IN THE SUPREME COURT OF OHIO

SUPREME COURT NO.

STATE OF OHIO	:	
Appellee	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth
vs.	:	Appellate District Court of Appeals
BRANDON M. SMITH	:	CA: 108708
Appellant		

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BRANDON M. SMITH

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EXPLANATION OF WHY THIS CASE IS A FELONY CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents two important issues for review.

First, it asks what a court must do before accepting a negotiated plea when the issue of a defendant's competence has been raised. Is it enough simply to accept evidence of competence and move forward, or must the court, as the Revised Code seems to imply, actually *find* that the defendant is competent?

After Brandon Smith's competence to stand trial was raised, a report was prepared by a psychiatrist at Northcoast Behavioral Healthcare. The report contains the conclusion that Mr. Smith was competent to stand trial. The parties stipulated to the admissibility of the report, and the court accepted it. What the court did not do is make a finding that Mr. Smith was competent. Nevertheless, the court accepted Mr. Smith's negotiated plea of guilty. The Eighth District Court of Appeals said, in essence, that the trial court's action was close enough.

Second, this case asks whether consecutive sentences which fall within an agreed range are subject to review. The court of appeals said they are not because an agreed range is an agreed sentence and because the sentences were lawful regardless of whether findings necessary for the imposition of consecutive sentences were made or were supported by the record. Even brief analysis of the relevant statutes and case law reveals that the court of appeals was wrong.

These matters need to be addressed, and not just because the Eighth District was wrong and Mr. Smith's rights were denied both at trial and on appeal. They need to be addressed because they set a precedent for other courts. In particular, the Eighth District's refusal to consider the sentencing issues on their merits, a refusal at least partly aligned with other district courts, provides a further erosion of the General Assembly's determination that Ohio sentences should be subject to meaningful review. And it undercuts the important principles that the words of statutes, and of this Court, matter.

The questions are important. They go to the heart of our legal system. This Court should grant jurisdiction and adopt Mr. Smith's propositions of law.

STATEMENT OF THE CASE AND FACTS

Brandon Smith was charged in a 19-count indictment with aggravated murder and other offenses many of which included either 1 or both 1- and 3-year firearm specifications, and two including schoolyard specifications. All offenses either grew out of or were discovered as a consequence of the killing of Daanahr N. Pugh on November 13, 2017 in Cuyahoga County.

Because the case was not tried, the record reveals no actual evidence about the circumstances surrounding the killing. While the parties agreed that events arose from a drug deal gone bad, their recitations of events showed disagreement about nearly everything else. For instance, Mr. Smith said that he was injured in a fracas inside Mr. Pugh's car and that he fired the shot that killed Pugh as he was running away. The State said there was no indication whatever that Smith was injured, that Smith killed Pugh in

cold blood, and that rather than run from the scene Smith stole Pugh's car as revealed by, among other things, Smith's blood in the car.[1]

On November 28, 2018, and by agreement with the State, Mr. Smith entered guilty pleas to single counts of involuntary manslaughter with a 3-year gun specification and to kidnapping. As part of the agreement, the parties recommended a sentence of from 9 to 25 years. The trial court imposed a sentence of 24 years.[2]

On appeal to the Eighth District, Mr. Smith raised two assigned errors.

> THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S GUILTY PLEAS WITHOUT MAKING A FINDING AS TO COMPETENCY.
>
> THE RECORD DOES NOT CLEARLY AND CONVINCINGLY SUPPORT THE IMPOSITION OF CONSECUTIVE SENTENCES.

By Journal Entry and Opinion of June 25, 2020, the court of appeals overruled both assigned errors and affirmed Mr. Smith's convictions and sentence. *State v. Smith*, 8th Dist. Cuyahoga, No. 108708, 2020-Ohio-3454. He now asks this Court to grant jurisdiction to hear his appeal from that decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

> Proposition of Law No. 1: When a question about a criminal defendant's competence is properly raised, the trial court may not accept a guilty plea from that defendant before first determining on the record and on the evidence that the defendant is, in fact, competent.

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[1] The State offered no explanation of how it happened that the uninjured Mr. Smith was bleeding when he stole the car.

[2] In an unrelated case resolved at the same time, Mr. Smith was sentenced to a concurrent term of 18 months in prison.

When a defendant waives the right to trial and elects instead to enter a guilty plea, that defendant's waiver of rights must be knowing, intelligent, and voluntary. The constitutions of the United States and of this state are clear on that point.

> When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. *Kercheval v. United States* (1927), 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009, 1012; *Mabry v. Johnson* (1984), 467 U.S. 504, 508-509, 104 S. Ct. 2543, 2546- 2547, 81 L. Ed. 2d 437, 443; *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274; *State v. Kelley* (1991), 57 Ohio St. 3d 127, 566 N.E.2d 658; Crim. R. 11(C).

State v. Engle, 74 Ohio St.3d 525, 527, 660N.E.2d 450 (1996).

