Wilson v. Hill, 2022 U.S. App. LEXIS 9052

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United States Court of Appeals for the Sixth Circuit

April 4, 2022, Filed

No. 21-3961

Reporter
2022 U.S. App. LEXIS 9052 * | 2022 WL 1182759

DAWUD WILSON, Petitioner-Appellant, v. LEON HILL, Warden, Respondent-Appellee.

Prior History: **Wilson** v. Wainwright, 2020 U.S. Dist. LEXIS 258384, 2020 WL 11193263 (N.D. Ohio, Oct. 26, 2020)

Counsel: **[*1] DAWUD WILSON**, Petitioner - Appellant, Pro se, Marion, OH.

For LEON HILL, Warden, Respondent - Appellee: Stephanie Lynn Watson, Office of the Attorney General, Columbus, OH.

Judges: Before: SUHRHEINRICH, Circuit Judge.

Opinion

ORDER

Dawud Wilson, a pro se Ohio prisoner, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. **Wilson** moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a)(5).

Appendix A

In 2015, **Wilson** entered a no-contest plea to robbery with a repeat violent offender (RVO) specification. The trial court subsequently sentenced **Wilson** to consecutive prison terms of eight years for the robbery conviction and two years for the RVO specification. On appeal, **Wilson** argued in relevant part that the trial court erred in imposing an additional and consecutive two-year prison sentence for the RVO specification "after making factual findings that [**Wilson**] did not admit and a jury did not find, in violation of his state and federal constitutional rights to trial by jury." Determining that **Wilson** had failed to raise that argument below, the Ohio Court of Appeals found no plain error committed by the trial court **[*2]** in

sentencing **Wilson** on the RVO specification and otherwise affirmed the trial court's judgment. *State v. **Wilson***, 2018- Ohio 902, 108 N.E.3d 517 (Ohio Ct. App. 2018), *perm. app. denied*, 153 Ohio St. 3d 1433, 2018-Ohio-2639, 101 N.E.3d 465 (2018).

Wilson timely filed a § 2254 habeas petition raising one ground for relief: the trial court violated his constitutional rights to due process and trial by jury by engaging in judicial factfinding to impose an enhanced sentence of two additional years for the RVO specification. A magistrate judge recommended that **Wilson**'s habeas petition be dismissed as procedurally defaulted. Over **Wilson**'s objections, the district court adopted the magistrate judge's report and recommendation in part, dismissed the habeas petition as procedurally defaulted, and denied a certificate of appealability. This timely appeal followed.

Wilson now moves this court for a certificate of appealability. To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court dismisses a habeas petition on procedural grounds, a certificate of appealability should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a **[*3]** constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The district court dismissed **Wilson**'s habeas petition because his one claim for relief was procedurally defaulted. A habeas petitioner procedurally defaults a claim when "(1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default." *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (quoting *Tolliver v. Sheets*, 594 F.3d 900, 928 n.11 (6th Cir. 2010)). The district court concluded that **Wilson** failed to comply with Ohio's contemporaneous-objection rule, that the Ohio Court of Appeals enforced that rule by applying plain-error review to his claim, and that the contemporaneous-objection rule is an adequate and independent state ground barring federal review. *See Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001). The magistrate judge determined that **Wilson** had failed to show cause to excuse his procedural default; **Wilson** has forfeited any challenge to that determination by failing to raise it in his objections to the magistrate judge's report and recommendation **[*4]** or in his motion for a certificate of appealability. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir.

2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

In his motion for a certificate of appealability, **Wilson** argues that defense counsel's objection at sentencing could be construed as raising an objection to the trial court's judicial factfinding as violating *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Defense counsel made the following objection to the RVO specification:

As the Court is well aware there are certain elements that have to be met for the repeat violent offender specification to come into play and for the Defendant to be sentenced on that. And one of those elements is that the offense involved[] an attempt to cause or a threat to cause serious physical harm to a person. It's our position that that particular element did not take place in this case.

As the district court pointed out, defense counsel challenged the factual basis for the trial court's finding that **Wilson**'s offense involved a threat to cause serious physical harm to a person but failed to assert that this finding must be made by a jury. When he raised his *Apprendi*/*Blakely* claim in his brief before the Ohio Court of Appeals, **Wilson** conceded that "this specific issue was not presented in the lower court" and was therefore subject to plain-error **[*5]** review.

Wilson also argues in his motion for a certificate of appealability that the contemporaneous-objection rule was not the procedural bar enforced by the Ohio Court of Appeals. Contrary to **Wilson**'s argument, the Ohio Court of Appeals stated, "Appellant concedes that he failed to raise an Apprendi argument in the trial court; that he thus waived it; and that this court is limited to reviewing this issue for plain error." ***Wilson***, 108 N.E.3d at 528; *see State v. Murphy*, 91 Ohio St. 3d 516, 2001- Ohio 112, 747 N.E.2d 765, 788 (Ohio 2001) ("The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review.").

Wilson has failed to show that jurists of reason would find it debatable whether the district court was correct in ruling that he had procedurally defaulted his only claim for relief. Accordingly, this court **DENIES Wilson**'s motion for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis on appeal.

Wilson v. Wainwright, 2021 U.S. Dist. LEXIS 178046

Copy Citation

United States District Court for the Northern District of Ohio, Eastern Division

September 20, 2021, Decided; September 20, 2021, Filed

CASE NO. 1:18-cv-2032

Reporter
2021 U.S. Dist. LEXIS 178046 * | 2021 WL 4264052

DAWUD WILSON, PETITIONER, vs. WARDEN LYNEAL WAINWRIGHT, RESPONDENT.

Counsel: [*1] **Dawud Wilson**, Petitioner, Pro se, Marion, OH.

For Warden Lyneal Wainwright, Respondent: Stephanie L. Watson, Office of the Attorney General - Criminal Justice Section, Columbus, OH.

Judges: HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA LIOI

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge David A. Ruiz (Doc. No. 17) recommending dismissal of petitioner **Dawud Wilson**'s ("**Wilson**") petition for a writ of habeas corpus filed under 28 U.S.C. § 2254 (Doc. No. 1). In response, **Wilson** filed a motion for certificate of appealability (Doc. No. 20) and an objection to the R&R (Doc. No. 21). Respondent Warden Lyneal Wainwright ("Wainwright") did not file a response to the motion or the objection.

For the reasons that follow, the petition is dismissed and the motion is denied.

Appendix B

I. Background

A. Underlying Conviction and Appeal

On October 19, 2015, in the Lake County Court of Common Pleas, **Wilson** was convicted of robbery and sentenced to ten (10) years in prison. (Doc. No 1 at 1.[1]) **Wilson** appealed to the Ohio Eleventh District Court of Appeals asserting three assignments of error;[2] however, only the second assignment of error is relevant to the instant petition. The [*2] court of appeals summarized the factual background of **Wilson**'s underlying conviction,[3] but only the facts relevant to the second assignment of error will be set forth here.

{P 2} On June 1, 2015, appellant was indicted for aggravated robbery, a felony-one, with a repeat violent offender ("RVO") specification (Count 1); robbery, a felony-two, with an RVO specification (Count 2); and receiving stolen property, a felony-five (Count 3). Appellant pled not guilty.

{P 3} On July 16, 2015, appellant filed a motion to suppress, arguing the sheriff's deputy lacked reasonable suspicion to stop him. Evidence at the suppression hearing revealed that on April 17, 2015, at about 1:00 p.m., appellant walked into the Buckeye Credit Union in Painesville Township and handed the teller a note, saying he had a loaded gun on him and to place all the bills from her drawer on the counter. Appellant's note indicated that if she did not follow the instructions in the note, he would use the gun to hurt her. The teller produced $1,972. Appellant took the money and left.

*State v. **Wilson***, 2018- Ohio 902, 108 N.E.3d 517, 519-20 (Ohio Ct. App. 2018).

{P 34} For his second assigned error, appellant contends:

{P 35} "The trial court erred to the prejudice of the defendant-appellant when it [*3] sentenced him to an additional and consecutive two years in prison for a repeat violent offender specification."

{P 36} Appellant argues the trial court erred in sentencing him for the RVO specification because, he contends, the record did not support one of the required findings for that specification.

{P 37} The Supreme Court of Ohio, in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, held that when reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *Id.* at P 1. Thus, applying the plain language of that statute, the Supreme Court held that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise

contrary to law." *Id.* The Court further held that "appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges." *Id.* at P 10.

{P 38} R.C. 2929.14(B)(2)(b) sets forth the findings required for a trial court to sentence an offender for an RVO specification. That section provides, in pertinent part:

{P 39} The court shall impose on an offender the longest prison term authorized * * * for the [underlying] **[*4]** offense and shall impose on the offender an additional definite prison term [for the RVO specification] of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

{P 40} (i) The offender is convicted of * * * a specification * * * that the offender is a repeat violent offender.

{P 41} (ii) The offender within the preceding twenty years has been convicted of * * * three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code [i.e., any felony of the first or second degree that is an offense of violence, such as aggravated robbery or robbery], including all offenses described in that division of which the offender is convicted * * * in the current prosecution and all offenses described in that division of which the offender previously has been convicted * * *, whether prosecuted together or separately.

{P 42} (iii) The offense * * * of which the offender currently is convicted * * * is * * * any felony of the second degree that is an offense of violence and *the trier of fact finds that the offense involved * * * a threat to cause serious physical harm to a person* * * *. (Emphasis added.)

{P 43} Appellant concedes the record supports the first **[*5]** and second required findings for an RVO specification. Thus, he concedes that under the first required RVO finding, he was convicted of an RVO specification in this case. He also concedes that under the second required RVO finding, he was convicted of three counts of aggravated robbery in one case in Cuyahoga County in 2009; that he was convicted of aggravated robbery in an unrelated case in that county that same year; that he was sentenced concurrently in both cases to five years in prison; that he was released from prison in 2014; and that, within one year of his release, while he was on post-release control, he committed the instant bank robbery.

{P 44} The only RVO finding appellant argues was not supported by the record is the third finding, i.e., that the current robbery involved a threat to cause serious physical harm to a person. In response, the state argues the note appellant presented to the teller at the time of the robbery supported the court's finding that appellant threatened to cause her serious physical harm.

{P 45} "While a plea of guilty is a complete admission of the defendant's guilt, a plea of no contest is not an admission of guilt, but is an admission of the truth **[*6]** of the facts alleged in the indictment * * *. Crim. R. 11(B)(1) and (2)." *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 423, 1996- Ohio 93, 662 N.E.2d 370 (1996).

{P 46} The requirements regarding no contest pleas in misdemeanor cases are different from those in felony cases. While the trial court is required under R.C. 2937.07 to obtain an explanation of circumstances before accepting a no contest plea to a misdemeanor, Crim.R. 11 does not require an explanation of circumstances before the court accepts a no contest plea to a felony. *State v. Williams*, 8th Dist. Cuyahoga No. 103762, 2016-Ohio-7777, 2016 WL 6804967, P 5, citing *State v. Magnone*, 2d Dist., 2016-Ohio-7100, 72 N.E.3d 212, P 45. However, while not required, the trial court can ask for an explanation of circumstances before accepting a no contest plea to a felony. *Id.* at P 8.

{P 47} The Supreme Court of Ohio has stated that "where the indictment * * * contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." *State v. Bird*, 81 Ohio St.3d 582, 584, 1998-Ohio 606, 692 N.E.2d 1013 (1998). An exception to this rule provides that when the trial court asks for an explanation of circumstances and that explanation negates the existence of an element of the offense, the trial court errs in finding the defendant guilty. *Williams, supra.*

{P 48} Further, "by pleading no contest to the indictment," a defendant "is foreclosed from challenging the factual merits of the underlying charge." *Bird, supra.* The essence [*7] of the no contest plea is that the defendant cannot be heard in defense. *Mascio, supra*, at 424, 662 N.E.2d 370. "[T]he defendant who pleads no contest waives the right to present additional affirmative factual allegations to prove that he is not guilty of the charged offense." *Id.*

{P 49} Here, during the plea hearing, appellant told the court it was his intention to plead no contest to *both the charge and the specification.* He also said he was admitting the truth of the facts set forth in the indictment and the facts to be presented by the prosecutor.

{P 50} After explaining the required findings for the RVO specification regarding appellant's prior and present convictions, the trial court advised appellant that there would also have to be a finding that he threatened to cause serious physical harm to the victim.

{P 51} Appellant said that he was voluntarily pleading no contest to robbery along with the RVO specification associated with that count and that he was asking the court to accept his plea.

{P 52} The court then asked the prosecutor for an explanation of circumstances. The prosecutor said that if the case had gone to trial, the evidence would have revealed that:

{P 53} On April 17, 2015, shortly before 1:00 P.M., [*8] the Buckeye State Credit Union * * * was robbed.

{P 54} The individual walked into the bank and handed a note to the teller. The note said,

{P 55} "1. Stay Calm. Don't raise your hands up or draw any attention.

{P 56} 2. I have a Loaded Gun on me.

{P 57} 3. Place All bills from the Drawer Onto the Counter.

{P 58} 4. I really don't want to hurt you, so Please:

{P 59} No Die (sic:) Packs, No Silent Alarms, No Bait Money, No GPS."

{P 60} In response to being provided that note the teller handed the individual * * * $1,972.

{P 61} The individual then left [the] bank. Upon arrival of Lake County Deputy Sheriffs, the employees describe[d] the suspect as being six foot tall, weighing approximately 200 pounds, being a black male with a beard * * *.

{P 62} The deputies * * * sent out a be-on-the-look-out broadcast. Several police officers, including Deputy * * * Leonello and Patrolman * * * Krejsa * * * set up on I-90 westbound. Deputy Leonello observed a [vehicle] fitting the description being driven by a black male pass[ ] him. About the same time Officer Krejsa also noted the vehicle.

{P 63} The two of them then proceeded to conduct a traffic stop. The driver of the vehicle was identified as **Dawud [*9]** A. **Wilson**. And upon stopping the vehicle the contents inside the vehicle in plain view were consistent with the information taken from the scene. In plain view was a large amount of currency * * *. The currency itself was bait money provided by the bank.

{P 64} In addition, a * * * coat contained $1,972 * * * in the * * * pocket. * * * They also found a * * * bag, which contained a typed robbery demand [note] * * * on the floor of the vehicle * * *[.]

{P 65} The following colloquy then took place between the court and appellant:

{P 66} THE COURT: [T]he Prosecutor has summarized what the evidence was going to show in your particular case. You heard that, correct?

{P 67} THE DEFENDANT: Yes, sir.

{P 68} THE COURT: * * * Are you * * * admitting the truth of the facts that the Prosecutor has set forth here in open Court today? * * *

{P 69} THE DEFENDANT: Yes.

{P 70} * * *

{P 71} THE COURT: [U]nderstanding the rights that you have, hearing now what the facts are and having reviewed the facts in the indictment, are you still admitting the truth of the facts by pleading no contest here today?

{P 72} THE DEFENDANT: Yes, sir.

{P 73} THE COURT: * * * [With respect to the RVO specification,] the court finds **[*10]** that * * * the Defendant has previously been convicted of offenses of violence, as noted in the repeat

violent offender specification, also that the crime[ ] to which he is pleading is, in fact, an offense of violence by statute. Three counts of aggravated robbery, felonies of the first degree, October 16th, 2009. Also aggravated robbery, a felony of the first degree[,] October 16th of 2009, both in the Cuyahoga County Court of Common Pleas. The Court also makes the finding that the Defendant did, in the commission of the crime here today, threaten to cause serious physical harm to a person, thereby triggering the RVO.

{P 74} All of that being said, the Court needs to have the Defendant review once again the written plea of no contest form, make sure you still want to enter that plea based upon the findings here today. * * * Sign the document only if you still want to plead no contest.

