

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

HUGH HUNTER

Appellant

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08-0661

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 89456

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT HUGH HUNTER

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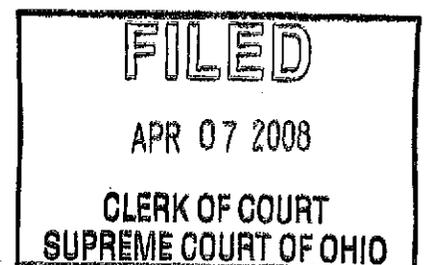


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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL
AND PUBLIC INTEREST:**

This case presents this Court with the opportunity to address whether *State v. Foster* (2006), 109 Ohio St. 3d 1 eliminated repeat violent offender (“RVO”) penalty enhancements and, if it did not, whether these enhancements remain unconstitutional. If *Foster* eliminated the RVO penalty enhancements, this Court should take this case to make that clear because at least two appellate districts have missed that point. *State v. Hunter*, Cuyahoga App. No. 89456, 2008 Ohio 794, ¶¶ 20-24 (“Opinion Below”); *State v. Adams*, Lake App. No. 2006-L-114, 2007 Ohio 2434, ¶¶ 23-27. If *Foster* did not eliminate RVO penalty enhancements, this Court should still accept the instant case because, under that interpretation, the penalty enhancements remain constitutionally infirm. Currently pending before this Court is a notice of certified conflict involving the same questions in the context of major drug offender (“MDO”) penalty enhancement. *See State v. Sanchez*, Case No. 2008-0429. This case provides a natural complement to the issue raised by the certified conflict in *Sanchez* and an opportunity for this Court to address the related questions in a comprehensive manner.

The nature of the uncertainty lies in conflicting views of this Court’s holding in *Foster*. In *Foster*, this Court held that R.C. 2929.14(D)(2)(b), which authorized the imposition of penalty enhancements on repeat violent offenders, was unconstitutional and, to remedy that violation, “excised R.C. 2929.14(D)(2)(b).” *Id.* at 29. It then explained that “[a]fter the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender specifications.” *Id.* at 29-30. The juxtaposition of these statements leads to two possible interpretations of *Foster*’s effect on RVO penalty enhancements. Focusing on the unqualified severance of the RVO penalty enhancement subsection, one might read *Foster*

as completely eliminating the enhancement provision. *See Adams*, 2007 Ohio 2434, at ¶ 34 (O'Neill, J. dissenting) (noting that *Foster* did not state that it was only severing portions of R.C. 2929.14(D)(2)(b)). Seizing on the statement that “judicial factfinding is not required before imposition of additional penalties,” one might conclude, like the Eighth District, that “only the offending portion of R.C. 2929.14(D)(2)(b) [has been] severed” and that the RVO penalty enhancements remained. Opinion Below at ¶ 22.

Although the Eighth District’s interpretation may seem reasonable in isolation, it is ultimately untenable. If only the factfinding required by R.C. 2929.14(D)(2)(b) to impose an RVO penalty enhancement were severed, the penalty enhancement would nonetheless remain unconstitutional because judicial factfinding is still required to determine that a defendant is a repeat violent offender. In *Foster*, this Court did not eliminate the statutory requirement that the trial court (and not a jury) make the determination of whether someone is a repeat violent offender as defined by R.C. 2929.01(DD), R.C. 2941.149. Such a determination necessarily requires the trial court to find certain facts, including that: 1) the defendant had been previously convicted of a certain offense; 2) (in most cases) the prior conviction resulted in death or physical harm; 3) that the defendant served (or was serving) prison time for that prior conviction; and 4) (in many cases) the current offense involved an attempt to cause serious physical harm or did result in serious physical harm. R.C. 2929.01(DD) (pre-HB 95 version of the statute). The Eighth District’s interpretation of *Foster* requires the assumption that this Court overlooked that the constitutional infirmity caused by the remaining judicial factfinding. Given the comprehensive review conducted by this Court in *Foster*, such an assumption is not reasonable. On the contrary, it is more logical to conclude that this Court found it unnecessary to address the

fact-finding required to determine that a defendant was a repeat violent offender *because* it had eliminated the RVO penalty enhancements completely.

