

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 07-291
Plaintiff-Appellee, :
v. : On Appeal from the
: Franklin County Court of Appeals,
: Tenth Appellate District
DARIAN HARALSON, :
Defendant-Appellant. : Court of Appeals
: Case No. 06AP-250

MEMORANDUM OF APPELLEE, THE STATE OF OHIO,
IN OPPOSITION OF JURISDICTION

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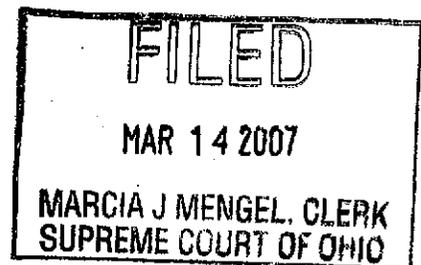


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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION NOR IS IT OF PUBLIC
OR GREAT GENERAL INTEREST**

The issue presented is not ripe for review. The juvenile court imposed a three year adult sentence but ordered that sentence stayed “pending successful completion of the juvenile disposition” in addition to a juvenile disposition of a commitment to the Department of Youth Services for three years for a gun specification consecutive with and prior to an indefinite term consisting of a minimum of six months and a maximum period not to exceed the child’s twenty-first birthday. Franklin County Court of Common Pleas Serious Youthful Offender Sentence/Judgment Entry, 05CR04-2388, filed February 16, 2006. As observed in *In re Anderson* (2001), 92 Ohio St. 3d 63; 2001 Ohio 131, the additional adult sentence “is a sort of provisional adult sentence.” Only after an additional hearing and under certain circumstances can the adult sentence be imposed. See, **R.C.2152.14**. “A claim that rests upon future events that may not occur at all, or may not occur as anticipated, is not considered ripe for review. *State v. ex rel. Keller v. Columbus* (2005), 164 Ohio App. 3d 648, 2005 Ohio 6500. See also, *State v. Sparks* (November 19, 2003), Washington App. No. 03CA21, unreported (issue of post-release control not ripe for review until the Parole Board makes a decision whether or not to impose such control upon release).

Appellant requests that this Court accept jurisdiction to determine whether *State v. Foster* (2006), 109 Ohio St. 3d 1; 2006 Ohio 856, applies in juvenile court in serious youthful offender proceedings, alleging that the Franklin County Court of Appeals decision in this case conflicts with the judgment of the Allen County Court of Appeals in *In re Hill* (May 22, 2006), Allen App. No. 1-05-65, unreported.

The 10th District Court of Appeals, after a detailed and well-reasoned analysis of the juvenile system in general and its greater emphasis on rehabilitation rather than punishment, determined that the 6th Amendment right to a jury does not attach to the juvenile justice system and, therefore, *Foster* has no bearing on the juvenile court's authority to make findings under R.C.2152.13(D)(2)(a) when deciding whether to impose a blended juvenile/adult sentence on a serious youthful offender. In contrast, the *Hill* opinion failed to specifically decide that the 6th Amendment right to a jury applies in serious youthful offender cases, thereby implicating *Foster*. Setting forth no analysis or reasoning, the *Hill* court merely remands "for further proceedings consistent with *Foster*."

A review of those decisions issued by the Third District Court of Appeals prior to *Hill* which considered *Foster* and *Blakely* reveal that the Third District routinely reversed and remanded on the basis of *Foster* for the sole reason that *Foster* declared 2929.14(B)(2) and (E)(4) unconstitutional. See, *State v. McKercher* (April 10, 2006), Allen App. No. 1-05-83, unreported; *State v. Powell* (April 10, 2006), Allen App. No. 1-05-51, unreported; *State v. Thompson* (April 24, 2006), Allen App. No. 1-05-34, unreported; *State v. Crisp* (May 22, 2006), Allen App. No. 1-05-45, unreported. Examining these prior decisions and comparing them to the decision in *Hill*, it is clear that the *Hill* court did not consider, as did the Franklin County Court of Appeals, whether the 6th Amendment of the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution are applicable in juvenile proceedings. There is, therefore, not a "clear conflict" necessitating certification.

