

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

RONALD CLARK,

Defendant-Appellant.

08-0154

Case No. _____

On Appeal from the Athens County Court
of Appeals, Case No. 07CA9

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT RONALD CLARK**

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Proposition of Law No. II: Where, during the course of his trial for a serious crime, an accused questions the effectiveness and adequacy of counsel, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with the current counsel participating if the complaint is not substantiated or is unreasonable. State v. Deal (1969), 17 Ohio St.2d 17, explained.8

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

I. First and Second Propositions of Law

A conflict between the First and Fourth Appellate Districts

The First and Fourth District Courts of Appeals disagree about whether this Court's syllabus law in State v. Deal (1969), 17 Ohio St.2d 17, should apply to criminal defendants who have privately retained counsel. Under the Deal syllabus, when a defendant tells a judge that his *appointed* counsel has not file a notice of alibi, the trial court must inquire into the allegations before the trial can proceed:

Where, during the course of his trial for a serious crime, an *indigent* accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with *assigned* counsel participating if the complaint is not substantiated or is unreasonable.

Deal, at syllabus, emphasis supplied.

Retained counsel sometimes falls short

Although counsel—both retained and assigned—generally does an effective job, sometimes even retained attorneys fall short. In fact, this Court has recently disciplined numerous attorneys for neglect or misconduct of retained counsel in criminal cases. See, e.g., Cleveland Bar Ass'n v. Kraus, Slip Opinion 2007-Ohio-6458 (neglect in trial court matters); Cincinnati Bar Ass'n v. Schwieterman, 115 Ohio St.3d 1, 2007-Ohio-4266 (stealing criminal retainer from law firm); Warren County Bar Ass'n v. Marshall, 113 Ohio St.3d 54, 2007-Ohio-980 (neglect in criminal appeal); Toledo Bar Ass'n v. Shousher, 112 Ohio St.3d 533, 2007-Ohio-611 (neglect in criminal trial court matters); Disciplinary Counsel v. Frazier, 110 Ohio St.3d 288, 2006-Ohio-4481 (neglect in criminal trial court matters); Cuyahoga County Bar Ass'n v. Britt, 109 Ohio St.3d 97, 99, 2006-Ohio-1933 (neglect of professional license matter related to a

criminal case). These disciplinary cases are likely only the tip of a much bigger iceberg because disciplinary authorities generally decline to prosecute cases of neglect in a single case and in which a court has not found the criminal defense lawyer ineffective.

Retained and appointed counsel owe the same duty to their clients

Recognizing that appointed and retained counsel owe the same duties to their clients, this Court has held that treating appointed and retained counsel alike “avoids the anomaly that one who employs his own counsel may have a lower standard applied to measure his constitutional right to assistance of counsel than one who at state expense had appointed counsel.” State v. Hester (1976), 45 Ohio St.2d 71, 80. In Hester, this Court rejected the proposal that retained counsel should be held to a lower standard than appointed counsel merely because the defendant (or the defendant’s family) paid for the lawyer’s bill. In this case, however, the Fourth District expressly held that a retained attorney who allegedly failed to secure alibi witnesses should be held to a lower standard merely because Mr. Clark’s family paid his bill—“Deal and its progeny only impose a duty upon a trial court to inquire on the record about complaints a defendant has raised regarding his appointed counsel, not retained counsel.” Opinion at ¶13, citations, quotation marks, and brackets omitted.

Unlike the Fourth District, the First District treats appointed and retained counsel alike when applying Deal. In a case involving retained counsel, the First District held that:

If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right.

State v. Jarvis (Feb. 5, 1999), Hamilton App. No. C-980210, 1999 Ohio App. LEXIS 294, at *24, quoting United States v. Calabro (C.A.2, 1972), 467 F.2d 973, 986.

The First District’s view better comports with the policy behind Deal and with this Court’s edict to “avoid[] the anomaly that one who employs his own counsel may have a lower

standard applied to measure his constitutional right to assistance of counsel than one who at state expense had appointed counsel.” State v. Hester (1976), 45 Ohio St.2d 71, 80.

This case is an ideal case to test the holding of Deal because it is nearly identical to the facts of Deal, except that Mr. Clark’s family retained counsel for him.

Mr. Clark’s family retained counsel for him, and his case is factually very similar to the facts of Deal, so this is an ideal case to test whether the Deal syllabus applies to retained counsel.

In Deal, this Court remanded a case for a hearing because:

From the record, it is impossible to determine whether appellant was adequately represented, because it contains nothing indicating why no witnesses were called or why no alibi defense was prepared. It is entirely possible that appointed counsel talked to those witnesses and concluded that there was no worthwhile alibi defense. The Court of Appeals affirmed appellant’s conviction on the ground that he had not established error because the record did not refute this possibility that counsel had investigated appellant’s alibi defense and found it wanting. We reverse because, in the circumstances of this case, it was the duty of the trial court to see that the record contained an adequate investigation of appellant’s complaint.

