[Cite as *State v. Woodson*, 2009-Ohio-5558.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92315

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEONTE WOODSON

DEFENDANT-APPELLANT

JUDGMENT:
FINDING OF GUILT AFFIRMED,
CONVICTIONS VACATED,
AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512368

BEFORE: Blackmon, J., McMonagle, P.J., and Boyle, J.

RELEASED: October 22, 2009

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Deonte Woodson appeals his convictions and sentence. Woodson assigns the following errors for our review:

> **"I. Trial counsel was ineffective for failing to request and present the testimony of an expert witness on the subject of eyewitness identifications."**
>
> **"II. The trial court erred in imposing consecutive sentences without making the appropriate findings and reasons as required by R.C. 2929.14."**
>
> **"III. The trial court erred in failing to merge count four, kidnapping, with the aggravated robbery conviction."**
>
> **"IV. The trial court erred in ordering restitution to be determined at a later date."**
>
> **"V. The trial court erred in sentencing the appellant on all counts as the appellant may only be convicted of one form of aggravated robbery and one form of felonious assault."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the finding of guilt, but vacate the sentence, and remand for resentencing. The apposite facts follow.

{¶ 3} On Easter Sunday, March 23, 2008, Myron Lashley was taking a short cut near abandoned homes in the vicinity of East 71st Street in the city of Cleveland. As Lashley walked, he noticed two men approaching, one of whom he recognized, and who was carrying a gun. Lashley began to run, but was shot several times, dragged behind an abandoned house, and then robbed.

{¶ 4} As a result of the above incident, on June 20, 2008, the Cuyahoga County Grand Jury indicted Deonte Woodson on one count of attempted murder, two counts of aggravated robbery, one count of kidnapping, and two counts of felonious assault. All counts had one and three-year firearm specifications attached. Woodson pleaded not guilty at his arraignment and the matter proceeded to a jury trial.

Jury Trial

{¶ 5} At the trial, the state presented the testimony of eight witnesses, including the victim, Lashley, who testified he was leaving the home of a friend and he decided to take a short cut. He noticed Woodson and another male approaching his direction. Lashley immediately recognized Woodson, whom he knew only as "Dee," and also noticed that Woodson was carrying a gun. Lashley testified that he decided to run when he saw the gun.

{¶ 6} Woodson and the unidentified male gave chase and Woodson began shooting, hitting Lashley several times. Lashley fell to the ground in an alley between two abandoned houses. He testified about the remainder of the encounter as follows:

"Q. Now what do they do?

A. They drag me from the alley to the back of the abandoned house and that's when they, like, where the money at, where the money at, where the stuff - -

Q. That's what they're saying to you while they're doing this.

A. Yeah. Then there was another guy that was standing with him saying, you might as well tell us where everything is or something, you see we ain't got no mask on, we about to kill you, we about to kill you.

Q. They told you that?

A. Yeah.

*** * ***

Q. All right. What happened next?

A. And then the one guy he was telling Dee to shoot me again. And Dee was, like, I already shot him enough, the police gon' be on they way, you know what I'm saying. And then they went through my little pockets and what not, took my little shoes off whatever, whatever they did and then they just fled."[1]

{¶ 7} After the assailants fled, Lashley crawled to the street. Although Lashley was not friends with Woodson, he knew him and had seen him on numerous occasions in the neighborhood.

{¶ 8} Johnny McKibben was at home with his wife when he heard a series of gunshots. He looked out the living room window and saw two men dragging another man across the field in the snow. The two men dragged the victim

[1]Tr. 253-254.

behind an abandoned home. McKibben immediately called the police, after which he observed the victim dragging himself from behind the abandoned house.

{¶ 9} Lashley's sister, Tanica Bell, visited her brother in the hospital the day following the shooting. Bell testified that Lashley indicated that Woodson was the shooter. After learning that Woodson, whom she has known all his life, was the shooter, she confronted him over the telephone. Woodson denied shooting Lashley, but kept inquiring about the source of her information.

{¶ 10} Bell further stated that Woodson called her several times the day after she first spoke with him regarding the shooting of her brother, and continued to deny shooting her brother. Bell stated that Woodson is known in the neighborhood as "Dee."

