

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

CASE NO. 2021-P-00035

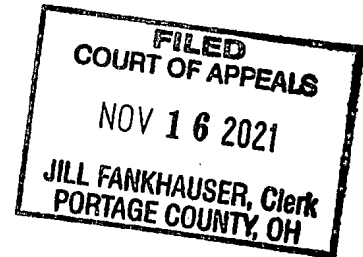
STATE OF OHIO,

Plaintiff-Appellee

vs.

DAMANTAE D. GRAHAM,

Defendant-Appellant.



BRIEF OF THE STATE OF OHIO

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TABLE OF CONTENTS
AND
TABLE OF AUTHORITIES

| | |
|--|------|
| STATEMENT OF THE CASE | 1 |
| LAW AND ARGUMENT | 2 |
| RESPONSE TO GRAHAM’S FIRST ASSIGNMENT OF ERROR..... | 6 |
| <p>Graham’s sentence of life without parole withstands his constitutional challenge. (T.d. 510).</p> | |
| <p>Authorities</p> | |
| <i>Cross v. Ledford</i> , 161 Ohio St. 469, 120 N.E.2d 118 (1954)... | 8 |
| <i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010)..... | 8 |
| <i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)..... | 8 |
| <i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 61 L.Ed.2d 1 (2005)..... | 8 |
| <i>State v. Larosa</i> , 11th Dist. No. 2018-T-0097, 2020-Ohio-160... | 7, 8 |
| <i>State v. Marcum</i> , 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231..... | 7 |
| <i>State v. Wilson</i> , 11th Dist. Lake No. 2017-L-028, 2017-Ohio-7127..... | 7 |
| R.C. 2953.08..... | 7 |

RESPONSE TO GRAHAM'S SECOND ASSIGNMENT OF ERROR.. 9

Reason and the record support the trial court's decision denying Graham's continuance proceeding with resentencing hearing on March 8, 2021. (T.d. 510).

Authorities

Bayus v. Bayus, 11th Dist. Trumbull No. 2011-T-0062, 2012-Ohio-1462..... 9

State v. Beecher, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900..... 9

State v. Ferranto, 112 Ohio St. 667, 148 N.E. 362 (1925)..... 9

State v. King, 11th Dist. Portage No. 2009-P-0040, 2010-Ohio-3254..... 9

State v. Landrum, 53 Ohio St.3d 107, 559 N.E.2d 710 (1990)..... 10

State v. Unger, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981)..... 9, 10, 12

Black's Law Dictionary (8 Ed.Rev.2004)..... 9

RESPONSE TO GRAHAM'S THIRD ASSIGNMENT OF ERROR..... 12

A jurisdictional challenge fails because the trial court resentenced Graham with subject-matter jurisdiction under a remand order issued by the Supreme Court of Ohio. (T.d. 510).

Authorities

Pratts v. Hurley, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992..... 12

Smith v. Shelton, 157 Ohio St.3d 1, 2019-Ohio-1677, 131 N.Ed.3d 1..... 13

State v. Aalim, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883..... 13

State v. Graham, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841..... 14

| | |
|---|--------|
| <i>State ex rel. McMinn v. Whitfield</i> , 27 Ohio St.3d 4, 500 N.E.2d 875 (1986)..... | 13 |
| R.C. 2929.03..... | 14 |
| R.C. 2929.06..... | 14, 15 |
| R.C. 2931.03..... | 13 |
| Ohio Constitution..... | 13 |
| S.Ct.Prac.R. 11.06..... | 15 |
| CONCLUSION..... | 16 |
| CERTIFICATE OF SERVICE | 16 |

TABLE OF REFERENCES TO THE RECORD

| | |
|---|--------|
| Transcript of the Docket, Journal Entries and Original Papers For Case No. 2016 CR 107E | "T.d." |
| March 8, 2021 Sentencing Hearing Transcript of Proceedings | "T.p." |

Statement of the Case

Damantae Graham (“Graham”), is serving life without the possibility of parole for the aggravated murder of Nicholas Massa. (T.d. 510). Evidence introduced at trial established beyond reasonable doubt that on February 7, 2016, Graham shot and killed Massa during the robbery of an apartment in Kent, Ohio. *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶¶ 217. Graham was also convicted and sentenced to consecutive prison terms for aggravated burglary, aggravated robbery, three counts of kidnapping, and two firearm specifications for holding the occupants of the apartment at gunpoint during a robbery and burglary where he fatally shot Massa. *Id.* (T.d. 510).