Like Mr. Deal, Mr. Clark complained that his counsel had not presented alibi witnesses:

Mr. Gardner refuses to represent me. I asked him two months ago to have my witnesses locked in. Now my witnesses, my alibis, are denied. How could you deny my alibis when that’s where I was? I can prove where I was. The State cannot prove where I was. I can prove where I was. Mr. Gardner refused to get my witnesses in. He refused to represent me period.

T.p. 3-4. Mr. Clark later specified that his three alibi witnesses were Joanne Wolfe, his mother, and his brother. T.p. 90. The trial court did allow the testimony of Ms. Wolfe because she had been disclosed as a witness, but the trial court also ruled that Mr. Clark had not followed the notice of alibi procedure. T.p. 90. Mr. Clark’s lawyer did not call either his brother or mother as alibi witnesses.

As in Deal, the trial court did not inquire as to “why no witnesses were called or why no alibi defense was prepared.” Worse, the trial court acknowledged it did not know and that it would inquire into Mr. Clark’s allegations about his attorney:

I don't know who your alibi witnesses are, but I can tell you I just explained to your counsel here at the table just a few minutes ago that the three witnesses he subpoenaed I'm going to allow him to call. Those witnesses. I don't know whether that's all the witnesses you're talking about, or of those are the people that you're calling alibi witnesses or not.

* * *

You're asking me to pass judgment on the status of your representation. I cannot do that.

T.p. 90, 93-4.

Mr. Clark's first two propositions of law provide give trial courts both the clear guidance and the discretion they need to deal with difficult litigants.

The trial court's statement that it "cannot" "pass judgment on the status of [Mr. Clark's] representation" provides another reason why this Court should accept jurisdiction—trial courts are justifiably reluctant to intercede in the attorney-client relationship, and they need guidance as to when they must and must not intercede. As a result of the split between the First and Fourth Districts, trial courts cannot know what they must do when a defendant complains that his retained attorney has not adequately prepared for trial. If the complaint comes well before trial, the defendant can discharge his attorney and either hire another one or request appointed counsel. But trial courts need guidance on how to handle such complaints on the eve of trial.

Admittedly, the trial court in this case listened patiently to Mr. Clark's complaints on the day of jury selection. These complaints were far from Mr. Clark's first, and Mr. Clark was a particularly difficult litigant to manage. But the second step required by Deal does not impose a significant burden on trial courts. To the contrary, it simply requires trial courts to ask counsel "why he had not filed notice of alibi or subpoenaed appellant's alleged witnesses." After listening to the answer, the trial court can exercise its discretion to decide whether the complaints have merit. That is the essence of Mr. Clark's first two propositions of law—clear guidance followed by trial court discretion.

The burden on trial courts for compliance with Deal is minimal, but the burden on defendants for non-compliance can be substantial. Under Deal, a trial court need only ask defense counsel if counsel has investigated an alibi claim. The trial court can easily and quickly ferret out frivolous claims—if counsel gives a plausible explanation, the court can move on. If counsel does not, the court can either appoint counsel or allow the defendant to retain competent counsel.

Conclusion

Trial courts must have a clear, uniform rule to apply when defendants complain that their counsel—retained or appointed—are not prepared for trial. With a clear rule, trial courts can confidently exercise their discretion to resolve one of the most difficult quandaries they face, when to intercede in the attorney client relationship to head off future claims of ineffective assistance of counsel.

This Court should accept jurisdiction on Propositions of Law One and Two, resolve the conflict between the First and Fourth Districts, and reverse the decision of the court of appeals.

II. Third Proposition of Law

Mr. Clark's third proposition of law ties into his first two—how does a trial court deal with a difficult defendant. Here, Mr. Clark produced affidavits from his family members describing bizarre, paranoid behavior. Mr. Clark also said that he thought his attorneys were conspiring against him. Nevertheless, the trial court declined to refer him for a psychological exam, in part because Mr. Clark was able to complain that his alibi witnesses were not called. The trial court and court of appeals also used Mr. Clark's nearly frivolous pro se filings and ramblings as examples of his competence. See, e.g., opinion at ¶21, citing Mr. Clark's "incorrect legal ideas[.]"

In this case, the court of appeals applied the wrong standard. The court of appeals held that “[i]n order to rebut [the presumption of competence], the defendant must request a competency hearing and at a subsequent hearing, a preponderance of the evidence must show that the defendant, his present mental condition, is not capable of understanding the proceedings and is unable to assist in his defense.” Opinion at ¶19, citing at State v. Smith, 2nd Dist. No. 21-58, 2006-Ohio-2365, ¶21; R.C. 2945.37(G). But the United States Supreme Court has held that “[i]t is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant’s ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency. . . .” Porter v. McKaskle (1984), 466 U.S. 984, 985 citing Drope v. Missouri (1975), 420 U.S. 162, and Pate v. Robinson (1966), 383 U.S. 375. This Court should accept jurisdiction to bring the law of the Second and Fourth Appellate Districts in line with the law as settled by the United States Supreme Court.

Defendants who may be paranoid and mentally ill—but who also might be intentionally disrupting the proceedings—create some of the most difficult cases for trial courts to manage. This Court should accept this case in order to give trial courts the guidance and tools they need to correctly manage potentially mentally ill but disruptive defendants.

