

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 MICHAEL K. ASHLEY)
)
 Defendant-Appellant.)
)

Case No. 2007-0591
On Appeal from the
Lake County Court of Appeals,
Eleventh Appellate District
Court of Appeals Case No.2006-L-134CA

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

CHARLES E. COULSON (0008667)
PROSECUTING ATTORNEY
LAKE COUNTY, OHIO

Alana A. Rezaee (0077942) (COUNSEL OF RECORD)
ASSISTANT PROSECUTING ATTORNEY
Administration Building
105 Main Street, P.O. Box 490
Painesville Ohio 44077
(440) 350-2683 Fax (440) 350-2585

COUNSEL FOR APPELLEE, STATE OF OHIO

DAVID H. BODIKER (0016590)
OHIO PUBLIC DEFENDER

SHERYL TRZASKA (0079915)
ASSISTANT STATE PUBLIC DEFENDER
Office of Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, OH 43215-2998
(614) 466-5394 Fax (614) 752-5167

COUNSEL FOR APPELLANT, MICHAEL K. ASHLEY

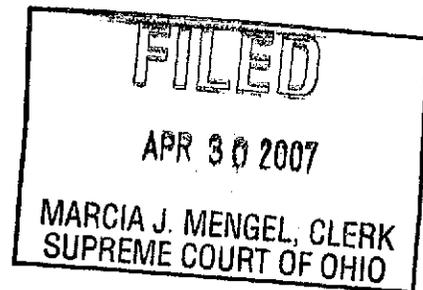


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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

On April 2, 2007, appellant Michael K. Ashely filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court, appealing the judgment of the Eleventh District Court of Appeals in *State v. Ashley*, 11th Dist. No. 2006-L-134, 2007-Ohio-690. In *Ashley*, the appellate court addressed appellant's arguments pertaining to this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Specifically, the Eleventh District held: (1) *Foster* does not violate federal or state notions of due process and prohibition against ex post facto laws; (2) this Court did not violate the separation of powers doctrine by severing the statutes it found incompatible with the Ohio and United States Constitutions; (3) the trial court's application of *Foster* to him, resulting in a more-than-the-minimum sentence, did not violate the "rule of lenity;" and (4) *Foster's* severance remedy does not run contrary to the intent of the Ohio General Assembly when it enacted Senate Bill 2.¹

In this appeal, appellant essentially challenges portions of the appellate court's holdings noted above. Appellant compares and challenges this Court's decision in *Foster* against the United States Supreme Court's decision in *Cunningham v. California* (2007), 127 S.Ct. 856. In this regard, appellant presents an inaccurate interpretation of the holding in *Cunningham* and misapplies it to this Court's decision in *Foster*.

While his appeal involves constitutional questions pertaining to due process, this Court has already rejected similar arguments. This Court denied a reconsideration motion in *Foster*, which

¹The appellate court made two other appropriate rulings that are not pertinent to this appeal. *Ashley*, at ¶28-34.

motion urged that the holding in *Foster* was violative of the ex post facto clause. *State v. Foster*, 109 Ohio St.3d 1408, 2006-Ohio-1703. Further, appellate courts across the State of Ohio have joined the Eleventh District in rejecting similar ex post facto and due process arguments regarding *Foster*.² And on February 28, 2007, this Court declined to accept jurisdiction and dismissed the appeal filed *State v. McGhee*, 2006-2088, wherein the appellant argued *Foster* violated due process and the rule against ex post facto laws, as well as the “rule of lenity.” *02/28/2007 Case Announcements*, 2007-Ohio-724. This court also denied the motion for reconsideration filed in *McGhee*, 2006-2088. *04/18/2007 Case Announcements*, 2007-Ohio-1722.

For the reasons discussed in more detail below, this Court should decline to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

Appellee is not dissatisfied with appellant’s statement of the case and facts. A review can also be found in *Ashley*, 2007-Ohio-690, at ¶2-6.

