

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

ROBIN SCHAEFER-KRAFT

Defendant-Appellant.

On Appeal from the
Court of Appeals,
First Appellate District,
Hamilton County, Ohio

Court of Appeals
Case No. C060979

08-0971

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBIN SCHAEFER-KRAFT**

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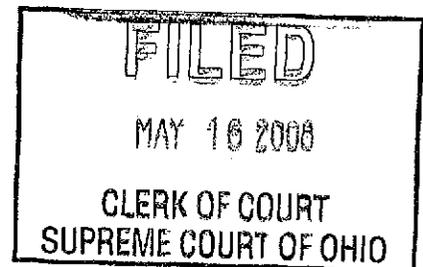


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IN ADDITION TO INVOLVING A FELONY, WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST, INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED.

Every Ohio citizen has an interest in a determinate criminal sentencing system and effective representation to understand that system. The United States Constitution and Ohio Constitution not only guarantee a defendant the right to representation, but effective representation. Absent knowledge of the determinate penalties, explained by an effective representative, a defendant cannot knowingly, voluntarily or intelligently enter into a plea agreement. If possible, this role is even more important when a defendant suffers from mental illness.

This case raises two substantial constitutional questions. First, because courts are slow to recognize the pervasive nature of mental illness and its influence on our criminal justice system, any review of claims of a involuntary plea can no longer consist of rubber stamping. Ohio courts of appeal rely on the Ohio Supreme Court's holding that a "defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel."¹ Yet, as advances are made in understanding mental illness this Court must avoid such blanket holdings. The First District Court of Appeals erred when it held her plea was voluntary despite Ms. Schaefer-Kraft's lack of competency and effective assistance of counsel.

Second, *State v. Foster* is incompatible with the controlling precedent of the United States Supreme Court. The appellate court erred in overruling the violation of Ms. Schaefer-Kraft's right to trial by jury when the trial court sentenced her to a term of incarceration which exceeded the statutory maximum mandated by the Sixth and Fourteenth Amendments; the violation of Ms. Schaefer-Kraft's rights under the Ex Post Facto Clause of the Federal

¹ State v. Bock (1986), 28 Ohio St.3d 108, 110, 502 N.E.2d 1016.

Constitution by sentencing her to a term of incarceration which exceeded the maximum penalty available under the statutory framework at the time of the offense; and the violation of the rule of lenity.

Ms. Schaefer-Kraft's sentencing and unknowing, involuntary and unintelligent plea raises substantial constitutional questions. Further, this Courts decision in *Foster* has affected a great number of cases. The resolution of these issues is a question of great public interest.

PROCEDURAL POSTURE

Defendant-Appellant, Robin Schaefer-Kraft, was indicted for two counts of rape, three counts of rape with specifications, three counts of attempted rape, four counts of felonious assault, and four counts of endangering children on August 26, 2005.²

On September 21, 2005 the Court approved payment of psychological expert for the defense³ and appointed court clinic forensic services for an examination of Robin.⁴ On October 17, 2005, the report of the court clinic was returned⁵ and on October 18, 2005 Robin was found incompetent to stand trial.⁶ The court ordered Robin receive treatment pursuant to R.C. § 2945.38.⁷ On April 12, 2006, Robin's competence was restored, but the court clinic determined her competence would have to be maintained in an inpatient setting until her criminal charges were resolved.⁸

Having allegedly restored her competence, the court conducted a hearing on a motion to suppress to exclude the use of Robins' statements⁹ and overruled the motion.¹⁰ On June 19, 2006

² T.d. 1.

³ T.d. 10.

⁴ T.d. 11.

⁵ *Id.*

⁶ T.d. 19.

⁷ *Id.*

⁸ T.d. 27.

⁹ T.p. 1 (Supplemental Transcript).

¹⁰ T.p. 5

Robin entered a plea of guilty to two counts of rape and four counts of endangering children.¹¹

Robin was sentenced to ten years on each count of rape and 5 years on each count of child endangering. Her sentence was to run consecutively for a maximum sentence of forty years.¹²

The First District affirmed the trial court decisions. See Appendix, April 2, 2008, Opinion and Judgment Entry of First District Court of Appeals, attached.