This Court has previously determined that the Ohio Constitution does not provide the right to a jury trial in juvenile delinquency proceedings. *In re Agler* (1969), 19

Ohio St. 2d 70, 77-78. See also, *In Re Anderson* (2001), 92 Ohio St. 3d 63; 2001 Ohio 131. As observed in *State v. Meade* (Wash. App. 2005), 129 Wn. App. 918, 925-926, 120 P. 3d 975, citing *McKeiver*, “*Blakely* did not alter long-standing rules regarding when the right to a jury attaches; it merely broadened and delineated the scope of that right once it does attach.”

As correctly found by the Tenth District Court of Appeals in its decision below, juvenile defendants have no 6th Amendment right to trials by jury, therefore, *Foster*, grounded on an accused’s 6th Amendment right to have factual findings necessary for the imposition of a sentence be made by the jury, is inapplicable in juvenile proceedings. *Blakely* and *Foster* are inapplicable to juvenile proceedings therefore further review is unwarranted.

Appellant also asserts an issue regarding self-defense and defense of others. Well-established law addresses and resolves these claims. See, *State v. Robbins* (1979), 58 Ohio St. 2d. 74, syllabus paragraph two and *State v. Wenger* (1979), 58 Ohio St. 2d 336. That appellant disagrees is insufficient to compel additional review.

Appellee, the State of Ohio, respectfully requests that jurisdiction be declined.

STATEMENT OF THE CASE AND THE FACTS

Appellant, a juvenile, was indicted by the Franklin County Grand Jury on: (1) one count of murder with a firearm specification, in violation of R.C.2903.02(A) and 2941.145; (2) one count of felony murder with a firearm specification, in violation of R.C.2903.02(B) and 2941.145; (3) two counts of attempted murder with firearm

specifications, in violation of R.C.2923.02 as it relates to R.C.2903.02 and 2941.145; and (4) two counts of felonious assault with firearm specifications, in violation of R.C.2903.11 and 2941.145. Each count specified that appellant, being 15 years old at the time of the offenses, used a firearm and was subject to a serious youthful offender sentence pursuant to R.C.2152.11 and 2152.13.

Appellant's case was originally scheduled in the criminal division of the Franklin County Court of Common Pleas, which transferred the case to the juvenile division upon motion of plaintiff-appellee, the State of Ohio. The court recognized that, pursuant to R.C.2152.13, serious youthful offender cases are tried in juvenile court. Appellant invoked his jury trial rights provided under R.C.2152.13(C)(1) and the following evidence was presented:

Christopher Harris has been friends with appellant and Darius Schultz since they were children. Harris testified that he had had a problem with Preston Smith (PJ) at the Easton Center in September, 2004. On December 27, 2004, Chris, his sisters Kiera and LaCretia, and Schultz were at Eric Green's house programming their cell phones. While at Green's home, Chris called PJ using Green's cell phone and told PJ to apologize for his previous behavior. Green then drove Harris and his friends back to the Harris home on Huy Road. Green called later and told Harris that PJ wanted to come over and fight. Harris responded "whatever" and sometime later, received a telephone call that "they" were on their way over to fight. Harris called appellant and, while waiting, retrieved his father's loaded gun, handing it to appellant upon his arrival.

When PJ appeared, Harris, Schultz and appellant went outside. PJ was out in the street and Harris told him to come up to his house if he wanted to fight. PJ was

accompanied by another male who was holding a gun down at his side. PJ and his companion began to walk up to the house when Brandon Russell and another male walked up from the rear of the house, telling Harris that they wanted to watch the fight. Russell punched Harris and Russell's companion began to throw punches. Harris turned to run away, slipped, and heard gunshots. Harris looked and saw appellant, on the porch, with the gun pointed in the air. Harris saw no one else shooting a gun. When the shooting stopped, Harris found his sister lying on the ground beside the house. Kiera Harris was lifeless when the medics arrived, dying very quickly from loss of blood from a through and through bullet wound.

