

[Cite as *State v. Belfoure*, 2002-Ohio-2959.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80159

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
CARDELL BELFOURE	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	June 13, 2002
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CHARACTER OF PROCEEDING:	Criminal appeal from Court of Common Pleas Case No. CR-402255
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JUDGMENT:	AFFIRMED.
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DATE OF JOURNALIZATION:	_____
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APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor CHRISTOPHER McMONAGLE, Assistant 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	ROBERT L. TOBIK Cuyahoga County Public Defender DARIN THOMPSON, Assistant 1200 West Third Street Cleveland, Ohio 44113-1569
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COLLEEN CONWAY COONEY, J.:

{¶1} Defendant-appellant Cardell Belfoure appeals his conviction on one count of carrying a concealed weapon and one count of possession of a weapon under disability. For the reasons below, we affirmed the decision of the trial court.

{¶2} On December 28, 2000, police received a robbery complaint. In response to the complaint, officers approached Belfoure who fled when he saw the police. They apprehended Belfoure after a chase and recovered a handgun from him.

{¶3} Belfoure was convicted by a jury of one count of carrying a concealed weapon, a fourth degree felony and one count of possession of a weapon while under disability, a fifth degree felony. The trial court sentenced Belfoure to a fifteen-month term for the concealed weapon charge and a twelve-month term for the disability charge, to run concurrently.

{¶4} Belfoure raises the following assignments of error on appeal:

I.

{¶5} THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURORS TO QUESTION THE WITNESSES.

{¶6} During Belfoure's trial, the court permitted jurors to ask questions by first submitting them in writing, and secondly discussing them with the attorneys outside the jury's hearing. If the court determined that they were proper, it questioned the witness accordingly.

{¶7} Belfoure maintains that the trial court committed per se reversible error by allowing jurors to question witnesses during his trial. *State v. Gilden* (2001), 144 Ohio App.3d 69.

{¶8} In *Gilden*, the procedure followed by the trial court in permitting juror questions is almost identical to the procedure used by the trial court herein.

{¶9} Citing several federal and Ohio state court decisions,¹ the First District appellate court acknowledged in *Gilden* that most courts that have addressed the issue of whether to allow juror questions have held that it is within the trial court's discretion to do so, and a decision should not be reversed absent a showing of prejudice. See *Id.*

{¶10} Despite the litany of cases finding to the contrary on this issue, the *Gilden* court held that juror questioning "is a gross

¹ *State v. Wayt* (1992), 83 Ohio App.3d 848, 857-858, 615 N.E.2d 1107, 1112; *State v. Sheppard* (1955), 100 Ohio App. 345, 390, 128 N.E.2d 471, 499, affirmed on other grounds (1956), 165 Ohio St. 293, 135 N.E.2d 340; *State v. Cobb*, 2000 Ohio App. LEXIS 3429 (July 24, 2000), Seneca App. No. 13-2000-07; *Logan v. Quillen*, 1995 Ohio App. LEXIS 4837 (Oct. 27, 1995), Hocking App. No. 94CA26; *State v. Mascarella*, 995 Ohio App. LEXIS 3708 (June 30, 1995), Tuscarawas App. No. 94 AP 100075; *State v. Sexton*, 1982 Ohio App. LEXIS 15558 (Nov. 24, 1982), Clark App. No. 1689; *State v. Ernst*, 1982 Ohio App. LEXIS 14381 (Oct. 29, 1982), Sandusky App. No. S-82-7. See also, *United States v. Bush* (C.A.2, 1995), 47 F.3d 511, 514-515; *Commonwealth v. Britto* (2001), 433 Mass. 596, 609-611, 744 N.E.2d 1089, 1103-1104; *State v. Hays* (1994), 256 Kan. 48, 53-54, 883 P.2d 1093, 1098-1099; Sylvester, *Your Honor, May I Ask A Question? The Inherent Dangers of Allowing Jurors to Question Witnesses* (1990), 7 Cooley L.Rev. 213; Annotation (1970), 31 A.L.R.3d 872.

distortion of the adversary system that undermines the jury's role as a neutral fact-finder and thus should be banned outright; because the practice is so inherently prejudicial, the defendant need not affirmatively show prejudice." *Gilden* at syllabus, paragraph one.

{¶11} Shortly after the *Gilden* decision, the Tenth District appellate court encountered the same issue in *State v. Fisher*, 10th Dist. No. 01AP-614, 2001-Ohio-8772. The trial court in *Fisher* also permitted jurors to submit questions in writing, which were reviewed by counsel and the court, approved, and then asked of witnesses. The *Fisher* court acknowledged the *Gilden* decision, but held "the practice of allowing jurors to submit questions does not amount to plain error. Instead, cases should be carefully examined to ascertain whether there was an abuse of discretion in the process." *Id.*

{¶12} The Ohio Supreme Court recently determined that a conflict exists between *Gilden* and *Fisher*, and the matter remains pending. *State v. Fisher* (2002), 94 Ohio St.3d 1484.