STATEMENT OF THE FACTS

The charges against Ms. Schaefer-Kraft involve allegations she and her husband engaged in sexual acts with their children. It was clear from the beginning; Ms. Schaefer-Kraft suffered from mental illness and had been severely abused by her husband. The competency evaluation revealed Robin had a guardian spirit, Mikey, who comes to her when she is scared and when she has nightmares.¹³ Robin was the victim of childhood sexual abuse and rape according to University Hospital Records. Paul Kraft, Robin's husband, who was facing similar charges and had been incarcerated on prior sexual abuse allegation, introduced Robin to drugs and emotionally and physically abused her by strapping her to the bed and beating her with a belt. Robin revealed "[H]e's my master ... he owns me ... I had to call him Daddy and Master."¹⁴

In order to combat her mental illness, Robin said she would basically try to self-medicate herself from the voice that she heard.¹⁵ The medication made her high, easily persuaded,¹⁶ and not able to remember most things.¹⁷

Relying on her ineffective counsel, Robin entered a plea of guilty to two counts of rape and four counts of endangering children.¹⁸ Her attorney advised Robin and her family she would

¹¹ T.d. 39.

¹² *Id.*

¹³ T.d. 17.

¹⁴ *Id.*

¹⁵ T.p. 5 (Supplemental Transcript).

¹⁶ T.p. 8 (Supplemental Transcript).

¹⁷ T.p. 10-11 (Supplemental Transcript).

receive the minimum sentence in a mental health facility and never suggested Robin pled no contest to preserve rights on appeal. As a result, Robin was sentenced to the maximum penalty on each count.

PROPOSITION OF LAW NO. 1

THE FIRST APPELLATE DISTRICT ERRED BY NOT FINDING ROBIN'S COUNSEL WAS INEFFECTIVE.

The purpose of the right to counsel is to protect the fundamental right to a fair trial.¹⁹ The Sixth Amendment to the United States Constitution guarantees individuals who are criminally accused the right to counsel.²⁰ The corresponding right is also guaranteed in the Ohio Constitution.²¹

Counsel must provide representation that is objectively reasonable in light of the circumstances.²² The right to counsel is the right to effective assistance of counsel.²³ To prevail on a claim of ineffective assistance of counsel, Robin must show counsel acted unreasonably and but for counsel's errors, there exists a reasonable probability that the results of the proceedings would have been different.²⁴ If there is a reasonable probability that the outcome of the proceeding would have been different if not for counsel's errors, the trial court's judgment will be reversed.²⁵

It has been determined the "failure to move the court to conduct a hearing to determine the mental competency of the accused falls below an objective standard of reasonable representation as to the prejudice of the accused by depriving him of a right guaranteed by the

¹⁸ T.d. 39.

¹⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁰ U.S. Const. Amend. IV; *Gideon v. Wainwright*, 372 U.S.335, 83 S. Ct. 792 (1963).

²¹ Ohio Const. Art. I, 10.

²² *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976).

²³ *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970).

²⁴ *Strickland*, 446 U.S. at 687-89.

²⁵ *State v. Bradley*, 42 Ohio St.3d 136 (1989) paragraph three of the syllabus.

federal and state constitutions.”²⁶ A defendant received ineffective assistance of counsel where counsel fails to formally raise the issues of competency and sanity, or to examine the psychiatrist who had prepared an evaluation upon a court referral.²⁷

Robin was found incompetent to stand trial on October 14, 2005.²⁸ In the report the examiner described Robin as having a guardian spirit, Mikey,²⁹ the victim of childhood sexual abuse and rape, introduced to drugs and emotionally and physically abused by being strapping to the bed and beaten with a belt.³⁰ The examining psychologist revealed Robin was diagnosed with Posttraumatic Stress Disorder from her history of childhood sexual abuse and rape, felt like committing suicide and Adjustment Disorder with depressed mood.³¹

During the first attempt to examine Robin on September 30, 2005 she was so emotionally distraught and tearful, the psychologist asked she be seen by the Hamilton County Justice Center (HCJC) Mental Health Unit to be placed on psychotropic medication, which was continually being adjusted.³² After being seen by the Mental Health Unit at the HCJC, Robin was further diagnosed with Major Depressive Disorder, Posttraumatic Stress Disorder, and acute Anxiety.³³

The report finding Robin competent echoed similar concerns.³⁴ She heard voices, was alcohol dependent, took Xanax and had been diagnosed with borderline personality disorder, posttraumatic stress disorder and major depression at various times in her life. Robin continued to speak of her “guardian spirit” Mickey and periodically described auditory hallucinations. Robin still believed her husband had astrologically projected into her room at the hospital and

²⁶ *State v. Brown*, C92-0300, First District App. Feb. 19, 1993, (citing *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373).

