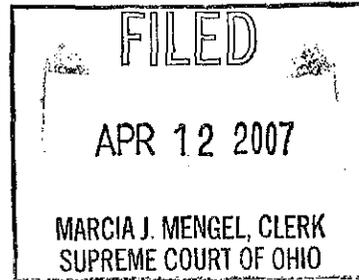


IN THE SUPREME COURT
OF THE
STATE OF OHIO



07-0651

STATE OF OHIO : CASE NO. 2007-0595
: :
Defendant-Appellee/ : :
Cross-Appellant : :
vs. : on Appeal from the First :
: District Court of Appeals :
FERNANDO CABRALES : For Hamilton County :
: :
Plaintiff-Appellant/ : Court of Appeals :
Cross-Appellee : Case No. C-0500682

MEMORANDUM IN SUPPORT OF JURISDICTION
ON BEHALF OF DEFENDANT-APPELLEE/CROSS-APPELLANT
FERNANDO CABRALES

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The trial court, in the instant case, imposed consecutive sentences for possession, transportation and trafficking in exactly the same drugs. This judgment illustrates again the problem that lower courts encounter trying to interpret and apply the prohibition against multiple convictions and sentences for allied offenses of similar import. This issue has produced the conflict certified by the First District in this case, and substantial disagreement among the courts. It clearly is an issue of great public interest.

Defendant's right to be free from unreasonable search and seizure is of constitutional magnitude, as is his right to due process, proper jury instructions and an adequate indictment which describes an offense.

For all these reasons, Appellant respectfully suggests that this Court exercise jurisdiction.

STATEMENT OF THE CASE

1) PROCEDURAL POSTURE

This matter comes before the Court on appeal from the judgment of the Court of Appeals, First Appellate District of Ohio. Defendant, Fernando Cabrales, was indicted in Hamilton County, Ohio, under case number B-0403121-D, for two counts of trafficking in marijuana (over 20,000 grams), under R.C. § 2925.03(A)(1) & (2), one count of possession of marijuana, under R.C. § 2925.11(A), all felonies of the second degree, and one count of conspiracy under R.C. § 2923.01(A)(2), a felony of the third degree.

A motion to suppress evidence was heard and denied on June 7, 2004. Defendant entered pleas of guilty to counts 1-3 on July 12, 2004. On September 29, 2004, the court granted Defendant's motion to withdraw his plea. Prior to trial, the court again denied Defendant's renewed motion to suppress, and his motion to dismiss count 4 of the indictment. The state was permitted to amend the indictment.

Defendant proceeded to jury trial on June 30, 2005. Counsel's motions for a verdict of acquittal were overruled. The jury found Defendant guilty as charged. On August 8, 2005, the court sentenced him to consecutive terms of 8 years on counts 1-3 and a concurrent term of 5 years on count 4. The First District Court of Appeals affirmed the convictions, but found that the possession and transportation counts were allied offenses and must be merged. Defendant's sentences were vacated pursuant to *Foster*, and he was remanded for resentencing. At the state's request, the court of appeals certified a conflict between its opinion regarding allied offenses and that of several other district courts, and the state filed the certification with this Court on April 4, 2007.

2) FACTS

On or about March 26, 2004, a RENU agent working traffic interdiction on I-74 stopped a vehicle which was found to contain 300 pounds of marijuana. It was owned and driven by Sean Mathews who was accompanied by James Longenecker. These individuals agreed to cooperate with RENU in completing delivery of the contraband. They indicated that they were in cell phone contact with an individual in California known only as Boo Boo (also represented as Bobo, or BowBow) who was directing them to the site of the delivery. At the officers' direction, they placed phone calls to that individual which were taped by RENU. An undercover officer replaced Mathews as the driver, and attempted to complete the delivery as directed over the phone. An individual later identified as Mundy Williams showed up at the designated meeting place, and engaged in some conversation with Longenecker and the officer, but refused to accept delivery at that location. When they refused to follow him to another location, he attempted to leave and was arrested.

When questioned further, Longenecker gave information about Boo Boo's description, residence, family and vehicles. RENU contacted police in Riverside, California, who decided that the information matched Fernando Cabrales. A photograph of Cabrales was e-mailed to Cincinnati where it was identified by Longenecker and Mathews as Boo Boo. Riverside police obtained a search warrant for Cabrales' residence and Hamilton County obtained an arrest warrant for his person. He was arrested on March 31, during a search of the residence. The search uncovered no drugs, paraphernalia, cash, packaging materials or sales records. Only a cell phone and personal papers were seized.

From the decision of the Court of Appeals, Defendant brings this appeal.

ARGUMENT

PROPOSITION OF LAW NO. 1

AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT ISSUED FOR DEFENDANT'S RESIDENCE DOES NOT SATISFY THE FIFTH AMENDMENT WHEN IT FAILS TO SUPPLY TIMELY PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF A CRIME OR CONTRABAND WOULD BE FOUND ON THE PREMISES.

Defendant's motion to suppress any evidence seized from his residence pursuant to the execution of a search warrant on March 31, 2004 was improperly overruled. Close examination of the warrant affidavit reveals no probable cause to believe that either drugs or money related to this offense would be found on the premises. In fact, the affidavit establishes that the drugs seized by RENU were obtained from a different location many miles from Defendant's home. Cash payments, according to the affidavit, could be expected to arrive by Federal Express some time after the delivery of the drugs was completed. Since no delivery was completed in this case, no proceeds could be expected.

Apart from these allegations, the affidavit contains only general conclusory statements about drug conspiracies and how they might be expected to operate. Such statements are circular, and do not supply probable cause to believe that contraband or evidence will be found at a given location and time. Even proof that Defendant had dealt drugs in the past would not be sufficient to support a present search unless the prior activity was closely related to the time of the issue of the warrant.

Since this affidavit offered no evidence of illegal activity closely linked in time to the issuance of the warrant, except for the events that lead to the instant charges, and affirmatively established that no drugs or proceeds from that transaction would be found on the premises, any evidence seized pursuant to the warrant should have been suppressed.

