

IN THE
SUPREME COURT OF OHIO

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

MERIT BRIEF OF PLAINTIFF-APPELLEE

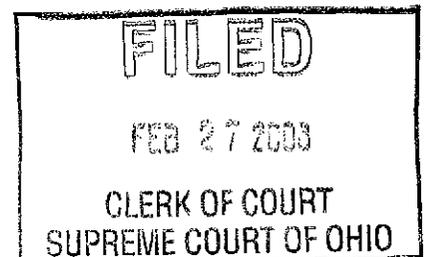
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IN THE
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DANNY WAYNE ROBERTS	:	<u>MERIT BRIEF OF PLAINTIFF-</u> <u>APPELLEE</u>
Defendant-Appellant	:	

Introduction

Danny Wayne Roberts was originally sentenced to eight years in prison. The First District Court of Appeals found that sentence violated *Blakely v. Washington* under its pre-*State v. Foster* interpretation of the law. It found that Roberts could be sentenced to nothing more than a bare minimum sentence and remanded the matter for resentencing. But it stayed that decision to allow this Court to review the matter. Despite this stay, the Ohio Department of Corrections released Roberts after he served two years.

Once this Court released *State v. Foster*, it remanded this matter to the trial court for resentencing. The trial court held a new sentencing hearing and imposed the original eight year sentence.

Roberts argues that it violates double jeopardy to resentence him because he had an expectation of finality. There is no dispute that when a defendant has a reasonable expectation of finality that resentencing him to prison would run afoul of the Double

Jeopardy Clause. But when a sentence has been appealed – be it by the defendant or the State – then it is in a state of doubt. That is what happened here. And that is why this matter should be affirmed.

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 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.

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

Roberts' original eight-year sentence was reduced by the First District Court of Appeals to two years. That decision was stayed while this Court considered the State's appeal. Despite the stay, the Ohio Department of Corrections released Roberts. After he was released, this Court remanded the matter to the trial court for resentencing under *State v. Foster*. Was the trial court permitted to resentence Roberts?

I. Double jeopardy will only prevent a trial court from resentencing a defendant when the defendant has a reasonable expectation of finality of his sentence. There can be no legitimate expectation of finality while a defendant's sentence is being considered on appeal.

The focal point of this matter is whether double jeopardy was violated when the trial court resentenced Roberts. Double jeopardy would have been violated if Roberts had a legitimate expectation of finality of his sentence. But because his sentence was constantly under appeal he could not have legitimately expected it to be final.

Double jeopardy is triggered when a defendant has a legitimate expectation of finality as to his sentence.² A defendant, however, does not have a legitimate expectation in the finality if he³ or the government⁴ challenges any part of the sentence on appeal. This is true even if the defendant has started serving the sentence.⁵ If Roberts had any expectation that

²*United States v. DiFrancesco* (1980), 449 U.S. 117, 139, 101 S.Ct. 426, 66 L.Ed.2d 328.

³*Pasquarille v. United States* (C.A.6, 1997), 130 F.3d 1220, 1222.

⁴*DiFrancesco*, supra, 449 U.S. at 139.

⁵*Id.*

his sentence was finalized then he willfully blinded himself to everything that happened after the First District Court of Appeals rendered its decision.

If Roberts had been paying any attention to his case then he had to know that this Court had accepted jurisdiction over his case and that the First District stayed its decision to reduce his sentence. As soon as this Court accepted jurisdiction over this matter his sentence was anything but final. Because Roberts could not have had a legitimate expectation that his sentence was final double jeopardy did not attach.

The State is aware of only one other Ohio case where a defendant was similarly situated to Roberts. In *State v. Straugh*, after the First District decided he could not be sentenced to more than a minimum sentence, the Department of Corrections erroneously released Straugh in spite of that decision being stayed. Just as happened here, this Court had accepted jurisdiction over the matter and ultimately remanded the matter for resentencing.⁶ After he was resentenced the First District found that it was constitutional to reincarcerate the defendant.⁷

There is Federal case law that offers guidance to this Court. It tells us that a defendant can have no legitimate expectation of finality while an appeal related to his sentence is pending nor can he develop one due to mistakes made by prison officials.

⁶*In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, 847 N.E.2d 1174, ¶156 and *State v. Straugh*, 110 Ohio St. 3d 1413, 2006-Ohio-3306, 850 N.E.2d 73.

⁷*State v. Straugh*, unreported, 1st Dist. No. C061024 (a copy of the judgement entry is included in the appendix.)

In *United States v. Blakney*, the trial court ignored a mandatory 10-year minimum sentence because it felt the sentence violated the Eighth Amendment. The government successfully appealed that decision, but the trial court again refused to impose the mandatory 10-year minimum. On the second appeal, the defendant argued that because she had fully served the sentence the trial court imposed that it would violate due process to reincarcerate her.

