

[Cite as *State v. Pagan*, 2015-Ohio-2767.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102465

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE PAGAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-546295-A

BEFORE: Stewart, J., Kilbane, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 9, 2015

FOR APPELLANT

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Jose Pagan requested that this appeal be placed on this court's accelerated calendar pursuant to App.R. 11.1 and Loc.R.11.1. By doing so, he has agreed that we may render a decision in "brief and conclusionary form" consistent with App.R. 11.1(E).

{¶2} In Cuyahoga C.P. No. CR-11-546295-A, a jury found Pagan guilty of obstructing justice, tampering with evidence (with one- and three-year firearm specifications), and carrying a concealed weapon. We affirmed his conviction on direct appeal, but remanded for resentencing because the obstructing justice count should have merged with the tampering with evidence count at sentencing. *See State v. Pagan*, 8th Dist. Cuyahoga No. 97268, 2012-Ohio-2197, ¶ 49. The state elected to have the court sentence on the tampering with evidence count. The court imposed a three-year sentence on the tampering with evidence count. It merged the one-year firearm specification on the tampering count into the three-year firearm specification. The total sentence was six years. Pagan did not appeal, but later filed a motion to vacate the sentence on the firearm specifications for the tampering with evidence count. He argued that the court erred by allowing the state to select which of the firearm specifications should merge. The court denied the motion to vacate the sentence and this appeal followed.

{¶3} Pagan argues that the court left it “up to the prosecutor” to elect to have the one-year firearm specification merge into the three-year firearm specification. He maintains that this was an error because the jury, not the state, should have been allowed to select which of the two firearm specifications should have merged.

{¶4} Pagan raised this same argument in a previous application to reopen his appeal, claiming that “the trial court erred by imposing a sentence on a three-year firearm specification due to the merger of allied offenses[.]” Rejecting this argument, we held that:

At the resentencing hearing, the State elected to pursue sentencing on Count 5, which involved a conviction for tampering with evidence with a three-year firearm specification. Accordingly, the court properly imposed a sentence for the base offense of tampering with evidence and the firearm specification related to it. *Any argument to the contrary is meritless.*

(Emphasis added.) *State v. Pagan*, 8th Dist. Cuyahoga No. 99935, 2014-Ohio-1510, *reopening disallowed*, Motion No. 475731, 2014-Ohio-4199, ¶ 9.

{¶5} While the state did not raise the law of the case doctrine as a basis for the court denying Pagan’s motion to vacate his sentence, we may raise it sua sponte in order to ensure consistent results in this case. *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, fn. 2. An application to reopen an appeal under App.R. 26(B) is a “collateral postconviction proceeding,” *State v. Hoffner*, 112 Ohio St.3d 467, 2007-Ohio-376, 860 N.E.2d 1021, ¶ 6, the results of which are binding for future litigation between the parties. This court previously rejected the same argument in an earlier collateral proceeding, so that decision was binding on the trial judge. The

court therefore had no basis for granting Pagan's motion to vacate his sentence. The assignments of error are overruled.

{¶6} Judgment affirmed.

It is ordered that appellee recover of said appellant 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 common pleas 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
ANITA LASTER MAYS, J., CONCUR