PROPOSITION OF LAW # 2

THE STATE OF OHIO LACKED JURISDICTION OVER DEFENDANT WHEN IT COULD NOT PROVE THAT HE CONSPIRED TO COMMIT AN OFFENSE WITHIN THE STATE OF OHIO AS CHARGED IN COUNT FOUR, OR THAT HE ACTUALLY COMMITTED ANY ELEMENT OF THE OFFENSES OF AGGRAVATED TRAFFICKING OR POSSESSION IN THE STATE OF OHIO.

Defendant Cabrales never left the state of California until he was extradited to Ohio to stand trial on these charges. Under R.C. 2901.11, the only arguable basis for jurisdiction is the allegation that he conspired to commit an offense in Ohio while in another state. Although delivery of drugs to a location within the state of Ohio might be evidence that the drugs were being sold or offered for sale in the state, no evidence established that Defendant knew of such a sale, or conspired with anyone to accomplish it. In fact, the taped phone conversations clearly show that he did not know the individual the drugs were being delivered to, or any details of the transaction. Any request for information required him to check with someone else for answers. Defendant testified that he only acted as an interpreter, and that he was never privy to the nature of the goods being delivered, or the details of the transaction. Under these circumstances, Ohio did not have jurisdiction to try Defendant and his motion to dismiss for lack of jurisdiction should have been granted.

PROPOSITION OF LAW NO. 3

A COUNT OF AN INDICTMENT WHICH LEAVES OUT OR IMPROPERLY STATES AN ESSENTIAL ELEMENT OF AN OFFENSE FAILS TO CHARGE AN OFFENSE UNDER OHIO LAW, AND COULD NOT, THEREFORE, BE AMENDED WITHOUT BEING SUBMITTED TO THE GRAND JURY FOR A NEW INDICTMENT.

Count four of Defendant's indictment charges that with "purpose to commit or to promote or facilitate the commission of Aggravated Trafficking and Possession" he agreed

with the co-defendants to do so in violation of R.C. 2923.01(A)(2). That statute, however, forbids acting with purpose to commit a "felony drug trafficking offense." The state apparently moved to amend the indictment prior to trial (although no written motion appears in the docket entries). Defendant filed a memorandum opposing the motion and moving for dismissal of Count 4. The court permitted amendment and Defendant was convicted of the amended charge.

It is well established in Ohio jurisprudence that felony charges may only be imposed by a grand jury through the indictment procedure. An indictment which omits an essential element of the offense is insufficient to charge a crime, and cannot be cured by amendment without violating Section 10, Article I of the Ohio Constitution. Defendant was convicted of a crime essentially different from that charged by the grand jury, in violation of his constitutional right, and the judgment on Count 4 must be vacated.

PROPOSITION OF LAW NO. 4

POSSESSION, TRANSPORTATION, AND SALE OF THE SAME DRUGS SIMULTANEOUSLY ARE ALLIED OFFENSES OF SIMILAR IMPORT, FOR WHICH DEFENDANT MAY RECEIVE ONLY A SINGLE CONVICTION AND SENTENCE.

Defendant was charged with possession, trafficking (transportation) and trafficking (sell or offer to sell) of exactly the same marijuana. The testimony at trial makes it clear that the drugs that form the basis for these charges were all recovered from defendant Mathews' vehicle. No additional drugs were uncovered in the search of Defendant's residence, nor did that search uncover any evidence that he had ever possessed or sold additional drugs. In addition, no sale was ever completed because the attempt to deliver the drugs after the arrest of Mathews and Longenecker was unsuccessful.

Although this Court has upheld multiple convictions for possession and trafficking in the past, these decisions are not in line with the Court's recent decision that theft and possession of the same stolen property are allied offenses, even under the Court's strict comparison of the elements standard. This Court has also recently reaffirmed the validity of pre-*Rance* decisions which hold that kidnaping can be an allied offense of either rape or robbery, even though a strict comparison of the elements could not support such a result. decisions that utilized a comparison of the facts rather than the elements of the offenses.

The First District found that the transportation section of R.C. 2925.03 was allied to possession of the same drugs because it is impossible to transport or prepare a drug for distribution without possessing it, as possession is defined by Ohio law. Defendant maintains that this decision should be extended to the "sell or offer to sell" portion of the statute in the instant fact pattern. Given the fact pattern here, possession and transportation are allied offenses of sale in this case. The state relied on either circumstantial evidence of an offer to sell the actual drugs which were seized, or a delivery of those drugs. Delivery is included in the definition of sale, so Defendant could not have delivered the drugs without also being guilty of selling them. Offering to sell the drugs necessarily implies control over them, which equates to at least constructive possession.

Both of the state's alternative theories postulate sale of the actual drugs seized, which were also the subject of the possession charge. Although an offender might offer to sell drugs without ever actually having the means to obtain or deliver them, this fact pattern is not present before the court. In this case, Defendant is charged with possession of the drugs that the state claims he transported and sold or offered to sell.

Trial counsel properly objected to multiple convictions and consecutive sentences

for these offenses. Since it was plain error for the trial court to impose separate convictions and sentences for possessing, selling and transporting the same drugs, Defendant is entitled to have two of his convictions and sentences vacated.

PROPOSITION OF LAW NO. 5

WHERE THE EVIDENCE PRESENTED AT TRIAL WOULD HAVE ALLOWED THE JURY TO CONCLUDE THAT THE DEFENDANT ATTEMPTED TO SELL MARIJUANA BUT WAS UNABLE TO COMPLETE THE TRANSACTION, DEFENDANT IS ENTITLED TO AN INSTRUCTION ON ATTEMPT AS A LESSER INCLUDED OFFENSE.

