

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Case No. 07-394

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

MARQUIS HAIRSTON,

Court of Appeals
Case No. 06AP-420

Defendant-Appellant

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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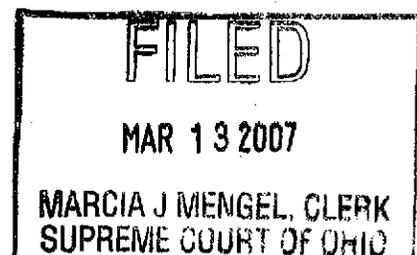


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant does not present any compelling reason for this Court to expend its scarce judicial resources to review his case. Defendant received a very long aggregate sentence because he committed a series of three home invasions involving four aggravated robberies, four kidnappings, three aggravated burglaries, three weapons charges, and three firearm specifications. Defendant and his accomplices invaded the homes of the four victims, looted the homes of the victims' property, tied up the victims, and threatened to kill them. Defendant had two prior stints in prison, and his current crimes confirm that defendant is a remorseless criminal who must be confined.

Defendant engages in vast understatement in contending that defendant received the 134-year aggregate sentence "for three aggravated robberies, where physical injuries to the victims are non-life threatening." There were *four* aggravated robberies because there were four victims. Moreover, defendant stands convicted of 14 serious offenses, not just three. As for defendant's contention that no life threatening physical injuries were involved, defendant again understates and overlooks the physical and psychological effects of his crimes. In addition, defendant threatened to kill all of the victims, and so he was certainly willing to inflict life-threatening injuries.

Defendant's legal arguments do not warrant review. Defendant errs in claiming that this Court needs to accept the present case to resolve a purported conflict between *Fears* and *Rance*. As explained below, *Fears* and *Rance* do not conflict, and, even if there were a conflict, the conflict would only affect the first prong of the allied-offenses test. The Tenth District conceded that defendant *satisfied* the first prong and that it

must proceed to the second prong. 10th Dist. Op. at ¶ 20. This ruling makes the *Fears-Rance* “conflict” a non-issue. Defendant’s merger argument fails under the second prong, given the prolonged and extreme restraints used to commit these kidnappings.

Defendant’s second proposition of law raises due process and ex post facto challenges to the *Foster* severance remedy. But those challenges were not raised in the trial court, and therefore only plain-error review is allowed here, which makes this case a poor vehicle in which to address those issues. Defendant does not point to any conflict amongst lower courts that might justify review.

Finally, defendant errs in claiming that his 134-year aggregate sentence constitutes cruel and unusual punishment. Defendant’s 134-year sentence does not “shock the conscience” when it is considered that defendant has been imprisoned twice before and that the 134-year aggregate sentence arises out of 11 first-degree felonies, 3 third-degree felonies, and 3 firearm specifications. Each sentence is proportionate to each respective crime, and the overall sentence is proportionate to defendant’s fourteen crimes and his felony criminal record.

The State respectfully requests that this Court decline jurisdiction in all respects.

STATEMENT OF FACTS

The State incorporates by reference the procedural and factual history set forth in paragraphs 2 through 6 and paragraphs 22 through 24 of the Tenth District opinion.

ARGUMENT

Response to First Proposition of Law: An aggravated robber who uses prolonged and extreme restraints on his victim has committed a kidnapping, and the kidnapping does not merge with the aggravated robbery.

Defendant errs in contending that the kidnapping and aggravated robbery offenses for each victim must merge. Merger is inappropriate for these prolonged kidnappings that all involved extreme restraints and risks of harm to the victims and secretive confinement.

A.

Under *State v. Rance* (1999), 85 Ohio St.3d 632, a two-part test applies for determining whether offenses will “merge” for sentencing purposes. Under the first step of the analysis pursuant to R.C. 2941.25(A), the test is whether the elements of the offenses correspond to such a degree that the commission of one offense will automatically result in the commission of the other offense. *Rance*, 85 Ohio St.3d at 636, 638, 639. In the first step, the elements of the offenses are compared in the abstract. *Id.* at paragraph one of the syllabus. If the offenses do not satisfy this test, then the offenses have a dissimilar import, the “merger” inquiry ends, and multiple sentences are allowed. *Id.* at 636.

