

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee,

v.

Robert W. Bates,

Appellant.

On Appeal From The
Second District Court Of Appeals

Case Nos. 2007-0293 & 2007-0304

MERIT BRIEF OF APPELLANT ROBERT W. BATES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
<i>Certified Question: Does a trial court have authority, generally, to order that a felony sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court?</i>	
ARGUMENT	3
<i>Proposition of Law No. 1: A trial court does not have the authority under R.C. § 2929.14(E)(4) to order that a felony sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court.</i>	
I. R.C. § 2929.14(E)(4) AUTHORIZES THE IMPOSITION OF CONSECUTIVE SENTENCES ONLY WHERE THE SENTENCES ARE IMPOSED BY A SINGLE OHIO COURT IN A SINGLE PROCEEDING	4
A. The Plain Language Of R.C § 2929.14(E)(4) And The Surrounding Provisions Demonstrate That (E)(4) Does Not Authorize The Sentence Imposed Below	4
B. The Rule Of Lenity Requires A Narrow Construction Of R.C. § 2929.14(E)(4)	7
II. THE <i>FOSTER</i> DECISION CANNOT BE INTERPRETED TO AUTHORIZE THE SENTENCE IMPOSED BELOW.....	8
A: The Portion Of R.C. § 2929.14(E)(4) That Authorizes Consecutive Sentences Survives <i>Foster</i>	8
B. Even If The Authorization Language Of (E)(4) Has Been Excised, The Trial Court Had No Authority To Order That Bates' Sentence Run Consecutively To A Previously-Imposed Sentence.....	11
CONCLUSION.....	14
APPENDIX	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Apprendi v. New Jersey</i> (2000), 530 U.S. 466.....	8
<i>Blakely v. Washington</i> (2004), 542 U.S. 296.....	8, 11, 13
<i>Jones v. United States</i> (1999), 526 U.S. 227	8
<i>Ring v. Arizona</i> (2002), 536 U.S. 584.....	8
<i>United States v. Booker</i> (2005), 543 U.S. 220.....	8

STATE CASES

<i>Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless</i> (2007), 113 Ohio St.3d 394, 2007-Ohio-2203.....	5
<i>Colegrove v. Burns</i> (1964), 175 Ohio St. 437.....	12
<i>Lynch v. Gallia County Bd. of Comm'rs</i> (1997), 79 Ohio St.3d 251	5
<i>State ex rel. Mason v. Griffin</i> (2004), 104 Ohio St.3d 279, 2004-Ohio-6384	12
<i>State ex rel. Toledo Edison Co. v. Clyde</i> (1996), 76 Ohio St.3d 508.....	7
<i>State v. Ascoine</i> (5th Dist. July 28, 2003), 2003 Ohio App. LEXIS 3689, 2003-Ohio-4145.....	7
<i>State v. Bailey</i> (8th Dist. Apr. 10, 2003), 2003 Ohio App. LEXIS 1759, 2003-Ohio-1834.....	5, 6
<i>State v. Bates</i> (2d Dist. Dec. 29, 2006), 2006 Ohio App. LEXIS 7018, 2006-Ohio-7086.....	1, 7, 10, 11
<i>State v. Foster</i> (2006), 109 Ohio St.3d 1, 2006-Ohio-856.....	<i>passim</i>
<i>State v. Hanning</i> (10th Dist. Feb. 9, 1999), 1999 Ohio App. LEXIS 400	5
<i>State v. Jones</i> (1985), 18 Ohio St.3d 116.....	12
<i>State v. Jordan</i> (2000), 89 Ohio St.3d 488	7
<i>State v. Mathis</i> (2006), 109 Ohio St.3d 54, 2006-Ohio-855	3

TABLE OF AUTHORITIES

(continued)

<i>State v. O'Mara</i> (1922), 105 Ohio St. 94.....	12
<i>State v. Purnell</i> (1st Dist. Nov. 22, 2006), 2006 Ohio App. LEXIS 6151, 2006-Ohio-6160.....	12
<i>State v. Thompson</i> (4th Dist. May 29, 2007), 2007 Ohio App. LEXIS 2523, 2007-Ohio-2724.....	10
<i>State v. Thompson</i> (5th Dist. Sept. 3, 2002), 2002 Ohio App. LEXIS 4807, 2002-Ohio-4717.....	4
<i>State v. Whalen</i> (2d Dist. Nov. 26, 2003), 2003 Ohio App. LEXIS 5845, 2003-Ohio-6539.....	12
<i>State v. Worrell</i> (10th Dist. May 3, 2007), 2007 Ohio App. LEXIS 2063, 2007-Ohio- 2216.....	11

STATUTES

R.C. § 1.47	9
R.C. § 1.50	9
R.C. § 2901.04	7
R.C. § 2929.14	<i>passim</i>
R.C. § 2929.141	11
R.C. § 2921.331	5
R.C. § 2929.41	6, 8
R.C. § 5145.01	8

STATEMENT OF THE CASE AND FACTS

On May 3, 2004, Appellant Robert Bates (“Bates”) pleaded guilty to two counts of aggravated robbery, one firearm specification pursuant to R.C. § 2929.14(D)(1)(a) and one count of attempted aggravated robbery in the Montgomery County Court of Common Pleas. *See State v. Bates* (2d Dist. Dec. 29, 2006), 2006 Ohio App. LEXIS 7018, 2006-Ohio-7086, ¶ 2. On May 20, 2004, Bates was sentenced to seven years in prison on each of the three robbery counts, to run concurrently, and to a three-year term for the firearm specification, to run consecutively, for a total ten-year term. *Id.*

On March 30, 2005, Bates pleaded no contest to three counts of aggravated robbery in the Miami County Court of Common Pleas. (*See* Mar. 31, 2005 Entry—Change of Plea; Imposition of Sentence). The trial court found Bates guilty of the three counts. Accepting a joint recommendation from the State and Bates, the trial court sentenced Bates to three, three-year terms, to run concurrently with each other but consecutively to the ten-year term previously imposed by the Montgomery County court. *Id.*

On January 20, 2006, Bates filed a delayed notice of appeal, which was granted by the Second Appellate District on February 21, 2006. (*See* Feb. 21, 2006 Decision and Entry). On appeal, Bates argued that the trial court exceeded its statutory sentencing authority under R.C. § 2929.14(E)(4) by imposing its sentence to run consecutively to the previously-imposed sentence of the Montgomery County court. *See Bates*, 2006-Ohio-7086, ¶ 5. The Second District disagreed and affirmed the trial court’s sentence, reasoning that “[a]lthough the issue is not free from difficulty, we conclude that R.C. 2929.14(E)(4) authorizes a trial court imposing a felony sentence to order that sentence to be served consecutively with a felony sentence imposed by another court.” *Id.* at ¶ 9.

On May 2, 2007, this Court accepted Bates' discretionary appeal and certified a conflict among the courts of appeal on the following question: Does a trial court have authority, generally, to order that a felony sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court? (*See* May 2, 2007 Entry).

ARGUMENT

Proposition of Law No. 1: *A trial court does not have the authority under R.C. § 2929.14(E)(4) to order that a felony sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court.*

R.C. § 2929.14(E)(4) states:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

- (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
- (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
- (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

In *State v. Foster*, this Court excised the portions of the above provision that required trial courts to make findings before imposing consecutive sentences.¹ *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 99; see *State v. Mathis* (2006), 109 Ohio St.3d 54, 2006-Ohio-

¹ The portion of (E)(4) that authorizes the imposition of consecutive sentences survives *Foster*, as discussed in Part II, *infra*. Thus, the post-*Foster* version of (E)(4) reads: "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively."

855, ¶ 26. Therefore, “judicial factfinding is not required before imposition of consecutive prison terms.” *Foster*, 2006-Ohio-856, ¶ 99.