Defense counsel requested, and was denied, an instruction on the lesser included offense of attempted trafficking under count one of the indictment which alleged sale or offer to sell. The trial court erroneously concluded that the facts did not warrant such an instruction, because the definition of sale includes an offer to sell. However, the evidence did not reveal who, if anyone, offered to sell these drugs, nor did the state rely on that theory to the exclusion of all others. The state emphasized in closing that the definition of sale included "delivery, barter, exchange, transfer or gift...." On the evidence presented, the jury could have found that Defendant did not offer drugs for sale, or even know that a sale was involved, but that he knew or should have known that they were being delivered, since he was interpreting the delivery instructions as they were given. Since that delivery was never completed, the jury could have found Defendant guilty of attempt.

A criminal defendant is entitled to a jury instruction on a lesser included offense when the offense on which the instruction is requested is necessarily lesser than and included within the charged offense and the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater. Since both prongs

of the test were met in this case, failure to give the lesser included offense instruction was prejudicial error.

PROPOSITION OF LAW NO. 6

THE EVIDENCE PRESENTED BELOW WAS INSUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

The case presented by the State of Ohio against Defendant fails to eliminate reasonable doubt. The state relies on the fact that Defendant was communicating by telephone with the drivers of the vehicle in which drugs were found. Defendant did not own the vehicle, and a search of his home failed to uncover any evidence of drug trafficking other than the cell phone in question. Even that evidence should have been suppressed because the search warrant affidavit did not supply timely probable cause to search. Defendant denied possession or knowledge of the marijuana, and stated that he was merely translating instructions as a favor to an acquaintance. The State's proof does not rise to the level of substantial evidence sufficient to convince a reasonable person of Defendant's guilt. For that reason, the Court should reverse Defendant's conviction and remand for appropriate action.

PROPOSITION OF LAW NO. 7

DUE PROCESS IS VIOLATED WHEN A COURT MODIFIES A PREVIOUSLY IMPOSED SENTENCE SO THAT IT NO LONGER COMPLIES WITH THE SENTENCING STATUTES IN EFFECT WHEN THE OFFENSE WAS COMMITTED, OR RE-SENTENCES CONVICTED OFFENDERS UNDER A DIFFERENT, AND MORE ONEROUS, SCHEME.

The Court of Appeals vacated Defendant's sentences pursuant to this Court's decision in *Foster*, but remanded for resentencing in accord with that opinion's instructions that the

trial court was free to impose any sentence without the need for any factual findings or admissions. Defendant maintains that such resentencing would violate due process in his case, since his alleged offenses predated the *Foster* decision.

The retroactive application of *Foster's* remedy to persons who committed their criminal offenses prior to the release of *Foster* violates clearly established United States Supreme Court precedent regarding ex post facto laws and due process. Regardless of whether a change in criminal law technically increases the punishment for a crime, a legislative enactment modifying a criminal penalty falls within the ex post facto prohibition if it: 1) is retrospective; and 2) disadvantages the offender affected by it.

Although the Ex Post Facto Clause does not, standing alone, apply to the judicial branch, the United States Supreme Court has recognized that similar limitations on retroactive judicial decisionmaking are inherent in the notion of due process. In other words, a court may not accomplish judicially what the constitution forbids to the legislature

Retroactive application of *Foster* seriously and unexpectedly disadvantages this Defendant. First and foremost, he would be divested of the presumption of minimum, less than maximum and concurrent terms of imprisonment. Since Defendant had no prior criminal record, had never served a prison term, and played only a minimal role in the offense, these presumptions were likely to benefit him if properly considered.

Second, he loses the meaningful appellate rights that existed prior to *Foster*. Before *Foster*, a defendant enjoyed a presumptive sentence within the range specified for his offense, and, if he received a sentence greater than the presumption, he could be assured a new sentencing hearing if the trial court failed to make the necessary findings, made erroneous findings or failed to provide reasons for those findings made in support of

maximum or consecutive terms. If the *Foster* remedy is retroactively applied to resentencings, these important rights, will unexpectedly be lost.

In *Foster*, this Court has attempted to do by judicial fiat that which the Ohio General Assembly is precluded from doing by the Ex Post Facto Clause. Due process forbids such a result. For defendants like Mr. Cabrales, whose criminal conduct pre-dates February 27, 2006, the severance remedy is unavailable as a matter of constitutional law. The decision to abolish sentencing presumptions for criminal defendants constitutes a marked and unpredictable departure from the law passed by the General Assembly. Given this unexpected and detrimental departure, due process precludes the retroactive application of the now-severed provisions to defendants whose offense conduct pre-dates the release of *Foster*.

PROPOSITION OF LAW NO. 8

THE OHIO RULES OF STATUTORY CONSTRUCTION REQUIRE APPLICATION OF THE RULE OF LENITY TO COURT INTERPRETATIONS OF A SENTENCING STATUTE.

The policy of lenity means that the Court will not interpret a criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess of what the legislature intended. R.C. 2901.04(A) provides that: "Sections of the Revised Code defining . . . penalties shall be strictly construed against the state, and liberally construed in favor of the accused." The decision to constitutionalize Ohio's sentencing statutes by excising all clauses that restrict the court's discretion to impose higher sentences does not pass the test of lenity in interpretation. The enactment of the statutory provisions struck down in the Ohio sentencing cases strongly suggests that the General Assembly did not intend for judges to impose consecutive or maximum

sentences in all cases.

CONCLUSION

For all the reasons stated above, due process requires that the Defendant's convictions be reversed and remanded. Defendant must at least be remanded for resentencing under *Foster* but that resentencing should not include retroactive application of the *Foster* severance remedy, or consecutive sentences for allied offenses of similar import.

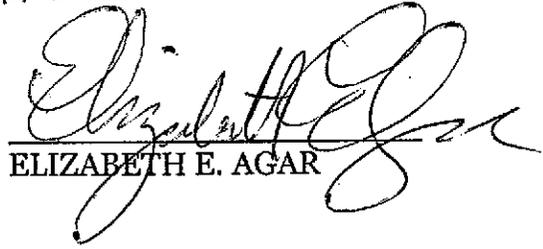


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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing instrument was delivered ^{Hand} to the office of the Prosecuting Attorney this ~~10th~~ day of APRIL, 2007.



