

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

Case No. 2010-0235

AARON P. FORD,

Defendant-Appellant.

[On appeal from the Licking County
Court of Appeals, 5th Appellate District]
Court of Appeals Case No. 2008-CA-00158
Trial Court Case No. 08 CR 449

APPELLEE'S MERIT BRIEF

Appearances:

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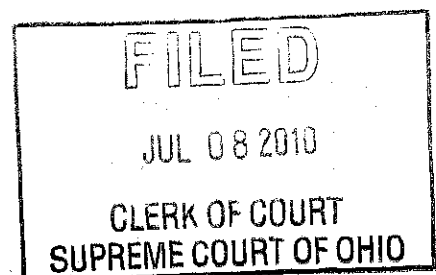


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STATEMENT OF THE FACTS AND CASE

The State accepts the Statement of Facts as submitted by the Appellant, and as further detailed by the 5th District Court of Appeals in the underlying case of *State v. Ford*, 2009-Ohio-6724, ¶¶ 2 – 18.

The State accepts the procedural posture as submitted by the Appellant.

ARGUMENT

Proposition of Law

The crime of discharging a firearm at or into a habitation under O.R.C. Section 2923.161 and an attached firearm specification under O.R.C. Sections 2929.14(D) and 2941.145 are NOT allied offenses of similar import.

By Entry filed on March 24, 2010, this Court determined that a conflict existed on the following issue:

Whether discharging a firearm at or into a habitation (R.C. 2923.161), and a firearm specification (R.C. 2929.14(D), R.C. 2941.145) are allied offenses of similar import as defined by R.C. 2941.25(A).

The conflict case is *State v. Elko*, 2004-Ohio-5209, an 8th District case.

The Appellant was convicted of Improperly Discharging a Firearm at or into a Habitation, in violation of O.R.C. §2923.161(A)(1), which provides:

(A) No person, without privilege to do so, shall knowingly do any of the following:

(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual.

He was additionally convicted of a Firearm Specification, in violation of O.R.C. §2929.14(D)(1)(a)(ii) and O.R.C. §2941.145(A), which provides in part:

(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that he offender possessed the firearm, or used it to facilitate the offense.

As a result, the defendant was sentenced to three (3) years at the Correctional Reception Center on his Improperly Discharging a Firearm at or into a Habitation conviction, along with an additional three (3) years to be served prior to and consecutive to the Improperly Discharging a

Firearm sentence, for an aggregate sentence of six (6) years.¹

¹ The Appellant was also convicted of M1 Inducing Panic, in violation of O.R.C. §2917.31(A)(3) and M1 Using Weapons While Intoxicated, in violation of O.R.C. §2923.15(A). Being misdemeanor offenses, the sentences merged into the three (3) year Improperly Discharging a Firearm sentence.

The Conflict:

In *State v. Elko, supra*, the defendant was convicted of three counts of Felonious Assault and one count of Improperly Discharging a Firearm into a Habitation, and additionally, was convicted of Firearm Specifications on those charges. He was sentenced to two years of imprisonment on each count of Felonious Assault and two years for Improperly Discharging a Firearm into a Habitation, the sentences to run concurrently. The Trial Court then sentenced Elko to three years imprisonment on the Firearm Specifications, merged them, and ordered the sentence to run consecutive with the two year sentence. *Id.* at ¶ 9. On appeal, the defendant claimed that he could not be convicted and sentenced on the Firearm Specifications when a firearm was an element of the underlying crimes. *Id.* at ¶ 84, 95. The *Elko* Court agreed with the defendant, stating:

R.C. 2923.161 specifically requires that a firearm be used to commit the crime; therefore, we agree with appellant that a firearm is an element of the underlying offense, and it was error for him to have been convicted and sentenced to a three year firearm specification. *Id.* at ¶ 95.

However, the Court found this to be a harmless error as it was appropriate for the defendant to have received the Firearm Specification sentence on the Felonious Assault conviction.

