

IN THE SUPREME COURT
OF THE
STATE OF OHIO

ORIGINAL

09-1693

STATE OF OHIO,
Appellee,

CASE NO. _____

-vs-

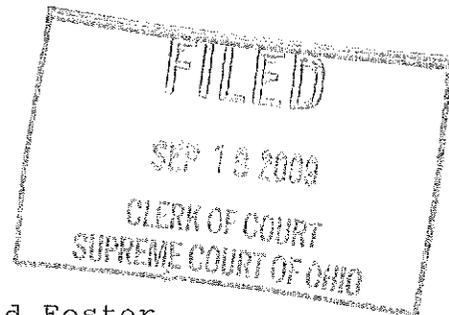
Court of Appeals No. C-080929
Trial Case No. B-0408159A

DAVID FOSTER,
Appellant.

ON APPEAL FROM THE FIRST
DISTRICT COURT OF APPEALS
FOR HAMILTON COUNTY

MEMORANDUM IN SUPPORT OF JURISDICTION

ON BEHALF OF DAVID FOSTER



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Hamilton County Prosecutor

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TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	3
LAW AND ARGUMENT	5
Proposition of law I: The MDO-enhanced sentence imposed upon Appellant constituted a deprivation of his liberty without due process of law and in violation of his constitutional right to trial by jury.	5
Proposition of law II: The Ohio sentencing statute R.C. 2929.14(D)(3)(b) that describes the MDO-enhanced penalty add-on is constructed unconstitutionally and constitutes a deprivation of Appellant's liberty without due process of law and violates his Fifth Amendment right against double jeopardy.	8
CERTIFICATE OF SERVICE	12
APPENDIX Judgment	

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

This case presents this Court with the opportunity to address whether State v. Foster (2006), 109 Ohio St.3d 1, eliminated major drug offender ("MDO") penalty enhancements and, if it did, whether these enhancements remain unconstitutional. If Foster eliminated the MDO penalty enhancements, this Court should take this case to make that clear because at least five appellate districts have missed that point. State v. Foster, Hamilton App. No. C-050378, 2006-Ohio, and C-0809929, 2009-Ohio; State v. Adams, Lake App. No. 2006-L-114, 2007-Ohio-2434 ¶¶ 23-27; State v. Roberson (8th Dist.), 2007 Ohio App. Lexis 5806, 2007-Ohio-2772; State v. Payne (11th Dist.), 2007 Ohio App. Lexis 5898, 2007-Ohio-6740; State v. Pena (10th Dist.) 2007 Ohio App. Lexis 3777, 2007-Ohio-4516. If Foster did not eliminate MDO penalty enhancements this Court should still accept the instant case because under that interpretation, the MDO penalty enhancements remain constitutionally infirm. See State v. Sanchez, Case No. 2008-0429. This case provides a natural compliment to the issue and an opportunity for this Court to address the related questions in a comprehensive manner.

The nature of the uncertainty lies in conflicting views of this Court's holding in Foster. If only the fact-finding required by R.C. 2929.14 (D)(3)(b) to impose an MDO penalty enhancement were severed, the penalty enhancement would nonetheless remain unconstitutional because judicial fact-finding is still required to determine that a defendant is a major drug offender. Such determination necessarily requires the trial court to find

certain facts. The courts which interpret Foster and conclude that only the portion of R.C. 2929.14(D)(3)(b) requiring judicial fact-finding have been severed require the assumption that this Court overlook that the constitutional infirmity was caused by the remaining judicial fact-finding. Given the comprehensive review conducted by this Court in Foster, such an assumption is not reasonable. On the contrary, it is more logical to conclude that this Court found it unnecessary to address the fact-finding required to determine that a defendant was a major drug offender because it had eliminated the MDO penalty enhancements completely.