²⁷ *State v. Brown* (1992), 84 Ohio App. 3d 414, 616 N.E.2d 1179.

²⁸ T.d. 17.

²⁹ T.d. 17.

³⁰ *Id.*

³¹ T.d. 17.

³² *Id.*

³³ *Id.*

³⁴ T.d. 29.

attacked her several times and had seen the ghosts of people who died in the hospital many years ago.³⁵

The diagnosis of the physician finding her competent was of chronic mental health issues including: posttraumatic stress disorder, alcohol dependence, borderline personality disorder and dependent personality disorder.³⁶ While the physician determined she was competent, he recommended she remain in an inpatient setting until her criminal charged were resolved because the greater the stress the more likely she was to produce auditory hallucinations and exacerbate her mystical perception and possibly suicidal ideas or act. The greater the stress the more likely Ms. Kraft would decompensate to the point she would become incompetent to stand trial.³⁷

Under these circumstances there is no trial tactic or strategy that would justify trial counsel failing to enter a plea of not guilty by reason of insanity or examine the psychiatrist who had prepared the evaluation. The record clearly indicates counsel never filed a plea of not guilty by reason of insanity on Robin's behalf. A person is "not guilty by reason of insanity" relative to a charge of an offense if the person proves at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.³⁸

Both reports indicate she had been suffering from mental illness for a number of years and was currently suffering from mental illness. Counsel's failure to enter a plea of not guilty by reason of insanity clearly fell below an objective standard of reasonable representation.

Prejudice arose from counsel's performance because based on the competency evaluation alone,

³⁵ *Id.*

³⁶ T.d. 29.

³⁷ *Id.*

³⁸ R.C. 2901.01 (A)(14)

detailing longstanding mental health disorders, there is a reasonable probability Robin could have succeeded on an insanity defense. Robin received ineffective assistance of counsel where counsel failed to formally raise the issue of sanity.

Likewise, under these circumstances there is no trial tactic or strategy that would justify trial counsel failure to challenge the final competency evaluation. The record clearly indicates counsel never sought to challenge the final competency report and the record only indicates an entry from the trial court Robin was now competent to stand trial.³⁹

Trial counsel had the opportunity to challenge the competency report by requesting a hearing. Robin's trial counsel was even granted payment for its own psychological expert,⁴⁰ yet Robin's counsel made no request to have the examining physician testify or to present contrary evidence. This failure fell below the objective standard of reasonable representation and prejudiced Robin by denying her rights guaranteed under the federal and state constitutions.

PROPOSITION OF LAW NO. 2

THE FIRST APPELLATE DISTRICT ERRED BY FINDING ROBIN COMPETENT AND ABLE TO UNDERSTAND THE IMPLICATION OF HER PLEA.

Crim. R. 11(C) requires the court to determine if a defendant is making a plea voluntarily, with an understanding of the nature of the charges and of the maximum penalty involved and determine if a defendant understands the effect of the plea of guilty. If the court cannot ensure the above requirements it shall not accept a guilty plea.⁴¹ In order to evaluate whether a guilty plea was entered knowingly, voluntarily, and intelligently a reviewing court will examine the totality of the circumstances.⁴²

³⁹ T.d. 47.

⁴⁰ T.d. 10.

⁴¹ Crim. R. 11.

⁴² *State v. Nero*, (1990) 56 Ohio St.3d 106, 108, 564 N.E.2d 474.

There must be some evidence the guilty plea was not the result of coercion, deception or intimidation, counsel's advice was competent in light of the circumstances surrounding the indictment, the plea was made with the understanding of the nature of the charges and the defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial or both.⁴³

In order to appreciate these considerations a defendant must be competent to stand trial. A criminal defendant is presumed competent to stand trial unless it is established that she is unable to understand the nature of the proceedings and cannot assist in her defense.⁴⁴ If determined to be incompetent, a defendant cannot enter a plea knowingly, intelligently or voluntarily.

Even if this Court determines Robin was competent to the level required for a proper plea, the mere fact she is competent to stand trial does not necessarily mean she has the mental capacity needed for and required by due process to make an intelligent decision to plead guilty. If there are facts which indicate she cannot make an intelligent plea due to other factors, such as the inability to handle the stress of a trial, which do not rise to the level of incompetence as determined by the court appoint physician, these factors may still deny a defendant her constitutional right to due process.