² See *State v. Lockett*, 1st Dist. No. C-060404, 2007-Ohio-308; *State v. Smith*, 2nd Dist. No. 21004, 2006-Ohio-4405; *State v. McGhee*, 3rd Dist. No. 17-06-05, 2006-Ohio-5162 (recently rejected by this Court in Case No. 2006-2088); *State v. Grimes*, 4th Dist. No. 04CA17, 2006-Ohio-6360 (Ohio Supreme Court Case No. 2007-0032, rejected by this Court on *03/28/2007 Case Announcements*, 2007-Ohio-1266); *State v. Paynter*, 5th Dist. No. CT2006-0034, 2006-Ohio-5542; *State v. Coleman*, 6th Dist. No. S-06-023, 2007-Ohio-448; *State v. Stroud*, 7th Dist. No. 05 MA 179, 2006-Ohio-7079; *State v. Mallette*, 8th Dist. No. 87984, 2007-Ohio-715; *State v. Hildreth*, 9th Dist. No. 06CA008879, 2006-Ohio-5058; *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082; *State v. Satterwhite*, 10th Dist. Nos. 06AP-666, 06AP-667, 2007-Ohio-798; *State v. Doyle*, 12th Dist. No. CA2005-11-020, 2006-Ohio-5373.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I

This Court's decision in *Foster* does not violate appellant's rights to Due Process and the Ex Post Facto Clauses guaranteed by the Ohio and United States Constitutions.

Appellant's first proposition of law is premised on alleged violations of ex post facto principles embedded in the notion of due process. Appellant argues, as he did below, that because he engaged in his criminal activity before this Court announced its decision in *Foster*, the trial court's application of *Foster* to his sentence violated his due process rights and the rule against ex post facto laws. He asserts that the application of *Foster* to his sentence exposed him to an increased penalty by unconstitutionally stripping him of the expectation of the presumptive minimum and concurrent terms of imprisonment that were in effect at the time he committed his crimes. The Eleventh District properly rejected appellant's argument, and there is no need for this Court to revisit the matter.

In *Ashley*, the appellate court, relying on its decision in *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, determined that *Foster* did not violate either federal or state constitutional notions of due process, and prohibition against ex post facto laws. *Id.* at ¶14-19.³ The appellate court noted that *Foster* did not contravene federal constitutional considerations because it "did not affect a defendant's right to a sentencing hearing; did not alter the statutory range of sentences available to trial courts for any particular degree of crime; and, because the potential for a judicial declaration that certain portions of Ohio's sentencing statutes were unconstitutional was prefigured

³A Notice of Appeal, Memorandum in Support of Jurisdiction, and Memorandum in Response addressing identical issues are currently pending before this Court in Case No. 2007-0241, *State v. Elswick*.

by the decisions of the United States Supreme Court in *Apprendi v. New Jersey* (2000), 530 U.S. 466; and, *Blakely v. Washington* (2004), 542 U.S. 296.” *Ashley*, at ¶16, citing *Elswick*, at ¶21-25. Here, appellant “knew that a more-than-minimum sentence could be imposed by the trial court, both under the pre-and post-*Foster* sentencing schemes; he knew that the statutory scheme was subject to judicial scrutiny; and, there is nothing to indicate his criminal conduct would have been affected by the sentencing change.” *Id.*

Regarding the state constitutional considerations, the Eleventh District followed the Third District Court of Appeals and determined that *Foster* did not violate the Ohio constitutional guarantee of due process since it is not substantively retroactive. *Ashley*, at ¶17, citing *Elswick*, at ¶28-30, citing *McGhee*, ¶21-25.⁴ While *Foster* applies retroactively in a limited number of cases, it “does not impair any vested right, or any accrued substantive right of a criminal defendant, since there is no such right in a presumed sentence.” *Id.*

Appellant’s arguments have already been properly addressed and rejected by the Eleventh District Court of Appeals, several other Ohio appellate courts, and this Honorable Court. Therefore, jurisdiction should be declined.