This Court's decision in State v. Chandler (2006), 109 Ohio St.3d 223, dealing with a MDO penalty enhancement made clear that Foster eliminated the MDO penalty enhancement entirely:

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

109 Ohio St.3d at 228. Likewise, in the aftermath of Foster, this Court affirmed the Eighth District's decision in State v. Short, Cuyahoga App. No. 83804, 2005 Ohio 4578, ¶39, which vacated a two-year MDO penalty enhancement as unconstitutional. In re Ohio Crim. Sentencing Statutes Cases (2006), 109 Ohio St.3d 313. And the Ninth District summarily remanded a major drug offender add-on for re-sentencing in State v. Brown (9th Dist.), 2006 Ohio App. Lexis 17854, 2006-Ohio-1905 ¶20. This uncertainty may result in differential treatment of such enhancements throughout the state and renders it impossible for both State and defense to

make informed decisions in criminal cases involving such specifications. A definitive answer from this Court will end that uncertainty, forestall needless litigation in state and federal court, and avert the issuance of conflicting decisions on this issue.

Appellant's second proposition of law raises the question of whether the Ohio sentencing statute that permits the MDO-enhanced penalty add-on constitutes itself a deprivation of his liberty without due process of law and violates his Fifth Amendment right against double jeopardy.

The courts that leave the judge discretion to add-on additional time for the major drug offender specification produce, de facto, an entirely unique penalty that should had never been enacted into law by the legislature and does not fit this Court's "bright line rule" created by Apprendi v. New Jersey (2000), 530 U.S. 466; the rule explained in Blakely v. Washington (2004), 542 U.S. 296, 303-304, and Ring v. Arizona (2002), 536 U.S. 584, 609, because since the jury's MDO finding have already resulted in a ten-year mandatory sentence under R.C. 2929.14(D)(3)(a) the add-on penalty resulting from R.C. 2929.14.(D)(3)(b) constituted double jeopardy; punishment for the same crime.

This Court should test the MDO add-on statute for double jeopardy violation under the Fifth Amendment's prohibition, and Apprendi-Blakely violation under prescribed maximum.

STATEMENT OF THE CASE AND FACTS

Defendant appealed from the judgment of the Court of Common

Pleas, Hamilton County.

Defendant, David Foster, was indicted under Case No. B-0408159-A for one count of trafficking in heroin, a felony of the first degree; one count of possession of the same heroin, a felony of the first degree; and one count of conspiracy, a felony of the second degree. Counts one and two were accompanied by specification that charge the defendant with being a major drug offender ("MDO").

Defendant was convicted on all counts and specifications. On April 14, 2005, Foster was sentenced to 10 years each on counts 5 and 6 and with 7 years additional years each on the MDO specifications, for a total of 34 years.

The First District twice remanded the case for re-sentencing; once per State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, and again per State v. Cabrales, Slip Opinion No. 2008-Ohio-1625. However, on re-sentencing, Foster, was sentenced to a ten-year mandatory prison term as a result of his conviction on an MDO specification to a possession/trafficking charge and, the trial court imposed an add-on penalty of seven-years under R.C. 2929.14(D)(3)(b).

Foster again appealed raising five assignments of error arguing that the trial court erred in imposing an additional term of seven-years over the maximum term for a felony of the first degree (AOEI), that the trial court violated his constitutional rights in allowing a co-defendant to testify against the defendant and to testify to hearsay (AOEII), that trial court erred when it denied defendant's rule 29 motion and journalized verdict forms that were not support by relevant, credible

evidence (AOEIII), that trial court erred when it denied his pretrial request to retain new counsel (AOEIV), and that he was denied of the effective assistance of counsel during the proceedings (AOEV).

The First District disagreed that R.C. 2929.14(D)(3)(b) was completely severed from Ohio's sentencing scheme and rejected the appellant's argument that the authority to impose "add-on" penalties for specifications, post Foster, is excised therefrom, and rejected the argument that the MDO add-on enhanced penalty violated both the United States and Ohio's Constitution's prohibition against double jeopardy and, the First District rejected all remaining assignments of error on the basis of res judicata and affirmed his conviction and sentence.

LAW AND ARGUMENT

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

The language in R.C. 2925.03 that describes the quantity of heroin to make the offense a first-degree, one subject to mandatory maximum prison time, also labels the offender as a Major Drug Offender per R.C. 2929.01.