The Eighth District's interpretation is further undermined by this Court's decision in *State v. Chandler* (2006), 109 Ohio St. 3d 223. Although *Chandler* addressed a major drug offender (MDO) penalty enhancement, its explanation of *Foster* applies with equal force to RVO penalty enhancements, which suffered from a similar constitutional flaw and which received the same remedy. *Chandler* made clear that *Foster* eliminated the MDO penalty enhancement entirely:

As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed.

109 Ohio St. 3d at 228. Likewise, in the aftermath of *Foster*, this Court affirmed the Eighth District's decision in *State v. Short*, Cuyahoga App. No. 83804, 2005 Ohio 4578, ¶ 39, which vacated a two-year MDO penalty enhancement as unconstitutional. *In re Ohio Crim. Sentencing Statutes Cases* (2006), 109 Ohio St. 3d 313. This Court's decision in *Chandler* and its affirmance of *Short* suggests that the penalty enhancements excised by *Foster* were indeed eliminated in their entirety. Admittedly, the clarity offered by *Chandler* is somewhat obscured by this Court's decision in *State v. Evans* (2007), 113 Ohio St. 3d 100. Although *Evans* did not address the issue presented here, it did involve RVO penalty enhancements, and this Court did not state that such enhancements had been eliminated.

After *Foster*, *Chandler*, and *Evans*, the continued viability of RVO (and MDO) penalty enhancements remains uncertain and should be resolved by this Court. This uncertainty may result in differential treatment of such enhancements throughout the state and renders it impossible for both the State and the defense to make informed decision in criminal cases

involving such specifications. Both prosecutors and defendants are unable to negotiate plea bargains effectively when the law regarding sentencing is uncertain. A definitive answer from this Court will end that uncertainty, forestall needless litigation in state and federal court, and avert the issuance of conflicting decisions on this important issue.

Appellant's third proposition of law raises the question of whether a trial court must hold a subsequent competency hearing when *new* issues regarding his competency arose *after* the initial competency determination, but *before* trial. When a defendant has been referred for subsequent competency evaluations, R.C. 2945.37 appears to provide an unambiguous answer: a competency hearing must be held. However, the Eighth District determined otherwise, concluding that a referral for additional competency evaluations does not require an additional competency hearing. Given the fluid and complicated nature of competency and mental health issues, it is not uncommon for an individual to be competent at one point in time but incompetent at another. *Cf. Panetti v. Quarterman* (2007), 127 S. Ct. 2842, 2847 ("Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition." Because the Eighth District's interpretation of R.C. 2945.37 fails to adequately reflect the dynamic nature of mental health issues, it provides inadequate procedural protections against the prosecution of incompetent defendants. Lower courts would benefit from this Court's guidance on this important issue.

STATEMENT OF THE CASE AND FACTS

Appellant Hugh Hunter was indicted on a single count of felonious assault which contained a repeat violent offender specification and a notice of prior conviction. These charges stemmed from Hunter's physical assault of a stranger in a church. Hunter punched the individual several times in the face for no apparent reason, took off his own shoes, left the church, and

wandered for several blocks until discovered by EMS.

Although Hunter was indicted in September 2004, his case did not go to trial for over two years because of competency issues. He was initially found competent to stand trial in May 2005. However, new questions about Hunter's competency arose after that initial determination, and Hunter was referred for several subsequent competency evaluations. The trial court did not, however, hold a hearing to address the new competency evaluations prior to trial.

Ultimately, Hunter was convicted, after a jury trial, of felonious assault, and found, after a bench trial, to be a repeat violent offender ("RVO"). Appellant objected several times to the RVO specification on "constitutional grounds." The trial court sentenced Hunter to a maximum eight-year prison sentence for felonious assault and imposed a two-year RVO penalty enhancement.

On appeal, Hunter raised three assignments of error arguing that the trial court erred in failing to hold a subsequent competency hearing when new competency issues arose prior to trial (AOE I), that the trial court violated his constitutional rights in imposing an RVO penalty enhancement (AOE II), and that the trial court's retroactive application of *Foster's* severance remedy violated his right to due process (AOE III). The Eighth District rejected all three assignments of error and affirmed his conviction and sentence.

LAW AND ARGUMENT

Proposition of Law I: *The RVO-enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury.*

In this case, the trial court imposed an RVO-enhanced sentence of two years. Because such enhancements are predicated on judicial fact-finding, they violate a defendant's

constitutional rights to due process and trial by jury. Therefore, this Court must vacate the RVO enhancement.