- A. The United States Supreme Court in *Cunningham v. California* (2007), 127 S.Ct. 856, did not determine that *Booker* cannot be applied to state sentencing law in the manner in which this Court applied it in *Foster*.

The argument contained in appellant’s subsection “A” under his first proposition of law is perplexing. The crux of it pertains to the United States Supreme Court’s decision in *Cunningham*. Specifically, appellant asserts the following:

⁴ This is the same *McGhee* case in which this Court declined to accept jurisdiction and denied a motion to reconsider. *State v. McGhee*, Ohio Supreme Court Case No. 2006-2088.

The United States Supreme Court has recently held that a state court cannot apply the *Booker* severance to state sentencing statutes in the manner that this Court applied *Booker* to Ohio's statutes. In *Cunningham v. California*, the Court found that California's application of the *Booker* severance remedy to the California sentencing findings was inapplicable. The Court found that California's attempt to compare their sentencing scheme with *Booker* is 'unavailing,' for the same reasons that Mr. Ashley argues that Ohio's *Booker* application is unavailing. *Cunningham* at 870. (Appellant's Memorandum, 3-4).

This assertion, however, misinterprets the reasoning and analysis conducted in *Cunningham*, and appellant then misapplies it to his argument concerning this Court's decision in *Foster*.

In *Cunningham*, the United States Supreme Court struck down California's determinate sentencing law as unconstitutional under *Blakely* and its progeny. Specifically, the United States Supreme Court explained that California's statutes authorized the defendant to be sentenced to a lower, mid, and upper term, but obligated the trial court to impose the middle term unless the judge found certain aggravating factors to exist. *Cunningham*, at syllabus. Thus, the United States Supreme Court held that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id.* at 871.

In rendering its decision in *Cunningham*, the United States Supreme Court abrogated the California Supreme Court's decision in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, wherein the court had found California's determinate sentencing law (DSL) survived Sixth Amendment inspection. But the United States Supreme Court disagreed and found that the "*Black* court attempted to rescue the DSL's judicial factfinding authority by typing it simply a reasonableness constraint, equivalent to the constraint operative in the federal system post-*Booker*." *Cunningham*, at 870. Indeed, the court in *Black* found that "[t]he level of discretion available to a California judge

in selecting which of the three available terms to impose appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-*Booker* sentencing.” Id. at 1261. The United States Supreme Court found the “comparison *** unavailing” and improper because “[t]he reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment.” Id. at 870.

Clearly, appellant makes two entirely incorrect assertions. (Appellant’s Memorandum, 4). The Supreme Court of California in *Black* did not use the *Booker* **severance** remedy, nor did the United States Supreme Court in *Cunningham* hold that a state court cannot apply the **severance** remedy in the manner in which this Court did in *Foster*. Instead, the United States Supreme Court concluded that:

As to the adjustment of California’s sentencing system in light of our decision, ‘[t]he ball...lies in [California’s] court.’ *Booker*, 543 U.S., at 265; cf. *supra*, at 15. We note that several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence. *** **Other States have chosen to permit judges genuinely ‘to exercise broad discretion... within a statutory range,’ *** which, ‘everyone agrees,’ encounters no Sixth Amendment shoal.** *Booker*, 543 U.S., at 233. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court’s decisions.” *Cunningham*, at 871. (Internal footnotes omitted) (Emphasis added).

Accordingly, this Court’s decision in *Foster* to sever those portions of Ohio’s sentencing scheme that violated the Sixth Amendment was entirely proper. See also R.C. 1.50. Now, in Ohio, trial courts are entrusted with full discretion to impose a prison sentence within the authorized

statutory range, a sentencing scheme which in no way offends the Sixth Amendment. *Foster*, paragraph seven of the syllabus. This Court simply did that which the United States Supreme Court condoned in both *Booker* and *Cunningham*.

