

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Plaintiff-Appellee, :  
-vs- :  
JAMES R. LEASURE, :  
Defendant-Appellant. :

07 - 0246

Case No. \_\_\_\_\_  
6th Dist. No. CL 2005 1260

MEMORANDUM IN SUPPORT OF JURISDICTION

FOR APPELLANT:

James R. Leasure, #498-554  
Lebanon Corr. Inst.  
P.O.B. 56  
Lebanon, Ohio 45036-0056

Appellant, in pro se

FOR APPELLEE:

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## JURISDICTIONAL STATEMENT

This case presents substantial constitutional questions surrounding the interpretation of a comparison between a plea of no contest and a plea of guilty under **North Carolina v Alford** (1971) 400 U.S. 25 in terms of the extent to which the ability to appeal constitutional errors is affected. The Sixth District Court of Appeals discussed this question solely in the context of internal unpublished opinions, being able to cite to no published, controlling decisions from this or any other court.

A decision from this Court comparing an "Alford" plea with a no contest plea is warranted.

Further, This case presents a substantial constitutional question surrounding the limitations on law enforcement personnel to initiate contact with citizens without identifying themselves as law enforcement, displaying firearms, to use the reaction of the unknowing and unsuspecting citizen to initiate a faux "Terry stop" without any reasonable, articulable suspicion beyond the reactions of the citizen to the conduct of the unidentified officer.

Finally, this case presents a substantial constitutional question surrounding the extent to which a trial counsel's "trial tactics" insulates him from tactics foredoomed to failure in a pre-trial suppression hearing that would be dispositive of the case if successful, by failing to bring corroborative eye-witnesses which would have clearly swayed the admittedly marginal decision of the trial court.

This Court should accept jurisdiction over this case.

### STATEMENT OF THE CASE

Appellant was initially charged with four drug-related charges and one count each of felonious assault and assault on a peace officer. A pre-trial motion to suppress a post-arrest statement due to the arresting officers' violation of Appellant's constitutional rights was granted. A subsequent motion to suppress evidence relating to the drug charges was denied.

Appellant eventually agreed to an "Alford" plea to one count of felonious assault (victim Police Officer) and one count of attempted possession of cocaine, felonies of the first and second degree, respectively. On July 5, 2005, Appellant was sentenced to serve three years on the felony I and five years on the drug felony, said terms ordered to be served consecutively.

Timely appeal was taken to the Sixth District Court of Appeals, which ruled that Appellant's Fourth Amendment claim and related ineffective counsel claim were waived due to the plea, and reversed and remanded the imposition of consecutive terms, on January 12, 2007. This timely appeal follows.

### STATEMENT OF FACTS

On April 27, 2004, a house trailer on Dorr Rd. in Toledo was under surveillance by a drug task force and members of the Toledo Police Dept. and the Sylvania Twp. Police. Detective Judge from Sylvania Twp. testified at the suppression hearing that he had been conducting surveillance and saw a Cadillac leave the area, and he and his partner, Officer Jones from Toledo, decided to follow it. The pair followed the car into a Springfield Twp. neighborhood and watched it pull into a driveway, which was next door to Appellant's mother's home. Judge, in plain clothes, wearing

jeans and a Carhartt jacket, and driving an unmarked SUV, blocked the driveway and, upon Appellant exiting the Cadillac, drew his weapon and threatened Appellant with it, without identifying himself as a police officer. His badge was on a chain around his neck, under his coat and he admitted never displaying or showing it to Appellant.

Appellant then got back into his vehicle and drove through the grass to the road to avoid the clear threat presented by the unknown stranger pointing a gun at him. The two officers followed Appellant and boxed him in at an intersection, whereupon Judge, weapon again drawn and without identifying himself as an officer, jumped out of his car and attempted to wrench Appellant's car door open, whereupon Appellant drove off, apparently running over Judge as he attempted to get away. Jones followed Appellant and arrested him, severely injuring him in the process, requiring hospitalization. Officer Judge sustained no permanent or serious injuries and was able to return to duty.

No traffic violations were cited against Appellant at any time. Subsequent to his arrest, drugs were allegedly found in his possession.

Following his arrest, the arresting officers disregarded his Miranda rights and elicited statements which were subsequently suppressed.

