IN THE OHIO SUPREME COURT

STATE OF OHIO	*
	* On appeal from the
Plaintiff-Appellee,	* Cuyahoga County Court
	* of Appeals, Eighth
	* Appellate District.
-VS-	*
	*
	* Court of Appeals
LAMAR CHANEY	* Case No. 88529
	*
Defendant-Appellant.	*

07-1138

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LAMAR CHANEY

LAMAR CHANEY #A398-524
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PRO-SE DEFENDANT-APPELLANT

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FILED
JUN 25 2007
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant was sentenced to several consecutive sentences in this case pursuant to O.R.C. 2929.14. The court imposed a consecutive sentence on appellant and sentenced him to over 19 years in prison.

Appellant contends that his case involves a substantial constitutional question because it questions whether the trial court violated the mandates in Apprendi v. New Jersey, 530 U.S. 466; Blakely v. Washington, (2004) 124 S.Ct 2531, State v. Foster, Supreme Court No. 2004-1568 (decided in January term of 2006) when sentencing him to consecutive sentences.

The Ohio Supreme court in State v. Foster, supra has recently held that appellants in Ohio who have been sentenced to consecutive sentences pursuant to O.R.C. section 2929.14 must be resentenced because their sentences are unconstitutional.

The substantial constitutional question posed in this case is whether Blakely, Apprendi, and Foster should apply to appellants sentence since he was sentenced to consecutive sentences.

Appellant respectfully requests that this honorable court answer this question in the affirmative and accept jurisdiction of his very important case.

STATEMENT OF THE CASE

Appellant pled guilty under case nos. CR-393419, CR-393431, CR-394297, and CR-394011 and received several consecutive sentences totaling 19 years.

On June 2, 2006 appellant Lamar Chaney filed a motion to vacate sentence pursuant to the mandates set forth in Blakely v. Washington, (2004), 124 S.Ct 2531, Apprendi v. New Jersey, (2000) 530 U.S. 466; and State v. Foster, Supreme Court No. 2004-1568.

The trial court dismissed appellants motion with a one line entry of dismissal.

Appellant filed a timely appeal, and on May 10, 2007, the Eighth District Court of Appeals affirmed the trial courts decision.

Appellant now brings his Memorandum in Support of Jurisdiction into this honorable court and requests that this honorable court accept jurisdiction of his case.

STATEMENT OF THE FACTS

In case no. CR-392440 appellant pled guilty to aggravated robbery and two counts of kidnapping. All three counts contained a firearm specification. In addition, appellant pled guilty in CR-393419A to aggravated robbery with a firearm spec, kidnapping, failure to comply with order/signal of police officer, and assault on a peace officer. In CR-393431B, the appellant pled guilty to possession of drugs. In CR-394011(B), appellant pled guilty to possession of marijuana, and in CR-394297A appellant pled guilty to aggravated robbery and kidnapping.

In CR-392440 appellant was sentenced to nine years. In CR-394297A appellant was sentenced to nine years. These sentences were ordered to be served consecutively. In CR-394011(B) he was sentenced to one year consecutive to the above two cases.

All other sentences for the remaining charges were ordered to be served concurrently.

Thus, defendant was sentenced to 19 years in prison.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law I: The appellants sentence is contrary to law and in violation of the Sixth and Fourteenth Amendment to the United States Constitution and Article I Section 10 of the Ohio Constitution due to the trial court imposing consecutive sentences upon appellant in violation of Blakely v. Washington, (2004) 124 S.Ct 2531; Apprendi v. New Jersey, (2000) 530 U.S. 466; and State v. Foster, Ohio Supreme Court No. 2004-1568 (decided in the January term of 2006).

Appellant submits that his sentence is "contrary to law" and must be vacated due to the rulings in Blakely v. Washington, (2004) 124 S.Ct 2531; Apprendi v. New Jersey, (2000) 530 U.S. 466; and State v. Foster, Ohio Supreme Court case no. 2004-1568.