{P 75} [DEFENSE COUNSEL]: Your Honor, Mr. **Wilson** has signed the written plea of no contest and I have signed it as well confirming that he has signed it. And I have discussed it and reviewed it with Mr. **Wilson** prior to Court as well.

{P 76} * * *

{P 77} THE COURT: * * * Finding the pleas to have been knowingly, **[*11]** intelligently, and voluntarily made, I will accept the no contest pleas that have both been made orally and in writing here in open Court today. With the findings and the reasons previously stated by the Court, I will find the Defendant guilty of the crime of robbery in violation of 2911.02(A)(2) of the Revised Code, a felony of the second degree as set forth in Count 2 of the indictment. I will also find him guilty of the repeat violent offender specification associated with Count 2 of the indictment as well.

{P 78} A "threat" intimidates or causes the victim to be afraid. *Dayton v. Dunnigan*, 103 Ohio App.3d 67, 71, 658 N.E.2d 806 (2d Dist. 1995). Further, a threat may be express or implied. *State v. Terzo*, 12th Dist. Butler No. 2002-08-194, 2003-Ohio-5983, 2003 WL 22532890, P 18.

{P 79} As indicated above, the robbery note appellant gave the teller said, "I have a Loaded Gun on me." The word "loaded" is in bold print, highlighted to stand out from the other type. Further, the note said, "I really don't want to hurt you, so Please: No Die (sic) Packs, No Silent Alarms, No Bait Money, No GPS." By pleading no contest and admitting he gave the teller a note saying he had a loaded gun and he would hurt her with it if necessary, appellant cannot dispute the note contained a threat that he would cause the teller serious physical harm if she did not comply with his demands.

{P 80} Appellant **[*12]** argues the note was not a threat because it said he did not want to hurt the teller. However, considering this phrase in context, he said that if she did not obey his instructions, he would hurt her.

{P 81} Further, appellant argues there was no evidence of a threat to cause serious physical harm because no evidence was presented that, during the robbery, he had a gun on him. However, the statement in appellant's note that "I have a Loaded Gun on me" was direct evidence he had a gun.

{P 82} Based on appellant's no contest plea and his stipulation to the indictment and the explanation of circumstances, the record supports the trial court's finding that appellant threatened to cause serious physical harm.

{P 83} Appellant also makes an Apprendi argument, arguing the trial court erred in sentencing him on the RVO specification after making a factual finding that a jury did not find and he did not admit, in violation of his right to a jury trial, pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellant is again referring to the court's finding that he threatened to cause serious physical harm. However, appellant's argument lacks merit because he waived his right to a jury trial on this issue and he admitted all facts necessary **[*13]** to allow the court to find he was a repeat violent offender.

{P 84} Appellant concedes that he failed to raise an Apprendi argument in the trial court; that he thus waived it; and that this court is limited to reviewing this issue for plain error.

{P 85} In *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, the trial court designated the defendant as a repeat violent offender based on his stipulation that he had a prior conviction for felonious assault with a specification that he caused "physical harm" (as required by the former version of the RVO statute). Hunter argued he had a right to have the jury make those findings. However, the Court in *Hunter* held that the court did not violate his right to a jury trial because: (1) Hunter waived his right to a jury trial, and (2) he stipulated to the facts necessary for the RVO specification.

{P 86} First, with respect to waiver, Hunter's case was tried to a jury, but he waived his right to a jury trial *on the RVO specification*. After the jury found appellant guilty of felonious assault, the court held a bench trial on the specification. The Supreme Court held that because Hunter chose to submit the RVO determination to the trial court, he waived any right he had to have the jury make this **[*14]** finding. *Id.* at P 31.

{P 87} Here, in pleading no contest to the specification, appellant waived his right to a jury on that issue and essentially asked the court to determine the specification based on his admission of the truth of the facts alleged in the indictment and contained in the prosecutor's statement of facts.

{P 88} Second, the *Hunter* Court held that since Hunter admitted all facts necessary for the court to designate him as a repeat violent offender, including that he caused physical harm to the victim, the trial court did not need to conduct fact-finding and no Sixth Amendment violation occurred. *Id.* at P 33.

{P 89} The dissent maintains that, although appellant admitted the truth of the prosecutor's statement of facts regarding his current conviction, the trial court should not have accepted those facts in enhancing his sentence. While the Supreme Court in *Hunter* upheld the trial court's acceptance of the defendant's stipulation to the facts of his *prior conviction*, the dissent suggests *Hunter* does not apply here because appellant stipulated to the facts of his *current* conviction. However, nothing in *Hunter* suggests a trial court may not accept a defendant's stipulation to the facts of **[*15]** his current conviction. It is important to note that,

while *judicial fact-finding* for sentence enhancement is expressly limited to the facts of a prior conviction, *stipulations* (which also obviate the need for a jury) are not. *Id.* at P 29.

{P 90} This court, in *State v. Payne*, 11th Dist. Lake No. 2004-L-118, 2005-Ohio-7043, 2005 WL 3610429, held that in order to be constitutionally permissible under *Apprendi*, "*any fact*, other than a prior conviction, must be determined by a jury or admitted by the appellant." (Emphasis added.) *Id.* at P 114. Thus, any fact other than a prior conviction that is found by a jury *or admitted by the defendant* complies with *Apprendi*, regardless of whether it relates to a prior or current conviction.

{P 91} In *Payne*, this court said it was the trial court's findings as to the seriousness of the defendant's *current conviction* (per the former statute) that enhanced his sentence under the RVO specification, and these findings "should have been decided by a jury (if appellant did not admit them, which he did not)[.]" *Id.* at P 116. Thus, this court implied that if a defendant admits the necessary findings regarding his current conviction, those findings need not be made by a jury.

{P 92} "'A stipulation, once entered into and * * * accepted by the court, **[*16]** is binding upon the parties and is a fact deemed adjudicated * * *.'" *State v. Carr*, 2d Dist. Montgomery No. 23826, 2010-Ohio-6470, 2010 WL 5550241, P 12, quoting 89 Ohio Jurisprudence 3d, Trial, Sec. 61. Thus, for RVO purposes, it makes no sense to draw a distinction between stipulations regarding the facts of a prior conviction and the facts of a current conviction. Once the defendant admits the facts recited by the prosecutor supporting a conviction, either prior or current, those facts are no longer in dispute. As the Court in *Hunter* said, where the defendant stipulates "to all the facts necessary for the trial court to designate him as a repeat violent offender," "the trial court ha[s] no need to conduct fact-finding * * * and no Sixth Amendment violation occurred * * *." *Hunter*, 2010-Ohio-6470 at P 32-33. That is exactly what happened here.

{P 93} The dissent's reliance on this court's decision in *Payne, supra*, in which this court held that the trial court violated *Apprendi*, is misplaced as the facts in *Payne* are distinguishable. Payne's case was tried by a jury, which found him guilty of the underlying offenses. At sentencing, the court enhanced the defendant's sentence based on the court's findings—from the testimony presented—that Payne caused physical harm in his prior conviction and serious physical harm in his **[*17]** current conviction, per the former RVO statute. *Id.* at P 107-108. Payne did not waive the jury as to the specification and *did not stipulate to the necessary findings*, and this court properly held the trial court's fact-finding regarding his prior and current convictions violated *Apprendi*. *Payne* at P 114.

{P 94} In contrast, here, appellant pled no contest to robbery *and the specification, thus waiving the jury as to both*, and *admitted all facts necessary for the RVO specification* as recited in the prosecutor's statement of facts. Before pleading, appellant told the court he would be admitting (1) the facts alleged in the indictment and (2) *the facts to be presented by the prosecutor*. Before hearing from the prosecutor, the court advised appellant, and he said he understood, that "there needs to be a finding, which would be today, that you threatened serious physical harm to the victim * * *." After the court notified him of this element, appellant said he was (1) voluntarily pleading no contest to robbery and the specification and (2) *asking the court to accept his plea.*

{P 95} Then, during the prosecutor's statement of facts, he said appellant handed the robbery note to the teller. In that note, [*18] appellant informed her that he had a loaded gun on him and indicated he would hurt her with it unless she followed his demands. *After hearing the facts as outlined by the prosecutor, appellant admitted they were true.* He thus essentially admitted he threatened to cause the teller serious physical harm. Appellant again asked the court to accept his plea. The court then found that appellant threatened to inflict serious physical harm on the teller, thus triggering the RVO statute.

{P 96} After making this finding, the court instructed appellant to again review the plea form to *make sure he still wanted to plead* based on the court's findings and *to only sign the form if that was still his wish.* After again reviewing the form with his attorney, appellant signed it, and the court found him guilty of robbery and the RVO specification.

{P 97} Since appellant waived his right to have the jury try the specification and admitted all facts necessary to enhance his sentence as an RVO, the trial court did not commit plain error in sentencing him.

Id. at 524-30 (all alterations and emphases in original).

B. Petition, R&R, Objection to R&R

Wilson, proceeding *pro se*, filed the instant petition raising one ground for [*19] relief:

[The] [t]rial court violated petitioner's Fourth Amendment rights to due process and trial by jury when it engaged in unconstitutional judicial fact-finding, with respect to the "serious physical harm" element, and sentenced petitioner to an enhanced sentence of two additional years for the repeat violent offender specification.

(Doc. No. 1 at 7.)

In support, **Wilson** offers the following factual statement:

In a second degree felony of violence, the "serious physical harm" element is an essential element to be proven by a jury before a trial court may sentence a defendant to an enhancement RVI sentence. Where the indictment does not contain the "serious physical harm" element, and the defendant does not stipulate to or admit that the crime contained the "serious physical harm" element (when the defendant pleads guilty or no contest), this element must be tried and proven by a jury before a trial court may sentence a defendant to additional RVO time.

In this case, neither the indictment nor the State's recitation of facts (prior to trial court's colloquy and defendant's pleading of no contest to the charge of robbery) contained the "serious physical harm" element. The trial court then proceeded to [*20] engage in fact-finding to find that the crime involved a threat of serious physical harm and sentenced petitioner to the maximum statutory limit for a second degree felony (8 years) plus an additional two years enhancement

sentence (ran [sic] consecutively) for the RVO specification for an aggregate of 10 years in prison.

(*Id.* at 8.)

In the R&R, the magistrate judge recommends that **Wilson**'s sole constitutional claim for relief—that the trial court erred in sentencing him to the RVO specification (in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)[4] and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004))[5]—be dismissed as procedurally defaulted for failing to comply with Ohio's contemporaneous objection rule. (*See* Doc. No. 17 at 16-19.)

Wilson raises three objections to the recommendation. First, **Wilson** objects to the magistrate judge's contention that **Wilson** does not challenge the constitutionality of his sentence, but rather his conviction, and that he should have asserted his constitutional objection at the time of the plea hearing, not at the sentencing hearing. (Doc. No. 21-1 at 1-2.) Second, **Wilson** challenges the magistrate judge's conclusion that he failed to comply with Ohio's contemporaneous objection rule. (*Id.* at 9-13.) And third, **Wilson** challenges the magistrate judge's conclusion that the state appellate court enforced Ohio's contemporaneous objection rule. (*Id.* at 13-19.)

The Court accepts and adopts all aspects of the R&R to which **Wilson** has not objected.

II. Discussion

A. Standard of Review

Under 28 U.S.C. § 636(b)(1), "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See Powell v. United States*, 37 F.3d 1499 (Table), 1994 WL 532926, at *1 (6th Cir. Sept. 30, 1994) ("Any report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party shall be subject to de novo review by the district court in light of specific objections filed by any party.") (citations omitted). **[*22]** "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004); *see also* Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); L.R. 72.3(b) (any objecting party shall file "written objections which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections"). After review, the district judge "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

When undertaking its de novo review of any objections to the R&R, this Court must be additionally mindful of the standard of review applicable in the context of habeas corpus. "Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, a federal court may grant habeas relief only when a state court's decision on the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' decisions from [the Supreme] Court, or was 'based [*23] on an unreasonable determination of the facts.' 28 U.S.C. § 2254(d)." *Woods v. Donald*, 575 U.S. 312, 315, 135 S. Ct. 1372, 191 L. Ed. 2d 464 (2015) (per curiam). This standard is "intentionally difficult to meet." *Id.* at 316 (internal quotation marks and citations omitted). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2001)).

B. Analysis

Wilson objects to the magistrate judge's recommendation that his single habeas claim should be dismissed due to procedural default. There is more than one mechanism by which a habeas claim may be procedurally defaulted. In this case, the mechanism at issue is procedural default due to **Wilson**'s failure to follow a state procedural rule in presenting his claims to the appropriate state court. Federal courts will not consider the merits of procedurally defaulted claims unless petitioner demonstrates cause and prejudice for the default, or where failure to review a claim would result in a fundamental miscarriage of justice. *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006) ("'[I]n all cases in which a state prisoner has defaulted his federal claims [*24] in state court pursuant to an independent and adequate state procedural rule, federal *habeas corpus review of the claims is barred* unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'") (emphasis added) (quoting *Coleman v. Thompson*, 501 U.S. 722, 749, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)).

In *Maupin v. Smith*, the Sixth Circuit set forth a four-factor test for determining whether a petitioner has defaulted his habeas claim for failure to follow a state procedural rule in presenting that claim to the state courts:

First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. ... Once the court determines that a state procedural rule was not complied with and that the [*25] rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986) (internal citations omitted).

Wilson does not object to the procedural default standard applied by the magistrate judge or the magistrate judge's conclusion that Ohio's contemporaneous objection rule is the state procedural rule applicable to his habeas claim. The contemporaneous objection rule requires a party to object at the trial court level in order to preserve an issue for appellate review. *See Hyams v. Cleveland Clinic Found.*, 2012- Ohio 3945, 976 N.E. 2d 297, 304 (Ohio Ct. App. 2012).

Wilson's first two objections relate to the second half of the first *Maupin* factor. Contrary to the magistrate judge's conclusion, **Wilson** maintains that he satisfied Ohio's contemporaneous objection rule with respect to his *Apprendi* claim with the following statement of his counsel at sentencing concerning the issue of a threat to cause serious physical harm:

> I would like to be heard as to the repeat violent offender specification. As the Court is well aware there are certain elements that have to be met for the repeat violent offender specification to come into **[*26]** play and for the Defendant to be sentenced on that. And one of those elements is that the offense involved[] an attempt to cause or a threat to cause serious physical harm to a person. It's our position that that particular element did not take place in this case.

(Doc. No. 8-1 at 274.)

For his first objection, **Wilson** argues that the magistrate judge erred by concluding that to the extent counsel's statement could be construed as an *Apprendi* argument (which the Court finds counsel's statement could not be so construed), it did not satisfy the contemporaneous objection rule because the statement was made at the sentencing hearing instead of the plea hearing. (Doc. No. 21-1 at 1-8.) The Court need not address **Wilson**'s first objection or adopt the magistrate judge's reasoning on that issue, however, because whether counsel's statement was made at the plea hearing or the sentencing hearing, the Court concludes that **Wilson** did not satisfy the contemporaneous objection rule for the reasons that follow.

For his second objection, **Wilson** contends that his counsel's statement at sentencing was adequate to put the trial court on notice that **Wilson** was raising a federal constitutional claim regarding **[*27]** his right to have a jury decide the issue of a threat of serious physical harm even though his lawyer did not expressly make an *Apprendi* argument. (*See* Doc. No. 21-1 at 9-13.) But the magistrate judge concluded that counsel's statement at sentencing did not raise an *Apprendi* argument and noted that **Wilson** conceded that very issue in his appellate brief. (*See* Doc. No. 17 at 16-17; *see also* Doc. No. 8-1 at 67-73 ("Mr. **Wilson** is aware that this specific issue[—that **Wilson** did not plead or stipulate to the fact that he threatened to cause serious bodily harm with respect to the bank robbery to which he pled no contest, and that factual determination by the judge was unconstitutional and should have been made by a jury—] was not presented in the lower court. Thus, he brings it before this Court under plain error.").) The magistrate judge further pointed out that the Eleventh District Court of Appeals determined that **Wilson** waived his *Apprendi* argument concerning the trial court's fact finding that he

threatened to cause serious physical harm[7] and a federal court cannot overrule that court's determination of state law. (Doc. No. 17 at 17.)