{¶13} This court's position on this issue was established in *State v. Sheppard* (1955), 100 Ohio App. 345, which states that although it is not encouraged, "[t]he right of a juror to question a witness during trial is within the sound discretion of the court." *Id.* At syllabus, paragraph 5.

{¶14} Here, the trial court's decision to permit jurors to ask

questions was within its discretion. To avoid prejudice to Belfoure, the trial court required the jurors to submit the questions in writing. The questions were reviewed by the trial court and counsel, and only those questions approved by all were presented to the testifying witnesses.

{¶15} Belfoure has failed to establish that he was prejudiced by the trial court's action. Accordingly, Belfoure's first assignment of error is overruled.

II.

{¶16} THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO MAXIMUM TERMS OF INCARCERATION WHERE THE RECORD DOES NOT SUPPORT THE SENTENCE.

{¶17} Belfoure disputes that the trial court complied with the statutory sentencing requirements in imposing the longest sentence for having a weapon while under disability, a fifth degree felony.

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{¶18} R.C. 2929.14(C) provides:

{¶19} The court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense *** only upon offenders who committed the worst forms of the offense ***.

{¶20} The trial court made the requisite category finding by stating on the record that Belfoure committed the worst form of the offense.

{¶21} In addition to the required category finding under R.C. 2929.14(C), the sentencing judge must provide for the record the reasons for said category finding. See *State v. Edmonson*, 86 Ohio St.3d 324, 326, 1999-Ohio-110; *State v. Gonzalez* (Mar. 15, 2001) Cuyahoga No. 77338. Reasons should mean the trial court's basis for its findings. *Gonzalez*.

{¶22} Here, the trial court set forth its reasons for finding that Belfoure committed the worst form of the offense at the sentencing hearing and in its judgment entry. The trial court explained that:

{¶23} [T]his is the worst form of possessing a firearm since by defendant's admission, it was carried in connection with anticipated drug activity, occurred in connection with a dispute over a drug transaction, and defendant previously had been imprisoned for an offense where a firearm was possessed.

{¶24} Belfoure acknowledges that the trial court used proper statutory language in labeling his crime as the worst possible offense; however, he maintains that the act did not actually qualify as such. Thus, Belfoure asks us to modify the sentence

imposed by applying the analysis set forth in *State v. DeAmiches* (Mar. 1, 2001), Cuyahoga App. No. 77609.

{¶25} In *DeAmiches*, this court found that the record did not support the court's finding that the crime at issue was the worst form of the offense. Thus, pursuant to R.C. 2953.08, we modified the maximum sentence imposed by the trial court.

{¶26} However, we determine that the trial court's finding in the instant case was supported by the record. At the sentencing hearing, Belfoure admitted to the trial court that the incident took place just eighteen months after he completed a ten-year sentence on aggravated burglary charges. He further explained to the court that the incident took place in relation to a drug deal.

{¶27} Therefore, the trial court followed the statutory mandates in sentencing Belfoure to a maximum prison term on the possession of a firearm while under disability charge.

{¶28} Accordingly, Belfoure's second assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been

affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, J. CONCURS;

MICHAEL J. CORRIGAN, P.J. CONCURS

WITH SEPARATE CONCURRING OPINION

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(a).

MICHAEL J. CORRIGAN, P.J., CONCURRING:

{¶29} I concur in the disposition of the assignments of error, but write separately to dispel any reliance upon *State v. DeAmiches* (Mar. 1, 2001), Cuyahoga App. No. 77609, as authority for the proposition that we may impose sentence according to our view of the evidence.

{¶30} To be sure, R.C. 2953.08(G)(2) permits the court of appeals to modify the sentence or vacate the sentence and remand

the matter to the trial court for resentencing when it "clearly and convincingly finds" that a sentence imposed by the trial court is contrary to law. However, in *State v. Jones*, 93 Ohio St.3d 391, 399, 2001-Ohio-1341, the Ohio Supreme Court admonished the courts of appeals that when a sentence is found to be contrary to law, the court of appeals errs by "modifying the sentence rather than vacating it and remanding the cause to the trial court for resentencing." The Supreme Court went on to say that the courts of appeals are not at liberty to substitute their judgment for that of the trial court.

{¶31} I believe our R.C. 2953.08(G)(2) authority to impose a sentence arises only in cases where there is no discretion in imposing sentence – for example, when the trial court fails to order a mandatory and definite prison term according to statute. Otherwise, we must defer to the trial court for resentencing so that the trial court can exercise its discretion. To the extent that *DeAmiches* suggests otherwise, I would find that case to be an aberration and obviously no longer good law.