STATEMENT OF THE CASE AND THE FACTS

Ronald Clark was tried and convicted of two counts of unlawful sexual contact with a minor, a third-degree felony. R.C. 2907.04(A). Apx. at A-1. The State's witnesses, including the alleged fifteen-year-old victim, testified that he twice put his finger into the vagina of the girl. He was sentenced to two consecutive four-year prison terms. Apx. at A-1.

Before trial, he filed a motion for a competency evaluation, which the trial court denied. The motion was based on the affidavits of his family members and alleged that he was acting bizarrely, that he thought that his attorney was conspiring against him, and that his behavior had changed substantially since his incarceration.

On the day trial began, Mr. Clark asked the trial court to discharge his attorney and to permit him to hire new counsel. As the dissenting judge in the court of appeals noted, Mr. Clark specifically told the trial court that his lawyer had not contacted his alibi witnesses. The lawyer's response was that he did not want to help Mr. Clark. As the dissenting court of appeals judge noted, Mr. Clark protested:

"Counsel has failed to represent me." [Clark] went on to say "I'm asking you to let me hire another counsel." The [Trial] Court responded by saying, among other things, "you're not going to have a right to hire other counsel."

After this exchange between the Appellant and the Court, his retained counsel stated: "Your Honor, I can't, I cannot represent him when he's saying this. **What's quite clear here is I am representing him and I have been trying to do a good job. And after he makes a statement like that I don't even want to help him. Alright?"**

State v. Clark, 4th Dist. No. 07CA9, at ¶37-8, (McFarland, P.J., dissenting) (emphasis supplied in opinion). By a two-to-one vote, the court of appeals affirmed. This timely appeal follows.

ARGUMENT

Proposition of Law No. I:

Where, during the course of his trial for a serious crime, an accused questions the effectiveness and adequacy of counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with counsel participating if the complaint is not substantiated or is unreasonable. State v. Deal (1969), 17 Ohio St.2d 17, explained.

Proposition of Law No. II:

Where, during the course of his trial for a serious crime, an accused questions the effectiveness and adequacy of counsel, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with the current counsel participating if the complaint is not substantiated or is unreasonable. State v. Deal (1969), 17 Ohio St.2d 17, explained.

The only difference between Mr. Clark's first proposition of law and the syllabus in Deal is that Mr. Clark eliminates the words "indigent" and "appointed." Mr. Clark's second proposition of law presents a slightly more general question by including all allegations of unpreparedness, not just the failure to present an alibi defense.

A defendant who learns on the eve of trial that his retained counsel has not done the promised work is in no better position to proceed to trial than someone whose appointed counsel failed to prepare. The defendant with retained counsel is equally at the mercy of his lawyer as is the defendant with appointed counsel. Further, treating appointed and retained counsel alike helps "avoid the anomaly that one who employs his own counsel may have a lower standard applied to measure his constitutional right to assistance of counsel than one who at state expense had appointed counsel." State v. Hester (1976), 45 Ohio St.2d 71, 80 (Ohio 1976) (referring to standard for ineffective assistance of counsel). Here, before denying Mr. Clark's request to

discharge counsel, the trial court should have asked defense counsel if Mr. Clark's complaints were justified, which is exactly what Deal requires.

Defendants generally have the right to retain counsel of their choice. Wheat v. United States (1988), 486 U.S. 153/ "[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment. . . ." State v. Cobb, Scioto App. No. 06CA3076, 2007-Ohio-188, at ¶10, citing Wheat v. United States (1988), 486 U.S. 153, 159. Further, this Court has also recognized that a defendant has "a presumptive right to employ his own chosen counsel." State v. Keenan, 81 Ohio St.3d 133, 137, 1998-Ohio-459 (emphasis on "presumptive" omitted).

The trial court should have granted a continuance to facilitate hiring of a new attorney.

The trial court should have allowed Mr. Clark to hire a new attorney because the record does not demonstrate that he was adequately represented. The trial court erroneously denied Mr. Clark the right to change retained counsel before trial without an adequate hearing. In Ohio, if a defendant raises a concern regarding his attorney's representation before or during trial, the trial court must conduct an inquiry into the defendant's concerns to determine the extent and veracity of the defendant's complaint. State v. Deal (1969), 17 Ohio St.2d 17, syllabus; State v. Prater (1990), 71 Ohio App.3d 78, 83. Here, the trial court let Mr. Clark speak, but made no effort to verify or refute Mr. Clark's assertions. Accordingly, this Court should reverse the decision of the court of appeals and remand this case for a hearing on Mr. Clark's request for a new trial.

In the alternative, the trial court should have permitted Mr. Clark to hire a new lawyer without a continuance.

Even if the trial court was within its discretion to deny a continuance for new counsel, the court erred by prohibiting Mr. Clark from hiring new counsel without a continuance. On the day of trial, Mr. Clark indicated that he was dissatisfied with his current counsel and asked for the

opportunity to hire a new lawyer. Mr. Clark informed the court, that he was ready hire the new counsel. T.p. 5 (“I’m ready to hire new counsel.”) But the trial court gave Mr. Clark only three choices: Proceed pro se, proceed pro se with his counsel as an advisor, and proceed with his current counsel. T.p. 91.