ELIZABETH E. AGAR

FILED
COURT OF APPEALS

MAR - 2 2007

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO,	:	APPEAL NO. C-050682
	:	TRIAL NO. B-0403121-D
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	PRESENTED TO THE CLERK
	:	OF COURTS FOR FILING
FERNANDO CABRALES,	:	
	:	MAR 02 2007
Defendant-Appellant.	:	

COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentence Vacated, and Cause Remanded.

Date of Judgment Entry on Appeal: March 2, 2007

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Elizabeth E. Agar, for Defendant-Appellant.

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH

2007 MAR -2 A 10: 08

FILED

Please note: This case has been removed from the accelerated calendar.

APP. 1

MARK P. PAINTER, Judge.

{¶1} Defendant-appellant Fernando Cabrales appeals his convictions for two counts of trafficking in marijuana,¹ one count of possession of marijuana,² and one count of conspiracy.³ We affirm Cabrales's conviction, but sustain his challenge to part of his sentence, and remand to the trial court for resentencing.

1. Six Assignments of Error

{¶2} Cabrales argues that the trial court erred by (1) overruling his motion to suppress the evidence seized from his house in California; (2) convicting him when Ohio lacked jurisdiction to charge him with conspiracy; (3) sentencing him on allied offenses of similar import (possession of, transportation of, and offering to sell the same drugs); (4) refusing a jury instruction on the lesser-included offense of attempt under one count of trafficking; (5) allowing a conviction that was based on insufficient evidence and was against the weight of the evidence, and failing to grant his motion for an acquittal; and (6) imposing consecutive sentences.

{¶3} Because trafficking in violation of R.C. 2925.03(A)(2) and possession in violation of R.C. 2925.11(A) are allied offenses of similar import, we vacate the separate sentences for these offenses and remand so that the trial court can merge the offenses for a single sentence. And in light of the Ohio Supreme Court's decision in *State v. Foster*,⁴ we must also vacate the remaining sentences and remand for resentencing. With respect to Cabrales's other assignments of error, they are without merit and overruled.

¹ R.C. 2925.03(A)(1) and (2).

² R.C. 2925.11(A).

³ R.C. 2923.01(A)(2).

⁴ See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

II. Smuggling Marijuana into Ohio

{¶4} On March 26, 2004, Officer Thomas Canada of the Regional Narcotics Unit ("RENU") stopped a car driven by Sean Matthews for crossing lane lines several times on Interstate 74. (RENU is a task force that is made up of officers from the Hamilton County Sheriff's Department and the Cincinnati Police Department and that targets drug traffickers in Hamilton County.) Matthews's car had just crossed the Indiana-Ohio border when Officer Canada noticed the erratic driving.

{¶5} Officer Canada approached the car and asked Matthews for his driver's license. He noticed that Matthews was very tired and asked where he was coming from and where he was going. Matthews stated that he was coming from Arizona and going to Columbus, Ohio, to visit a friend. When Officer Canada asked who the friend was, Matthews was uncertain.

{¶6} Because people generally know whom they are visiting, Officer Canada's suspicion was aroused by Matthews's response. Officer Canada walked back to his vehicle to check Matthews's license. When he approached Matthew's car for a second time, he noticed a marijuana odor. Officer Canada then asked Matthews and his companion, James Longenecker, to get out of the car.

{¶7} At this time, Agent Arnold arrived with a drug-sniffing dog. When Officer Canada asked Matthews if he could search the car, Matthews responded, "If you wish." Because Officer Canada did not get a clear affirmative answer to the search request, he asked Agent Arnold to walk his dog around the car. The dog indicated a scent on the left rear passenger door. In Officer Canada's view, this gave him the probable cause he needed to investigate further.

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{¶8} Underneath a stack of clothes in the back seat was a black duffle bag that emitted a marijuana odor. A subsequent search of the entire car resulted in the confiscation of three duffle bags containing over 300 pounds of marijuana. Matthews and Longenecker were arrested and taken to a police station for questioning.

{¶9} During their questioning of Longenecker, the officers discovered that he had been delivering marijuana for a man known as Boo Boo (also known as Bow Bow). Both Matthews and Longenecker agreed to cooperate with RENU by attempting to complete the marijuana delivery. Because Longenecker had completed other deliveries for Boo Boo in the past (from California to Denver), and because it was Matthews's first experience transporting narcotics, the police asked Longenecker to place recorded phone calls to Boo Boo and to complete the delivery.

{¶10} Officer Steven Lawson, an undercover narcotics investigator with RENU, took Matthews's place as the driver of the vehicle. After Longenecker resumed contact with Boo Boo, he explained that rainy weather and traffic had delayed their arrival in Cincinnati. Boo Boo seemed to understand and instructed Longenecker to take the marijuana to a hotel parking lot in the Kenwood suburb. Boo Boo was recorded as stating that a man named Mundy, driving a silver Honda, would meet them and pick up the marijuana at the hotel parking lot.

{¶11} A person later identified as Mundy Williams eventually arrived at the hotel parking lot in a silver Honda, but refused to accept delivery at that location. He asked Longenecker and Officer Lawson to follow him to a nearby house to complete the delivery. But Officer Lawson refused to follow him to another location (for safety reasons and because the police were in position at the hotel parking lot).

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{¶12} Williams became angry that Longenecker and Officer Lawson were not going to follow him to another location, and he attempted to leave. But RENU officers stopped and arrested him before he could exit from the parking lot.

{¶13} After Williams's arrest, Longenecker was further questioned about his trafficking activities. Longenecker told the police that he had transported drugs for Boo Boo approximately six to seven times over the previous year, and that he had typically driven the drugs from California to Colorado. When Boo Boo had contacted him about this transport from California to Ohio, Longenecker enlisted the help of Matthews because he knew it would require a long drive.