On habeas corpus, a federal court is bound by a state court's interpretation of the state's procedural rules. *Brewer v. Overberg*, 624 F.2d 51, 53 (6th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981); *Hicks v. Bobby*, No. 1:05-cv-2722, 2006 U.S. Dist. LEXIS 84618, 2006 WL 3256512, at *7 (N.D. Ohio Nov. 9, 2006) ("In considering a petition for a writ of habeas corpus, the federal courts must defer to a state court's interpretation of its own rules of evidence and procedure.") (internal quotation marks omitted) (citing among authority *Brewer*, 624 F.2d at 52). "Only in rare cases will a federal habeas corpus court not defer to a state's application of its own contemporaneous **[*29]** objection rule." *McBee v. Grant*, 763 F.2d 811, 816 (6th Cir. 1985). Such rare cases include "when a state appellate court applies a procedural bar that has no foundation in the record or state law, the federal courts need not honor that bar." *Walker v. Engle*, 703 F.2d 959, 966 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983). This is not one of those rare cases.

There is a foundation in Ohio law for application of the procedural bar at issue in this case to *Apprendi/Blakely* claims. In *State v. Payne*, 114 Ohio St. 3d 502, 2007- Ohio 4642, 873 N.E.2d 306 (Ohio 2007), the Ohio Supreme Court held that a *Blakely* challenge is forfeited on appeal if the appellant failed to raise that issue in the trial court.[8] *See id.* at 312 ("[W]e hold that a lack of an objection in the trial court forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the announcement of *Blakely*."); *see also State v. Hale*, 119 Ohio St. 3d 118, 2008- Ohio 3426, 892 N.E.2d 864, 908 (Ohio 2008) ("Although *Blakely* had been decided the previous year, Hale did not raise a *Blakely* objection in the trial court. Thus, he has forfeited this claim."); *State v. Cambron*, 2020- Ohio 819, 152 N.E.3d 824, 831 (Ohio Ct. App. 2020) ("When a defendant fails to preserve an objection to a particular issue at trial, 'forfeiture' of that issue occurs.") (citing *Payne*, 873 N.E.2d at 311).

And there is a foundation in the record for application of Ohio's procedural bar to **Wilson**'s habeas claim. On its face, the objection of **Wilson**'s counsel at sentencing challenged the factual basis for the **[*30]** trial court's finding that the offense for which **Wilson** was being convicted involved a threat of serious physical harm, not the issue of whether a jury, rather than the trial court, was required to make that finding. And when **Wilson** raised this issue on appeal, he conceded in his appellate brief that this issue was not raised before the trial court and, therefore, was brought before the appellate court for plain error review.

The Eleventh District Court of Appeal's ruling that **Wilson** was barred from raising an *Apprendi* claim on appeal because he failed to raise that issue before the trial court has a foundation both in the record and Ohio law. Therefore, this Court is bound by the state court's interpretation of its own procedural rule that **Wilson**'s *Apprendi* claim is procedurally barred. *Brewer*, 624 F.2d at 53. **Wilson**'s second objection is overruled.

For his third objection, **Wilson** challenges the magistrate judge's conclusion that the state appellate court enforced the procedural bar and satisfied the second *Maupin* factor because the

Eleventh District Court of Appeals did not use the words "contemporaneous objection rule" and did not "clearly and expressly" state that its judgment rested upon the procedural [*31] bar. (Doc. No. 21-1 at 13-19.) **Wilson**'s argument is unavailing.

In order for a state court to enforce the procedural bar, the court is not required to use the specific words "contemporaneous objection rule" as long as the state court expressly identifies a defendant's failure to comply with the procedural rule and relies on that procedural bar in its ruling. *See* Scheck v. ***Wilson***, No. 06-cv-1761, 2009 U.S. Dist. LEXIS 70654, 2009 WL 2486051, at *20 (N.D. Ohio Aug. 11, 2009) (finding that the Ohio court of appeals expressly stated that petitioner failed to object and clearly relied on this procedural bar in dismissing petitioner's claim, and overruling habeas petitioner's objection (that the state appeals court did not clearly rely on the contemporaneous objection rule) to the magistrate judge's recommendation that petitioner's prosecutorial claim was procedurally defaulted, where the Ohio court of appeals stated that "'although Appellant elicited testimony regarding the disposal of [the victim's] urine sample, the record reflects that he failed to raise an objection regarding the alleged prosecutorial misconduct[]'" which, "read in context, clearly and expressly states that the Ohio Appellate Court relied on the contemporaneous objection rule in dismissing Scheck's [*32] prosecutorial misconduct claim" and distinguishing cases where the state court "did not even mention the procedural bar"); *see also* *Mason v. Brunsman*, 483 F. App'x 122, 130 (6th Cir. 2012) (finding that "the Ohio Court of Appeals clearly and expressly relied on [defendant's] counsel's violation of Ohio's contemporaneous objection rule in declining to review [defendant's habeas] prosecutorial vouching claim[]" when "[t]he Ohio Court of Appeals concluded that Mason's counsel failed to object to the prosecutors comments concerning [the State's witness's] credibility; therefore the court reviewed this aspect of his claim for plain error[]"); *Echols v. Houk*, No. C-1-03-66, 2005 U.S. Dist. LEXIS 43421, 2005 WL 1745475, at *8 (S.D. Ohio July 25, 2005) (finding that the court of appeals clearly and expressly relied upon Ohio's contemporaneous objection rule in addressing petitioner's habeas claim concerning joinder when it stated: "Echols did not make or renew a request for severance of the joined counts at any time during trial. If a motion to sever is not renewed, the issue is waived unless there is plain error.").

The Ohio Eleventh District Court of Appeals made the following finding regarding **Wilson**'s *Apprendi* claim:

Appellant concedes that he failed to raise an Apprendi argument in the trial court; that he thus waived [*33] it; and that this court is limited to reviewing this issue for plain error.

Wilson, 108 N.E.3d at 528.

Here, the court of appeals expressly stated that **Wilson** failed to raise the *Apprendi* issue at trial, thus waiving that issue, and relied upon that procedural failure to limit its review to plain error, thus enforcing Ohio's procedural rule. *See* *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) ("we view a state appellate court's review for plain error as the enforcement of a procedural default[]") (citing *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000) ("Controlling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules.")). The magistrate judge correctly concluded that the

Ohio Court of Appeals enforced the state's procedural bar, thus satisfying the second *Maupin* factor. **Wilson**'s third objection is overruled.[9]

III. Conclusion

For the foregoing reasons, **Wilson**'s objections are overruled. The Court accepts and adopts the portions of the magistrate judge's report and recommendation to which **Wilson** did not object and accepts and adopts the magistrate judge's recommendation that **Wilson** is not entitled to habeas relief on the ground that his single claim for relief is procedurally defaulted. **Wilson**'s petition is dismissed.

In addition to [*34] his objections to the R&R, **Wilson** filed a motion for a certificate of appealability in the event the Court concluded that his claim for habeas relief is procedurally defaulted. (Doc. No. 20.) In the motion, **Wilson** simply reasserts the arguments in his traverse and objections to the report and recommendation, concluding by stating that reasonable jurists could resolve the issues therein in a different manner. The Court disagrees and will not issue a certificate of appealability with respect to **Wilson**'s single claim for relief which this Court has concluded is plainly barred on procedural grounds and no reasonable jurist would find it debatable that the Court was correct in its procedural ruling. *See* *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000) ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted."). **Wilson**'s motion is denied.

The Court certifies that an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue [*35] a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b). This case is closed.

IT IS SO ORDERED.

Dated: September 20, 2021

/s/ Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

Footnotes

- 1

All page number references are to consecutive page numbers assigned to each individual document by the Court's electronic filing system.

- 2

The first relates to a suppression issue, the second relates to the issue of whether the trial court erred "when it sentenced [**Wilson**] to an additional and consecutive two years of prison for a repeat violent offender specification[,]" and the third relates to whether the trial court erred by sentencing **Wilson** to a maximum, eight-year prison sentence for robbery. *See* State v. ***Wilson***, 2018- Ohio 902, 108 N.E.3d 517, 519 (Ohio Ct. App. 2018).

- 3

"State-court factual findings are presumed correct unless rebutted by clear and convincing evidence." *Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012) (citing 28 U.S.C. § 2254(e)(1)).

- 4

In *Apprendi*, the Supreme Court ruled that the Sixth Amendment to the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum (other than the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt").

- 5

In *Blakely*, the Supreme Court applied *Apprendi* and ruled that the Sixth Amendment to the Constitution prohibits a judge from enhancing a criminal sentence based upon facts other than those decided by the jury or admitted by the defendant.

> [T]he "statutory maximum". . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.... In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment[.]" **[*21]**

Blakely, 542 U.S at 303-04 (emphases in original).

- 6

If a threat of serious physical harm was found to be present, **Wilson**'s sentence for the bank robbery would be enhanced under the RVO specification to which he pled no

contest. If that fact was not found, there would be no sentence enhancement. The trial court found that the bank robbery for which **Wilson** was being convicted did involve a threat of serious physical harm and imposed a two-year enhancement based upon the RVO specification. In this habeas petition, **Wilson** contends that his constitutional rights were violated when the trial court made an alleged unconstitutional fact finding that the bank robbery to which **Wilson** pled no contest involved a threat of serious physical harm and enhanced **Wilson**'s sentence on that basis. **Wilson** admits that he pled no contest to the RVO, but contends that he did not admit to the fact of a "threat of serious physical harm" necessary to support the RVO sentencing enhancement.

• 7

The Eleventh District Court of Appeals determined both that **Wilson** waived his right to a jury on the issue of whether the bank robbery for which he was being sentenced included a threat of serious physical harm and admitted all necessary facts to support the trial court's findings, and failed to raise an *Apprendi* argument before the trial court, thus waiving that argument:

> Appellant also makes an Apprendi argument, [*28] arguing that the trial court erred in sentencing him on the RVO specification after making a factual finding that a jury did not find and he did not admit, in violation of his right to a jury trial[.] . . . Appellant is again referring to the [trial] court's finding that he threatened to cause serious physical harm. However, appellant's argument lacks merit because he waived his right to a jury trial on the issue and admitted all the facts necessary to allow the court to find he was a repeat violent offender.
>
> Appellant conceded that he failed to raise an Apprendi argument in the trial court; that he thus waived it; and that this court is limited to reviewing this issue for plain error.

Wilson, 108 N.E.3d at 527-28.

• 8

In *Payne*, the Ohio Supreme Court distinguished waiver, which is the intentional relinquishment of a right, from forfeiture, which is failure to preserve an objection and does not extinguish the need for a plain error analysis. *See Payne*, 873 N.E.2d at 310-11 and n.2 (Noting that "[t]he court of appeals in [Payne] mistakenly, yet perhaps understandably, conflated waiver with forfeiture.").

• 9

Wilson does not object to the magistrate judge's conclusion that the third *Maupin* factor is satisfied, or that **Wilson** failed to establish cause and prejudice to excuse his procedural default.

Wilson v. Wainwright, 2020 U.S. Dist. LEXIS 258384

United States District Court for the Northern District of Ohio, Eastern Division
October 26, 2020, Decided; October 26, 2020, Filed
CASE NO. 1:18-cv-2032

Reporter
2020 U.S. Dist. LEXIS 258384 * | 2020 WL 11193263

DAWUD WILSON, Petitioner, v. LYNEAL WAINWRIGHT, Warden, Respondent.

Subsequent History: Adopted by, Objection overruled by, Writ of habeas corpus dismissed, Certificate of appealability denied, Motion denied by Wilson v. Wainwright, 2021 U.S. Dist. LEXIS 178046, 2021 WL 4264052 (N.D. Ohio, Sept. 20, 2021)
Certificate of appealability denied, Motion denied by, As moot Wilson v. Hill, 2022 U.S. App. LEXIS 9052 (6th Cir., Apr. 4, 2022)

Prior History: State v. Wilson, 2018-Ohio-902, 2018 Ohio App. LEXIS 964, 108 N.E.3d 517, 2018 WL 1257886 (Ohio Ct. App., Lake County, Mar. 12, 2018)

Wilson v. Wainwright, 2020 U.S. Dist. LEXIS 258384, *1, 2020 WL 11193263, 2020 WL 11193263 (N.D. Ohio October 26, 2020)

Counsel: [*1] Dawud Wilson, Petitioner, Pro se, Marion, OH.

For Warden Lyneal Wainwright, Respondent: Stephanie L. Watson, Office of the Attorney General - Criminal Justice Section, Columbus, OH.

Appendix C

Judges: David A. Ruiz, UNITED STATES MAGISTRATE JUDGE. JUDGE SARA LIOI.

Opinion by: David A. Ruiz

Opinion

REPORT AND RECOMMENDATION

Petitioner, Dawud Wilson (Petitioner or Wilson), challenges the constitutionality of his convictions in the cases of State v. Wilson, Lake County Court of Common Pleas Case No. 15-CR-000326. Petitioner, pro se, filed his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (R. 1). Lyneal Wainwright (Respondent) filed his Answer/Return of Writ. (R. 8). Petitioner has filed a Traverse (R. 14), to which Respondent did not file a reply. This matter is before the undersigned Magistrate Judge pursuant to Local Rule 72.2. For reasons set forth in detail below, it is recommended that the habeas petition be DISMISSED as procedurally defaulted.

I. Summary of Facts

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, factual determinations made by state courts are presumed correct. 28 U.S.C. § 2254(e)(1); see also Franklin v. Bradshaw, 695 F.3d 439, 447 (6th Cir. 2012) ("State-court factual findings are presumed correct unless rebutted by clear and convincing [*2] evidence.") The Eleventh District Court of Appeals (state appellate court), on an appeal from a collateral post-conviction filing, summarized the facts underlying Petitioner's conviction as follows:1Link to the text of the note

[*P34] For his second assigned error, appellant contends:

[*P35] "The trial court erred to the prejudice of the defendant-appellant when it sentenced him to an additional and consecutive two years in prison for a repeat violent offender specification."

[*P36] Appellant argues the trial court erred in sentencing him for the RVO specification because, he contends, the record did not support one of the required findings for that specification.

[*P37] The Supreme Court of Ohio, in State v. Marcum, 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, held that when reviewing felony sentences, appellate courts must apply the standard of

review set forth in R.C. 2953.08(G)(2). Id. at ¶1. Thus, applying the plain language of that statute, the Supreme Court held that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." Id. The Court further held that "appellate courts may not apply the abuse-of-discretion [*3] standard in sentencing term challenges." Id. at ¶10.

[*P38] R.C. 2929.14(B)(2)(b) sets forth the findings required for a trial court to sentence an offender for an RVO specification. That section provides, in pertinent part:

The court shall impose on an offender the longest prison term authorized * * * for the [underlying] offense and shall impose on the offender an additional definite prison term [for the RVO specification] of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of * * * a specification * * * that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of * * * three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code [i.e., any felony of the first or second degree that is an offense of violence, such as aggravated robbery or robbery], including all offenses described in that division of which the offender is convicted * * * in the current prosecution and all offenses described in that division of which the offender previously has been convicted * * *, whether prosecuted together or separately.

(iii) The offense * * * of which the offender currently is convicted [*4] * * * is * * * any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved * * * a threat to cause serious physical harm to a person * * *. (Emphasis added.)

