

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO,</b>	:	<b>Case No. 2021-0518</b>
	:	
Appellee,	:	<b>On Appeal from the Butler</b>
	:	<b>Court of Appeals, Twelfth</b>
	:	<b>Appellate District</b>
<b>-vs-</b>	:	
	:	<b>Court of Appeals Case No.</b>
	:	<b>CA2020-02-0020</b>
<b>BRIAN DARNELL SOWELL,</b>	:	
	:	
Appellant.	:	

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**STATE OF OHIO'S RESPONSE TO APPELLANT'S MOTION AND  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT  
GENERAL INTEREST AND WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION**

Appellee, State of Ohio, herein responds to Appellant, Brian Darnell Sowell, on the issue of jurisdiction, under S.Ct.Prac.R. 7.03. Appellant is not a public figure. This case is not one of public or great general interest, nor does this case pose any substantial constitutional question that would affect the public. Moreover, Appellant's proposition of law lacks merit.

**STATEMENT OF THE CASE AND FACTS**

On August 21, 2019, Appellant was indicted and charged, in Count 1, with trafficking in a fentanyl-related compound in violation of R.C. 2925.03(A)(1). Count 1 was indicted as a fourth-degree felony because it was alleged that the offense was committed in the vicinity of a school or committed in the vicinity of a juvenile. (Indictment, T.d. 04)

In Count 2, Appellant was charged with possession of a fentanyl-related compound in violation of R.C. 2925.11(A). (*Id.*) Count 2 was indicted as a fourth-degree felony because it was alleged that the amount of the drug involved equaled or exceeded ten unit-doses but was less than 50 unit-doses or the amount equaled or exceeded one gram but was less than five grams. (*Id.*)

In Count 3, Appellant was charged with trafficking in a fentanyl-related compound in violation of R.C. 2925.03(A)(2). (*Id.*) Count 3 was indicted as a first-degree felony because it was alleged that the amount of the drug involved equaled or exceeded 100 unit-doses but was less than 200 unit-doses or the amount equaled or exceeded ten grams but was less 20 grams and the offense was committed in the vicinity of a school or committed in the vicinity of a juvenile. (*Id.*) Count 3 included a firearm specification under R.C. 2941.141. (*Id.*)

In Count 4, Appellant was charged with possession of a fentanyl-related compound in violation of R.C. 2925.11(A). (*Id.*) Count 4 was indicted as a first-degree felony because it was alleged that the amount of the drug involved equaled or exceeded 200 unit-doses but was less than 500 unit-doses or the amount equaled or exceeded 20 grams but was less than 50 grams. (*Id.*) Count 4 included a firearm specification under R.C. 2941.141. (*Id.*)

In Count 5, Appellant was charged with having weapons while under disability in violation of R.C. 2923.13(A)(2), a third-degree felony. (*Id.*) In Count 6, Appellant was charged with having weapons while under disability in violation of R.C. 2923.13(A)(3), a third-degree felony. (*Id.*) In Count 7, Appellant was charged with illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor. (*Id.*)

On February 10, 2020, Appellant and the State entered into a plea agreement. (Guilty Plea & Jury Waiver, T.d. 59) Appellant agreed to plead guilty to Count 3, trafficking in a fentanyl-related compound, as amended from a first-degree felony to a second-degree felony. (*Id.*) In exchange for Appellant's guilty plea, the State agreed to seek dismissal of the firearm specification attached to Count 3 and to seek dismissal of Counts 1, 2, 4, 5, 6, and 7, including any attached firearm specifications. (*Id.*)

On the same day, the Butler County Court of Common Pleas convened a plea hearing. (Plea Hearing, T.p.) The trial court engaged in a Crim.R. 11(C) colloquy with Appellant. (*Id.* 3-10) After that, the trial court asked the assistant prosecutor for a statement of facts. (*Id.* 10)

The State charges that on or about June 27th of 2019, in Butler County, Ohio, Brian Sowell did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the other offender or another person, when the drug involved is a fentanyl-related compound or a compound mixture, preparation or substance containing a fentanyl-related compound, and Division (C)(10)(a) of this section does not apply to the drug involved, and the amount of the drug involved equals

or exceeds 10 grams, but is less than 20 grams, contrary to Ohio Revised Code Section 2925.03(a)(2), a felony of the second degree.