If the offenses have similar import under the first step, the analysis proceeds to a second step under R.C. 2941.25(B), where the court must determine whether the offenses were committed separately or with a separate animus. *Rance*, 85 Ohio St.3d at 636. If the offenses were committed separately or with a separate animus, the defendant may be punished for both. *Id.* If not, the court must merge the offenses of similar import and

sentence the defendant on only one of them. *Id.*

The defendant bears the burden of establishing his entitlement to merger. *State v. Mughni* (1987), 33 Ohio St.3d 65, 67; *State v. Logan* (1979), 60 Ohio St.2d 126, 128-29.

B.

While defendant contends that the first prong of *Rance* has been modified by *Fears*, such contention is ultimately irrelevant because defendant's merger argument fails under the second prong of the *Rance* test. Even if kidnapping and aggravated robbery satisfy the first prong of the still-viable *Rance* test, the offenses still will not merge under the second prong if the offenses were committed with a separate animus. *State v. Fears* (1999), 86 Ohio St.3d 329, 344.

Separate animus exists for kidnapping when the restraint is prolonged, the confinement secretive, or the movement substantial. *Id.* at 344, citing *State v. Logan* (1979), 60 Ohio St.2d 126, syllabus. A separate animus can also exist for kidnapping if the restraint of the victim substantially increased the risk of harm separate and apart from the other crime. *Logan*, at syllabus. The question is whether the restraint or movement was merely incidental to the aggravated robbery or whether it has a significance independent of the robbery. *Logan*, 60 Ohio St.2d at 135.

In these home invasions, the restraint was prolonged for each victim. The home invasion of Cynthia Green's residence lasted at least 45 minutes, and it thereafter took a number of minutes for Green to escape her restraints. The ten-minute home invasion of the Reames/Pinkerton residence was followed by the victims working free of their

restraints, at least six or seven minutes of time for Reames. Although Maransky did not give an exact time frame on how long the home invasion of his residence lasted, he described events that would have taken several minutes while his residence was generally looted. In addition, Maransky said it took him about fifteen minutes to free himself of restraints. These prolonged time periods are sufficient to give the kidnapping counts a significance that warrants separate sentencing for the kidnappings. See, e.g., *State v. Seiber* (1990), 56 Ohio St.3d 4, 19 (20 to 40 minutes); *State v. Blue* (1992), 10th Dist. No. 91AP-1525 (5 or 10 minutes); *State v. Martin* (1999), 8th Dist. No. 73456 (“substantial and prolonged” restraint; 15 minutes); *State v. Johnson* (1992), 8th Dist. No. 61015 (“prolonged” 15 or 20 minutes).

To say that kidnapping would merge with aggravated robbery here would mean that aggravated robbers could restrain their victims of their liberty for indefinite amounts of time merely because they harbored a continuing robbery purpose. The interests of bodily integrity and personal freedom underlying the kidnapping statute would be given short shrift if robbers could continue such armed restraint indefinitely in the hope of coercing the victims to disclose the existence of more loot.

Adding to the significance of the kidnappings is the fact that each of the victims were tied up, and at least three of the victims were gagged. Tying up the victims can justify separate sentencing, as the case law shows. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 67 (kidnappings had independent significance despite continuing robbery motive in tying up and torturing victims); *State v. Reynolds* (1998), 80 Ohio St.3d 670, 682 (tying up of victim cited as one of reasons kidnapping did not

merge with robbery); *State v. Gore* (1999), 131 Ohio App.3d 197, 203 (“extreme restraint is unnecessary to commit robbery.”); *State v. Moore*, 8th Dist. No. 79353, 2002-Ohio-2133, ¶ 25 (victim hog-tied during robbery). Separate sentencing for kidnapping is also allowed when the victim is tied up in order to facilitate the escape, as occurred here. *State v. Perkins* (1994), 93 Ohio App.3d 672, 684.

The tying up and gagging of the victims also substantially increased the risk of harm separate and apart from the robberies. Tightened bindings create risks of harm, as shown by Green’s continuing health problems and bruising from her restraints, and as shown by Reames’ feet turning blue because of his restraints. The tying up of Maransky in the basement particularly posed a danger of harm or death. Living alone, Maransky could not be certain that he could escape or that he would be found by someone else.