The underlying 5th District case of *State v. Ford, supra*, while noting the Appellant's reliance on *State v. Elko, supra*, declined to follow *Elko*. The Court noted the State's reliance on *State v. Burks*, 2008-Ohio-2463, in which the 10th District Court of Appeals rejected *Elko, supra*. In *Burks*, the defendant was convicted, in part, of Felonious Assault and Improperly Discharging a Firearm at or into a Habitation, both with accompanying Firearm Specifications. On those convictions, he was sentenced to eight concurrent years on the underlying offenses with a consecutive five year sentence on the Firearm Specifications.² On Appeal, the defendant alleged

² He was additionally convicted of Having a Weapon While Under Disability and received an additional four year sentence on that offense, for an aggregate sentence of seventeen years. *Burks*, at ¶¶ 19 – 20.

that the Trial Court did not properly sentence the defendant in this matter because firearm use was an element to both the Firearm Specification and the underlying charges. *Id* at ¶ 38. Furthermore, the defendant specifically relied on *State v. Elko, supra*. *Id* at ¶ 41. However, *Burks* specifically declined to follow *Elko*, finding that Ohio's felony sentencing laws require the trial court to sentence the defendant on the Firearm Specification, in addition to the sentence imposed on the underlying Improperly Discharging a Firearm conviction. *Id* at ¶¶ 42 – 44.

Ultimately, in addressing the identical issue raised in *Elko* and *Burks, supra*, the underlying *Ford* court specifically found that O.R.C. §2941.25(A) is not applicable, as “a firearm specification does not charge a separate criminal offense.” *Ford* at ¶ 54. *Ford* further stated that the firearm specification only comes into play once a defendant is convicted of a felony and that the firearm specification is merely a sentencing provision which provides for an enhanced penalty. *Id*.

The Issue:

The Appellant claims that the Improperly Discharging a Firearm offense and the Firearm Specification are allied offenses of similar import, in violation of O.R.C. §2941.25(A), which 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.

It is the State's position that these are not allied offenses of similar import due to the fact that a firearm specification is merely a sentencing enhancement only, and not an independent felony criminal offense. The firearm penalty enhancement specification is not an offense; it does not define or create a separate offense of which a defendant can be convicted. It only comes into play once a defendant is convicted of a underlying felony as set forth in the statute. Therefore, O.R.C. §2941.25(A) has no application. *Ford, supra* at ¶ 54.

Ford went on to state that its conclusion that O.R.C. §2941.25(A) does not apply to firearm specifications is further supported by the fact that the legislature has set forth a separate test to determine when firearm specifications merge. Specifically, O.R.C. §2929.14(D)(1)(b) provides that a court shall not impose more than one prison term on a offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction. Thus, this section precludes the imposition of consecutive firearm specification penalties or sentences in that context. *Ford* concluded that if O.R.C. §2941.25(A) was intended to apply to firearm specifications in the same manner that that statute applies to criminal offenses, there would be no need for a separate statutory provision regarding the merger of firearm specifications. *Id.* at ¶ 55. Additionally, O.R.C. §2929.14(D)(1)(e) specifically excludes the application of firearm specifications to certain offenses such as Carrying a Concealed Weapon, Illegal Conveyance of Firearms, or Having Weapons Under Disability, unless certain parameters apply. Again, if

O.R.C. §2941.25(A) applied to firearm specifications, there would be no need for this separate statutory provision regarding the availability of firearm specifications on certain offenses.

However, the Appellant alleges that the term “offense” is vague and as such should be construed against the State. As this Court stated in *State v. Brown*, 119 Ohio St.3d 447:

A cardinal rule of statutory interpretation is that “[a] court must look to the language and purpose of the statute in order to determine legislative intent.” *State v. Cook* (1998), 83 Ohio St.3d 404, 416. “When the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.” *State v. Krischer*, 109 Ohio St.3d 391, syllabus.

Brown, *supra* at ¶ 37.

The Appellant correctly notes that the term “offense” is defined in O.R.C. §2935.01(D), which provides:

(D) “Offense,” except where the context specifically indicates otherwise, includes felonies, misdemeanors, and violations of ordinances of municipal corporations and other public bodies authorized by law to adopt penal regulations.

Clearly firearm specifications are not included within the foregoing.