{¶ 11} Detective Leroy Gilbert of the Cleveland Police Department's Third District Detective Bureau was the lead investigator on the case. Detective Gilbert developed a photo array and met with Lashley while he was still in the hospital. Lashley identified Woodson from the photo array.

{¶ 12} Woodson was subsequently arrested in Stark County, Ohio. Detective Gilbert met with Woodson, while he was in custody, and Woodson provided a written statement denying any involvement in the shooting.

{¶ 13} Sherry Hall, Woodson's mother, testified on his behalf. Hall normally entertains her friends and family at her home every Easter Sunday. Hall testified

that she was certain Woodson was at her home that day and said that Woodson had traveled with his cousins to Stark County the day after Easter Sunday.

{¶ 14} The jury acquitted Woodson of attempted murder, but found him guilty of the remaining charges, along with the attached firearm specifications. The trial court sentenced Woodson to concurrent prison terms of three years on the firearm specifications and ten years on the remaining charges. The trial court ordered the ten years to be served consecutive to the three years on the firearm specification.

Ineffective Assistance of Counsel

{¶ 15} In the first assigned error, Woodson argues trial counsel was ineffective for failing to present expert testimony on the subject of eyewitness identification. We disagree.

{¶ 16} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.[2] Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show that his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the

[2](1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

lawyer's deficient performance.[3] To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.[4] Judicial scrutiny of a lawyer's performance must be highly deferential.[5]

{¶ 17} Further, in *Strickland*, the Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[6]

{¶ 18} In the instant case, Woodson argues trial counsel should have called an expert witness on the subject of eyewitness identification because this was a case of mistaken identity. We are not persuaded.

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[3]*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

[4]Id. at paragraph two of syllabus.

[5]*State v. Sallie* (1998), 81 Ohio St.3d 673, 674.

[6]*Strickland*, 104 S.Ct. at 2065.

{¶ 19} Lashley testified that although he was not a friend of Woodson, he knew him because he had seen him numerous times in and about the neighborhood and that Woodson was friends with several people that lived in the neighborhood. Lashley recognized Woodson as he approached with the unidentified male.

{¶ 20} After Lashley was dragged behind the abandoned building, the unidentified male remarked that they were not wearing masks because they planned to kill him. Thus, the average person could conclude that even if Lashley did not know Woodson prior to that day, he had an opportunity to look at his assailants' face.

{¶ 21} Officer Daniel Makad, who responded to the scene, stated that Lashley indicated that he knew the suspect. Officer Makad testified in pertinent part as follows:

> **"I began to question him, does he know who shot him. He said, not by name, but I could identify him. I said, do you know where they live. He said, in the Garden Valley area, East 79 and the Kinsman area."[7]**

{¶ 22} Nonetheless, Woodson cites *State v. Bradley*[8] in support of his argument that trial counsel should have called an expert witness. However,

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[7]Tr. 307.

[8]181 Ohio App.3d 40, 2009-Ohio-460.

Woodson's reliance is misplaced because in *Bradley*, unlike this case, the victim had never seen the perpetrator prior to the incident and did not identify him until 30 days after the incident. *Bradley* also involved a cross-racial identification. Under such circumstances, eyewitness identification may be untrustworthy.[9]

{¶ 23} As previously stated, Lashley knew Woodson, saw him as he approached, and watched him as he stood over him as he laid on the ground behind the abandoned house. In addition, Lashley was able to indicate on the scene that he knew who shot him.

{¶ 24} Based on the foregoing, we conclude it was a matter of sound trial strategy for defense counsel not to call an expert witness to opine on the issue of eyewitness identification. As such, trial counsel was not ineffective. Accordingly, we overrule the first assigned error.

Consecutive Sentences

{¶ 25} In the second assigned error, Woodson argues the trial court erred when it imposed consecutive sentences without making the appropriate findings. We disagree.

[9]See *United States v. Smithers* (C.A.6, 2000), 212 F.3d 306, 311-313.

