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State v Scuba, 11th Dist. No. 2006-G-2713, 11/27/06 (7pp)

Ohio Criminal Rule 57

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JURISDICTIONAL STATEMENT

This case presents a crucial question for this Court's determination which affects a multitude of cases in Ohio: Whether a motion filed pursuant to Crim. R. 57(B) constitutes a direct attack, as held in **State v Bush** (2002) 96 Ohio St. 3d 235, or can be relabelled and misconstrued as a collateral attack as the lower courts attempt to do in this case, citing to the overruled portions of **State v Reynolds** (1997) 79 Ohio St. 3d 158.

As the question as to whether and to what extent a motion under a specific criminal rule should have been fully answered by this Court in **Bush**, but apparently, still confuses the lower courts, this case is ripe for review to answer the question conclusively, yet again, for the benefit of the lower courts so as to reconcile the lower courts with the constitution and the decisions of this Court.

This Court should accept jurisdiction over this case to resolve this question, permit full briefing and, ultimately, overrule the lower courts.

STATEMENT OF THE CASE

Appellant was convicted of one count each of aggravated robbery and felonious assault, with accompanying firearm specifications and was sentenced unlawfully to serve a ten year term on the aggravated robbery which carries a maximum term of three years, absent additional fact finding beyond those alleged in the indictment and proven beyond a reasonable doubt, along with a seven year term on the assault charge, also in excess of the two year statutory maximum term. Further, these sentences were unlawfully ordered to run consecutively based solely upon further judicial factfinding of facts not charged or proven.

This unlawful sentence was reversed on **Edmondson** grounds, (**State v Edmondson** (1999) 86 Ohio St. 3d 324) and, on resentencing, the trial court reimposed the unlawful term on the assault charge, substituted an unlawful nine year term for the prior unlawful ten year term, and unlawfully ran the sentences consecutively again.

Appellant completed the direct appeal process, exhausted all state remedies, and his federal habeas corpus proceedings remain pending at this time in the United States Court of Appeals for the Sixth Circuit.

Following the decision of this Court in **State v Foster** (2006) 109 Ohio St. 3d 1 wherein the **Blakely v Washington** (2004) 542 U.S. 296 was finally applied to Ohio's sentencing scheme, Appellant presented a direct attack upon his unlawful sentence in the trial court, which attempted to unlawfully convert it to a post-conviction petition and denied relief on June 6, 2006. (The Motion was filed May 19, 2006). Timely appeal was taken to the Eleventh District Court of Appeals, which affirmed the trial court on

November 27, 2006. This timely appeal follows.

STATEMENT OF FACTS

The maximum available prison term for a felony of the first degree absent additional fact findings beyond those alleged in the indictment or found by a jury is three years, and two years for a felony of the second degree, by action of the mandatory language set forth in O.R.C. §2929.14(A) and (B), and the mandatory language set forth in O.R.C. §2929.14(E) requires a concurrent sentence. In **Blakely v Washington**, supra, the U.S. Supreme Court held that such a sentencing scheme requires the mandatory presumptive sentence to be imposed in the absence of properly alleged additional facts (under notice and opportunity to be heard grounds) and that such facts must be found by a jury beyond a reasonable doubt under Sixth Amendment grounds.

Appellant was unlawfully sentenced to serve nineteen years where his maximum available statutory sentence was six years (which adds three years for the firearm specification which must run consecutively by action of separate statute).

Appellant has served more than the maximum available prison term under an unlawful sentence.

PROPOSITION OF LAW NO. I:

A MOTION FILED PURSUANT TO CRIMINAL RULE 57(B) IS NOT A COLLATERAL ATTACK, BUT RATHER A DIRECT ATTACK AND THE RELIANCE BY THE COURT OF APPEALS UPON STATE V REYNOLDS (1997) 79 Ohio St. 3d 158 IS MISPLACED WHERE STATE V BUSH (2002) 96 Ohio St. 3d 235 IS CONTROLLING AS DISTINGUISHING REYNOLDS.

LAW AND ARGUMENT

Criminal Rule 57(B) provides a remedy where no other criminal rule specifically addressed a situation. In this case, there is no available criminal rule to deal with a direct attack upon an unlawfully imposed sentence. As such, Criminal Rule 57(B) is controlling. See, e.g. **Miller v Walton** (2005) 163 Ohio App. 3d 703, wherein the court held "Obviously, there must be a remedy, else anyone denied [a constitutional right] would simply be out of luck". (id at ¶16), citing **State v Lehrfield** 2004-Ohio-2277, 2004 WL 1043795 and **State v Harrison**, 2005-Ohio-4212; **State v Plassman**, 2004-Ohio-279, 2004 WL 103016.