In light of all the facts, there was an independent existence for kidnapping and aggravated robbery, and those counts do not merge under the second prong of *Rance*.

C.

Defendant’s contention that *Fears* modified or overruled the first prong of *Rance* is wrong. *Fears* never cited *Rance* or otherwise purported to modify the *Rance* “comparison of elements” approach as it relates to merger of offenses. As stated in *State v. Lowe*, 164 Ohio App.3d 726, 2005-Ohio-6614, ¶ 27: “*Fears* did not alter, modify or overrule the abstract analysis test required by *Rance*.”

Fears is consistent with the first prong of *Rance*. In concluding that the aggravated-robbery specification would merge with the kidnapping specification, the

Fears Court quoted *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198 n. 29, for the proposition that “implicit within every robbery (and aggravated robbery) is a kidnapping.” (Emphasis added) *Fears* cannot be seen as *sub silentio* overruling the first prong of *Rance* when *Fears* used the very same “automatically” logic as *Rance* in concluding that every aggravated robbery will include a kidnapping. “*Rance*’s two prong test was not abandoned in * * * *Fears* * * *.” To the contrary, the *Fears* court found that ‘implicit within every robbery * * * is a kidnapping,’ thus concluding the first prong of the *Rance* test.” *State v. Ross*, 9th Dist. No. 22447, 2005-Ohio-5189, ¶ 50, at n. 1, rev’d on other grounds, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶ 146.

This Court has continued to rely on *Rance* even after *Fears*. See *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶ 101; *State v. Childs* (2000), 88 Ohio St.3d 558, 561-62. Defendant’s first proposition of law does not warrant review.

Response to Second Proposition of Law: The severance remedy in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, does not violate due process or ex post facto principles.

In *Apprendi v. New Jersey* (2000), 530 U.S. 466, the United States Supreme Court held 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.” *Id.* at 490. The Court applied the *Apprendi* principle to state sentencing guidelines in *Blakely v. Washington* (2004), 542 U.S. 296, and to federal guidelines in *United States v. Booker* (2005), 543 U.S. 220.

In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Court held that *Apprendi* and *Blakely* required the invalidation of the Ohio statutory sentence-finding

requirements that applied to non-minimum, maximum, and consecutive sentences, as well as those sentence-finding requirements that applied to the imposition of an additional 1-10 years on repeat violent offenders and major drug offenders. *Foster*, at ¶¶ one, three, and five of the syllabus.

As its remedy for unconstitutionality, the *Foster* Court severed the unconstitutional sentence-finding requirements from the statutory scheme. *Foster*, at ¶¶ two, four, and six of the syllabus. After such severance, the trial courts now have full discretion to impose non-minimum, maximum, and consecutive sentences without making statutory findings. *Id.* at ¶ seven of the syllabus.

Defendant's plea and sentencing came over a month after the announcement of *Foster*. But the defense raised no objection to the application of the *Foster* severance remedy in the trial court. Despite this waiver through lack of objection, defendant now contends that application of the *Foster* severance remedy in his sentencing hearing constituted an improper retroactive application of the post-severance sentencing scheme to his crimes. For the following reasons, defendant's arguments lack merit.

A. No Plain Error

Issues not raised in the lower courts cannot be raised on appeal; such issues are deemed waived. *State v. Williams* (1977), 51 Ohio St.2d 112. Ohio appellate courts "may take notice of waived errors only if they can be characterized as 'plain errors.'" *State v. Murphy* (2001), 91 Ohio St.3d 516, 532.

For an error to be plain, it must not only be plain in the sense of being obvious, it must also be so serious as to indicate that, but for the error, the outcome clearly

would have been different. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Long*, 53 Ohio St.2d 91, at paragraph three of the syllabus. A claimed error will be “plain error” only if it was “‘plain’ at the time that the trial court committed it.” *Barnes*, 94 Ohio St.3d at 28.

In the present case, it was not obvious at the time of sentencing that defendant would have been entitled to non-minimum and concurrent sentencing as a matter of ex post facto or due process. As a result, defendant cannot show that plain error occurred.

