

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : 08 - 1857
Appellee :
-vs- :
CURTIS BRADLEY :
Appellant : On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 89856

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT

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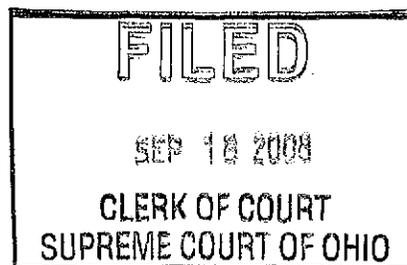


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BECAUSE THE REMEDY MANDATED BY <i>STATE V. FOSTER</i>, 109 OHIO ST.3D 1, 2006-OHIO-856, CANNOT BE APPLIED RETROACTIVELY, PERSONS WHOSE FELONY OFFENSES WERE COMMITTED PRIOR TO FEBRUARY 27, 2006 MUST BE SENTENCED TO MINIMUM AND CONCURRENT TERMS OF IMPRISONMENT	
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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 a question that has repeatedly been presented to this Court and which this Court has repeatedly declined to hear: whether the remedy in this Court's case of *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, which excised the statutory requirement that findings be made before sentencing a defendant to more than minimum terms of imprisonment, can be applied to persons whose criminal offenses were committed prior to *Foster's* announcement.

This issue was discussed briefly during the oral argument in *Foster's* companion case (oral argument of amici curiae Cuyahoga County Public Defender and Ohio Association of Criminal Defense Lawyers in support of appellee, *State v. Quinones*, Case No. 2004-1771, which was consolidated into the *Foster* decision) It was then brought before the Court in the form of a motion for reconsideration in *Foster* that was denied without further opinion. As discussed below, this issue has now risen to new significance as a result of this Court's recent decisions in *State v. Simpkins*, Slip Opinion 2008-Ohio-1197. Moreover, as discussed below, the Court will now have to confront the issue in two pending capital cases – thus this case can be held in abeyance and will not be a burden to this Court's limited resources.

This issue remains a critical and recurring one. Its ramifications extend not only to sentences that exceed minimum terms of imprisonment but also to sentences that involve consecutive terms of imprisonment. Simply put, the question is whether a defendant can be subjected to a judicial revision of Ohio's sentencing laws that makes it easier to impose more than the minimum sentence, when the judicial revision occurred after the defendant committed his or her crime.

The ramifications of this case have grown exponentially as a result of this Court's recent decision in *State v. Simpkins*, Slip Opinion 2008-Ohio-1197. In *Simpkins*, this Court held that a sentence that failed to include post-release control is void ab initio – the case is to be treated as if there has never been a sentencing. *Id.* at par. 22. In light of *Simpkins*, there will be scores of defendants who will be required to return to trial courts for a new sentencing hearing, oftentimes at the instance of the local county prosecutor who is seeking to add post-release control to the previously imposed term of years. Those defendants previously enjoyed a sentencing scheme that created a presumption against sentences that exceeded minimum and concurrent terms and which only countenanced such sentences after a judge had considered the presumptive sentence and rejected it via findings made on the record; moreover, reasons were required in support of findings when the sentence imposed included a maximum term or consecutive terms of imprisonment. Now these defendants are being subjected to a change in the rules because *Foster's* remedy is being applied retroactively, not only in the Eighth District but throughout the State.

If *Foster's* remedy continues to apply, many of these defendants may move to withdraw guilty pleas entered years ago because the original plea was entered in reliance on the pre-*Foster* assumption that a sentence that exceeded minimum and concurrent terms would be applied only where a judge could justify that sentence through explicit findings and, oftentimes, with reasons in support of those findings. This fundamental shift in how sentences are computed may result in the trial of cases that have long since been closed by prosecutors and long since put to rest by crime victims. But, in light of *Simpkins*, motions to withdraw guilty pleas will have been made prior to sentencing, and thus must be liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521.

The constitutional considerations attendant to retroactive application of the *Foster* remedy have never been addressed by this Court. The issue presented herein is one of several raised in two capital cases before the Court at this time: *State v. Elmore*, Case No. 2007-0475, and *State v. Ketterer*, Case No. 2007-1261 (Proposition of Law III). Both of those cases have been fully briefed and now await oral argument.