[*P43] Appellant concedes the record supports the first and second required findings for an RVO specification. Thus, he concedes that under the first required RVO finding, he was convicted of an RVO specification in this case. He also concedes that under the second required RVO finding, he was convicted of three counts of aggravated robbery in one case in Cuyahoga County in 2009; that he was convicted of aggravated robbery in an unrelated case in that county that same year; that he was sentenced concurrently in both cases to five years in prison; that he was released from prison in 2014; and that, within one year of his release, while he was on post-release control, he committed the instant bank robbery.

[*P44] The only RVO finding appellant argues was not supported by the record is the third finding, i.e., that the current robbery involved a threat to cause serious physical harm to a person. In response, the state argues the note appellant presented to the teller at the time [*5] of the robbery supported the court's finding that appellant threatened to cause her serious physical harm.

[*P45] "While a plea of guilty is a complete admission of the defendant's guilt, a plea of no contest is not an admission of guilt, but is an admission of the truth of the facts alleged in the indictment * * *. Crim.R. 11(B)(1) and (2)." State ex rel. Stern v. Mascio, 75 Ohio St.3d 422, 423, 1996- Ohio 93, 662 N.E.2d 370 (1996).

[*P46] The requirements regarding no contest pleas in misdemeanor cases are different from those in felony cases. While the trial court is required under R.C. 2937.07 to obtain an explanation of circumstances before accepting a no contest plea to a misdemeanor, Crim.R. 11 does not require an explanation of circumstances before the court accepts a no contest plea to a felony. State v. Williams, 8th Dist. Cuyahoga No. 103762, 2016-Ohio-7777, ¶5, citing State v. Magnone, 2d Dist. Clark No.2015-CA-94, 2016-Ohio-7100, ¶45, 72 N.E.3d 212, 72 N.E.3d

212. However, while not required, the trial court can ask for an explanation of circumstances before accepting a no contest plea to a felony. Id. at ¶8.

[*P47] The Supreme Court of Ohio has stated that "where the indictment * * * contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." State v. Bird, 81 Ohio St.3d 582, 584, 1998- Ohio 606, 692 N.E.2d 1013 (1998). An exception to this rule provides that when the trial court asks for an explanation of circumstances and that explanation negates [*6] the existence of an element of the offense, the trial court errs in finding the defendant guilty. Williams, supra.

[*P48] Further, "by pleading no contest to the indictment," a defendant "is foreclosed from challenging the factual merits of the underlying charge." Bird, supra. The essence of the no contest plea is that the defendant cannot be heard in defense. Mascio, supra, at 424. "[T]he defendant who pleads no contest waives the right to present additional affirmative factual allegations to prove that he is not guilty of the charged offense." Id.

[*P49] Here, during the plea hearing, appellant told the court it was his intention to plead no contest to both the charge and the specification. He also said he was admitting the truth of the facts set forth in the indictment and the facts to be presented by the prosecutor

[*P50] After explaining the required findings for the RVO specification regarding appellant's prior and present convictions, the trial court advised appellant that there would also have to be a finding that he threatened to cause serious physical harm to the victim.

[*P51] Appellant said that he was voluntarily pleading no contest to robbery along with the RVO specification associated with that count and that he was asking [*7] the court to accept his plea.

[*P52] The court then asked the prosecutor for an explanation of circumstances. The prosecutor said that if the case had gone to trial, the evidence would have revealed that:

On April 17, 2015, shortly before 1:00 P.M., the Buckeye State Credit Union * * * was robbed. The individual walked into the bank and handed a note to the teller. The note said,

"1. Stay Calm. Don't raise your hands up or draw any attention.

2. I have a Loaded Gun on me.

3. Place All bills from the Drawer Onto the Counter.

4. I really don't want to hurt you, so Please:

No Die (sic.) Packs, No Silent Alarms, No Bait Money, No GPS."

In response to being provided that note the teller handed the individual * * * $ 1,972.

The individual then left [the] bank. Upon arrival of Lake County Deputy Sheriffs, the employees describe[d] the suspect as being six foot tall, weighing approximately 200 pounds, being a black male with a beard * * *. The deputies * * * sent out a be-on-the-look-out broadcast. Several police officers, including Deputy * * * Leonello and Patrolman * * * Krejsa * * * set up on I-90 westbound. Deputy Leonello observed a [vehicle] fitting the description being driven by a black male [*8] pass[ ] him. About the same time Officer Krejsa also noted the vehicle. The two of them then proceeded to conduct a traffic stop. The driver of the vehicle was identified as Dawud A. Wilson. And upon stopping the vehicle the contents inside the vehicle in plain view were consistent with the information taken from the scene. In plain view was a large amount of currency * * *. The currency itself was bait money provided by the bank. In addition, a * * * coat contained $ 1,972 * * * in the * * * pocket. * * * They also found a * * * bag, which contained a typed robbery demand [note] * * * on the floor of the vehicle * * *[.]

The following colloquy then took place between the court and appellant:

THE COURT: [T]he Prosecutor has summarized what the evidence was going to show in your particular case. You heard that, correct?

THE DEFENDANT: Yes, sir.

THE COURT: * * * Are you * * * admitting the truth of the facts that the Prosecutor has set forth here in open Court today? * * *

THE DEFENDANT: Yes.

* * *

THE COURT: [U]nderstanding the rights that you have, hearing now what the facts are and having reviewed the facts in the indictment, are you still admitting the truth of the facts by pleading no [*9] contest here today?

THE DEFENDANT: Yes, sir.

THE COURT: * * * [With respect to the RVO specification,] the court finds that * * * the Defendant has previously been convicted of offenses of violence, as noted in the repeat violent offender specification, also that the crime[ ] to which he is pleading is, in fact, an offense of violence by statute. Three counts of aggravated robbery, felonies of the first degree, October 16th, 2009. Also aggravated robbery, a felony of the first degree[,] October 16th of 2009, both in the Cuyahoga County Court of Common Pleas. The Court also makes the finding that the Defendant did, in the commission of the crime here today, threaten to cause serious physical harm to a person, thereby triggering the RVO. All of that being said, the Court needs to have the Defendant review once again the written plea of no contest form, make sure you still want to enter that plea based upon the findings here today. * * * Sign the document only if you still want to plead no contest.

[DEFENSE COUNSEL]: Your Honor, Mr. Wilson has signed the written plea of no contest and I have signed it as well confirming that he has signed it. And I have discussed it and reviewed it with [*10] Mr. Wilson prior to Court as well.

* * *

THE COURT: * * * Finding the pleas to have been knowingly, intelligently, and voluntarily made, I will accept the no contest pleas that have both been made orally and in writing here in open Court today. With the findings and the reasons previously stated by the Court, I will find the Defendant guilty of the crime of robbery in violation of 2911.02(A)(2) of the Revised Code, a felony of the second degree as set forth in Count 2 of the indictment. I will also find him guilty of the repeat violent offender specification associated with Count 2 of the indictment as well.

[*P78] A "threat" intimidates or causes the victim to be afraid. Dayton v. Dunnigan, 103 Ohio App.3d 67, 71, 658 N.E.2d 806 (2d Dist.1995). Further, a threat may be express or implied. State v. Terzo, 12th Dist. Butler No. 2002-08-194, 2003-Ohio-5983, ¶18.

[*P79] As indicated above, the robbery note appellant gave the teller said, "I have a Loaded Gun on me." The word "loaded" is in bold print, highlighted to stand out from the other type. Further, the note said, "I really don't want to hurt you, so Please: No Die (sic) Packs, No Silent Alarms, No Bait Money, No GPS." By pleading no contest and admitting he gave the teller a note saying he had a loaded gun and he would hurt her with it if necessary, appellant cannot dispute the note contained a threat that [*11] he would cause the teller serious physical harm if she did not comply with his demands.

[*P80] Appellant argues the note was not a threat because it said he did not want to hurt the teller. However, considering this phrase in context, he said that if she did not obey his instructions, he would hurt her.

[*P81] Further, appellant argues there was no evidence of a threat to cause serious physical harm because no evidence was presented that, during the robbery, he had a gun on him. However, the statement in appellant's note that "I have a Loaded Gun on me" was direct evidence he had a gun.

[*P82] Based on appellant's no contest plea and his stipulation to the indictment and the explanation of circumstances, the record supports the trial court's finding that appellant threatened to cause serious physical harm.

[*P83] Appellant also makes an Apprendi argument, arguing the trial court erred in sentencing him on the RVO specification after making a factual finding that a jury did not find and he did not admit, in violation of his right to a jury trial, pursuant to State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellant is again referring to the court's finding that he threatened to cause serious physical harm. However, appellant's argument [*12] lacks merit because he waived his right to a jury trial on this issue and he admitted all facts necessary to allow the court to find he was a repeat violent offender.

[*P84] Appellant concedes that he failed to raise an Apprendi argument in the trial court; that he thus waived it; and that this court is limited to reviewing this issue for plain error.

[*P85] In State v. Hunter, 123 Ohio St. 3d 164, 2009-Ohio-4147, 915 N.E.2d 292, the trial court designated the defendant as a repeat violent offender based on his stipulation that he had a prior conviction for felonious assault with a specification that he caused "physical harm" (as required by the former version of the RVO statute). Hunter argued he had a right to have the jury make those findings. However, the Court in Hunter held that the court did not violate his right to a jury trial because: (1) Hunter waived his right to a jury trial, and (2) he stipulated to the facts necessary for the RVO specification.

[*P86] First, with respect to waiver, Hunter's case was tried to a jury, but he waived his right to a jury trial on the RVO specification. After the jury found appellant guilty of felonious assault, the court held a bench trial on the specification. The Supreme Court held that because Hunter chose [*13] to submit the RVO determination to the trial court, he waived any right he had to have the jury make this finding. Id. at ¶31.

[*P87] Here, in pleading no contest to the specification, appellant waived his right to a jury on that issue and essentially asked the court to determine the specification based on his admission of the truth of the facts alleged in the indictment and contained in the prosecutor's statement of facts.

[*P88] Second, the Hunter Court held that since Hunter admitted all facts necessary for the court to designate him as a repeat violent offender, including that he caused physical harm to the victim, the trial court did not need to conduct fact-finding and no Sixth Amendment violation occurred. Id. at ¶33.

[*P89] The dissent maintains that, although appellant admitted the truth of the prosecutor's statement of facts regarding his current conviction, the trial court should not have accepted those facts in enhancing his sentence. While the Supreme Court in Hunter upheld the trial court's acceptance of the defendant's stipulation to the facts of his prior conviction, the dissent suggests Hunter does not apply here because appellant stipulated to the facts of his current conviction. However, nothing in [*14] Hunter suggests a trial court may not accept a defendant's stipulation to the facts of his current conviction. It is important to note that, while judicial fact-finding for sentence enhancement is expressly limited to the facts of a prior conviction, stipulations (which also obviate the need for a jury) are not. Id. at ¶29.

[*P90] This court, in State v. Payne, 11th Dist. Lake No. 2004-L-118, 2005-Ohio- 7043, held that in order to be constitutionally permissible under Apprendi, "any fact, other than a prior conviction, must be determined by a jury or admitted by the appellant." (Emphasis added.) Id. at ¶114. Thus, any fact other than a prior conviction that is found by a jury or admitted by the defendant complies with Apprendi, regardless of whether it relates to a prior or current conviction.

[*P91] In Payne, this court said it was the trial court's findings as to the seriousness of the defendant's current conviction (per the former statute) that enhanced his sentence under the RVO specification, and these findings "should have been decided by a jury (if appellant did not admit them, which he did not)[.]" Id. at ¶116. Thus, this court implied that if a defendant admits the necessary findings regarding his current conviction, those findings need not be made by a jury.

[*P92] "'A [*15] stipulation, once entered into and * * * accepted by the court, is binding upon the parties and is a fact deemed adjudicated * * *.'" State v. Carr, 2d Dist. Montgomery No. 23826, 2010-Ohio-6470, ¶12, quoting 89 Ohio Jurisprudence 3d, Trial, Sec. 61. Thus, for RVO purposes, it makes no sense to draw a distinction between stipulations regarding the facts of a prior conviction and the facts of a current conviction. Once the defendant admits the facts recited by the prosecutor supporting a conviction, either prior or current, those facts are no longer in dispute. As the Court in Hunter said, where the defendant stipulates "to all the facts necessary for the trial court to designate him as a repeat violent offender," "the trial court ha[s] no need to conduct fact-finding * * * and no Sixth Amendment violation occurred * * *." Hunter at ¶32-33. That is exactly what happened here.

[*P93] The dissent's reliance on this court's decision in Payne, supra, in which this court held that the trial court violated Apprendi, is misplaced as the facts in Payne are distinguishable. Payne's case was tried by a jury, which found him guilty of the underlying offenses. At sentencing, the court enhanced the defendant's sentence based on the court's findings - from the testimony presented - that Payne caused physical [*16] harm in his prior conviction and serious physical harm in his current conviction, per the former RVO statute. Id. at ¶107-108. Payne did not waive the jury as to the specification and did not stipulate to the necessary findings, and this court properly held the trial court's fact-finding regarding his prior and current convictions violated Apprendi. Payne at ¶114.

[*P94] In contrast, here, appellant pled no contest to robbery and the specification, thus waiving the jury as to both, and admitted all facts necessary for the RVO specification as recited in the prosecutor's statement of facts. Before pleading, appellant told the court he would be admitting (1) the facts alleged in the indictment and (2) the facts to be presented by the prosecutor. Before hearing from the prosecutor, the court advised appellant, and he said he understood, that "there needs to be a finding, which would be today, that you threatened serious physical harm to the victim * * *." After the court notified him of this element, appellant said he was (1) voluntarily pleading no contest to robbery and the specification and (2) asking the court to accept his plea.

[*P95] Then, during the prosecutor's statement of facts, he said appellant handed [*17] the robbery note to the teller. In that note, appellant informed her that he had a loaded gun on him and indicated he would hurt her with it unless she followed his demands. After hearing the facts as outlined by the prosecutor, appellant admitted they were true. He thus essentially admitted he threatened to cause the teller serious physical harm. Appellant again asked the court to accept his plea. The court then found that appellant threatened to inflict serious physical harm on the teller, thus triggering the RVO statute.

[*P96] After making this finding, the court instructed appellant to again review the plea form to make sure he still wanted to plead based on the court's findings and to only sign the form if that was still his wish. After again reviewing the form with his attorney, appellant signed it, and the court found him guilty of robbery and the RVO specification.

[*P97] Since appellant waived his right to have the jury try the specification and admitted all facts necessary to enhance his sentence as an RVO, the trial court did not commit plain error in sentencing him.

State v. Wilson, 2018-Ohio-902, ¶¶ 34-97, 108 N.E.3d 517, 524-530 (Ohio Ct. App. Mar. 12, 2018) (emphasis in original).

II. Procedural History

A. Conviction

On June 1, 2015, a Lake County Grand Jury issued [*18] a three-count indictment charging Wilson with: 1) one count of aggravated robbery in violation of Ohio Revised Code (O.R.C.) § 2911.01(A)(1) with a repeat violent offender (RVO) specification, 2) one count of robbery in violation of O.R.C. § 2911.02(A)(2) with an RVO specification, and 3) one count of receiving stolen property in violation of O.R.C. § 2913.51(A). (R. 8-1, Exh. 1).

On June 5, 2015, Wilson, represented by counsel, entered a plea of not guilty. (R. 8-1, Exh. 2).

