

NO. 08-0661

THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 89456

STATE OF OHIO,

Plaintiff-Appellee

-vs-

HUGH HUNTER,

Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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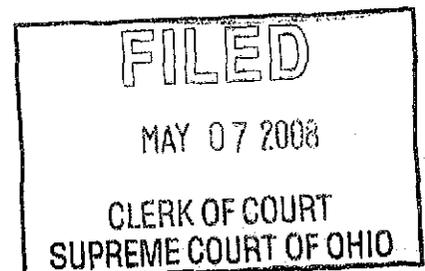


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I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST IN PART

In this case, the State asks that this Court accept Appellant's first proposition of law and reject his second and third propositions of law. Appellant asks that this Court determine whether the enhanced penalty for Repeat Violent Offender Specification pursuant to R.C. 2929.14(D)(3)(b) was excised in its entirety and trial courts may no longer impose the penalty. As this Court has taken this issue for consideration in *State v. Sanchez*, Ohio Supreme Court Case No. 2008-0429, the State asks that this case be accepted for review as to Appellant's first proposition of law only and be stayed pending the resolution of *Sanchez*.

Appellant has not presented this Court with issues that involve substantial constitutional questions or an issue of great general and public interest within his second and third propositions of law. Appellant argues within his second proposition of law that the remedy of resentencing announced by this Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 is unconstitutional. This Court has rejected Appellant's argument since that decision and should continue to do so as the remedy of resentencing announced in *Foster* does not violate Appellant's constitutional rights.

In his third proposition of law, Appellant does not raise a constitutional question nor an issue of great public import; he merely asks this Court to review the decision of the appellate court for error correction where he disagrees with the discretion exercised by the trial court and affirmed by the appellate court. Appellant asks this court to place bright line rules and mandate competency hearings despite the trial court's finding that a criminal defendant is found to be competent to stand trial. As the trial court committed

no error and where the appellate court properly affirmed the trial court's actions in this matter regarding the issues of Appellant's competency, the State asks that this Court decline Appellant's third assignment of error.

II. STATEMENT OF THE CASE AND FACTS

After a bifurcated trial, Appellant was convicted of felonious assault in violation of R.C. 2903.11 by a jury and of a repeat violation offender specification in violation of R.C. 2941.149. The trial court sentenced Appellant to the maximum sentence of eight years for felonious assault and an additional two years for the repeat violent offender specification for an aggregate sentence of a term of incarceration of ten years. In its opinion, the Eighth District Court of Appeals found the following facts relevant to its determination of Appellant's assignments of error:

{¶ 2} 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 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.

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.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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.

State v. Hunter, Cuyahoga App. No. 89456, 2008-Ohio-794, at ¶ 3-10.

III. LAW AND ARGUMENT

A. APPELLANT'S PROPOSITION OF LAW NO. 1 SHOULD BE ACCEPTED AND HELD PENDING *STATE V. SANCHEZ*

Appellant's first proposition of law reads:

The RVO-enhanced sentences 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 *State v. Sanchez*, Ohio Supreme Court Case No. 2008-0429, this Court accepted jurisdiction based upon a conflict within the appellate districts and ordered the parties to brief the following question:

"Pursuant to [*State v. Foster* [109 Ohio St.3d 1, 2006-Ohio-856], has R.C. 2929.14(D)(3)(b) been severed in its entirety, thereby precluding a trial court from imposing an additional sentence upon a person found to be a major drug offender? Alternatively, has the court's decision in *Foster* severed only the violative portion of R.C. 2929.14(D)(3)(b) that required the trial court to engage in judicial fact finding before imposing an add-on sentence?"

117 Ohio St.3d 1456, 884 N.E.2d 66 (Table), 2007-Ohio-6697, quoting *State v. Sanchez*, Greene App. No. 06-CA-154, 2007-Ohio-6697, Decision and Entry filed February 6, 2008.

In *Foster*, this Court held at syllabus paragraph 6, "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, 160 L.Ed.2d 621, followed.)"

The clear intent of this Court's decision was pronounced in the syllabus; this Court had no intention of denying the legislative intent to provide for additional enhanced sentencing for repeat violent offenders and major drug offenders. In *State v. Fitzer*, Cuyahoga App. No. 88177, 2007-Ohio-2496, the Eighth Appellate district followed this Court's pronouncement of law in *Foster* at syllabus paragraph 6, holding, "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 fact-finding." *Id.*, at ¶ 6. There is no ambiguity in this Court's holding in the syllabus in *Foster* and this Court has determined that intent.