A. Repeat Violent Offender (RVO) Specification

At the outset, it should be noted that the General Assembly recently amended the statutory provisions related to RVO specifications with House Bill 95 (effective date of 8/03/06). However, because the criminal conduct in this case occurred almost a year prior to the effective date of those amendments, the prior RVO law applies (pre-HB 95).

Pursuant to R.C. 2941.149(A), the State must charge the repeat violent offender specification in the indictment, and the determination of whether someone is a repeat violent offender *must* be made by the trial court. In this case, the trial court could only find Mr. Hunter to be a repeat violent offender if, in addition to his present second-degree felony conviction, it found, beyond a reasonable doubt that he was previously convicted of a first or second degree felony that resulted in death or physical harm *and* for which he served prison time.¹ R.C. 2929.01(DD).

Under pre-HB 95, pre-*Foster* law, the repeat violent offender specification, if found, carries several potential consequences. First, the trial court could impose any sentence within the statutory range, even the maximum, without making any additional findings. R.C. 2929.14(D)(2)(a). Second, any prison time imposed is mandatory and cannot be reduced. R.C. 2929.14(D)(2)(a). Third, the trial court must impose the maximum sentence if it finds that the present offense caused physical harm that “carried a substantial risk of death to a person or substantial permanent disfigurement of a person.” R.C. 2929.14(D)(2)(a). Fourth, the trial court could impose an RVO enhanced sentence of 1-10 years in prison in addition to the statutory

maximum (hereinafter referred to as “penalty enhancements”), if it finds that the maximum prison sentence is both:

- “[I]nadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism;” and,
- “[D]emeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.”

R.C. 2929.14(D)(2)(b).

In other words, the trial court must find several facts in order to find Mr. Hunter to be a repeat violent offender (previously convicted for a first or second degree felony that caused death or physical harm and served prison time on that offense) and several additional facts to impose an RVO penalty enhancement (maximum term inadequate to punish the offender and demeaning to the seriousness of the offense).

B. United States Supreme Court’s Recent Sixth Amendment Jurisprudence Related to Sentencing

It is well-settled that the United States Constitution protects every criminal defendant “against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged” and gives him “the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.” *United States v. Booker* (2005), 543 U.S. 220, 230 (citations omitted). Beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court has applied these venerable principles of

¹ Although there are other specific crimes that might result in a repeat violent offender classification, none of these other crimes are relevant to this case.

criminal law to modern sentencing schemes, rendering sentences predicated on most judge-found facts unconstitutional. In *Apprendi v. New Jersey*, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (2000) 530 U.S. 466, 489. *Apprendi* creates a “bright-line rule” to which there is but one exception (existence of a prior conviction). *Cunningham v. California* (2007), ___ U.S. ___, 127 S.Ct. 856, 868-69.

The United States Supreme Court, in *Blakely v. Washington*, explained that the “statutory maximum” referred to in *Apprendi* is the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (2004) 542 U.S. 296, 303-304 (emphasis in original). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Id.*; see also *Cunningham*, 127 S.Ct. at 860.

After *Blakely*, it is clear that a sentencing judge “exceeds his proper authority” when he inflicts punishment which “the jury’s verdict alone does not allow.” *Id.* This is true whether the enhanced sentence is dependent on his finding “a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as [*in Blakely*])” and “[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it.” *Id.* at 305, n.8 (emphasis in original). If the sentencing judge must find an additional fact of any kind (other than existence of a prior conviction) to impose a longer prison term, the sentencing scheme does not comport with the Sixth Amendment. *Cunningham*, 127 S.Ct. at 869.

C. Analysis of Constitutionality of RVO Penalty Enhancements

1. Foster and RVO specifications

In *State v. Foster* (2006), 109 Ohio St. 3d 1, 3 this Court considered the constitutional implications of *Blakely* and *Apprendi* on Ohio's felony sentencing structure. Ohio's repeat violent offender penalty enhancement was among those sentencing provisions analyzed for violations of the Sixth Amendment.

When *Foster* turned its attention to the RVO penalty enhancements in R.C. 2929.14 (D)(2)(b), which enable a sentencing court to exceed the normal statutory maximum, this Court found a constitutional problem. Specifically, it explained that this subsection violates *Blakely* and the Sixth Amendment because it "requires the court to make findings before imposing an additional penalty on repeat violent offenders." *Id.* Recognizing this constitutional problem, this Court "excised R.C. 2929.14(D)(2)(b)." *Id.* at 29.