{¶ 26} In *State v. Foster*, [10] the Ohio Supreme Court declared R.C. 2929.14(E)(4), which governed consecutive sentences, unconstitutional and excised the offending part of the statute from the statutory scheme. In *Foster*,[11] the Ohio Supreme Court held that judicial fact-finding to impose the maximum or a consecutive sentence is unconstitutional in light of *Blakely v. Washington.*[12]

{¶ 27} "After the severance, judicial fact-finding is not required before a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant."[13] As a result, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive, or more than the minimum sentence."[14]

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[10]109 Ohio St.3d 1, 2006-Ohio-856, applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

[11]Id. at 61, 64, and 67.

[12](2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

[13]Id. at ¶99.

[14]*Foster,* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus.

{¶ 28} Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range.[15]

{¶ 29} An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.[16] When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.[17]

{¶ 30} In *Foster*,[18] the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Ohio Supreme Court held that R.C. 2929.11 does not mandate judicial fact-finding; rather, the trial court is merely to "consider" the statutory factors set forth in this section prior to sentencing.[19]

{¶ 31} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the "overriding purposes of felony

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[15] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See, also, *State v. Lindsay*, 5th Dist. No. 06CA0057, 2007-Ohio-2211; *State v. Parish*, 6th Dist. No. OT-07-049, 2008-Ohio-5036; *State v. Bunch*, 9th Dist. No. 06 MA 106, 2007-Ohio-7211; and, *State v. Haney*, 11th Dist. No. 2006-L-253, 2007-Ohio-3712.

[16] *Blakemore*, supra.

[17] *State v. Murray*, 11th Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio State Med. Bd.,* 66 Ohio St.3d 619, 621, 1993-Ohio-122.

[18] 109 Ohio St.3d 1, 2006-Ohio-856.

[19] Id.

sentencing."[20] Those purposes are "to protect the public from future crimes by the offender and others and to punish the offender."[21] R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.[22]

{¶ 32} However, Woodson argues that *Oregon v. Ice* abrogated *Foster's* decision declaring the consecutive sentencing section of Senate Bill 2 unconstitutional. *Oregon v. Ice* acknowledged that trial judges historically have decided when to impose consecutive sentences; consequently, it upheld Oregon's law on consecutive sentencing.

{¶ 33} The implication of Woodson's argument is that Senate Bill 2 on consecutive sentences is constitutional, and thus the trial court must make findings before it can impose a consecutive sentence. We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart

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[20]*State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322.

[21]Id.

[22]Id.

from the pronouncements in *Foster* until the Ohio Supreme Court orders otherwise.[23]

{¶ 34} Moreover, our review of the record indicates that the trial court sentenced Woodson within the statutory ranges, provided by R.C. 2929.14, for the respective offenses. The record also indicates that the trial court considered the overriding purposes of felony sentencing. Since the trial court sentenced Woodson within the statutory range and properly considered the purposes of felony sentencing as outlined in R.C. 2929.11, we conclude the trial court did not abuse its discretion when sentencing Woodson. Accordingly, we overrule the second assigned error.

Merger of Convictions

{¶ 35} In the third assigned error, Woodson argues the trial court erred when it failed to merge kidnapping with the aggravated robbery conviction. We disagree.

{¶ 36} R.C. 2941.25 states, in pertinent part, as follows:

> **"* * *where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one, but where his conduct results in two or more offenses of the same or similar kind**

[23] See *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009 -Ohio-3379; and *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.

committed separately or with a separate animus as to each, the defendant may be convicted of all of them."

{¶ 37} The word "animus" in R.C. 2941.25 is defined as "purpose" or "immediate motive."[24] The issue is whether the crime was committed with a separate purpose or immediate motive from that with which a defendant committed the other offense.[25]

{¶ 38} In reviewing the offense of kidnapping, where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions.[26]

{¶ 39} Further, where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that

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[24]*State v. Wright*, 12th Dist. No. CA2008-11-279, 2009-Ohio-4131, citing *State v. Logan* (1979), 60 Ohio St.2d 126.

[25]*State v. Coffey*, 2nd Dist. No. 2006 CA 6, 2007-Ohio-21, ¶26.