Several witnesses to the events in question were identified at the suppression hearing, but trial counsel called none of them. The trial court reluctantly overruled the motion to suppress the drug evidence, due to counsel's failure to bring the witnesses.  
\*(Appellant)

PROPOSITION OF LAW NO. I:

AN "ALFORD" PLEA IS TREATED SIMILARLY TO A PLEA OF  
NO CONTEST WHICH DOES NOT ACT AS A WAIVER OF AN  
ANTECEDENT FOURTH AMENDMENT CLAIM.

LAW AND ARGUMENT

Although Rule 11 does not directly address the issue of an Alford plea, such pleas are treated similarly to the no contest plea and accepted only if in the interest of effective administration of justice. 35 Geo. L. J. Ann. Rev. Crim. Proc. (2006) at 390, citing Fed. R. Crim. P. 11(f) advisory committee's note (1974 Amendment). While a guilty plea operates as a waiver of alleged errors by a trial court in not suppressing evidence, See **State v Elliott** (1993) 86 Ohio App. 3d 792, a plea of no contest does not so operate. See, e.g. **City of Huber Heights v Duty**(1985) 27 Ohio App. 3d 244, Syllabus. ("Unlike a plea of no contest, plea of guilty operates as a waiver of claimed errors of the trial court in failing to suppress evidence." (id, emphasis added) The Syllabus of the Court in **Duty**, under the doctrine of expressio unis est exclusion alterius, mandates that a no contest plea does not operate as a waiver of a fourth amendment claim.

In **Haring v Prosise** (1983) 462 U.S. 306, the Court held that a plea, even of guilty, in a state court proceeding, did not constitute a waiver of an antecedent Fourth Amendment claim and the defendant was not precluded from bringing either §1983 claims or habeas corpus claims based thereupon.

In this case, the court of appeals failed to consider the "Alford" plea as tantamount to a no contest plea and improperly emplaced a waiver of the right to appeal the suppression decision

by the trial court, which was dispositive of the case.

A review of the record of the suppression hearing demonstrates that Appellant was entitled to have the evidence suppressed based upon the relevant law and facts and the trial court erred as a matter of law in failing to do so, as well as abused its discretion with an unreasonable decision. See, e.g. **State v Adams** (1980) 62 Ohio St. 2d 151.

The Court of Appeals' treatment of this issue as waived is clearly erroneous and this Court should accept jurisdiction.

**PROPOSITION OF LAW NO. II:**

WHERE A CITIZEN IS APPROACHED BY AN UNIDENTIFIED LAW ENFORCEMENT OFFICER WHO DISPLAYS A FIREARM, FAILS TO IDENTIFY HIMSELF AS LAW ENFORCEMENT AND CHASES THE CITIZEN WHO PRUDENTLY DEPARTS FROM THE PERCEIVED THREAT, IT IS NEITHER A CONSENSUAL ENCOUNTER NOR A LEGITIMATE "TERRY" STOP AND ANY EVIDENCE THUS UNCONSTITUTIONALLY OBTAINED MAY NOT BE USED AT TRIAL.

**LAW AND ARGUMENT**

In this case, the evidence adduced at the suppression hearing was undisputed in demonstrating that officer Judge never identified himself as an officer, approached Appellant after following him, with his firearm displayed, and chased after Appellant when Appellant prudently left the area. After boxing Appellant in in traffic, again Judge approached Appellant's vehicle, without any identification of himself as law enforcement, again with his weapon displayed, whereupon Appellant again left the area of the perceived threat, inadvertantly injuring Judge,

During the subsequent arrest, Appellant was severely injured, and following the formal arrest, his rights under Miranda were admittedly disregarded by the officers.

A consensual encounter between law enforcement and a citizen requires, of necessity, the knowledge on the part of the citizen that he is being approached by law enforcement, in order to relieve the officer of his burden to have probable cause or a reasonable articulable suspicion that criminal activity is afoot. See **Illinois v Wardlow** (2000) 528 U.S. 119; **Florida v Royer** (1982) 460 U.S. 491. Otherwise, such an encounter is investigatory and requires a reasonable articulable suspicion of criminal activity. **Terry v Ohio** (1968) 392 U.S. 1. The final type of police-citizen contact involves an actual arrest which requires probable cause to detain the citizen. **Wong Sun v U.S.** (1963) 371 U.S. 471, **Wolf v Colorado** (1949) 338 U.S. 25.