2. RVO-enhanced sentences were eliminated by *Foster*

The key question presented for this Court's consideration is whether *Foster* eliminated RVO penalty enhancements by completely excising R.C. 2929.14(D)(2)(b) or whether it merely severed 2929.14(D)(2)(b) in mid-sentence and thus kept the penalty enhancements for repeat violent offenders? Although *Foster*, read out of context, may seem somewhat ambiguous on this issue, closer scrutiny illustrates that *Foster* excised all of R.C. 2929.14(D)(2)(b) and thus eliminated RVO penalty enhancements.

Foster did not remove specific portions of (D)(2)(b), but rather simply "excised R.C. 2929.14(D)(2)(b)." *Id.* at 29. Thus, by the plain language of *Foster*, RVO penalty enhancements were eliminated. However, shortly thereafter in the *Foster* opinion, this Court states that: "[a]fter the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender specifications." *Id.* at 29-30. This

statement, standing alone, could be interpreted to mean that only the fact-finding within R.C. 2929.14(D)(2)(b) has been removed and that the penalty enhancements survive.²

This apparent ambiguity is resolved by an analysis of the RVO statutory provisions after *Foster*. *Foster* cannot be interpreted as merely excising a portion of subsection (D)(2)(b) because, under such a reading, the RVO penalty enhancements still depend on judicial fact-finding that a defendant is repeat violent offender. The *Foster* opinion left untouched the statutory provision requiring the trial court (and not a jury) to make the determination of whether someone is a repeat violent offender as defined by R.C. 2929.01(DD). R.C. 2941.149. In finding someone to be a repeat violent offender, the trial court must find the following facts:

1. Defendant was previously convicted of aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration, or a felony of the first or second degree;
2. If the prior conviction involved a felony of the first or second degree (other than the specifically listed offenses), the offense resulted in death or physical harm;
3. Defendant served (or was serving) prison time for that prior conviction; and,
4. If the current offense involved a felony of the first or second degree (other than certain specifically listed offenses), the offense involved an attempt to cause serious physical harm to a person or did result in serious physical harm.

R.C. 2929.01(DD). It is by now well-established that such judicial fact-finding may not serve as the basis for increasing a criminal defendant's sentence. *See e.g. Apprendi*, 530 U.S at 489; *Blakely*, 542 U.S. at 303-304.³ Indeed, even before *Foster* was decided, lower courts had

² This alternative interpretation of *Foster* requires severance of R.C. 2929.14(D)(2)(b) in mid-sentence.

³ The sole exception to *Apprendi*'s "bright line rule" is the fact of a prior conviction. *Cunningham*, 127 S.Ct. at 860. Moreover, the continued viability of that exception is in doubt

concluded that the RVO penalty enhancement was unconstitutional because it was predicated on judicial fact-finding that a defendant was a repeat violent offender. *State v. Malcom*, Cuyahoga App. No. 85351, 2005 Ohio 4133, ¶¶4-5 and 9-10.

Because this Court did not sever the statutory requirement that a judge determine whether a defendant is a repeat violent offender, R.C. 2941.149, or the judicial fact-finding attendant to that determination, it must have excised the RVO penalty enhancements in their entirety. If this Court had only severed a portion of R.C. 2929.14(D)(2)(b), leaving the penalty enhancements intact, RVO penalty enhancements would remain unconstitutional.

Any lingering ambiguity about the impact of *Foster* on RVO penalty enhancements is resolved by this Court's treatment of major drug offender (MDO) penalty enhancements. In *Foster*, this Court found the very same constitutional flaw with MDO and RVO penalty enhancements and employed the very same remedy. 109 Ohio St. 3d at 24 and 29 (explaining that "[a]s with R.C. 2929.14(D)(2)(b), R.C. 2929.14(D)(3)(b) cannot withstand a *Blakely* challenge because judicial factfinding is required and a court may not add the additional penalties based solely on the jury's verdict.") As such, this Court's treatment of MDO penalty enhancements informs its intention with respect to RVO penalty enhancements. In *State v. Chandler*, this Court, in an opinion written by the same Justice who authored *Foster*, made clear that *Foster* eliminated the MDO penalty enhancement:

As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed.

as a majority of the United States Supreme Court now recognizes that the decision, establishing the prior conviction exception, was wrongly decided. *Shepard v. United States* (2005), 544 U.S. 13, 27-28 (Thomas, J., *concurring*).