Appellant ran inside the Harris home, gave Chris' father the gun, and washed his hands. Appellant then gathered bullet casings from the front porch.

Preston Smith (PJ) is a freshman at Columbus State but knew Harris from Mifflin High School. Harris was then a freshman and PJ was a senior. Eric Golden is his friend and Eric Green and Brandon Russell were neighbors. Smith testified that, on December 27, 2004, Chris Harris called PJ and told him that he would give Smith a chance to apologize. Later that day, Eric Golden called and told him that Harris wanted to fight, one on one. PJ drove to Harris' house with Russell and Sean Black. A second car carrying Eric Green, Eric Golden, Steven and Antwon and a third car with Brandon Russell's friends followed. The plan was for a fist fight, one on one. PJ walked up to the Harris home with Eric Golden and Chris Harris came out of the house with appellant and Schultz. Keisha Harris walked up and asked him whether he was PJ and whether they were armed. Chris Harris began to argue with PJ about the phone call. Brandon Russell walked up from around the back of the house with Sean Black and the fistfight began with punches thrown.

Appellant pointed the gun and fired. PJ was shot in the left leg, with a wound to his upper left thigh.

Sean Black also attends college at Columbus State and is employed at Dick's Sporting Goods. Black knows PJ, Russell, Golden and Green but did not know Chris Harris or appellant. On December 27, 2004 Black went to Golden's house and heard about the plan to fight someone from Huy Road. Black drove to Harris' home with Russell and PJ. Two other cars followed. Black walked up to 1713 Huy Road and stood near the porch. There were three to four people on the porch and two others standing in the grass. Black saw no punches thrown but could sense that a fight was about to occur. Kiera ran up and said that no one was going to jump her brother. Harris was arguing and yelled for someone to get his "strap". A few seconds later he heard gunshots.

Brandon Russell was 19 years old on December 27, 2006. Earlier that day, Russell went to Sean Black's house and then to see Eric Golden before going to Huy Road. Russell did not know Chris Harris or why the fight was planned but went along with the others to help. Arriving at the Harris home, Russell saw several people in front of the house, one, later identified as Chris Harris, with his shirt off. Three or four people were in the front yard, a few more were in the street, and a couple more were at the corner of Huy Road and Oakland Park Avenue. Several of the boys were arguing. The fight began and Keith Paxton attempted to punch Harris but missed. Russell tried to trip Harris, heard someone yell "grab the strap" and then heard shots fired from the house. Russell began to run to the car. PJ was limping and Russell's shirt had bullet holes in it.

Eric Golden, a freshman at Columbus State University, drove to Harris's house with Eric Green, Steven and Antwon. Eric Green and PJ walked to the front of the

house and Russell went around the back. Golden noticed a girl, another person on the porch, and Chris Harris in the driveway. The girl approached and told them that there would be no guns. Golden believed that no one in his group was armed. Chris Harris removed his shirt, preparing to fight. The girl said "you are not about to jump my brother" and pushed him. Brandon Russell came around from the back of the house and tried to punch Harris but missed. The male on the porch began to shoot and Golden ran back to the cars

Darius Schultz, appellant's best friend, spent the day with appellant and Harris. The group was at Eric Green's house, programming cell phones, when Chris Harris noticed PJ's phone number in Green's cell phone. Harris called PJ and told him to apologize. PJ refused and approximately an hour later they returned to the Harris home on Huy Road. PJ called later and said he wanted to fight Harris, one on one. Chris said okay and got a gun out of his father's car. They called others to help and appellant arrived first. Appellant got the gun and waited with Harris for P.J. When PJ arrived, Schultz could see that there were others around the corner. Right before the fight began, Schultz and appellant were standing on the porch. Chris and P.J. were in front of them, arguing. Schultz told Chris and PJ to go into the street to fight. Three or four others came around the back of the house and said they just wanted to watch the fight. One from that group shook hands with Schultz and then walked over to Chris and hit him in the chest. More people ran up and began to fight. Schultz ran over to Chris to jump into the fight and heard gunshots. Appellant was on the porch and his arm was level when he was shooting the gun. Schultz saw no one other than appellant with a gun.