However, while R.C. § 2929.14(E)(4) (hereinafter “(E)(4)”) authorizes an Ohio trial judge to impose consecutive sentences when a defendant is convicted of multiple offenses in a single proceeding before that judge, it does not authorize the imposition of a sentence consecutive to a sentence previously imposed by another Ohio court in a different proceeding. Both the plain language of (E)(4) and a review of the surrounding provisions demonstrate that the Miami County Common Pleas trial judge erred by relying on (E)(4) to order that Bates’ Miami County sentences be served consecutively to the Montgomery County sentences. *See State v. Thompson* (5th Dist. Sept. 3, 2002), 2002 Ohio App. LEXIS 4807, 2002-Ohio-4717, ¶¶ 28, 30 (reversing consecutive sentence imposed under (E)(4), where sentence ordered to run consecutively to a sentence imposed by another Ohio court).

I. R.C. § 2929.14(E)(4) AUTHORIZES THE IMPOSITION OF CONSECUTIVE SENTENCES ONLY WHERE THE SENTENCES ARE IMPOSED BY A SINGLE OHIO COURT IN A SINGLE PROCEEDING.

A. The Plain Language Of R.C § 2929.14(E)(4) And The Surrounding Provisions Demonstrate That (E)(4) Does Not Authorize The Sentence Imposed Below.

By its terms, (E)(4) authorizes consecutive sentences only where the sentences are imposed by a single court. Specifically, (E)(4) applies only “[i]f multiple prison terms *are* imposed on an offender for convictions of multiple offenses” *Id.* (emphasis added). By using only the present tense of the verb, the legislature limited (E)(4) to cases where the “multiple prison terms” are imposed at a single time—that is, in a single proceeding.

This application of (E)(4) is confirmed by the surrounding sentencing provisions. The provisions immediately preceding (E)(4) require consecutive sentences in certain cases, such as where the defendant pleads guilty to or is convicted of firearm or body armor specifications or

commits a crime after escaping from prison. *See* R.C. § 2929.14(E)(1)-(3). Each of those provisions ends by requiring that such sentences be imposed “consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.” *Id.* In this way, the language of (E)(1) through (E)(3) unambiguously requires that such sentences be imposed consecutively to previously-imposed Ohio sentences.

However, the “magic words” that punctuate sections (E)(1) through (E)(3) do not appear in (E)(4). Where the General Assembly omits language in this way, Ohio courts interpret such omission to be purposeful and intentional. *See Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless* (2007), 113 Ohio St.3d 394, 2007-Ohio-2203, ¶ 12 (“A court is neither to insert words that were not used by the legislature nor to delete words that were used.”); *Lynch v. Gallia County Bd. of Comm’rs* (1997), 79 Ohio St.3d 251, 254 (“[A] reviewing court must not construe a statute so as to supply words that are omitted.”); *State v. Hanning* (10th Dist. Feb. 9, 1999), 1999 Ohio App. LEXIS 400, *12-13 (holding that where criminal statute, which governed “bindover” authority for juvenile defendants, did not explicitly refer to accomplice liability, statute did not apply to accomplice-defendant). For example, in *State v. Bailey* (8th Dist. Apr. 10, 2003), 2003 Ohio App. LEXIS 1759, 2003-Ohio-1834, a defendant was convicted of driving “so as to willfully elude or flee a police officer after receiving a visible or audible signal . . . to stop,” in violation of R.C. § 2921.331(B). The defendant argued that the trial court erred because the jury was not instructed that this offense required proof of a “lawful order or direction.” *Id.* at ¶ 42. The court noted that while the phrase “lawful order or direction” appeared nearby in R.C. § 2929.331(A), it did not appear in § 2921.331(B). Therefore, the court concluded that “it is clear the legislature never intended to include an element that the police

signal or order be a 'lawful order or direction' as evidenced by its omission from section B." *Id.* at ¶ 46.

The Court should reach the same result here. The legislature clearly intended that sentences under R.C. § 2929.14(E)(1)-(3) are to apply "consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender." However, because the legislature purposefully omitted this language from (E)(4), (E)(4) must *not* apply to sentences "previously or subsequently imposed upon the offender."²

To be sure, Chapter 2929 of the Revised Code provides at least two examples of how the General Assembly *could have* authored (E)(4) had it intended for this language to apply to previously-imposed sentences. First, as noted above, the legislature could merely have included in (E)(4) the language that appears no fewer than five times in (E)(1)-(3). Second, R.C. § 2929.41(B)(2) states:

If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison term it imposes consecutively to any prison term imposed upon the offender by the court of another state or the United States.

Had the legislature intended for (E)(4) to apply to previously-imposed sentences, it could added the above language to (E)(4) and revised it to apply to "courts of this state." Alternatively, the legislature could have added that phrase to the language of § 2929.41(B)(2) itself. But the legislature did neither of those things.

² The absence of the "previously . . . imposed" language in (E)(4) is particularly significant in light of the fact that the certified conflict asks whether a trial court has the authority "to order that a felony sentence imposed by it be served consecutively with a felony sentence *previously imposed* by another Ohio court." Thus, the certified conflict presents the issue in terms of authority that is expressly granted in (E)(1)-(3) but that is missing from (E)(4).

Because (E)(4) does not include a reference to previously-imposed sentences, and because that omission must be presumed to be purposeful, (E)(4) applies only where the consecutive sentences are imposed by a single Ohio judge in a single proceeding.

B. The Rule Of Lenity Requires A Narrow Construction Of R.C. § 2929.14(E)(4).

Even if the Court determines that (E)(4) does not unambiguously authorize consecutive sentences only where imposed by a single Ohio judge in a single proceeding, the Court should find that (E)(4) is ambiguous and interpret it in Bates' favor. The rule of lenity provides that where a criminal statute is ambiguous, that statute must be strictly construed against the State and in favor of the defendant. R.C. § 2901.04(A); see *State v. Jordan* (2000), 89 Ohio St.3d 488, 492; *State v. Ascoine* (5th Dist. July 28, 2003), 2003 Ohio App. LEXIS 3689, 2003-Ohio-4145, ¶¶ 16, 20 (urging legislature to "address the loophole" created by sex offender statute but applying rule of lenity to reverse judgment against defendant).

At most, (E)(4) is ambiguous. Unlike R.C. § 2929.14(E)(1)-(3), (E)(4) does not expressly apply to sentences "previously or subsequently imposed." Rather, (E)(4) is arguably ambiguous as to the time at which the "multiple prison terms" are imposed and the number of courts that impose them. Thus, if the Court concludes that (E)(4) is ambiguous, it is "susceptible of more than one reasonable interpretation." *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513; see also *Bates*, 2006-Ohio-7086, ¶ 9 (noting that under (E)(4), the question presented "is not free from difficulty").

If (E)(4) is ambiguous, the Court must strictly construe it against the State. For this additional reason, the Court should find that (E)(4) authorizes consecutive sentences only where

they are imposed by a single judge in a single proceeding and not where, as here, an Ohio sentence is imposed to run consecutively to a previously-imposed Ohio sentence.³

II. THE *FOSTER* DECISION CANNOT BE INTERPRETED TO AUTHORIZE THE SENTENCE IMPOSED BELOW.

A. The Portion Of R.C. § 2929.14(E)(4) That Authorizes Consecutive Sentences Survives *Foster*.

In *State v. Foster*, the Court was concerned with one (and only one) important aspect of Ohio's sentencing statutes: the constitutionality of provisions requiring judicial findings. Applying a series of United States Supreme Court decisions, the *Foster* Court held that such provisions violate the Sixth Amendment. See *United States v. Booker* (2005), 543 U.S. 220; *Blakely v. Washington* (2004), 542 U.S. 296; *Ring v. Arizona* (2002), 536 U.S. 584; *Apprendi v. New Jersey* (2000), 530 U.S. 466; *Jones v. United States* (1999), 526 U.S. 227. Specifically, the Court held that (E)(4) was unconstitutional because it "require[d] judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before the imposition of consecutive sentences," in violation of the United States Supreme Court's decision in *Blakely*. *Foster*, 2006-Ohio-856, syllabus ¶ 3.

