

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

-vs-

KEVIN JOHNSON

Appellant.

CASE NO. 2006-2154

On Appeal from the
Court of Appeals
Twelfth Appellate District
Butler County, Ohio

COURT OF APPEALS
CASE NO.: CA 2005 10 0422

APPELLANT'S REPLY BRIEF

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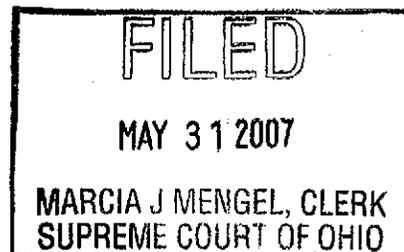


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ARGUMENT

Defendant-Appellant's Sole Proposition of Law:

Whether the trial court has the option to impose concurrent or consecutive sentences when a defendant is convicted of multiple counts of an offense listed in R.C. 2929.13(F).

The State argues R.C. 2929.13(F) mandates that trial courts impose mandatory consecutive sentences upon an offender convicted of two or more offenses listed in R.C. 2929.13(F)(1)-(14). However, in support of its position, the State mistakenly relies on *State v. Pelfrey* (2007), 112 Ohio St.3d 422, 2007-Ohio-256. In *Pelfrey*, this Court stated that “[w]hen the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning.” *Id.* at ¶12. Additionally, this Court reasoned that “[t]o construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts.” *Id.*, at ¶11. If this Court does not construe what is already plain, that Johnson’s sentences may be imposed either consecutively or concurrently, then this Court would be performing a legislative function, in contrast to the principles articulated in *Pelfrey*.

The State also argues that the Third District Court of Appeals in *State v. Sharp*, Allen App. No. 01-02-06, 2002 Ohio 2343; 2002 Ohio App. LEXIS 2343 “[d]id not apply any statutory interpretation rules as promulgated by this Court.” (Merit Brief of Appellee, 3). However, at the time that *Sharp* was decided, the court of appeals followed the pre-

Foster sentencing guidelines and did not use additional tools beyond the plain meaning of the sentencing statutes. *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856. The State argues that because *Sharp* was decided pre-*Foster*, it is not in direct conflict with *State v. Johnson*, 2006 Ohio 5195, 2006 Ohio App. LEXIS 5120. However, this Court has already decided that these two cases are in direct conflict with each other. *State v. Johnson* (2007), 112 Ohio St.3d 1439, 2007 Ohio 152, 860 N.E.2d 746. Furthermore, *Foster* has no impact on whether *Sharp* and *Johnson* are in direct conflict with each other. Post-*Foster*, the decision to impose concurrent rather than consecutive sentences is within the sound discretion of the trial court. *Foster* does not mandate the imposition of mandatory consecutive sentences in this case.

In *Sharp*, the Third District Court of Appeals held that R.C. 2929.13(F) does not require the imposition of consecutive sentences, and in contrast, the Twelfth District Court of Appeals held that the statute requires the offender to serve consecutive sentences. Although the State criticizes the Third District for failing to indicate statutory language to support its holding, the court could not do so because such a statute does not exist. Instead, the court relied on the principal that Ohio's sentencing scheme generally requires that sentences of imprisonment be served concurrently. R.C. 2929.41(A).

The State also mistakenly relies on the language in R.C. 2929.13(F) that the offender shall not receive a reduced sentence for

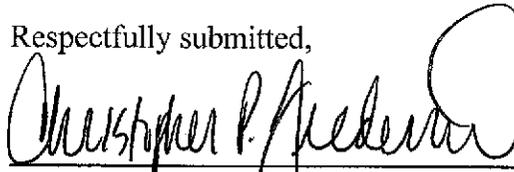
committing rape in violation of R.C. 2907.02(A)(1)(b) as relating to consecutive sentences. However, the language in the statute clearly refers to the reduction of the mandatory life sentence, not whether the offender should receive consecutive or concurrent sentences.

Finally, the State's reliance on the final bill analysis of the body armor offense is wholly irrelevant to the State's position. The final bill analysis states that the offender must serve a mandatory prison term imposed consecutively to any other body armor specification prison term. (Merit Brief of Appellant, 9). There is no doubt that when the Ohio General Assembly states that mandatory consecutive sentences are to be imposed, the trial court has no discretion to impose concurrent sentences. It is the absolute absence of such language that gives the trial court the authority to impose the mandatory sentences concurrently to each other.

CONCLUSION

In view of the foregoing law and argument, it is respectfully requested that this Court reverse the decision of the Twelfth District Court of Appeals and remand this case to the trial court.

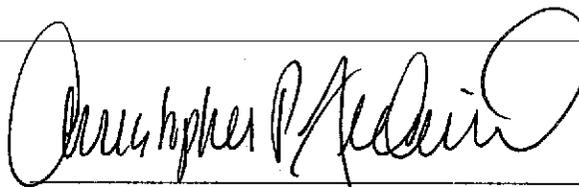
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief was sent by regular U.S. mail this 30th day of May 2007, to: Robin Piper, Prosecuting Attorney for Butler County, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011.

A handwritten signature in black ink, reading "Christopher P. Frederick". The signature is written in a cursive style with a large, looping initial "C".

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