Further, "[f]undamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial." *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995) (citing *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), and *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)). It follows that a defendant who is incompetent to stand trial is incompetent to enter a negotiated plea. See *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

The question in this case is whether Mr. Smith was competent when he entered his plea. The question had been raised. Indeed, as the court of appeals acknowledged, Smith had been referred twice for competency determinations. First, in March 2019 he was referred to the court psychiatric clinic where, according to a report by Dr. Lamoureux, he "refused or was unable to cooperate with the evaluation." Accordingly, the doctor could not render an opinion on Smith's competency. *Smith*, *supra*, at ¶ 3. Mr. Smith was then

sent to Northcoast Behavioral Healthcare for an inpatient evaluation. A report from Dr. Barrett concluded that he was in fact competent to stand trial. *Id.*

Although the parties stipulated to Dr. Barrett's report, the court neither accepted the stipulation or made a finding that Mr. Smith was (or was not) competent. Rather, in a mere 32 lines of transcript, the court held what it referred to as a competency hearing without ever making a ruling on Smith's competency.

> [THE COURT]: We're here today on a couple issues. One is the competency report that's dated May 24th, 2018. And it is prepared, written by Jera Barrett, J-E-R-A, Barrett, B-A-R-R-E-T-T, M.D., J.D., from North Coast Behavioral Healthcare.
>
> And I believe both the State and the defense have had an opportunity to review this report. Is that correct?
>
> MR. WEBSTER [Defense Counsel]: Yes, your Honor.
>
> THE COURT: Is that correct?
>
> MR. THOMAS [Prosecutor]: Yes. What's the date of the report for the record, your Honor?
>
> THE COURT: It's May 24th, 2018.
>
> MR. THOMAS: Thank you.
>
> THE COURT: And it is this doctor's opinion with reasonable medical certainty that Mr. Smith presently has the capacity to assist in his defense and that Mr. Smith presently has the capacity to understand the nature and objective of the proceedings against him.
>
> And so what is the defense's position regarding this report?
>
> MS. WEBB [Defense Counsel]: I'm sorry, your Honor, regarding?
>
> THE COURT: This report, are you stipulating?
>
> MS. WEBB: We are stipulating, yes, your Honor.
>
> THE COURT: On behalf of the state?
>
> MR. THOMAS: We also stipulate.
>
> THE COURT: All right. So that's the first issue.

And what the court did not do at the hearing, it did not do in the journal entry which, in relevant part reads:

> HEARING HELD ON DEFENDANT BRANDON SMITH'S COMPETENCY REPORT RECEIVED FROM NORTHCOAST BEHAVIORAL ON 05/24/2018. BOTH

> STATE AND DEFENSE HAD PREVIOUSLY REVIEWED THE REPORT PRIOR TO TODAY'S HEARING. BOTH STATE AND DEFENSE STIPULATE IN COURT AND ON THE RECORD TO DEFENDANT'S COMPETENCY REPORT FROM NORTHCOAST BEHAVIORAL, DATED 05/24/2018 AND SIGNED BY DR. JERA BARRETT.

What did not happen at the competency hearing, and what did not happen in the journal entry did not happen anywhere else in the record of this case. The trial court simply made no finding about Mr. Smith's competence. That matters. R.C. 2945.38(A) sets forth the relevant procedures and the mandated finding. "If the issue of a defendant's competence to stand trial is raised and if the court, upon conducting the hearing provided for in section 2945.37 of the Revised Code, finds that the defendant is competent to stand trial, the defendant shall be proceeded against as provided by law." The court, that is, must make the relevant finding.[3] And as set forth above, it did not.

Although the parties stipulated to Dr. Barrett's report, as R.C. 2945.37(E) provides, the stipulation did no more than admit the report into evidence. "A written report of the evaluation of the defendant may be admitted into evidence at the hearing by stipulation." Of course, stipulating to the admissibility of a report is not the same as stipulating to its conclusions. And it is a conclusion regarding Mr. Smith's competence, a conclusion in the form of a finding by the court, is what the General Assembly mandated in R.C. 2945.38. And regardless of stipulation, the court in Mr. Smith's case made no finding.

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[3] R.C. 2945.38(B) provides what is to be done if the court finds the defendant incompetent to stand trial.

The court of appeals said that did not matter. The parties, that court said, "stipulated to the defendant's competency, and the court noted the parties' stipulation in its journal entry." *Smith*, 2020-Ohio-3454 at ¶ 18. But the parties did not stipulate to Mr. Smith's competence, nor did the journal entry say that they did.

Mr. Smith argued on appeal that Mr. Smith's case was like *State v. Whitling*, 110 N.E.3d 63, 2018-Ohio-1360 (12th Dist. 2018). In *Whitling*, a competency report was prepared and filed with the court, the court declared Whitling competent, and then entered a guilty plea. While the 12th District in that case found no merit to the argument that the competency hearing was perfunctory and that the competency report was never formally admitted into evidence, it found that the court's failure to journalize its finding that Whitley was competent, rendered the ensuing plea invalid.