In her final competency evaluation dated April 10, 2006 Robin remains very fearful of her husband, remains convinced of his supernatural ability to continue to torment her as well as reach her through his friends and family to cause harm and continues to discuss her guardian spirit Mickey.⁴⁵ In finding Robin competent, the examining physician recommends the only way to maintain Robin's competence is through inpatient hospitalization until her criminal charges

⁴³ State v. Piacella (1971), 27 Ohio St.2d 92, 271 N.E.2d 852, at syllabus.

⁴⁴ R.C. 2945.37(A).

⁴⁵ T.d. 29.

are resolved. If Robin were to experience a high level of stress she was likely to have more auditory hallucinations and exacerbation of her mystical perceptions and possibly suicidal ideas or acts. The greater the stress, the more likely Robin would decompensate to the point that she would become incapacitated and incompetent to stand trial.⁴⁶

The above conclusion is eerily similar to the first report finding Robin incompetent. The examining psychologist stated: “[d]ue to her high level of agitation, the defendant is extremely compromised in her ability to relate to an attorney. Although the defendant can disclose available pertinent facts regarding the alleged offenses, she could not be expected to challenge prosecution witnesses or to testify relevantly on her own behalf given her current mental state.”⁴⁷ “The defendant’s current mood disorder would compromise her ability to tolerate the stress of a trial or hearing and to participate in a reasonable manner.”⁴⁸

The same mental disorders establishing Robin was unable to understand the nature of the proceedings and could not assist in her defense were now overlooked so long as she continued inpatient hospitalization until her criminal charges were resolved. Yet, the second examining physician strongly warned the greater the stress, like a trial, would cause Robin to decompensate to the point she was incompetent to stand trial.

Ironically, the April 10, 2006 report found Robin competent to stand trial, but the words used to explain her competence are clearly the same as used to declare her incompetent. As such it is clear Robin was not able to enter the plea knowingly, voluntarily and intelligently because a segment of her constitutional rights, including the right to trial, were unavailable to her as a result of her mental disorders.

⁴⁶ T.d. 29.

⁴⁷ T.d. 17.

⁴⁸ *Id.*

Even assuming the report finding Robin competent is accepted by this Court, due process demands Robin have the mental capacity required to make an intelligent fully informed decision. A trial was not an option for Robin because as the report indicates, any great stressor would cause Robin to become incompetent. Therefore, her decision to plead guilty was not knowing, voluntary or intelligent and a violation of due process because she was not competent and because she was unable to make a fully informed intelligent decision as a result of her mental disorders. The appellate court erred by holding Robin's plea was voluntary.

PROPOSITION OF LAW NO. 3

THE FIRST APPELLATE DISTRICT ERRED BY NOT FINDING SENTENCES IN EXCESS OF THE STATUTORY MAXIMUM, INCOMPATIBLE WITH THE CONTROLLING PRECEDENT OF THE UNITED STATES SUPREME COURT AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS.

The sentence rendered by the Court of Common Pleas and upheld by the First District Court of Appeals in this case violates the Sixth and Fourteenth Amendments to the Federal Constitution, and the decision of the Supreme Court of *State v. Foster*⁴⁹ which purportedly authorizes the sentence. *Foster* is incompatible with the controlling precedent of the United States Supreme Court. The decision of the First District Court of Appeals must be reversed and this case remanded with instructions to enter minimum and concurrent terms of incarceration.

The jury trial guarantee of the Sixth Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment.⁵⁰ Once a legislature, state or federal, has predicated the availability of a criminal penalty upon proof of a particular fact, the penalty may not be imposed unless the fact has been admitted by the defendant or found by a jury to have

⁴⁹ (2006), 109 Ohio St.3d 1, 2006-Ohio-856.