B. Offenders Had Fair Notice that Severance Was a Possible Remedy

In *Bouie v. City of Columbia* (1964), 378 U.S. 347, the United States Supreme Court held that due process requires that if a judicial construction of a criminal statute is “‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given retroactive effect.” *Id.* at 354, quoting Hall, *General Principles of Criminal Law* (2d ed. 1960), at 61. Although *Bouie* referenced ex post facto principles, the Court later refused to incorporate “jot-for-jot” the Ex Post Facto Clause into due process limitations on judicial decisionmaking. *Rogers v. Tennessee* (2001), 532 U.S. 451, 459. The Court explained that *Bouie* was “rooted firmly in well established notions of *due process*” and that “[i]ts rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.” *Id.* (emphasis sic).

The *Foster* Court's severance of the various sentencing provisions was not the result of a "judicial construction" of a criminal statute, and therefore *Bouie* is inapposite. Instead of being a "judicial construction," the *Foster* severance was a result of constitutional challenges to the statutory scheme.

In any event, the *Foster* severance remedy was a foreseeable result that could be expected if the challenges to the various sentencing findings were successful. The *Foster* Court patterned its remedy after *Booker*. Given that it followed the blueprint set forth by the United States Supreme Court, it is difficult to characterize the Court's remedy as "unexpected and indefensible." *Bouie*, 378 U.S. at 354.

Aside from *Booker*, R.C. 1.50 provides that *any* statutory provision that is held unconstitutional may be severed. Thus, any party who wishes to benefit from a finding that a statute is unconstitutional is on notice that severance is possible.

Indeed, this Court on numerous occasions has severed unconstitutional statutes. See, e.g., *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, ¶39; *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, 17; *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 464-65; *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466. Consequently, offenders can hardly be surprised that the *Foster* Court invoked R.C. 1.50.

C. General Ex Post Facto Principles Lend No Support to the Due Process Argument

The attempt to equate the *Foster* Court's severance remedy with an ex post facto law is unconvincing. As noted above, ex post facto principles do not apply to judicial decisionmaking. *Rogers*, 532 U.S. at 459. Moreover, *Dobbert v. Florida* (1977), 432 U.S. 282, is instructive. The defendant in that case argued that subjecting

him to Florida's new death-penalty statute violated ex post facto principles because there was no "valid" death-penalty statute in effect at the time of his crimes. The Court rejected this argument, stating that the old statute, regardless of whether it was constitutional, "provided fair warning as to the degree of culpability which the State ascribed to the act of murder." *Id.* at 297. The existence of the old statute was an "operative fact" to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution." *Id.* at 298. Likewise, Ohio's sentencing statutes have long served as an "operative fact" warning offenders of the potential penalties that may be imposed for various crimes. Notably, federal circuit courts have consistently rejected arguments that the remedy fashioned in *Booker* violates ex post facto or *Bouie* due process principles. See, e.g., *United States v. Alston-Graves* (D.C. Cir. 2006), 435 F.3d 331, 343.

Essentially, defendant wants it both ways – he seeks the benefit of the retroactive application of *Foster*'s merit holding to his crimes while simultaneously claiming that the same degree of retroactivity of the severance remedy is unconstitutional. But, as the New Jersey Supreme Court aptly stated, a "[d]efendant does not have the right to a windfall sentence under an unconstitutional scheme, but only the right to a new sentencing proceeding under a constitutional one." *State v. Natale* (2005), 184 N.J. 458, 492, 878 A.2d 724, 743. Defendant's second proposition of law does not warrant review.

Response to Third Proposition of Law: Multiple proportionate punishments for multiple crimes do not constitute cruel and unusual punishment.

The legislature has broad, plenary discretion in prescribing crimes and penalties. *State v. Morris* (1978), 55 Ohio St.2d 101, 112. Courts give substantial deference to the legislature's discretion. *Harmelin v. Michigan* (1991), 501 U.S. 957, 999 (plurality). A punishment is cruel and unusual only if it is "so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 371, quoting *State v. Chaffin* (1972), 30 Ohio St.2d 13.