On October 19, 2015, Wilson withdrew his former plea of "not guilty" and entered a plea of no contest to the robbery charge in Count Two, including the RVO specification (R. 8-1, Exh. 3). After advising Wilson of his legal rights regarding trial and prosecution and finding that Wilson understood his rights, the trial court accepted Wilson's plea, and found him guilty of robbery, including the RVO specification. (R. 8-1, Exhs. 4 & 25). As part of the plea, at the time of sentencing, the State agreed to move to dismiss the remaining counts of the indictment. (R. 8-1, Exh. 4).

On October 26, 2015, prior to sentencing, Wilson, pro se, filed motion to dismiss counsel and motion to withdraw his plea, requesting an oral hearing for both motions. (R. 8-1, Exhs. 5 & 6). The State filed a response. (R. 8-1, [*19] Exh. 7).

On November 20, 2015, Wilson filed an Amended Motion to Dismiss Indictment after having previously filed a similar motion on November 9, 2015. (R. 8-1, Exh. 8).

On January 4, 2016, the trial court held a hearing to address Wilson's pro se Motions:

This day, to-wit: January 4, 2016, came the Lake County Prosecuting Attorney, Charles E. Coulson, by and through Charles F. Cichocki, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and the Defendant, Dawud Wilson, being in Court and represented by counsel, Cory R. Hinton, Esquire, this matter came on for hearing on various motions filed pro se by the defendant, to wit: Motion to Withdraw Plea, filed 10/26/2015; Motion to Dismiss Indictment, filed 11/09/2015; Amended Motion to Dismiss Indictment, filed 11/20/2015; and, Request for Bill of Particulars, filed 11/20/2015.

After consultation with his counsel, the Defendant in open court and on the record orally withdrew all of the afore-referenced motions and request.

(R. 8-1, Exhs. 10 & 26).

On January 22, 2016, the trial court imposed an aggregate sentence of ten years imprisonment—eight years for robbery as found in Count Two and an additional two-year sentence for the accompanying [*20] RVO specification. (R. 8-1, Exh. 11). Pursuant to the plea agreement, all remaining counts of the indictment were dismissed. Id.

B. Direct Appeal

On April 28, 2016, Wilson, through counsel, filed a motion for leave to file a delayed appeal, which the state appellate court granted. (R. 8-1, Exhs. 13 & 14).

Wilson raised the following assignments of error:

1. The trial court erred by denying the Defendant-Appellant's motion to suppress in violation of his due process rights and rights against unreasonable search and seizure as guaranteed by the Fourth, Fifth and Fourteenth Amendments [sic] to the United States Constitution and Sections 10 and 14, Article I of the Ohio Constitution.

2. The trial court erred to the prejudice of the Defendant-Appellant when it sentenced him to an additional and consecutive two years in prison for a repeat violent offender specification.

3. The trial court erred by sentencing the Defendant-Appellant to a maximum, eight-year prison sentence for robbery.

(R. 8-1, Exh. 15).

On March 12, 2018, the state appellate court overruled all three assignments of error and affirmed the judgment of the common pleas court. Wilson, 2018-Ohio-902 at ¶107.

On April 25, 2018, Wilson, through counsel, filed a notice of appeal with the Ohio Supreme Court. (R. 8-1, Exh. 18). Wilson set forth one [*21] proposition of law:

1. A Repeat Violent Offender-enhanced sentence to a charge of robbery violates a defendant's constitutional rights to due process and trial by jury where a trial court makes factual findings regarding the RVO following a no contest plea to an indictment that does not include the requisite "serious physical harm" language and the defendant not only does not admit to threatening serious physical harm but also challenges such a finding.

(R. 8-1, Exh. 19).

On July 5, 2018, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4). (R. 8-1, Exh. 21).

C. Federal Habeas Petition

On September 5, 2018, Wilson, pro se, filed a Petition for Writ of Habeas Corpus. Petitioner raises one grounds for relief:

GROUND ONE: The trial court violated petitioner's Fourth Amendment rights to due process and trial by jury when it engaged in unconstitutional judicial factfinding, with respect to the "serious physical harm" element, and sentenced petitioner to an enhanced sentence of two additional years for the repeat violent offender (RVO) specification.

Supporting Facts: In a second degree felony of violence, the "serious physical harm" element is an essential element to be proven by [*22] a jury before a trial court may sentence a defendant to an enhancement RVO sentence. Where the indictment does not contain the "serious physical harm" element, and the defendant does not stipulate to or admit that the crime contained the "serious physical harm"

element (when the defendant pleads guilty or no contest), this element must be tried and proven by a jury before a trial court may sentence a defendant to additional RVO time.

In this case, neither the indictment nor the State's recitation of facts (prior to trial court's colloquy and defendant's pleading of no contest to the robbery) contained the "serious physical harm" element. The trial court then proceeded to engage in fact-finding to find that the crime involved a threat of serious physical harm and sentenced petitioner to the maximum statutory limit for a second degree felony (8 years) plus an additional two year enhancement sentence (ran consecutively) for the RVO specification for an aggregate of 10 years in prison.

(R. 1, PageID# 7-8).

III. Exhaustion and Procedural Default

A. Exhaustion Standard

State prisoners must exhaust their state remedies prior to raising claims in federal habeas corpus proceedings. See 28 U.S.C. § 2254(b), (c). This [*23] requirement is satisfied "when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." Manning v. Alexander, 912 F.2d 878, 881 (6th Cir. 1990). However, if relief is no longer available in state court, exhaustion can be rendered moot: "If no remedy exists, and the substance of a claim has not been presented to the state courts, no exhaustion problem exists; rather, it is a problem of determining whether cause and prejudice exist to excuse the failure to present the claim in the state courts." Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994); see also Buell v. Mitchell, 274 F.3d 347, 349 (6th Cir. 2001) ("a petitioner cannot circumvent the exhaustion requirement by failing to comply with state procedural rules.") (citations omitted).

B. Procedural Default Standard

Federal courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or where failure to review the claim would result in a fundamental miscarriage of justice. See Lundgren v. Mitchell, 440 F.3d 754, 763 (6th Cir. 2006) (citing Wainwright v. Sykes, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)).

A claim may become procedurally defaulted in two ways. Id. First, a petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state

court. [*24] Id.; see also Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986). If, due to petitioner's failure to comply with the procedural rule, the state court declines to reach the merits of the issue, and the state procedural rule is an independent and adequate grounds for precluding relief, the claim is procedurally defaulted. Id.

Second, a petitioner may also procedurally default a claim by failing to raise and pursue that claim through the state's "ordinary appellate review procedures." O'Sullivan v. Boerckel, 526 U.S. 838, 848, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, it is procedurally defaulted. See, e.g., Engle v. Isaac, 456 U.S. 107, 125-130, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); see also Coleman v. Thompson, 501 U.S. 722, 731-32, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). This second type of procedural default is often confused with exhaustion. Exhaustion and procedural default, however, are distinct concepts. AEDPA's exhaustion requirement only "refers to remedies still available at the time of the federal petition." Engle, 456 U.S. at 125 n. 28. Where state court remedies are no longer available to a petitioner because he failed to use them within the required time period, procedural default and not exhaustion bars federal court review. Id. In Ohio, a petitioner is not entitled to raise claims in post-conviction proceedings where those claims could have been raised on direct appeal. [*25] Id. Thus, if an Ohio petitioner failed to raise a claim on direct appeal, which could have been raised, the claim is procedurally defaulted. Id.

A claim is adequately raised on direct appeal if it was "fairly presented" to the state court. To fairly present a claim to a state court a petitioner must assert both the legal and factual basis for his claim. See McMeans v. Brigano, 228 F.3d 674, 681 (6th Cir. 2000). Accordingly, a "petitioner must present his claim to the state courts as a federal constitutional issue--not merely as an issue arising under state law." Koontz v. Glossa, 731 F.2d 365, 368 (6th Cir. 1984). A petitioner can take four actions in his brief which are significant to the determination as to whether a claim has been fairly presented as a federal constitutional claim: "(1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law." Newton v. Million, 349 F.3d 873, 877 (6th Cir. 2003), abrogated on other grounds as recognized in English v. Berghuis, 529 Fed. App'x 734, 744-45 (6th Cir. Jul. 10, 2013).

A petitioner's procedural default, however, may be excused upon a showing of "cause" for the procedural [*26] default and "actual prejudice" from the alleged error. See Maupin, 785 F.2d at 138-39. "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." Franklin v. Anderson, 434 F.3d 412, 417 (6th Cir. 2006) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). Meanwhile, "[d]emonstrating prejudice requires showing that the trial was infected with constitutional error." Id. Where there is strong evidence of a petitioner's guilt and the evidence supporting petitioner's claim is weak, the actual prejudice requirement is not satisfied. See, e.g., United States v. Frady, 456 U.S. 152, 172, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Perkins v. LeCureux, 58 F.3d 214, 219-20 (6th Cir. 1995); Rust v. Zent, 17 F.3d 155, 161-62 (6th Cir. 1994). Prejudice does not occur unless petitioner demonstrates "a reasonable probability" that the outcome of the trial would have been different. Mason v. Mitchell, 320 F.3d 604, 617 (6th Cir. 2003).

Finally, a petitioner's procedural default may also be excused where a petitioner is actually innocent in order to prevent a "manifest injustice." See Coleman, 501 U.S. at 749-50. Conclusory statements, however, are not enough—a petitioner must "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); accord Jones v. Bradshaw, 489 F.Supp.2d 786, 807 (N.D. Ohio 2007) (Katz, J.)

C. Analysis

Respondent argues that Petitioner's sole constitutional ground [*27] for relief is the assertion that the trial court erred in sentencing him to the RVO specification in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, (2004). (R. 8, PageID# 48). The court agrees that this argument is the only federal constitutional claim raised by the petition. Respondent further avers that this ground for relief "was procedurally defaulted due to [Petitioner's] failure to contemporaneously raise it during his trial court proceedings, and the appellate court's enforcement of his forfeiture in direct review." (R. 8, PageID# 48).

Respondent asserts that the first element of the Maupin test is satisfied as Petitioner allegedly failed to comply with an applicable state procedural rule—the contemporaneous objection rule. Petitioner disagrees, and points to an objection raised by his counsel at sentencing. (R. 14, PageID# 394). The state appellate court, however, found that Petitioner failed to raise an Apprendi argument in the trial court, conceded that he did not raise such an argument at the plea hearing, and, therefore waived it. Wilson, 2018-Ohio-902 at ¶84. As a result, the state appellate court limited its review to plain error. Id.

Indeed, Petitioner did not expressly raise an Apprendi argument at sentencing, but he did raise a [*28] similar argument, as defense counsel stated:

I would like to be heard as to the repeat violent offender specification. As the Court is well aware there are certain elements that have to be met for the repeat violent offender specification to come into play and for the Defendant to be sentenced on that. And one of those elements is that the offense involved, an attempt to cause or a threat to cause serious physical harm to a person. It's our position that that particular element did not take place in this case.

(R. 8-1, Exh. 26, PageID# 339). However, the state appellate court is correct that no such argument was raised at the plea hearing, where, even according to Petitioner's appellate brief in state court, defense

counsel conceded that: "Mr. Wilson is aware that this specific issue was not presented in the lower court. Thus, he brings it before this Court under plain error." (R. 8-1, Exh. 15, PageID# 137).

Further, even if Petitioner's argument during sentencing could be construed as raising an Apprendi argument, it can reasonably be inferred that the state appellate court found that the challenge should have come at the plea hearing and not the sentencing hearing. Indeed, at sentencing, [*29] defense counsel was not really arguing a sentencing issue or the permissible range of sentences for someone who had been convicted of an RVO specification, but rather he was challenging the guilt finding of the RVO itself by arguing that "certain elements" of the RVO specification were not satisfied. Clearly, such an objection then was not contemporaneous as it was not raised at the plea hearing, but rather at the sentencing hearing.

Finally, although Petitioner believes that the state appellate court's finding—that he did not raise a contemporaneous objection—is "simply not true" (R. 14, PageID# 394), this court cannot overrule a state court's interpretation of state law. See, e.g., Vroman v. Brigano, 346 F.3d 598, 604 (6th Cir. 2003) ("Federal courts are obligated to accept as valid a state court's interpretation of state law and rules of practice of that state.") (emphasis added); Volpe v. Trim, 708 F.3d 688, 697 (6th Cir. 2013) ("[w]hen assessing the intent of a state legislature, a federal court is bound by a state court's construction of that state's own statutes.") (citations omitted); Brooks v. Anderson, 292 Fed. App'x 431, 437 (6th Cir. 2008) (finding that habeas courts "must defer to a state court's interpretation of its own rules of evidence and procedure when assessing a habeas petition."). This court cannot, under the facts and [*30] circumstances of this case, second-guess the state appellate court's finding that Petitioner failed to raise a timely objection to the state court's finding of guilty of the RVO specification. By performing only a plain error review of this issue, the state appellate court actually enforced the state procedural sanction, thereby satisfying the second prong of Maupin. See Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001) ("we view a state appellate court's review for plain error as the enforcement of a procedural default") (citing Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000) ("Controlling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules.")

Turning to the third prong of Maupin, the Sixth Circuit Court of Appeals has held that Ohio's contemporaneous objection rule constitutes an adequate and independent state ground barring federal review absent a showing of cause for the waiver and resulting prejudice. See e.g,. White v. Mitchell, 431 F.3d 517, 525 (6th Cir. 2005); Mason v. Mitchell, 320 F.3d 604, 635 (6th Cir. 2003) (citing Hinkle, 271 F.3d at 244 ("We have held that Ohio's contemporaneous objection rule constitutes an adequate and independent state ground that bars federal habeas review absent a showing of cause and prejudice.") (citing Scott v. Mitchell, 209 F.3d 854, 867-68 (6th Cir. 2000)).

The only remaining consideration under Maupin is whether Petitioner has demonstrated both [*31] "cause" and "prejudice" to excuse his default. To establish "cause," Wilson must show that "something external to the petitioner, something that cannot fairly be attributed to him[;] . . . some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), abrogated in part by Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); accord Wade v. Timmerman-Cooper, 785 F.3d 1059 (6th Cir. 2015). Petitioner has failed to present any cause to excuse

his procedural default. Moreover, though he has not raised such an argument, Petitioner cannot claim the alleged ineffective assistance of counsel caused his default. See Wade, 785 F.3d at 1077 ("Ineffective assistance of counsel can constitute 'cause' and 'prejudice' in this context, but the claim of ineffective assistance itself must have been fairly presented in the state courts or it too is subject to procedural default.") (citing Edwards v. Carpenter, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)). Petitioner has not raised any claim of ineffective assistance of counsel in the state courts. Thus, he has failed to establish any cause to excuse his procedural default. Because he has not demonstrated cause to excuse the default, the court need not consider the "prejudice" prong of the procedural default analysis of this claim. See, e.g., Simpson v. Jones, 238 F.3d 399, 409 (6th Cir. 2000).

Consequently, the court finds that Wilson's [*32] sole ground for relief is procedurally defaulted and recommends that it be dismissed.

IV. Conclusion

For the foregoing reasons, it is recommended that Wilson's Petition be DISMISSED as procedurally defaulted.

/s/ David A. Ruiz

U.S. MAGISTRATE JUDGE

Date: October 26, 2020

Footnotes

1Link to the location of the note in the document

The court includes only those facts germane to the sole ground for relief raised by Petitioner—whether the guilt-finding as to the repeat violent offender (RVO) specification, to which Petitioner pled no contest, was the product of unconstitutional judicial fact-finding.

State v. Wilson, 2018-Ohio-902

Court of Appeals of Ohio, Eleventh Appellate District, Lake County
March 12, 2018, Decided
CASE NO. 2016-L-039

Reporter
2018-Ohio-902 * | 108 N.E.3d 517 ** | 2018 Ohio App. LEXIS 964 *** | 2018 WL 1257886

STATE OF OHIO, Plaintiff-Appellee, - vs - DAWUD WILSON, Defendant-Appellant.

