

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2007-1812
Plaintiff-Appellee : On Appeal from the Hamilton
County Court of Appeals, First
vs. : Appellate District
CORNELIUS HARRIS : Court of Appeals
Case Number C-060587
Defendant-Appellant :

MEMORANDUM IN RESPONSE

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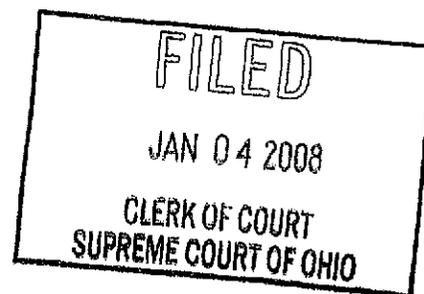


TABLE OF CONTENTS

PAGE

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.

ARGUMENT 5.

Proposition of Law No. I: The trial court did not err by sentencing the defendant to consecutive terms for Aggravated Robbery and Robbery as they are not allied offenses of similar import. 5.

Proposition of Law No. II: To justify a finding of ineffective assistance of counsel, Defendant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result would have been different. 6.

Proposition of Law No. III: Failure to properly raise and preserve an issue in the court below constitutes a waiver of that issue on appeal to the Ohio Supreme Court. 8.

Proposition of Law No. IV: Harris' appellate counsel was not ineffective for failing to claim this Court's ruling in State v. Foster violated the ex post facto and due process clauses of the constitution. 11.

CONCLUSION 14.

CERTIFICATE OF SERVICE 14.

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION.**

Harris wants this Court to reverse itself and find that its decision in *State v. Foster*¹ was in error. But Harris failed to raise that issue below. Consequently, he is barred from arguing that issue here.

As for the other issues in his memorandum, the very definition of hearsay excludes statements identifying the defendant. This case offers no new or unique perspective on the issue. The First District properly applied the Rules of Evidence and reached the right conclusion.

Lastly, this Court currently has pending a case concerning allied offenses of similar import and what test should be used to determine them.² Harris' Aggravated Robbery and Robbery convictions are not unique in any way that would distinguish them from the case already before this Court.

¹ *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d. 470.

² *State v. Cabrales*, Supreme Court Case No. 2007-0651.

STATEMENT OF THE CASE AND FACTS

a) Procedural Posture:

The Hamilton County Grand Jury indicted Harris charging him with 3 counts of Aggravated Robbery, 3 counts of Robbery, and 5 counts Felonious Assault. All the charges also had a 3-year gun specification.

At his trial, a jury found Harris guilty as charged. The trial court imposed a 10-year sentence on each of the Aggravated Robbery charges, an 8-year sentence on each of the Robbery charges, and an 8-year sentence on each of the Felonious Assault charges. The judge also imposed a 3-year sentence on one of the gun specifications. All those sentences were run consecutive to each other.

The First District Court of Appeals affirmed Harris' conviction.

b) Statement of Facts:

On a Friday night after getting off from work, three childhood friends gathered for their weekly domino game. James Lawrence and Demon Meatchem would gather at James' apartment for the game. Dwight Lawrence, James' brother, would join in the game. During these games, the trio would wager small amounts of money on the outcome of the contests. This particular game was running late in the night, in part because Dwight had to take a break to go to the movies with his girlfriend.

When James and his girlfriend returned, Dwight rejoined the game in James' apartment and his girlfriend went upstairs to their apartment. The trio was playing when they heard a knock at the door. Not expecting any visitors at that time of night, James cautiously went to the door. On the other side was Evander Kelly and Harris.

The Lawrence brothers knew Kelly from childhood. He had grown up in the same neighborhood. *Id.* None of the three knew Harris. But since he was with a person they knew James let both of them in the apartment. The three continued playing dominos as Kelly asked if he could use the bathroom. When Kelly returned, Harris asked if he could use the bathroom. All the while, Kelly and the Lawrence brothers joked around in normal conversation.

All this changed when Harris returned from the bathroom. He had a gun in his hand. Harris struck Dwight in the back of the head with the gun. As he did so he told the trio to, “[I]ay it down.” By this he meant the group was to give him everything they had. *Id.* He then ordered the three to lay face down on the bed. When they did so, Harris began ransacking the apartment looking for anything of value. He took the money from the domino game, cell phones, CD’s, and DVD’s. While he was tearing the apartment apart, Harris came upon a hammer. He picked it up and implied that he was going to use it to kill all of them saying, “[y]ou all going to make me go on some real killer stuff.”