(2006), 109 Ohio St. 3d 223, 228. Likewise, in the aftermath of *Foster*, this Court affirmed the Eighth District's decision in *State v. Short*, Cuyahoga App. No. 83804, 2005 Ohio 4578, ¶ 39, which vacated a two-year MDO penalty enhancement as unconstitutional. *In re Ohio Crim. Sentencing Statutes Cases* (2006), 109 Ohio St. 3d 313. After this Court's decision in *Chandler* and its affirmance of *Short*, it is clear that *Foster* eliminated MDO penalty enhancements. Because *Foster* treated MDO and RVO penalty enhancements in an identical fashion, it is equally clear that RVO penalty enhancements have been eliminated.

3. Trial Court Erred in Imposing RVO-Enhanced Sentences

Given that *Foster* excised that statutory provision authorizing RVO-enhanced sentences, the trial court clearly erred when it imposed an additional two-year sentence based on the RVO specification charged in the indictment. Even if this Court decides that *Foster* did not excise the RVO penalty enhancement provision (R.C. 2929.14(D)(2)(b)) in its entirety, the RVO-enhanced penalty still violated the defendant's Sixth and Fourteenth Amendment rights because it depended on judge-found facts (prior conviction involved physical harm to the victim and defendant served a prior prison term for that conviction). Either way, the RVO penalty enhancements must be vacated.

Proposition of Law II: *State v. Foster's elimination of beneficial sentencing presumptions cannot be retroactively applied to defendants whose criminal conduct pre-dated the Foster decision.*

The trial court violated appellant's state and federal due process rights by retroactively applying changes to Ohio's sentencing statute adopted by this Court in *State v. Foster* (2006), 109 Ohio St. 3d 1, which severed sentencing presumptions beneficial to Mr. Hunter.

By excising, in *Foster*, statutory presumptions in favor of minimum and concurrent sentences and against maximum sentences, this Court has significantly revised Ohio's sentencing

law to the disadvantage of criminal defendants. For the reasons expressed in *Miller v. Florida* (1987), 482 U.S. 423, the *Ex Post Facto* Clause would clearly prohibit the Ohio legislature from eliminating the statutory presumptions in Ohio's felony sentencing law and applying that change retroactively. Just as the legislation could not be applied retroactively, due process prevents the retroactive application of the *Foster* remedy.⁴ *Bowie v. South Carolina* (1964), 378 U.S. 347, 354.

For defendants, like Mr. Hunter, whose criminal conduct pre-dates the *Foster* decision (February 27, 2006), the severance remedy is unavailable as a matter of constitutional law. The only remedy consistent with both Hunter's Sixth Amendment rights (as outlined in *Blakely* and *Foster*) and his due process rights (as outlined in *Miller* and *Bowie*) is the imposition of a two-year sentence.

Proposition of Law III: *If a trial court refers a defendant for an additional competency evaluation after he or she was originally found competent, the trial court must hold a hearing on that subsequent competency evaluation.*

Appellant's due process and statutory rights were violated when his competency to stand trial was at issue, when the trial court held a single competency hearing approximately one and half years prior to trial, and when the trial court failed to hold a subsequent competency hearing despite new developments calling into doubt his competency to stand trial. When, as here, a defendant's competency continues to be an issue after an initial competency hearing and additional competency evaluations are ordered, both the state and federal constitutions and Ohio law require the trial court to hold a competency hearing and make a competency determination *after* the subsequent evaluations and closer to trial.

⁴ To the extent that this Court rejects Hunter's first proposition of law, this same retroactivity argument applies to his RVO penalty enhancements. If *Foster* did not eliminate RVO

“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.’” *State v. Smith* (2000), 89 Ohio St. 3d 323, 329 (quoting *Drope v. Missouri* (1975), 420 U.S. 162, 171). To ensure that only the competent stand trial, Ohio law has adopted specific procedures. As an initial matter, the issue of defendant’s competency may be raised by the court, prosecution, or defense at any time. R.C. 2945.37(B). If the issue is raised before trial is commenced, the trial court is statutorily required to hold a hearing. R.C. 2945.37(B); *see also State v. Were* (2002), 94 Ohio St. 3d 173, paragraph one of the syllabus. Such a hearing must be held within thirty days after the issue is raised or, if the defendant has been referred for a competency evaluation, within ten days after the filing of the report of the evaluation. R.C. 2945.37(C).

