

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 07-0475
PHILLIP E. ELMORE, :
Appellant. :

REPLY MERIT BRIEF OF APPELLANT PHILLIP E. ELMORE

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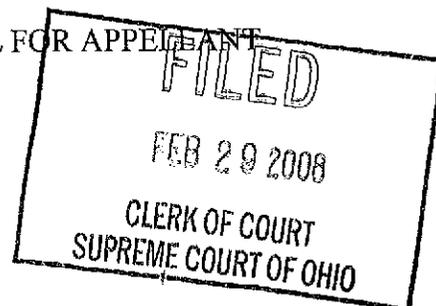


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PROPOSITION OF LAW NO. ONE

APPLICATION OF THE FOSTER REMEDIES TO A DEFENDANT WHO COMMITTED HIS OFFENSE(S) PRIOR TO THE ANNOUNCEMENT OF FOSTER VIOLATES A DEFENDANT'S RIGHT TO TRIAL BY JURY.

PROPOSITION OF LAW NO. TWO

THE FOSTER REMEDIES CONSTITUTE JUDICIAL LEGISLATION AND APPLICATION OF THE FOSTER REMEDIES TO A DEFENDANT WHO COMMITTED HIS OFFENSE(S) PRIOR TO THE ANNOUNCEMENT OF FOSTER IS VIOLATIVE OF THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION.

PROPOSITION OF LAW NO. THREE

APPLICATION OF THE FOSTER REMEDIES TO A DEFENDANT WHO COMMITTED HIS OFFENSE(S) PRIOR TO THE ANNOUNCEMENT OF FOSTER IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION UNDER ROGERS V. TENNESSEE (2001), 532 U.S. 451.

(ARGUED TOGETHER)

Initially, there has been no “waiver” or forfeiture by Appellant of the issues under consideration in this appeal. Appellee suggests that the “many of the issues” raised in the instant appeal are forfeited because they were not raised in the prior appeal to the Court. (Appellee’s Brief at 6). Such a contention is without merit for a variety of reasons. First, Appellee has failed to identify the particular issues that were purportedly not raised. Apparently, Appellee is of the opinion that the Court, instead of Appellee, should scour the record to identify and adjudicate potential issues.

Second, Appellee can point to no rule that requires an Appellant to raise in a prior appeal sentencing issues that he raises in a subsequent appeal following resentencing. Here, there was a sentencing. The case was remanded and then there was a re-sentencing.

Appellant could not properly identify issues for the second appeal until the trial court actually imposed sentence.

Third, in the first appeal Appellant did attack the imposition of more than minimum, maximum and consecutive sentences under Blakely v. Washington (2004), 542 U.S. 296. See Appellant's Supplemental Brief, Proposition of Law 17.

Fourth, State v. Foster (2006), 109 Ohio St.3d 1, was decided prior to Appellant's re-sentencing—Elmore could not have divined the remedies, including the excision of constitutional portions of Ohio sentencing scheme that Foster wrought.

Fifth, at re-sentencing Appellant objected to retroactive application of the remedies outlined in Foster, as well as, the rule of lenity and the imposition of non-minimum, maximum and consecutive sentences. See Resentencing Hearing Tr., pp. 4 & 5.

Sixth, the Court is not bound by federal law regarding the necessity of an objection to preserve Blakely error. In State v. Payne (2007), 114 Ohio St.3d 502, 2007-Ohio-4642 the Court indicated that it was bound by Washington v. Recuenco (2006), 548 U.S. 212, to hold that the lack of a trial court objection waives the right to claim a Fifth and Fourteenth Amendment Blakely violation:

we first determine whether the trial court's error in sentencing Payne pursuant to the pre-Foster version of the sentencing statute is structural. If it is, our inquiry is at an end. Controlling our disposition on this issue is the Supreme Court's recent decision in Washington v. Recuenco (2006), 548 U.S. 212.

State v. Payne, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶¶19-20.