⁵⁰ *Duncan v. Louisiana* (1968), 391 U.S. 45.

been proven beyond a reasonable doubt.⁵¹ “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact - no matter how that state labels it – must be found by a jury beyond a reasonable doubt.”⁵²

As explained in *Blakely*, if a legislature enacts a mandatory determinate criminal sentencing system, the Sixth Amendment forbids a court from imposing any penalty in excess of the statutory maximum unless the required factual findings have been made in accordance with the right to trial by jury.⁵³ The “statutory maximum” 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.”⁵⁴ As a result, prior to the decision of the Ohio Supreme Court in *Foster*, the Sixth and Fourteenth Amendments prohibited the imposition of non-minimum consecutive sentences in Mr. Mitchell’s case.⁵⁵ Here Ms. Schaefer-Kraft was convicted of two counts of rape and four counts of child endangering. Because the Federal Constitution required the imposition of minimum sentences and forbade the imposition of consecutive sentences, the only lawful sentence which could have been rendered against Ms. Schaefer-Kraft prior to *Foster* was a minimum term of imprisonment.⁵⁶

The decision of this Court in *Foster* is incompatible with the controlling precedent of the United States Supreme Court as it relates to unconstitutional criminal sentences. As a result, post-*Foster* sentencing as applied to Ms. Schaefer-Kraft case violates the Federal Constitution.

PROPOSITION OF LAW NO. 4

⁵¹ *United States v. Booker* (2005), 543 U.S. 220; see also *Blakely v. Washington* (2004), 542 U.S. 296; *Apprendi v. New Jersey* (2000), 530 U.S. 466; *Jones v. United States* (1999), 526 U.S. 227; *Foster*, 2006 Ohio-865 at ¶¶2-12.

⁵² *Ring v. Arizona* (2002), 536 U.S. 584, 602.

⁵³ *Blakely*, 542 U.S. 296.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Foster*, 2006-Ohio-856 at ¶¶ 156-67; *In re Criminal Sentencing*, 2006-Ohio-2109 at ¶221; *State ex rel Mason v. Griffin* (2004), 104 Ohio St.3d 279, 282.

THE FIRST DISTRICT COURT OF APPEALS ERRED BY NOT FINDING THE TRIAL COURT VIOLATED MS. SCHAEFER-KRAFTS' RIGHTS UNDER THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION BY SENTENCING HER TO A TERM OF INCARCERATION WHICH EXCEEDED THE MAXIMUM PENALTY AVAILABLE UNDER THE STATUTORY FRAMEWORK AT THE TIME OF THE OFFENSE.

The Ex Post Facto Clause prohibits the Ohio General Assembly from retroactively increasing the penalty for a crime which has already been committed.⁵⁷ If the Ohio General Assembly has passed a law repealing the statutory maximums which were held unconstitutional and severed in *Foster*, the Ex Post Facto Clause would have prohibited the application of any increased penalty upon Ms Schaefer-Kraft.

The Ex Post Facto Clause clearly does not permit a patently unlawful penalty to be imposed merely because the increased statutory maximum resulted from judicial severance instead of legislative action. In *Rogers v. Tennessee*, the Supreme Court was careful to note that retroactive application of pure common law principles was sometime permissible because such judicial acts, whether they be characterized as “making” or finding” the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements.⁵⁸

In contrast, the unilateral judicial severance of a statute has noting to do with “the incremental and reasoned development of precedent that is the foundation of the common law system.” Retroactive judicial severance of a statute places the accused in exactly the same circumstances he would be in if the legislature enacted an unlawful ex post facto law. The mere fact that the statute is changed by judicial degree rather than legislative act is irrelevant: the

⁵⁷ See, e.g., *Ring*, 536 U.S. at 602.

⁵⁸ (2001) 532 U.S. 451 at 460-61.

statute itself is what has been changed, not merely the prevailing judicial interpretation of the meaning of the statute.⁵⁹

Because judicial severance changes the actual terms of the statute, it must be viewed as in effect, an implied legislative change. *Foster* ruled that the severance remedy, including severance of those provisions that did not violate the Sixth Amendment (for example, presumptive minimum sentences), was the remedy of the General Assembly would have intended.⁶⁰ Viewed as a legislative change, the Ex Post Facto Clause applies directly, and it bars any retroactive application of the *Foster* remedy to the detriment of Jamin.⁶¹ Legislative actions the Ohio Supreme Court rules the General Assembly would have intended must be subject to the same Ex Post Facto limitations as legislation that the General Assembly actually passes. The Ex Post Facto Clause prohibits the State of Ohio from retroactively increasing a criminal penalty, whether legislatively or judicially.