At that point, Demon began begging for his life saying that he had a little girl that he needed to go home to. Harris ordered him back on the bed saying “[L]ay your bitch back down” and “I’m not trying to hear that.” Harris then went back to ransacking the apartment.

Near the conclusion, Harris told the three to hold pillows up over their heads. Demon thought that Harris was going to shoot them execution style. So Demon decided to fight back rather than die. He rushed Harris and grabbed him. Dwight joined in and the two struggled with Harris.

During this fight, the gun slipped from Harris' hand and skittered across the floor to Kelly. Kelly picked up the gun and used it to shoot Dwight and Demon. He also shot at, and narrowly missed, James. With the gunshots, Kelly and Harris took off and ran out the door. James' girlfriend saw the pair fleeing together through the parking lot.

James used his cell phone to call 9-1-1 and the authorities. James told the officers that one of the assailants was Evander Kelly. But because they did not know Harris' name, they could only give a physical description. All three of the victims gave Detective Karaguleff the same description. All of them described him as a light-skinned black male in his early 20's around six feet tall, with braids. The most identifying feature was Harris' rather distinctive tattoo. Harris has the word "Drama" tattooed across the front of his neck. A drawing of a bullet bookends each side of the word. While the victims were not sure of what the tattoo said at the time, they all knew it was a large tattoo on his neck.

Detective Karaguleff investigated the case for three-and-a-half months before receiving information concerning Harris' name. Once he received that tip, Detective Karaguleff prepared a photo array with Harris' picture in it. He then showed it to all the robbery victims separately. Both James and Dwight picked Harris as their assailant. Demon could only say the robber was one of two pictures on the array. One of those two was the picture of Harris.

ARGUMENT

Proposition of Law No. I: The trial court did not err by sentencing the defendant to consecutive terms for Aggravated Robbery and Robbery as they are not allied offenses of similar import.

Harris argues that he should not be sentenced on both the Aggravated Robbery and Robbery charges because they are allied offenses. The First District Court of Appeals has applied this Court's instructions in *State v. Rance*³ and repeatedly held that Aggravated Robbery and Robbery are not allied offenses.

In dealing with allied offenses, R.C. 2941.25 states:

§ 2941.25 Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

In *State v. Rance*, the this Court held a reviewing court is to compare the elements of the offenses in the abstract.⁴ If the elements correspond, the defendant may not be convicted of both unless the Court finds that the defendant committed the crimes separately or with a separate animus. The issue is whether the elements of the crimes correspond to such a degree that the commission of one offense results in the commission of the other. If the elements do not so correspond, the crimes are not allied offenses of similar import.

³*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699.

⁴ *Id.*; see also, *State v. Meridy* (Oct. 22, 2003), Hamilton App. No. C-030069.

The First District Court has applied *Rance* to Aggravated Robbery and Robbery charges numerous times.⁵ Each time the Court has found that when the elements of the crimes are compared in the abstract, the two charges are not allied offenses.⁶

Given the analysis in *Rance*, and The First District's decision in *State v. Palmer*, Harris' proposition should fail.

Proposition of Law No. II: To justify a finding of ineffective assistance of counsel, Defendant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result would have been different.

Harris next alleges he was deprived of the effective assistance of counsel at his trial. He claims trial counsel erred by not objecting to hearsay statements and not cross-examining effectively. Harris is wrong on both claims.

A two-step analysis is used when considering a claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.⁷

⁵*State v. Johnson*, Hamilton App. No. C-050399, 2006-Ohio-6449; *State v. Palmer*, 148 Ohio App.3d 246, 2002-Ohio-3536, 772 N.E.2d 726; *State v. Stonestreet*, Hamilton App. No. C-040264, 2005-Ohio-4416; *State v. Smith*, Hamilton App. No. C-040348, 2005-Ohio-1325; *State v. McNeal* (2001) Hamilton App. No. C-000717.

⁶*Id.*

⁷*Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064.

To justify a finding of ineffective assistance of counsel, Defendant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy.⁸ A reviewing court should not reverse a conviction unless the defendant shows "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."⁹

Statements Concerning Harris' Identification

Harris first complains that his counsel did not object to the description the victims gave Detective Karaguleff. He claims these were hearsay. He is wrong. Evid. Rule 801(D)(1)(c) exempts such statements from the definition of hearsay.¹⁰ But even if descriptions were hearsay, the decision of whether to object or not falls squarely within the ambit of trial strategy.¹¹

Generally, hearsay is inadmissible.¹² Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted.¹³ But a statement is not hearsay if it is a prior statement by a witness and, "[t]he declarant testifies at the trial * * * and is subject to cross-examination concerning the statement, and the statement is * * * one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the

⁸*State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, 977, citing *Strickland* at 689, 104 S.Ct. at 2065; *State v. Wickline* (1990), 50 Ohio St.3d 114, 552 N.E.2d 913.