The trial court should have provided Mr. Clark with a fourth option, proceed with new counsel without a continuance. Of course, it would have been logistically difficult for Mr. Clark to hire a lawyer, but his family members could have sought out a lawyer. With no delay, the choice of a new lawyer does not harm the trial court’s interest in controlling its own docket. Cobb at ¶10 (citations omitted).

Here, the trial court’s limited choices prohibited Mr. Clark from choosing to hire a new lawyer to go forward with trial immediately. Without a continuance, the trial court would have no interest in Mr. Clark’s choice of attorneys. Of course, Mr. Clark would face risks in bringing on an attorney at the last minute, but Mr. Clark could voluntarily decide to take those risks.

Conclusion to Propositions of Law Nos. I and II

At the end of the court’s hearing, Mr. Clark’s counsel said, “after he makes a statement like that I don’t even want to help him. Alright?” T.p. 96. The trial court should have permitted Mr. Clark to discharge counsel. At a minimum, the trial court should have attempted to verify Mr. Clark’s allegations. The trial court did neither.

The court of appeals’ distinction between retained and appointed counsel makes no practical sense. By contrast, Mr. Clark’s proposition of law “avoids the anomaly that one who employs his own counsel may have a lower standard applied to measure his constitutional right to assistance of counsel than one who at state expense had appointed counsel.” State v. Hester (1976), 45 Ohio St.2d 71, 80.

This Court should grant Mr. Clark a new trial. In the alternative, this Court should remand this case for a hearing on his allegations.

Proposition of Law No. III:

The standard for reviewing a motion for a competency evaluation is whether the defendant has shown a bona fide issue of incompetence.

The trial court abused its discretion by failing to refer Mr. Clark for a competency evaluation. The conviction of an accused person who is not legally competent to stand trial is a violation of due process, and a defendant is entitled to a hearing where, as here, there is a bona fide doubt as to the defendant's competence. State v. Rubenstein (1987), 40 Ohio App.3d 57, 60, citing Bishop v. United States (1956), 350 U.S. 961. See also Pate v. Robinson (1966), 383 U.S. 375; Drope v. Missouri (1975), 420 U.S. 162, 172. The test for determining a defendant's competence to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States (1960), 362 U.S. 402, 402. The standard for determining competence to stand trial is governed by R.C. 2945.37. R.C. 2945.37(G) provides that a defendant "is presumed to be competent to stand trial." But, "[i]f, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code."

Further, "if evidence available to a trial judge raises a bona fide doubt regarding a defendant's ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency. . . ." Porter v. McKaskle (1984),

466 U.S. 984, 985 citing Drope v. Missouri (1975), 420 U.S. 162, and Pate v. Robinson (1966), 383 U.S. 375.

Mr. Clark's attorney, his mother and a family friend all stated that he was ranting irrationally and claiming that his attorney was conspiring with the prosecution. They also said that Mr. Clark's behavior had changed substantially since his incarceration. They described his behavior as "bizarre." See, Motion for a Psychological Examination, Feb. 20, 2007, and attached affidavits. Bizarre, paranoid behavior creates a genuine issue of competency.

Further, the trial court denied an evaluation because it determined that it was not convinced that Mr. Clark was incompetent. Entry (Feb. 23, 2007) at 1. But in deciding whether to refer Mr. Clark for an evaluation, the trial court should have asked whether there was a genuine question of incompetence, not whether Mr. Clark had actually proven incompetence. This Court should accept jurisdiction, vacate Mr. Clark's conviction, and remand this case for a competency evaluation and a new trial.

Proposition of Law No. IV:

The application of State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, to crimes committed after February 27, 2006 violates the Due Process Clause of the United States Constitution.

Sentencing Mr. Clark without the benefit of the presumptions in R.C. 2929.14 creates a constitutional violation that was soundly condemned in Hicks v. Oklahoma (1980), 447 U.S. 343. Oklahoma courts had determined that the state's habitual offender statute was constitutionally infirm while Mr. Hicks case was pending on appeal. The Oklahoma Court of Criminal Appeals acknowledged the unconstitutionality of the state sentencing law, but affirmed the sentence because it was within the range of punishment that "could have been imposed in any event." Hicks, 447 U.S. at 344.

The United States Supreme Court ruled that a state court decision deprives a defendant of a liberty interest when it removes procedural safeguards in a statute:

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

The State argues, however, that, in view of the revisory authority of the Oklahoma Court of Criminal Appeals, the petitioner had no absolute right to a sentence imposed by a jury. See Okla. Stat., Tit. 22, § 1066 (1971) ("The Appellate Court may reverse, affirm or modify the judgment appealed from. . ."). The argument is unpersuasive. The State concedes that the petitioner had a statutory right to have a jury fix his punishment in the first instance, and this is the right that was denied. Moreover, it is a right that substantially affects the punishment imposed. No case has been cited to us in which the Court of Criminal Appeals has increased a sentence on appeal, and the State's Assistant Attorney General indicated at oral argument that it was doubtful whether the appellate court had power to do so. In consequence, it appears that the right to have a jury fix the sentence in the first instance is determinative, at least as a practical matter, of the maximum sentence that a defendant will receive. Nor did the appellate court purport to cure the deprivation by itself reconsidering the appropriateness of the petitioner's 40-year sentence. Rather, it simply affirmed the sentence imposed by the jury under the invalid mandatory statute. In doing so, the State deprived the petitioner of his liberty without due process of law.