After holding that judicial findings provisions were unconstitutional, the *Foster* Court chose to excise those provisions. With respect to (E)(4), *Foster* held that "R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial factfinding is not required before imposition of consecutive prison terms." *Id.* at syllabus ¶ 4. At bottom, *Foster* thus achieved two purposes: it declared judicial findings unconstitutional, and it removed the findings provisions from the code.

³ Prior to *Foster*, R.C. § 2929.41(A) mandated a presumption of concurrent sentences. Although *Foster* purportedly excised this section, R.C. § 5145.01, which was not excised, also requires that "[i]f a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence" These provisions further suggest that (E)(4), which authorizes consecutive sentences, be construed strictly against the State.

However, what the *Foster* Court did *not* do (indeed, was *careful* not to do) was change the law of sentencing outside the judicial findings context. In removing the judicial findings provisions, the Court stated a narrow, explicit aim: “[o]ur holdings are limited to areas where the statutes are *Blakely*-deficient.” *Id.* at ¶ 84. In other words, the “holdings” at issue, including the severance remedy, were limited to the “areas where the statutes” required judicial findings. Therefore, “[t]he excised portions remove only the presumptive and judicial findings that relate to ‘upward departures.’” *Id.* at ¶ 98. The Court’s stated intent was to remove the unconstitutional “areas” of the code—nothing more, nothing less.

Similarly, the *Foster* Court recognized that a severance remedy must be applied carefully to minimize disruption to the overall statute. As *Foster* noted, the General Assembly intends for courts to give effect to statutes in their entirety. *See id.* at ¶ 93; *see also* R.C. § 1.47(B) (“In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective . . .”). Consequently, R.C. § 1.50 requires that where the Court severs a portion of a statute, it must sever with precision. And it bears noting that at the outset of its remedy discussion, the *Foster* Court quoted R.C. § 1.50 in full:

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, ***the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision*** or application, and to this end the provisions are severable.

Foster, 2006-Ohio-856, ¶ 93 (emphasis added in opinion). In this way, not only did the *Foster* Court express an intention to limit severability to unconstitutional findings provisions, it was *required* by statute to do so.

Before *Foster*, (E)(4) contained two discrete concepts. First, it authorized the imposition of consecutive sentences “[i]f multiple prison terms are imposed on an offender for convictions

of multiple offenses.” See Part I, *infra*. Second, it required that judges make specific findings in order to impose consecutive sentences. See R.C. § 2929.14(E)(4)(a)-(c).

Applying the principles of severance, it is clear that the authorization of consecutive sentences embodied in (E)(4) survives *Foster*. First, the authorization language is not unconstitutional. Although the findings requirements of (E)(4) were clearly “*Blakely*-deficient,” the authorization language, which does not mention findings at all, is not. Simply stated, there was no reason for the Court to strike the authorization language.

Second, the authorization language can be “given effect” even though the findings requirement is removed. The post-*Foster* version of (E)(4) states that “[i]f multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively.” The only difference after *Foster* is that instead of making findings, judges may impose consecutive sentences under (E)(4) in their discretion. The *Foster* Court itself noted this difference, explaining that “[a]fter the severance, judicial factfinding is not required before imposition of consecutive prison terms.” *Foster*, 2006-Ohio-856, syllabus ¶ 4.

Indeed, some Ohio courts of appeal already understand *Foster* to excise only the findings portion of (E)(4):

We believe that the Ohio Supreme Court did not intend to strike down R.C.2929.14(E)(4) in its entirety; rather, the court struck down the statute to the extent that ‘judicial fact-finding’ is necessary before a court orders consecutive sentences.

State v. Thompson (4th Dist. May 29, 2007), 2007 Ohio App. LEXIS 2523, 2007-Ohio-2724, ¶ 13; see *Bates*, 2006-Ohio-7086, ¶¶ 12-14 (quoting (E)(4) authorization language but noting that

findings are no longer required).⁴ The *Foster* Court stated its intent to excise only unconstitutional portions of statutes, and it should be taken at its word.⁵

In order to assess whether the authorization language of (E)(4) survives *Foster*, it is important to understand what *Foster* does and what it does not do. *Foster* excises judicial findings from Ohio's sentencing code, as required by *Blakely*. It does not address, nor was it intended to address, the propriety of imposing sentences consecutive to previously-imposed Ohio sentences. Because *Foster* excised only unconstitutional provisions, and because the authorization language can be given effect in the absence of a findings requirement, the authorization language of (E)(4) survives *Foster*.

B. Even If The Authorization Language Of (E)(4) Has Been Excised, The Trial Court Had No Authority To Order That Bates' Sentence Run Consecutively To A Previously-Imposed Sentence.

As described above, the *Foster* decision did not sever the authorization language of (E)(4). However, if it did, then the trial court had no authority to impose discretionary consecutive sentences *at all*. First, it is undisputed that the *Foster* Court left intact several provisions of the code that permit or require the imposition of consecutive sentences. *See, e.g.*, R.C. § 2929.14(E)(1)-(3) (requiring consecutive sentences where, *inter alia*, the defendant is found guilty of a firearm specification or body armor specification or commits crime after escaping from prison); R.C. § 2929.141 (permitting consecutive sentences where defendant

⁴ Other Ohio courts of appeal have held that because all of (E)(4) was purportedly excised, trial courts may now rely on common law authority to impose consecutive sentences. *See, e.g., State v. Worrell* (10th Dist. May 3, 2007), 2007 Ohio App. LEXIS 2063, 2007-Ohio-2216, ¶¶ 7-11. These holdings are incorrect for two reasons: the authorization language of (E)(4) was not excised, as discussed in Part II A, and even if it was, trial courts cannot rely on inherent authority to impose sentences to run consecutively to previously-imposed sentences, as discussed in Part II B.

⁵ Although *Foster* states that R.C. § 2929.14(E)(4) is "excised in [its] entirety," this phrase should be read in light of the Court's statement that (E)(4) is unconstitutional only so far as it "requires judicial findings for consecutive terms." *See Foster*, 2006-Ohio-856, ¶ 97. In fact, the *Foster* opinion includes not a single mention of the authorization language of (E)(4).

committed a felony while on post-release control). However, it is also undisputed that none of these provisions could apply to Bates. *See Bates*, 2006-Ohio-7086, ¶ 7. Thus, if the *Foster* Court severed the authorization language of (E)(4), it severed the trial court's only arguable authority to impose consecutive sentences on Bates.⁶ If the trial court cannot rely on even the tenuous language of (E)(4), it had no other basis on which to impose Bates' sentence. In light of *Foster*, that sentence is unlawful.

Further, if the authorization language of (E)(4) was severed, the trial court could not rely on any "inherent" (non-statutory) authority to impose Bates' sentence. Rather, the authority to impose sentences comes from only one place: the statutes enacted by the General Assembly. "In construing and applying statutory provisions, courts must remain mindful that the Ohio General Assembly holds the *exclusive* power to prescribe punishment for crimes committed within Ohio." *State v. Whalen* (2d Dist. Nov. 26, 2003), 2003 Ohio App. LEXIS 5845, 2003-Ohio-6539, ¶ 14 (citing *State v. O'Mara* (1922), 105 Ohio St. 94) (emphasis added); *see State v. Jones* (1985), 18 Ohio St.3d 116, 118 (noting that "the substantive power to prescribe crimes and determine punishments is vested with the legislature"). Consequently, "[i]n matters of criminal sentencing, the trial court does not have inherent power to act, but has only such power as is conferred by statute or rule." *State v. Purnell* (1st Dist. Nov. 22, 2006), 2006 Ohio App. LEXIS 6151, 2006-Ohio-6160, ¶ 10 (citing *State ex rel. Mason v. Griffin* (2004), 104 Ohio St.3d 279, 2004-Ohio-6384); *see Colegrove v. Burns* (1964), 175 Ohio St. 437, 438 ("Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute."). Indeed, the General Assembly has conferred that power through "a comprehensive and complicated felony sentencing plan." *See Foster*, 2006-Ohio-856, ¶ 49.