It is respectfully suggested that, in light of *Simpkins*, this issue is a compelling one. This case should be accepted and held for the determination of *Elmore* and *Ketterer*.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a *Foster* “resentencing.” The defendant originally received a four-year prison sentence for one count of drug trafficking, a first-degree felony; a four-year sentence for one count of drug possession, a first-degree felony; and a six-month sentence for one count of possession of criminal tools, a fifth-degree felony, with all sentences ordered to run concurrently with one another. Docket, April 5, 2005. That sentence was reversed due to this Court’s intervening decision in *State v. Foster* (2006), 109 Ohio St.3d 1. *State v. Bradley*, (June 29, 2006), Cuyahoga App. No. 86351.

On remand, the trial court imposed the same prison sentence, but suspended the imposition of court costs.

This timely appeal follows.

LAW AND ARGUMENT

Proposition of Law I:

Because the remedy mandated by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, cannot be applied retroactively, persons whose felony offenses were committed prior to February 27, 2006 must be sentenced to minimum and concurrent terms of imprisonment.

The trial court violated Mr. Bradley's due process rights by retroactively applying detrimental changes to Ohio's sentencing statute when resentencing him. Because the remedial portion of *State v. Foster* (2006), 109 Ohio St. 3d 1 eliminated statutory presumptions beneficial to Bradley, this portion of the *Foster* decision cannot be applied to him because his criminal conduct pre-dated the decision. A minimum term of imprisonment is the only sentence which is consistent with *both* his Sixth Amendment right to a jury and the ex post facto principles inherent in the Due Process Clause of the Fourteenth Amendment and the prohibition on retroactive laws in Article II, Section 28 and Article I, Section 16 of the Ohio Constitution.

A. *State v. Foster*

In *Foster*, this Court struck down as unconstitutional statutory provisions which, among other things, required judicial fact-finding to overcome the statutory presumption in favor of minimum and concurrent sentences and against maximum sentences. 109 Ohio St.3d at paragraphs one and three of the syllabus. *Foster* correctly held that sentences that exceed minimum and concurrent terms of imprisonment based on statutorily required judicial factfinding violated *Blakely v. Washington* (2004), 542 U.S. 296. *Id.* at 19-21. *Foster* also correctly recognized that the remedy for this Sixth Amendment violation lay in one of three directions: 1) jury determination of the required sentencing factors; 2) imposition of minimum and concurrent terms; or, 3) severance of the requirement of judicial fact finding from SB 2. *Id.* at 25. The Court selected the last option and severed the offending statutory provisions. *Id.* at

paragraphs two and four of the syllabus. *Id.* at 27-30. In excising the unconstitutional statutorily required judicial factfinding, the Court also eliminated the statutory presumptions in favor of minimum and concurrent prison terms and against maximum prison terms, which were beneficial to criminal defendants.

B. Basic Principles of Ex Post Facto and Due Process

The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, any legislation that “changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed.” *Miller v. Florida* (1987), 482 U.S. 423, 429 (quoting *Calder v. Bull* (1798), 3 Dall. 386, 390). The Ex Post Facto Clause “looks to the *standard of punishment* proscribed by the statute, rather than to the sentence actually imposed.” *Lindsey v. Washington* (1937), 301 U.S. 397, 401. Regardless of whether the change “technically” increased the punishment for the crime, the legislative enactment falls within the *ex post facto* prohibition if it: 1) is retrospective; and 2) disadvantages the offender affected by it. *Miller*, 482 U.S. at 432-33.

Although the Ex Post Facto Clause “does not of its own force apply to the Judicial Branch of government,” the United States Supreme Court has recognized “that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers v. Tennessee* (2001), 532 U.S. 451, 456. Given the similar impact of judicial decisionmaking and legislation on the rights of criminal defendants, the fundamental principle that “the required criminal law must have existed when the conduct in issue occurred” must be applied to restrict the retroactive application of both. *Bowie v. South Carolina* (1964), 378 U.S. 347, 354. In short, the Court explained:

If a state legislature is barred by the Ex Post Facto Clause from passing [a retroactive 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.

Id. at 353. While *Bowie* involved a judicial attempt to expand the reach of a criminal statute, subsequent courts have held that the Due Process Clause likewise proscribes “judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing a criminal act.” *Dale v. Haeberlin* (C.A. 6 1989), 878 F.2d 930, 934; see also *Devine v. New Mexico Dep’t of Corrections* (C.A. 10 1989), 866 F.2d 339, 344-45.