The Court for the District of Columbia disagreed. It ruled that "[w]hen the government takes a direct appeal from a district court order a defendant can have no legitimate expectation in the finality of the district court order, whether or not the defendant has been released from prison."⁸

The Northern District of Illinois dealt with a situation where the prison officials mistakenly released a defendant 20 months early. It found that the defendant could be returned to prison because a defendant does "not acquire a 'legitimate' expectation that he would serve only five years merely because his Judgment and Commitment Order contained a typographical error to that effect, or because the U.S. Bureau of Prisons mistakenly relied on that order and released him 20 months early."⁹

Roberts did not have a legitimate expectation of finality. Therefore, the trial court was able to reincarcerate him without violating double jeopardy.

⁸*United States v. Blakney* (D.C. Cir. 1997), 132 F.3d 1482.

⁹*Ramos v. Gilkey*, N.D. Ill. Case 97 C 7981, 1999 WL 122781, *3.

II. It would be unfair to both the State of Ohio and to other defendants to deny the trial court the power to reincarcerate Roberts.

Roberts may argue that it is unfair to place *him* back into prison. Roberts should not be permitted to reap the benefit of being convicted in the only appellate district that had ruled trial courts had to impose minimum sentences under *Blakely v. Washington* and being released by mistake, while other similarly situated defendants across Ohio are serving their full prison terms because they just weren't as fortunate as Roberts. Ohio sentencing law should not be turned into a game of chance that favors the fortunate. Allowing Roberts to reap the benefit of this extraordinary happenstance is unfair to every defendant who is properly serving their prison sentences.

To agree with Roberts in this matter would render this Court's decision to remand the matter for resentencing a nullity. When a lower court's decision is vacated, "[a]ll previous findings are invalidated, and both parties must start from scratch"¹⁰ – a principal this Court recognized when it ordered completely new resentencing hearings for defendants whose sentences were impacted by *State v. Foster*. Agreeing with Roberts would allow him to pick those portions of the appellate process he found favorable and to simply discard this Court's decision because it did not favor him. That's not how appellate procedure works.

Agreeing with Roberts would also place new, uncontrollable limitations on the government's right to appeal illegal sentences. For example, if a defendant who committed a third degree felony were sentenced to only a month in prison then the State would have a

¹⁰*State v. Duncan*, 154 Ohio App. 3d 254, 2003-Ohio-4695, 796 N.E.2d 1006, ¶ 49.

right to appeal that sentence as being contrary to law.¹¹ If this Court agrees with Roberts then the State's right to appeal would exist only if the entire appellate process were completed within a single month. And that's not taking into account the possibility of the prison sentence, and thus the State's ability to appeal, being shortened due to something such as jail time credit or some form of early release.

Not allowing the trial court to reincarcerate Roberts would be unfair to defendants who are properly serving their full prison sentences. It would be unfair to the State who properly appealed the decision to shorten his prison term. Therefore, Roberts' reincarceration should be affirmed.

III. Roberts was still serving his sentence when he was resentenced by the trial court.

Even if the First District had not stayed its decision, Roberts was still serving his sentence when this court remanded the matter to the trial court for resentencing. This is because post-release control is part of defendant's sentence.

Roberts cites this Court to *State v. Bezak*,¹² which he somehow reads as meaning he cannot be resentenced because his sentence was fully served. *Bezak* has nothing to do with resentencing a defendant after a successful appeal. Instead, it says that a defendant cannot be resentenced to post-release control once they have been released from prison because post-release control is part of a defendant's sentence.¹³ To try to add it on after a person had

¹¹R.C. 2953.08(B)(2).

¹²*State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, 863 N.E.2d 961.

¹³*Id.* at ¶18.

been released would violate double jeopardy because at that point in time the defendant had a legitimate expectation of finality.

Since *Bezak* tells us that a person's sentence includes post-release control it follows that Roberts' sentence wasn't fully served when he was resentenced. As noted in Roberts' merit brief, he was arrested while on post-release control. He was still serving his sentence for his crimes. Thus, Roberts' argument that he had fully served his sentence is meritless.

In the end, this case is nothing more than a case about correcting the illegal or invalid sentence Roberts was given. He was sentenced under pre-*Foster* law and his case was pending when *Foster* was released. Thus his sentence was unconstitutional. "[T]he correction of an invalid sentence does not constitute double jeopardy, and that a prisoner whose guilt is established by jury verdict may not escape punishment because the court committed an error in passing sentence."¹⁴ Roberts' sentence had to be vacated and he had to be resentenced.

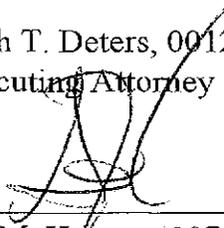
¹⁴*State ex rel. Cleveland v. Calandra* (1980), 62 Ohio St.2d 121, 122, fn. 403 N.E.2d 989 citing *Bozza v. United States* (1947), 330 U.S. 160, 166-167, 67 S.Ct. 645, 91 L.Ed. 818 and *In re Bonner* (1894), 151 U.S. 242, 14 S.Ct. 323, 14 S.Ct. 323, 38 L.Ed. 149 (limited on other grounds by *State ex rel. LTV Steel Co. v Gwin*, 64 Ohio St. 3d 245, 1992-Ohio-20, 594 N.E.2d 616.)