In this instance, the state's position asserted that the initial encounter was "consensual" despite the dearth of any evidence to even suggest that Officers Judge or Jones ever identified themselves as police, until the eventual actual arrest of Appellant. (and the subsequent beating Appellant took)

The trial court erred as a matter of law in failing to suppress the evidence obtained as a result of the unreasonable search and seizure in this case and reversal is required.

The proper suppression of the evidence unconstitutionally obtained in this case would have disposed of the majority, if not all of the charges against Appellant and would have alleviated the necessity to enter a no contest plea under **Alford**.

The Court of Appeals' determination that this issue was waived was incorrect, as waiver requires the intentional relinquishment of a known right, **U.S. v Olano** (1993) 507 U.S. 725; **Johnson v Zerbst** (1938) 304 U.S. 458, which was not present in this case.

PROPOSITION OF LAW NO. III:

WHERE TRIAL COUNSEL FAILS TO BRING EYEWITNESSES WHO WOULD CORROBORATE THE DEFENSE'S POSITION IN A CLOSE-CASE SUPPRESSION PROCEEDING, AND THE EYEWITNESS TESTIMONY HOLDS A REASONABLE PROBABILITY OF AFFECTING THE VERY CLOSE CALL MADE BY THE TRIAL COURT, SUCH COUNSEL IS INEFFECTIVE, WITHIN THE MEANING OF THE CONSTITUTION.

LAW AND ARGUMENT

Where counsel in a criminal case makes errors so serious as to render such counsel ineffective, and the defense is prejudiced thereby, such counsel is constitutionally ineffective and reversal is required. **Strickland v Washington**(1984) 466 U.S. 668. While counsel is afforded wide deference to pursue trial tactics, where such tactics are "foredoomed to failure" they are not immune from constitutional scrutiny. **State v Kole** (2001) 92 Ohio St. 3d 303.

In this case, several eyewitnesses were identified during the suppression proceedings, all of whom were asserted to be corroborative of the defense's position, yet counsel inexplicably did not present the witnesses' testimony. The testimony of Judge and Jones, claiming that they had not fully blocked the driveway, and that Judge had, in fact, identified himself as police were ludicrous given the state of the evidence, but would have been completely eviscerated by the testimony if disinterested witnesses. A review of the trial court's decision on the suppression issue demonstrates clearly how close of a call it appeared to be for the Court and there is no question but that the witnesses would have swayed the decision favorably to the defense.

Had counsel not been ineffective, the unconstitutional evidence would have been suppressed and the results of the proceed-

ings would have been different. **Lockhart v Fretwell**(1993) 506 U.S. 364.

The Court of Appeals' decision that this issue is waived is clearly erroneous because, as noted above, there is no demonstration of the intentional relinquishment of a known right. **Olano**, *supra*, and **Zerbst** *supra*.

**CONCLUSION**

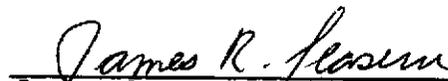
For the foregoing reasons, this Court should accept jurisdiction, permit full briefing and, ultimately, reverse, and Appellant so prays.

Respectfully submitted,

  
James R. Leasure, #498-554  
Lebanon Corr. Inst.  
P.O.B. 56  
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Appellant, in pro se

**SERVICE**

I hereby certify that a true copy of the foregoing was sent to the office of the Lucas County Prosecutor, 700 Adams St., Toledo, Ohio 43624, via regular U.S. Mail, on this 5 day of February, 2007.

  
James R. Leasure  
Appellant, in pro se

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-05-1260

Appellee

Trial Court No. CR-2004-1943

v.

James R. Leasure

**DECISION AND JUDGMENT ENTRY**

Appellant

Decided: January 12, 2007

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Brad A. Smith, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

\* \* \* \* \*

SKOW, J.

{¶ 1} This cause comes on appeal from the Lucas County Court of Common Pleas. Appellant, James R. Leasure, entered a plea pursuant to *North Carolina v. Alford* (1970) 400 U.S. 25, to charges of felonious assault, a felony of the first degree and a violation of R.C. 2903.11(A)(2), and attempted possession of crack cocaine, a felony of the second degree and a violation of R.C. 2923.02 and R.C. 2925.11(A), (C)(4)(e).