Even, assuming arguendo, the act of judicial severance which expands the available range of punishment falls outside the proscriptions of the Ex Post Facto Clause; it can still exceed the limits on retroactive judicial decisions as explained in *Rogers*.⁶² The court expressly noted that its holding was based in part on the fact that the retroactive decision at issue did not involve “. . . the interpretation of a statute but an act of common law judging.”⁶³

The decision of the Ohio Supreme Court in *Foster* did not merely constitute judicial interpretation of the meaning of a statute; the sentencing statutes themselves were altered and enlarged through judicial severance, an act of common law judging. Nevertheless, assuming the

⁵⁹ See *State v. Waddell* (N.C. 1973), 194 S.E. 2d 19, 29-30, abrogated on other grounds, *Woodson v. North Carolina* (1970), 428 U.S. 280; see also *State v. Watkins* (N.C. 1973), 196 S.E. 2d 750, 755.

⁶⁰ *Foster* ¶ 90-92.

⁶¹ See, *Miller v. Florida* (1987), 482 U.S. 423, 431.

⁶² (2001) 532 U.S. 451 460-61.

⁶³ *Id.*

Ex Post Facto Clause does not reach this act of judicial severance, the decision in *Foster* still violated the Fourteenth Amendment because “[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.”⁶⁴ The Fourteenth Amendment prohibits the Supreme Court of Ohio from achieving the same unconstitutional legislative result through an act of judicial severance.⁶⁵ Consequently, the holding of *Rogers* prohibits the State of Ohio from imposing any term of incarceration exceeding the minimum on Robin.

PROPOSITION OF LAW NO. 5

THE RULE OF LENITY REQUIRES THE IMPOSITION OF MINIMUM AND CONCURRENT SENTENCES.

Ms. Schaefer-Kraft’s sentence violates the rule of lenity. The rule of lenity cautions against increasing the penalty imposed upon a particular offender where the increase is based on nothing more than a guess as to what criminal sanction the legislature intended.⁶⁶ The General Assembly has expressly incorporated the rule of lenity into the statutory framework of Ohio’s criminal justice system.⁶⁷

The attempt to constitutionalize Ohio’s sentencing statutes by excising all clauses that restrict the trial court’s discretion to impose higher sentences does not pass the test of lenity. The enabling statute specifics “increased penalties for offenses based upon the seriousness of the

⁶⁴ *Bowie v. City of Columbia* (1964), 378 U.S. 347, 353-54.

⁶⁵ *Id.* at 378 U.S. at 353-45; accord *Rogers*, 532 U.S. at 460-61.

⁶⁶ *Ladner v. United States* (1958), 358 U.S. 169, 178.

⁶⁷ *State v. Best*, Mahoning App. No. 04 MA 203, 2005-Ohio-4375 at ¶44-46; *State v. Quisenberry* (1994), 69 Ohio St.3d 556, 557.

offense and the criminal history of the offender,” with judicial discretion to be limited to these goals.⁶⁸

These goals were embodied in the statutes ultimately enacted and subsequently voided by the Ohio Supreme Court in *Foster*. These have been replaced by a judicial decision that findings are only required when a trial court seeks to impose a sentence below the statutory presumption.⁶⁹ This construction imposes the least lenient construction of the statute on defendants sentenced after *Foster* and violates the statutory limits placed on judicial construction of legislative pronouncements.

CONCLUSION

Based on the foregoing, Ms. Schaefer-Kraft requests this Court accept jurisdiction and grant leave to appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify a true and exact copy of the foregoing Memorandum in Support of Jurisdiction was served upon the Hamilton County Prosecuting Attorney by ordinary US mail this 13 day of May 2008.



RAVERT J. CLARK

⁶⁸ R.C. 181.24(B)(1)(3).

⁶⁹ *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, at ¶21.

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

STATE OF OHIO,	:	APPEAL NO. C-060979
	:	TRIAL NO. B-0508400
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ROBIN SCHAEFER-KRAFT,	:	
	:	
Defendant-Appellant.	:	

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

Defendant-appellant Robin Schaefer-Kraft was indicted for six counts of rape,² three counts of attempted rape,³ three counts of felonious assault,⁴ and four counts of endangering children.⁵ (The charges involved Schaefer-Kraft and her husband engaging in sexual acts with their children.) The trial court found her incompetent to stand trial and ordered her hospitalized. Schaefer-Kraft was restored to competency, but the trial court ordered that she remain in the hospital during the trial to preserve her competency.