But in a subsequent decision, the United States Supreme Court has expressly

ruled that states are not bound by federal procedural rules:

the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply sets certain minimum requirements that States must meet but may exceed in providing appropriate relief. They provide no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations.

Danforth v. Minnesota (2008), ___ U.S. ___, 128 S.Ct. 1029, 2008 U.S. LEXIS 2012 at

*43. Accordingly, the Supreme Court of the United States has effectively eliminated the *ratio decidendi* of Payne. Ohio is not bound to the federal procedural treatment of Blakely violations, and should follow the procedure set forth by the Court before it incorrectly ruled that it was bound by federal procedural rules.

Although the Court did not expressly address the issue in Foster, it reversed and remanded hundreds of cases with no mention of the requirement of a trial court objection or that a claim be previously raised in the initial direct appeal. See, e.g., In re Ohio Criminal Sentencing Statutes Cases, 110 Ohio St.3d 264, 2006-Ohio-4475; 110 Ohio St.3d 156, 2006-Ohio-4086; 110 Ohio St.3d 70, 2006-Ohio-3663; 109 Ohio St.3d 518, 2006-Ohio-3254; 109 Ohio St.3d 509, 2006-Ohio-2721; 109 Ohio St.3d 411, 2006-Ohio-2394; 109 Ohio St.3d 313, 2006-Ohio-2109. Before the Court incorrectly believed it was bound by federal procedural law, it reversed and remanded sentences in light of Foster regardless of whether a trial court objection was made or whether specific claim was raised in the prior appeal. The Court should do the same here. Given these six factors, Appellee's claims of forfeiture cannot be substantiated.

Appellees arguments, on pages 3 and 4 of its brief, invite the Court to hold that

Foster only made procedural rather than substantive changes in the law. Appellee relies on Collins v. Youngblood (1990), 497 U.S. 37 and Schriro v. Summerlin (2004), 542 U.S. 348, for the proposition that Foster made procedural rather than substantive changes in the law when it severed the statutes that contained presumptions that, absent judicial fact-finding, defendants should be sentenced to minimum and concurrent sentences. Appellee's reliance is misplaced. That is because Foster altered the range of persons who could be subject to non-minimum, maximum or consecutive sentences. Schriro recognizes that a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See, Bousley v. United States (1998), 523 U. S. 614, 620-621. Likewise, Collins left intact the Beazell v. Ohio (1925), 269 U.S. 167, 169-170, formulation that a change in criminal law is substantive if it modifies "the nature or amount of the punishment imposed for its commission." Collins, at 50. There can be no doubt that Foster changed the nature of punishment and the amount of punishment by eliminating presumptions that favored probationary or minimum and concurrent sentences.

Appellee attempts to distinguish Miller v. Florida (1987), 482 U.S. 423, on the grounds that the case involved sentencing changes made by the state legislature rather than the state judiciary and necessarily employed ex Post Facto Clause jurisprudence instead of "fair notice" Due Process Clause judicial gloss. Such a characterization is peculiar since the Miller court "recognized that central to the ex post facto prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'"

432 U.S. at 430 (internal citations omitted). Since “fair notice” is a component of both due process and ex post facto clause retroactivity analysis, Miller, while not necessarily providing the rule of decision, is still instructive.

Appellee also tries to distinguish Miller v. Florida by stating again that Foster only wrought procedural changes. (Appellee’s Brief at 5). Foster did not merely change the identity of the fact-finder but instead, just like the legislative change in Miller, eliminated presumptive sentences that benefitted defendants.

Appellee claims that Miller can be distinguished from Foster on its underlying effect. (Brief at 5). In Miller, the Florida legislature increased presumptive sentencing ranges in violation of the ex Post Facto Clause. In Foster, even though Ohio’s presumptive sentencing ranges did not violate Blakely, the Court eliminated those presumptive sentencing ranges. Contrary to Appellee’s pronouncement, the effect is the same in Miller and in Foster. In both cases, criminal defendants lost the protection of lower presumptive sentences.