The trial court’s single competency hearing in this case, held seventeen months prior to trial, was constitutionally and statutorily insufficient. A trial court is statutorily required to hold a competency hearing *whenever* the issue of competency is raised prior to trial and, in particular, whenever a competency evaluation has been ordered. R.C. 2945.37(B). A single competency hearing is not necessarily sufficient to comply with these statutory requirements. When an issue regarding the defendant’s competency resurfaces after an initial competency hearing, the trial court must conduct another hearing. In this case, the trial court recognized that Hunter had profound mental health issues and “slips in and out of competency.” Indeed, after the initial competency hearing, the trial court ordered Hunter to be forcibly medicated on multiple occasions and referred him for several additional competency evaluations. However, it neglected

enhancements, then its removal of a presumption against an RVO penalty enhancement cannot be retroactively applied to Mr. Hunter.

to hold another competency hearing, at any time, during the seventeen months prior to trial. In so doing, the trial court failed to comply with Ohio law and state and federal due process.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Mr. Hugh Hunter respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions and issues of great general and public interest for review.

Respectfully Submitted,


CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was hand-delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 31 day of March 2008.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

Attachment not scanned

Judge Villanueva

Court of Appeals of Ohio

2008 MAR 14 A 9:41 EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

m(ACI)

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION
No. 89456

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HUGH HUNTER

A520054

DEFENDANT-APPELLANT



**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-456999

BEFORE: Kilbane, J., Gallagher, P.J., and McMonagle, J.

RELEASED: February 28, 2008

JOURNALIZED: MAR 10 2008

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MARY EILEEN KILBANE, J.:

Hugh Hunter ("Hunter") appeals from his conviction and sentence received in the Cuyahoga County Common Pleas Court. Hunter argues that the trial court erred when it failed to conduct a second competency hearing and when it imposed an unconstitutional sentence. For the following reasons, we affirm the decision of the trial court.

On September 1, 2004, Hunter attacked Andrew McAuliffe ("McAuliffe") as McAuliffe was closing up the church after attending the 7:00 o'clock morning mass at Saint Malachi church on 2459 Washington Street in Cleveland, Ohio. Without provocation, Hunter started beating McAuliffe in the face, causing multiple fractures and lacerations. Cleveland Police Officers arrested Hunter that same day.

On September 29, 2004, a Cuyahoga County Grand jury indicted Hunter with felonious assault with repeat violent offender and notice of prior conviction specifications. On October 12, 2004, the trial court referred Hunter to the Court Psychiatric Clinic ("Clinic") for competency and sanity evaluations. On November 10, 2004, the Clinic reported that Hunter "refused to cooperate with the evaluation" and it was therefore unable to render an opinion as to his competency. The trial court ordered that Hunter be transferred to Northcoast

Behavioral Healthcare Center for a twenty-day inpatient competency evaluation. On December 16, 2004, this case was transferred to the mental health docket.

On February 25, 2005, the trial court re-referred Hunter to the Clinic for competency and sanity evaluations. On April 20, 2005, the trial court ordered Hunter to "take his prescribed medications including injectable medications" and authorized the Cuyahoga County Corrections staff to "administer such medications using reasonable force, if necessary." On April 26, 2005, the trial court referred Hunter to the Clinic for a status update. Eventually, the Clinic filed two competency evaluations, dated March 21 and May 11, 2005, both of which concluded that Hunter was competent to stand trial. The State of Ohio ("State") and defense counsel stipulated to the evaluations, and on May 23, 2005, the trial court adopted the findings, concluding that Hunter was competent to stand trial.

After determining Hunter's competency, the trial court attempted to hold a plea hearing. The trial court, through the advice of defense counsel, anticipated that Hunter would plead guilty to felonious assault and the State would dismiss the specifications. However, during the court's discussion with Hunter, it appeared that Hunter believed his attorney did not understand his

position. The trial court postponed the hearing. On June 2, 2005, the trial court held another change of plea hearing. However, at the hearing, Hunter was adamant that he did not want to plead guilty. Because of this decision, the trial court referred Hunter to the Clinic for the fourth time to be re-evaluated for competency and sanity.