In case no. CR-392440 appellant pled guilty to aggravated robbery and two counts of kidnapping. All three counts contained a firearm specification. In addition, appellant pled guilty in CR-393419A to aggravated robbery with a firearm spec, kidnapping, failure to comply with order/signal of police officer, and assault on a peace officer. In CR-393431B, the appellant pled guilty to possession of drugs. In CR-394011(B), appellant pled guilty to possession of marijuana, and in CR-394297A appellant pled guilty to aggravated robbery and kidnapping.

In CR-392440 appellant was sentenced to nine years. In CR-394297A appellant was sentenced to nine years. These sentences were ordered to be served consecutively. In CR-394011(B) he was sentenced to one year consecutive to the above two cases. All other sentences for the remaining charges were ordered to be served concurrently.

Thus, appellant was sentence to 19 years in prison.

In Ohio, at the time the appellant was sentenced, the minimum he could have received for all charges would have been (6) years. Specifically, the minimum for the aggravated robberies and kidnappings would have been 3 years and the gun specification conviction would have been three years consecutive to that sentence.

According to Blakely supra, since appellant was sentenced to more than the minimum sentence, a jury, not the trial court, should have decided his sentence.

On June 24, 2004, the Supreme Court of the United States held that any fact required to support the imposition of a prison sentence must be submitted by a jury and found beyond a reasonable doubt. See Blakely v. Washington, (2004) 124 S.Ct 2531, 2536. The Blakely court held in pertinent part:

> "Our precedents make clear, however, that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the bases of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra at 602, 153 L.Ed.2d 556, 122 S.Ct 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone") quoting Apprendi, supra at 483, 147 L.Ed.2d 435, 120 S.Ct 2348, Harris v. United States, 536 U.S. 545, 563, 153 L.Ed.2d 524, 122 S.Ct 2406 (2002) (plurality opinion) (same); cf. Apprendi supra at 488, 147 L.Ed.2d 435, 120 S.Ct 2348 (facts admitted by the defendant.)

The relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Id.

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment", Blakely, supra, and the judge exceeds his proper authority." Id.

In this case, the honorable trial court could only impose a 19 year sentence by making judicial factual findings on the record that were neither determined by a jury nor stipulated to by the appellant. See O.R.C. 2929.14(E)(4).

The court made these "judicial fact findings" at the appellants plea and sentencing hearing. (See pages 82 and 83 of sentencing hearing)

The appellant did not stipulate to the findings made by the court or otherwise waive his constitutional right to have these facts determined by a jury. See Blakely supra.

This determination was a violation of the Apprendi and Blakely rulings. Apprendi has made it clear that "if a State makes an increase in a appellant's authorized punishment contingent on the finding of a fact, that face - no matter how the state labels it - must be found by a jury beyond a reasonable doubt. Apprendi, at 482-83; also see Ring 122 S.Ct at 2439, 153 L.Ed.2d 572.

"Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several facts (as in Ring), or any aggravated fact (as in the appellant's Chaney's case), it remains the case that

the jury's verdict alone does not authorize the sentence."

"Nor does it matter that the judge must, after finding aggravated facts, make a judgment that they present a compelling ground for departure". See Blakely 124 S.Ct 2538, Id., at n. 8.

The trial court cannot make that judgment without findings some facts to support it beyond the bare elements of the offense.

Appellant has hereby showed how his sentence is illegal under Federal law pursuant to the Apprendi, and Blakely mandates.

In State v. Foster, Supreme Court case No. 2004-1568 (decided in the January term of 2006) the Ohio Supreme Court ruled that appellant's in Ohio who have been sentenced to consecutive sentences under O.R.C. 2929.14(C) must be resentenced because their sentence is unconstitutional.

Appellant Lamar Chaney contends that his motion to correct or vacate his illegal sentence is the proper avenue for relief under his circumstances. Other courts in Ohio have granted motions to vacate sentences.

For example, in State v. Machaterre, 2006 WL 664359 (Ohio App.6th Dist), the Sixth District Court of Appeals reversed a appellants case after he filed a motion to correct or vacate his illegal sentence.

In Machaterre supra, the defendant was convicted in 2000 by subsequently filed his motion to vacate on November 9, 2004.

This motion was denied by the trial court on May 3, 2005.