Subsequent History: Discretionary appeal not allowed by State v. Wilson, 153 Ohio St. 3d 1433, 2018-Ohio-2639, 2018 Ohio LEXIS 1691, 101 N.E.3d 465 (July 5, 2018)
Habeas corpus proceeding at, Magistrate's recommendation at Wilson v. Wainwright, 2020 U.S. Dist. LEXIS 258384 (N.D. Ohio, Oct. 26, 2020)

Prior History:

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 2015 CR 000326.

Counsel: For Plaintiff-Appellee: Charles E. Coulson, Lake County Prosecutor, and Anna C. Kelley, Assistant Prosecutor, Painesville, OH.

For Defendant-Appellant: Charles R. Grieshammer, Lake County Public Defender, and Vanessa R. Clapp, Assistant Public Defender, Painesville, OH.

Judges: CYNTHIA WESTCOTT RICE, J. DIANE V. GRENDELL, J., concurs, TIMOTHY P. CANNON, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

Appendix D

Opinion by: CYNTHIA WESTCOTT RICE

Opinion

[**519] CYNTHIA WESTCOTT RICE, J.

[*P1] Appellant, Dawud Wilson, appeals his conviction and sentence, following his no contest plea to robbery and a repeat violent offender specification, in the Lake County Court of Common Pleas. The principal issue is whether the trial court erred in denying appellant's motion to suppress. For the reasons that follow, we affirm.

[*P2] On June 1, 2015, appellant was indicted for aggravated robbery, a felonyone, with a repeat violent offender ("RVO") specification (Count 1); robbery, a felony-two, with an RVO specification (Count 2); and receiving stolen property, a [**520] felony-five (Count 3). Appellant pled not guilty.

[*P3] On July 16, 2015, appellant [***2] filed a motion to suppress, arguing the sheriff's deputy lacked reasonable suspicion to stop him. Evidence at the suppression hearing revealed that on April 17, 2015, at about 1:00 p.m., appellant walked into the Buckeye Credit Union in Painesville Township and handed the teller a note, saying he had a loaded gun on him and to place all the bills from her drawer on the counter. Appellant's note indicated that if she did not follow the instructions in the note, he would use the gun to hurt her. The teller produced $1,972. Appellant took the money and left.

[*P4] Lake County Sheriff's deputies immediately responded. Based on information provided by deputies, dispatch issued a "Be On The Lookout" broadcast to area law enforcement agencies with a description of the suspect and his vehicle.

[*P5] Deputy William Leonello, a 34-year veteran police officer, said he was on duty at the intersection of Route 84 and Route 91, when he heard a broadcast from dispatch that a robbery had just occurred at the Buckeye Credit Union at the intersection of Fairgrounds Road and Route 20. Dispatch described the suspect as a black male dressed in black clothing with a beard driving a small tan or gold pickup truck, possibly [***3] a Chevrolet S-10.

[*P6] Initially, Deputy Leonello planned to go to Route 2 to try to locate the suspect, but dispatch then said the suspect was last seen driving south on a side street off Woodland Road. As a result, the deputy took Route 91 to I-90. He drove east on I-90 and then stopped in a turnaround near Route 306. Turnarounds on I-90 connect the eastbound and westbound lanes of traffic. While positioned perpendicular to I-90 westbound, Deputy Leonello observed oncoming traffic.

[*P7] Deputy Leonello said he was not just looking for Chevrolet S-10s; he was looking for any vehicle that fit the description, such as a Ford Ranger. The deputy said he was there for less than two minutes when he saw a small tan pickup truck, a Ford Ranger, travelling westbound. The deputy saw the driver was a black male wearing dark clothing; however, he could not see whether the driver had a beard because he was looking away from him. The truck was in the left (high-speed) lane, but travelling at a normal rate of speed.

[*P8] Deputy Leonello said that as the truck passed him, he still could not see the driver's face because he turned his head to the right and did not look toward him. The deputy then pulled out into [***4] the westbound lanes of travel and followed the truck. He was planning to stop and identify the driver. The deputy did not, however, activate his overhead lights; he just followed him, trying to get the number on his license plate.

[*P9] Then, as Deputy Leonello went under the Route 306 bridge, dispatch said the suspect vehicle was a tan Ford Ranger, not a Chevrolet S-10. The deputy said the truck he was following matched that description. He also said the description he had of the suspect fit the description of the male he was following, but he still could not tell if the driver had a beard.

[*P10] Deputy Leonello tried to call for back up, but could not get through. As he approached the Kirtland Road bridge, he saw a Willoughby Police cruiser positioned in a turnaround just west of the bridge. The deputy continued to follow the suspect, but still did not activate his overhead lights.

[*P11] The driver of the Willoughby Police cruiser positioned in the turnaround was Willoughby Police officer Charles Krejsa, a 20-year veteran police officer. [**521] He testified he heard dispatch broadcast that a robbery had just occurred at the credit union. He heard the dispatch describe the suspect as a black male wearing [***5] a black shirt with a beard who had stolen cash and left the scene. After hearing the suspect was last seen driving south on Fairgrounds Road toward Route 84, Officer Krejsa believed the suspect was headed for I-90. As a result, the officer drove to Route 84, then to Route 306, and then onto I-90.

[*P12] Officer Krejsa said that about five minutes after he heard the initial dispatch, he pulled into the turnaround at the Kirtland Road overpass. Officer Krejsa said this location was about ten minutes away from where the suspect was last seen.

[*P13] Officer Krejsa said he was observing westbound traffic for one to two minutes when he saw a small, tan Ford Ranger pickup truck in the left-hand lane. He said that because it was similar to an S-10, it was "immediately apparent" this truck matched the description of the suspect vehicle. He said the radio band he was using does not provide all information being broadcast, and he did not hear the subsequent

broadcast that the suspect vehicle was a Ford Ranger. Officer Krejsa said that as the driver of the truck drove by, he saw the driver was a black male wearing a black shirt; however, he said he could not see whether the driver had a beard because the male [***6] was looking away from him as he drove by.

[*P14] Officer Krejsa said he pulled out to follow the truck and, as he did, he noticed a Lake County Sheriff's vehicle was following the truck. Officer Krejsa said his intent was to see if there was any additional information he could get to "cement [his] suspicions" that this was the suspect vehicle. Officer Krejsa said that the overhead lights of the Sheriff's Office's cruiser were not activated at that time.

[*P15] Deputy Leonello testified that he radioed dispatch for a registration check on the truck. He provided the license plate number and a description of the truck. He did not hear back from dispatch, but, based on the information he had, he decided to stop the driver of the truck. Deputy Leonello activated his overhead lights. Officer Krejsa said that, in order to provide back up, he also activated his overheads.

[*P16] The officers testified the driver pulled his truck across the three lanes of traffic to the right berm without incident. Deputy Leonello exited his cruiser and Officer Krejsa parked behind his vehicle and exited his. Deputy Leonello called out to the driver, later identified as appellant, to exit his vehicle; keep his hands where he could [***7] see them; turn around; and walk backwards toward him. Appellant complied. Officer Krejsa told appellant he was being detained but not arrested and mirandized him.

[*P17] The officers saw appellant was wearing a black shirt and dark pants. Both said that appellant did not have a beard, but he had what appeared to be glue on his jaw and under his lower lip.

[*P18] The officers secured appellant in Officer Krejsa's cruiser because it was equipped with video and they then approached appellant's truck. They did not enter the truck at that time, but from the outside, they saw a black jacket in the back seat with $50 bills protruding from the pocket.

[*P19] Appellant did not present any opposing testimony or evidence and, thus, the officers' testimony was undisputed.

[*P20] When appellant's vehicle was later inventoried, officers found his robbery note on the floor near the center console; the exact amount of cash stolen from the [**522] bank in appellant's jacket, which was "bait" money (cash that is recorded for tracking purposes); and a three-page list of other banks with their locations, escape routes, and appellant's notes as to whether or not they would be good targets.

[*P21] Following a hearing, the trial court denied the [***8] motion to suppress.

[*P22] On October 19, 2015, pursuant to the parties' plea bargain, appellant pled no contest to robbery and the RVO specification as charged in Count 2 in exchange for the state's agreement to dismiss the remaining counts. The court found appellant's plea was voluntary, accepted the plea, and found him guilty of robbery and the RVO specification.

[*P23] At his sentencing, the trial court reiterated its findings under the RVO statute and sentenced appellant as an RVO. The court sentenced him to eight years in prison for robbery and to two years for the RVO specification, the two terms to be served consecutively to each other, for a total of ten years in prison.

[*P24] Appellant appeals, asserting three assignments of error. For his first, he alleges:

[*P25] "The trial court erred by denying the defendant-appellant's motion to suppress in violation of his due process rights and rights against unreasonable search and seizure as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 14, Article I of the Ohio Constitution."

[*P26] Appellant argues Deputy Leonello lacked reasonable suspicion to stop him and, thus, any evidence obtained as a result of the stop must be suppressed.

[*P27] HN1 Appellate review of a trial court's ruling on a motion to suppress evidence presents [***9] a mixed question of law and fact. State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8, 797 N.E.2d 71. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and is in the best position to resolve factual questions and assess the credibility of the witnesses. Id.; State v. Mills, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). "[T]he trier of fact * * * is in the best position to observe and evaluate the demeanor, voice inflection, and gestures of the witnesses." State v. Dach, 11th Dist. Trumbull Nos. 2005-T-0048 and 2005-T-0054, 2006-Ohio-3428, ¶42. "[T]he factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." City of Warren v. Simpson, 11th Dist. Trumbull No. 98-T-0183, 2000 Ohio App. LEXIS 1073, 2000 WL 286594, *3 (Mar. 17, 2000).

[*P28] HN2 An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by some competent, credible evidence. State v. Guysinger, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (4th Dist.1993). Moreover, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. Warren, supra. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. State v. Djisheff, 11th Dist. Trumbull No. 2005-T-0001, 2006-Ohio-6201, ¶19.

[*P29] HN3 "A police officer may stop an individual if the officer has a reasonable suspicion, based [***10] on specific and articulable facts that criminal behavior has occurred * * *." State v. Tarrance, 11th Dist. Portage No. 2012-P-0073, 2013-Ohio-2831, ¶19, citing Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An investigatory stop must be limited in duration and scope and can only last as long as necessary for an officer to confirm or dispel his suspicion of [**523] criminal activity. State v. Weimer, 11th Dist. Lake No. 2013-L-008, 2013-Ohio-5651, ¶44, citing Terry, supra. A reasonable suspicion requires a minimal level of objective justification, i.e., something more than an unparticularized suspicion or hunch. Id. A brief stop of a suspicious individual to determine his identity or maintain the status quo while obtaining more information may be the most reasonable course of action in light of the facts known to the officer at the time. Id. at ¶46. "[A]n objective and particularized suspicion that criminal activity was afoot must be based on the * * * totality of the circumstances." State v. Andrews, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991). "Furthermore, these circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." Id. at 87-88.

[*P30] "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood [***11] by those in law enforcement." Id. at 88. Further, a police officer may rely on police radio dispatch to provide reasonable suspicion of criminal conduct to support an investigatory detention. State v. Burrows, 11th Dist. Trumbull 2002-Ohio-1961, 2002 WL 605106, *5 (2002).

[*P31] Based on our review of the evidence, Deputy Leonello had a reasonable, articulable suspicion of criminal activity that warranted his investigatory stop of appellant. The deputy, who has 34 years experience as a police officer, learned from dispatch that a bank robbery had just been committed. Dispatch provided the deputy with the suspect's last known location and direction of travel, which led the deputy to conclude that the suspect would likely be headed to I-90 as a means of escape. Further, the deputy obtained a description of the suspect and his vehicle. In less than two minutes from establishing his position in the turnaround, Deputy Leonello saw appellant's vehicle, which matched the description of the suspect's truck in terms of the color, size, make, and model. Significantly, the deputy did not stop appellant until after dispatch advised the suspect vehicle was a Ford Ranger. Further, dispatch described the suspect as a black male wearing [***12] black clothing and a beard. When appellant passed Deputy Leonello while travelling westbound on I-90, the deputy saw a black male wearing dark clothes. The only reason the deputy was unable to confirm whether appellant had a beard was because he turned away when he saw the deputy. Appellant thus matched the suspect's description in terms of his gender, race, and clothing. As a result, when the deputy stopped appellant, he had a reasonable, articulable suspicion that he was the robber.

[*P32] Appellant's reliance on State v. Woods, 11th Dist. Lake No. 99-L-111, 2000 Ohio App. LEXIS 4353, 2000 WL 1370850 (Sep. 22, 2000), in which this court invalidated a stop, is misplaced as its facts are easily distinguishable from those presented here. In Woods, the officer testified he stopped the defendant because he matched the suspect's description and made furtive movements. However, the suspect was described as wearing a black hooded nylon coat, while the defendant was wearing a green coat with a fur collar. Further, in Woods the officer's decision to look for the suspect near the entrance of the freeway was based only on a hunch that the freeway was the most likely means of escape, whereas,

here, dispatch advised officers of appellant's escape route. Further, [***13] in Woods, the officer was not informed the suspect had a vehicle and thus was not informed of the description of a vehicle, while here, before Deputy Leonello stopped appellant, he had been informed [**524] that the suspect was driving a tan Ford Ranger and that was exactly the type of vehicle appellant was driving. Further, while this court in Woods held that the act of the defendant in turning his face from police was not a furtive movement, here, the state did not argue appellant's similar action was a furtive movement. Rather, the state relied on this evidence to explain why the officers could not confirm whether appellant had a beard.

[*P33] We therefore hold the trial court did not err in denying appellant's motion to suppress.

[*P34] For his second assigned error, appellant contends:

[*P35] "The trial court erred to the prejudice of the defendant-appellant when it sentenced him to an additional and consecutive two years in prison for a repeat violent offender specification."

[*P36] Appellant argues the trial court erred in sentencing him for the RVO specification because, he contends, the record did not support one of the required findings for that specification.

[*P37] HN4 The Supreme Court of Ohio, in State v. Marcum, 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, held that when [***14] reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). Id. at ¶1. Thus, applying the plain language of that statute, the Supreme Court held that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." Id. The Court further held that "appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges." Id. at ¶10.

[*P38] R.C. 2929.14(B)(2)(b) sets forth the findings required for a trial court to sentence an offender for an RVO specification. That section provides, in pertinent part:

The court shall impose on an offender the longest prison term authorized * * * for the [underlying] offense and shall impose on the offender an additional definite prison term [for the RVO specification] of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of * * * a specification * * * that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty [***15] years has been convicted of * * * three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code [i.e., any felony of the first or second degree that is an offense of violence, such as aggravated robbery or robbery], including all offenses described in that division of which the offender is convicted * * * in the current prosecution and all offenses described in that division of which the offender previously has been convicted * * *, whether prosecuted together or separately.

(iii) The offense * * * of which the offender currently is convicted * * * is * * * any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved * * * a threat to cause serious physical harm to a person * * *. (Emphasis added.)

[*P43] Appellant concedes the record supports the first and second required findings for an RVO specification. Thus, he concedes that under the first required RVO finding, he was convicted of an RVO specification in this case. He also concedes [**525] that under the second required RVO finding, he was convicted of three counts of aggravated robbery in one case in Cuyahoga County in 2009; that he was convicted of aggravated robbery in an unrelated case [***16] in that county that same year; that he was sentenced concurrently in both cases to five years in prison; that he was released from prison in 2014; and that, within one year of his release, while he was on post-release control, he committed the instant bank robbery.

[*P44] The only RVO finding appellant argues was not supported by the record is the third finding, i.e., that the current robbery involved a threat to cause serious physical harm to a person. In response, the state argues the note appellant presented to the teller at the time of the robbery supported the court's finding that appellant threatened to cause her serious physical harm.