[26]*Logan* at syllabus.

involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.[27]

{¶ 40} After reviewing the record, we conclude that Woodson's conduct toward Lashley after he shot him was not merely incidental to the robbery, but involved a prolonged restraint or substantial movement and subjected Lashley to an increased risk of harm beyond the robbery. Lashley testified that after he was shot several times, Woodson and his accomplice dragged him behind an abandoned house. McKibben also testified that after he heard gunshots, he looked out his window and observed two men dragging a man across the field in the snow behind an abandoned house.

{¶ 41} Woodson's kidnapping of Lashley took on a significance of its own as he and his accomplice dragged Lashley to the back of the abandoned house and continued their asportation of Lashley after shooting him. Woodson's actions substantially increased the risk of harm to which Lashley was exposed.[28] At trial, Dr. Charles Emerman, Associate Chief of Staff at Metrohealth Hospital, testified that he treated Lashley for multiple gunshot wounds that would have been fatal if he had not received prompt treatment.

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[27]Id.

[28]*State v. Herbert*, 3rd Dist. No. 5-07-51, 2009-Ohio-9141, ¶26.

{¶ 42} Thus, Woodson committed the two offenses with a separate animus sufficient to support separate convictions.[29] Accordingly, we overrule the third assigned error.

Restitution

{¶ 43} In the fourth assigned error, Woodson argues the trial court erred in ordering restitution to be determined at a later date.

{¶ 44} The trial court has the authority to require the defendant to make restitution to the victim for the economic loss suffered.[30] "If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount."[31]

{¶ 45} The record indicates that the trial court had information before it that Lashley had incurred medical bills, which neither Medicare nor Medicaid had paid. In addition, it was brought to the court's attention that Lashley would not receive compensation from the fund for victims of violent crime, because Lashley had a felony conviction. Based upon this, the trial court took the issue of restitution under advisement and ordered that it may be determined at a later date.

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[29]See *Logan*; see *State v. Davis* (Dec. 21, 1989), Cuyahoga App. No. 56296.

[30] *State v. Brown*, 3rd Dist. No. 1-06-66, 2007 -Ohio- 1761. See R.C. 2929.18(A)(1).

[31]Id.

{¶ 46} While the record indicates that the trial court might hold Woodson accountable for Lashley's out-of-pocket medical expenses, the trial court never imposed a restitution order. Since no restitution order was imposed, the issue is not ripe for our review.

Allied Offenses

{¶ 47} In the fifth assigned error, Woodson argues the trial erred in sentencing him on both counts of aggravated robbery and both counts of felonious assault involving a single victim. We agree.

{¶ 48} The Double Jeopardy Clause of the United States Constitution prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[32] These double-jeopardy protections apply to the states through the Fourteenth Amendment.[33] Additionally, Section 10, Article I of the Ohio Constitution provides, "No person shall be twice put in jeopardy for the same offense."

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[32] *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656.

[33] *Benton v. Maryland* (1969), 395 U.S. 784, 786, 89 S.Ct. 2056, 23 L.Ed.2d 707; *State v. Tolbert* (1991), 60 Ohio St.3d 89, 90.

{¶ 49} The facts of this case involve the third double-jeopardy prohibition–the prohibition against multiple punishments for the same offense. R.C. 2941.25 provides:

> **"(A) Where 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.**
>
> **"(B) Where 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."**

{¶ 50} In the instant case, the record indicates that the offenses were a series of continuous acts with a single objective and were also part of a single criminal adventure, with a logical relationship to one another, which were bound together by time, space, and purpose. Thus, pursuant to R.C. 2941.25, Woodson may be convicted of only one form of the two offenses.

{¶ 51} Consequently, the trial court erred in imposing two separate sentences for aggravated robbery and two separate sentences for felonious assault and they are, therefore, reversed and the matter is remanded for imposition of a single sentence for each offense. The trial court is to identify the

aggravated robbery count and the felonious assault count for which Woodson was convicted.[34] Accordingly, we sustain the fifth assigned error.

Judgment affirmed in part, vacated in part and remanded for resentencing.

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 be sent to said court to carry this judgment into execution. 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.

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
MARY J. BOYLE, J., CONCUR

[34] *State v. Hamilton*, Cuyahoga App. No. 91869, 2009-Ohio-3595. See, also, *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569.