Once Schaefer-Kraft was restored to competency, a hearing was held on a motion to suppress her confession, which the trial court overruled. Schaefer-Kraft

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2907.02(A)(1)(b).

³ R.C. 2923.02(A).

⁴ R.C. 2903.11(A)(1).

⁵ R.C. 2919.22(A).

then entered a guilty plea to two counts of rape and four counts of endangering children. The trial court adjudicated her a sexual predator and imposed a ten-year prison term for each count of rape and a five-year prison term for each count of child endangering. All the prison terms were ordered to be served consecutively, for a total of 40 years' imprisonment.

In her appeal, Schaefer-Kraft raises four assignments of error, arguing that (1) her trial counsel was ineffective; (2) her plea was involuntary; (3) her motion to suppress was improperly denied; and (4) her sentence was unconstitutional. Because Schaefer-Kraft's plea was voluntary and her sentence appropriate, we affirm the judgment of the trial court. We address the assignments of error out of order for purposes of this judgment entry.

In her second assignment of error, Schaefer-Kraft contends that her plea was not knowingly, intelligently, or voluntarily entered because (1) she was incompetent; (2) she suffered from mental-health disorders; and (3) the trial court required her to be hospitalized to maintain her competency at the time of the plea. After reviewing the record, we hold that Schaefer-Kraft entered her guilty plea knowingly, intelligently, and voluntarily.

First, Schaefer-Kraft's competency had been restored, as detailed in the competency report submitted by the court-appointed mental-health professional. The report indicated that Schaefer-Kraft had been becoming more assertive, had displayed average intelligence, and had been actively participating in various groups at the hospital, including leading a patient-empowerment group.

Further, although Schaefer-Kraft did suffer from mental-health disorders, this did not prevent her from assisting in her defense. The competency report, as

well as the Crim.R. 11(C) trial colloquy, demonstrated that she understood the nature of the charges and penalties, and that she was giving up her right to a trial by jury. Further, the Ohio Supreme Court has held that a “defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.”⁶

Finally, Schaefer-Kraft argues that her plea was not voluntary because she had been hospitalized during the time she entered the plea. The competency report indicated that the stress of a trial or other courtroom proceedings could have caused her to regress to the point that she would become incompetent to stand trial. To manage the stress, the trial court ordered Schaefer-Kraft to remain hospitalized until the criminal charges were resolved, as it was permitted to do under R.C. 2945.401(J)(2)(a)(i).

Therefore, considering the totality of the circumstances surrounding Schaefer-Kraft’s plea, we hold that the plea was entered knowingly, intelligently, and voluntarily. The second assignment of error is overruled.

In her first assignment of error, Schaefer-Kraft argues that her trial counsel was ineffective for failing to challenge the competency report and for failing to enter a plea of not guilty by reason of insanity. But when entering a guilty plea as a part of a plea bargain, a defendant waives any prior errors in the proceedings, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea.⁷ Because we have held that Schaefer-Kraft’s plea was entered voluntarily, her claim of ineffective assistance of counsel has been waived. But even if this claim was not waived, we hold that it is meritless given our discussion of the

⁶ *State v. Bock* (1986), 28 Ohio St.3d 108, 110, 502 N.E.2d 1016.

⁷ *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658.

voluntariness of Schaefer-Kraft's plea. Further, the record demonstrates that Schaefer-Kraft knew the wrongfulness of engaging in sexual acts with children at the time that she did so, effectively precluding a plea of not guilty by reason of insanity,⁸ and the decision not to challenge the report restoring Schaefer-Kraft to competency fell within the range of reasonable professional assistance given that nothing in the record indicates that challenging the competency report would have produced a different result.⁹ Accordingly, the second assignment of error is overruled.

We also overrule Schaefer-Kraft's third assignment of error, which asserts that the trial court erred in overruling her motion to suppress. Her plea of guilty effectively waived this claim.¹⁰

In her final assignment of error, Schaefer-Kraft contends that her sentence, which was imposed following the Ohio Supreme Court's decision in *State v. Foster*,¹¹ was unconstitutional because "*Foster* is incompatible with the controlling precedent of the United States Supreme Court." We overrule this assignment of error, as Schaefer-Kraft's sentence totaling 40 years' incarceration complied with *Foster*, and because we have previously held that we are bound to follow *Foster* and do not have jurisdiction to declare *Foster* unconstitutional.¹²

Accordingly, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court

⁸ *State v. Johnson*, 1st Dist. Nos. C-020256 and C-020257, 2003-Ohio-3665, at ¶41, citing R.C. 2901.05(A) and 2901.01(A)(14) (a person is "not guilty by reason of insanity" when, at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts).