{¶14} Longenecker testified that he and Matthews had driven to Boo Boo's residence on March 24, 2004. They then went to the residence of a person whom he only knew by the name of Jessie. At this house, Longenecker and Boo Boo loaded the car that Matthews had borrowed from a friend with three duffle bags filled with marijuana. Two of the bags fit in the trunk, but the third had to be placed in the back seat.

{¶15} After getting some sleep, Longenecker and Matthews began to drive nonstop from California to Ohio on the morning of March 25. Throughout the trip, Longenecker kept in contact with Boo Boo by using Matthews's cellular phone. While the original route was supposed to end in Cleveland, Boo Boo called while Longenecker and Matthews were in Indiana, and instructed them to change the delivery to Cincinnati. Almost immediately after they crossed the Indiana-Ohio border on I-74, RENU officers stopped the vehicle based on Matthews's erratic driving.

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{¶16} With the information Longenecker provided about Boo Boo's description, residence, family, and vehicles, RENU contacted the Riverside, California, police department. The Riverside police believed that the physical description matched Fernando Cabrales. Cabrales's picture was sent by e-mail to RENU officers, and both Longenecker and Matthews separately identified Fernando Cabrales as the "Boo Boo" they had been in contact with throughout the transaction.

{¶17} Riverside police obtained a search warrant, and Hamilton County obtained an arrest warrant for Fernando Cabrales. He was arrested on March 31, during a search of his residence. No drugs or cash was seized, but the cellular phone that was used to place the calls between Boo Boo and Longenecker was found in Cabrales's home and seized.

{¶18} Cabrales testified in his own defense at trial. He claimed that he had no idea what Longenecker had been delivering, but that he believed that the merchandise might have included clothing. While he admitted to being the voice on the recorded telephone calls, he claimed that he had merely been offering translation services between Longenecker and another party. The jury did not believe this defense and found Cabrales guilty on all charges. He was sentenced to 24 years' incarceration.

III. Motion to Suppress

{¶19} In his first assignment of error, Cabrales argues that the trial court erred by overruling his motion to suppress any evidence seized from the search of his residence on March 31, 2004. Cabrales maintains that the affidavit used to obtain a search warrant contained no probable cause to believe that either drugs or money

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related to the alleged offenses would be found on the premises. Cabrales's assignment is without merit.

{¶20} Appellate review of a suppression ruling involves mixed questions of law and fact.⁵ When ruling on a motion to suppress, the trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight of the evidence.⁶ An appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence.⁷ But the appellate court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard.⁸

{¶21} In determining whether a search warrant was adequately supported by probable cause, the reviewing court's duty is merely to ensure that the issuing magistrate or judge had a substantial basis for concluding that probable cause existed.⁹ This standard of review grants a great deal of deference to the issuing magistrate.¹⁰

{¶22} To establish probable cause to issue a search warrant, an affidavit must contain sufficient information to allow a magistrate to draw the conclusion that evidence is likely to be found at the place to be searched.¹¹ Probable cause exists when a reasonably prudent person would believe that there is a fair probability that the place to be searched contains evidence of a crime.¹²

{¶23} In the present case, the affidavits used to secure the search and arrest warrants were prepared after Longenecker and Matthews had been arrested and had

⁵ See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8.

⁶ See *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583.

⁷ *Burnside*, supra, at ¶8.

⁸ *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

⁹ See *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640.

¹⁰ See *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141.

¹¹ See *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741.

¹² See *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317.

provided the police with detailed information about Cabrales. The affidavit for the search warrant accurately described Cabrales's primary residence. Both Longenecker and Matthews identified Cabrales's picture as the man they knew as "Boo Boo." They detailed how Cabrales had led them to Jessie's residence to pick up the marijuana and how they were in constant contact with Cabrales throughout their drive from California to Ohio. Longenecker also attested that Cabrales had directed him to deliver the drugs to a hotel parking lot in Kenwood, and that a person named Mundy in a silver Honda would be there to pick up the drugs.

{¶24} According great deference to the judge authorizing the search warrant, we hold that the incidents described in the affidavit provided a substantial basis to conclude that probable cause existed to issue the warrant. All of Cabrales's instructions demonstrated his intimate knowledge of the delivery of 300 pounds of marijuana from California to Ohio. Thus the trial court did not err in overruling Cabrales's motion to suppress, and his first assignment of error is overruled.

IV. Jurisdiction

{¶25} Cabrales's second assignment of error contends that the trial court erred by denying his motion to dismiss for lack of jurisdiction under R.C. 2901.11 and for failure to state an offense in count four of the indictment.

{¶26} Under R.C. 2901.11, a person is subject to criminal prosecution and punishment in Ohio if "while out of this state, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in this state." While Cabrales argues that there was no evidence that he knew that drugs were being sold or offered for sale in Ohio, all the evidence pointed to the contrary: (1)

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Longenecker and Matthews were constantly in contact with Cabrales by cellular phone; (2) Cabrales instructed Longenecker and Matthews where to deliver the marijuana; and (3) he provided a description of the person who would be waiting for the marijuana in Cincinnati, as well as the type of car that person would be driving. These facts illustrate that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶27} Additionally, the trial court did not err in overruling Cabrales's motion to dismiss count four for failure to state an offense. Count four of the indictment stated that Cabrales, "with purpose to commit or to promote or to facilitate the commission of aggravated trafficking and possession, agreed with another person or persons * * * that one or more of them would engage in conduct that facilitate[d] the commission of any of the specified offenses, and subsequent to [their] entrance into such plan or agreement, a substantial overt act, to wit: the transport of marihuana from California to Hamilton County in furtherance of the conspiracy was committed by the defendant or another person or persons." (Marijuana is spelled with an "h" in the statute. We note that both spellings are acceptable.)