Schultz was wearing a black hooded sweatshirt as well as a black t-shirt but

took the sweatshirt off when everyone arrived for the fight. Schultz admitted that, initially, he told a different story to the police because he did not want appellant to go to jail.

Keisha Harris, Chris's 13 year old sister, saw boys running toward her brother and fighting and then heard gunshots from the porch where appellant stood. Keisha ran into the house and her father told her to call the police. Appellant said that he shot someone in the leg and for her to not tell anyone. Keisha saw no one else with a gun.

Eric Green testified that, on December 27, 2004, he helped Chris and Kiera and later drove them home. Green received phone calls about a fist fight between Chris Harris and PJ and drove back to the Harris home. Green heard no one talking about guns. Green stayed near the parked cars and heard back-to-back gunshots. PJ limped back to where the cars were parked.

John Farnlacher lived across the street at 1708 Huy Road. Farnlacher was in his kitchen about 11:45 pm when he heard rapid, semi-automatic gunshots and glass breaking and dropped to the floor. When the shooting stopped, Farnlacher discovered a broken window and a bullet hole in his window shade. The police recovered a bullet from the back wall of his closet.

Later that night, after leaving the hospital, Darius "Dean" Edwards, appellant's cousin, talked to appellant. Appellant said that he thought he had shot someone and Edwards told him to wash his hands with bleach.

Travis Carpenter, a police officer with the Clinton Township Police Department, responded to 1713 Huy Road and found a 9 millimeter semi-automatic handgun, later determined to be the property of Chris Harris's father, in the hall closet. The weapon emitted a strong odor of vinegar when discovered. Carpenter assisted in locating

shell casings from the front yard area of 1713 Huy Road and a bullet from the wall of a closet at 1708 Huy Road. There were many footprints in the snow and a second firearm, a .22 caliber handgun, was found under the car parked in the driveway of 1713 Huy Road.

Appellant did not testify; appellant's versions of events were presented through Detective McEvoy and the videotape of appellant's statement.

Appellant first told McEvoy that he fired the gun in the air to get the others to leave and that someone from the other group fired a gun back toward where Kiera was standing. Appellant then said that he started shooting up and then fired down, aiming away from the group of people on the lawn. Appellant, apologizing for lying, changed his story again and said that he fired toward the group but over their heads, making sure that his arm remained high. Finally, appellant told the officers that he fired the gun three times toward the ground and that he must have hit Kiera when she was running around the yard. Appellant repeatedly told Detective McEvoy that he never intended to shoot anyone and that he did not aim the gun at anyone.

After deliberations, the jury adjudicated appellant to be a delinquent minor for having committed the offenses of reckless homicide as lesser-included offenses to the felony murder and murder counts and found that appellant was 15 years old at the time of the incident. The jury also determined that appellant had a firearm "on or about his person or under his control" and that appellant did "display, and/or brandish and/or indicate he possessed and/or used the firearm in the commission of the offense." The jury also adjudicated appellant delinquent on the accompanying firearm specifications and made appellant eligible for a blended adult/juvenile serious youthful offender sentence.

On February 8, 2006, the juvenile court held a sentencing hearing and, finding appellant to be a serious youthful offender, imposed an adult and juvenile sentence committing appellant to the legal custody of the Department of Youth Services for an indefinite term of six months and a maximum period not to exceed appellant's 21st birthday and an additional three-year prison sentence in the Ohio Department of Rehabilitation and Correction. The juvenile court imposed also an additional three-year prison sentence on the accompanying firearm specifications.