Appellee entered a nolle prosequi to four other charges, including possession of cocaine, trafficking in cocaine, and assault. After a sentencing hearing, the trial court imposed a term of three years incarceration for felonious assault and five years incarceration for attempted possession of crack cocaine. The terms were ordered to run consecutively for a total term of eight years incarceration.

{¶ 2} Appellant timely appealed and now sets forth three assignments of error:

{¶ 3} "I. The trial court erred in not granting Leasure's motion to suppress because the consensual encounter with him became a detention without probable cause or a reasonable articulable suspicion.

{¶ 4} "II. Leasure received ineffective assistance of counsel at the suppression hearing which materially affected the outcome.

{¶ 5} "III. Leasure's sentence was unconstitutional under *Foster* because the trial court made findings of fact in imposing consecutive sentences that were not the minimum available."

{¶ 6} The state contends that a guilty plea, including a plea entered pursuant to *Alford*, waives all appealable errors except those errors precluding a knowing, intelligent and voluntary guilty plea, citing our decision in *State v. Pringle* (June 30, 1999), 6th Dist. No. L-98-1275. Because this argument impacts appellant's first and second assignments of error, we address them jointly.

{¶ 7} "A plea of guilty following a trial and prior to sentencing effectively waives all appealable errors which may have occurred at trial, unless such errors are shown to

have precluded the defendant from voluntarily entering into his or her plea pursuant to the dictates of Crim.R. 11 and *Boykin v. Alabama* (1969), 395 U.S. 238, 243." *State v. Kelley* (1991), 57 Ohio St.3d 127, paragraph two of the syllabus. Possible error in a trial court's denial of a motion to suppress is among those appealable errors waived. See *Huber Hts. v. Duty* (1985), 27 Ohio App.3d 244, syllabus; *State v. Elliott* (1993), 86 Ohio App.3d 792, 795; *State v. Moldonado*, 6th Dist. No. L-03-1166, 2004-Ohio-3001, ¶ 6. 621/1272

{¶ 8} A defendant entering a plea of guilty also waives the right to appeal alleged ineffective assistance of counsel, unless it is shown that the ineffective assistance "caused the plea to be less than knowing and voluntary." *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, citing *United State v. Broce* (1989), 488 U.S. 563, 574. See, also, *State v. Towbridge*, 6th Dist. No. L-02-1125, 2004-Ohio-481, ¶ 26, citing *State v. Spates* (1992), 64 Ohio St.3d 269, 272. Here, appellant only argues that his counsel was ineffective for failing to call eyewitnesses to testify at his suppression hearing.

{¶ 9} In *Pringle*, we held that a guilty plea entered pursuant to *Alford* is "procedurally indistinguishable from a guilty plea in that it severely limits claimed errors to those which affect the voluntariness of the plea." *Pringle*, 6th Dist. No. L-98-1275, citing *State v. McDay* (May 9, 1997), 6th Dist. No. L-96-027; *State v. Witcher* (Dec. 30, 1993), 6th Dist. No. L-92-354; *State v. Barhite* (July 12, 1991), 6th Dist. No. L-90-043. An *Alford* plea allows a defendant to enter a plea of guilty while professing his innocence. Our analysis of waived errors for an *Alford* plea is identical to the analysis

performed when a defendant enters a plea of guilty. Thus, we must examine appellant's plea hearing.

{¶ 10} The United States Constitution and Crim.R. 11(C) governs a trial court's acceptance of a guilty plea in a felony case. A trial court's compliance with these standards makes possible "a more accurate determination of the voluntariness of a defendant's plea by ensuring an adequate record for review." *State v. Nero* (1990), 56 Ohio St.3d 106, 107. The United States Constitution requires the record to reflect a knowing and voluntary waiver of "(1) the Fifth Amendment privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers." *Id.*, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243.

{¶ 11} Crim.R. 11(C)(2) requires the trial court to personally address the defendant, on the record, and conduct a colloquy in order to:

{¶ 12} "(a) Determin[e] that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 13} "(b) [Inform] the defendant of and determin[e] that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 14} "(c) [Inform] the defendant and determin[e] that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses

against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

Crim.R. 11(C)(2)(a)-(c).