{¶28} Under R.C. 2921.01(A), conspiracy prohibits a person from purposely committing, promoting, or facilitating the commission of "felony drug trafficking, manufacturing, processing, or possession offense[s]." Thus the indictment incorrectly used the wording "aggravated trafficking and possession" instead of "felony drug trafficking, manufacturing, processing, or possession." The trial court granted the state's motion to amend the indictment to substitute the word "felony" for the word "aggravating" so that the charge would conform with R.C. 2923.01(A).

{¶29} Crim.R. 7(D) provides that “[t]he court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.” Here, the trial court could have amended the indictment so long as the amendment did not change the name or identity of the crime charged.¹³

{¶30} In this case, the trial court allowed the amendment merely to substitute the word “felony” for “aggravating.” This amendment did not alter the name or identity of the crime charged. The amendment did not add any additional elements that the state was required to prove. And Cabrales has been unable to show that he had been misled or prejudiced by the amendment. Cabrales had notice of both the offense and the applicable statute. Accordingly, the second assignment of error is overruled.

V. Allied Offenses of Similar Import

{¶31} In his third assignment of error, Cabrales argues that the possession of, transportation of, and offering to sell the same drugs are allied offenses of similar import under R.C. 2941.25(A), and that no separate animus existed for the commission of each of these crimes. As a result, Cabrales contends that he should not have been sentenced separately for each crime. In support of his argument, Cabrales relies on our decision in *State v. Jennings*,¹⁴ where we held that a defendant may be indicted for both possession and trafficking, but that if the charges stem from a single transaction involving the same type and quantity of drugs, there can only be

¹³ Crim.R. 7(D); *State v. O'Brien* (1987), 30 Ohio St.3d 122, 125-26, 508 N.E.2d 144.

¹⁴ See *State v. Jennings* (1987), 42 Ohio App.3d 179, 537 N.E.2d 685.

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one conviction under R.C. 2941.25(A).¹⁵ Cabrales's reliance on *Jennings* is misplaced because it was superseded by the Ohio Supreme Court's decision in *State v. Rance*.¹⁶ But Cabrales is correct that trafficking in drugs in violation of R.C. 2925.03(A)(2) and possession of drugs in violation of R.C. 2925.11(A) are allied offenses of similar import.

{¶32} R.C. 2941.25(A) provides, "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment * * * may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶33} In *Rance*, the Ohio Supreme Court held that to determine whether crimes are allied offenses of similar import under R.C. 2941.25(A), courts must assess "whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other."¹⁷ The *Rance* test requires a strict textual comparison of the statutory elements, without reference to the particular facts of the case, to determine if one offense requires proof of an element that the other does not. If the elements do correspond, the defendant may be convicted and sentenced for only one offense, unless the court finds that the defendant committed the crimes separately or with separate animus.¹⁸ Therefore, we must determine whether the possession and trafficking counts involved allied offenses of similar import or whether the charged offenses were committed separately or with separate animus.¹⁹

¹⁵ Id.

¹⁶ See *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, 710 N.E.2d 699.

¹⁷ Id. at 638.

¹⁸ Id. at 638-39.

¹⁹ Id.

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{¶34} Since *Rance*, we have held that possession and trafficking in the same type and quantity of a controlled substance are not allied offenses, because when the elements of each offense are compared in the abstract, each requires proof of a fact that the other does not.²⁰ But this analysis was restricted to trafficking in violation of R.C. 2925.03(A)(1)—selling or offering to sell a controlled substance—and did not involve trafficking in violation of R.C. 2925.03(A)(2)—preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance.

{¶35} A possession charge only requires proof that a defendant obtained, possessed, or used a controlled substance, while a trafficking charge under R.C. 2925.03(A)(1) requires proof that the defendant was either selling or offering to sell the controlled substance. The added mens rea of intending to sell or offering to sell the controlled substance is the differentiating element. As we have said previously, “It is possible to possess [marijuana] without offering it for sale, and it is possible to sell or offer to sell [marijuana] without possessing it, e.g., when one serves as a middleman.”²¹ Accordingly, possession and trafficking in violation of R.C. 2925.03(A)(1) are not allied offenses of similar import.

{¶36} But *Cabrales* also claims that possession of drugs in violation of R.C. 2925.11(A) and trafficking in drugs in violation of R.C. 2925.03(A)(2) are allied offenses of similar import. We agree. Although the Tenth and Twelfth Appellate Districts have ruled otherwise,²² for a person to commit a trafficking offense in

²⁰ See *State v. Foster*, 1st Dist. No. C-050378, 2006-Ohio-1567; see also, *State v. Salaam*, 1st Dist. No. C-020324, 2003-Ohio-1021, and *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

²¹ *Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

²² See *State v. Guzman*, 10th Dist. No. 02AP-1440, 2003-Ohio-4822; *State v. Alvarez*, 12th Dist. No. CA2003-03-067, 2004-Ohio-2483.

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violation of R.C. 2925.03(A)(2), that person would also have to violate R.C. 2925.11(A)—possession of drugs. The trafficking statute prohibits a person from preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance when the defendant knows or reasonably believes that the controlled substance is intended for resale. For a person to prepare for shipment or transport drugs, that person would necessarily have to possess the drugs. The statutory elements of these crimes correspond to such a degree that the commission of one crime will result in the commission of the other.

{¶37} Thus, Cabrales's third assignment of error is sustained as to possession of drugs in violation of R.C. 2925.11(A) and trafficking in drugs in violation of R.C. 2925.03(A)(2). We reverse the sentences for these offenses and remand this case so that the trial court may resentence Cabrales in accordance with this decision—so that Cabrales is sentenced for only one of these offenses.

{¶38} We also note that Cabrales claims that the two counts of trafficking involved allied offenses, and that he should not have been sentenced separately for these offenses. But Cabrales was charged under two separate subsections of R.C. 2925.03(A). Subsection (1) forbids a person from selling or offering to sell a controlled substance, while subsection (2) prohibits a person from preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance when the defendant knows or reasonably believes that the controlled substance is intended for resale. Because Cabrales needed a separate animus to commit each crime—offering to sell and transporting—these crimes were not allied offenses of similar import.

