

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2009-1693
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
DAVID FOSTER : Court of Appeals
Defendant-Appellant : Case Number C-080929

MEMORANDUM IN RESPONSE

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

The case at hand only wants to revisit *State v. Foster* (2006), 109 Ohio St.3d 1, 845 N.E.2d 470, which was prudently decided by this Court. Foster does not argue that new law has changed the effect of *Foster*, only that some courts are misinterpreting its decision and effect. This case is not one of public or great general interest.

Additionally, Foster's case does not involve a substantial constitutional question. The Supreme Court of the United States has already declared cumulative punishment for the same conduct constitutional where it is specifically authorized by the legislature. Here, the Ohio legislature specifically enacted statutes providing for punishment as a major drug offender over and above that for possession or trafficking in drugs. The question presented by Foster's case is not a novel one.

STATEMENT OF THE CASE AND FACTS

A Hamilton County Grand Jury indicted David Foster with one count of trafficking in heroin, a felony of the first degree, possession of heroin, a felony of the first degree, and conspiracy, a felony of the second degree. Foster was charged with major drug offender specifications on each of the drug counts. After a jury trial, Foster was convicted on all counts. The court sentenced Foster to thirty-four years in prison.

On appeal, the First District Court of Appeals affirmed Foster's convictions but remanded the case for resentencing under *State v. Foster*. The trial court imposed the same sentence. Foster appealed again. In that appeal, the First District found that the trafficking and possession charges were allied offenses of similar import and remanded for resentencing. The trial court then imposed a seventeen-year term, with ten years mandatory time for the underlying

offenses, and seven years for the MDO specification. Foster appealed again, but the First District affirmed the trial court's judgment.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Classification and sentencing as a major drug offender requires no judicial fact-finding.

Foster's first issue on appeal is that his classification and sentencing as a major drug offender rests on judicial fact-finding. But, the jury made a finding that Foster had possessed and sold more than 250 grams of heroin, which was sufficient to prove the MDO specification. No judicial fact-finding was required, and none occurred.

Under R.C. 2925.11(C)(6)(f) and 2925.03(C)(6)(g), if the amount of heroin equals or exceeds two hundred fifty grams, the offender is a major drug offender, and shall be sentenced to mandatory time for a felony of the first degree, and may be sentenced to additional time as a major drug offender under R.C. 2929.14(D)(3)(b). That code authorizes an additional prison term of one to ten years.

In its review of Foster's case, the First District noted that *State v. Foster*¹ severed the judicial fact-finding requirements of R.C. 2929.14(D)(3)(b), but it left intact the authority to impose additional penalties for MDO specifications. Therefore, judges still retain the discretion to sentence for an additional one to ten years under 2929.14(D)(3)(b), just as they have discretion in sentencing for other crimes.

In *State v. Foster*, this Court said "After the severance, judicial fact-finding is not required before imposition of additional penalties for repeat-violent-offender and major-drug-offender specifications."² This language makes clear that additional penalty for an MDO

¹ *State v. Foster* (2006), 109 Ohio St.3d 1, 845 N.E.2d 470.

² *Id.* at 29-30, 845 N.E.2d at 498.

specification is still allowed. No judicial fact-finding is necessary. Judges possess discretion to sentence anywhere within the statutory range without making additional findings of fact.³

Proposition of Law No. 2: The add-on enhancement of 2929.14(D)(3)(b) does not violate double jeopardy.

Foster's second issue on appeal is that the MDO add-on violated the prohibition against double jeopardy. But, the First District noted that not every imposition of multiple punishments violates double jeopardy. The legislature may allow for cumulative punishment of the same conduct.⁴

When the legislature intends to permit multiple punishments for a single offense, the double jeopardy clause is not violated.⁵ Here, the legislature intended to create a penalty for a person who sells or possesses large amounts of heroin over and above the penalty imposed for the drug trafficking or possession itself.⁶ Therefore, the MDO specification on possession and trafficking charges does not violate double jeopardy.

The double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.⁷ The trial court did not exceed its statutory sentencing authority.⁸ Foster's sentence fell within the statutory range set forth by the legislature. The Double Jeopardy Clause was not violated in this case.

³ *Id.*

⁴ *State v. Gonzales*, supra.

⁵ *State v. Childs* (2000), 88 Ohio St.3d 558, 561, 728 N.E.2d 379, 383.

⁶ *State v. Gonzales* (2002), 151 Ohio App.3d 160, 176, 783 N.E.2d 903, 915.

⁷ *State v. Childs*, supra.

⁸ *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 433 N.E.2d 181.

CONCLUSION

Foster's appeal is based on arguments that have already been made clear by the Court – classification and sentencing as a major drug offender requires no judicial fact-finding, and the additional time from the enhancement does not violate the Double Jeopardy Clause. The Court should not take Foster's case, as it does not raise any novel issues.

Respectfully,

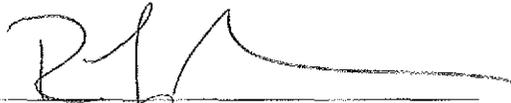
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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to David Foster, pro se, CCI #495-541 P.O. Box 5500, Chillicothe, OH 45601, Cincinnati, Ohio 45202, counsel of record, this 1st day of October, 2009.



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