

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DALE R. CROWE,

Defendant-Appellant.

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:
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Case No. **07-1283**

1st Dist. No. C-070390

MEMORANDUM IN SUPPORT OF JURISDICTION

FOR APPELLANT:

Dale R. Crowe, #519-303
Lebanon Corr. Inst.
P.O.B. 56
Lebanon, Ohio 45036-0056

Appellant, in pro se

FOR APPELLEE:

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Assistant Hamilton County
Prosecuting Attorney

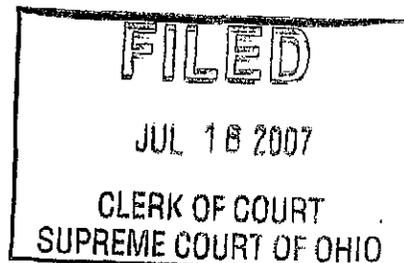


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JURISDICTIONAL STATEMENT

This case presents substantial constitutional questions regarding the imposition of consecutive sentences absent any statutory authority or subject matter jurisdiction to do so, resulting in a due process and equal protection violation, as well as questions surrounding the failure to properly advise regarding appellate remedies, and rights and the deprivation of counsel for appeal as well as ineffective counsel at the trial level for failing to consult about an appeal. Each of these questions have been addressed by the U.S. Supreme Court in ways favorable to the appellant, but the state courts have not addressed them and this Court should accept jurisdiction.

Likewise, this case presents a substantial constitutional question regarding the refusal to permit a delayed appeal based upon grounds determined to be adequate by the U.S. Supreme Court but disregarded by the court of appeals herein, warranting intervention by this Court.

STATEMENT OF THE CASE

On May 3, 2006, Appellant entered a plea of guilty to one count of involuntary manslaughter and one count of aggravated robbery, and was sentenced to serve consecutive terms totalling fourteen years. On the same day, under a separate case number, he was sentenced to an additional six year term for conviction of one count of engaging in a pattern of corrupt activity for a total term of consecutive terms totalling twenty years.

In approximately October, 2006, Appellant filed a Motion to Withdraw his plea and, just prior to a scheduled evidentiary hearing on that motion, newly appointed counsel convinced Appellant to withdraw the motion, stating that he could re-file it after the trial court judge left office in January.

On May 31, 2007, Appellant filed a motion for delayed appeal, explaining that the trial court had not given him any indication of his right to appeal, and that counsel had not consulted with him regarding the availability of an appeal, which was denied on June 20, 2007. This timely appeal follows.

STATEMENT OF FACTS

The relevant facts to this appeal begin with the fact that Appellant was never advised of the availability of an appeal for the unlawful sentence that was imposed upon him, by either court or counsel, that counsel did not consult with Appellant in any way regarding an appeal, despite the fact that any reasonable person sentenced to an unlawful sentence would want to appeal it, whether the sentence was "agreed" or not, because it was not authorized by law, and that the sentence itself is unlawful, in

that the only statutory provisions that once permitted the imposition of consecutive terms of incarcerated were excised in their entirety by this Court in *State v Foster* (2006) 109 Ohio St. 3d 1, several months prior to Appellant's sentencing, rendering the imposition of consecutive sentences not only unlawful, but void.

PROPOSITION OF LAW NO. I:

THE LACK OF NOTICE OF AVAILABLE APPELLATE REMEDIES, COMBINED WITH INEFFECTIVE COUNSEL FOR FAILING TO CONSULT WITH A DEFENDANT ABOUT APPEAL OPTIONS, ARE SUFFICIENT GROUNDW TO WARRANT LEAVE TO FILE A DELAYED APPEAL AND THE DENIAL THEREOF DEPRIVES A DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION.

LAW AND ARGUMENT

It is well settled that a state is not required to provide appellate remedies, but where a state does so, the access thereto and application thereof must comport with due process and equal protection. *Griffin v Illinois* (1956) 351 U.S. 12; *Douglas v California* (1963) 372 U.S. 353.

In Ohio, O.R.C. §2953.08 governs appeal remedies regarding a sentence in a criminal case and expressly provides that, while a sentence that is "agreed" is not appealable, a sentence that is not authorized by law is, in fact, appealable. The statute does not exclude "agreed" sentences from the provisions that authorize appeals for unlawful sentences.

In this case, Appellant's sentences were ordered to run consecutively in the absence of any statutory authority to do so, based upon the fact that the only two statutes, O.R.C. §§2929.14(E) (4) and 2929.41(A) have been excised in their entirety, and have no further effect, by the Syllabus in *State v Foster*, supra.

In short, the trial court had no subject matter jurisdiction

to impose consecutive terms (with the exception of the firearm specification, governed by a separate and distinct statute unaffected by **Foster**).

In **Wolfe v Randle** (S.D. Ohio, 2003) 267 F. Supp. 2d 743, the Court held that the failure of a trial court to advise a defendant of his rights regarding the available appeal processes is a denial of the due process and equal protection required under **Griffin and Douglas**, *supra*.

In **Roe v Flores-Ortega** (2000) 528 U.S. 470, the Court held that the failure of counsel to file a notice of appeal without a defendant's consent is not *per se* ineffective, however counsel is required to consult with a defendant regarding the availability of an appeal and where counsel fails to do so, and a reasonable man in the defendant's position would have wanted to appeal, the defendant has been denied effective counsel.

In this case, both of these failures adversely affected the ability of Appellant to timely appeal the unlawful sentence imposed upon him. Both of these reasons, supported with controlling authorities, were presented to the court of appeals, unopposed, with the singular exception that the prosecutor erroneously argued that because the sentence was "agreed" it was not subject to appellate review (an argument previously rejected in **State v Kershaw** (1999) 132 Ohio App. 3d 243) and the Court of appeals summarily denied Appellant the opportunity to appeal.