The appeal arose from the March 8, 2021, resentencing of Graham in accordance with a remand order issued by the Supreme Court of Ohio. The Statement of the case and Procedural History relevant to this appeal will be considered together.

Pre-Hearing Proceedings

On December 17, 2020, the Supreme Court of Ohio found the sentence of death was not appropriate because the aggravating factors did not outweigh the mitigating circumstances beyond a reasonable doubt in Graham’s case. *Graham*, 2020-Ohio-6700, ¶¶ 204-216. The supreme court affirmed Graham’s convictions and issued the following remand order “We vacate his death sentence and remand the cause to the trial court for resentencing consistent with R.C. 2929.06.” *Id.* at ¶¶ 217.

The Supreme Court of Ohio’s remand order was filed in the Portage County Court of Common Pleas on January 6, 2021. (T.d. 492). The next day, the trial court scheduled Graham’s resentencing hearing for March 8, 2021 at 11:15 am and sent notices to the parties. (T.d. 494).

Graham's first motion to continue the resentencing hearing was filed on January 26, 2021, and argued a course the defense team might be taking in the Supreme Court of the United States in the future as the basis for the continuance. (T.d. 479). The State filed a response and the trial court denied the continuance. (T.d. 498, 499). A month later, Graham filed his "renewed motion for a continuance and request for a status hearing." (T.d. 500). Graham argued a continuance was necessary because while his application to re-open was pending in the Supreme Court of Ohio the trial court's jurisdiction was suspect, additional counsel was not available, and a post-conviction witness who had prepared an extensive affidavit was also not available. (T.d. 500). The State filed a response and the trial court denied the continuance renewal. (T.d. 501, 502).

Four days before the scheduled hearing, Graham filed in the trial court a resentence memorandum. (T.d. 504). He sought a concurrent sentence of life with the possibility of parole after 25 years and included the memorandum as support for the requested sentence. (T.d. 504). In mitigation, he argued Graham's youth, dysfunctional family background, potential for rehabilitation, proportionality of sentence to similar crimes by similar individuals, and the possibility of extending *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), to 19-year-olds. (T.d. 504). Attached to the memorandum was Laurence Steinberg's October 15, 2018 Affidavit, Aracelis Rivera's April 11, 2019 Affidavit, and Rivera's CV. (T.d. 504).

Writ of Prohibition

On March 4, 2021, Graham filed a complaint for writ of prohibition naming the Honorable Laurie J Pittman as Respondent with this Court. The Writ was filed on a Thursday seeking to prohibit a hearing scheduled to occur four days later. In support of

his writ, Graham sought to prohibit the trial court from conducting the scheduled March 8, 2021 resentencing hearing claiming that the trial court lacked subject-matter jurisdiction upon the filing of his S.Ct.Prac.R. 11.06 application to re-open. The State filed a motion to dismiss as the claim was not cognizable in prohibition. This Court granted the State's motion to dismiss holding "without direct legal authority indicating a subsequent application for reopening filed in the Supreme Court of Ohio is the functional equivalent of an appeal or deprives a trial court of jurisdiction, we cannot say respondent's lack of jurisdiction is patent and unambiguous." *State of Ohio ex. rel. Graham v. Judge Pittman*, 11th Dist. Portage No. 2021-P-0023, ¶¶ 8, 10. This Court further found "it appears that the Supreme Court of Ohio's granting of an application for reopening, as opposed to an appellant's mere filing, implicates a trial court's jurisdiction." *Id.* at ¶ 9.

Resentencing Proceedings

The matter proceeded to a resentencing hearing on March 8, 2021. The trial court noted for the record defense renewed objections to proceeding with the hearing despite the additional counsel's and Dr. Rivera's unavailability. (T.p. 6). In mitigation, the defense offered, via zoom, the testimony of Dr. Laurence Steinberg, a professor of psychology at Temple University. Dr. Steinberg has testified in both state and federal court on the subject of the appropriate punishment for juvenile and young adults who commit serious crimes. (T.p. 9). In his opinion, the constitutional protections under *Roper/Graham/Miller* line of cases should extend to 19-year-olds as recent scientific development supported that an individual's brain continues to develop not reaching adult maturity until ages 22 or 23. (T.p. 13-18). As support for this extension of the current law, he explained the five most important distinctions between adults and adolescents are that an adolescent is 1)

more impulsive, 2) more focused on immediate circumstances and less likely to think of future consequences, 3) more focused on potential rewards of risky decision than potential costs, 4) more susceptible to influence of others and likely to act reckless in their presence, and 5) impressionable as personalities are still developing. (T.p. 10).

