[Cite as *State v. Porter*, 2009-Ohio-3373.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91575

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CORVADE PORTER

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506633

BEFORE: Rocco, J., Gallagher, P.J., and Blackmon, J.

RELEASED: July 9, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, Corvade Porter, appeals from a common pleas court judgment of conviction on two counts of felonious assault with firearms specifications and one count of having a weapon while under disability. Appellant argues that his attorney did not provide him with effective assistance because counsel did not assert the affirmative defense of self-defense. He also contends that the court deprived him of due process by failing to instruct the jury on self-defense. While we find no merit in appellant's assignment of error, we nonetheless vacate the judgment of conviction and sentence and remand for the state to elect which felonious assault charge will merge into the other for purposes of conviction and sentence, and for resentencing following this election.

Procedural History

{¶ 2} Appellant was charged in a three-count indictment filed February 15, 2008 with one count of felonious assault in violation of R.C. 2903.11(A)(1) with one- and three-year firearm specifications, one count of felonious assault in violation of R.C. 2903.11(A)(2) with one and three-year firearm specifications, and one count of having a weapon while under disability. Appellant waived his right to a jury trial with respect to the weapon charge. The case proceeded to a jury trial with respect to the two felonious assault charges. After trial, the jury

returned guilty verdicts on both felonious assault charges and all of the firearm specifications. The court found appellant guilty of having a weapon while under disability after the state introduced evidence of the prior conviction and appellant stipulated that he was the person named in that judgment entry.

{¶ 3} At sentencing, appellant's counsel argued that the two felonious assault charges "actually merge for sentencing" because "[t]hose were just two alternate theories of felonious assault regarding the same act." The court agreed, and the prosecutor did not object. Nonetheless, the court sentenced appellant on all three charges. The court sentenced appellant to three years' imprisonment on the first count of felonious assault and three years on the merged firearms specifications, to be served prior and consecutive to the sentence on the base charge. The court imposed the same sentence on the second felonious assault charge, that is, three years' imprisonment on the firearms specifications, to be served prior and consecutive to the sentence of three years on the base charge. The sentences on the felonious assault charges were to be served concurrent to one another but consecutive to a sentence of one year's imprisonment on the charge of having a weapon while under disability, for a total of seven years' imprisonment, followed by five years' postrelease control.

Facts

{¶ 4} At trial, the jury heard the testimony of the victim, Jesse Perry, his girlfriend, Latoria Stewart, and her "niece," Charita Levy, as well as Cleveland

Patrol Officer Jennifer Ciaccia, Sergeant Nathan Willson, and Detective Marcus Saffo. Charita Levy testified that she left her car at appellant's home in November 2007 for appellant to repair it. Appellant called her and told her that the car had been stolen. He promised to check with his neighbors and call her back, but he never did.

{¶ 5} On January 20, 2008, Levy's "aunt," Latoria Stewart, picked Levy up from work. Stewart also picked up her former boyfriend, Jesse Perry. After Levy told Stewart and Perry about her car, all three decided to go talk to appellant. When they arrived at appellant's house Levy and Perry got out of the car and approached appellant, who was in the driveway outside his home. Levy asked whether appellant had spoken to his neighbors. Levy said appellant became defensive, and Perry stepped in. Appellant asked Levy why she brought Perry with her. She told appellant that Perry was her cousin. Appellant then said he had to go to the bathroom.

{¶ 6} Levy said that she thought "[s]omething don't feel right" about appellant leaving in the middle of a conversation. She returned to the car and encouraged Perry to do so as well, but Perry wanted to stay and talk to appellant. Appellant came out of the house, walked up to Perry, and said, "what you was saying?" Perry responded, "what do you mean, what I'm saying?" Perry also removed his hood. Levy saw fire coming from appellant's hands, but she never saw a gun. Perry ran back to the car. Levy heard a second shot. When

Perry got in the car, Levy saw that he had blood coming from his mouth. Perry reported to her that appellant had shot him in the mouth. Levy and Stewart then took Perry to the hospital.