Ohio's delayed appeal process has been condemned by the federal courts as constituting a system of "absolute discretion" with no rhyme or reason for denying leave to appeal, and the Courts have determined that, even where a delayed appeal is de-

nied to a defendant, it cannot constitute an "adequate and independent state ground" to apply a procedural default to preclude federal review. See **Deitz v Money** (CA6, 2004) 391 F3d 804.

Appellant submits that the failure of the Court of Appeals to permit a delayed appeal in this case deprived Appellant of due process and equal protection access to available appellate remedies and the failure of the Court of Appeals to appoint counsel, as required by **State v Sims** (1971) 27 Ohio St. 2d 79 (see also **tate v Gentry** (1983) 10 Ohio App. 3d 227) deprived Appellant of his Constitutional right to counsel on appeal. **Gideon v Wainwright**(1963) 372 U.S. 335, **Douglas**, supra.

This Court should accept jurisdiction and, ultimately, reverse.

PROPOSITION OF LAW NO. II:

AN "AGREED" SENTENCE THAT IS NOT AUTHORIZED BY LAW IS VOID AB INITIO AND MUST BE VACATED.

LAW AND ARGUMENT

It is axiomatic that criminal laws and sentences derive from statutes enacted by the legislature. No act can be punished except by statute. **Mitchell v State** (1884) 42 Ohio St. 383. Any act, to be criminal, must be declared so by some statute or ordinance. **Akron v Rowland** (1993) 67 Ohio St. 3d 391.

Moreover, the sentencing authority of trial courts is also limited to terms expressly authorized by statute. In **State v Beasley** (1984) 14 Ohio St. 3d 74, this Court invalidated a sentence that was not authorized by law, being less than the minimum term expressly authorized by statute, citing **Colegrove v Burns** (1964) 175 Ohio St. 437 for the proposition that a court "has no power to substitute a different sentence for that provided by law".

This Court, in **Beasley** specifically held:

"Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or **void**." (id at 76, emphases added)

A trial court may not impose a sentence that is not expressly authorized by law. O.R.C. §2901.04 and, as such, any sentence so imposed by a court is a nullity, void and unenforceable.

A defendant so sentenced is, therefore, entitled to have the unlawful sentence vacated and be properly resentenced to a term authorized by law.

PROPOSITION OF LAW NO. III:

THE SEVERANCE, IN THEIR ENTIRETY, OF OHIO REVISED CODE SECTIONS 2929.14(E)(4) AND 2929.41(A) BY THIS COURT IN STATE V FOSTER (2006) 109 Ohio St. 3d 1 SERVED TO ERASE ALL PROVISIONS OF THE OHIO REVISED CODE THAT VESTED JURISDICTION IN A SENTENCING COURT TO IMPOSE CONSECUTIVE TERMS OF INCARCERATION, AND A SENTENCE IMPOSED CONSECUTIVELY SUBSEQUENT TO THE ISSUANCE OF FOSTER IS VOID AB INITIO.

LAW AND ARGUMENT

Appellant incorporates in full the argument set forth under Proposition of Law No. II above herein by reference for the relevant law demonstrating that a sentence that is not authorized by law is void.

Appellant further submits that a close review of the Syllabus and Dicta of the **Foster** decision demonstrates that this Court specifically held: "The following sections....have no meaning... R.C. §2929.41. These sections are severed and excised in their entirety as is....2929.14(E)(4)..." (id at ¶97)

Although the Court suggests that they have now removed all fetters from a trial court's restraint on imposing any kind of sentence the trial court may want to, the fact is that the Court

instead excised all statutory provisions that permit the imposition of consecutive sentences. The Court apparently erroneously assumed that there remains other authority in the Code that permits such consecutive terms, but in reality, the Court removed the last vestiges of such authority. Therefore, in the absence of further legislative action, that authority no longer exists and renders the consecutive sentences imposed upon this Appellant unlawful and requires vacation of the unlawful sentence and remand for lawful sentencing.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction over this case and ultimately, vacate the unlawful sentence or in the alternative, remand to the Court of Appeals with instructions to permit a direct appeal, and Appellant so prays.

Respectfully submitted,



Dale R. Crowe, #519-303
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Appellant, in pro se

SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Hamilton County Prosecutor, 230 E. 9th St. Cincinnati, Ohio 45202, via regular U.S. Mail, on this 12 day of July, 2007.



Dale R. Crowe
Appellant, in pro se

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

STATE OF OHIO,

APPEAL NO. C-070390
TRIAL NO. B-0601040,
B-0602694-A

Appellee,

vs.

ENTRY OVERRULING MOTION
FOR LEAVE TO APPEAL

DALE R. CROWE,

Appellant.

This cause came on to be considered upon the *pro se* motion of the appellant for leave to file a delayed appeal and upon the memorandum in opposition.

The Court finds that the motion is not well taken and is overruled as the appellant has failed to provide sufficient reasons for failure to perfect an appeal as of right.

Further, all other pending motions are overruled as being moot.

To The Clerk:

Enter upon the Journal of the Court on JUN 20 2007 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

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



STATE OF OHIO,

APPEAL NO. C-070390
TRIAL NO. B-0601040,
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Appellee,

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FOR LEAVE TO APPEAL

DALE R. CROWE,



D73813417

Appellant.

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Further, all other pending motions are overruled as being moot.

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By: *Printz*
Presiding Judge

(Copies sent to all counsel)

Lebanon - A519303