R.C. 2929.14(D)(3)(a) defines defendants convicted of violating R.C. 2925.03 or 2925.11, as major drug offenders. The key fact to find according to the drug possession/trafficking statute to qualify a defendant for a major drug offender specification is the quantity of contraband. That fact is also identical with the essential element for the crime that makes it a first-degree felony rather than some lesser offense.

In the present case, the defendant was sentenced to a ten-year mandatory prison term as a result of his conviction on MDO specification to a possession/trafficking charge. The court also imposed an add-on term of seven-years for the MDO specification under division (D)(3)(b); such enhancements are predicated on judicial fact-finding, they violate a defendant's constitutional right to due process and trial by jury. Pre-Foster, R.C. 2929.14(D)(3)(b) permitted trial courts to impose on major drug offenders an additional prison term ranging from one to ten years. Post-Foster, a court no longer has that discretion. Sentences predicated on judge found facts are unconstitutional.

To accommodate the constitutional directive of the Sixth Amendment the Ohio Supreme Court in Foster applied Apprendi and its progeny to Ohio sentencing laws. And to remedy constitutional defect the Court severed offending portions of the State's sentencing statute. It held that in keeping with the overriding goals of Ohio's criminal sentencing statutes, that R.C. 2929.14(D)(3)(b) is unconstitutional and severed R.C. 2929.14(D)(3)(b) to remedy several Sixth Amendment concerns. The ambiguity perceived by some courts is resolved by a simple analysis of the MDO statutory provision after Foster. Foster cannot be interpreted as merely excising a portion of subsection (D)(3)(b) because, under such a reading, the MDO penalty enhancements still depend on judicial fact-finding that a defendant is a major drug offender. It is by now well-established that such judicial fact-finding may not serve as the basis for increasing defendant's sentence.

If this Court had only severed a portion of R.C. 2929.14(D)(3)(b), leaving the penalty enhancements intact, MDO penalty enhancements would remain unconstitutional. The major drug offender specification remain in effect in Ohio law and the penalty for the underlying offense and the specification remain separated as in original legislation, only the add-on that require fact-finding has been severed to accord Foster et al. In other words, judges may impose sentences within the statutory range of the criminal offense in question as long as a jury verdict or the defendant's own admission support the sentence and as long as the sentence is statutory. The courts that leave the judge discretion to add-on additional time for the major drug offender specification produce, de facto, an entirely new and unique penalty that was never enacted into law by the legislature and does not fit within Ohio's statutory scheme for sentencing.

Judges do not lose the ability to impose the sentence that underscores the General Assembly's intent to reserve serious punishment for those individuals whom society deem to be particularly serious drug offenders. That issue of the defendant being a major drug offender is qualified with the offender's ten-year sentence that gives effect to the legislature intent. The trial judge still determines the penalties for the offense and specification.

Given that Foster excised that statutory provision authorizing MDO enhancements add-on sentences, the trial court clearly erred when it imposed an additional seven-year sentence based on the MDO specification charged in the indictment. Even if this Court decides to change its mind, the MDO enhanced penalty

still violated the defendant's Fifth Amendment right against double jeopardy because the MDO-enhanced "add-on" is constructed unconstitutionally. Either way, the MDO add-on penalty enhancement must be vacated.

Proposition of law II: The Ohio sentencing statute R.C. 2929.14(D)(3)(b) that describes the MDO-enhanced penalty add-on is constructed unconstitutionally and constitutes a deprivation of Appellant's liberty without due process of law and violates his Fifth Amendment right against double jeopardy.

The language in R.C. 2925.03 that describes the quantity of heroin to make the offense a first-degree, one subject to mandatory maximum prison time, also labels the offender as a Major Drug Offender per 2929.01.

R.C. 2929.14(D)(3)(a) defines defendants convicted of violating R.C. 2925.03 or 2925.11 as a major drug offender. The key fact to find according to the drug possession/trafficking statute to qualify a defendant for a major drug offender specification is the quantity of contraband. That fact is also identical with the essential element for the crime that makes it a first-degree felony rather than some lesser offense.