On July 28, 2005, the trial court ordered Hunter to undergo an inpatient competency evaluation at Twin Valley Behavioral Healthcare ("Twin Valley") in Columbus. On December 8, 2005, after Hunter returned from Twin Valley, the trial court referred him to the Clinic for a sanity evaluation. However, Hunter refused to cooperate with the Clinic, and on January 11, 2006, the trial court referred him to Twin Valley for an inpatient sanity evaluation. On January 18, 2006, the trial court issued its second order requiring Hunter to take all prescribed medications and permitting staff to use "reasonable force" in administering them. On April 4, 2006, the trial court ordered Hunter returned from Twin Valley.

On May 18, 2006, the trial court conducted its third change of plea hearing and, once again, Hunter stated that he was not going to plead guilty. During a brief hearing on July 13, 2006, the trial court questioned Hunter about whether he was taking his medications. Hunter told the court that he felt

he did not need them, but that he was not feeling well. After that, Hunter slipped off of his chair, fell to one knee, and then lay prone on the floor. The trial court issued its third order requiring Hunter to take all prescribed medications. On July 27, 2006, the trial court referred Hunter, for the sixth time, to the Clinic for competency evaluations.

On October 23, 2006, Hunter's case proceeded to trial. Hunter stipulated to the notice of prior conviction specification and asked that the repeat violent offender specification be bifurcated and determined by the trial court. The court agreed. During trial, the State called two witnesses and rested; defense counsel did not present witnesses. The jury retired and, after deliberating, found Hunter guilty of felonious assault as charged in the indictment.

After the jury's verdict, but prior to the bench trial on the repeat violent offender specification, the parties discussed a possible plea agreement. The potential agreement involved Hunter pleading guilty on an additional felony case in return for the dismissal of the repeat violent offender specification in the present case. Once again, Hunter displayed confusion and ultimately decided he did not want to plead guilty.

That same day, the trial court began Hunter's trial on the repeat violent offender specification. During this portion of his trial, Hunter stipulated to his

indictment and conviction for felonious assault in CR240691 and to the medical records associated with that case. Deputy Sheriff Jimmy Fields testified about his investigation into the 1989 incident. Deputy Sheriff Fields stated that in 1989, Hunter assaulted corrections officer Gregory Rickett while he was in the psychiatric "pod" of the Cuyahoga County Jail. According to Deputy Sheriff Fields, Rickett received a laceration that required stitches. The trial court determined that the "physical harm specification has been proved beyond a reasonable doubt" and proceeded immediately to sentencing.

At the sentencing hearing, the trial court imposed a maximum sentence of eight years on the felonious assault charge and an additional two years for the repeat violent offender specification. The trial court ordered the time to be served consecutively for a total prison sentence of ten years. Hunter appeals, raising three assignments of error.

In his first assignment of error, Hunter argues as follows:

"The trial court's failure to hold a subsequent competency hearing when new issues regarding appellant's competency arose prior to trial violated R.C. 2945.37 and R.C. 2945.371 and denied appellant due process of law."

As the Ohio Supreme Court has observed, "fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial." *State v. Berry*, 72 Ohio St.3d 354, 359, 1995-Ohio-310.

State v. Halder, Cuyahoga App. No. 87974, 2007-Ohio-5940. The test used to determine if a criminal defendant is competent to stand trial was articulated in *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788:

“[T]he test must be whether he [the accused] 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 factual understanding of the proceedings against him.”

The right to a hearing on the issue of competency rises to the level of a constitutional guarantee where the record contains “sufficient indicia of incompetence” that an inquiry into the defendant’s competency is necessary to ensure his right to a fair trial. *Berry*, supra, quoting *Drope v. Missouri* (1975), 420 U.S. 162, 95 S.Ct. 896.

By statute, Ohio recognizes the right of a criminal defendant not to be tried or convicted of a crime while incompetent. R.C. 2945.37(B) provides:

“In a criminal action in a court of common pleas, a county court or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant’s competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after trial has commenced, the court shall hold a hearing on the issue only for good cause shown * .”**

“A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental

condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense.” *State v. Vrabel* (Mar. 2, 2000), Mahoning App. No. 95 CA 221.

Under constitutional due process principles, the standard for determining competency to stand trial is the same as the standard for determining competency to enter a guilty plea or a plea of no contest. *Halder, supra; State v. Kovacek* (May 30, 2001), 9th Dist. No. 00CA007713. The burden of establishing incompetence, however, is upon the defendant. *Halder, supra*. In reviewing a judge’s determination of competency, we examine whether the conclusion was supported by competent, credible evidence. *State v. Hicks* (1989), 43 Ohio St.3d 72, 79. A judge’s decision on competency will not be disturbed absent an abuse of discretion. *Halder, supra*.