FIRST PROPOSITION OF LAW

THE RIGHT TO A JURY IN CRIMINAL PROCEEDINGS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 5, ARTICLE I OF THE OHIO CONSTITUTION IS INAPPLICABLE IN JUVENILE DELINQUENCY DISPOSITIONAL SENTENCES WHICH MUST, PURSUANT TO R.C. 2152.01, PROVIDE FOR THE REHABILITATION OF THE OFFENDER.

Appellant argues that, pursuant to this Court's recent decision in *State v. Foster* (2006), 109 Ohio St. 3d 1, 2006 Ohio 856 applying *Blakely v. Washington* (2004), 542 U.S. 269 to Ohio's sentencing statutes, the trial court could not make specific findings and impose an adult penalty in accordance with R.C.2152.13(D)(2).

In *Blakely v. Washington*, the Supreme Court ruled that a judge could not increase a defendant's sentence if the jury did not make the necessary factual findings required for the enhanced penalty without violating a defendant's constitutional rights under the Sixth Amendment to have a jury determine beyond a reasonable doubt all the facts essential to his sentence. In *Foster* this Court applied *Blakely* to Ohio's sentencing statutes. *Foster* struck down as unconstitutional, R.C. 2929.14(B) and (C), which required fact-finding before a court could impose more than a minimum sentence, or

impose the longest sentence authorized by the legislature. Employing the remedy set forth in *United States v. Booker* (2005), 543 U.S.220, *Foster* severed the unconstitutional statutes and upheld the balance of the Ohio sentencing statutes. Under *Foster*, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Id.*, paragraph seven of the syllabus. *Foster* is applied to cases pending on direct review at the time that decision was announced.

In this case, defense counsel suggested to the court, citing *Blakely*, that imposition of an adult sentence would violate appellant’s rights pursuant to the Fifth Amendment. Appellant, therefore, failed to raise a Sixth Amendment claim to bring potential error to the court’s attention. See, *United States v. Booker* (2005), 543 U.S. 220.

Notwithstanding waiver, appellant claims that the Franklin County Court of Appeals was incorrect when it found, pursuant to *McKeiver v. Pennsylvania* (1970, 403 U.S.545, that *Foster* is inapplicable to juvenile delinquency proceedings because the jury trial in juvenile court is authorized by R.C.2152.13(C)(1) and not mandated by the Constitutions of the United States or the State of Ohio.

Appellant claims that juvenile delinquents have a 6th Amendment right to a jury in a serious youthful offender case because “the blended sentencing scheme * * * bears no resemblance to the traditional juvenile justice system where the focus was upon the treatment and rehabilitation of the juvenile and not the punishment * * *. Appellant’s Memorandum, page 9. Appellant, however, ignores the plain language of

R.C.2152.14(E)(3) which precludes imposition of the adult portion of the dispositional sentence absent clear and convincing evidence that “the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.” Rehabilitation within the juvenile system, therefore, remains one of the juvenile court’s primary considerations, even when considering whether to enforce an adult sentence. The “distinct rehabilitative aspects”¹ of the juvenile system, including the serious youthful offender dispositional statutes, puts this case squarely within the well-established holding of *McKeiver v. Pennsylvania* that the Sixth Amendment right to a jury does not attach in a juvenile proceeding.

The first proposition of law merits no further review.

SECOND PROPOSITION OF LAW

THE TRIAL COURT MAY NOT INTERFERE IN TRIAL COUNSEL’S STRATEGIC DECISION WHETHER TO SEEK AN INSTRUCTION ON SELF-DEFENSE. *STATE V. GRIFFIE* (1996), 74 OHIO ST. 3d 332 AND *STATE V. HILL* (1996), 75 OHIO ST. 3d 195, 1996 OHIO 222, FOLLOWED.

Appellant claims that the trial court erred for not instructing the jury on self-defense and the defense of others, instructions not requested by appellant at trial.