Conclusion

When this case is boiled down, Roberts original sentence was illegal because he was sentenced under unconstitutional sentencing laws. "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."¹⁵ This Court recognized that Roberts original sentence was invalid and properly remanded the matter to the trial court for resentencing. There was never a legitimate expectation of finality because Roberts' sentence was constantly under appeal. Without that legitimate expectation, double jeopardy did not prevent reincarceration. Therefore, the trial court was vested with the authority to resentence Roberts to prison and this matter should be affirmed.

Respectfully,

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Prosecuting Attorney

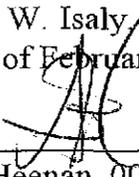


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¹⁵*Bozza*, supra, 330 U.S. at 166-167.

Certificate of Service

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to Charles W. Isaly, 4007 Bach Buxton Rd., Amelia, Ohio 45102, counsel of record, this 20th day of February, 2008.



Scott M. Heenan, 0075734P
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Appendix

Revised Code 2953.08 A-2.
State v. Straugh, unreported, 1st Dist. No. C061024 A-8.

Revised Code 2953.08

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the sentence was not imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of section 2929.14 of the Revised Code.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division

(D)(3)(b) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (H) of section 2929.20 of the Revised Code.

(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under

this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(D)(1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty

days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of section 181.25 of the Revised Code. Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of section 2953.21 of the Revised Code or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that

have been so appropriated specifically for the purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

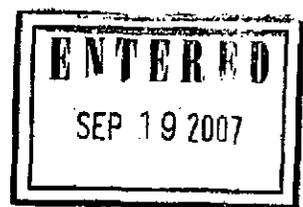
IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



D75107335

STATE OF OHIO, : APPEAL NO. C-061024
 : TRIAL NO. B-0309888
 Plaintiff-Appellee, :
 :
 vs. :
 :
 MICHAEL STRAUGH, a.k.a :
 MICHAEL STRAUGHN, :
 :
 Defendant-Appellant. :

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant, Michael Straugh, ak.a. Michael Straughn, appeals the judgment of the Hamilton County Court of Common Pleas sentencing him to concurrent four-year terms of imprisonment for kidnapping and robbery.

In 2004, Straugh entered guilty pleas to the offenses. He appealed, and this court ordered the sentences to be reduced to an aggregate of two years' imprisonment. The state appealed, and the Supreme Court of Ohio reversed our decision in light of *State v. Foster*.² The supreme court then remanded the cause for resentencing.³

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.
³ See *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.

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Meanwhile, Straugh had completed the two-year sentence as ordered by this court, and he had been released from prison. But in compliance with the supreme court's order mandating resentencing, Straugh was again brought before the trial court. After a new sentencing hearing, the trial court imposed the original four-year sentence.

We begin with the second assignment of error, in which Straugh now argues that the trial court erred in resentencing him under *Foster*. He argues that the court was required to sentence him under the pre-*Foster* sentencing scheme and that its failure to do so violated the Ex Post Facto Clause and the Due Process Clause of the United States Constitution. We recently rejected this argument in *State v. Bruce*.⁴ Because *Bruce* is controlling, we find no error in the application of *Foster*, and we overrule the second assignment of error.

In the first and third assignments of error, Straugh argues that even if the application of *Foster* was proper, the court erred in imposing the four-year term. We address these assignments together.

Under *Foster*, trial courts have full discretion to impose a sentence within the statutory range.⁵ In this case, Straugh concedes that the sentences were within the statutory ranges for kidnapping and robbery. But he argues that evidence of his rehabilitation rendered the imposition of the original four-year term improper.

We find no merit in this argument. In committing the offenses, Straugh had confined his victim blindfolded in a car for approximately two hours and had forced her to retrieve money from an automatic teller machine. He had threatened to kill

⁴ 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44, jurisdictional motion overruled, 113 Ohio St.3d 1492, 2007-Ohio-1986, 865 N.E.2d 915.

⁵ *Foster*, supra, at ¶100.

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her if she were to implicate him in the offenses. In light of the aggravated nature of the crimes, the trial court could have reasonably concluded that the need for punishment outweighed Straugh's asserted rehabilitation.

Straugh was afforded a complete hearing for the resentencing, and it is apparent from the record that the trial court considered all relevant circumstances in imposing the original four-year term. Accordingly, we reject Straugh's contention that the sentences violated his due-process rights and his right to be free from cruel and unusual punishment.

And though this case presents the unusual circumstance of Straugh having been released after serving the sentence mandated by this court's judgment, that circumstance was of no constitutional significance. In light of the state's appeal, Straugh could claim no vested right to be released after serving only two years. The trial court was bound by the supreme court's order under *Foster*, and we find no error in the resentencing. Accordingly, we overrule the first and third assignments of error and affirm the judgment of the trial court.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 19, 2007
per order of the Court *M. W. Pauls*
Presiding Judge