Appellee also argues that because federal circuit courts have rejected an ex Post Facto Clause/Due Process Clause attack on resentencing following United States v. Booker (2005), 543 U.S. 220, that the Court’s decision in Foster is somehow unassailable. (Brief at 6). Appellant respectfully refers the Court to the his Merit Brief at pages 13 and 14 for an explanation as to why the Foster remedy unlike the Booker remedy cannot be applied retroactively.

Appellee contends that retroactive application of the remedial aspects of Foster is constitutionally required. (Brief at 7). The United States Supreme Court recently rejected

Appellee's argument in Danforth v. Minnesota (2008) ___ U.S. ___, 128 S.Ct. 1029, 2008

U.S. Lexis 2012 at*43, where the United States Supreme Court expressly ruled:

the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply sets certain minimum requirements that States must meet but may exceed in providing appropriate relief. They provide no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations.

There was and presently is no federal requirement that Ohio's presumptive sentencing provisions be excised along with the particular judicial fact-finding provisions that ran afoul of Blakely. Thus, retroactive application of the remedial aspects of Foster is not required under the federal constitution.

Bizarrely, the OPAA argues that Foster's severance remedy was not a result of "judicial construction of a statute." (OPAA Brief at 6-7). It is difficult to fathom how the Court got to the conclusion that judicial fact-finding provisions in Ohio sentencing statutes ran afoul of Blakely without construing those statutes. In fact, severance of the judicial fact-finding provisions occurred because the Court could not apply the doctrine of constitutional avoidance by formulating a construction that avoided constitutional infirmities.

The OPAA argues that since severance is possible in any case involving an unconstitutional statute, that severance was foreseeable in this instance. (OPAA Brief at 7-8). The standard is whether Foster's repeal of both the constitutional and unconstitutional provisions of the sentencing statutes was unexpected and indefensible under the law as it existed when the defendant committed the offense. See, Bouie v. City of Columbia (1964), 378 U.S. 347, 354; Rogers v. Tennessee (2001), 532 U.S. 451,

460-61. The Court, in State ex rel Mason v. Griffin (2004), 104 Ohio St.3d 279, 2004-Ohio-1477, gave notice that, when faced with an unconstitutional portion of a sentencing statute, a trial judge should apply statutes without any enhancement. Foster did much more than was suggested by Griffin when it also severed constitutional portions of the statutes dealing with presumptive minimum and concurrent sentences. Thus, the severance of both constitutional and unconstitutional sections of Ohio's sentencing law was not foreseeable but, rather, "unexpected and indefensible" under Griffin. Under such circumstances, the complete Foster remedy was *sui generis*.

The OPAA contends that the since the General Assembly did not "intend" for the sentence finding provisions to be elements that they are not governed by Apprendi v. New Jersey (2000), 530 U.S. 466. (OPAA brief at 10). Apprendi itself disposes of this argument by indicating that a state cannot avoid In re Winship's burden of proof by characterizing sentencing elements as sentencing factors. In short, state characterizations are irrelevant-- if it looks like an element and acts like an element then it is an element. Since the Ex Post Facto Clause/Due Process Clause analysis prohibits the State of Ohio from retroactively increasing a criminal penalty and the Foster remedy retroactively increased criminal penalties by eliminating presumptive minimum and concurrent sentence, Appellant Elmore may be sentenced to no more than three years.

Proposition of Law No. Four
A COMMON PLEAS COURT LACKS JURISDICTION TO IMPOSE
CONSECUTIVE SENTENCES FOR THE COMMISSION OF MULTIPLE
FELONIES.