⁹*Strickland* at 694, 104 S.Ct. at 2068.

¹⁰Evid R. 801(D)(1)(c).

¹¹*State v. Hirsch* (1998), 129 Ohio App.3d 294, 717 N.E.2d 789.

¹²Evid.R. 802.

¹³Evid.R. 801(C).

prior identification.”¹⁴ Numerous courts have found that descriptions of a suspect given by a victim are not hearsay.¹⁵

Here, the testimony of the three victims meets all the requirements of Evid. R. 801(D)(1)(c). Their statements concerning Harris’ appearance were one of identification made soon after perceiving him. The circumstances of the identification certainly demonstrated the reliability of the identification. The trial court said as much in overruling Harris’ motion to suppress. Tellingly, Harris has not appealed that ruling. Finally, all three victims testified at trial and were cross-examined concerning the identification. In fact, it was the central issue of the trial.

Consequently all the conditions of Evid. R. 801(D)(1)(c) were met and the statements were not hearsay.

But had they been hearsay the decision not to object to them could have been a trial strategy. And here that strategy was clear. Defense counsel aggressively cross-examined the victims and Detective Karaguleff concerning discrepancies in the descriptions. Obviously, trial counsel could not point out the differences in those descriptions if they were not in evidence. Allowing the varying descriptions was part of the defense’s plan to show that the victims had misidentified Harris. In fact, this misidentification theory was the entire defense at trial. While the attempt to create confusion on Harris’ identity as the robber failed, it was a valid trial strategy.

¹⁴Evid.R. 801(D)(1)(c).

¹⁵*State v. Carter*, 7th Dist. No. 03-MA-245, 2005-Ohio-1347; *State v. McCurdy*, Hamilton App. No. C-020808, 2003-Ohio-5518; *State v. Anderson*, 154 Ohio App.3d 789, 2003-Ohio-5439, 798 N.E.2d 1155.

Failure to Cross-examine

As for any supposed failure to cross-examine, it does not exist. Defense counsel strenuously cross-examined all three victims concerning their identification. He specifically focused on the lack of any mention of a tattoo in any of the first reports to police. He questioned Detective Karaguleff concerning his notes and where and when the first mention of the tattoo was made. All the while defense counsel was arguing that the victims based their description on seeing his client with Evander Kelly on Vine St. days or weeks after the crime had been committed. This theory that the victims had misidentified Harris was the central tenet of the defense. To say that defense counsel did not effectively cross-examine witnesses concerning the identification is not a fair reading of the record.

Trial counsel did not violate any duty he owed Harris. Therefore Harris was not deprived of the effective assistance of counsel. His second proposition of law is meritless.

Proposition of Law No.III: Failure to properly raise and preserve an issue in the court below constitutes a waiver of that issue on appeal to the Ohio Supreme Court.

Next Harris challenges the constitutionality of this Court's ruling in *State v. Foster*.¹⁶ Specifically, he claims he can only be sentenced to concurrent, minimum sentences.

But Harris never challenged the constitutionality of his sentence below. Therefore the issue has not been properly preserved for review here.¹⁷

Therefore Harris' Proposition of Law No. III is not properly before this Court.

¹⁶ *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d. 470.

¹⁷*State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, syllabus paragraph 2.

Proposition of Law No.IV: Harris' appellate counsel was not ineffective for failing to claim this Court's ruling in State v. Foster violated the ex post facto and due process clauses of the constitution.

Finally, Harris alleges his appellate counsel was ineffective for failing to challenge the constitutionality of this Court's ruling in *State v. Foster*.¹⁸ The standard to be employed in reviewing an ineffective assistance of appellate counsel claim is the same one used when considering such a claim made with respect to trial counsel.¹⁹ Thus, a conviction will not be reversed unless the claimant can show both defective performance as well as prejudice resulting therefrom.²⁰

Here, Harris suffered no prejudice because the issue is meritless. Harris objects to the retroactive application of *State v. Foster*, and argues that it seriously and unexpectedly disadvantages criminal defendants.²¹ He contends that he can only receive the minimum sentence allowed by law. These arguments have already been decided to the contrary by numerous Ohio courts.