(*Id.* 10-11)

After the statement of facts, the trial court asked Appellant's trial counsel whether or not he agreed with the State's statement of facts, and Appellant's trial counsel agreed. (*Id.* 11) The trial court asked Appellant whether or not he would admit that the State's statement of facts was accurate, and Appellant responded affirmatively. (*Id.*) Appellant then plead guilty to Count 3 as amended. (*Id.* 12)

The trial court then proceeded to sentencing. (*Id.* 12-13) Appellant waived the preparation of a presentence investigation report (PSI). (*Id.* 13) The trial court subsequently asked Appellant's defense attorney whether he wished to present anything in mitigation, and Appellant's attorney responded affirmatively. (*Id.* 14) Appellant's trial counsel spoke on Appellant's behalf. (*Id.* 14-16) Appellant then addressed the trial court for a period of time. (*Id.* 16-19)

After that, the trial court asked whether the assistant prosecutor wished to present anything on behalf of the State. (*Id.* 19) The assistant prosecutor pointed out that, during the past 16 years, Appellant had spent nearly ten years in prison. (*Id.*) The assistant prosecutor pointed out that, on June 18, 2019, in another case, the trial court had placed Appellant on community control. (*Id.* 20) The assistant prosecutor pointed out that, six days later on June 24, 2019, Appellant had been selling fentanyl. (*Id.*)

So yes, he's plead (sic) to trafficking under the distribution theory for drugs that were found on June 27th. But if you look at Count I and Count II, he's specifically charged in those counts with trafficking, which is actual sells, because he was selling fentanyl.

Three days later, on June 27th, the police execute a search warrant at that house. The only person present is [Appellant's] juvenile daughter. And in that house,

with [Appellant's] juvenile daughter, is 28 grams of fentanyl and a handgun. Someone who is concerned about their children probably wouldn't let them be in the house by themselves with 28 grams of poison and a handgun.

Look at his record. A CR99 case for possession of cocaine, CR01 case for possession of cocaine, a CR02 case for trafficking in cocaine, a CR03 case for trafficking in cocaine, attempt to trafficking in cocaine, and possession of cocaine. CR04 case for possession of cocaine. A separate CR04 case for trafficking in cocaine. A CR05 case for trafficking in cocaine. A separate CR05 case for two counts of possession of cocaine. A CR2010 case for domestic violence. A CR11 case for possession of heroin and possession of cocaine, and a CR2012 case for trafficking in heroin and possession of heroin, and then ultimately that CR18 case for aggravated assault that he's on probation for.

I think the evidence shows that when given the -- a chance to be in the community, [Appellant] commits crimes. And while it's true this is not a violent offense, the police did find a handgun in the drug dealer's toolkit, as I'll refer to it, that they found in the house, with drugs, scales, blenders, cutting agent, packaging supplies.

The greatest indicator of how someone's future behavior will be is their past behavior. He has shown no ability to follow the law. He has shown no ability to be a law abiding citizen or comport himself to the rules of civilized society, and I'm requesting that you sentence him to the maximum possible prison term, 8 years plus 17 months.

(*Id.* 20-21) Appellant stood silent, failing to object. (*Id.* 21)

The trial court then stated on the record:

I don't think I need to elaborate too much. Fentanyl -- so I'll make a few comments. I think everybody in this room knows the danger of fentanyl. It's been in the news -- and heroin of course has been in the news a great deal. And then fentanyl has, in a sense, somewhat taken the place of heroin. It's just extraordinary dangerous. Many, many people have died because of the strength of fentanyl. To have it, to sell it, to give it to other people, is a horribly dangerous activity for all kinds of people.