VI. Lesser-Included Offense

{¶39} Cabrales's fourth assignment of error argues that the trial court erred by refusing his request for a jury instruction on the lesser-included offense of attempt under count one of the indictment—the trafficking count that prohibited him from selling or offering to sell a controlled substance. Cabrales contends that the jury could have found that he had not offered the drugs for sale, or had even known that a sale was involved, but that he knew or should have known that the drugs were being delivered. Cabrales further rationalizes that since the delivery was never completed, the jury would likely have found him guilty only of attempting to traffick in a controlled substance. Cabrales's argument is without merit.

{¶40} We note the oddity of this question—how does a person *attempt to offer to sell* a controlled substance? Doesn't a person merely offer to sell the drug, not attempt to offer to sell? It seems the answer is within the statute.

{¶41} R.C. 2925.03(A)(1) prohibits a person from selling or *offering to sell* a controlled substance. For purposes of R.C. 2925.03(A)(1), the phrase “ ‘offer to sell a controlled substance,’ simply means to declare one's readiness or willingness to sell a controlled substance or to present a controlled substance for acceptance or rejection.”²³ And for a person to be convicted of trafficking, the delivery of the narcotics need not be completed. As the Ohio Supreme Court has stated, “A person can ‘offer to sell a controlled substance’ in violation of R.C. 2925.03(A)(1) without transferring a controlled substance to the buyer.”²⁴ Thus the statute subsumes an attempt to traffick in a controlled substance within its definition—there does not need to be an actual delivery.

²³ See *State v. Henton* (1997), 121 Ohio App.3d 501, 510, 700 N.E.2d 371, citing *State v. Patterson* (1982), 69 Ohio St.2d 445, 432 N.E.2d 802.

²⁴ See *State v. Scott* (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798.

{¶42} Additionally, the state presented sufficient evidence at trial from which the jury could reasonably have inferred that Cabrales had acted as a conspirator in offering to sell a controlled substance in violation of R.C. 2925.03(A)(1). Cabrales was constantly in contact with Longenecker and Matthews by cellular phone, he instructed Longenecker and Matthews where to deliver the marijuana, and he provided descriptions of the person and the car that were to be waiting for the marijuana in Cincinnati. These facts illustrate that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶43} Accordingly, the trial court did not err in refusing to instruct the jury on attempt, and we overrule Cabrales's fourth assignment of error.

VII. Sufficiency and Weight; Crim.R. 29 Motion for Acquittal

{¶44} In his fifth assignment of error, Cabrales argues that there was insufficient evidence to convict him, that his conviction were against the manifest weight of the evidence, and that the trial court erred by denying his Crim.R. 29 motion for an acquittal.

{¶45} When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.²⁵

{¶46} A review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror."²⁶ We must review the entire record, weigh the evidence,

²⁵ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

²⁶ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

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consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.²⁷ A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.²⁸

{¶47} And the standard of review for the denial of a Crim.R. 29(A) motion to acquit is the same as the standard of review for the sufficiency of the evidence. A motion for a judgment of acquittal should not be granted when reasonable minds can reach different conclusions as to whether each element of the crime charged has been proved beyond a reasonable doubt.²⁹

{¶48} Cabrales was found guilty of two counts of trafficking in a controlled substance, one count of possession of a controlled substance, and conspiracy. The trafficking statute prohibits a person from knowingly (1) selling or offering to sell a controlled substance, or (2) preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance that the person has reasonable cause to believe will be resold.³⁰ The possession statute forbids a person from knowingly obtaining, possessing, or using a controlled substance.³¹ And the conspiracy statute proscribes a person from facilitating and planning with another person the commission of trafficking in or possessing drugs.³²

{¶49} The state presented the testimony of coconspirators Longenecker and Matthews, as well as the testimony of RENU Officers Canada, Morgan, and Lawson, and of Riverside, California, Police Officer Robert Roggeveen.

²⁷ *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

²⁸ *Id.*

²⁹ See Crim.R. 29; see, also, *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

³⁰ R.C. 2925.03(A)(1) and (2).

³¹ R.C. 2925.11(A).

³² R.C. 2923.01(A)(1).

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{¶50} Longenecker testified that he had transported drugs several times for a man named "Boo Boo," from California to Colorado. He stated that Boo Boo had contacted him in March 2004 to make a delivery to Ohio. Because of the nonstop driving that was involved in the drug delivery, Longenecker had enlisted the assistance of Matthews to make the drive from California to Ohio.

{¶51} Longenecker further testified that he and Matthews had met at Boo Boo's residence on March 24. They then drove to another person's home to pick up three duffle bags of marijuana weighing over 300 pounds. The following day, Longenecker and Matthews began the drive to Ohio. Along the journey, Boo Boo would regularly call to chart their progress. Once Longenecker and Matthews reached Indiana, Boo Boo instructed them to change their delivery destination from Cleveland to Cincinnati. Once they crossed the Indiana-Ohio border, RENU Officer Canada pulled them over for traffic infractions.

{¶52} Officer Canada testified that his suspicions had been aroused when Matthews had failed to answer questions competently. He also had noticed an odor of marijuana when he approached the car for a second time. When Officer Canada was not given a clear affirmative on his request to search the vehicle, he asked Agent Arnold and his drug-sniffing dog to walk around the car. The dog indicated a scent on the left rear passenger door. Officer Canada then searched the car where the dog had indicated, and he found a duffle bag containing marijuana. In all, there was over 300 pounds of marijuana in the vehicle.

{¶53} Longenecker and Matthews both testified that, after they were arrested, they had cooperated with the RENU officers. Officer Lawson sat in the place of Matthews and attempted to make the drug delivery with Longenecker. They

contacted Boo Boo again, and he instructed them to deliver the drugs to a hotel parking lot in Kenwood. Longenecker also testified that Boo Boo had told them that a person named Mundy would pick up the marijuana in a silver Honda.