Ex Post Facto and Due Process Rights

Harris argues that the holding of *State v. Foster* should not be applied retroactively. He states that the loss of the presumption of a less than the maximum sentence and non-

¹⁸*State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d. 470.

¹⁹See e.g. *State v. Nickelson* (1996), 75 Ohio St.3d 10, 11, 661 N.E.2d 168, 169; *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458.

²⁰See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693; also see *State v. Goodwin* (1999), 84 Ohio St.3d 331, 334, 703 N.E.2d 1251, 1256; *State v. Goff* (1998), 82 Ohio St.3d 123, 129, 694 N.E.2d 916, 929; *State v. Loza* (1994), 71 Ohio St.3d 61, 83, 641 N.E.2d 1082, 1105.

²¹ *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d. 470.

consecutive sentence puts such defendants at a disadvantage. He also claims that because courts no longer need to make sentencing findings, the right to have those findings reviewed on appeal has been lost.

In *Bielat v. Bielat*, the this Court stated that “[t]he retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].’ ”²² As explained by the United States Supreme Court, “the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them.”²³

In *State v. Bruce*, the First District Court of Appeals held that the *Foster* decision does not violate the *ex post facto* or due process clauses.²⁴ The Court stated:

“This court is bound to follow the decision of the Ohio Supreme Court in *Foster*. We ‘cannot overrule or modify *Foster*.’ We do not have jurisdiction to declare *Foster* unconstitutional.” (Footnotes omitted)²⁵

And further:

“Moreover, the application of *Foster* to this case does not violate *ex post facto* and due process concepts. The Ex Post Facto Clause is a limitation on legislative powers. It does not apply to the ‘Judicial Branch of government,’ ‘courts,’ or ‘judicial decision making.’ Retroactive judicial decision-making is limited by the due process concept of fair warning, not by the Ex Post Facto Clause. With respect to judicial decision, fair warning is violated when the judicial interpretation is ‘unexpected and indefensible by reference to the law

²² *Bielat v. Bielat* (2000), 87 Ohio St. 3d 350, 721 N.E.2d 28.

²³ *Collins v. Youngblood* (1990), 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30

²⁴ *State v. Bruce*, 1st Dist. No. C-060456, 2007-Ohio-175. See also *State v. Ashipa*, 1st Dist. No. C-060411, 2006-Ohio-2245.

²⁵ *Id.* at ¶6.

which had been expressed prior to the conduct in issue.’ ” (Footnotes omitted) ²⁶

It cannot be said that the *Foster* decision disadvantaged Harris: the punishment for his felonies remained unchanged after *Foster*.²⁷ The statutory range within which he could be sentenced was not altered in any fashion. The fact that the trial courts need not make factual findings on the record is not a change in punishment; it is procedural in nature. And as stated in *State v. Walls*, “[a]speculative and attenuated’ possibility that the statutory change has increased the measure of punishment will *not* constitute an ex post facto violation.”²⁸

Further, numerous Ohio appellate courts are in agreement that the *Foster* case does not violate the ex post facto prohibition. Other decisions in agreement include *State v. Dawson*, 8th Dist. No. 88486, 2007-Ohio-2761; *State v. Green*, 11th Dist. No. 2005-A-0069, 2005-A-0070, 2006-Ohio-6695, ¶22; *State v. Smith*, 2nd Dist. No. 21004, 2006-Ohio-4405, ¶32-34; *State v. McGhee*, 3rd Dist. No. 17-06-05, 2006-Ohio-5162, at ¶¶ 20, 25; *State v. Grimes*, 4th Dist. No. 04CA17, 2006-Ohio-6360; *State v. Hildreth*, Lorain App. No. 06CA8879, 2006-Ohio-5058, at ¶10; *State v. Durbin Greene* App. No. 2005-CA-134, 2006-Ohio-5125, at ¶41-42.

Harris’ arguments in contradiction with *State v. Foster* have already been decided by many appellate courts. No legal authority exists to vacate Harris’ sentence and this

²⁶ *Id.* at ¶8.

²⁷ *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d. 470.

²⁸ *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829

proposition of law is not the basis to grant jurisdiction. Consequently his appellate counsel was not ineffective for failing to raise the issue.

CONCLUSION

Jurisdiction should be denied.

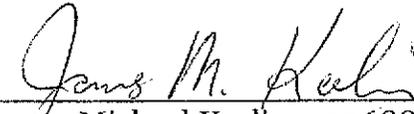
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Theresa G. Hare, Office of the Ohio Public Defender, 8 East Long St.- 11th Floor, Columbus, Ohio 43215, counsel of record, this 2 day of January, 2008.


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