In *State v. Evans*, 113-Ohio-St.3d-100, this Court affirmed the validity of repeat violent offender sentencing after *Foster*. In *Evans*, at paragraph 8, this Court's stated:

At the time the court of appeals conducted its review in this case, we had not yet decided three cases that are relevant here. In the first, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, in accordance with decisions of the United States Supreme Court in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, *Ring v. Arizona* (2002), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403, we held that statutory requirements that trial judges make certain findings before imposing an enhanced sentence are unconstitutional. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 440, paragraph one of the syllabus. We severed the offending statutes and held that trial courts "are no longer required to make findings or give

their reasons for imposing maximum, consecutive, or more than the minimum sentences" or "before imposition of additional penalties for repeat-violent-offender and major-drug-offender specifications." *Id.* at paragraphs six and seven of the syllabus.

Appellant raises no novel arguments in asking that this Court overrule its decision in *Foster*. Rather, he asks this Court to reconsider its holding. Although he relies on *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, that case does not determine whether or not the legislative intent to provide a penalty for repeat violent offenders was severed by this Court's holding in *Foster*, this Court stated that, "In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, we held that R.C. 2929.14(D)(3)(b) is unconstitutional under *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, because it required judicial factfinding before an additional ten years of prison could be imposed. *Id.* at paragraph five *228 of the syllabus. We severed R.C. 2929.14(D)(3)(b) to remedy the constitutional violation. *Id.* at paragraph six of the syllabus. 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. *Id.*" However, it did not address or overrule the syllabus law in *Foster* that clearly provides for enhanced sentencing. To rely on a case that did not address the specific issue presented in *Sanchez* and did not specifically overrule syllabus law is not compelling.

The general assembly provided for enhanced penalties for repeat violent offenders. Prior to *Foster*, convicted felons were on notice that the commission of further crimes of violence were subject to enhanced penalties. This Court recognized these premises by holding the enhanced penalties found in R.C. 2929.14(D)(2)(b)

remained in force after Foster. This Court affirmed that holding in Evans and the State asks that if this Court accepts Appellant's proposition of law that it continue to allow trial courts to impose an enhanced penalty to protect the public from repeat violent offenders.

B. APPELLANT'S SECOND PROPOSITION OF LAW SHOULD NOT BE ACCEPTED FOR REVIEW.

Appellant's second proposition of law reads:

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

Since this Court's decision in *Foster*, Appellant's proposition of law has been presented in several different ways but the basis of the claim has been that this Court's decision in *Foster* violates the *Ex Post Facto* clause of the United States and Ohio Constitutions and a defendant's due process rights. Every intermediate appellate court has rejected this argument.

More importantly, this Court consistently denies leave to appeal this claim from the appellate courts. In September 2007, this Court denied leave to appeal a similar claim in *State v. Ferko*. Sup. Ct. No. 2007-0971. In January 2008, this Court again denied leave to appeal a similar claim in *State v. Farmer*. Sup. Ct. No. 2007-1820. This proposition does not present this Court with a legitimate constitutional issue. The State asks that this Court decline to hear Appellant's second proposition of law.

c. APPELLANT'S THIRD PROPOSITION OF LAW SHOULD NOT BE ACCEPTED FOR REVIEW.

Appellant's third proposition of law reads:

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

The appellate court did not error in rejecting Appellant's arguments as to the trial court's finding that Appellant was competent to stand trial. Appellant does not raise a constitutional question nor an issue of great public import; he merely asks this Court to review the decision of the appellate court for error correction where he disagrees with the discretion exercised by the trial court and affirmed by the appellate court. Appellant asks this court to place bright line rules and mandate a competency hearing despite the trial court's finding that a criminal defendant is found to be competent to stand trial. As the trial court committed no error and where the appellate court properly affirmed that trial court's actions in this manner regarding the issues of Appellant's competency, the State asks that this Court decline Appellant's third assignment of error.

The Eighth District noted that Hunter stipulated that he was competent to stand trial after the first competency evaluation was completed. Hunter's attorney never raised the issue of competency again. Although the trial court did not hold a subsequent competency hearing, "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." *State v. Hunter*, Cuyahoga App. No. 89456, 2008-Ohio-794 at ¶ 18. The trial court was in the best position to determine whether to hold an unrequested competency hearing. Further, the record in this case does not reflect (nor does Appellant note) that Appellant was not competent during trial or that cause was given to order a further competency evaluation. The trial court was steadfast in its duty to ensure that Hunter understood the

nature of the proceedings and was able to assist in his defense. For these reasons, this proposition of law should not be taken.

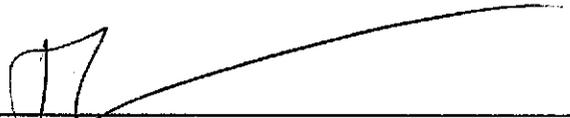
IV. CONCLUSION

The State asks that this Court accept only Appellant's first proposition of law and hold such case pending this Court's decision in State v. Sanchez. Further, Appellant has not presented issues of law in his second and third propositions of law that merit resolution by this Court.

Respectfully submitted,

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SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction has been mailed this 6th day of May 2008, to Cullen Sweeney, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.



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