⁶ Of course, as discussed in Part I, *supra*, (E)(4) does not authorize the imposition of sentences to run consecutively to previously-imposed sentences.

And that plan is the *exclusive* source of sentencing authority, including the power to impose consecutive sentences. If the *Foster* Court excised all of (E)(4), then the *Bates* trial court had no authority to impose consecutive sentences, either through (E)(4) or through “inherent,” non-statutory power.⁷

Alternatively, even if *Foster* permits trial courts to rely on some “inherent” sentencing power, the *Foster* Court did not intend to expand the authority to impose consecutive sentences beyond that provided by (E)(4). As discussed in Part I, the enacted version of (E)(4) authorizes consecutive sentences only where they are imposed by a single Ohio court in a single proceeding. Thus, prior to *Foster*, *Bates*’ sentence was not authorized by law. And nothing about the *Foster* opinion suggests that the Court intended to alter this state of affairs. In fact, *Foster* is silent on this question. Because the *Foster* Court discussed neither the scope of (E)(4) nor the scope of the “full discretion” it allegedly substituted in its place, there is no evidence that *Foster* intended to strike down the legislature’s express intent, much less that it successfully took such a drastic step.

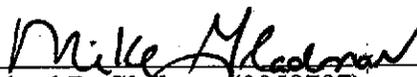
More importantly, *Foster* had a narrow purpose, which was to apply *Blakely* and other United States Supreme Court authority to rectify problems with Ohio’s statutory sentencing scheme that led to unconstitutional treatment of defendants. To read *Foster* as *expanding* judicial sentencing authority would contradict the crucial concern of *Foster*: *limiting* judicial sentencing authority.

⁷ Although the *Foster* Court concluded that trial courts now have “full discretion” to impose consecutive sentences, the Court did not identify the source of such discretionary authority. In any case, this statement should not be read as a recognition of “inherent” sentencing authority. Rather, *Foster* merely describes the state of the law after severance of the (E)(4) findings provisions: because judges are no longer required to make findings before imposing a sentence pursuant to the authorization language of (E)(4), they now have “full discretion” to do so. See Part I, *infra*.

CONCLUSION

For the foregoing reasons, Appellant Robert W. Bates respectfully requests that this Court answer the certified question in the negative, reverse the decision of the Second District Court of Appeals and remand this matter for concurrent sentencing.

Respectfully submitted,



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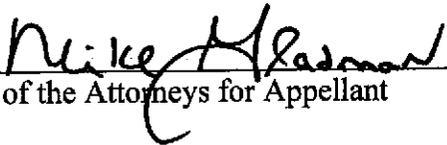
Counsel for Appellant Robert W. Bates

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellant Robert W. Bates was served via first class U.S. mail, postage prepaid, this 9th day of July, 2007, upon:

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One of the Attorneys for Appellant

APPENDIX

APPENDIX

	Page
R.C. § 2929.14	1
Entry dated Mar. 31, 2005, <i>State v. Bates</i> , Miami Cty. Court of Common Pleas, Case No. 04CR333	10
Notice of Appeal filed Feb. 12, 2007, Ohio Supreme Court, Case No. 07-0293	14
Notice of Certified Conflict filed Feb. 15, 2007, Ohio Supreme Court, Case No. 07-0304.....	16
Opinion dated Dec. 29, 2006, <i>State v. Bates</i> , Second Appellate District, Case No. 06-CA-08.....	20
Final Entry dated Dec. 29, 2006, <i>State v. Bates</i> , Second Appellate District, Case No. 06-CA-08.....	26
<i>State v. Thompson</i> , (5th Dist.), 2002 Ohio App LEXIS 4807, 2002-Ohio-4717	28

2929.14 Definite prison terms.

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), or (L) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in section 2907.02 or 2907.05 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D)(1)(a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code

that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(II) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(2)(a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (DD)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3)(a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an

additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(E)(1)(a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing,

was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code.

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F)(1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code

committed on or after the effective date of this amendment and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code, or if a person is convicted of or pleads guilty to attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, the court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of section 2903.06 of the Revised Code and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to section 2929.142 of the Revised Code.

Effective Date: 04-08-2004; 06-01-2004; 09-23-2004; 04-29-2005; 07-11-06; 08-03-2006; 01-02-2007; 01-04-2007; 04-04-2007

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MIAMI COUNTY
COMMON PLEAS COURT

05 MAR 31 AM 9:41

JAN A. NOTTINGER
CLERK OF COURTS

IN THE COMMON PLEAS COURT
OF MIAMI COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	CASE NO. 04CR333
PLAINTIFF,	:	JUDGE ROBERT J. LINDEMAN
VS.	:	ENTRY
ROBERT BATES,	:	CHANGE OF PLEA;
DEFENDANT.	:	IMPOSITION OF SENTENCE
	:	INDICTMENT FOR:
	:	AGGRAVATED ROBBERY
	:	ORC §2911.01(A)(1)
	:	3 COUNTS

On March 30, 2005, the Defendant and his attorney, Steve Layman, appeared in Court at which time the Defendant withdrew his plea of not guilty entered herein on the indictment and entered plea of no contest. The Court inquired of the Defendant and upon being satisfied that Defendant has been fully and completely advised of all of his rights and that he comprehends the same; and the Court finding that Defendant is entering his plea of no contest voluntarily and intelligently; and the Court having been advised by the State of the nature of Defendant's conduct constituting said offense; the Court accepts Defendant's plea of no contest and finds the Defendant guilty to the charges contained in the indictment to three (3) counts of Aggravated Robbery, ORC §2911.01(A)(1), felonies of the first degree.

Further, upon the Court accepting Defendant's plea of no contest the Defendant knowingly and voluntarily waived his right to a presentence investigation. Thereafter, Defendant's sentencing hearing was held pursuant to R.C. §2929.19. The Defendant was afforded all rights pursuant to Crim. Rule 32.

The Court has considered the record, oral statements, and any victim impact statements. The Court considers the factors pursuant to R.C. §2929.13(B).

Further, the Court finds that the offender is not amenable to an available community control sanction pursuant to §2929.13(B)(2)(a). After weighing the seriousness and recidivism factors in §2929.12, the Court finds that a prison term is consistent with the purposes and principles in §2929.11.

IT IS HEREBY ORDERED:

1. That Defendant is sentenced to be confined to the Ohio Department of Rehabilitation and Correction for a stated term of three (3) years on each count. Said prison time imposed shall be served concurrently with each other and consecutively to Montgomery County sentences.

2. Defendant is to pay the costs herein. Further, the Court hereby grants judgment against the Defendant and in favor of the County of Miami, State of Ohio, in the amount of \$168.37, pursuant to Section 2947.23 of the Ohio Revised Code.

Defendant is therefore **Ordered** conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 87 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate State Institution. Defendant is **Ordered** to pay any restitution, all prosecution costs, court appointed counsel costs and any fees permitted pursuant to Ohio Revised Code §2929.18(A)(4).