In non-capital cases, claims of disproportionality rarely succeed. *Solem v. Helm* (1983), 463 U.S. 277, 289-90. "The Eighth Amendment * * * forbids only extreme sentences that are grossly disproportionate to the crime." *State v. Coleman* (1997), 124 Ohio App.3d 78, 82. "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer v. Andrade* (2003), 538 U.S. 63, 77.

In judging disproportionality, courts must keep in mind that "the Eighth Amendment does not mandate adoption of any one penological theory." *Harmelin*, 501 U.S. at 999. Legislatures and judges can accord "different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id.*

Legislatures and courts are also allowed to consider the defendant's criminal record. They can conclude that "individuals who have repeatedly engaged in serious or violent criminal behavior and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." *Ewing v. California* (2003), 538 U.S. 11, 24 (plurality). There is "a valid interest

in deterring and segregating habitual criminals.” Id. at 25 (quoting another case).

The vast majority of sentencing factors here were unfavorable to defendant, including: (1) the prolonged nature of these crimes; (2) the extended looting of property and cars; (3) the threats of death if the victims did not cooperate; (4) the risk of serious physical harm or death if the victims did not escape their bindings on their own; (5) the commission of serial home invasions; (6) defendant already had been imprisoned twice for serious offenses; (7) defendant was out of prison just seven days before starting his home-invasion spree; (8) lack of remorse and contrition, as shown by a refusal to cooperate with authorities when given the opportunity; (9) defendant was the ringleader in the home invasions; (10) in total, defendant stands convicted on 11 first-degree felonies, 3 third-degree felonies, and 3 firearm specifications requiring nine consecutive years of imprisonment. In light of the entire case, including defendant’s dismal criminal history, the 134-year aggregate sentence does not shock the sense of justice. The vast majority of observers would welcome the safety that comes from incarcerating defendant for the rest of his life.

Courts “have universally upheld sentences where the term of years is greater than the defendant’s expected natural life * * *.” *United States v. Yousef* (C.A. 2, 2003), 327 F.3d 56, 162-63. “The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment.” *United States v. Beverly* (C.A. 6, 2004), 369 F.3d 516, 537. A life-expectancy argument was also rejected in *Lockyer*, 538 U.S. at 74 (rejecting reliance on age of persons sentenced).

In addition, the 134-year aggregate sentence is not the benchmark for determining defendant's cruel and unusual punishment claim. "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *State v. Berger* (Az. 2006), 134 P.3d 378, 384, quoting *United States v. Aiello* (C.A. 2, 1988), 864 F.2d 257, 265. "[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Berger*, 134 P.3d at 384. "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." *Id.*

Capping an aggregate sentence at normal life expectancy, or forcing a reduction in some offenses because the defendant must be punished for others, would lead to the absurd result that a defendant could obtain a *reduction* in punishment for some offenses by committing more offenses. "[I]t is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." *Pearson v. Ramos* (C.A. 7, 2001), 237 F.3d 881, 886. "There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing." *State v. August* (Ia. 1999), 589 N.W.2d 740, 744 (emphasis *sic*).

Just as the commission of more crimes should not force a reduction in sentence for other crimes, the commission of several crimes should not force concurrent

sentencing on the trial court. Concurrent sentencing results in no effective punishment for the offender, and the right to avoid cruel and unusual punishment does not give a defendant the right to avoid punishment altogether for a particular crime. "The Eighth Amendment does not prohibit a state from punishing defendants for the crimes they commit; the amendment prohibits a sentence only if it is grossly disproportionate to the severity of the crime." *United States v. Schell* (C.A. 10, 1982), 692 F.2d 672, 675. Defendant makes no claim that the ten-year sentences were grossly/shockingly disproportionate for each first-degree felony.

The three-year firearm specifications also do not constitute cruel and unusual punishment. *State v. Roe* (1989), 41 Ohio St.3d 18, 27-28.

Defendant's third proposition of law does not warrant review.

Respectfully submitted,

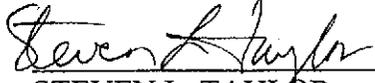


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 13th day of Mar., 2007, to Toki M. Clark, Clark Law Office, 233 South High Street, 3rd Floor, Columbus, Ohio 43215, counsel for defendant-appellant.



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