

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2007-1475
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
DANNY WAYNE ROBERTS : Court of Appeals
Defendant-Appellant : Case Number C060675

MEMORANDUM IN RESPONSE

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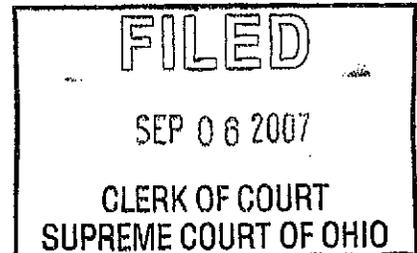


Table of Contents

Explanation of why this case is not a case of public or great general interest and does not involve a substantial constitutional question	1.
Statement of the Case and Facts	2.
State's Proposition of Law: Double Jeopardy is not violated when a sentence is erroneously reduced and the original, greater sentence, is later reinstated.	3.
<u>Authorities Presented:</u>	
<i>Burns v. United States</i> (8 th Cir.1977), 552 F.2d 828	3.
<i>DeWitt v. Ventetoulo</i> (1 st Cir. 1993), 6 F.3d 32	3.
<i>Lerner v. Gill</i> (1st Cir. 1985), 751 F.2d 450	3.
<i>Littlefield v. Caton</i> (1 st Cir.1988), 856 F.2d 344	3.
<i>State v. Duncan</i> , 154 Ohio App. 3d 254, 2003-Ohio-4695, 796 N.E.2d 1006	4.
<i>United States v. Cook</i> (4 th Cir.1989), 890 F.2d 672	3.
<i>United States v. DiFrancesco</i> (1980), 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 ..	3.
<i>United States v. Lundien</i> (4 th Cir.1985), 769 F.2d 981	3.
<i>United States v. Ortega</i> (5 th Cir.1988), 859 F.2d 327	3.
<i>United States v. Rico</i> (2 nd Cir. 1990), 902 F.2d 1065	3.
<i>United States v. Villano</i> (10 th Cir.1987), 816 F.2d 1448	3.
Conclusion	5.
Certificate of Service	5.

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STATE OF OHIO : NO. 2007-1475
Plaintiff-Appellee :
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DANNY WAYNE ROBERTS : MEMORANDUM IN RESPONSE
Defendant-Appellant :

Explanation of why this case is not a case of public or great general interest and does not involve a substantial constitutional question

The only question that this case presents is whether trial courts can (or indeed must) follow the orders of this Court. This case, along with many others, were taken by this Court pending its decision in *State v. Foster*. This Court ordered that the matter be remanded to the trial court for resentencing consistent with *Foster*. The trial court complied. And, unsurprisingly, the First District affirmed.

As will be demonstrated in the argument against Roberts' proposition of law, returning him to prison was constitutional and there is no reason this Court should accept this appeal.

Statement of the Case and Facts

Roberts was originally sentenced to eight years in prison for committing five counts of gross sexual imposition. Roberts appealed and, under law in effect in the First District prior to *State v. Foster*, his sentence was reduced to the minimum sentence of two years. The State of Ohio moved for a stay of the First District's Decision and appealed the matter to this Court. The First District granted the stay and this Court accepted jurisdiction over the matter.

Despite the stay, Roberts was released from prison after he served two years in prison. After he was released, this Court issued the *State v. Foster* decision. Relying on *Foster*, this Court remanded Roberts' case back to the trial court for resentencing.¹

The trial court resentenced Roberts in conformity with *Foster* and resentenced him to the original eight-year sentence. Roberts again appealed, but this time the First District affirmed his sentence.

¹See *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, 847 N.E.2d 1174 and *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 740.

Argument Against Robert's Proposition of Law

State's Proposition of Law: Double Jeopardy is not violated when a sentence is erroneously reduced and the original, greater sentence, is later reinstated.