⁹ See *State v. Robinson*, 6th Dist. No. L-03-1307, 2005-Ohio-5266, at ¶19, citing *State v. Womack*, 6th Dist. No. L-04-1092, 2005-Ohio-2689.

¹⁰ *State v. Ketterer*, 111 Ohio St.3d, 70, 85, 2006-Ohio-5283, 855 N.E.2d 48, citing *Kelley*, supra.

¹¹ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 740.

¹² *State v. Bruce*, 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44, at ¶6.

OHIO FIRST DISTRICT COURT OF APPEALS

under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 2, 2008
per order of the Court _____.

Presiding Judge

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 07/28/2006
code: GJEI
judge: 44



Judge: DAVID P DAVIS

NO: B 0508400

STATE OF OHIO
VS.
ROBIN LEE SCHAEFER-KRAFT

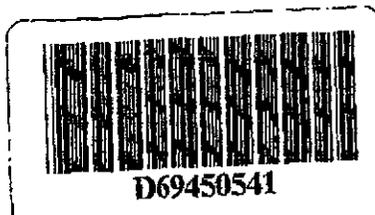
JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel THEODORE KNOEBBER on the 28th day of July 2006 for sentence.

The court informed the defendant that, as the defendant well knew, the defendant had pleaded guilty, and had been found guilty of the offense(s) of:

- count 1: RAPE, 2907-02A1B/ORCN,F1
- count 2: RAPE, 2907-02A1B/ORCN,F1
- count 14: ENDANGERING CHILDREN, 2919-22/ORCN,F3
- count 15: ENDANGERING CHILDREN, 2919-22/ORCN,F3
- count 16: ENDANGERING CHILDREN, 2919-22/ORCN,F3
- count 17: ENDANGERING CHILDREN, 2919-22/ORCN,F3
- count 3: RAPE WITH SPECIFICATION, 2907-02A1/ORCN, DISMISSAL
- count 4: RAPE WITH SPECIFICATION, 2907-02A1/ORCN, DISMISSAL
- count 5: RAPE WITH SPECIFICATION, 2907-02A1/ORCN, DISMISSAL
- count 6: RAPE WITH SPECIFICATION, 2907-02A1/ORCN, DISMISSAL
- count 7: ATTEMPT (RAPE), 2923-02A/ORCN, DISMISSAL
- count 8: ATTEMPT (RAPE), 2923-02A/ORCN, DISMISSAL
- count 9: ATTEMPT (RAPE), 2923-02A/ORCN, DISMISSAL
- count 10: FELONIOUS ASSAULT WITH SPECIFICATIONS, 2903-11A1/ORCN, DISMISSAL
- count 11: FELONIOUS ASSAULT WITH SPECIFICATION, 2903-11A1/ORCN, DISMISSAL
- count 12: FELONIOUS ASSAULT WITH SPECIFICATIONS, 2903-11A1/ORCN, DISMISSAL
- count 13: FELONIOUS ASSAULT WITH SPECIFICATIONS, 2903-11A1/ORCN, DISMISSAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.



THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 07/28/2006
code: GJEI
judge: 44



Judge: DAVID P DAVIS

NO: B 0508400

STATE OF OHIO
VS.
ROBIN LEE SCHAEFER-KRAFT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS
count 2: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS
count 14: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS
count 15: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS
count 16: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS
count 17: CONFINEMENT: 5 Yrs DEPARTMENT OF CORRECTIONS

THE SENTENCES IN COUNTS #1, #2, #14, #15, #16, AND #17 ARE TO BE
SERVED CONSECUTIVELY TO EACH OTHER.

THE DEFENDANT IS TO RECEIVE CREDIT FOR THREE HUNDRED
THIRTY-SIX (336) DAYS TIME SERVED.

COSTS REMITTED.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS
REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED
AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO
WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE
INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR
IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL
CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE
REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL,
PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO
SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT
PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW.
IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED
DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE
SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS
CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE,
TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 07/28/2006
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Judge: DAVID P DAVIS

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STATE OF OHIO
VS.
ROBIN LEE SCHAEFER-KRAFT

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

DEFENDANT DETERMINED A SEXUAL PREDATOR