

IN THE SUPREME COURT OF OHIO

09-0714

STATE OF OHIO,	:	Case No. <u>C-050810</u>
Plaintiff-Appellee,	:	On Appeal from the Hamilton
vs.	:	County Court of Appeal,
	:	First Appellate District
GARY T. MYLES,	:	Court of Appeals
	:	Case No. B-0405015
Defendant-Appellant.	:	B-0409251

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND FELONY.

This case involves a felony and of public or great general interest and involves a substantial constitutional question which involves a felony.

Defendant-Appellant, now moves this court to accept jurisdiction of this case to determine if the First District Court erred in not resolving the constitutional question of can a court convict a defendant on a faulty indictment.

It is so prayed.

STATEMENT OF THE FACTS AND CASE

Mr. Myles was indicted on two counts of Failure to Comply with an Order or Signal of Police Officer in violation of R.C. § 2921.331(B), a felony of the third degree; One count of Aggravated Vehicular Homicide in violation of R.C. § 2903.06(A), a felony of the second degree, and one count of Murder in violation of R.C. § 2903.02(B)[SF] a felony of the first degree.

The case went to trial before Honorable Judge Beth Myles, a bench trial, and Mr. Myles was found guilty of the above charges. Mr. Myle filed a timely appeal on this matter. This Court affirmed mr. Myles conviction and sentence. Mr. Myles did file an appeal to the Ohio Supreme Court and he further asserted a claim of ineffective assistance of appellate counsel as was precedent by this Appellate Court, and other Appellate Districts.

Appellant raised several issues in his App.R.26(B), for reopening of his appeal. Now, comes appellant on a timely appeal to the Ohio Supreme Court.

ARGUMENT

Proposition of Law No.I: The Appellate Court erred not overturning appellant convictions due to a defective indictment that failed to properly charge any level of mens rea and failed to give notice of the charges against him.

In **Colon**, the court held that "an indictment that fails to include all the essential elements of an offense is a defective indictment. "State v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, at ¶18. Mens rea is an essential element. Id. at ¶15. "It's a part of every criminal offense in Ohio, except those that plainly impose strict liability." Id. at ¶11 (citing **State v. Lozier**, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770). Where a criminal statute does

not note the requisite mental state or plainly impose strict liability recklessness is sufficient culpability."

R.C. 2901.21(B).

The State indicted Mr. Myles using the following language:

Cause the death of Sylvia Scherer as a proximate result of the defendant committing or attempting to commit an offense of violence, to wit: felonious Assault, which is a felony of the Second Degree that is not a violation of 2903.03 or 2903.04 of the Revised Code., in violation of Section 2903.02(B) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

Colon I noted that, "the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." But felony murder is one of the few crimes in Ohio that has no mens rea element directly attached to it. The mens rea element is found in the predicate offense and does not arise from the catchall culpable mental state of recklessly found in R.C. 2901.21(B).

As the Ninth Appellate District recently noted, "a person commits felony murder pursuant to R.C. 2903.02(B) by proximately causing another's death while possessing the mens rea element set forth in the underlying first or second degree offense of violence. In other words, the predicate offense contains the mens rea element of the felony murder." Colon I at ¶11, citing *State v. Lozier*, 101 Ohio Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, at ¶18. *State v. Sandoval*, 9th Dist. No .07CA-0092-76, 2008-Ohio-4402 at ¶21.

When the Ohio Supreme court first addressed the then new felony murder statute, it concluded that, "[i]n reversing the felony murder conviction, the court of appeals critically misconstrued the standard of mens rea necessary to commit felony murder. Felonious assault is defined as knowingly causing, or attempting to cause physical harm to

another, by means of a deadly weapon.***

The tenth Appellate District likewise concluded that the "intent to kill is conclusively presumed as long as the state proves the required intent to commit the underlying felony offense of felonious assault.