In the present case, the defendant was sentenced to a ten-year mandatory prison term as a result of his conviction on a MDO specification to a possession/trafficking charge. The court also imposed an add-on prison term of seven-years for the MDO-enhanced "add-on" under R.C. 2929.14(D)(3)(b)- beyond the maximum "statutory" sentence allowed for a first-degree felony, pursuant to R.C. 2929.14(A)(1) (For a felony of the first-degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.)

As the statute now stands, the defendants convicted of violating R.C. 2925.03 or 2925.11 as major drug offenders still face the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Since the MDO finding has already resulted in a ten-year mandatory sentence under R.C. 2929.14(D)(3)(a), the add-on penalty resulting from R.C. 2929.14(D)(3)(b) constituted double jeopardy; punishment for the same crime. See Blockburger v. United States (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306. States are already prohibited from punishing a defendant for identical, duplicate offenses pursuant to the Double Jeopardy Clause. See State v. Zima, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶16 ("The Fifth Amendment to the United States Constitution provides that '[n]o person shall *** be subject for the same offence to be twice put in jeopardy of life or limb.' Similar, Section 10, Article I of the Ohio Constitution provides, 'No person shall be twice put in jeopardy for the same offense'").

The additional term is beyond the statutory maximum allowed for a first-degree felony and was held to be unconstitutional by the Ohio Supreme Court. Division (D)(3)(b) was removed from the Ohio sentencing statute by the Foster decision. In Apprendi v. New Jersey, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt" (2000), 530 U.S. 466, 489. The United States Supreme Court, in Blakely v. Washington, explained that the "statutory maximum" referred to in Apprendi is the "maximum sentence a judge may

impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (2004), 542 U.S. 296, 303-304. See also Cunningham v. California (2007), ____ U.S. ____, 127 S.Ct. 856, 868-69.

After Blakely, it is clear that a sentencing judge "exceeds his proper authority" when he inflicts punishment which "the jury verdict alone does not allow." *Id.* This is true whether the enhanced sentence is dependent on his finding "a specified fact (as in Apprendi), one of several specified facts (as in Ring), or any aggravating fact (as in Blakely)" and "[w]hether the judicially determined facts require a sentence enhancement or merely allow it." *Id.* at 305, n.8. (As here).

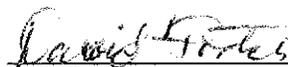
In the present case, the court has said that the defendant is guilty of twice the same act (despite that only one commission of possession/trafficking occurred under the facts of this case), once when he was sentenced to the maximum of 10 years as a major drug offender pursuant to R.C. 2929.14(D)(3)(a) and once when the court found him to be a major drug offender and sentenced him to an additional add-on penalty of seven-years pursuant to R.C. 2929.14(D)(3)(b) (that division exposes defendants to a sentence of eleven to twenty years in prison). There is no question that the additional "add-on" seven years was based upon the same facts and circumstances (with no change whatsoever), as the ten years. And there is no question that the defendant was twice punished for the single specification in the indictment; once when sentenced to a mandatory maximum sentence and again when sentenced to an additional seven years. Conversely, because the jury's MDO finding have already resulted in a ten-year mandatory

sentence under R.C. 2929.14(D)(3)(a), the add-on enhanced penalty resulting from R.C. 2929.14(D)(3)(b) constituted double jeopardy: punishment for the same crime.

Beginning with Apprendi v. New Jersey (2000), 530 U.S. 466, the United States Supreme Court has applied venerable principles of criminal law to modern sentencing schemes, rendering many unconstitutional. In State v. Foster (2006), 109 Ohio St.3d 1, 3, this Court considered the constitutional implications of Blakely and Apprendi on Ohio's felony sentencing provisions analyzed for violations of the Sixth Amendment and excised R.C. 2929.14(D)(3)(b). Id. at 29. This Court should now consider the constitutional implications here on Ohio's felony sentencing structure and analyze for violations of the Fifth Amendment's Double Jeopardy Clause.

Since the trial court must find several facts in order to find Foster to be a major drug offender and several additional facts to impose an MDO penalty enhancement, the MDO enhanced sentence is, nonetheless, unconstitutional (if the sentencing judge must find an additional fact of any kind to impose a longer prison term, the sentencing scheme does not comport with the Sixth Amendment). Either way, the MDO enhanced "add-on" penalty must be vacated.

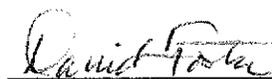
Respectfully submitted,



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CERTIFICATE OF SERVICE

I here by certify that a copy of the foregoing Memorandum In Support of Jurisdiction was sent by ordinary U.S. mail to the Prosecuting Attorney at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 16 day of September, 2009.



David Foster

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

STATE OF OHIO,

Plaintiff-Appellee,

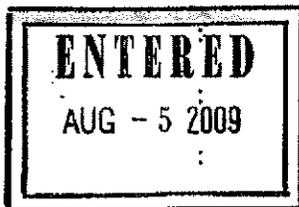
vs.

DAVID FOSTER,

Defendant-Appellant.

APPEAL NO. C-080929
TRIAL NO. B-0408159-A

JUDGMENT ENTRY.



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

Following a jury trial in 2005, defendant-appellant David Foster was found guilty of trafficking in and possession of heroin, along with two accompanying major drug-offender ("MDO") specifications. The trial court imposed a 34-year prison term. On appeal, this court affirmed the findings of guilt, but remanded the case for resentencing under *State v. Foster*.² The trial court imposed the same sentence. Foster appealed again. In that appeal, we held that Foster's trafficking and possession convictions involved allied offenses of similar import and again remanded his case for resentencing. This time, the trial court imposed a 17-year term—10 years of mandatory confinement under the MDO sentencing provision set forth in R.C. 2929.14(D)(3)(a), and an MDO "add-on" sentence of 7 years under R.C. 2929.14(D)(3)(b). Raising five assignments of error, Foster now appeals from his second resentencing. We affirm.

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

² 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470.



In his first assignment of error, Foster claims that the trial court erred when it sentenced him to the 7-year MDO add-on under R.C. 2929.14(D)(3)(b). He contends that R.C. 2929.14(D)(3)(b) was completely severed from Ohio's sentencing scheme in *State v. Foster*,³ thereby stripping the judiciary of the authority to sentence a defendant to any MDO "add-on." But *Foster* severed only those code provisions that had required judicial fact-finding.⁴ It left intact the authority to impose additional penalties for MDO specifications.⁵ This argument has no merit.

Foster next contends that the MDO add-on violated the prohibition against double jeopardy. He argues that since the jury's MDO finding resulted in a ten-year mandatory sentence under R.C. 2929.14(D)(3)(a), the add-on penalty in R.C. 2929.14(D)(3)(b) constituted multiple punishment for the same crime.

Not every imposition of multiple punishments violates double jeopardy. The legislature may allow for cumulative punishment for the same conduct.⁶ Our review of this issue is limited to ensuring that the trial court did not exceed its statutory sentencing authority.⁷ It did not. Foster's sentence fell within the statutory range set forth by the legislature. There was no double-jeopardy violation.

Foster's first assignment of error is overruled.

Foster's remaining assignments of error each contest matters pertaining to his 2005 trial. The issues raised are therefore res judicata since they could have been, or were, decided in his direct appeal from that judgment.⁸ On this basis, we overrule Foster's second, third, fourth, and fifth assignments of error.

The trial court's judgment is affirmed.



³ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 476.

⁴ Id.

⁵ Id. at paragraph six of the syllabus; see, also, *State v. Pena*, 10th Dist No. 06AP-688, 2007-Ohio-4516.

⁶ *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903, ¶40.

⁷ Id., citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 433 N.E.2d 181.

⁸ *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

OHIO FIRST DISTRICT COURT OF APPEALS

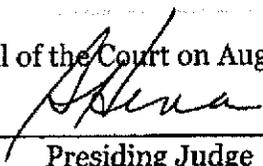
A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 5, 2009

per order of the Court



Presiding Judge