{¶54} A person later identified as Mundy arrived in the hotel parking lot in a silver Honda, but refused delivery at that location. He wanted Longenecker and Officer Lawson to follow him to a nearby house, but they refused. When Williams became angry that Longenecker and Officer Lawson would not follow him to another location, he attempted to leave. But RENU officers arrested him before he could exit from the parking lot.

{¶55} Based on the information that Longenecker had provided about Boo Boo's description, residence, family, and vehicles, RENU contacted the Riverside, California, police department. The Riverside police believed that the physical description matched Fernando Cabrales. The Riverside police then e-mailed a picture to RENU officers. Both Longenecker and Matthews independently confirmed that Cabrales was the Boo Boo who had organized the transportation of over 300 pounds of marijuana from California to Ohio.

{¶56} Thus, the evidence demonstrated that Longenecker and Matthews were constantly in contact with Cabrales by cellular phone, that Cabrales instructed Longenecker and Matthews where to deliver the marijuana, and that he provided descriptions of the person and car that were to be waiting for the marijuana in Cincinnati. It is clear that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶57} We conclude that a rational factfinder, viewing the evidence in a light most favorable to the state, could have found that the state had proved beyond a

reasonable doubt that Cabrales had possessed, trafficked in, and conspired to deliver over 300 pounds of marijuana in Hamilton County. Therefore, the evidence presented was legally sufficient to sustain the convictions. And the trial court did not err in overruling Cabrales's Crim.R. 29(A) motion.

{¶58} Although Cabrales insists that he was merely translating instructions to Longenecker and Matthews, our review of the record does not persuade us that the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding Cabrales guilty of possession of a controlled substance, two counts of trafficking in a controlled substance, and conspiracy. Therefore, his convictions were not against the manifest weight of the evidence.

{¶59} We overrule Cabrales's fifth assignment.

VIII. Sentencing

{¶60} In Cabrales's sixth and final assignment of error, he challenges the trial court's imposition of consecutive sentences. He maintains that the sentences violated his rights to a jury trial and due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Sections Five and Sixteen, Article I, of the Ohio Constitution, because the sentences were made consecutive based on facts not determined by a jury or proved beyond a reasonable doubt. Cabrales also contends that the Ohio Supreme Court's decision in *State v. Foster*,³³ which held that the imposition of consecutive sentences based on judicial factfinding is unconstitutional, retroactively modifies a defendant's sentence in violation of the Ex Post Facto Clause of the United States Constitution.

³³ See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

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{¶61} In this case, the trial court imposed consecutive sentences after making findings under R.C. 2929.14(E)(4) that Cabrales's crimes reflected a total disregard for the safety of the public. The court also determined that consecutive terms were necessary to protect the public from future crimes, since it believed that Cabrales had transported drugs into Colorado multiple times and that a return trip to Cleveland had been discussed.

{¶62} In *Foster*, the Ohio Supreme Court noted that "R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) require trial courts that impose consecutive sentences to make the statutorily enumerated findings and to give reasons at the sentencing hearing to support those findings for review on appeal."³⁴ But because the "total punishment increases through consecutive sentences only after judicial findings beyond those determined by the jury or stipulated to by the defendant, R.C. 2929.14(E)(4) violates principles announced in *Blakeley*"³⁵ and is therefore unconstitutional.

{¶63} The court's remedy was to sever R.C. 2929.14(E)(4) as unconstitutional and to keep the remaining unaffected provisions of the sentencing statutes. After the severance, judicial factfinding is not required before a trial court imposes consecutive prison terms. Trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to provide reasons for imposing a sentence involving consecutive prison terms.³⁶

{¶64} In this case, the trial court imposed consecutive sentences for possession and the two trafficking offenses after it had made findings based on an unconstitutional statute. We must sustain the assignment of error, vacate the

³⁴ Id. at ¶66, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

³⁵ Id. at ¶67.

³⁶ Id. at ¶100.

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consecutive sentences, and remand the case for resentencing in light of *Foster*. But Cabrales's other argument is without merit. We have previously held that the Ohio Supreme Court's decision in *Foster* does not violate ex post facto and due process principles.³⁷

{¶65} For all the foregoing reasons, we hereby vacate the sentences imposed by the trial court and remand this case for resentencing in light of *Foster*³⁸ and for the imposition of only one sentence for the trafficking offense in violation of R.C. 2925.03(A)(2) and the possession offense in violation of R.C. 2925.11(A). In all other respects, the trial court's judgment is affirmed.

Judgment affirmed in part, sentence vacated, and
cause remanded for resentencing.

HENDON and WINKLER, JJ., concur.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

³⁷ See *State v. Bruce*, 1st Dist. No. C-060456, 2007-Ohio-175.
³⁸ *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.



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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Appellee,

APPEAL NO. C-050682
TRIAL NO. B-0403121D

vs.

ENTRY OVERRULING MOTION FOR
RECONSIDERATION AND GRANTING
MOTION TO CERTIFY CONFLICT

FERNANDO CABRALES,

Appellant.

This cause came on to be considered upon the motion of the appellee for reconsideration and, in the alternative, to certify this appeal to the Ohio Supreme Court as being in conflict with *State v. Greitzer*, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037; as well as a series of cases cited in appellee's motion from the 4th, 6th, 8th, 10th, and 12th appellate districts of Ohio. The Court has also considered the appellant's memorandum in opposition.

The Court finds that the motion for reconsideration is not well taken and is overruled. The Court finds that the motion to certify a conflict in this appeal is well taken and is granted.

It is the order of this Court that the appeal be certified to the Ohio Supreme Court as being in conflict with the above cases regarding the following issue:

Are the offenses of trafficking in a controlled substance in violation of R. C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

To The Clerk:

Enter upon the Journal of the Court on MAR 29 2007 per order of the Court.

By: _____

Presiding Judge

(Copies sent to all counsel)