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State of Ohio, Appellant v. Jesse James Wilson, Appellee

Court of Appeals No. L-92-357

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS COUNTY

1993 Ohio App. LEXIS 4854

October 8, 1993, Decided

**PRIOR HISTORY:** [\*1] Trial Court No. CR 84-6310**COUNSEL:** Anthony G. Pizza, prosecuting attorney, and Lawrence J. Kiroff, for appellant.

Charles E. Boyk, for appellee.

**JUDGES:** Peter M. Handwork, J., Charles D. Abood, J., CONCUR. Melvin L. Resnick, J., dissents.**OPINION****DECISION AND JUDGMENT ENTRY**

This is an appeal from a judgment of the Lucas County Court of Common Pleas which granted appellee Jesse James Wilson's petition for post-conviction relief as to a firearm specification, vacated appellant's conviction on the specification and set aside his sentence thereon. Appellant, state of Ohio, has appealed setting forth the following assignments of error:

"1. THE COURT BELOW ERRED IN GRANTING APPELLEE'S PETITION FOR POST-CONVICTION RELIEF.

"2. APPELLEE'S PETITION FOR POST-CONVICTION RELIEF IS BARRED BY THE DOCTRINE OF *RES JUDICATA*."

The facts which are relevant to the issues raised on appeal are as follows. On July 30, 1984, appellee, along with two co-defendants, was indicted on one count of aggravated robbery in violation of R.C. 2911.01, with specifications of use of a firearm and a previous conviction. Appellee was tried before a jury with one of his co-defendants on September [\*2] 18, 1984.

On September 20, 1984, the jury found appellee guilty of the aggravated robbery and the firearm specification, and the trial court found appellee guilty of the prior conviction specification. On September 24, 1984, the trial court sentenced appellant to fifteen to twenty-five years incarceration for the aggravated robbery and three years actual incarceration on the firearms specification, to be served consecutively. On September 24, 1984, appellee appealed his conviction and, on June 14, 1985, his conviction was affirmed by this court.

On April 29, 1992, appellee filed a motion to vacate his conviction on the firearm specification in which he asserted that the trial court had erroneously instructed the jury that the state did not need to prove that the gun was or could readily be made operable, an essential element of the offense pursuant to *State v. Gaines* (1989), 46 Ohio St.3d 65, 545 N.E.2d 68.

In response, on September 9, 1992, appellant filed a motion to dismiss, and memorandum in opposition to, appellee's petition for post-conviction relief. Appellant argued that *Gaines* should not be applied retroactively to this case, that the trial court's jury instruction [\*3]

properly stated the state's burden of proof on the firearm specification, that the trial court had acted properly pursuant to the legal authority applicable at the time of appellee's conviction, and that appellee's claim for relief was barred by the doctrine of *res judicata*.

On September 26, 1992, the trial court filed its judgment entry in which it determined that *Gaines* was to be applied retroactively and that, since the holding in *Gaines* was "clearly at odds with the jury instruction in this case providing that 'it is not necessary for the state to prove \* \* \* operability'" [emphasis added], appellee's conviction and additional sentence on the firearm specification must be set aside. The trial court also determined that the doctrine of *res judicata* did not bar appellant's petition, since the issues raised by the petition involved the effect of *Gaines*, which had not been ruled upon at the time of appellee's appeal from his conviction.

In his first assignment of error, appellant asserts that the trial court erred in granting appellee's petition for post-conviction relief. In support of this assignment of error, appellant sets forth the same arguments as [\*4] he set forth in the trial court. In response, appellee argues that *Gaines* is to be applied retroactively and that the trial court failed to properly instruct the jury as to the firearm specification.

The issues raised by appellant's first assignment of error are 1) whether or not the trial court erred in applying the *Gaines* decision retroactively and 2) if *Gaines* is applicable, whether or not the trial court erred by finding that it had not properly instructed the jury as to the state's burden of proof on the firearm specification.

In *State v. Gaines*, *supra*, the Supreme Court of Ohio held at syllabus:

" R.C. 2923.11(B) and 2929.71(A) require that, prior to imposition of an additional term of three years actual incarceration for possession of a firearm during the commission of a felony, *the state must prove beyond a reasonable doubt that the firearm was operable or could readily have been rendered operable at the time of the offense.*" (Emphasis added).

In *State v. Murphy* (1990), 49 Ohio St.3d 206, 551

N.E.2d 932, at syllabus, the Supreme Court of Ohio reaffirmed its holding in *Gaines*, but modified it as to the *type of evidence needed* to prove [\*5] the firearm specification holding:

"The state must present evidence beyond a reasonable doubt that a firearm was operable at the time of the offense before a defendant can receive an enhanced penalty pursuant to R.C. 2929.71(A). However, such proof can be established beyond a reasonable doubt by the testimony of *lay witnesses* who were in a position to observe the instrument and the circumstances surrounding the crime. ( *State v. Gaines* [1989], 46 Ohio St.3d 65, 545 N.E.2d 68, modified.)<sup>1</sup>

1 The issue raised by appellant's first assignment of error does not involve the sufficiency of the evidence offered to prove the firearm specification but is limited to the correctness of judges' instructions to the jury as to the state's burden of proof on the firearm specification.