[*P45] HN5 "While a plea of guilty is a complete admission of the defendant's guilt, a plea of no contest is not an admission of guilt, but is an admission of the truth of the facts alleged in the indictment * * *. Crim.R. 11(B)(1) and (2)." State ex rel. Stern v. Mascio, 75 Ohio St.3d 422, 423, 1996- Ohio 93, 662 N.E.2d 370 (1996).

[*P46] HN6 The requirements regarding no contest pleas in misdemeanor cases are different from those in felony cases. While the trial court is required under R.C. 2937.07 to obtain an explanation of circumstances before accepting a no contest plea to a misdemeanor, Crim.R. 11 does not require an explanation of circumstances before the court accepts a no contest plea to a felony. [***17] State v. Williams, 8th Dist. Cuyahoga No. 103762, 2016-Ohio-7777, ¶5, citing State v. Magnone, 2d Dist. Clark No.2015-CA-94, 2016-Ohio-7100, ¶45, 72 N.E.3d 212. However, while not required, the trial court can ask for an explanation of circumstances before accepting a no contest plea to a felony. Id. at ¶8.

[*P47] HN7 The Supreme Court of Ohio has stated that "where the indictment * * * contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant

guilty of the charged offense." State v. Bird, 81 Ohio St.3d 582, 584, 1998- Ohio 606, 692 N.E.2d 1013 (1998). An exception to this rule provides that when the trial court asks for an explanation of circumstances and that explanation negates the existence of an element of the offense, the trial court errs in finding the defendant guilty. Williams, supra.

[*P48] Further, "by pleading no contest to the indictment," a defendant "is foreclosed from challenging the factual merits of the underlying charge." Bird, supra. The essence of the no contest plea is that the defendant cannot be heard in defense. Mascio, supra, at 424. "[T]he defendant who pleads no contest waives the right to present additional affirmative factual allegations to prove that he is not guilty of the charged offense." Id.

[*P49] Here, during the plea hearing, appellant told the court it was his intention to plead no contest to both the charge and the specification. He also said he was admitting the truth [***18] of the facts set forth in the indictment and the facts to be presented by the prosecutor.

[*P50] After explaining the required findings for the RVO specification regarding appellant's prior and present convictions, the trial court advised appellant that there would also have to be a finding that he threatened to cause serious physical harm to the victim.

[*P51] Appellant said that he was voluntarily pleading no contest to robbery along with the RVO specification associated with [**526] that count and that he was asking the court to accept his plea.

[*P52] The court then asked the prosecutor for an explanation of circumstances. The prosecutor said that if the case had gone to trial, the evidence would have revealed that:

On April 17, 2015, shortly before 1:00 P.M., the Buckeye State Credit Union * * * was robbed.

The individual walked into the bank and handed a note to the teller. The note said,

"1. Stay Calm. Don't raise your hands up or draw any attention.

2. I have a Loaded Gun on me.

3. Place All bills from the Drawer Onto the Counter.

4. I really don't want to hurt you, so Please:

No Die (sic.) Packs, No Silent Alarms, No Bait Money, No GPS."

In response to being provided that note the teller handed the individual [***19] * * * $1,972.

The individual then left [the] bank. Upon arrival of Lake County Deputy Sheriffs, the employees describe[d] the suspect as being six foot tall, weighing approximately 200 pounds, being a black male with a beard * * *.

The deputies * * * sent out a be-on-the-look-out broadcast. Several police officers, including Deputy * * * Leonello and Patrolman * * * Krejsa * * * set up on I-90 westbound. Deputy Leonello observed a [vehicle] fitting the description being driven by a black male pass[ ] him. About the same time Officer Krejsa also noted the vehicle.

The two of them then proceeded to conduct a traffic stop. The driver of the vehicle was identified as Dawud A. Wilson. And upon stopping the vehicle the contents inside the vehicle in plain view were consistent with the information taken from the scene. In plain view was a large amount of currency * * *. The currency itself was bait money provided by the bank.

In addition, a * * * coat contained $1,972 * * * in the * * * pocket. * * * They also found a * * * bag, which contained a typed robbery demand [note] * * * on the floor of the vehicle * * *[.]

The following colloquy then took place between the court and appellant:

THE [***20] COURT: [T]he Prosecutor has summarized what the evidence was going to show in your particular case. You heard that, correct?

THE DEFENDANT: Yes, sir.

THE COURT: * * * Are you * * * admitting the truth of the facts that the Prosecutor has set forth here in open Court today? * * *

THE DEFENDANT: Yes.

* * *

THE COURT: [U]nderstanding the rights that you have, hearing now what the facts are and having reviewed the facts in the indictment, are you still admitting the truth of the facts by pleading no contest here today?

THE DEFENDANT: Yes, sir.

THE COURT: * * * [With respect to the RVO specification,] the court finds that * * * the Defendant has previously been convicted of offenses of violence, as noted in the repeat violent offender specification, also that the crime[ ] to which he is pleading is, in fact, an offense of violence by statute. Three counts of aggravated robbery, felonies of the first degree, October 16th, 2009. Also aggravated robbery, a felony of the first degree[,] October 16th of 2009, both in the Cuyahoga County Court of Common Pleas. The Court also [**527] makes the finding that the Defendant did, in the commission of the crime here today, threaten to cause serious physical [***21] harm to a person, thereby triggering the RVO.

All of that being said, the Court needs to have the Defendant review once again the written plea of no contest form, make sure you still want to enter that plea based upon the findings here today. * * * Sign the document only if you still want to plead no contest.

[DEFENSE COUNSEL]: Your Honor, Mr. Wilson has signed the written plea of no contest and I have signed it as well confirming that he has signed it. And I have discussed it and reviewed it with Mr. Wilson prior to Court as well.

* * *

THE COURT: * * * Finding the pleas to have been knowingly, intelligently, and voluntarily made, I will accept the no contest pleas that have both been made orally and in writing here in open Court today. With the findings and the reasons previously stated by the Court, I will find the Defendant guilty of the crime of robbery in violation of 2911.02(A)(2) of the Revised Code, a felony of the second degree as set forth in Count 2 of the indictment. I will also find him guilty of the repeat violent offender specification associated with Count 2 of the indictment as well.

[*P78] HN8 A "threat" intimidates or causes the victim to be afraid. Dayton v. Dunnigan, 103 Ohio App.3d 67, 71, 658 N.E.2d 806 (2d Dist.1995). Further, a threat may be express or implied. State v. Terzo, 12th Dist. Butler No. 2002-08-194, 2003-Ohio-5983, ¶18.

[*P79] As indicated [***22] above, the robbery note appellant gave the teller said, "I have a Loaded Gun on me." The word "loaded" is in bold print, highlighted to stand out from the other type. Further, the note said, "I really don't want to hurt you, so Please: No Die (sic) Packs, No Silent Alarms, No Bait Money, No GPS." By pleading no contest and admitting he gave the teller a note saying he had a loaded gun and he would hurt her with it if necessary, appellant cannot dispute the note contained a threat that he would cause the teller serious physical harm if she did not comply with his demands.

[*P80] Appellant argues the note was not a threat because it said he did not want to hurt the teller. However, considering this phrase in context, he said that if she did not obey his instructions, he would hurt her.

[*P81] Further, appellant argues there was no evidence of a threat to cause serious physical harm because no evidence was presented that, during the robbery, he had a gun on him. However, the statement in appellant's note that "I have a Loaded Gun on me" was direct evidence he had a gun.

[*P82] Based on appellant's no contest plea and his stipulation to the indictment and the explanation of circumstances, the record supports [***23] the trial court's finding that appellant threatened to cause serious physical harm.

[*P83] Appellant also makes an Apprendi argument, arguing the trial court erred in sentencing him on the RVO specification after making a factual finding that a jury did not find and he did not admit, in violation of his right to a jury trial, pursuant to State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellant is again referring to the court's finding that he threatened to cause serious physical harm. However, appellant's argument lacks merit because he waived his right to a jury trial on this issue and he admitted [**528] all facts necessary to allow the court to find he was a repeat violent offender.

[*P84] Appellant concedes that he failed to raise an Apprendi argument in the trial court; that he thus waived it; and that this court is limited to reviewing this issue for plain error.

[*P85] In State v. Hunter, 123 Ohio St. 3d 164, 2009-Ohio-4147, 915 N.E.2d 292, the trial court designated the defendant as a repeat violent offender based on his stipulation that he had a prior conviction for felonious assault with a specification that he caused "physical harm" (as required by the former version of the RVO statute). Hunter argued he had a right to have the jury make those findings. However, the Court in Hunter held that the court did not [***24] violate his right to a jury trial because: (1) Hunter waived his right to a jury trial, and (2) he stipulated to the facts necessary for the RVO specification.

[*P86] First, with respect to waiver, Hunter's case was tried to a jury, but he waived his right to a jury trial on the RVO specification. After the jury found appellant guilty of felonious assault, the court held a bench trial on the specification. The Supreme Court held that because Hunter chose to submit the RVO determination to the trial court, he waived any right he had to have the jury make this finding. Id. at ¶31.

[*P87] Here, in pleading no contest to the specification, appellant waived his right to a jury on that issue and essentially asked the court to determine the specification based on his admission of the truth of the facts alleged in the indictment and contained in the prosecutor's statement of facts.

[*P88] Second, the Hunter Court held that since Hunter admitted all facts necessary for the court to designate him as a repeat violent offender, including that he caused physical harm to the victim, the trial court did not need to conduct fact-finding and no Sixth Amendment violation occurred. Id. at ¶33.

[*P89] The dissent maintains that, although appellant [***25] admitted the truth of the prosecutor's statement of facts regarding his current conviction, the trial court should not have accepted those facts in enhancing his sentence. While the Supreme Court in Hunter upheld the trial court's acceptance of the defendant's stipulation to the facts of his prior conviction, the dissent suggests Hunter does not apply here because appellant stipulated to the facts of his current conviction. However, nothing in Hunter suggests a trial court may not accept a defendant's stipulation to the facts of his current conviction. It is important to note that, HN9 while judicial fact-finding for sentence enhancement is expressly limited to the facts of a prior conviction, stipulations (which also obviate the need for a jury) are not. Id. at ¶29.

[*P90] This court, in State v. Payne, 11th Dist. Lake No. 2004-L-118, 2005-Ohio-7043, held that HN10 in order to be constitutionally permissible under Apprendi, "any fact, other than a prior conviction, must be determined by a jury or admitted by the appellant." (Emphasis added.) Id. at ¶114. Thus, any fact other than a prior conviction that is found by a jury or admitted by the defendant complies with Apprendi, regardless of whether it relates to [***26] a prior or current conviction.

[*P91] In Payne, this court said it was the trial court's findings as to the seriousness of the defendant's current conviction (per the former statute) that enhanced his sentence under the RVO specification, and these findings "should have been decided by a jury (if appellant did not admit them, which he did not)[.]" Id. at ¶116. Thus, this court implied that if a defendant admits [**529] the necessary findings regarding his current conviction, those findings need not be made by a jury.

[*P92] HN11 "'A stipulation, once entered into and * * * accepted by the court, is binding upon the parties and is a fact deemed adjudicated * * *.'" State v. Carr, 2d Dist. Montgomery No. 23826, 2010-Ohio-6470, ¶12, quoting 89 Ohio Jurisprudence 3d, Trial, Sec. 61. Thus, for RVO purposes, it makes no sense to draw a distinction between stipulations regarding the facts of a prior conviction and the facts of a current conviction. Once the defendant admits the facts recited by the prosecutor supporting a conviction, either prior or current, those facts are no longer in dispute. As the Court in Hunter said, where the

defendant stipulates "to all the facts necessary for the trial court to designate him as a repeat violent offender," "the trial court ha[s] no need to conduct fact-finding * * * and no Sixth Amendment violation [***27] occurred * * *." Hunter at ¶32-33. That is exactly what happened here.

[*P93] The dissent's reliance on this court's decision in Payne, supra, in which this court held that the trial court violated Apprendi, is misplaced as the facts in Payne are distinguishable. Payne's case was tried by a jury, which found him guilty of the underlying offenses. At sentencing, the court enhanced the defendant's sentence based on the court's findings - from the testimony presented - that Payne caused physical harm in his prior conviction and serious physical harm in his current conviction, per the former RVO statute. Id. at ¶107-108. Payne did not waive the jury as to the specification and did not stipulate to the necessary findings, and this court properly held the trial court's fact-finding regarding his prior and current convictions violated Apprendi. Payne at ¶114.

[*P94] In contrast, here, appellant pled no contest to robbery and the specification, thus waiving the jury as to both, and admitted all facts necessary for the RVO specification as recited in the prosecutor's statement of facts. Before pleading, appellant told the court he would be admitting (1) the facts alleged in the indictment and (2) the facts to be presented [***28] by the prosecutor. Before hearing from the prosecutor, the court advised appellant, and he said he understood, that "there needs to be a finding, which would be today, that you threatened serious physical harm to the victim * * *." After the court notified him of this element, appellant said he was (1) voluntarily pleading no contest to robbery and the specification and (2) asking the court to accept his plea.

[*P95] Then, during the prosecutor's statement of facts, he said appellant handed the robbery note to the teller. In that note, appellant informed her that he had a loaded gun on him and indicated he would hurt her with it unless she followed his demands. After hearing the facts as outlined by the prosecutor, appellant admitted they were true. He thus essentially admitted he threatened to cause the teller serious physical harm. Appellant again asked the court to accept his plea. The court then found that appellant threatened to inflict serious physical harm on the teller, thus triggering the RVO statute.

[*P96] After making this finding, the court instructed appellant to again review the plea form to make sure he still wanted to plead based on the court's findings and to only sign the form [***29] if that was still his wish. After again reviewing the form with his attorney, appellant signed it, and the court found him guilty of robbery and the RVO specification.

[*P97] Since appellant waived his right to have the jury try the specification and [**530] admitted all facts necessary to enhance his sentence as an RVO, the trial court did not commit plain error in sentencing him.

[*P98] For his third and final assigned error, appellant alleges:

[*P99] "The trial court erred by sentencing the defendant-appellant to a maximum, eight-year prison sentence for robbery."

[*P100] Appellant concedes the trial court was required by R.C. 2929.14(B)(2)(b) to impose the longest possible prison term for his robbery offense (eight years) because the court also imposed a prison term for the RVO specification. He also concedes the trial court was not required to make any particular findings before imposing a maximum sentence and that, in imposing such sentence, the court was only required to consider the sentencing factors in R.C. 2929.11 and R.C. 2929.12. However, he argues that because, in his view, the court's finding that he threatened to cause serious physical harm (as to the RVO specification) was contrary to law, the eight-year term for robbery should also be vacated due [***30] to the court's alleged errors in imposing that sentence.

[*P101] First, appellant argues the court erred in finding that the teller suffered serious psychological harm per R.C. 2929.12(B)(2) because, in his view, that finding was not supported by the record. However, in considering this seriousness factor, the trial court stated:

There was also serious psychological harm caused to the teller. Certainly, even though I don't have a written victim impact statement, I can imagine receiving the note * * * and the fear, the terror, [and] the concern for one's life and * * * well-being * * *. So I do find that there was serious psychological harm.

[*P103] The trial court thus found that serious psychological harm was a natural consequence of appellant giving the teller the note during the robbery.

[*P104] Further, appellant's own words at sentencing helped prove the psychological harm his actions caused the teller when he stated: "I do realize that my actions have caused a negative impact on [the tellers'] lives * * *."