{¶ 15} Upon a review of the plea hearing, we find that the trial court complied with Crim.R. 11(C); it ascertained each requirement listed in Crim.R. 11(C) and in *Boykin*. Therefore, appellant's first and second assignments of error are not well-taken.

{¶ 16} In his third assignment of error, appellant asserts that his sentences were imposed in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which found, pursuant to *Blakely v. Washington* (2004), 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, that specified sections of Ohio's sentencing statutes violate the Sixth Amendment to the United States Constitution.<sup>1</sup> Pursuant to *Foster*, trial courts are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences, and have full discretion to impose a prison sentence within the statutory range. *Id.*, ¶ 100. The trial court did not, in its judgment entry or at the sentencing hearing, specifically cite a statutory section severed by *Foster*. Appellant argues that the trial court violated *Foster* when it imposed terms which were above the minimum terms allowed; appellant cites no statutory section upon which the trial court relied in contravention of *Foster*. Appellant received the minimum allowable term of three years for a felony of the first degree, and the five year term is

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<sup>1</sup>*Foster* held the following statutory sections unconstitutional: R.C. 2929.14(B), (C), (D)(2)(b), (D)(3)(b), and (E)(4); R.C. 2929.19(B)(2); and R.C. 2929.41(A).

greater than the minimum but less than the maximum allowed for a felony of the second degree.

{¶ 17} With respect to cases pending on direct review, where a trial court relied on any of the unconstitutional statutes when imposing a sentence, the sentence is deemed void, must be vacated, and the matter should be remanded to the trial court for a new sentencing hearing. *Foster* at ¶ 103-104.

{¶ 18} With respect to the greater than minimum term of five years incarceration, we find that the sentencing court only considered the factors of R.C. 2929.12(B), (C), and (D), which are factors to be considered in exercising its discretion to most effectively "comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code \* \* \*." The court considered that appellant had a juvenile record for unauthorized use of a motor vehicle and has a history of drug treatment and "numerous drug offenses," indicating that appellant was likely to commit future crimes pursuant to R.C. 2929.12(D)(2) and (3). *Foster*, 2006-Ohio-856, ¶ 40. The crimes were also committed while appellant was awaiting sentencing and under community control, factors constitutionally considered pursuant to R.C. 2929.12(D)(1). *Id.* The court also found that the victim suffered serious harm and that the crime was perpetrated as part of organized criminal activity, factors "indicating that the offender's conduct is more serious than conduct normally constituting the offense" pursuant to R.C. 2929.12(B)(2) and (7). *Id.* at ¶ 38. Because these are discretionary factors, appellant's sentence of five years incarceration was not imposed in violation of *Foster*. *Id.* at ¶ 42, ¶ 99.

{¶ 19} However, we find error with respect to the consecutive nature of appellant's sentence. When the court ordered the two terms of incarceration to run consecutively at the sentencing hearing, it did not state any of the factors of R.C. 2929.14(E)(4) as required pre-*Foster*. However, the judgment entry states: "Being necessary to fulfill the purposes of R.C. 2929.11, and not disproportionate to the seriousness of the offender's conduct or the danger the offender poses and the Court FURTHER FINDS: defendant's criminal history requires consecutive sentences." We have held that when no findings in violation of *Foster* are made at the sentencing hearing, but are printed in the judgment entry, the consecutive aspect of the judgment of conviction is void and the defendant is entitled to a new sentencing hearing. *State v. McCaster*, 2006-Ohio-5116, ¶ 4, citing *State v. Finn*, 6th Dist. No. L-05-1019, 2006-Ohio-1983 and *State v. Harris*, 6th Dist. No. E-04-034, 2006-Ohio-1396. Appellant's third assignment of error is not well-taken, in part, and well-taken, in part.

{¶ 20} Appellant's judgment of conviction is hereby vacated as to the consecutive aspect of appellant's sentence. *State v. Goodell*, 6th Dist. No. L-05-1262, 2006-Ohio-3386. This matter is remanded to the trial court for resentencing in accordance with *Foster* and the non-severed portions of Ohio's sentencing laws. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT VACATED, IN PART.

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

<u>Mark L. Pietrykowski, J.</u>	_____
	JUDGE
<u>Arlene Singer, P.J.</u>	_____
	JUDGE
<u>William J. Skow, J.</u>	_____
CONCUR.	JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.