In **State v Reynolds**, supra, this Court was faced with a case in which the pro se litigant filed an unnamed, untitled motion that did not invoke any specific rule of court, but generally appeared to challenge his conviction. The Court held, that, in such a case, it was appropriate for a trial court to consider such a pleading as a post conviction petition and treat it accordingly.

In **State v Bush**, however, this Court, when faced with a case in which the litigant properly invoked a specific criminal rule, held that it is improper for a trial court to convert the pleading to a post conviction proceeding.

Part of the determination was influenced by the desire of the

prosecutors, and an apparent willingness to acquiesce by the trial courts, to attempt to emplace the procedural barriers unique to post conviction petitions to as many challenges to unlawful convictions and sentences as possible thereby creating havoc in the courts. The **Bush** Court's decision appeared to clarify the law for the lower courts to follow but, as in the instant case, the lower courts appear to refuse to do so.

This Court should accept jurisdiction over this case and, ultimately, reverse.

PROPOSITION OF LAW NO. II:

A SENTENCE WHICH EXCEEDS THE STATUTORY MAXIMUM BASED UPON JUDICIAL FACT FINDINGS OF FACTS NOT ALLEGED IN THE INDICTMENT, ADMITTED BY THE DEFENDANT, OR FOUND BY A JURY BEYOND A REASONABLE DOUBT IS VIOLATIVE OF THE RIGHT TO A JURY AND DUE PROCESS OF LAW AND MUST BE REVERSED.

LAW AND ARGUMENT

In **Blakely v Washington**, supra, the Court held that facts which are used to enhance a sentence beyond the statutory maximum must be alleged in the indictment and proven beyond a reasonable doubt to a jury. In **State v Foster**, supra, this Court applied the **Blakely** doctrine to Ohio's sentencing scheme. Ohio law, as written, renders the maximum sentence for a first degree felony as three years, absent additional fact findings, and two years for a second degree felony. The law, as written, is mandatory on these points, as is the law requiring concurrent sentences.

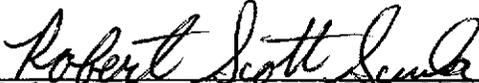
In **Foster**, this Court held that Ohio's statutes were unconstitutional and required reversal and remand for resentencing those cases which present a direct attack.

Appellant has presented a direct attack upon his unlawful sentence and the sentence must be reversed.

CONCLUSION

For any or all of the foregoing reasons, this Court should accept jurisdiction and reverse and Appellant so prays.

Respectfully submitted,


Robert S. Scuba, #359-073
Lebanon Corr. Inst.
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Appellant, in pro se

SERVICE

I hereby certfiy that a true copy of the foregoing was sent to the office of the Geauga County Prosecutor, 231 Main St., Chardon, Ohio 44024, via regular U.S. Mail, on this 6 day of December, 2006..


Robert S. Scuba
Appellant, in pro se

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS
NOV 27 2006
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2006-G-2713
ROBERT S. SCUBA, :
Defendant-Appellant. :

Criminal Appeal from the Court of Common Pleas, Case No. 97 C 000129.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Janette M. Bell*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Robert S. Scuba, pro se, Lebanon Correctional Institution, P.O. Box 56, Lebanon, OH 45036 (Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Robert S. Scuba, appeals the judgment entered by the Geauga County Court of Common Pleas. The trial court denied Scuba's motion to correct his sentence.

{¶2} In 1998, Scuba was convicted of aggravated robbery, in violation of R.C. 2911.01(A)(1), and felonious assault, in violation of R.C. 2903.11(A)(2). In addition, Scuba was convicted of accompanying firearm specifications for both convictions.