C. Foster Remedy Violates Appellant’s Due Process Rights

Prior to *Foster*, Mr. Bradley enjoyed a presumption of a minimum sentence pursuant to R.C. 2929.14(B) and 2929.14(C). See *Foster*, 2006 Ohio 856, at ¶¶ 60, 64, 97 and 102. The trial court could only impose on him a more than minimum sentence if it found certain factors had been established. R.C. 2929.14(B), 2929.14(C), R.C. 2929.14(E)(2). Moreover, because Ohio’s pre-*Foster* sentencing law “provide[d] precise guidance for criminal sentencing within clearly defined constraints” and required trial courts to follow “an articulated process when determining a sentence,” it “accord[ed] meaningful review of these sentencing decisions by the appellate courts.” *State v. Comer* (2003) 99 Ohio St. 3d 463, 465-66. A trial court could only impose a sentence that exceeds the presumption if it made the statutorily required findings, gave reasons for those findings, and “clearly align[ed]” its reasons with the findings they purport to justify. Id. at 467-68; see also *State v. Edmonson* (1999), 86 Ohio St. 3d 324, 325 and 328-29. If the trial court failed to precisely follow the articulated process provided by the statute or if its findings and/or reasons were insufficient, the sentence would be vacated and reversed. In short, before *Foster*, Mr. Bradley had a presumptive sentence of three years that could only be enhanced by

statutorily prescribed judicial fact-finding, and he also possessed the meaningful ability to appeal any enhanced sentence.

Having the *Foster* remedy applied to his resentencing hearing, Mr. Bradley was substantially disadvantaged in two critical respects. First, he was divested of the presumption of a minimum sentence for his robbery conviction. Second, he lost significant appellate rights which existed pre-*Foster*. As the Court explained in *Comer*, the statutorily required findings and reasons are necessary so “an appellate court can conduct a meaningful review of the sentencing decision.” 99 Ohio St. 3d at 468. Before *Foster*, Mr. Bradley had a presumptive sentence of three years, and, if he received a more than minimum sentence, as he did here, he could be assured a new sentencing hearing if the trial court failed to make the necessary findings or made unreasoned findings. See *State v. Mathis* (2006), 2006 Ohio 855, ¶ 34 and 37 (explaining that “pre-*Foster*, R.C. 2953.08(G)(1) provided an opportunity for remand to the trial court if required findings were missing” for a de novo sentencing hearing).

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. As in *Miller*, Ohio defendants had the expectation of a presumptive (minimum) sentence which could only be overcome with specific evidence and had appellate rights which would ensure that any enhanced sentence rested squarely on a permissible basis. The elimination of any presumptive sentence and the ability to challenge a deviation from the presumptive sentence for lacking the requisite findings and/or reasons substantially disadvantages criminal defendants. Accordingly, such legislation cannot be retroactively applied to defendants, like Mr. Bradley, whose offense conduct pre-dated the legislation.

Just as the Ex Post Facto Clause would prohibit the legislature from retroactively eliminating beneficial sentencing presumptions, the Due Process Clause, as explained *Bouie* and *Dale*, forbids the retroactive application of the *Foster* remedy. For defendants like Mr. Bradley, whose criminal conduct pre-dates February 27, 2006, the severance remedy is unavailable as a matter of constitutional law. As recognized by the Court, the decision to abolish sentencing findings for criminal defendants constitutes a marked and unpredictable departure from the law passed by Ohio's General Assembly. See *Foster*, 2006 Ohio 856, ¶ 87 (explaining that "[t]he General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B. 2 would be held unconstitutional). Given this unexpected and detrimental departure, due process precluded the retroactive application of *Foster*'s remedial provisions to Bradley's sentencing hearing.

CONCLUSION

For the foregoing reasons, Defendant-Appellant 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. He further requests that this case be held pending the determination of identical issues raised in *State v. Elmore*, Case No. 2007-0475, and *State v. Ketterer*, Case No. 2007-1261 (Proposition of Law III).

Respectfully submitted,


JOHN T. MARTIN, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served 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 18th day of September, 2008.


JOHN T. MARTIN, ESQ.
Counsel for Appellant

AUG 4 - 2008

Judge Timothy McSindy

m(c/r/c)

FILED Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION
No. 89856

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TAXED

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CURTIS BRADLEY

A 482867

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-459805

BEFORE: Calabrese, J., Cooney, P.J., and Rocco, J.