In Mr. Myles case the mens rea of the underlying offense of felonious assault is lacking in the indictment all together. Therefore, it is clear that the indictment is constitutionally invalid to charge the offense of felony murder (B) as defined by statute, because it is lacking the underlying offense mens rea of felonious assault.

So, where as here, felony murder is charged, and the indictment lacks the required mens rea element of the predict offense of felonious assault, then the indictment is faulty, and the state failed to properly charge an offense. the state failed to give notice of the offense in which Mr. Myles had to defend. Therefore, Mr. Myles's Due Process rights has been violated under the Ohio, and United States Constitution.

Therefore, Mr. Myles request that this Court Grant relief by overturning the conviction of murder in this case, and remand back with instruction to re-indict with the required mens rea element of felonious assault, or in the alternative vacate conviction and remand.

Proposition of Law No.2: The Appellate Court erred by giving appellant a sentence that was unconstitutional under the Ohio and United States Constitutions pursuant to Apprendi v. New Jersey (2000), 530 U.S 466; Blakely v. Washington(2004), 542 U.S. 296; and United States v. Booker(2005),543 U.S. 220, as Interpreted by the Ohio Supreme Court in State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856.

In Foster, the Ohio Supreme Court held that the following provisions of Ohio's Sentencing Statutes require judicial fact-finding and are

therefore unconstitutional: R.C. 2929.14(B), (C), (D)(2)(B), (E)(4), 2929.19(B)(2), and 2929.41(A). The aforementioned provisions of Ohio sentencing statutes are unconstitutional pursuant to the United States Supreme Court decisions in *Apprendi v. New Jersey*(2000), 530 U.S. 466; *Blakely v. Washington*(2004), 542 U.S. 296, and *United States v. Booker*(2005), 543 U.S. 220.

The **Foster** Court held that the unconstitutional statutory provisions cited above are capable of being severed. The statutes applicable to this appeal are R.C. 2929.14(B) and 2929.14(E)(4), R.C. 2929.14(B) requires, if a prison sentence is imposed, that the Court must choose the shortest prison term unless the Court makes findings pursuant to 2929.14(B). R.C. 2929.14(E)(4) deals with the consecutive sentence findings previously mandated. Findings contrary to the Supreme Court's decision in **Foster** were made by the Court in the instant case. (9/21/2005 Sentencing Transcripts, p. 846-850). The Court made findings regarding why a sentence other than the minimum was required under the sentencing statutes. *Id.* The Court also made findings as to why consecutive sentences were warranted under the sentencing statutes. *Id.* Since the findings made by the Court are improper under **Foster**, Appellant's sentence is voidable. *State v. Payne*, 873 N.E.2d 306. Appellant also asserts a claim of ineffective assistance of counsel for failing to object to the imposition of above minimum and consecutive sentences in this case.

Proposition of Law No.3: A defendant is deprived of the effective assistance of appellate counsel when appellate counsel fails to raise a constitutional error pursuant to *Strickland v. Washington* when counsel failed to raise at sentencing the unconstitutionality of the Ohio Sentencing Statutes, pursuant to *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296.

A convicted criminal defendant is entitled to the effective assistance of appellate counsel on a first appeal as of right. **Douglas v. California**(1963), 372 U.S. 353; **Evitts v. Lucey**(1985), 469 U.S. 387, 396. Appellate counsel is ineffective if appellate counsel's performance is objectively unreasonable, and if that deficiency substantially prejudices the defendant's appeal. **Strickland v. Washington**(1984), 466 U.S. 668, 694-695.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-prong test set forth in **Strickland v. Washington**(1984), 466 U.S. 668, 687. See also **State v. Reed**, 74 Ohio St.3d 98, 100. First, a defendant must show counsel's performance was deficient. Defendant can meet this standard by showing defense counsel's act or omissions were not the result of reasonable judgment. If deficient performance is shown, a defendant must show prejudice. **Strickland** at 692. The prejudice prong requires a showing "that, but for counsel's unprofessional errors, the result of the proceeding would have been different... A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 699.