Hicks, at 346-347 (footnotes and internal citations omitted).

Here, this Court excised the various statutes that set out the procedures permitting a sentencer to impose a sentence beyond a minimum, concurrent one. The Ohio law was declared unconstitutional because it did not mandate that elements needed to impose a sentence over the statutory minimum be found by a jury beyond a reasonable doubt. By eliminating the statutory elements necessary to impose a sentence other than minimum and concurrent, Foster, 109 Ohio

St.3d 1, 2006-Ohio-856, denies Mr. Clark a substantial liberty interest that the “Fourteenth Amendment preserves against arbitrary deprivation by the State.” Hicks, at 346, referring to Vitek v. Jones (1980), 445 U.S. 480, 488-489, Wolff v. McDonnell (1974), 418 U.S. 539, Greenholtz v. Nebraska Penal Inmates (1979), 442 U.S. 1, and Morrissey v. Brewer (1972), 408 U.S. 471. Mr. Clark’s federal due process claim and liberty interest arise from the sentencing elements and procedures set out in R.C. 2929.14(B), (C), and (E), 2929.19(B)(2), 2929.41(A), and his appellate rights set out in R.C. 2953.08. Mr. Clark retains an overriding liberty interest in these procedures; they cannot be eliminated to his detriment, especially when to do so will substantially affect the punishment imposed.

By permitting the trial court to impose any sentence within the terms provided in R.C. 2929.14(A) without using the statutorily prescribed procedures, Mr. Clark will be deprived of his liberty without due process of law. Mr. Clark has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by statute and only in accordance with due process of law. Further, he has a substantial liberty interest in the appellate procedures devised by the state legislature. Evitts v. Lucey (1985), 469 U.S. 387, 396. This Court should modify his sentence to minimum, concurrent terms.

Proposition of Law No. V:

Postrelease control does not violate the separation of powers now that Am.Sub.H.B. 137 permits the executive to impose the sanction without a court order.

Postrelease control survived its initial separation of powers challenge only because a court authorized the sanction before the executive could impose it on a defendant. Woods v. Telb (2000), 89 Ohio St. 3d 504, 512 (“in contrast to the bad-time statute, post-release control is part of the original judicially imposed sentence . . . [;] there is nothing in the Parole Board’s

discretionary ability to impose post-release control sanctions that impedes the judiciary's ability to impose a sentence").

However, Am. Sub. H.B. 137 now authorizes the executive branch to impose the sanction without a court order. R.C. 2929.14(F)(1) ("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"). Because postrelease control no longer requires court authorization, and because R.C. 2929.14(F)(1) now "impedes the judiciary's ability to impose a sentence[,]," postrelease control can no longer survive a separation of powers challenge. This Court should vacate Mr. Clark's term of postrelease control.

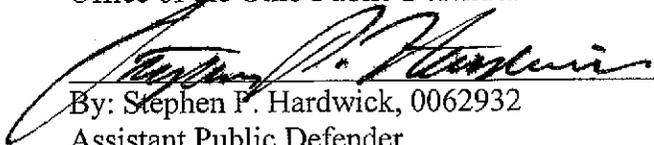
CONCLUSION

The conflicting decisions of the First and Fourth Appellate Districts leave trial courts without clear guidance as to how to handle one of the most frustrating problems they face—a criminal defendant who, on the day of trial, complains that his counsel is not ready to proceed. With clear guidance from this Court, trial courts can know when to inquire into the defendant's allegations. Once the trial courts make the inquiry, they can exercise their discretion to protect both the defendant's right to counsel and the need to move the case toward resolution.

This Court should accept jurisdiction and reverse the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender

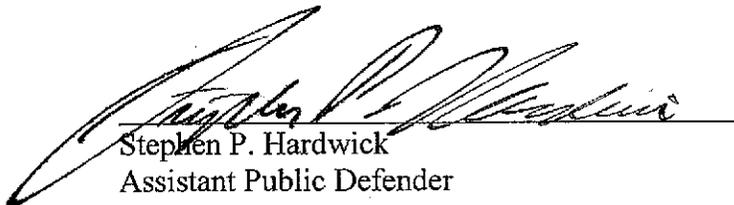

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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing has been sent by regular U.S. mail, postage prepaid upon Patrick J. Lang, Assistant Athens County Prosecutor, Courthouse, One S. Court Street, Athens, Ohio 45701 on this 22nd day of January, 2008.