However, Machaterre appealed the trial courts decision and the court of appeals reversed and remanded his case on March 17, 2006. The Appellate court found that due to the recent ruling in State v. Foster, supra, appellant sentence was unconstitutional and therefore, void. See State v. Machaterre.

"Where a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing". See e.g., State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 section 23 (where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the offender).

O.R.C. 2953.08 (A)(4) holds:

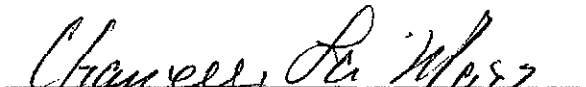
> (A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as matter of right the sentence imposed upon the defendant on one or more of the following grounds:
>
> (4) The sentence is contrary to law.

Appellant has showed how his sentence is "contrary to law" and therefore just as in Machaterre supra, his motion to vacate or correct sentence should have been well taken by the trial court.

CONCLUSION

Appellant respectfully requests that this honorable court accept jurisdiction of his very important case so that his unlawfully imposed sentence can be corrected. See Blakely, Apprendi, and Foster supra.

Respectfully submitted,



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Pro-Se Appellant
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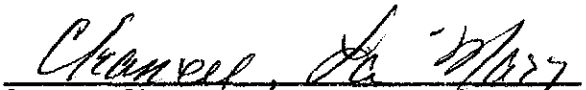
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of appellants Memorandum in Support of Jurisdiction to the Ohio Supreme Court has been sent by regular U.S. mail to counsel for appellee, William D. Mason, located at 1200 Ontario Street, Cleveland Ohio 44113 on this 12 day of June 2007.



Lamar Chaney
Pro-Se Appellant

Attachment not scanned

In The Supreme Court of Ohio

Case Information Sheet

Case Name:	Case No.:
State of Ohio v. Lamar Chaney	

I. Has this case previously been decided or remanded by this Court? Yes ☐ No ☒

If so, please provide the Case Name: N/A
Case No.: N/A
Any Citation: N/A

II. Will the determination of this case involve interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes ☒ No ☐

If so, please provide the Case Name and Citation: Blakely v. Washington, (2004) 124 S.Ct 2531, and State v. Foster, Supreme Court No. 2004-1568.

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes ☒ No ☐

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution Amends.: 6th, 14th
Ohio Constitution: Article I, Section 10
United States Code: Title N/A Section N/A
Ohio Revised Code: R.C. 2929.14
Court Rule: N/A
Ohio Admin. Code: O.A.C. N/A - -

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

1) Abuse of discretion from trial court
2) Illegal sentence.
3)

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes ☐ No ☒

If so, please identify the Case Name: N/A
Case No.: N/A
Court where Currently Pending: N/A
Issue: N/A

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Counsel for:

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88529

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMAR CHANEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-393419, CR-393431, CR-394011, CR-394297

BEFORE: Rocco, J., Calabrese, P.J., Dyke, J.

RELEASED: May 10, 2007

JOURNALIZED:

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAY 10 200

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

This case came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1, the record from the lower court, the briefs and the oral arguments of counsel. Appellant Lamar Chaney appeals from common pleas court orders in four criminal cases in which the court overruled his motions to vacate or correct the sentences imposed upon him. These motions were based on the assertion that the sentences were illegal pursuant to recent decisions of the U.S. Supreme Court and Ohio Supreme Court in *Blakely v. Washington* (2004), 542 U.S. 296 and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

In each of the four cases at issue here (as well as a fifth case which is not included in this appeal), appellant entered a plea of guilty to one or more criminal charges on October 24, 2000. The journal entries reflecting the pleas each state that "as part of plea in defendant's five pending cases, the state agrees to a sentence for defendant of no more than 15 years and no less than 20 years [sic]." Appellant was sentenced on December 27, 2000 as follows:

- Case No. 393419 – four years' imprisonment on each of four counts, to run concurrently with one another and concurrently with the sentences in the other cases.
- Case No. 393431 – seven years' imprisonment on one count, to run concurrently with the sentences in the other cases.

- Case No. 394011 – one year imprisonment on one count, to run consecutive to the sentence imposed in Case Nos. 392440 and 394297, and concurrent to the sentence imposed in Case Nos. 393431 and 393419.
- Case No. 394297 – nine years' imprisonment on each of three counts, to run concurrently with one another and with Case Nos. 393431 and 393419 but consecutive to Case Nos. 392440 and 394011.