In the present case, Hunter’s competency to stand trial was raised before the trial started. The record establishes that the trial court complied with the mandates of R.C. 2945.37 before the trial started. The court ordered numerous mental examinations to ensure that Hunter was competent to stand trial. In addition, the trial court conducted a hearing and all parties were given an opportunity to present evidence. In fact, the State and defense counsel stipulated to the competency evaluations prepared by the Clinic. After hearing the stipulations, the trial court adopted the reports and found Hunter

competent to stand trial. In *State v. O'Neill*, Mahoning App. No. 03 MA 188, 2004-Ohio-6805, the Seventh Appellate District determined that "where the parties stipulate to the contents of the competency reports which opine that the defendant is competent, the parties stipulate to competency and waive the competency hearing."

Nonetheless, Hunter argues that because over a year passed between his competency hearing and the time of trial, and issues of competency had been raised, the trial court should have conducted a second competency hearing. We note that Hunter's trial counsel never requested a second competency hearing and was comfortable enough with the trial court's decisions referring him for further competency and sanity evaluations and ordering Hunter to take his prescribed medications. In addition, at each stage in the process, the trial court took the time to question Hunter to determine if he was able to assist in his own defense. While no one disputes that Hunter suffers from "profound mental health issues," incompetency to stand trial "must not be equated with mere mental or emotional instability or even outright insanity." *State v. Bock* (1986), 28 Ohio St.3d 108; *Halder*, supra.

After reviewing the entire record before us and examining the totality of the evidence on the issue of competency, we conclude that there was competent,

credible evidence before the trial court to support a finding of competency to stand trial. We further find that the trial court did not abuse its discretion when it failed to conduct a second competency hearing. The trial court had sufficient evidence to indicate that Hunter was presently capable of consulting with his attorneys. Accordingly, we overrule Hunter's first assignment of error.

In his second assignment of error, Hunter argues as follows:

"The RVO enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury."

Hunter argues that the repeat violent offender ("RVO") specification is unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 and, therefore, the trial court erred when it sentenced him to additional prison time under the RVO specification. Hunter asks this court to vacate the additional two-year sentence imposed under the RVO specification. We disagree and affirm the actions of the trial court.

This court recently addressed this identical issue in *State v. Fitzer*, Cuyahoga App. No. 88177, 2007-Ohio-2496, and held as follows:

"In *State v. Foster* syllabus 6, the Ohio Supreme Court held: 'R.C. 2929.14(D)(2)(b) and (D)(3)(b) are capable of being severed. After the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender

specifications. (*United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738.) We read this to mean that only the offending portion of R.C. 2929.14(D)(2)(b) is severed. Consequently, the imposition of an additional penalty for the RVO violation is constitutional. Thus, a judge may impose an additional one-to-ten year sentence on an RVO specification without judicial factfinding. Consequently, this case is *Blakely-Booker-Foster* compliant.”

In the present case, the record indicates that the grand jury indicted Hunter on the RVO specification on September 29, 2004. The record further indicates that after a bench trial in which the State presented evidence, the trial court concluded that the RVO specification had been proven beyond a reasonable doubt. Accordingly, the additional sentence was imposed without judicial fact finding. See, also, *State v. Roberson*, Cuyahoga App. No. 88338, 2007-Ohio-2772.

For the reasoning stated in *Fitzer*, *supra*, and *Roberson*, *supra*, we overrule Hunter’s second assignment of error.

In his third and final assignment of error, Hunter argues as follows:

“Appellant was deprived of his liberty without due process of law when he was sentenced under a judicially altered, retroactively applied, and substantially disadvantageous statutory framework.”

In this assigned error, Hunter argues that *Foster*, *supra*, should not apply to his case because his crime occurred prior to the *Foster* decision. Hunter also

claims his due process rights were violated with an ex post facto application of *Foster* because the crime occurred before *Foster* was released. In *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715, this court concluded that the remedial holding of *Foster* does not violate a defendant's due process rights or the ex post facto principles contained therein.

Based on this court's precedent, we overrule Hunter's third and final assignment of error.

The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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



MARYEILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR