

NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 103696

STATE OF OHIO,

Plaintiff-Appellant

-vs-

LUGENE L. SCOTT,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

The State of Ohio respectfully petitions this Honorable Court to accept jurisdiction and summarily reverse the Eighth District Court of Appeal's opinion in *State v. Scott*, 8th Dist. Cuyahoga No. 103696, 2016-Ohio-5929, vacating Defendant-Appellee Lugene Scott's sentence for having a weapon while under disability arising from the 2013 indictment. The Eighth District's decision is contrary to this Court's opinions in *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 20, and *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 29, which provide that a defendant may expressly waive the Double Jeopardy protection afforded by R.C. 2941.25 by stipulating as part of his or her plea agreement with the State that the offense to which he or she is pleading to does not merge with any other offense. The Eighth District ignored the fact that Defendant agreed as part of his plea agreement arising from the 2013 indictment that his offense of having a weapon while under disability did not merge with any other offense, including his prior conviction for having a weapon while under disability arising from the 2007 indictment. Because the Eighth District's analysis of Defendant's sentence for having a weapon while under disability arising from the 2013 indictment is contrary to this Court's clear directive in *Rogers* and *Underwood*, summary reversal is the proper remedy.

In the event that this Honorable Court does not summarily reverse the Eighth District's opinion, the State respectfully submits that this case is worthy of Supreme Court review as a substantial constitutional question, requests that jurisdiction be accepted, and requests that this Court consider whether an appellate court may review a sentence where the defendant agrees as part of his plea agreement with the State that the offense to which he is pleading does not merge as an allied offense with any other offense, including prior convictions, the State and the defendant agree upon a specific sentence within the statutory range, and the trial court accepts the defendant's

plea and imposes the agreed-upon sentence.

STATEMENT OF THE CASE AND RELEVANT FACTS

In its opinion vacating Defendant's sentence for having a weapon while under disability arising from the 2013 indictment, the Eighth District set forth the following relevant facts, which the State adopts as follows:

In 2007, Scott was charged with shooting Damien Taylor ("Taylor") and Donnie Davidson ("Davidson"). Taylor was paralyzed as a result of the shooting. In this prior case, after a bench trial, Scott was found guilty of aggravated assault of Davidson, felonious assault of Taylor, and having a weapon while under disability. Scott was sentenced to one-year incarceration for aggravated assault, five years incarceration for the felonious assault, and three years incarceration for having a weapon while under disability, to be served consecutively for a total of nine years incarceration. Scott appealed the conviction and sentences, and this court affirmed both in *State v. Scott*, 8th Dist. Cuyahoga No. 90671, 2008-Ohio-6847.

In April 2013, Taylor died from complications from the gunshot received in 2007. The coroner ruled his death a homicide. Scott was charged with aggravated murder, felonious assault, and having a weapon while under disability. Scott and the state reached a plea agreement where if Scott pled guilty to voluntary manslaughter and having a weapon while under disability, the remaining counts would be dismissed. The plea agreement also included a sentence of ten years incarceration for voluntary manslaughter and two years incarceration for having a weapon while under disability, to be served consecutively, for a total of 12 years incarceration.

State v. Scott, 8th Dist. Cuyahoga No. 103696, 2016-Ohio-5929, ¶¶ 3-4.

Defendant appealed his convictions and sentence for voluntary manslaughter and having a weapon while under disability to the Eighth District, arguing, among other assignments of error, that having "a five-year sentence for having a weapon while under disability is void when the maximum statutory sentence can be no greater than three years." *Id.* at ¶ 4. The State responded to this argument by highlighting the fact that Defendant's sentence for having a weapon while under disability arising from the 2013 indictment was an agreed-upon sentence of *two* years that was discussed on the record and that Defendant waived any argument regarding double jeopardy

when he agreed as part of his plea agreement that the offense of having a weapon while under disability that he was pleading to did not merge with any other offense, including prior offenses to which he was convicted, which was also discussed on the record. This fact, which was supported by citations to the record in the State's brief, was not discussed in the Eighth District's opinion.

In its opinion, the Eighth District wholly ignored the State's argument regarding waiver. Instead, the Eighth District vacated Defendant's sentence for having a weapon while under disability arising from the 2013 indictment after finding that the sentence was contrary to law because the "single act of possession supported both charges" in 2007 and 2013 for having a weapon while under disability and thus, defendant "cannot now be put in jeopardy twice for the same offense." *Id.* at ¶ 13. In vacating the sentence, the Eighth District stated that "the additional two years that Scott was sentenced to in this case for having a weapon while under disability is contrary to law and therefore places the sentences outside the permissible statutory range. Scott's two-year sentence must be vacated." *Id.*

The State now appeals the Eighth District's decision to vacate Defendant's sentence for having a weapon while under disability.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW I: A reviewing court's failure to consider a defendant's agreement with the State as part of his plea agreement that the offense to which he is pleading does not merge with any other offense, including prior convictions, is contrary to the opinions in *State v. Underwood* and *State v. Rogers* and requires summary reversal.

The Eighth District's decision to vacate Defendant's sentence for having a weapon while under disability arising from the 2013 indictment and to ignore the fact that Defendant agreed as part of his plea agreement to waive any argument regarding merger is contrary to this Honorable Court's opinions in *State v. Underwood* and *State v. Rogers*. In *Underwood*, this Court stated that "nothing in this decision precludes the state and a defendant from stipulating in the plea agreement

that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence.” 2010-Ohio-1, at ¶ 29. In *Rogers*, this Court found that “it is possible for an accused to expressly waive the protection afforded by R.C. 2941.25, such as by ‘stipulating in the plea agreement that the offenses were committed with separate animus.’” 2015-Ohio-2459, ¶ 20, citing *Underwood* at ¶ 29. By ignoring Defendant’s agreement that his offense for having a weapon while under disability does not merge with any other offenses, including the prior 2007 conviction for having a weapon while under disability, and finding that the offenses for having weapons while under disability arising from the 2007 and 2013 indictments would subject Defendant to double jeopardy, the Eighth District’s opinion is contrary to *Rogers* and *Underwood*, and should be summarily reversed.

APPELLANT’S PROPOSITION OF LAW II: Where a defendant agrees as part of his plea agreement with the State that the offense to which he is pleading does not merge with any other offense, including prior convictions, and also agrees to a particular sentence that is within the statutory range for that offense, defendant’s sentence is unreviewable on appeal.

This appeal presents an opportunity for this Honorable Court to consider whether a defendant has a right to appeal his sentence where he agreed as part of his plea agreement with the State that the offense to which he is pleading does not merge with any other offense, including prior convictions, and agreed to a particular sentence for that offense that is within the statutory range, and the trial court accepted his plea and imposed the agreed-upon sentence.

Pursuant to R.C. 2953.08, a defendant “enjoys a limited right to appeal sentences[.]” *Scott*, 2016-Ohio-5929, ¶ 24 (S. Gallagher, J., dissenting), citing *State v. Marcum*, 2016-Ohio-1002, ¶ 22. Section 2953.08(D)(1) of the Ohio Revised Code prohibits review of a sentence if the sentence is “authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” A sentence is authorized by law “only if it comports

with all mandatory sentencing provisions.” *Underwood* at ¶ 20. A sentence that is contrary to law is not authorized by law. *See Scott*, 2016-Ohio-5929, ¶ 25 (S. Gallagher, J., dissenting). “A sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12.” *State v. Ortiz-Rojas*, 8th Dist. Cuyahoga No. 103688, 2016-Ohio-5138, ¶ 3.

Here, the Eighth District correctly found that Defendant’s sentence for having a weapon while under disability arising from the 2013 indictment was jointly agreed to and was imposed by the trial court. *See Scott*, 2016-Ohio-5929, at ¶ 4. The crux of this appeal is that the Eighth District incorrectly found that Defendant’s sentence for having a weapon while under disability was reviewable on appeal because it was not authorized by law. Defendant waived any argument on appeal that his sentence was unauthorized by law based on double jeopardy when he agreed as part of his plea agreement that his offense for having a weapon while under disability arising from the 2013 indictment did not merge with any other offense, including his 2007 conviction for having a weapon while under disability. *See Underwood* at ¶ 29; *Rogers* at ¶ 20.

Additionally, contrary to the Eighth District’s holding, Defendant’s two-year sentence for having a weapon while under disability arising from the 2013 indictment was within the applicable sentencing range for the offense and thus, not contrary to law. To find that the sentence for the offense of having a weapon while under disability arising from the 2013 indictment was contrary to law, the Eighth District added the sentence imposed for the 2007 offense of having a weapon while under disability, which was three years, to the sentence imposed for the 2013 offense, which was two years. The Eighth District’s analysis of this issue offends this Court’s opinion in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 13-15. In *Saxon*, this Court held

that each offense must have an individual sentence. *Id.* Instead of following *Saxon*, the Eighth District shoehorned an allied offenses argument into a contrary to law argument to obtain the result that it wanted. Consequently, Defendant's sentence for the offense of having a weapon while under disability arising out of the 2013 indictment was not contrary to law; instead, it was unreviewable on appeal pursuant to R.C. 2953.08(D)(1).

CONCLUSION

Based on the foregoing, the State of Ohio respectfully submits that the Eighth District's failure to analyze Defendant's agreement with the State as part of his plea agreement that his offense of having a weapon while under disability arising from the 2013 indictment does not merge with any other offense requires summary reversal as being contrary to this Court's opinions in *State v. Underwood* and *State v. Rogers*. Alternatively, the State respectfully submits that this case is worthy of review by this Honorable Court and requests that this Court accept jurisdiction to consider whether an appellate court may review a sentence where: (1) the defendant and the State agree as part of the plea agreement that the offense to which defendant will plead to does not merge with any other offense, including prior convictions, and agree upon a specific sentence for that offense that is within the statutory range; and (2) the trial court accepts the defendant's plea and imposes the agreed-upon sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent via U.S. regular mail and/or by e-mail on this 7th day of November, 2016 to:

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