> Once the issue of competency has been raised, the procedures set forth in R.C. 2945.37 and 2945.38 are required to be followed so that the question of appellant's competence to stand trial may be put to rest. Until the trial court resolves this issue by putting on an entry, there remains an issue as to whether appellant is competent to stand trial. Therefore, for the reasons stated above, we find that the trial court erred in accepting appellant's guilty plea without first determining defendant's competency in accordance with R.C. 2945.38(A).

2018-Ohio-1360 at ¶ 22.

Like the court in *Whitling*, the court in this case did not follow the General Assembly's mandate that it enter its finding regarding the defendant's competence. More, and unlike the court in *Whitling*, the court in this case did not even make a finding. It follows, that the court improperly accepted Mr. Smith's guilty plea in violation of his statutory rights as well as his rights to fair trial and due process as protected by the Sixth

and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 16 of the Ohio Constitution.

> Proposition of Law No. 2: A recommended sentencing range is not "[a] sentence . . . recommended jointly by the defendant and the prosecution, and consecutive sentences where the findings are not supported by the record are not lawful." Such sentences are not, therefore, "not subject to review under" R.C. 2953.08(D), and a court of appeals improperly overrules an appeal of such a sentence without ruling on the merits of the argument presented.

As part of the plea agreement in this case, Mr. Smith and the State recommended that the court impose a sentence of no fewer than 9 and no more than 25 years in prison. At the sentencing hearing, Mr. Smith argued for a sentence of or near the 9-year minimum and the State for a sentence of or near the 25-year maximum. The court imposed a sentence of 24 years. To reach that sentence, the court ordered that the 14-year sentence on Count 1 and the 10-year sentence on Count 4 run consecutively.

In his second assigned error on appeal to the Eighth District, Mr. Smith argued that the sentence was improper because he had not agreed to a recommendation of consecutive prison terms and the record did not support the decision to impose them. The court of appeals did not reach the merits of his argument. Rather, it held, as it has held consistently, that the appeal was precluded by R.C. 2953.08(D)(1). That section provides that "[a] sentence imposed upon a defendant is not subject to review under this section 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."

The district court said that a recommended sentencing range is a recommended sentence. 2020-Ohio-3454 at ¶ 22. Further, the court said that "when the trial court

imposes nonmandatory consecutive sentences within an agreed sentencing range, the sentence is authorized by law and not subject to review, regardless of any express agreement to consecutive sentences," *id.* at ¶ 23, and apparently regardless of whether the court makes or could properly make the findings necessary to impose consecutive sentences.

The court was wrong. An agreed sentencing range is not a jointly recommended sentence and, therefore, review of the sentence is not precluded even if the sentence "is authorized by law." And a consecutive sentence, regardless of whether it is within a recommended sentencing range, is not "authorized by law" when the record clearly and convincingly does not support the trial court's findings under R.C. 2929.14(C)(4).

Agreed range is different than agreed sentence.

On it's face, R.C. 2945.08(D)(1) applies to and prohibits appellate review of a lawfully authorized "sentence" that "has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." The question is whether a sentence can be a range, and the answer, at least in Ohio, is that it cannot.

As Chief Justice O'Connor observed during oral argument just last week, "We are a profession where words matter." Oral Argument, *State v. Dowdy*, No. 2019-1430, held Aug. 5, 2020, available at https://ohiochannel.org/video/supreme-court-of-ohio-case-no-2019-1430-state-v-dowdy (accessed Aug. 10, 2020) at 8:41. And despite the efforts of the Eighth District, there is neither wiggle room nor ambiguity in the words in this case.

The word *sentence* is defined by statute. "'Sentence' means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense." R.C. 2929.01(EE). And, of course, "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42. Accordingly, and without wiggle room or ambiguity, a sentence is a "sanction or combination of sanctions." It is not however much the Eighth District might say otherwise, a range of sanctions.

Again, "words matter."

Improperly imposed consecutive sentences are not lawful.

In *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 156 N.E.3d 659, this Court made clear that "[i]n order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4)." *Id.* at the syllabus. It follows that consecutive sentences imposed by a court that does not make the required findings are contrary to law and, therefore, subject to appeal pursuant to R.C. 2953.08(B)(2). And, of course, that sentence is unlawful and R.C. 2953.08(D)(1) does not preclude review.

What is true of consecutive sentences made without the required findings is, necessarily true of consecutive sentences where the record clearly and convincingly does not support those findings. See *State v. Marcum*, 140 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶¶ 22-23.

Conclusion

Because the 24-year sentence in this case was neither an agreed sentence nor a lawful one, it was subject to review. Accordingly, the court of appeals improperly overruled it as not subject to appeal. Rather, the court should have reviewed it on its merits, and the case should be remanded for the court to do that.

CONCLUSION

For the reasons above, the Court should accept jurisdiction, adopt Mr. Smith's proposition of law, reverse the decision of the court of appeals, and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by e-mail to Michael O'Malley, Cuyahoga County Prosecutor, at mcomalley@prosecutor.cuyahogacounty.us this 10th day of August, 2020.

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