On cross-examination, Dr. Steinberg admitted that his testimony was based on a 2018 affidavit in which he was asked whether 19-year-olds would share the same attributes as an 18-year-old that trigger their constitutional protections that the Supreme Court had already recognized for people who are under 18. (T.p. 20). He explained those constitution protections included banning the death penalty for persons under 18, banning life without parole for non-homicide crimes committed by a juvenile, and state statutes that mandate life without parole for crimes committed by juveniles. (T.p. 20). As Graham was over 18 and Ohio permits life without parole for persons over 18, Dr. Steinberg further admitted none of the three constitutional protections he described were applicable to Graham. (T.p. 21). He further admitted that without meeting Graham, conducting an interview with him or even having the opportunity to be in the same room with the defendant, Dr. Steinberg was asking the trial court to make new law with Graham's case. (T.p. 19, 21).

The mitigation evidence continued with the presentation of a 15 minute video containing 5 family members Graham's maternal grandmother, mother, sister, brother and uncle. (Defense Exhibit I). Before the presentation, trial counsel shared the narrative his family would present of a boy who suffered from generational dysfunction, abuse, violence, and substance abuse. (T.p. 23). The grandmother who was raised as a slave and witnessed her own mother's death contributed to Graham being raised by a single

mother in several low income locations. (T.p. 24). Without a male influence in his life, Graham started running away from home at age 14. (T.p. 25). Each family member also contributed an affidavit admitted as an exhibit at the hearing. (Defense Exhibits D, E, F, G, and H).

Trial Counsel provided a summation of Dr. Rivera's report as an exhibit at the hearing in the form of sentencing factors. (Defense Exhibit C). The six factors trial counsel asked the court to consider to determine an appropriate sentence for Graham included: 1) his age, 2) his dysfunctional family, 3) his mental health and substance abuse, 4) his potential for rehabilitation, 5) the proportionality to similar crimes by similar actors, and 6) the factors that are predictive of good behavior that were all absent in his life. (T.p. 27-28, 28-31, 32-33, 33-34, 35-36, and 36-37).

The Prosecutor presented victim impact statements from Massa's mother, sister and father. In the five years without Nicholas, all three family members stated they continue to feel his loss profoundly and have seen no remorse from Graham. (T.p. 41, 42-45, 46-47). The Prosecutor recommended a sentence of life without the possibility of parole consecutive to 3 years for the firearm specification and consecutive to the previous sentence the court imposed on the other counts to protect society from this individual. (T.p. 48). On the advice of counsel, Graham did not make a statement. (T.p. 50).

The trial court considered the overriding principles of R.C. 2929.19 including protecting the public and future crimes by the defendant and others, to fairly punish the defendant using the minimum sanctions that the Court determined accomplishes that purpose without imposing unnecessary burdens on the state or federal resources, while understanding the need for incapacitating Defendant involved deterring the defendant

and others from future crimes, rehabilitating the Defendant, and restitution to the victims and the public. (T.p. 50-51). The court sentenced Graham to life without parole for the aggravated murder, a consecutive prison term of 3 years for the gun specification to all run consecutive to the previously imposed 61 years on the other 5 counts. (T.d. 510). The trial court made the requisite consecutive statutory findings at the hearing and in the entry. (T.p. 51-51; T.d. 510).

Supreme Court of Ohio Proceedings

After the Supreme Court of Ohio vacated his sentence of death, Graham filed an application for reopening pursuant to S.Ct.Prac.R. 11.06 on the basis that appellate counsel was ineffective for failing to raise four claims including two race-based claims. The State filed a Memorandum of Law in Response. Graham's application for reopening did not demonstrate appellate counsel was deficient for failing to raise the four claims and did not demonstrate a reasonable probability of success had appellate counsel presented his proposed claims on appeal. On May 11, 2021, the Supreme Court of Ohio denied the application for reopening under S.Ct.Prac.R. 11.06. *State v. Graham*, Supreme Court Case No. 2016-1882.

