

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080770
	:	TRIAL NO. B-0103491
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
GAREY SMITH,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Garey Smith appeals his convictions for felonious assault. We conclude that his assignments of error do not have merit, so we affirm the judgment of the trial court.

The facts of this case have been stated in three prior decisions from this court, *Smith I*,² *Smith II*,³ and *Smith III*.⁴ Because this appeal involves only procedural issues, we limit our recitation to the procedural history.

Smith was indicted on the following counts: count one, aggravated murder of Jimmy Gordon; count two, felonious assault of Steven Franklin, in violation of R.C. 2903.11(A)(1); count three, felonious assault of Franklin, in violation of R.C. 2903.11(A)(2); count four, attempted murder of Franklin; count five, felonious assault of Jeff King, in violation of R.C. 2903.11(A)(1); count six, felonious assault of King, in violation of R.C. 2903.11(A)(2); count seven, attempted murder of King; count eight,

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² *State v. Smith*, 1st Dist. No. C-020610, 2004-Ohio-250.

³ *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222.

⁴ *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469.

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felonious assault of Andre Ridley, in violation of R.C. 2903.11(A)(1); count nine, felonious assault of Ridley, in violation of R.C. 2903.11(A)(2); count ten, attempted murder of Ridley; and count eleven, having a weapon under a disability.

After a jury trial, Smith was found not guilty of count seven, guilty of the lesser charge of murder on count one, and guilty of the remaining counts. The trial court sentenced Smith for count one (murder), count four (attempted murder of Franklin), count six (felonious assault on King), count ten (attempted murder of Ridley), and count eleven (having a weapon under a disability). The trial court merged counts two and three into count four, count five into count six, and counts eight and nine into count ten. The state did not appeal the trial court's merger of those counts.

Smith appealed his convictions. And in *Smith I*, this court reversed his convictions and remanded the case for a new trial because Smith had been denied his right to self-representation. Smith was retried on all the counts except count seven on which he had been found not guilty. The results of the second jury trial were as follows: count one, murder—hung jury; count two, previously merged felonious assault of Franklin—guilty; count three, previously merged felonious assault of Franklin—guilty; count four, attempted murder of Franklin—hung jury; count five, previously merged felonious assault of King—guilty; count six, felonious assault of King—guilty; count eight, previously merged felonious assault on Ridley—guilty; count nine, previously merged felonious assault on Ridley—guilty; count ten, attempted murder of Ridley—hung jury; and count eleven, having a weapon under a disability—guilty. The trial court sentenced Smith for counts two, three, five, six, eight, nine, and eleven. It dismissed counts four and ten.

Smith was tried only for count one (murder) in his third jury trial. The jury found him not guilty.

In *Smith II*, Smith appealed the convictions from his second jury trial. In that case, we ordered that Smith be retried on counts five and six, and that he be resentenced in accordance with the Ohio Supreme Court's decision in *State v. Foster*.⁵ We overruled his assignment of error that asserted that the trial court had violated his right to be free from double jeopardy when it unmerged counts two and three and counts eight and nine.⁶ The state dismissed counts five and six, rather than retrying them. Following *Smith II*, Smith was sentenced to eight years for each felonious assault, plus three years for the gun specification on each count, and to one year for having a weapon under a disability. The four gun specifications were merged. The aggregate sentence was 36 years.

Smith appealed the sentence in *Smith III*. In that case, we affirmed his convictions for having a weapon under a disability and the findings of guilt on the previously merged counts.⁷ But we vacated the sentences imposed for the four felonious assaults and remanded the case for resentencing so that only one sentence would be imposed for each victim.⁸ Following our remand, the trial court merged counts two and three and counts eight and nine and sentenced Smith to eight years for count two, with three years for the gun specification to that count, and to eight years for count eight, with three years for the gun specification to that count. The gun-specification terms were concurrent, but they were otherwise made consecutive to the other sentences. The sentences for counts two and eight were also consecutive. The aggregate sentence was 19 years. This appeal followed.

Smith's first, third, fourth, and part of his second assignments of error raise similar issues, so we consider them together. In them, Smith asserts that his convictions for the previously merged offenses were improper because they resulted in sentences on void

⁵ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

⁶ *Smith II*, supra, at ¶75.

⁷ *Smith III*, supra, at ¶43.

⁸ Id.

counts, amounted to double jeopardy, violated his due-process rights, and amounted to cruel and unusual punishment. The gist of Smith’s argument is that once the counts were merged after his first jury trial, they no longer existed. The trial court’s decision to unmerge the counts and to allow a retrial on them, according to Smith, made the counts void. We rejected this argument twice—in *Smith II*⁹ and *Smith III*.¹⁰ Smith now urges us to reconsider those decisions. We decline to do so. And even if we were inclined to reconsider our earlier decisions, we would be bound by the Ohio Supreme Court’s recent decision in which it stated that “the court of appeals’ reversal of Smith’s first sentence did not bar his retrial on the criminal charges merged in the first sentence.”¹¹ The first, third, and fourth assignments of error are overruled.

In addition to challenging his retrial for the previously merged counts, Smith also asserts in his second assignment of error that his convictions amounted to double jeopardy because prosecutorial misconduct had occurred in the first trial. In *Smith I*, we noted that the prosecutor had acted improperly during the first jury trial, but we concluded that the issue was moot because we reversed Smith’s convictions on other grounds.¹² Smith argues that, given the prosecutor’s impropriety during the first trial, the state forfeited its right to try him again for those offenses. Based on the Ohio Supreme Court’s decision in *State v. Keenan*,¹³ we disagree. The second assignment of error is overruled.

Smith has been permitted by this court to raise an additional assignment of error pro se. In it, he asserts that the trial court erred when it unmerged the counts because it allowed multiple convictions for a single offense. To the extent that Smith is arguing that

⁹ *Smith II*, supra, at ¶75

¹⁰ *Smith III*, supra, at ¶¶32-35.

¹¹ *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, 894 N.E.2d 44, ¶12.

¹² *Smith I*, supra, at ¶46.

¹³ 81 Ohio St.3d 133, 141-142, 1998-Ohio-459, 689 N.E.2d 929.

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he was convicted of allied offenses of similar import, we disagree. The felonious-assault offenses for which he now stands convicted were committed against separate victims. And based on our earlier discussion, we also disagree to the extent that Smith is arguing that the offenses once merged could not be unmerged by the trial court. The supplemental assignment of error is overruled.

The trial court's judgment is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., HILDEBRANDT and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 1, 2009

per order of the Court _____.
Presiding Judge