In *Sanders v. McMackin* (N.D. Ohio W.D. 1992), 786 F. Supp. 672, the court determined that the holdings in *Gaines* and *Murphy* are to be applied retroactively. As set forth above, the trial court determined that [\*6] it had improperly instructed the jury that it was not necessary for the state to prove that the firearm could actually fire a projectile. Upon consideration of the entire jury charge, *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, in light of the above authority, we find that the trial court did not err by finding that it had failed to properly instruct the jury as to the firearm specification and, therefore, the lower court did not err in granting appellee's petition for post-conviction relief. Appellant's first assignment of error is not well-taken.

In his second assignment of error, appellant asserts that appellee's petition for post-conviction relief is barred by the doctrine of *res judicata* since appellant could have raised the issue of the propriety of the trial court's jury instructions on appeal from his conviction but failed to do so. Appellant asserts that the case of *State v. Gaines* cannot be used to justify appellee's failure to previously raise these issues.

Upon consideration of the record herein, this court finds that the trial court did not err in finding that the doctrine of *res judicata* did not bar appellee's petition for post-conviction [\*7] relief. As the trial court noted, the *Gaines* decision had not been decided at the time of appellee's appeal from his conviction and therefore the issue raised by his post-conviction relief petition was not and could not have been raised at that time. Accordingly, appellant's second assignment of error is found not well-taken.

Upon consideration whereof, this court finds that substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4, amended 1/1/80.

*Peter M. Handwork, J.*

*Charles D. Abood, J.*

CONCUR.

Melvin L. Resnick, J.,

dissents.

**CONCUR BY: MELVIN L. RESNICK (In Part)**

**DISSENT BY: MELVIN L. RESNICK (In Part)**

**DISSENT**

RESNICK, M.L., J. I concur, in part, and I dissent, in part. I concur with the majority's conclusion that the *Gaines* and *Murphy* holdings should be applied retroactively. I further concur with the majority's treatment of appellant's second assignment of error. However, I dissent from the majority's conclusion [\*8] that the trial court improperly instructed the jury as to the firearm specification.

According to the judgment entry granting appellee's petition for post conviction relief, the trial court instructed the jury that "it is not necessary for the state to prove \* \* \* 'operability.'" In my opinion, the majority and the court which granted appellee's petition for post conviction relief disregarded essential elements of the

trial court's instruction. The transcript shows that the trial court instructed the jury as follows:

"The defendants are charged with Aggravated Robbery. Before you can find the Defendants guilty of that charge, *you must find beyond a reasonable doubt* that on or about the 19th day of June, 1984, and in Lucas County, Ohio, the Defendants knowingly obtained property owned by another without his consent and for the purpose of depriving him of that property the Defendant had a deadly -- *and that the Defendant had a deadly weapon or firearm* on or about his person or under his control.

"The act of having a deadly weapon or firearm on or about his person or under his control must occur as part of the sequence of acts leading up to, occurring during, or [\*9] immediately subsequent to the theft.

"Deadly weapon means any instrument, device, or thing, capable of inflicting death, and designed or specially adapted for use as a weapon or possessed, carried, or used as a weapon.

"Firearm means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.

"Firearm includes an unloaded firearm and any firearm which is inoperable, but can readily be rendered operable.

"A deadly weapon is any instrument, device, or thing which has two characteristics. The first characteristic is that it is capable of inflicting or causing death. The second characteristic is in the alternative, either the instrument, device, or thing was designed or specially adapted for use as a weapon or it was possessed, carried, or used in this case as a weapon. These are questions of fact for you to determine.

"The court instructs you that when there is credible evidence that there was a firearm used in a robbery or aggravated robbery *and if that firearm is not available for testing*, it is not necessary for the state to prove that the firearm could actually fire a projectile [\*10] in order to sustain a finding of guilty. A jury is permitted to infer that an instrument is operable from all of the facts and circumstances that were developed in the evidence during the trial." (Emphasis our own.)

The Ohio Supreme Court has held that "[A] single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979) 60 Ohio St.2d 136, 141,

398 N.E.2d 772, citing *Cupp v. Naughten* (1973), 414 U.S. 141, 146-147. I believe that a review of the trial court's instruction in its entirety shows it to be in conformance with the holding in *Murphy*.<sup>1</sup> For this reason, I respectfully dissent from the majority's decision to affirm this case.

1 In addition, appellee benefitted from the trial court's circumstantial evidence instruction pursuant to *State v. Kulig* (1974), 37 Ohio St.2d 157, 309 N.E.2d 897, later overruled by *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Moreover, the trial court's decision did not mention, and apparently did not consider, the *Murphy* decision which modified *Gaines*.

[\*11]