A reviewing court will not reverse a conviction in a criminal case due to jury instructions unless it is found that the jury instructions amount to prejudicial error. *State v. DeHass* (1967), 10 Ohio St. 2d 230, syllabus paragraph two. Failure to object to the jury instruction at trial waives all but plain error. *State v. Jackson* (2001), 92 Ohio St. 3d 436, 444 citing *State v. Underwood* (1983), 3 Ohio St. 3d 12, syllabus. “Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.” *State v. Wogenstahl* (1996), 75 Ohio St. 3d 444, 357. Plain

¹ Opinion below, *State v. D. H.*, at 31.

error is noticed only with the utmost caution in those exceptional circumstances necessary to prevent a manifest miscarriage of justice. *State v. Fenwick* (2001), 91 Ohio St. 3d 1252, 1254; *State v. Long* (1978), 53 Ohio St. 2d 91, syllabus.

In this case, defense counsel pursued a clear strategy, arguing that the evidence failed to establish that appellant fired the gun that caused Kiera's death. To assert a claim of self-defense, the defendant would have to contradict his theory of defense and concede that he acted intentionally but was justified in doing so. See, *State v. Champion* (1924), 109 Ohio St. 281, 286-287. It was a reasonable trial strategy for the defense to argue that appellant had no involvement in the shooting death of the victim rather than argue that appellant caused her death but was justified in some fashion. It is strongly presumed that the decision whether to seek an instruction on self-defense is a matter of trial tactics. *State v. Griffie* (1996), 74 Ohio St. 3d 332, 333, 1996 Ohio 71. "Trial courts cannot interfere with counsel's trial tactics or representation of their clients." *State v. Hill* (1996), 75 Ohio St. 3d 195, 212. 1996 Ohio 222.

Moreover, to successfully establish self-defense where deadly force is involved, the accused must prove by a preponderance of the evidence that he was not at fault in creating the situation that gave rise to the affray; that he had a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape was in the use of that force and finally, that the accused had not violated any duty to retreat and avoid the danger. *State v. Robbins* (1979), 58 Ohio St. 2d. 74, syllabus paragraph two; *State v. Williford* (1990), 49 Ohio St. 3d 247, 249.

Defense of another is a variation of self-defense and requires proof of the same elements. Under certain circumstances, one may employ appropriate force to

defend another person against an assault. "One who intervenes", however, "stands in the shoes of the person whom he is aiding, and if the person aided is the one at fault, then the intervener is not justified in his use of force and is guilty of an assault." *State v. Wenger* (1979), 58 Ohio St. 2d 336, 340; *State v. Harris* (1998), 129 Ohio App. 3d 527, 538.

The degree of force employed to repel a perceived danger must also be reasonable under the circumstance. As stated in *State v. Fox* (1987), 36 Ohio App. 3d 78, 79, "one may use such force as the circumstances require in order to defend against danger which one has good reason to apprehend." When a greater degree of force is employed than is necessary under all the circumstances, the affirmative defense of self-defense fails. *Id.* See also, *State v. McLeod* (1948), 82 Ohio App. 155, 157.

In this case, Christopher Harris agreed to engage in a fight with, and left the safety of his own home to meet, his intended combatant. Harris, and concomitantly, appellant, were themselves responsible in creating the situation leading to the use of force. In addition, appellant emptied a semi-automatic into a group of people in response to a fist fight, thereby employing a far greater degree of force than was necessary under any reasonable view of the circumstances. In light of these facts, the affirmative defense of self-defense was almost impossible to establish. There was, therefore, no reasonable possibility that the result below would be different had the court proceeded as appellant proposes.

The second proposition of law merits no further review.

CONCLUSION

Based on the foregoing, the within appeal does not present a question of such constitutional substance or of such public or great general interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on March 14, 2007 a copy of the foregoing was hand-delivered to **JOHN W. KEELING**, counsel for appellant, Office of the Franklin County Public Defender, 373 South High Street, 12th Floor, Columbus, Ohio, 43215 and mailed by ordinary United States mail to **KATHERINE HUNT FEDERLE** and **JASON A. MACKE**, counsel for Amicus Curiae, Ohio State College of Law, 55 West 12th Avenue, Columbus, Ohio 43210.



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