The OPAA claims that Foster left in place the first part of R.C. § 2929.14(E)(4)

permitting the imposition of consecutive sentences. (OPAA Brief at 16). A reading of Foster indicates that no part of R.C. § 2929.14(E)(4) survived excision. “Because R.C. 2929.14(E)(4) and 2929.41(A) require judicial facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional.” Foster, 109 Ohio St.3d at 25, 2006-Ohio-856, ¶83. These sections are severed and excised in their entirety, as is, . . . , 2929.14(E)(4), which requires judicial findings for consecutive terms. . . .” Id. at ¶ 97. OPAA contentions are rejected by a fair reading of Foster, itself.

The OPAA claims that common pleas courts have inherent authority to impose consecutive sentences. (OPAA Brief at 16). Such a claim runs afoul of the limited authority granted in § 4(B), Art.IV of the Ohio Constitution, “[t]he courts of common pleas and divisions thereof shall have original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.” (Emphasis added). In addition, if it is true that Ohio courts have inherent authority to impose consecutive sentences, then one can reasonably question whether the General Assembly has the power, at all, to regulate the imposition of consecutive sentences. The Court has never held that the General Assembly cannot permissibly legislate in the area of consecutive sentencing. Inaction by the Court to protect its turf by failing to find consecutive sentencing legislation violates separation of powers and positive action by the General Assembly indicates that the power to impose consecutive sentences is not inherent but must have its genesis in statute. Without statutory authority, imposition of consecutive sentences in this case was unlawful.

Proposition of Law No. Five

THE RULE OF LENITY CODIFIED IN R.C. § 2901.04(A) REQUIRES THE IMPOSITION OF MINIMUM AND CONCURRENT SENTENCES FOR THOSE PERSONS WHO COMMITTED THEIR OFFENSES PRIOR TO THE ANNOUNCEMENT OF THE OPINION IN STATE V. FOSTER (2006), 109 OHIO ST.3D 1, 2006-OHIO-856.

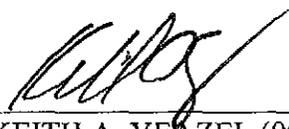
In Ohio there are no common law crimes. R.C. § 2901.03. Likewise, in Ohio there are no common law sentences. Every statute defining offenses or penalties must be strictly construed against the state and liberally construed in favor of the accused. R.C. 2901.04(A). Thus, the rule of lenity is not merely a narrow rule of statutory construction as the OPAA suggests, but is, instead, a rule of broad applicability in criminal law. Moreover, Ohio's statutory construction laws should be read *in pari materia*.

Here, application of the rule of lenity in Foster would have resulted in severance of the unconstitutional portions requiring judicial fact-finding from those constitutional portions of the sentencing statutes which provided presumptions in favor of minimum and concurrent sentences. What then would be left is a sentencing scheme that the General Assembly within its exclusive purview could decide to modify or not. Instead, the Court cobbled together a common law sentencing scheme without presumptive sentences that is not true to legislative intent. The Court's decision in Foster liberally construed the remainder of the sentencing statutes in favor of the state and strictly construed them against criminal defendants. The Foster remedies turned the rule of lenity on its head. The Court should find that the rule of lenity requires that persons who committed their offense(s) prior to Foster are entitled to minimum and concurrent sentences.

CONCLUSION

A policy of the prohibition against retroactive application of judicial decisions presumably rests, in part, on the apprehension that the judiciary, in increasing penalties retroactively for an existing crime, is not acting with the purpose a purpose to prevent dangerous conduct, but instead to impose by fiat penalties against a specific class of persons. Here, that class of persons involves felons. Such is not the role of the judiciary in our tripartite system of government. The Court should limit itself to making judicial rather than legislative decisions by holding that the Foster remedy can not be applied retroactively to those persons who committed their offenses prior to the effective date of Foster. The Court should reverse the non-minimum, maximum, and consecutive sentences imposed in the case and order that the trial court impose minimum, concurrent sentences on remand.

Respectfully submitted,



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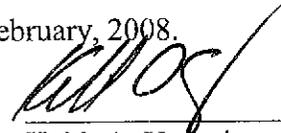
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