Scuba was originally sentenced to a ten-year term for the aggravated robbery conviction, a seven-year term for the felonious assault conviction, and a three-year term on the firearm specifications. These sentences were ordered to be served consecutively, resulting in an aggregate prison term of 20 years. Scuba appealed his convictions and sentences to this court. This court affirmed Scuba's convictions, but reversed his sentences and remanded the matter for resentencing.¹ The basis for the reversal was that the trial court failed to adequately state its reasons for imposing the maximum sentence for the aggravated robbery conviction.²

{13} Upon remand, the trial court resentenced Scuba to a nine-year term on the aggravated robbery conviction, a seven-year term on the felonious assault conviction, and a three-year term on the firearm specifications. These sentences were also ordered to be served consecutively, resulting in an aggregate prison term of 19 years. Scuba appealed the trial court's judgment to this court, and this court affirmed the judgment entry of sentence.³

{14} In May 2006, Scuba filed a "motion to correct unlawful sentence." The basis of Scuba's motion was that his sentence was unlawful in light of the Supreme Court of Ohio's decision in *State v. Foster*, which found certain portions of Ohio's sentencing statutes unconstitutional, because they mandated judicial factfinding.⁴ Specifically, the Supreme Court of Ohio declared portions of R.C. 2929.14, 2929.19, and 2929.41 unconstitutional, due to the statutes' requirement of judicial factfinding for the imposition of consecutive sentences or a sentence greater than the maximum

1. *State v. Scuba* (Nov. 5, 1999), 11th Dist. No. 98-G-2176, 1999 Ohio App. LEXIS 5232.

2. *Id.* at *16-18.

3. *State v. Scuba* (Mar. 29, 2002), 11th Dist. No. 2000-G-2308, 2002 Ohio App. LEXIS 1487, at *9.

4. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

sentence authorized based solely on facts found by the jury or admitted by the defendant.⁵

{¶5} The state filed a motion in opposition to Scuba's motion to correct his sentence. The state argued that the *Foster* decision only applied to cases then pending on direct review and that the decision did not apply to Scuba. The trial court denied Scuba's motion to correct his sentence.

{¶6} Scuba raises the following assignment of error:

{¶7} "The trial court erred as a matter of law in refusing to correct the unlawful sentence imposed in violation of the Sixth and Fourteenth Amendments, thereby violating the Due Process and Equal Protection Clauses and furthering the Sixth and Fourteenth Amendment violations."

{¶8} Scuba filed his motion pursuant to Crim.R. 57(B), which provides:

{¶9} "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

{¶10} In this matter, Scuba sought relief following his conviction. By definition, Scuba sought postconviction relief. As the Supreme Court of Ohio has stated:

{¶11} "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21."⁶

5. *Id.* at paragraphs one and three of the syllabus.

6. *State v. Reynolds* (1997), 79 Ohio St.3d 158, syllabus.

{¶12} Pursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed within 180 days of the date the trial transcript is filed with the court of appeals in the direct appeal.⁷ However, an exception to the 180-day rule is set forth in R.C. 2953.23, which provides, in part:

{¶13} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶14} “(1) Both of the following apply:

{¶15} “(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right.

{¶16} “(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶17} “(2) [This section concerns the petitioner being actually innocent of the

7. *State v. Savage*, 11th Dist. No. 2005-L-119, 2006-Ohio-3418, at ¶8.

crime as established by DNA evidence. It is not applicable to the case sub judice.]”

{¶18} Scuba’s motion was filed well beyond the 180-day time limit provided in R.C. 2953.21(A)(2). The record reveals the trial transcript was filed in his first appeal in October 1998. His motion for postconviction relief was filed in May 2006. Thus, we will address whether one of the exceptions set forth in R.C. 2953.23 applies to this matter.

{¶19} The exception delineated in subsection (A)(1)(a) does not apply to this matter. The additional rights described in *Blakely v. Washington*⁸ and *State v. Foster*⁹ do not apply to individuals in Scuba’s situation. Specifically, in *United States v. Booker*, the United States Supreme Court held that the *Blakely* Sixth Amendment holding applies to “all cases on direct review.”¹⁰ Similarly, the Supreme Court of Ohio, in applying the *Blakely* decision to Ohio’s sentencing scheme, instructed that cases “pending on direct review” be remanded for resentencing hearings.¹¹ Finally, this court and other appellate courts have limited the *Blakely* and *Foster* holdings to cases pending on direct appeal.¹² Scuba’s direct appeals of the trial court’s judgment entries were final at the time of the *Blakely* and *Foster* decisions. Thus, these holdings do not retroactively apply to individuals in Scuba’s situation.

{¶20} Moreover, the criteria in subsection (A)(1)(b) were not satisfied. This prong only concerns errors pertaining to the petitioner’s guilt or errors pertaining to the imposition of a death sentence. It does not apply to felony sentencing. Since subsections (A)(1)(a) and (A)(1)(b) of R.C. 2953.23 must both be satisfied for the

8. *Blakely v. Washington* (2004), 542 U.S. 296.