Further, once Defendant is released from his term of incarceration at the Ohio Department of Rehabilitation and Corrections, Defendant shall be placed on Post Release Control for a period of five (5) years and he shall be subject to the following terms and conditions of said Post Release Control:

CONDITIONS OF SUPERVISION

1. The Defendant shall obey federal, state and local laws and ordinances, including all orders, rules and regulations of Miami County Common Pleas Court and the Department of Rehabilitation and Correction. The Defendant agrees to conduct himself as a responsible law abiding citizen.
2. The Defendant shall always keep his supervising officer informed of his residence and place of employment. He shall obtain permission from his supervising officer before changing his residence or his employment.
3. The Defendant shall not leave the State of Ohio without written permission of the Adult Parole Authority.
4. The Defendant shall not enter the grounds of any correctional facility nor attempt to visit any prisoner without the written permission of his supervising officer. The Defendant shall not communicate with any prisoner in any manner without obtaining permission from his supervising officer.
5. The Defendant shall follow all orders verbal or written given to him by his supervising officer or other authorized representatives of the Court or the Department of Rehabilitation and Correction.
6. The Defendant shall not purchase, possess, use or have under his control, any firearms, ammunition, dangerous ordnance or weapons, including chemical agents, electronic devices used to immobilize, pyrotechnics and/or explosive devices.
7. The Defendant shall not purchase, possess, use or have under his control, any narcotic drug or other controlled substance or illegal drugs, including any instrument, device or other object used to administer drugs or to prepare them for administration, unless it is lawfully prescribed for him by a licensed physician. The Defendant agrees to inform his supervising officer promptly of any such prescription and he agrees to submit to drug testing if required by the Adult Parole Authority.
8. The Defendant shall report any arrest, citation of violation of the law, conviction or any other contact with a law enforcement officer to his supervising officer no later than the next business day. The Defendant shall not enter into any agreement or other arrangement

with any law enforcement agency which might place him in the position of violating any law or condition of his supervision, unless the Defendant has obtained permission in writing from the Adult Parole Authority, or from the Court.

9. The Defendant shall submit to a search, without warrant, of his person, his motor vehicle, or his place of residence by a supervising officer or other authorized representative of the Department of Rehabilitation and Correction at any time.

10. The Defendant shall sign a release of confidential information from any public or private agency if requested to do so by a supervising officer.

11. The Defendant shall not associate with persons having a criminal background and/or persons who may have gang affiliation, or could influence him to engage in criminal activity, without the prior permission of his supervising officer.

12. The Defendant shall comply with all financial obligations, including child support as ordered by any court and/or the Department of Rehabilitation and Correction.

13. The Defendant shall give all information regarding his financial status to assist in determining his ability to pay specific financial obligations, to his supervising officer.

14. The Defendant shall follow all rules and regulations of treatment facilities or programs of any type in which he is placed or ordered to attend while under the jurisdiction of the Court, and/or Department of Rehabilitation and Correction.

After prison release, if post-release control is imposed, for violating post release control conditions, the adult parole authority or parole board could impose a more restrictive or longer control sanction, return defendant to prison for up to nine months for each violation, up to a maximum of 50 percent of the stated term.

SPECIAL CONDITIONS:

1. That Defendant pay Court costs of this case.

In the event that the Defendant is sentenced to confinement which is to be served in a local detention facility, and if the Defendant is presented with an itemized bill pursuant to §2929.37 of the Ohio Revised Code for payment of the costs of confinement, the Defendant is required to pay the bill in accordance with that section.

If the Defendant does not dispute the bill described in division (B)(7)(a)(i) of §2929.19 of the Ohio Revised Code and does not pay the bill by the time specified in §2929.37 of the Ohio Revised Code, the Clerk of Court may issue a certificate of judgment against the offender as described in that section.

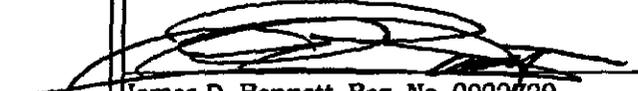
The Defendant is further notified that the sentence herein includes any certificate of judgment issued as described in division (B)(7)(a)(ii) of §2929.19 of the Ohio Revised Code.

Further, the Court advises the Defendant of his right to appeal; that if he is unable to pay the cost of an appeal, he has the right to appeal without payment; that if he is unable to obtain counsel for an appeal, counsel will be appointed without cost; that if he is unable to pay the cost of documents necessary to an appeal, such documents will be provided without costs; and that he has a right to have notice of appeal timely filed on his behalf.

✓ The Clerk shall deliver three copies of this entry to the Adult Parole Authority.

Re

JUDGE ROBERT J. LINDEMAN


James D. Bennett, Reg. No. 0022729
First Assistant Prosecuting Attorney

U. 622 - Pg. 544

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ROBERT BATES,

Defendant-Appellant.

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07-0293

Case No. _____

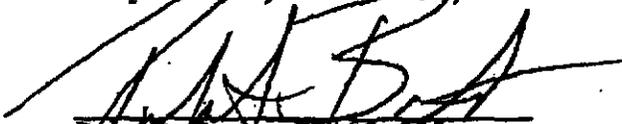
2nd Dist. No. 06-CA-08

NOTICE OF APPEAL

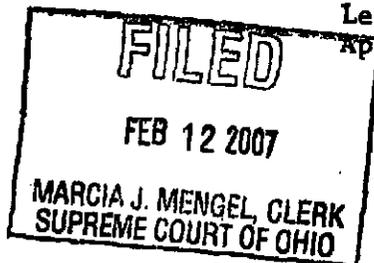
Now comes Appellant, Robert Bates, proceeding in pro se, and respectfully gives notice of his intent to appeal the decision of the Second District Court of Appeals in the above styled cause, affirming the judgment of the trial court in imposing consecutive sentences, issued on December 29, 2006, to the Supreme Court of Ohio.

This case involves a felony, presents a question of great general and public interest and presents a case in conflict with other Courts of Appeals in Ohio, and is a claimed appeal as of right.

Respectfully submitted,

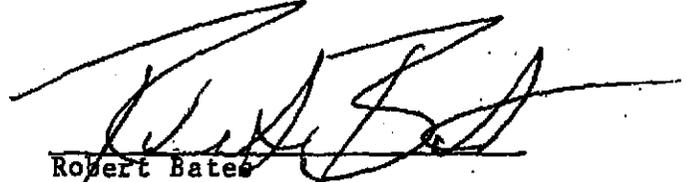


Robert Bates, #469-325
Lebanon Corr. Inst.
H.O.B. 56
Lebanon, Ohio 45036-0056
Appellant, in pro se



CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Miami County Prosecutor, 201 W. Main St., Troy, Ohio 45373, via regular U.S. Mail, on this 7th day of February, 2007.

A handwritten signature in black ink, appearing to read 'Robert Bates', is written over a horizontal line.

Robert Bates
Appellant, in pro se

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ROBERT W. BATES,

Defendant-Appellant.

07-0304

Case No. _____

2nd Dist. No. 06-CA-08

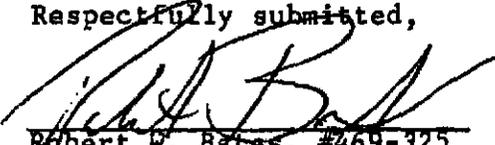
APPELLANT'S NOTICE OF CERTIFIED CONFLICT

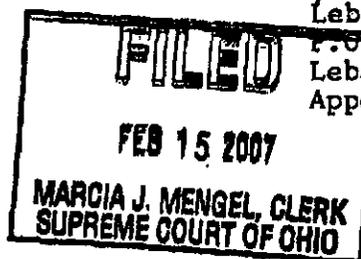
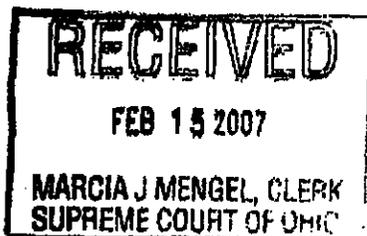
Now comes Appellant, Robert W. Bates, proceeding in pro se, and respectfully gives Notice of the Order of the Second District Court of Appeals in the above styled cause, certifying a conflict in this case with State v Thompson, Fairfield App. No. 01CA62, 2002-Ohio-4717, pursuant to S. Ct. Prac. R. IV, Section 1.

A Copy of the Court of Appeals' decision in this case, as well as in Thompson, supra, are attached hereto in compliance with the rule.

The Court Certified the Conflict in an Entry dated January 29, 2007, a copy of which is attached hereto.

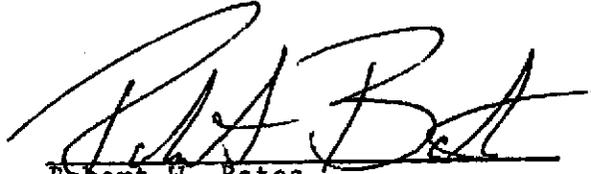
Respectfully submitted,


Robert W. Bates, #469-325
Lebanon Corr. Inst.
P.O. B. 56
Lebanon, Ohio 45036-0056
Appellant, in pro se



CERTIFICATE OF SERVICE

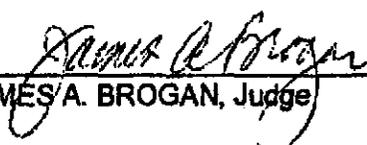
I hereby certify that a true copy of the foregoing was sent to the office of the Miami County Prosecutor, 201 W. Main St., Troy, Ohio 45373, via regular U.S. Mail, on this ~~10th~~^{11th} day of February, 2007.



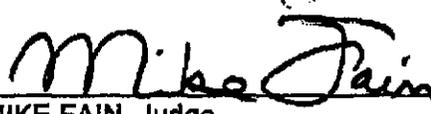
Robert W. Bates
Appellant, in pro se

We agree with Bates that our judgment is in conflict with the judgment in *State v. Thompson*, supra. Accordingly, his motion to certify a conflict is GRANTED. The question certified is: Does a trial court have authority, generally, to order that a felony sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court?

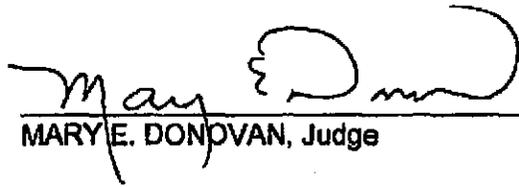
SO ORDERED.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



MARY E. DONOVAN, Judge

Copies to:

Miami County Prosecutor
Attention - James Bennett
201 W Main St
Troy OH 45373

Christopher C. Bazeley
7333 Paragon Road
Suite 200
Dayton, OH 45459

idf

2

Bates contends that the trial court had no authority to order the sentence imposed – three concurrent three-year sentences – to be served consecutively to a ten-year felony sentence previously imposed by another Ohio court. We conclude that R.C. 2929.14(E)(4) does provide authority for the sentence imposed. Accordingly, the judgment of the trial court is Affirmed.

I

Bates was charged by indictment with three counts of Aggravated Robbery. He pled guilty as part of a plea bargain. That plea bargain included a joint recommendation, by both Bates and the State, that the sentence would be three, three-year terms of imprisonment, to be served concurrently with one another, but consecutively with a ten-year sentence previously imposed by the Montgomery County Common Pleas Court. The trial court accepted the plea, and imposed the agreed-upon sentence.

From his sentence, Bates appeals.

II

Bates's sole assignment of error is as follows:

"THE TRIAL COURT'S IMPOSITION OF THREE-YEAR SENTENCES OF CONFINEMENT FOR THREE COUNTS OF AGGRAVATED ROBBERY WAS UNLAWFULLY IMPOSED CONSECUTIVELY TO A TEN-YEAR SENTENCE IMPOSED IN MONTGOMERY COUNTY."

The State responds to Bates's assignment of error by asserting that Bates is prohibited from appealing from his sentence because, under R.C. 2953.08(D), a defendant

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may not appeal from a sentence if the State and the defendant jointly recommend a sentence as part of a plea negotiation, that sentence is imposed by the trial court, and "the sentence is authorized by law." We understand Bates's entire argument on appeal to be that the consecutive sentence imposed upon him, while jointly recommended, is not authorized by law, and we agree with him that if, in fact, his sentence is not authorized by law, then R.C. 2953.08(D) furnishes no impediment to his appeal.

Bates cites *State v. Thompson*, 2002-Ohio-4717, Fairfield App. No. 01CA62, for the proposition that, except under certain circumstances expressly provided for in R.C. 2929.14(E) (1), (2), and (3), which have no application here, a trial court has no authority to order a felony sentence imposed to be served consecutively to a felony sentence previously imposed by another Ohio court. We agree with Bates that *State v. Thompson*, supra, so holds, and that the application of this holding to his case would require reversal of his sentence.

In *State v. Thompson*, supra, the Ohio Fifth District Court of Appeals notes that its decision is in conflict with the opinion of the Ohio Tenth District Court of Appeals in *State v. Gillman*, 2001-Ohio-3968, Franklin App. No. 01 AP-662. We have read *State v. Gillman*, supra, and we conclude that its holding is, in fact, in conflict with the holding of *State v. Thompson* on the precise issue that Bates raises in this appeal. Thus, whichever way we decide the issue, we will be in conflict with one of these two sister courts.

Although the issue is not free from difficulty, we conclude that R.C. 2929.14(E)(4) authorizes a trial court imposing a felony sentence to order that sentence to be served consecutively with a felony sentence imposed by another court. R.C. 2929.14(E)(1), (2), and (3) require the imposition of sentences consecutively under certain circumstances.

R.C. 2929.14(E)(4) *permits* the imposition of consecutive sentences. Formerly, the trial court was required to make certain findings, set forth in R.C. 2929.14(E)(4), as a result of which it *might*, in its discretion, order consecutive sentences. In the aftermath of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court is no longer required to make certain findings before it "may," pursuant to R.C. 2929.14(E)(4), order consecutive sentences, but may exercise its discretion to do so.

The issue in this appeal is whether the permissive provision for consecutive sentences set forth in R.C. 2929.14(E)(4) extends not only to multiple prison terms imposed by the sentencing court, but also extends to the situation, like the one here, where one or more felony prison terms are being imposed after a defendant already has a felony prison term pending that was imposed by another Ohio court.

R.C. 2929.14(E)(4) provides as follows:

"If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if ***."

The omitted part of Division (E)(4) corresponds to the findings that are no longer required, as a result of *State v. Foster*, *supra*.

In our view, the language used in R.C. 2929.14(E)(4) is broad enough to encompass multiple prison terms imposed on an offender by different courts. This interpretation is consistent with R.C. 2929.14(A), which requires a sentence of imprisonment to be served concurrently with a sentence of imprisonment "imposed by a court of this state, another state, or the United States[,]" "[e]xcept as provided in *** division (E) of section 2929.14 *** of the Revised Code." The exception recognizes that R.C. 2929.14(E) authorizes the imposition of a sentence to be served consecutively with a sentence imposed by a different

court, and does not distinguish between the various subdivisions of R.C. 2929.14(E).

Furthermore, a contrary interpretation of R.C. 2929.14(E)(4) would lead to the absurd result that someone who has already been sentenced to a lengthy term of imprisonment, and who is either out on bond or escaped, could commit offenses carrying no more punishment than the term of imprisonment already hanging over him, with impunity, secure in the knowledge that even if he is caught, tried and convicted, his sentence will be made concurrent with, and subsumed by, the sentence already pending. We understand that the concept of felony sentencing underlying the statutory scheme enacted in 1996 reserves the imposition of consecutive sentences for the more serious offenses and offenders warranting them, but surely there is a need for a trial judge to have available the possibility of imposing consecutive sentences when circumstances warrant.

In reaching the conclusion that R.C. 2929.14(E)(4) authorizes the sentence imposed in this case, we recognize that our decision appears to be in conflict with that of the Fifth District Court of Appeals in *State v. Thompson*, supra. Bates may wish to move to certify our judgment in his appeal as being in conflict with the decision in *Thompson*, in accordance with App. R. 25.

Bates's sole assignment of error is overruled.

III

Bates's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

.....
BROGAN and DONOVAN, JJ., concur.

Copies mailed to:

**Christopher Bazeley, Esq.
James D. Bennett, Esq.
Hon. Robert J. Lindeman**

RECEIVED DEC 29 2006

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

ROBERT BATES

Defendant-Appellant

Appellate Case No. 06-CA-08

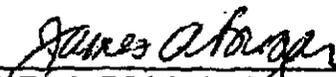
Trial Court Case No. 04-CR-333

(Criminal Appeal from
Common Pleas Court)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 29th day
of December, 2006, the judgment of the trial court is *Affirmed*.