The record is certainly bad. I made the comment back in June that the record that [Appellant] had did justify prison at that time. And there were some -- I probably would have given you prison back in those days, but there were some extenuating circumstances with the primary offender at that time, and some strong sympathy that the woman victim had for that primary offender, your co-defendant. And that led me to put her on community control. And I couldn't very well justify sending you to prison if I was going to put her on community control at the same time.

Had it not been for that, then you would have gone to prison back then. Your record is bad. You know that, [Appellant]. It's just been recited by the State, and especially, especially troubling is that short period of time after you were placed on community control, until the time that you were found, or at least was found to be in your home, all of the fentanyl and the related paraphernalia and the weapon that has been referenced here.

(*Id.* 21-22) Once more, Appellant stood silent and did not object. (*Id.*)

Afterwards, the trial court stated that it had considered the overriding purposes of felony sentencing and had considered the seriousness and recidivism factors set forth in the statutes. (*Id.* 22-23) The trial court stated that it had also considered Appellant's "background record," and that it had considered "any and all statements" made during the hearing. (*Id.* 23) Then the trial court sentenced Appellant to serve an indefinite term of eight years to twelve years in prison. (*Id.*)

Appellant appealed his sentence to the Twelfth District Court of Appeals. *State v. Sowell*, 12th Dist. Butler No. CA2020-02-020, 2021-Ohio-889, ¶1. Appellant argued that the trial court had improperly considered his prior criminal history and had improperly considered the charges that were dismissed as a part of the plea negotiations. *Id.* ¶9. The Twelfth District rejected Appellant's arguments and affirmed Appellant's sentence. *Id.* ¶¶10-14.

## **ARGUMENT**

**Response to Proposition of Law: Appellant's indefinite sentence of eight to twelve years in prison was not contrary to law since the trial court was permitted to consider the information regarding Appellant's prior criminal history and the information regarding the other charges that were dismissed under the plea agreement.**

In Appellant's sole proposition of law, he argues that Twelfth District erred when it affirmed his sentence because his sentence was contrary to law because the trial court improperly considered evidence that was not properly part of the record, because there was no evidence of his extensive criminal history, and because Appellant was not given an opportunity to respond

regarding his extensive criminal history. (Appellant's Memorandum in Support of Jurisdiction, 3-6) Appellant also argues that the Twelfth District erred when it affirmed his sentence because the trial court erred when it considered the charges that were dismissed because Appellant did not have the opportunity to respond. (Appellant's Memorandum in Support of Jurisdiction, 6-8)

Ohio Revised Code 2953.08(G)(2) governs appellate review of felony sentences. *State v. Brandenburg*, 12th Dist. Butler Nos. CA2014-10-201 & CA2014-10-202, 2016-Ohio-4918, ¶9, see also *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶10. And, according to R.C. 2953.08, when an appellate court reviews a felony sentence, it must review the record including the findings that support the sentence imposed by the trial court. *State v. Timpe*, 12th Dist. Clermont No. CA2015-04-034, 2015-Ohio-5033, ¶8. And R.C. 2953.08(G)(2) gives an appellate court the authority to increase, reduce, or modify a sentence on appeal. *Id.* Moreover, under the statute, an appellate court may vacate a felony sentence and remand the issue to the trial court for resentencing. *Id.* However, the standard of review is not an abuse of discretion. *Id.*, see also *Marcum*, 2016-Ohio-1002, at ¶8. Instead, an appellate court may only act under R.C. 2953.08(G)(2) if the appellate court finds clearly and convincingly that the trial court's findings under R.C. 2929.13(B) or R.C. 2929.13(D) or R.C. 2929.14(B)(2)(e) or R.C. 2929.14(C)(4) or R.C. 2929.20(I) are not supported by the record. *Brandenburg*, 2016-Ohio-4918, at ¶9, see also *Marcum*, 2016-Ohio-1002, at ¶23. Alternatively, the appellate court may still act under R.C. 2953.08(G)(2) if the sentence is contrary to law. *Timpe*, 2015-Ohio-5033, at ¶8. A felony sentence is not clearly and convincingly contrary to law if the trial court considered the principles and purposes found in R.C. 2929.11; considered the R.C. 2929.12 factors; properly imposed postrelease control; and sentenced the defendant within the permissible statutory range. *Brandenburg*, 2016-Ohio-4918, at ¶9.