9. *State v. Foster*, supra.

10. *United States v. Booker* (2005) 543 U.S. 220, 267-268.

11. *State v. Foster*, at ¶104.

12. *State v. Savage*, 2006-Ohio-3418, at ¶14; *State v. Luther*, 9th Dist. No. 05CA008771, 2006-Ohio-2414, at ¶12; and *State v. Lipford*, 5th Dist. No. 2006CA00025, 2006-Ohio-4240, at ¶12.

exception to the 180-day period to apply, Scuba would not benefit from this exception, even if it could be argued that the *Blakely* and *Foster* holdings should be applied retroactively.

{¶21} Scuba's motion was filed outside of the statutorily mandated 180-day period for filing petitions for postconviction relief. Also, none of the exceptions set forth in R.C. 2953.23 apply to extend that time period. While the trial court did not elaborate or indicate its specific reasons for denying Scuba's motion, the trial court was not authorized to consider the motion due to its untimeliness.¹³ The trial court did not err by denying Scuba's motion to correct his unlawful sentence.

{¶22} Scuba's assignment of error is without merit.

{¶23} The judgment of the trial court is affirmed.

DIANE V. GRENDALL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.

13. *State v. Luther*, 2006-Ohio-2414, at ¶12.

STATE OF OHIO
COUNTY OF GEAUGA

)
FILED
)
IN COURT OF APPEALS

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

NOV 27 2006

STATE OF OHIO,

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

Plaintiff-Appellee,

JUDGMENT ENTRY

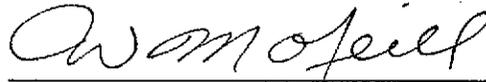
- vs -

CASE NO. 2006-G-2713

ROBERT S. SCUBA,

Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and order of this court that the judgment of the trial court is hereby affirmed.



JUDGE WILLIAM M. O'NEILL
FOR THE COURT

MB

12/056

At the time the action is commenced the clerk shall enter in the appearance docket the names, except as provided in Rule 6(E), of the parties in full, the names of counsel and index the action by the name of each defendant. Thereafter the clerk shall chronologically note in the appearance docket all: process issued and returns, pleas and motions, papers filed in the action, orders, verdicts and judgments. The notations shall be brief but shall show the date of filing and the substance of each order, verdict and judgment.

An action is commenced for purposes of this rule by the earlier of, (a) the filing of a complaint, uniform traffic ticket, citation, indictment, or information with the clerk, or (b) the receipt by the clerk of the court of common pleas of a bind over order under Rule 5(B)(4)(a).

(B) Files

All papers filed in a case shall be filed in a separate file folder and on or after July 1, 1986 shall not exceed 8 1/2 inches x 11 inches in size and without backing or cover.

(C) Other books and records

The clerk shall keep such other books and records as required by law and as the supreme court or other court may from time to time require.

(D) Applicability to courts not of record

In courts not of record the notations required by subdivision (A) shall be placed on a separate sheet or card kept in the file folder.

(Adopted eff. 7-1-73; amended eff. 7-1-85)

Crim R 56 [Reserved]

Crim R 57 Rule of court; procedure not otherwise specified

(A) Rule of court

(1) The expression "rule of court" as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and is filed with the Supreme Court.

(2) Local rules shall be adopted only after the court gives appropriate notice and an opportunity for comment. If the court determines that there is an immediate need for a rule, the court may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

(B) Procedure not otherwise specified

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure,

and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists. (Adopted eff. 7-1-73; amended eff. 7-1-94)

Crim R 58 Forms

The forms contained in the Appendix of Forms which the supreme court from time to time may approve are illustrative and not mandatory.

(Adopted eff. 7-1-73)

Crim R 59 Effective date

(A) Effective date of rules

These rules shall take effect on July 1, 1973, except for rules or portions of rules for which a later date is specified, which shall take effect on such later date. They govern all proceedings in actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(B) Effective date of amendments

The amendments submitted by the supreme court to the general assembly on January 10, 1975, shall take effect on July 1, 1975. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(C) Effective date of amendments

The amendments submitted by the supreme court to the general assembly on January 9, 1976 shall take effect on July 1, 1976. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(D) Effective date of amendments

The amendments submitted by the Supreme Court to the General Assembly on January 12, 1978 and on April 28, 1978, shall take effect on July 1, 1978. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(E) Effective date of amendments

The amendments submitted by the Supreme Court to the General Assembly on January 14, 1980, shall