Moreover, when one looks at the placement in the Revised Code of O.R.C. §2929.14, it is within the chapter titled “Penalties and Sentencing.” Specifically, O.R.C. §2929.14(D)(1)(a)(ii) provides:

(D)(1)(a) Except as provided in (D)(1)(e) of this section, if an offender herein is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of a type described in Section 2941.141, 2941.144, or 2941.145 of the Revised Code, the Court shall impose on the offender one of the following prison terms:

(ii) A prison term of three years if this specification is of the type described in Section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender’s person or under the offender’s control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense.

This is the provision in the Ohio Revised Code that authorizes and sets forth the specific three

year prison term associated with a violation of O.R.C. §2941.145. As such, due to its placement and content, it is clear that the firearm specification is a penalty and sentencing provision, as opposed to a stand-alone offense.

Double Jeopardy:

The Appellant further alleges that the consecutive sentences are cumulative punishment and in violation of his double jeopardy rights. It is the State's position that this issue is beyond the scope of the issue certified as a conflict.

However, if the Court decides to address this issue, the State would respectfully submit that the reasoning and analysis of the 5th District in *Ford*, relying on *Missouri v. Hunter* (1983), 459 U.S. 359, governs.

As stated in *Ford*, *supra*, the U.S. Supreme Court stated in *Missouri v. Hunter* "with respect to cumulative sentences opposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Hunter* at 366, *Ford* at ¶ 59. *Ford* continues, quoting:

Simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockberger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. . . . Where, as here, a legislature specifically authorized cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockberger*, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. *Hunter* at 368. *Ford* at ¶ 60.

In the case sub judice, the imposition of the consecutive sentences was statutorily mandated pursuant to O.R.C. §2929.14(D)(1)(a)(ii) and 2929.14(E)(1)(a). Specifically, O.R.C. §2929.14(D)(1)(a)(ii) provides that a Court **shall impose** a three (3) year prison term on a firearm specification if the offender had a firearm on or about his person or under his control while committing the offense and used the underlying firearm to facilitate the offense. In addition, O.R.C. §2929.14(E)(1)(a) provides that if a mandatory prison term described above is imposed upon an offender, the offender shall serve the mandatory prison term **consecutively to and prior to any prison term imposed for the underlying felony**. Given that the underlying

Firearm Specification was mandated by statute to be consecutively imposed to the Appellant's underlying felony sentence, the Trial Court did not commit error in its underlying sentence.

Moreover, this court in *State v. Roe*, 41 Ohio St.3d 18, has previously ruled a three year term of prison imposed under a firearm specification does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions pursuant to *Missouri v. Hunter, supra*. *Roe* at pg 35.

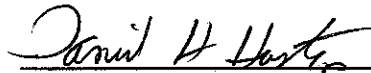
However, if the Court were to decide that the firearm specification is an offense for the purpose of O.R.C. §2941.45(A), it is the State's position that the firearm specification would not qualify as an allied offense of similar import. Pursuant to *State v. Rance*, 85 Ohio St.3d 632 and *State v. Cabrales*, 118 Ohio St.3d 54, offenses are allied offenses of similar import, if, in comparing elements in the abstract, the offenses are so similar that committing one necessarily results in committing the other. This comparison of elements in the abstract is done without considering the evidence in the case, and does not require an exact alignment of elements. *Cabrales* at ¶¶ 26 – 27.

The problem in this analysis is that O.R.C. §2929.14(D)(1)(a)(ii) and 2941.145(A) do not specifically apply to the Improperly Discharging a Firearm offense. They apply to most felonies, with the exceptions noted pertaining to certain weapon offenses noted above. Thus, in the abstract, it is impossible to compare the elements because the underlying offense is not specified in the firearm specification. Therefore, there is no merger.

CONCLUSION

For the reasons stated within, the State respectfully urges this Court to answer the certified question in the negative, and to affirm the judgment of the 5th District Court of Appeals in *Ford, supra*.

Respectfully submitted,



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Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been sent by regular U.S. mail this 8th day of July, 2010 to Attorney for Defendant-Appellant, Christopher Shook 33 W. Main Street, P.O. Box 4190, Newark, Ohio 43058-4190.



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