[*P105] Second, appellant argues that the trial court erred in finding that no less seriousness factors were present because appellant said at sentencing that he did not intend to harm the teller. Appellant argues this comment [***31] supported the less serious factor in R.C. 2929.12(C)(3) (that the offender did not expect to cause physical harm). However, HN12 "[a] trial court is not required to give any particular weight * * * to a given set of circumstances; it is merely required to consider the statutory factors * * *." State v. DelManzo, 11th Dist. Lake No. 2007-L-218, 2008-Ohio-5856, ¶23. Thus, despite appellant's comment at sentencing, the court was not required to give it any weight. The trial court was able to observe appellant while testifying and, in finding that no less serious factors were present, the court, as the trier of fact, obviously found appellant's comment lacked credibility.

[*P106] Based on our review of the record, the court considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness factors in R.C. 2929.11 in imposing appellant's sentence. We therefore hold appellant's maximum sentence for robbery was not contrary to law.

[*P107] For the reasons stated in this opinion, the assignments of error are overruled. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

[**531] DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part, with a Concurring/Dissenting [***32] Opinion.

Concur by: TIMOTHY P. CANNON (In Part)

Dissent by: TIMOTHY P. CANNON (In Part)

Dissent

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

[*P108] I dissent from the majority's opinion as it relates to appellant's second assignment of error, which asserts the trial court erred in its imposition of sentence on the repeat violent offender specification. The assignment of error has merit.

[*P109] When a repeat violent offender specification is properly alleged in an indictment, it is the trial court's duty to initially determine the issue of whether an offender should be designated a repeat violent offender ("RVO"). R.C. 2941.149(B). In State v. Hunter, the case cited by the majority in support of its holding, the defendant waived his right to a jury trial regarding the RVO specification to an indicted charge of felonious assault. 123 Ohio St. 3d 164, 2009-Ohio-4147, ¶5. The specification was bifurcated from the felonious assault charge, and the specification was tried to the bench. Id. At that time, former R.C. 2929.01(DD) identified the findings the trial court was required to make when determining whether an offender should be designated an RVO; those findings related to the nature of the offender's previous convictions and the nature of the current offense. See id. at ¶12-20.

[*P110] [***33] The defendant in Hunter stipulated that, during the commission of his previous felonious assault conviction, he caused physical harm to the victim and had served a prison sentence on that previous conviction—factual findings required under former R.C. 2929.01(DD)(2)(a). Id. at ¶32. The trial court accepted this stipulation and designated the defendant an RVO. Id. at ¶29. On appeal, the defendant challenged his RVO designation on the basis that it violated his Sixth Amendment right to have a jury make the findings in former R.C. 2929.01(DD)(2)(a). Id.

[*P111] The Ohio Supreme Court held: "When designating an offender as a 'repeat violent offender' pursuant to former R.C. 2929.01(DD), a trial court does not violate the Sixth Amendment by considering relevant information about the offender's prior conviction that is part of the judicial record." Id. at paragraph two of the syllabus (emphasis added), following Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). The Supreme Court's entire Hunter opinion related to the appropriateness of judicial factfinding only as it related to judicial records of prior convictions. It supported its holding with the following analysis: "Significantly, the Sixth Amendment does not limit a sentencing court's consideration to the existence of a prior conviction. On the contrary, the United States Supreme Court has held that courts may consider the information contained in court documents that are related to the prior conviction." Id. at ¶36 (emphasis sic). "[T]he Sixth Amendment does not bar judicial consideration of a defendant's prior convictions at sentencing because '"recidivism * * * is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."'" Id. at ¶35 (emphasis added), quoting Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), quoting Almendarez-Torres v. United States, 523 U.S. 224, 244, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[*P112] The majority opinion erroneously [***34] applies the holding in Hunter to the case sub judice, the facts of which are inapposite. Appellant herein challenges the trial court's factual finding of "serious physical harm" as it relates to appellant's [**532] current offense, not his prior convictions, and as it relates to his RVO sentencing enhancement, not his designation as an RVO.

[*P113] Former R.C. 2929.01(DD) has been rewritten and is now located at R.C. 2929.01(CC). The findings the trial court must make in order to designate an offender an RVO no longer include any finding related to "physical harm" or "serious physical harm."

[*P114] A finding of "serious physical harm" now becomes necessary only after the trial court has designated the offender an RVO and the matter is before the court for imposition of an enhanced penalty due to that designation. R.C. 2929.14(B)(2)(b). Even then, a finding of "serious physical harm" is only required when the "offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is * * * any felony of the second degree that is an offense of violence[.]" R.C. 2929.14(B)(2)(b)(iii). And, even then, only if "the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted [***35] in serious physical harm to a person." Id.

[*P115] "Both the United States and Ohio Supreme Courts have explained that the historical role of the jury in finding facts necessary to convict or increase a sentence range is protected by the Sixth Amendment." State v. Oller, 10th Dist. Franklin No. 16AP-429, 2017-Ohio-814, ¶45, 85 N.E.3d 1135, citing Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009); United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); Apprendi and Hunter, supra; and State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470.

[*P116] The factfinding relative to the "serious physical harm" component of R.C. 2929.14(B)(2)(b) therefore violates the Sixth Amendment if made by the trial court, as opposed to the jury. See State v. Bishop, 5th Dist. Stark No. 2014CA00190, 2015-Ohio-3023, ¶19-21. In reaching this conclusion, the Fifth District followed the holding in Smith v. Petkovich, 562 F.Supp.2d 912, 922 (N.D. Ohio 2008), which explains:

The holding in Apprendi established that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' 530 U.S. at 489. [Petitioner] received the statutory maximum of eight years for felonious assault. That the trial court then resorted to judicial factfinding to establish a separate additional sentence of nine years predicated on the Petitioner's repeat offender status and the assignment of the eight year statutory maximum for felonious assault, clearly marks the additional sentence as unconstitutional under Apprendi. Accordingly, [***36] [Petitioner's] independent nine-year sentence is contrary to clearly established federal law and he is entitled to habeas relief on the merits.

[*P117] Of course, as the majority notes, "'nothing prevents a defendant from waiving his Apprendi rights [to a jury determination of every element of the charge].'" Hunter, supra, at ¶30, quoting Blakely, supra, at 310. "[W]hile the Sixth Amendment generally prohibits judicial fact-finding, there is an 'exception for prior criminal convictions and the defendant's consent to judicial fact-finding.'" [**533] Id. (emphasis sic), quoting Foster, supra, at ¶7.

[*P118] Here, however, appellant's no contest plea should not be construed as his consent to judicial factfinding on this issue. For the following reasons, the majority errs in holding otherwise.

[*P119] A no contest plea admits only the truth of the facts alleged in the indictment. Crim.R. 11(B)(2). Appellant pled no contest to robbery, a second-degree felony of which "serious physical harm" is not an element. The indictment did not allege "serious physical harm" in the robbery count or in the attached RVO specification. Therefore, not even a jury would have been permitted to find that appellant threatened "serious physical harm" to the victim under that count. As such, the trial court violated appellant's [***37] right to procedural due process. See, e.g., Russell v. United States, 369 U.S. 749, 763-764, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (citations omitted).

[*P120] The error in this case was further compounded by the trial court's decision to act as the trier of fact in order to make that factual finding, which was neither alleged in the indictment nor admitted to by appellant, for purposes of penalty enhancement. This amounted to a violation of appellant's Sixth Amendment rights.

[*P121] The trial court was only permitted to enhance appellant's sentence relative to the RVO specification if a trier of fact found appellant's actions threatened, attempted, or resulted in "serious physical harm" to the victim. See State v. Brown, 10th Dist. Franklin Nos. 10AP-836 & 10AP-845, 2011-Ohio-3159, ¶23, fn. 2 (holding the trial court properly enhanced the defendant's sentence for second-degree felony robbery only because the indictment for the attached RVO specification alleged "serious physical harm" and the jury instructions for the robbery count included a finding of "serious physical harm"); State v. Davis, 7th Dist. Mahoning No. 08 MA 152, 2009-Ohio-5079, ¶36 (holding that, although the defendant may have in fact threatened to cause serious physical harm to the robbery victims, only the trier of fact was permitted to make such a finding for purposes [***38] of penalty enhancement). A trial court, however, does not try facts at a plea hearing; it simply determines whether there is a sufficient factual basis to support a plea to the indicted charge.

[*P122] Contrary to the majority's assertion, this holding is further supported by this court's opinion in State v. Payne, 11th Dist. Lake No. 2004-L-118, 2005-Ohio-7043. Under the RVO statute at that time, the trial court was required, inter alia, to make an independent, judicial finding that "serious physical harm" occurred, or had been attempted, in the current conviction. Id. at ¶106, citing former R.C. 2929.01(DD). This court held that the trial court's finding of "serious physical harm," as it related to the current conviction, went "beyond what is constitutionally permissible under Apprendi and Blakely; i.e., any fact, other than a prior conviction, must be determined by a jury or admitted by the appellant." Id. at ¶114 (emphasis sic). We held the defendant's constitutional rights, as set forth in Apprendi, Blakely, and Booker, were violated even though, at the time, the finding of "serious physical harm" was required when initially designating a defendant an RVO. Id. at ¶113. A constitutional violation is even more apparent [***39] when, as here, the trial court acts as the trier of fact under the current statutory scheme, because this finding must now be applied at the sentencing phase to enhance the penalty of a defendant who has already been designated an RVO. See, e.g., State v. Payne, 11th Dist. Lake No. 2006-L-272, [**534] 2007-Ohio-6740, ¶76, citing Payne, 2005-Ohio-7043, at ¶104 (Grendell, J., concurring and dissenting) (recognizing the RVO designation and RVO sentence as distinct issues: "[T]he factfinding required before the imposition of additional penalties is separate and distinct from the factfinding required to determine an offender's status as a repeat violent offender. An offender may be determined to be a repeat violent offender without suffering the imposition of additional penalties."); see also id. at ¶63-64 (Cannon, J., concurring) (recognizing the distinction between judicial factfinding for sentencing purposes as opposed to judicial factfinding for designation purposes, the latter of which is now completely "capable of determination by public record of a prior conviction").

[*P123] At no time did appellant ever admit to threatening "serious physical harm" nor was it alleged in the indictment to which he pled no contest. To suggest there was an admission [***40] or stipulation of "serious physical harm" is a complete distortion of the record. Even the trial court understood that appellant had neither admitted nor stipulated to "serious physical harm," which is why the court stated it was required to make this finding "as the trier of fact." Again, a trial court does not try facts at a plea or

sentencing hearing. Nevertheless, the court stated: "And again there needs to be a finding, which would be today, that you threatened serious physical harm to the victim in this particular case as well, or inflicted physical harm. Having sat through some earlier hearings, I think it was the threat of physical harm that's the real issue." It is also noteworthy that the trial court, in its initial statement of findings, concluded: "The Court specifically finds * * * [appellant] did threaten to inflict physical harm on the employee of Buckeye State Credit Union by virtue of the written letter[.]" However, the court subsequently stated: "The Court also makes the finding that the Defendant did, in the commission of the crime here today, threaten to cause serious physical harm to a person, thereby triggering the RVO."

[*P124] Appellant did admit to certain facts as [***41] presented by the prosecutor, e.g., that he handed a note to the teller indicating he was carrying a firearm. The majority is suggesting that because those facts may be sufficient to support a finding of "serious physical harm," the trial court was permitted to act as the trier of fact and enhance appellant's sentence accordingly. On that basis, the trial court could find appellant guilty of anything, regardless of the indictment or plea, based on a prosecutor's statement. Further, a statement of facts by a prosecutor in the face of a no contest plea does not constitute evidence. See State v. Magnone, 2d Dist. Clark No. 2015-CA-94, 2016-Ohio-7100, ¶46, 72 N.E.3d 212, citing State v. Green, 81 Ohio St.3d 100, 104, 1998- Ohio 454, 689 N.E.2d 556 (1998). Thus, although appellant admitted to the facts as presented by the prosecutor at his plea hearing, that does not equate to an admission or stipulation to the characterization of those facts as threatening "serious physical harm." The trial court was not permitted to find that those facts equated to "serious physical harm" in order to enhance appellant's sentence. See Apprendi, supra, and its progeny.

[*P125] The majority opinion completely mischaracterizes and distorts what is stated in this dissent. The distinction between (a) factual findings that were properly made in a case already concluded, of which a future [***42] court may take judicial notice, and (b) factual findings that must be made by a trier of fact in a case still pending before the court, has been explained herein and cannot be made more clear.

[*P126] [**535] To summarize, there are two serious flaws in this case. First, appellant never, at any time, admitted or stipulated to threatening "serious physical harm." The prosecutor never stated that appellant threatened "serious physical harm." Nevertheless, the trial court proceeded to make a factual finding based on the facts presented by the prosecutor. Second, that finding was made even though it was not alleged in the indicted count to which appellant pled no contest.

[*P127] Appellant's two-year sentence for the RVO specification should be vacated, and this matter should be remanded for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 09, 2022

Mr. Dawud Wilson
Marion Correctional Institution
P.O. Box 57
Marion, OH 43302-0057

Re: Case No. 21-3961, *Dawud Wilson v. Leon Hill*
Originating Case No.: 1:18-cv-02032

Dear Mr. Wilson,

The enclosed petition for rehearing en banc is being returned to you unfiled.

The court denied your motion or extension of time to file a petition for rehearing on April 25, 2022. Therefore, the petition is not accepted for filing.

This case is closed.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Stephanie Lynn Watson

APPENDIX E

AP

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 25, 2022

Mr. Dawud Wilson
Prisoner ID 680-903
P.O. Box 57
Marion, OH 43302

Re: Dawud Wilson
v. Leon Hill, Warden
Application No. 22A53

Dear Mr. Wilson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on July 25, 2022, extended the time to and including September 1, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob A. Levitan
Case Analyst

APPENDIX F

COUNT 2

On or about the 17th day of April, 2015, in the Township of Painesville, Lake County, State of Ohio, one **DAWUD WILSON**, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, attempt to inflict, or threaten to inflict physical harm on employee(s) of Buckeye State Credit Union and/or Kathleen Trivette.

This act, to-wit: **Robbery**, constitutes a Felony of the Second degree, contrary to and in violation of the Ohio Revised Code, Title 29 §2911.02(A)(2) and against the peace and dignity of the State of Ohio.

REPEAT VIOLENT OFFENDER SPECIFICATION § 2941.149 COUNT 2

The Grand Jurors further find and specify that **DAWUD WILSON** is a repeat violent offender, having been previously convicted on October 16, 2009 of three (3) counts of Aggravated Robbery, felonies of the first degree, in the Cuyahoga County Court of Common Pleas Case No. CR-09-524540-A and on October 16, 2009 of Aggravated Robbery, a felony of the first degree, in the Cuyahoga County Court of Common Pleas Case No. CR-09-525453-A.

COUNT 3

On or about the 17th day of April, 2015, in the Township of Painesville, Lake County, State of Ohio, one **DAWUD WILSON** did receive, retain, or dispose of certain property, being an Ohio motor vehicle license plate, GAU1214, the property of another, one Nick A. Scholtz, the said Dawud Wilson knowing or having reasonable cause to believe said property had been obtained through the commission of a theft offense.

Said property being listed in Section 2913.71 of the Revised Code.

This act, to-wit: **Receiving Stolen Property**, constitutes a Felony of the Fifth degree, contrary to and in violation of the Ohio Revised Code, Title 29 §2913.51(A) and against the peace and dignity of the State of Ohio.

PROSECUTING ATTORNEY

A TRUE BILL

This Bill of Indictment found upon testimony sworn and sent before the Grand Jury at the request of the Prosecuting Attorney.

Wendeline Densmore

GRAND JURY-FOREPERSON/DEPUTY

I certify this to be a full, true and correct copy of the original indictment, with the endorsements thereon, now on file in my office.

_____ *DEPUTY*

Maureen G. Kelly, CLERK OF COURTS

CFC/dmk May 29, 2015
(0014700)