Stephen P. Hardwick
Assistant Public Defender

Counsel for Appellant Ronald Clark

#270733

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

FILED
ATHENS COUNTY, OHIO

DEC 05 2007

A. M. W., CLERK
APPEALS

State of Ohio,

Plaintiff-Appellee,

v.

Ronald Clark,

Defendant-Appellant.

Case No. 07CA9

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

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C. David Warren, Athens County Prosecutor, and Patrick J. Lang, Assistant Athens County Prosecutor, Athens, Ohio, for appellee.

Kline, J.:

(11) Ronald Clark appeals his convictions and sentences for three counts of unlawful sexual conduct with a minor from the Athens County Common Pleas Court. On appeal, Clark contends that the trial court abused its discretion when it denied, without an adequate hearing, his request to discharge his attorney and retain new counsel. Because Clark, inter alia, waited until the morning of his jury trial to make his request, we disagree. Clark next contends that the court abused its discretion when it failed to order a competency evaluation. Because we find that the evidence of Clark ranting and raving is insufficient to order the evaluation, we disagree. Clark next contends that his non-minimum sentence violates the Due Process Clause of the United States Constitution. Because we have addressed this issue in the past, we disagree.

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Finally, Clark contends that H.B. 137 violates the separation of powers because the executive branch now has the authority to impose post-release control without a court order. Because Clark has waived this issue by not raising it in the trial court, and because he does not have standing to raise this issue, we do not address it.

Accordingly, we affirm the judgment of the trial court.

I.

{12} The Athens County Grand Jury indicted Clark for three counts of unlawful sexual conduct with a minor. Clark entered not guilty pleas and eventually his cases were set for a jury trial. Clark fired his first retained attorney. Two days before his scheduled jury trial, Clark's second retained attorney filed a motion for a competency evaluation. The court continued the jury trial so that it could hold a competency hearing.

{13} At the hearing, the court considered the affidavits of two witnesses and a statement by Clark's counsel. All three indicated that Clark recently ranted and raved about his case and thought that everyone was out to get him. The court gave Clark time to respond to the two witnesses and his attorney. Clark agreed with the witnesses and his attorney. The court denied Clark's request for a competency evaluation.

{14} On the morning of Clark's jury trial, Clark asked the court to discharge his second attorney and grant him a continuance so that he could hire a third attorney for the trial. Clark explained on the record his reasons for the request. The court denied Clark's request.

{15} The jury found Clark guilty of all three counts of unlawful sexual conduct with a minor. The court sentenced Clark to a non-minimum prison term.

{¶6} Clark appeals and asserts the following four assignments of error: I. "The trial court erred by denying Mr. Clark's request to discharge his attorney and to retain new counsel without an adequate hearing." II. "The trial court abused its discretion by not referring Mr. Clark for a competency evaluation." III. "The trial court erred by imposing a non-minimum prison term in violation of the Due Process Clause of the Fourteenth Amendment [to the] United States Constitution." And, IV. "The trial court erred by imposing post-release control."

II.

{¶7} Clark contends in his first assignment of error that the trial court erred in denying his request for a continuance to enable him to retain other private counsel. Clark asserts that the court failed to conduct an adequate hearing to investigate his complaint against his current counsel, i.e., his counsel did not, inter alia, present alibi witnesses.

{¶8} The trial court has discretion to grant or deny a request for a continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. Likewise, it has the same discretion to grant or deny a substitution of counsel. "An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶9} "In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *Unger, supra*, at 67-68.

{¶10} Here, the trial court did not abuse its discretion when it refused to continue the trial. First, Clark did not ask for a specific amount of time to obtain other counsel. However, even if he obtained different counsel right away, it would take his counsel at least a week or two to familiarize himself with the case. Second, Clark filed a motion for a competency evaluation two days before his first scheduled jury trial. The court granted his request for a hearing and continued the jury trial. So, the court already continued the trial once. Third, Clark waited until the morning of his second scheduled jury trial to request the continuance. The jurors, witnesses, opposing counsel, and the court were present and ready to proceed.

{¶11} Fourth, the court by implication determined that the requested delay was not for a legitimate reason. Clark told the court that he was not receiving adequate representation. However, the court informed Clark that "[w]e've been through this once before. You terminated the services of another attorney, if you recall that. And now you have [an attorney] who, despite what you think, has vigorously represented you."

{¶15} Clark further contends that the court should have at least allowed him to substitute counsel without a continuance. Clark does not cite to a single authority that would allow the court to make such a decision. Further, we can find no authority that would permit a trial court to allow newly retained counsel, without any knowledge of the case, to proceed.

{¶16} Accordingly, we overrule Clark's first assignment of error.

III.

{¶17} Clark contends in his second assignment of error that the trial court erred when it denied his request for a competency evaluation. Our review is for abuse of discretion. See, e.g., *State v. Smith*, Montgomery App. No. 21-58, 2006-Ohio-2365, ¶21.