"The Constitution contains no general rule that prohibits a court from increasing an earlier sentence where the court finds that it was erroneous and that a higher sentence was required by law. On the contrary, this has occurred, and been upheld against constitutional or other challenges, in a number of cases. . . . And in principle, there is no difference between such cases and a case like this one in which a sentence is reduced and later, finding the reduction to be unlawful, the court reinstates the original sentence."²

Roberts claims that it was fundamentally unfair and in violation of his due process rights for the trial court to alter his sentence in a way that frustrated his expectations. He argues that due process is violated because he believed his sentence was over and that it is unfair to defeat that expectation. If Roberts had any expectation that his sentence was fully served then he willfully blinded himself to everything that happened after the First District Court of Appeals rendered its initial decision.

Had Roberts been paying any attention to his case then he had to know that the matter had been appealed to and accepted by this Court. He would have known that the decision lowering his sentence to two years had been stayed by the First District. He had to know that there was the

²*DeWitt v. Ventetoulo* (1st Cir. 1993), 6 F.3d 32, 34, citing *United States v. DiFrancesco*, 449 U.S. 117, 133-34, 101 S.Ct. 426, 435-36, 66 L.Ed.2d 328 (1980); *United States v. Rico*, 902 F.2d 1065, 1068-69 (2nd Cir.), cert. denied, 498 U.S. 943, 111 S.Ct. 352, 112 L.Ed.2d 316 (1990); *United States v. Cook*, 890 F.2d 672, 675 (4th Cir.1989); *Littlefield v. Caton*, 856 F.2d 344, 348-49 (1st Cir.1988); *United States v. Ortega*, 859 F.2d 327, 334 (5th Cir.1988), cert. denied, 489 U.S. 1027, 109 S.Ct. 1157, 103 L.Ed.2d 216 (1989); *United States v. Villano*, 816 F.2d 1448, 1451 (10th Cir.1987); *Lerner v. Gill*, 751 F.2d 450, 458 (1st Cir.), cert. denied, 472 U.S. 1010, 105 S.Ct. 2709, 86 L.Ed.2d 724 (1985); *United States v. Lundien*, 769 F.2d 981, 986-87 (4th Cir.1985), cert. denied, 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed.2d 789 (1986); *Burns v. United States*, 552 F.2d 828, 831 (8th Cir.1977).

possibility that what happened below could be altered. He had to know that the eight years that he was originally sentenced to was still out there. He had to know that if this Court reversed, as it did, that he would be facing the rest of his sentence.

Roberts, for all practical purposes, received an own recognizance appeal bond. His sentence was constantly under appeal and, thus, constantly in flux – a process he set into motion with his initial appeal to the First District Court of Appeals.

To agree with Roberts in this matter would render this Court’s decision to remand the matter for resentencing a nullity. But defendants cannot be allowed to just pick and choose those parts of an appellate proceeding that they find favorable. When a lower court’s decision is vacated, “[a]ll previous findings are invalidated, and both parties must start from scratch”³ – a principal this Court recognized when it ordered completely new resentencing hearings for defendants who’s sentences were impacted by *State v. Foster*.

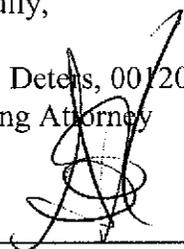
³*State v. Duncan*, 154 Ohio App. 3d 254, 2003-Ohio-4695, 796 N.E.2d 1006, ¶ 49.

Conclusion

The trial court properly followed this Court's order that Robert's be resentenced pursuant to *State v. Foster*. Roberts' erroneous release from prison pending the outcome of the appellate process does not create any constitutional prohibition to returning him to prison to serve his sentence now that the process has come to its end. Therefore, this Court should decline jurisdiction over this appeal.

Respectfully,

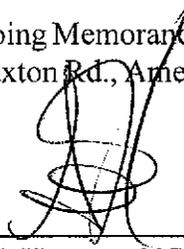
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Certificate of Service

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Charles W. Isaly, 4007 Bach Buxton Rd., Amelia, Ohio 45102, counsel of record, this 5th day of September, 2007.



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