Murder, in violation of R.C. 2903.02(B), corresponding to the shot that struck home; and a second count of Felonious Assault, in violation of R.C. 2903.11(A)(2), and a second count of Attempted Murder, in violation of R.C. 2903.02(A), corresponding to the shot that missed. The Supreme Court conducted the analysis required by *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, and concluded that each Felonious Assault conviction must be merged into its corresponding Attempted Murder conviction, but that the two Attempted Murder convictions did not merge. Here, by contrast, Powers was charged with, and convicted of, just one count of Attempted Murder, in violation of R.C. 2903.02(A). Thus, the trial court here did not have the option of declining to merge two Attempted Murder convictions – there is only one.

{¶ 23} Furthermore, it is consistent with *State v. Williams*, supra, to merge

Powers's conviction for Felonious Assault in violation of R.C. 2903.11(A)(2) with his conviction for Attempted Murder in violation of R.C. 2903.02(A), since the Supreme Court held convictions for those two offenses to be subject to merger. There may be some question whether, under *State v. Williams*, supra, the trial court was required to merge the two Felonious Assault convictions, but it did merge them, and the State has not appealed.

{¶ 24} In short, we agree with Powers that the trial court erred by failing to merge the Felonious Assault and Attempted Murder convictions. This error meets the strict standard for plain error, since the result would clearly have been different had the convictions been merged.

{¶ 25} Powers's sole assignment of error is sustained.

III

{¶ 26} Powers's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for the State to elect which of the two convictions, Felonious Assault and Attempted Murder, shall be merged into the other, for the trial court to merge the convictions accordingly, and for re-sentencing.

BROGAN and FROELICH, JJ., concur.

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