Response to Graham's First Assignment of Error: Graham's sentence of life without parole withstands his constitutional challenge. (T.d. 510).

On appeal, Graham challenges his life without parole sentence as unconstitutional. He argues the penalty violates his Eighth Amendment right and bases his constitutional claim on the "evolving standards" regarding juvenile offenders following the *Roper/Miller/Graham* line of cases. He also seeks an extension of the trilogy cases of recognized constitutional protections to 19-year-old homicide offenders. On the authority

of *State v. Larosa*, 11th Dist. No. 2018-T-0097, 2020-Ohio-160, ¶ 84., Graham's constitutional challenge fails.

Standard of Review

The standard of review for a felony sentence is governed by R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶16. "The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentencing or modification given by the sentencing court." R.C. 2953.08(G)(2) further provides:

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard of review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the revised Code, whichever, if any, is relevant;
- (b) That the sentence is contrary to law.

"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. Wilson*, 11th Dist. Lake No. 2017-L-028, 2017-Ohio-7127, ¶18.

This Court "may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Marcum* at ¶23. Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the

evidence,” but not to the extent of such certainty as is required “beyond a reasonable doubt” in a criminal case, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Marcum* at ¶22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

Analysis

In *LaRosa*, a 15-year-old juvenile offender sentenced to life in prison without parole for aggravated murder made the same constitutional challenge Graham is making on appeal. *LaRosa* argued his sentence of life without parole for aggravated murder was cruel and unusual punishment under the Eighth and Fourteenth Amendments relying on the “evolving standards” regarding juveniles following *Roper*, *Graham*, and *Miller*. *LaRosa*, 2020-Ohio-160, at ¶ 79. This Court affirmed the life without parole sentence and rejected *LaRosa*’s argument on appeal:

as this Court has previously held, the *Roper*, *Graham*, and *Miller* decisions are inapplicable here because “none holds that the sentence of a juvenile homicide offender to a discretionary sentence of life without parole constitutes cruel and unusual punishment.” *Lane supra*, at ¶ 75. “To the contrary, the Supreme Court in *Miller, supra*, stated that a sentencing court is *not* precluded from imposing a life-without-parole sentence on a juvenile homicide offender.” *Id.* at ¶ 80 (emphasis sic) (citations omitted).

Id. at ¶ 84.

Under the authority of *LaRosa*, Graham’s reliance on the “evolving standards” regarding juvenile offenders following the trilogy of Supreme Court cases as support for his Eighth Amendment constitutional challenge fails. Therefore, he has no basis to argue for an extension of those protections to a 19-year-old homicide offender. Graham’s first assignment of error is without merit and should be overruled.

Response to Graham's Second Assignment of Error: Reason and the record support the trial court's decision denying Graham's continuances and proceeding with the resentencing on March 8, 2021. (T.d. 510).

In his second assignment of error, Graham claims the trial court abused its discretion in denying his motion and renewed motion for a continuance of the March 8, 2021 resentencing hearing. Graham's claim is without merit.

Standard of Review

The scope of review of a trial court's decision to grant or deny a motion to continue is abuse of discretion. *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981).

The term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Ferranto*, 112 Ohio St. 667, 676-678, 148 N.E. 362 (1925). "An abuse of discretion is the trial court's failure to exercise sound, reasonable, and legal decision-making." *State v. King*, 11th Dist. Portage No. 2009-P-0040, 2010-Ohio-3254, ¶ 67, citing *State v. Beecher*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶ 62 (quoting Black's Law Dictionary (8 Ed.Rev.2004) 11). Unlike the review of a pure issue of law, when an appellate court's review is confined to the discretion of the trial court, "the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Bayus v. Bayus*, 11th Dist. Trumbull No. 2011-T-0062, 2012-Ohio-1462, ¶ 16, quoting *Beecher* at ¶ 67.

Analysis

The Supreme Court of Ohio has held that "the grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge." *Unger*, 67 Ohio St.2d at 67, 423 N.E.2d 1078. Moreover, "an appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *Id.* The Supreme

Court advised in determining whether a trial had abused its discretion in ruling on a motion for continuance, a reviewing court must weigh any potential prejudice to the defendant against the trial court's "right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *Id.*

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be in the circumstances present in every case, particularly in the reasons presented to the judge at the time the request is denied." *Unger* at 67. The factors that are instructive to evaluate a motion include: "the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors." *State v. Landrum*, 53 Ohio St.3d 107, 115, 559 N.E.2d 710 (1990).