Costs to be paid as stated in App.R. 24.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



MARY E. DONOVAN, Judge

Copies mailed to:

Christopher Bazeley, Esq.
7333 Paragon Road, Suite 200
Dayton, OH 45459
Attorney for Defendant-Appellant

James D. Bennett, Esq.
Miami County Prosecutor's Office
201 W. Main Street - Safety Building
Troy, OH 45373
Attorney for Plaintiff-Appellee

Hon. Robert J. Lindeman
Miami County Common Pleas Court
201 W. Main Street
Troy, OH 45373

2002 Ohio 4717, *; 2002 Ohio App. LEXIS 4807, **

STATE OF OHIO, Plaintiff-Appellee -vs- KENNETH THOMPSON, Defendant-Appellant

Case No. 01CA62

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD COUNTY

2002 Ohio 4717; 2002 Ohio App. LEXIS 4807

September 3, 2002, Date of Judgment Entry

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDING: Criminal Appeal from Fairfield County Court of Common Pleas Case 99-CR-0289.

DISPOSITION: Trial court's judgment was reversed and case was remanded.

COUNSEL: For Plaintiff-Appellee: GREGG MARX, Asst. Prosecuting Attorney, Fairfield County Prosecutor's Office, Lancaster, OH.

For Defendant-Appellant: ANDREW T. SANDERSON, Lancaster, OH.

JUDGES: Hon. William Hoffman, P.J., Hon. John Wise, J., Hon. Julie Edwards, J. Hoffman, P.J., and Wise, J., concur. Edwards, J. dissents.

OPINIONBY: William Hoffman

OPINION:

Hoffman, P.J.

[*P1] Defendant-appellant Kenneth Thompson appeals his sentence from the Fairfield County Court of Common Pleas on one count each of receiving stolen property and grand theft of a motor vehicle. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

[*P2] On December 6, 1999, the Fairfield County Grand Jury indicted appellant on one count of receiving stolen property in violation of R.C. 2913.51, a felony of the fourth degree, one count of breaking and entering in violation of R.C. 2911.13, a felony of the fifth degree, and one count of grand theft of a motor vehicle in violation of R.C. 2913.02 **[**2]**, a felony of the fourth degree. On December 29, 1999, appellant entered a plea of not guilty to the charges contained in the indictment.

[*P3] Subsequently, on January 13, 2000, appellant withdrew his former not guilty plea and entered a plea of guilty to one count each of receiving stolen property and grand theft of a motor vehicle. On the same date, the trial court sentenced appellant to a nine month prison sentence on both counts, to be served concurrently, and also fined appellant \$ 250.00 on each count. In addition, appellant was ordered to make restitution to the victim. As memorialized in its January 20, 2000, Judgment Entry, the trial court suspended appellant's prison sentence and placed appellant on

community control for a period of five years. The remaining count in the indictment was dismissed.

[*P4] Appellee filed a Motion to Revoke appellant's community control on January 24, 2001. In its motion, appellee alleged appellant had violated the same by failing to maintain good behavior and/or obey the law because on November 16, 2000, appellant was convicted of engaging in a pattern of corrupt activity, a felony of the second degree. Appellant was convicted in Franklin **[**3]** County Court of Common Pleas Case No. 2000-CR-04-2659, and sentenced to five years in prison in such case. In addition, on November 16, 2000, appellant's probation was revoked in Franklin County Case No. 99-CR-08-4131. The Franklin County court, in such case, sentenced appellant to one year in prison and ordered that such sentence be served consecutive to his five year sentence in Franklin County Case No. 00-CR-04-2659.

[*P5] A probable cause hearing was held on October 15, 2001. Pursuant to an entry filed on October 25, 2001, the trial court found that there was probable cause to believe that appellant had violated the terms of his community control. The trial court, in its entry, specifically found, in relevant part, as follows:

[*P6] "1. The Defendant was convicted of Receiving Stolen Property and Grand Theft of a Motor Vehicle on January 13, 2000 in the Fairfield County Court of Common Pleas; 2. Upon his conviction, the Court sentenced the Defendant to concurrent sentencing of nine (9) months on each count which was suspended when the Defendant was placed on five (5) years of community control. 3. On November 16, 2000, the Defendant was convicted in Franklin County, **[**4]** Ohio, of one count of Engaging in a Pattern of Corrupt Activity in case number 00CR-04-2659 for which the Defendant received a sentence of five (5) years in prison. 4. On November 16, 2000, the Defendant's probation was revoked in Franklin County, Ohio, in case number 99-CR-08-4131 for which the Defendant received a sentence of one (1) year in prison, which was consecutive to case number 00-CR-04-2659. 5. The Defendant violated Term # 15 of his terms of probation."

[*P7] After revoking appellant's probation, the trial court ordered appellant's nine month sentence be reimposed and that the same be served consecutively to appellant's sentence in Franklin County Common Pleas Case No. 00CR-04-2659.

[*P8] It is from the trial court's October 25, 2001, entry that appellant now prosecutes his appeal, raising the following assignment of error: n1

[*P9] "THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING DEFENDANT-APPELLANT TO CONSECUTIVE SENTENCES."

----- Footnotes -----

n1 Pursuant to an Entry filed on February 11, 2002, this Court granted appellant's motion to file a delayed appeal.

----- End Footnotes -----

[5]**

I

[*P10] Appellant, in his sole assignment of error, argues that the trial court erred in sentencing appellant to consecutive sentences. We agree.

[*P11] The first issue that must be addressed is whether the trial court had authority to order that appellant's nine month sentence in this matter be served consecutive to his sentence in Franklin County Case No. 00CR-04-2659. As is stated above, the trial court originally sentenced appellant to concurrent nine month sentences in this matter and then suspended imposition of the same and placed appellant on community control for a period of five years. While he was on community control, appellant was convicted of engaging in a pattern of corrupt activity in the above Franklin County Court of Common Pleas case and was sentenced to five years in prison. Thus, as appellee notes in its brief, this Court must first determine whether "when a defendant placed on community control is sentenced for a new felony in another county [Franklin], does a court have discretion to order consecutive sentences to the new felony when revoking the defendant's community control when the revocation occurred after the other county sentenced the **[**6]** defendant?"

[*P12] ^{HN1} R.C. 5145.01, on duration of sentences, states, in part, as follows: "if a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply." ^{HN2} Pursuant to R.C. 2929.41(A), "except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state, another state, or the United States." ^{HN3} R.C. 2929.41(B) states, in relevant part: * * * "If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison term it imposes consecutively **[**7]** to any prison term imposed upon the offender by the court of another state or the United States.

[*P13] In turn, ^{HN4} R.C. 2929.14(E) provides as follows:

[*P14] "(E)(1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently **[**8]** imposed upon the offender.

[*P15] "(b) If a mandatory prison term is imposed upon an offender pursuant to

division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

[*P16] "(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, or if an offender who is an **[**9]** inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

[*P17] "(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code or if a prison term is imposed for a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

[*P18] "(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court **[**10]** finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

[*P19] "(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

[*P20] "(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

[*P21] "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. (Emphasis added.) R.C. 2929.14.

[*P22] The above statutes were considered in State v. Gillman, Franklin App. No. 01 AP-662, 2001 Ohio 3968 [**11]. In *Gillman*, the defendant argued that the trial court erred in ordering appellant to serve consecutive sentences. The defendant was originally placed on community control for a period of three years in Case A after entering a plea of guilty to one count of attempted felonious assault. While on

community control in Case A, the defendant pled guilty in Case B to two counts of aggravated robbery with a firearm specification and was sentenced to 22 years in prison. Shortly thereafter, in Case A, the defendant stipulated that the offense in Case B constituted a violation of his community control in Case A. After revoking the defendant's community control, the trial court sentenced the defendant to a prison term of five years in Case A and ordered that the same be served consecutively to the prison term imposed in Case B.