On June 2, 2006, appellant filed a motion in each of these cases asking the court to vacate or correct the sentences because they were unconstitutional under *Blakely* and *Foster*. The court overruled these motions. Appellant now appeals these decisions.

Appellant urges that the sentences imposed upon him were void because they exceeded the statutory minimum terms and the court made them consecutive with one another based on statutes which *Foster* declared unconstitutional.[1] Appellant did not have a direct appeal pending at the time that *Foster* was decided. The court in *Foster* emphasized that to vacate the

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[1]The factual premise of one of these arguments simply does not apply to two of these cases. The sentences imposed in Case Nos. 393419 and 393431 are not consecutive. Therefore, this aspect of appellant's assignment of error is inapplicable to these cases.

sentence and resentence the offender was an appropriate remedy only for those cases pending on direct review. *Foster* at ¶¶104 and 106. In the context of collateral review, "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane* (1989), 489 U.S. 288, 309.

Appellant's motion before the trial court must be construed at a petition for post-conviction relief pursuant to R.C. 2953.21. When a criminal defendant, after his convictions become final, files a motion to vacate or correct his sentence on the basis that his constitutional rights have been violated, the motion is a petition for post-conviction relief as defined in R.C. 2953.21. *State v. Reynolds* (1997), 79 Ohio St.3d 158.

Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief must be filed within 180 days after the expiration of the time for filing an appeal if no direct appeal was ever filed. Appellant's petitions were filed more than five years after the expiration of the time for appeal. Therefore, the court lacked jurisdiction to entertain the petition unless both of the following applied:[2]

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[2]The other statutory exception, for cases in which DNA evidence establishes actual innocence, is inapplicable to this case. R.C. 2953.23(A)(2).

"(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

"(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence." R.C. 2953.23(A)(1).

Appellant cannot meet the first of these two conditions. Appellant's claim does not rely on any facts which he may have been unavoidably prevented from discovering. Furthermore, although appellant's claim is arguably[3] based on the

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[3]We say "arguably" because the Supreme Court's decision in *Blakely* was an extension of its holding in *Apprendi v. New Jersey* (2000), 530 U.S. 466, so it is questionable that *Blakely* establishes a "new" right. On the other hand, at least one federal court has noted that *Blakely* did establish a "new understanding of 'statutory maximum'" as "the maximum [a judge] may impose without any additional findings," and therefore did create a new rule not dictated or compelled by *Apprendi*. *United States v. Robledo* (S.D. Tex. 2005), 2005 U.S. Dist. LEXIS 43161, adopted by 2006 U.S.

United States Supreme Court's recognition of a new federal right, that right does not apply retroactively to post-conviction relief claims. Both *Foster*, at ¶104 and *United States v. Booker* (2005), 543 U.S. 220, 268, expressly held that they applied only to cases on direct review. They also do not meet the strict requirements of *Teague v. Lane* (1989), 489 U.S. 288, for retrospective application of a new constitutional rule to cases on collateral review.

Under *Teague*, 489 U.S. at 311, a new constitutional rule may apply retrospectively if it either (1) "places 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe,'" or (2) is a watershed rule of criminal procedure which is implicit in the concept of ordered liberty and which affects the fundamental fairness and accuracy of the criminal proceeding. Because appellant's claim concerns the manner in which his sentence was determined, the first exception is clearly inapplicable. The second exception applies only narrowly to procedures "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. Certainly, the factual basis for sentencing is not central to a determination of guilt or innocence. Therefore, *Blakely* and *Foster* do not apply retrospectively to cases on collateral review.

Dist. LEXIS 58197.

Appellant's petition for post-conviction relief was not timely filed and appellant did not meet any of the exceptions set forth in R.C. 2953.23. Therefore, the common pleas court properly denied the petition. See, e.g., *State v. Williams*, Franklin App. No. 06AP-842, 2007-Ohio-1015.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

ANTHONY O. CALABRESE, JR., P.J., and
ANN DYKE, J., CONCUR