Here, January 6, 2021 Graham sought to appoint only 2 trial attorneys, Malarcik and Porter. (T.d. 491). On January 21, 2021, Attorneys Porter and Umaña filed a motion in the Ohio Supreme Court to be appointed as Graham's counsel for his S.Ct.Prac.R. 11.06 application to re-open. Five days later, on January 21, 2021, trial counsel filed the first motion for a continuance seeking a half-year delay based on a hypothetical timeline for filing in the Supreme Court of the United States that was a mere intention when the motion was filed. (T.d. 497).

February 3, 2021, the Supreme Court of Ohio granted Attorneys Porter and Umaña motion and appointed them to represent Graham for the purpose of filing an application for reopening. *Graham*, Court Announcement 2021-Ohio-289. January 10, 2021, the trial court denied the first motion for a continuance. (T.d. 499). February 26, 2021, appointed counsel filed the application for reopening in the Supreme Court. Also on February 26,

2021, trial counsel filed a renewal of the motion to continue raising for the first time the lack of jurisdiction due to Graham's application for reopening in the Supreme Court of Ohio and unavailability of a post-conviction witness and additional counsel. (T.d. 500). The State notes, Graham waited until May 17, 2021 file a Writ for Certiorari in the Supreme Court of the United States.

At the time the trial court denied the first request for a continuance, the reason presented for the continuance was the defense team's mere intention of future action in the Supreme Court of the United States and a possible half-year delay. (T.d. 497). Reason and the record supported the trial court's decision to deny the request for a continuance based on a mere intention. Moreover, on the same day the first motion for a continuance was filed, Attorney Porter also filed a motion seeking appointment as counsel in the Ohio Supreme Court to file a S.Ct.Prac.R. 11.06 application to reopen on behalf of Graham and failed to include that as reason for the continuance. When the Supreme Court granted his motion and appointed him counsel on February 3, 2021, he did not update his continuance at that time to raise the issue of subject-matter jurisdiction with the trial court and the forthcoming action in the Supreme Court but waited 23 days. The reason for this delay is suspect if the same counsel appointed to represent Graham in the trial court and in the Ohio Supreme Court waits till the last possible moment to raise the Supreme Court of Ohio action as the leading reason for the continuance.

The renewed continuance did not offer a length of delay. The renewal relied on an alleged jurisdictional defect without any direct legal support and presented for the first time an issue of unavailability regarding a postconviction witness and additional counsel. (T.p. 500). As Graham was represented by two appointed counsel, the postconviction

witness had an extensive affidavit that could be a hearing exhibit and this Court's pre-hearing decision found Graham could raise the jurisdictional issue on appeal, there was no significant potential prejudice such that it would outweigh other considerations. Weighing the potential prejudice against the concerns of efficient administration of justice, the court was within its discretion to deny the renewal of Graham's continuance. Accordingly, reason and the record supported the trial court's decision.

The trial court's decision denying the continuance and the renewal comports with both the holding in *Unger* and the record in this case. Graham has failed to demonstrate an abuse of discretion, his second assignment of error is without merit and should be overruled.

Response to Graham's Third Assignment of Error: A jurisdictional challenge fails because the trial court resentenced Graham with subject-matter jurisdiction under a remand order issued by the Supreme Court of Ohio. (T.d. 510).

In his third assignment of error, Graham asserts the trial court lacked jurisdiction to resentence him on March 8, 2021. He relies on the filing of a S.Ct.R.Prac. 11.06 application to re-open in the Supreme Court of Ohio ten days before his resentencing hearing. Graham's claim is without merit.

Standard of Review

Subject-matter jurisdiction refers to the constitutional power of a court to adjudicate a particular case or type of case. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶¶ 11-12, 34.

Analysis

Contrary to Graham's assertions pre-hearing and again on appeal, the trial court had jurisdiction to conduct the March 8, 2021 resentencing hearing. Graham has failed to

presented any case law holding the filing of an application to re-open in the Supreme Court of Ohio deprives the trial court of its jurisdiction or authority to resentence an offender in a criminal case. Moreover, in this matter the case was on remand from the Supreme Court of Ohio for the sole purpose of conducting the resentencing hearing.