{¶18} "It has long been recognized that 'a person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. (Cites omitted)." *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶36. "Fundamental principles of due process require that a criminal defendant who is legally incompetent may not be tried. (Cite omitted.)" *Id.*

{¶19} All defendants are presumed competent to stand trial. *State v. Bomar*, Scioto App. No. 00CA2703, 2000-Ohio-1974, citing R.C. 2945.37(G). See, also, *State v. McGrath*, Meigs App. No. 02CA7, 2003-Ohio-1811, ¶11. "In order to rebut this presumption, the defendant must request a competency hearing and at a subsequent hearing, a preponderance of the evidence must show that the defendant, as a result of

{¶12} Fifth, the record shows that Clark contributed to the circumstance that gave rise to his request for a continuance. Part of what Clark said shows that he does not understand the law. For example, he said, "I never had a preliminary hearing. That's a dismissal right there. My indictments wasn't (sic) certified. That's a dismissal. The Bill of Particulars ain't certified. That a dismissal straight out of the law book." Clark was not willing to listen to his attorney. Clark wanted his attorney to do the impossible and get the case dismissed. Thus, Clark's attitude contributed to any conflict he had with his attorney. In addition, a third attorney could not get the case dismissed if he pursued Clark's reasoning as outlined above.

{¶13} Clark relies on *State v. Deal* (1969), 17 Ohio St.2d 17 to support his claim that the trial court failed to conduct an adequate hearing regarding his complaint about his retained counsel. "However, *Deal* and its progeny only impose a duty upon a trial court to inquire on the record about complaints a defendant has raised regarding his appointed counsel[,] not retained counsel. (Cites omitted.) *State v. Downing*, Greene App. No. 01-CA-78, 2002-Ohio-1302. See, also, *State v. King* (1995), 104 Ohio App.3d 434, 437; *State v. Bowshier*, Clark App. No. 06-CA-41, 2007-Ohio-5364, ¶154.

Moreover, the trial court patiently listened to Clark before and after the jury selection to explain the problems he had with his counsel as indicated by several exchanges between the court and Clark regarding Clark's counsel.

{¶14} Therefore, based on these circumstances, we find that the trial court did not abuse its discretion in denying Clark's request to continue the trial to substitute retained counsel.

his present mental condition, is not capable of understanding the proceedings and is unable to assist in his defense." *Smith*, supra, at ¶21; R.C. 2945.37(G). A court has discretion to order a competency evaluation. R.C. 2945.371(A).

¶20 Here, the hearing occurred before trial. At the hearing, the evidence showed only that Clark ranted and raved on at least two occasions. The fact that Clark ranted and raved outside the courtroom in front of two witnesses and over the phone with his counsel, by itself, is simply not enough evidence to require a competency evaluation. Clark failed to affirmatively demonstrate that he could not assist in his own defense.

¶21 In addition, the pre-trial record fails to indicate that Clark had difficulty understanding the proceedings or that he was incapable of assisting his counsel in his defense. For example, Clark explained to the court why he fired his first attorney and later why he wanted to fire his second attorney. His explanations showed that, even though he held incorrect legal ideas, he was familiar with court procedure. For example, he knew about discovery and alibi witnesses. During these pre-trial hearings, the court asked Clark other questions. Clark meaningfully responded to each question.

¶22 Therefore, based on this evidence, we find that the trial court did not abuse its discretion when it refused to refer Clark for a competency evaluation.

¶23 Accordingly, we overrule Clark's second assignment of error.

IV.

¶24 Clark contends in his third assignment of error that the trial court erred by imposing a non-minimum sentence. He maintains that the sentence violates the Due Process Clause of the United States Constitution. Specifically, he claims that the

Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which followed the reasoning in *Blakely v. Washington* (2004), 542 U.S. 296, deprived him of a statutory liberty interest when it removes procedural safeguards in a statute.

¶25 Clark did not raise his due process argument in the trial court. He received his sentence after *Blakely*, supra, was decided on June 24, 2004. Thus, he has forfeited all but plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶31 ("we hold that a lack of an objection in the trial court forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the announcement of *Blakely*.").

¶26 Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights, although a defendant did not bring them to the attention of the court. The Supreme Court of Ohio has found that "[b]y its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 2002-Ohio-68. See *Payne*, supra. First, an error must exist. *Id.*, citing *State v. Hill* (2001), 92 Ohio St.3d 191, 200, citing *United States v. Olano* (1993), 507 U.S. 725, 732 (interpreting Crim.R. 52[B]'s identical federal counterpart, Fed.R.Crim.P. 52[b]). Second, the error must be plain, obvious, or clear. *Id.* (Citations omitted.) Third, the error must affect "substantial rights," which the court has interpreted to mean "but for the error, the outcome of the trial clearly would have been otherwise." *Id.* citing *Hill* at 205; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶27} "The burden of demonstrating plain error is on the party asserting it. (Cite omitted.) A reversal is warranted if the party can prove that the outcome 'would have been different absent the error.'" (Cite omitted.) *Payne* at ¶17. A reviewing court should use its discretion under Crim.R. 52(B) to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, supra, at paragraph three of the syllabus.