Moreover, appellant's argument that by severing the offending statutes in *Foster* this Court failed to uphold the intent of the Ohio General Assembly when it enacted Senate Bill 2 was rejected by the Eleventh District Court of Appeals. Appellant argues, as he did below, that excising the findings a trial court was required to make when imposing more than the minimum, maximum, or consecutive terms essentially eliminated the goals of S.B. 2, particularly that of uniformity and proportionality in sentencing, because the effect of *Foster* is to place unfettered discretion in the hands of our trial courts. Appellant also argues that *Foster* renders meaningful appellate review of sentences impossible. (Appellant's Memorandum, 4, 6).

In rejecting appellant's argument, the Eleventh District relied on its decision in *Elswick Ashley*, at ¶25-26. In *Elswick*, the court noted that "[t]he Supreme Court described the 'overwhelming majority' of S.B. 2 reforms that survive its holding, and noted that trial courts must still 'consider those portions of the sentencing code that are unaffected by [its] decision ***.'" *Elswick*, at ¶51, 45-54, citing *Foster*, at ¶¶101-102, 105. Moreover, this Court aptly noted that:

Excising the unconstitutional provisions does not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender. See R.C. 2929.11. The excised portions remove only the presumptive and judicial findings that relate to "upward departures," that is, the findings necessary to increase the potential prison penalty. We add no language, and the vast majority of S.B. 2, which is capable of being read and standing alone, is left in place. *Foster*, at ¶98.

Additionally, the Eleventh District properly concluded that "it [was] without power to review the Ohio Supreme Court's decisions regarding legislative intent." *Ashley*, at ¶26.

For the foregoing reasons, appellant's arguments lack merit and this Court should decline jurisdiction.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. II

Foster's severance remedy does not violate the principle of Separation of Powers provided in the United States Constitution.

In appellant's second proposition of law, he argues that the severance remedy used in *Foster* was an act in violation of the Separation of Powers doctrine. The Eleventh District Court of Appeals properly found this exact argument to be without merit below: "R.C. 1.50 specifically provides for the severance by the Ohio judiciary of constitutionally unsound portions of statutes; and this same remedy was applied by the United States Supreme Court to the federal sentencing guidelines, in *United States v. Booker* (2005), 543 U.S. 220." *Ashley*, at ¶20.

Furthermore, the Eleventh District Court of Appeals added "that the inferior tribunals of this state are strictly bound by the constitutional mandates and statutory constructions made by the Ohio Supreme Court. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 475 (constitutional mandates); *State v. Sides*, 11th Dist. No. 2005-L-175, 2006-Ohio-2778, at ¶13 (statutory constructions). Neither the trial court, nor this court, can alter the remedies prescribed by the Supreme Court in curing a constitutionally-infirm statute." *Ashley*, at ¶20.

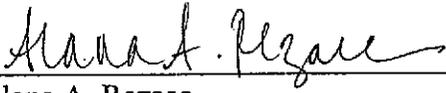
Nothing indicates that this Court exceeded its power or infringed on that of the legislature by severing the statutes it found incompatible with the Ohio and United States Constitutions. Instead, this Court acted within its statutory authority and fulfilled its duty by finding certain sentencing provisions unconstitutional, and implementing the appropriate remedy to cure a constitutionally-infirm statute. The Eleventh District properly ruled on this issue and there is no need for this Court to revisit the matter. Jurisdiction should be declined.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By: 
Alana A. Rezaee
Assistant Prosecuting Attorney
Counsel of Record

COUNSEL FOR APPELLEE
STATE OF OHIO

Administration Building
105 Main Street
P.O. Box 490
Painesville, Ohio 44077
(440) 350-2683 Fax (440) 350-2585

PROOF OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Sheryl Trzaska, Esquire, Assistant State Public Defender, Office of Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, OH 43215-2998, on this 26th day of April, 2007.



Alana A. Rezae (0077942)
Assistant Prosecuting Attorney

AAR/klb