[*P23] The defendant, in *Gillman*, appealed, arguing that the trial court erred in ordering that his sentence in Case A be served consecutively to his sentence in Case B. The defendant, in his appeal, specifically argued, in part, that R.C. 2929.14(E)(4) did not allow ****12** trial courts to impose a sentence in one case consecutive to a sentence previously imposed in a separate proceeding, but rather allows consecutive sentences only when a trial court is imposing multiple prison terms arising out of the same proceeding. The Court of Appeals rejected such argument holding, in part, as follows:

[*P24] "In the present case, R.C. 2929.14(E)(4) states unambiguously, "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively * * *." The plain language of subsection (4) does not require multiple prison terms for multiple offenses to be imposed in the same proceeding or to be based upon the same facts in order for any resulting sentences to be served consecutively. Although appellant relies upon various inferences, interpretations, and assumptions utilizing the language of other subsections and related statutes, such are not necessary given the clear, nonrestrictive language of subsection (4). Had the legislature desired subsection (4) to apply only to multiple sentences and offenses arising out of the same proceeding, ****13** it could have simply provided for such restrictions in plain terms."

[*P25] Subsections (1), (2), and (3) [of R.C. 2929.14(E)] pertain to circumstances when there are multiple sentences and one of the sentences was for one of three specific types of conduct. Subsection (4) applies to all other situations when there exists multiple sentences. In subsections (1), (2), and (3), the legislature made it mandatory that sentences for gun specifications, crimes in a detention facility, and certain acts against a law enforcement officer be served consecutively to all other sentences imposed previously or subsequently. The legislature undoubtedly made consecutive sentences mandatory for such crimes to underscore the serious nature of those offenses. Subsection (4) then gives the trial court the discretion to determine whether sentences for multiple offenses that do not fit into subsections (1), (2), or (3) should be served consecutively. As subsections (1), (2), and (3) require sentences to be served consecutively to other sentences imposed previously or subsequently when the offense was of an especially serious nature, we read subsection (4) to give the trial ****14** court the discretion to order a sentence to be served consecutively to any previous or subsequent sentence when the court makes the required findings indicating that the prison terms should be served consecutively. While we agree R.C. 2929.14(E)(4) is not a model of clarity, we do not believe the legislature intended that the trial court would not have this type of discretion in sentencing. 2001 Ohio 3968, [slip op.] at 2-3. (Emphasis added). n2

----- Footnotes -----

n2 While the defendant, in *Gillman*, filed an appeal with the Supreme Court of Ohio, his appeal was not allowed for review. See State v. Gillman, 95 Ohio St.3d 1421, 2002 Ohio 1737, 766 N.E.2d 162.

----- End Footnotes-----

[*P26] The court, in *Gillman*, concluded that the trial court did not err in ordering the defendant's sentence in Case A to be served consecutively to his sentence in Case B.

[*P27] Although we appreciate the struggle undertaken by our colleagues in *Gillman*, we must disagree with the Tenth District's conclusion. Although we agree with **[**15]** the *Gillman* court's observation R.C. 2929.14(E) is not a model of clarity, we cannot find R.C. 2929.14(E)(4), when viewed in light of the other statutes referenced in R.C. 2929.41, permits the action taken by the trial court in the matter sub judice.

[*P28] Unlike R.C. 2929.14(E)(1), (2), or (3), R.C. 2929.14(E)(4) does not reference imposing a consecutive prison term to any other prison term previously or subsequently imposed upon the offender. We do not believe this omission was by oversight.

[*P29] ^{MNS} Unless specifically ordered to run consecutively to any previously ordered sentence, any sentence of a court rendered subsequent to the previously ordered sentence runs concurrently thereto. See R.C. 2929.41. In the case sub judice, the Franklin County Court was free to order its sentence to run consecutively to any sentence which had been imposed by the Fairfield County Court, provided it followed the mandates of R.C. 2929.41.

[*P30] We agree the statutory framework is tortured **[**16]** and unclear, at best. However, under these circumstances, we conclude the imposition of sentence by the Fairfield County Court runs afoul of at least two overarching legal theories.

[*P31] First is the defendant's right to have no greater sentence than the sentence originally imposed. While we understand appellant's sentence was reimposed as a result of a probation violation, the court did not, indeed, could not indicate appellant's original sentence would be served consecutively to any other subsequent offense in the original sentencing entry. The original sentencing entry states if appellant should violate the terms of his community control sanctions he would be required to serve nine months in a state penal institution. Sentencing entry at p. 3-4.

[*P32] Second, to permit a court imposing the first sentence to enhance a sentence in this manner usurps whatever statutory authority is granted to the subsequent sentencing court. We presume the Franklin County Court took appellant's previous record and status as a probationer in Fairfield County into account when fashioning a sentence for the offense appellant committed in Franklin County. In fact, R.C. Chapter 2929 specifically **[**17]** permits the imposition of stiffer penalties within the sentencing structure where a defendant has the greatest likelihood to re-offend, or where a new offense is committed while a defendant is on probation or community control.

[*P33] Appellant's sole assignment of error is sustained. The judgment of the Fairfield County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Consistent with this opinion and law.

By Hoffman, P.J. and

Wise, J. concur

Edwards, J. dissents

DISSENTBY: Julie A. Edwards

DISSENT: EDWARDS, J., DISSENTING OPINION

[*P34] I respectfully dissent from the majority's analysis and disposition of appellant's sole assignment of error. Based on Gillman, supra., I would find that the trial court had authority to order that appellant's sentence in this matter be served consecutively to appellant's sentence in Franklin County Case No. 00-CR-04-2659 provided that the trial court made the requisite findings mandated by R.C. 2929.14(E)(4). As is stated by the majority in its opinion, while the defendant, in Gillman, appealed to the Ohio Supreme Court, his appeal **[**18]** was not allowed for review.

[*P35] However, upon review of the record, I would find that the trial court failed to make the findings required by R.C. 2929.14(E)(4), which is cited in the majority's opinion, prior to imposing the consecutive sentences. The trial court stated as follows on the record at the sentencing hearing:

[*P36] "THE COURT: ... But it's always been the policy of this Court, pursuant to 2929.41, that any new felony committed by a probationer, parolee or escapee, is to be served consecutively. And that's exactly what the facts indicate in this case. There was an additional felony committed in another jurisdiction, Franklin County, for engaging in a pattern of corrupt activity for which he was convicted on the 15th of November of 2000, and was sentenced in this court to the previous - - in this case that we're now considering, for the revocation of his probation. This sentence was ordered judgment on January 20th of 2000, which was some ten or eleven months prior to the conviction in Franklin County.

[*P37] "And therefore, it would seem inappropriate in the circumstances of sentencing philosophically, anyway, to permit the **[**19]** - - any sentences committed subsequent to another criminal offense to be served concurrently. That would seem to me not logical if sentencing - - if the purposes for sentencing are to deter the Defendant, if he realized that he could commit any offense thereafter and whatever it is, that it would be served concurrent to his original sentence, to me, does not make sense. It would then give a license to any convicted person to commit criminal offenses subsequent to the original one and know that all those sentences would be served concurrently. Especially if - - well, not especially, but - -

[*P38] "And therefore, the Court, understanding its policy for years has been if a defendant commits a subsequent offense while on probation with this court, that the sentence that he would be serving would be served consecutively to that sentence, whether it be in this county or in any other county. It being the basis, primarily, for the violation of his probation in this court.

[*P39] "Therefore, the Court orders the sentence of nine months in this case, being two 18-month sentences to be served concurrently, being a total of nine months to be served consecutive to the sentences in **[**20]** Franklin County." Transcript of October 15, 2001, hearing at 31-33. Moreover, in its October 25, 2001, entry, the trial court merely ordered "that the (9) nine month sentences be served consecutively to the sentence in case number OOCR-04-2659 in the Franklin County Court of Common Pleas."

[*P40] Clearly, the trial court failed to find that consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Nor did the trial court determine whether any of the factors contained in R.C. 2929.14(E)(4)(a) through (c) were present.

[*P41] Since the trial court did not comply with R.C. 2929.14(E)(4) prior to imposing consecutive sentences, I would remand this matter to the trial court for resentencing.

Judge Julie A. Edwards