In the instant case, counsel failed to offer any objection at sentencing to the imposition of a sentence above the minimum sentence or to the imposition of a consecutive sentence. Although **Foster** or **Payne** had yet to be decided, **Blakely v. Washington** had been decided almost eighteen (18) months before Appellant's sentence. Moreover, **Apprendi v. New Jersey**(2000), 530 U.S. 466, had long since been decided. Further, evidence of the United States Supreme Court's concern with sentencing findings made other than by a jury came in the 2002 capital case of **Ring v. Arizona**(2002), 536 U.S. 584. The Supreme Court

rejected Arizona's capital sentencing scheme that allowed the sentencing judge, not the jury, to make the finding regarding the presence of an aggravating factor.

The Ohio Supreme Court found in **Foster** that it had not been anticipated until **Apprendi** that jury right may be implicated in sentencing. **Foster**, 109 Ohio St.3d at 3-4. In **Blakely**, the Supreme Court held that the Sixth Amendment prohibits a judge from imposing a sentence greater than that allowed by the jury verdict. **Blakely**, 542 U.S at 303-304. Defense counsel should have been aware of the status of the case law on sentencing issues before handling Appellant's sentencing in this matter. The failure to know the case law is deficient performance. The prejudice to Appellant is that had counsel raised this issue at trial, there is a reasonable probability that Appellant's case would already have been sent back to the trial court for resentencing. Thus, defense counsel's deficient performance prejudiced Appellant. **Strickland**, 466 U.S. at 994.

CONCLUSION

Mr. Myles' case presents a substantial constitutional question in that it challenges the convictions due to a defective indictment that failed to properly charge any level of mens rea, appellant's sentence was unconstitutional under the Ohio and United States Constitutions. This Court should also grant jurisdiction in order to continue to insure that criminal defendants are afforded the effective assistance of appellate counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION has been sent by regular U.S. mail, postage prepaid to Philip R. Cummings, Hamilton County Assistant prosecutor, Suite 4000, 230 E. 9th Street, Cincinnati, Ohio 45202 on this 15 day of April, 2009.

Gary Myles
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Counsel of record

COUNSEL FOR APPELLANT
GARY MYLES

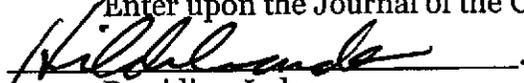
**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-050810
	:	TRIAL NOS. B-0405015
Plaintiff-Appellee,	:	B-0409251
vs.	:	
GARY T. MYLES,	:	<i>ENTRY DENYING</i>
	:	<i>APPLICATION TO REOPEN.</i>
Defendant-Appellant.	:	

We consider this cause upon defendant-appellant Gary T. Myles's App.R. 26(B) application to reopen his appeal and upon the state's opposing memorandum.

Myles failed to file his application within the 90 days prescribed by App.R. 26(B)(1). He asserts that he delayed filing his application until after the Ohio Supreme Court had declined jurisdiction over his appeal there, because he believed that the doctrine of res judicata barred him from seeking to reopen his appeal on the ground of appellate counsel's incompetence until after the supreme court had considered the matter. But Myles's motion seeking a discretionary appeal in the supreme court did not divest this court of jurisdiction to rule upon a timely filed App.R. 26(B) application. Nor did his appeal there bar him, under the doctrine of res judicata, from applying for reopening his appeal here.¹ Therefore, his pending appeal to the supreme court cannot be said to have provided good cause for his delay in filing his application. Accordingly, the court denies the application.²

To the Clerk:

Enter upon the Journal of the Court on MAR - 5 2009, per order of the Court.

Presiding Judge

(COPIES SENT TO ALL PARTIES.)

¹ See *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221; S.Ct.Prac.R. II(2)(D)(1).

² See App.R. 26(B)(1) and 26(B)(2)(b).