SUBJECT-MATTER JURISDICTION TO RESENTENCE

The trial court had subject-matter jurisdiction to proceed with Graham's March 8, 2021 resentencing hearing. "There shall be a court of common pleas and such division of common pleas and division thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law." Article IV, Section 4(A) and (B) of the Ohio Constitution. Furthermore, "Article IV, Section 4(B) of the Ohio Constitution grants exclusive authority to the General Assembly to allocate certain subject matters to the exclusive original jurisdiction of specified division of the courts of common pleas." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 2.

The General Assembly enacted R.C. 2931.03 providing "[t]he court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the courts of common pleas." Therefore, "jurisdiction over all crimes and offenses is vested in the court of common pleas, general division, unless such jurisdiction specifically and exclusively is vested in other divisions of the other courts of common pleas of in the lower court's." *State ex rel. McMinn v. Whitfield*, 27 Ohio St.3d 4, 5, 500 N.E.2d 875 (1986).

The Portage County Court of Common Pleas has subject-matter jurisdiction felony cases. R.C. 2931.03, *Smith v. Shelton*, 157 Ohio St.3d 1, 2019-Ohio-1677, 131 N.Ed.3d 1, ¶ 8.

AUTHORITY TO RESENTENCE ON REMAND

The trial court had the authority to resentence Graham to life without parole, a sentence within the statutory range.

Under the Supreme Court of Ohio's remand order, the trial court sentenced Graham consistent with R.C. 2929.06. *Graham*, 2020-Ohio-6700, ¶ 217. R.C. 2929.06 governs the resentencing of an individual after the sentence of death has been set aside, nullified, or vacated. In Graham's circumstances, "the trial court that sentenced the offender shall conduct a hearing to resentence the offender." R.C. 2929.06(A). The statutory section further provides "at the resentencing hearing the court shall impose upon the offender a sentence * * * of life imprisonment that were available under division (D) of section 2929.03 or under section 2929.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed." R.C. 2929.06(A)(2). The trial court had the authority under R.C. 2929.06(A)(2) to resentence Graham to life without the possibility of parole, life with parole eligibility after serving 25 years, or life with parole eligibility after serving 30 years. R.C. 2929.03(D) [Effective January 1, 2008 to April 5, 2017].

FILING APPLICATION TO REOPEN NO IMPACT ON COURT'S AUTHORITY

As the trial court had subject-matter jurisdiction over the criminal case and sentencing and the authority to resentence Graham on remand pursuant to R.C. 2929.06, the final consideration is what, if any, impact the filing of Graham's application to re-open had on this authority.

Graham's assertion of an interaction between the trial court's subject-matter jurisdiction and his application to re-open in the Supreme Court was premature. An

application for reopening is only granted if “there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” S.Ct.Prac.R. 11.06(E).

Subsection (F) of the rule governs the action taken if the petition is granted and it provides:

If the Supreme Court grants the application, the clerk of the Supreme Court shall serve notice on the clerk of the trial court, and the Supreme Court will do both of the following: have point counsel to represent the applicant if the applicant is indigent and not currently represented; Impose conditions, if any, necessary to preserve the status quo during the pendency of the reopened appeal.

S.Ct.Prac.R. 11.06(F) establishes that the basis of Graham's present challenge is flawed. Graham's prohibition to the trial court's March 8th, 2021, proceeding was based solely on the filing of his application to re-open in the Supreme Court. However, the Supreme Court's own rule provides that it is the granting of the application not the filing that triggers the Supreme Court to impose conditions to preserve the status quo during the pendency of the “reopened appeal.” S.Ct.Prac.R. 11.06(F).

Graham has offered no support from an order, legal citation, rule, or statute that the mere filing of the application to re-open impacted the Supreme Court of Ohio's remand order to resentence pursuant to R.C. 2929.06. He has failed to demonstrate his jurisdictional challenge to the March 8, 2021 resentence hearing. Accordingly, Graham's third assignment of error is without merit and should be overruled.

CONCLUSION

For the foregoing reasons, this Court should overrule Graham's three assignments of error and affirm the judgment of the trial court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the State of Ohio has been sent by regular U.S. mail to Michelle Umaña and Erika LaHote at 205 East Broad Street, Suite 1400, Suite 1400, Columbus, Ohio 43215 on this 16th day of November 2021.

/s Pamela J Holder
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