In Appellant’s memorandum in support of jurisdiction, he complains that the assistant prosecutor’s statements regarding Appellant’s extensive criminal history were not supported by evidence. (Appellant’s Memorandum in Support of Jurisdiction, 3-6) Appellant’s focus on evidence—or the lack thereof—is misplaced.

According to Evid.R. 101(C)(3), the Ohio Rules of Evidence do not apply to sentencing hearings. *State v. Mavrakis*, 9th Dist. Summit No. 27457, 2015-Ohio-4902, ¶ 29, *see also State v. Miranda*, 10th Dist. Franklin No. 11AP-788, 2012-Ohio-3971, ¶17. In fact, a trial court may even consider information during sentencing that would not have been admissible at trial. *Miranda*, 2012-Ohio-3917, at ¶17.

Turning to R.C. 2929.19, which governs sentencing hearings, one finds:

The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. At the hearing, the offender, the prosecuting attorney, the victim or the victim’s representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender. (Emphasis added.)

R.C. 2929.19(A). As can be seen, R.C. 2929.19(A) explicitly provides that the offender, the prosecutor, and the victim may present *information* pertinent to sentencing. *Miranda*, 2012-Ohio-3971, at ¶17. The General Assembly did not use the word, “evidence,” in the statute when it referred to the matters that may be presented for the trial court’s consideration. *Id.*

Moreover, according to R.C. 2929.19(B)(1):

At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or



Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 of the Revised Code.

So, before a trial court imposes sentencing, it must consider the information—not evidence—presented by the persons mentioned in R.C. 2929.19(A), meaning that a trial court is required to consider any information presented by the State.

What is more, during sentencing, a trial court may consider hearsay and consider information that is entirely unrelated to the offense for which the offender was convicted. *State v. Bowser*, 136 Ohio App.3d 162, 2010-Ohio-951, 926 N.E.2d 714, ¶15 (2nd Dist.) The trial court may consider prior arrests even if the arrest did not result in a charge. *Id.* The trial court may even consider the facts that underlie a charge for which the offender was ultimately acquitted. *Id.* In fact, the trial court may consider a criminal charge and facts supporting said charge even if the charge was dismissed under a plea agreement. *Id.* ¶16.

So, under the statutes and case law set forth above, the assistant prosecutor had a statutory right to present *information*—which did not have to be supported by evidence—to the trial court regarding Appellant. The trial court was statutorily required to consider that information. The trial court could also consider a wide variety of information, including any charges dismissed under the plea agreement and consider the facts which supported those charges. Given this, the trial court did not err regarding Appellant’s sentence.

Moreover, the record conclusively establishes that the trial court gave Appellant the opportunity to allocute and that Appellant exercised his right of allocution. The record also conclusively establishes that, after the assistant prosecutor addressed the trial court, Appellant stood silent, failing to object. Appellant’s failure to object is not the equivalent to a deprivation of the right of allocution. And Appellant’s failure to object is not the trial court’s error.

In light of the foregoing, Appellant's proposition of law lacks merit, and this Court should not exercise jurisdiction over it.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the decision of the Twelfth District Court of Appeals and neither accept jurisdiction nor grant leave for the appeal of Brian Darnell Sowell since his proposition of law lacks merit. What is more, this Court should not accept jurisdiction over this appeal because Appellant has neither raised a substantial constitutional question nor presented an issue of public or great general interest.

Respectfully submitted,

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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing State's Response to Appellant's Memorandum in Support of Jurisdiction was sent by regular mail to Appellant:

Brian Darnell Sowell  
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on this 27th day of April, 2021.

/s/ Michael Greer  
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