{¶28} In *State v. Grimes*, Washington App. No. 06CA17, 2006-Ohio-6360, this court considered and rejected a due process challenge to a sentence imposed in accordance with the Supreme Court of Ohio's holding in *Foster*. There, we agreed with the observations of the Ninth and Second Districts, which rejected such challenges outright. In doing so, those courts expressed that it is unlikely that the Supreme Court of Ohio would have directed lower level courts to violate the Constitution; and, in any event, the appellate courts are bound by directives of the Supreme Court of Ohio. *Id.* at ¶8, citing *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.

{¶29} In finding that the Supreme Court of Ohio's remedy in *Foster* does not violate the Due Process Clause of the United States Constitution, we also expressed our approval of the reasoning set forth by the Third District in *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162. *Grimes* at ¶9, citing with approval *McGhee* at ¶¶11 & 13-20. Because the range of prison terms for the defendant's offense remained the same both before and after *Foster*, we concluded, "it is difficult to understand how appellant could maintain that an enlargement of the criminal statute occurred, generally,

or available punishments, in particular." *Id.* at ¶10. Further, we noted that the appellant did not attempt to explain how he would have acted differently had he known that the Supreme Court of Ohio would strike down parts of R.C. 2929.14. *Id.* Accordingly, we found that the court did not err in imposing the maximum sentence for the offense. *Id.* at ¶11.

{¶30} Based upon our holding in *Grimes* (and numerous decisions following *Grimes*), we find that the trial court did not err in imposing non-minimum sentences for Clark's offenses. See, also, *State v. Miller*, Auglaize App. No. 2-07-02, 2007-Ohio-4744 (*Foster* does not violate the Due Process Clause of the United States Constitution). We do not accept Clark's implied invitation to revisit these issues. Therefore, we do not find any error, let alone plain error.

{¶31} Accordingly, we overrule Clark's third assignment of error.

V.

{¶32} Clark contends in his fourth assignment of error that H.B. 137 violates the separation of powers because the executive branch of government now has the authority to impose post-release control without a court order. We do not address this issue for two reasons.

{¶33} First, we find that Clark has waived this argument. He did not raise the separation of powers argument in the trial court. He now raises it for the first time on appeal. However, a reviewing court should not review constitutional claims for the first time on appeal. See, e.g., *Logan v. McKinney* (Aug. 23, 1996), Hocking App. No. 95CA12; *State v. Shepherd* (Nov. 2, 1995), Scioto App. No. 94CA2322.

{¶34} In addition, we find that Clark does not have standing to make this argument. Our colleagues in the Twelfth District Court of Appeals have addressed this same issue in *State v. Rogers*, Fayette App. No. CA2006-09-036, 2007-Ohio-3720 and *State v. Calhoun*, Butler App. No. CA2006-08-190, 2007-Ohio-3612. The *Rogers* and *Calhoun* courts found that when the judicial branch actually imposes the post-release control, instead of the executive branch, a defendant does not have standing to challenge the constitutionality of the provisions of the statutes affected by H.B. 137. See, also, *State v. Morris*, Pickaway App. No. 06CA28, 2007-Ohio-5291.

{¶35} Here, Clark received notice of the imposition of the optional post-release control from the trial court. Therefore, he does not have standing to challenge the constitutionality of the statutes affected by H.B. 137.

{¶36} Accordingly, we overrule Clark's fourth assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

McFarland, P.J., dissenting.

{¶37} I respectfully dissent because the record below is very troublesome. This is readily apparent after reviewing and considering the dialogue between the Appellant, his counsel and the court regarding the legal representation of the Appellant. The record reveals the Appellant told the court about his displeasure with his retained counsel and his desire to fire him. He specifically stated that "Counsel has failed to represent me." He went on to say "I'm asking you to let me hire another counsel." The Court responded by saying, among other things, "you're not going to have a right to hire other counsel."

{¶38} After this exchange between the Appellant and the Court, his retained counsel stated: "Your Honor, I can't, I cannot represent him when he's saying this. What's quite clear here is I am representing him and I have been trying to do a good job. And after he makes a statement like that I don't even want to help him. Alright ?" (Emphasis added.)

{¶39} In my view, it was an abuse of discretion for the trial court to proceed with the jury trial after this alarming statement from counsel. Any jurist hearing such a statement should be very concerned about the impact it has on the Appellant's subjective belief about his legal representation and the fairness of the proceedings. The record, at a minimum, shows a significant conflict between counsel and the Appellant that was left unresolved.

{¶40} As such, the trial court should have continued the trial and permitted Appellant the opportunity to seek other counsel or proceed pro se. In hearing these

statements by counsel, yet requiring the same counsel to remain at the trial, the court below tainted the process and acted unreasonably.

{¶41} I realize it can be very frustrating to a trial court when an accused acts the way the Appellant did in the proceeding below. However, that frustration should yield to the greater interest of providing equal justice under the law, particularly when an accused hears his attorney does not want to help him.

{¶42} Accordingly, I dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

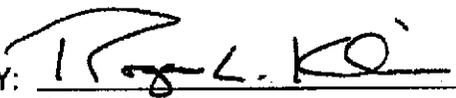
If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec.2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J.: Dissents with Dissenting Opinion.
Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: 
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.