RELEASED: July 24, 2008

JOURNALIZED: AUG 4 - 2008

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

AUG 4 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

JUL 24 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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ANTHONY O. CALABRESE, JR., J.:

Defendant, Curtis Bradley (appellant), appeals the court's resentencing him to four years in prison for drug related charges as being unconstitutional based on ex post facto principles. After reviewing the facts of the case and pertinent law, we affirm.

I.

On June 29, 2006, we affirmed appellant's drug related convictions, but remanded his case for resentencing under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. See *State v. Bradley*, Cuyahoga App. No. 86351, 2006-Ohio-3660. On April 6, 2007, the court resentedenced appellant to the same four-year prison term, and it is from this order that appellant appeals.

II.

In his sole assignment of error, appellant argues that he "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." Specifically, appellant argues that because his criminal conduct predates *Foster*, the remedial portion of that decision should not apply to him.

The Ex Post Facto Clause of Section 10, Article I, of the United States Constitution prohibits, inter alia, "every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when

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committed." *Mallett v. North Carolina* (1901), 181 U.S. 589, 593, citing *Calder v. Bull* (1798), 3 U.S. 386.

In the instant case, appellant was convicted of two, first degree felonies, which carry prison terms of between three and ten years, and a fifth degree felony, which carries a prison term of between six and 12 months. See R.C. 2929.14. The court sentenced appellant to an aggregate term of four years, which is one year more than the three-year minimum sentence he could have received.

Appellant's ex post facto argument, as it relates to *Foster*, has been expressly addressed and rejected by this court in such cases as *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715. Appellant argues, however, that *Mallette* was "wrongly decided and should not be followed." In *Mallette*, we held that *Foster's* retroactive application to cases on direct appeal and those pending in the trial court at the time of its release, was constitutional:

"* [M]allette had notice that the sentencing range was the same at the time he committed the offenses as when he was sentenced. *Foster* did not judicially increase the range of his sentence, nor did it retroactively apply a new statutory maximum to an earlier committed crime, nor did it create the possibility of consecutive sentences where none existed. As a result, we conclude that the remedial holding of *Foster* does not violate Mallette's due process rights or the ex post facto principles contained therein." *Mallette*, supra, at ¶47.**

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Appellant now argues that *Mallette* cannot be reconciled with *Miller v. Florida* (1987), 482 U.S. 423. In *Miller*, the defendant committed various sex offenses on April 25, 1984. On May 8, 1984, Florida's sentencing guidelines were revised, and these revisions went into effect on July 1, 1984. The defendant in *Miller* was sentenced on October 2, 1984, under the new guidelines. The 1984 Florida sentencing revisions increased the points assigned to sexual offenses. Before the guidelines, the defendant would have been subject to a three and one-half to a four and one-half year presumptive prison sentence. After the guidelines, the defendant was subject to a presumptive sentence of five and one-half to seven years. The *Miller* court held the retroactive application of this revision unconstitutional because it "substantially disadvantaged" the defendant's position. *Id.* at 432. "Thus, even if the revised guidelines law did not 'technically *** increase *** the punishment annexed to [petitioner's] crime,' it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law." *Id.* at 433.

In *Mallette*, on the other hand, pre-*Foster*, the defendant was subject to a three- to ten-year sentence, with a presumption of the minimum three years, unless the court found certain sentence-enhancing facts. Post-*Foster*, the defendant is subject to a three- to ten-year sentence, at the court's discretion. Notably, there is no increased presumptive sentence under Ohio's *Foster* scheme,

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which is the very thing that the United States Supreme Court found violated ex post facto principles in *Miller*.

In summary, Ohio courts have exhaustively rejected appellant's arguments herein, and the Ohio Supreme Court has repeatedly declined to revisit this issue. See, e.g., *State v. Miller*, Licking App No. 2007-CA-21, 2008-Ohio-2641; *State v. Napper*, Ross App. No. 07CA2975, 2008-Ohio-1555; *State v. Long*, Belmont App. No. 07BE27, 2008-Ohio-1531; *State v. McGhee*, Shelby App. No.17-06-05, 2006-Ohio-5162.

Appellant presents no arguments not already considered by this court, and we, once again, reaffirm our holding in *Mallette*. Appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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


ANTHONY O. CALABRESE, JR., JUDGE
COLLEEN CONWAY COONEY, P.J., and
KENNETH A. ROCCO, J., CONCUR