{¶ 7} Levy, Stewart, and Perry all testified that Perry was not armed. Perry testified that when appellant came back from the house, he was holding something under his sleeve. Perry asked appellant about it, but appellant said nothing. Appellant fell back, his arm came up and Perry saw fire.

Law and Analysis

{¶ 8} Appellant contends that his attorney did not provide him with effective assistance because he did not request a jury instruction on self-defense. The standard for determining whether a defendant has been deprived of the effective assistance of counsel is essentially the same under Article I, Section 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution. *State v. Bradley* (1989), 42 Ohio St.3d 137, 142. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington* (1984), 466 U.S. 668, 687-88. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v.. Morrison*, 449 U.S. 361, 364-365 (1981)." Id., at 691. To warrant reversal, "[t]he defendant must show that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694.

{¶ 9} Self-defense is an affirmative defense as to which the defendant bears the burden of proof by a preponderance of the evidence. *State v. Williford* (1990), 49 Ohio St.2d 247, 249. To support a jury instruction on self-defense, the defendant must prove by a preponderance of the evidence (1) that he was not at fault in creating the situation giving rise to the affray, (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that the use of force was the only means of escape from the danger, and (3) that he did not violate any duty to retreat or avoid the danger. *State v. Robbins* (1978), 58 Ohio St.2d 74, 80.

{¶ 10} First, appellant created the situation giving rise to the affray by returning to confront Perry after appellant had retreated to the house. *State v. Yates*, Cuyahoga App. No. 88842, 2007-Ohio-6630, ¶47. Moreover, no reasonable jury could have found that appellant had a bona fide belief that the use of force was the only means of escape. Appellant had just escaped the confrontation by going into the house. Nothing prevented appellant from retreating again. *Yates*, at ¶49.

{¶ 11} Appellant's attorney made a reasonable strategic decision not to argue self-defense or to seek a jury instruction on it. Appellant was not prejudiced by counsel's decision because the evidence did not support the

defense; there is no reasonable probability that the result of the proceedings would have been different if he had requested a jury instruction on self-defense.

{¶ 12} During jury deliberations, the jury asked the court whether "it can consider self-defense knowing it was not raised during the trial. Can this be cause for reasonable doubt?" The court instructed the jury that self-defense is an affirmative defense that "has certain elements that have to be proved * * * by the party raising that defense, i.e., the defendant. It was not raised in this case." The court then instructed the jury again on the concept of reasonable doubt. Because the evidence did not support the defense, the court did not abuse its discretion by failing to instruct the jury on self-defense following the jury's question. The court's instruction was a correct statement of the law. Therefore, appellant's assignment of error is overruled.

{¶ 13} Although we find no error at trial, we perceive one plain error at sentencing. Cf. *State v. Elmore*, 111 Ohio St.3d 515, 524, 2006-Ohio-6207, ¶52. "We have held that felonious assault charges pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import if the state is unable to show that there was a separate animus for each count of felonious assault." *State v. Wilson*, Cuyahoga App. No. 91091, 2009-Ohio-1681, ¶46; see, also, *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249. "[T]he state must elect which of [the] two * * * charges will merge into the other for purposes of * * * conviction and sentence." *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶43

(emphasis added).

{¶ 14} At sentencing, appellant asked the court to merge the two felonious assault charges for sentencing. The court agreed. The state did not argue that the two offenses were committed with a separate animus so that appellant could be convicted of both, nor did it elect which charge would merge into the other.

{¶ 15} Nevertheless, the court proceeded to sentence appellant separately on the two charges.

{¶ 16} Having determined that the offenses were allied, the court plainly erred by failing to direct the state to elect which offense would merge into the other and by sentencing appellant on both charges. Accordingly, we vacate the judgment of conviction and remand for the state to elect which charge will merge into the other for purposes of conviction and sentence, and for resentencing. *Brown*, supra, at ¶43.

{¶ 17} This cause is vacated and remanded to the common pleas court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

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

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR