

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2009-1997
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
KENNETH HODGE	:	Court of Appeals Case Number C-080968
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

Joseph T. Deters (0012084P)
Prosecuting Attorney

James Michael Keeling (0068810P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3178
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

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Janet Moore
Attorney at Law
Ohio Justice & Policy Center
215 E. Ninth St., Suite 601
Cincinnati, Ohio 45202

(513) 421-1108

COUNSEL FOR DEFENDANT-APPELLANT, KENNETH HODGE

FILED
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SUPREME COURT OF OHIO

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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**

Since this Court decided *State v. Foster*,¹ criminal defendants have screamed for it's reversal. But this Court has steadfastly held that *Foster* is the law in Ohio. This case offers no reason to revisit that decision.

The First District Court of Appeals applied *Foster* to Hodge's case and reached the proper result. This Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

a) Procedural Posture:

In July of 2008, Hodge pled guilty to 5 counts of Aggravated Robbery each with a 3-year gun specification. The trial court sentenced him to 3 years on each count and an additional 3 years for the gun specification. The trial court ran the sentences consecutively.

Hodge appealed claiming the trial court erred in imposing consecutive sentences without making findings. The First District Court of Appeals affirmed citing *State v. Foster*.

b) Facts:

About 8:30 at night right before Christmas 2007, Hodge, along with co-defendants Nashon Wallace and David Keeling, approached a group of boy scouts and their fathers selling Christmas trees in Northside. (T.p. 11). Keeling carried a loaded sawed-off shotgun under his coat. *Id.*

He pointed it at one of the boys and demanded money. *Id.* One of the fathers, John Hancock, intervened and tried to get the robbers to leave. *Id.*

¹ *State v. Foster*, 109 Ohio St.3d 1, 855 N.E.2d 470, 2006-Ohio-856.

Hodge punched Hancock and his son in the face. *Id.* Wallace then took the group's earnings for the night from the nearby storage locker. *Id.* The robbery netted the group \$130. *Id.*

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Hodge's case offers no reason for this Court to reverse *State v. Foster*.

In the past three cases where defendants have asked this Court to reverse *State v. Foster* based on the United States Supreme Court's decision in *Oregon v. Ice*², it has declined.³ By doing so, this Court has reaffirmed *Foster* as good law and sent the message that it will not be reversed.

As one court of appeal recently noted,

in *State v. Elmore*, the Ohio Supreme Court briefly discussed *Ice*, although it did not fully address all the ramifications of *Ice* because neither party had briefed the issue before oral argument. In its affirmance of the trial court's authority to impose consecutive sentences on the defendant, the Ohio Supreme Court stated that "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so." *Id.* at ¶ 36. Although the Court has not yet fully analyzed the implications of *Ice* relative to *Foster*, it appears to continue to follow the principles set forth in *Foster*.

Until the Ohio Supreme Court states otherwise, *Foster* remains binding. The trial court had full discretion to impose a prison sentence within the statutory range and it did not err when it ordered consecutive sentences without articulating any judicial fact-finding.⁴

Hodge's case is a particularly inappropriate opportunity to revisit *Foster*. Hodge, and accomplices, pulled a sawed-off shotgun on a group of Boy Scouts and their fathers selling Christmas trees as a fundraiser. When one of the fathers tried to protect his son, Hodge punched him and the boy in the face. These are

² *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517,

³ *State v. Robinson* (Nov. 4, 2009), Ohio Supreme Ct. No. 2009-1438, *State v. Mickens* (Oct. 14, 2009), Ohio Supreme Ct. No. 2009-1270, *State v. Reed* (Sept. 30, 2009), Ohio Supreme Ct. No. 2009-1207.

⁴ *State v. Balckburn*, Hancock App. No. 5-09-18, 2009-Ohio-5902.

hardly the acts of model citizen who made some “bad choices” as Hodge claims in his memorandum in support.

Consequently, Hodge’s case offers no reason for this Court to revisit *State v. Foster* and overturn that case. This Court should decline jurisdiction.

Proposition of Law No. 2: Oregon v. Ice does not overrule State v. Foster.

This Court’s severance of the consecutive sentence findings in *Foster* could not be undone by *Ice*, since severance is a state-law question.⁵ Furthermore, the United States Supreme Court held in *Ice*, “We hold, . . ., that the Sixth Amendment does not exclude Oregon’s choice.”⁶ The Court further stated, “We recognize that not every state initiative will be in harmony with Sixth Amendment ideals.”⁷

It is apparent by the language of the Court that Oregon’s sentencing scheme is constitutional but that the Court was not addressing other states’ sentencing schemes, and the Court acknowledges that each state’s sentencing scheme would require independent review. Because *Ice* only addressed Oregon’s statutory sentencing scheme, *Ice* has no effect on this Court’s decision in *Foster* nor does it declare Ohio’s sentencing statutes to be constitutional.

⁵ See *Virginia v. Hicks* (2003), 539 U.S. 113, 121, 123 S. Ct. 2191, 156 L. Ed. 2d 148, (“[w]hether these provisions are severable is of course a matter of state law”).

⁶ *Ice*, 129 S.Ct. at 715.

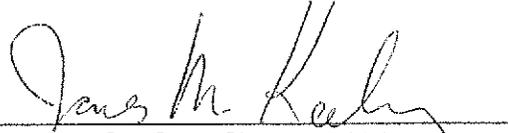
⁷ *Ice*, 129 S.Ct. at 719.

CONCLUSION

This Court should decline jurisdiction to hear Hodge's case.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney



James Michael Keeling, 0068810P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3178
Attorneys for Plaintiff-Appellee, State of
Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Janet Moore, Ohio Justice & Policy Center, 215 E. Ninth St., Suite 601, Cincinnati, Ohio 45202, counsel of record, this 1 day of Dec, 2009.



James Michael Keeling, 0068810P
Assistant Prosecuting Attorney