ORIGINAL

IN THE SUPREME COURT OF OHIO
Case Number 09-1997

STATE OF OHIO,

Plaintiff-Appellee

v.

KENNETH HODGE

Defendant-Appellant

On Appeal from the Hamilton County Court of Appeals, First Appellate District

C.A. No. C08 0968

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STATEMENT OF FACTS

In 2007, the Appellant, Kenneth Hodge, along with two codefendants pointed a loaded, sawed-off shotgun at a group of Boy Scouts who were selling Christmas trees and demanded money. When the father of one of the boys attempted to ward off Hodge and his codefendants, Hodge punched the man and his son. One of the codefendants held the shotgun while the other took the money that the Boy Scouts had raised during the sale.

Hodge was sentenced to a total of eighteen years in prison after pleading guilty to five counts of Aggravated Robbery. The sentence consisted of three years on each count of Aggravated Robbery as well as three years for the gun specification. The trial court ordered the sentences were to run consecutively.

PROPOSITION OF LAW I

BY ABROGATING STATE V. FOSTER, OREGON V. ICE AUTOMATICALLY AND RETROACTIVELY REVIVED OHIO'S CONSECUTIVE SENTENCING STATUTES, R.C. 2929.14(E)(4), 2929.19(B)(2)(C), 2929.41(A), AND 2953.08(G).

A. Ice Abrogated Foster With Respect To Consecutive Sentencing

B. Ice Automatically and Retroactively Reactivated Ohio's Consecutive Sentencing Statutes

C. The State Cannot Prove The Error Harmless Beyond A Reasonable Doubt

1. R.C. 2953.08(G)(1) Requires Remand

2. The Sentence Is Disproportionate And Inconsistent

2. The Sentence Imposes An Unnecessary Burden On Government Resources

LAW AND ARGUMENT

The Appellant argues that the decision of the Supreme Court of the United States issued in *Oregon v. Ice* (2009), 129 S.Ct. 711, abrogated the decision of the Supreme Court of Ohio in *State v. Foster* (2006), 109 Ohio St.3d 1, and automatically revived Ohio's consecutive sentencing statutes which previously required that the trial court make certain factual findings when imposing consecutive sentences upon an offender. The Ohio Prosecuting Attorneys Association disagrees.

Prior to *Foster*, the Ohio Revised Code required that certain statutory factors must be considered and findings made regarding those factors prior to the imposition of a sentence. See e.g. RC. 2929.11-R.C. 2929.14. In *Foster*, the Court excised several statutory requirements.

The Supreme Court of Ohio held in *Foster* that R.C. 2929.14(E)(4) and 2929.41(A), which required judicial fact-finding before the imposition of consecutive

sentences, were unconstitutional under the decisions of the Supreme Court of the United States in *Blakely v. Washington* (2004), 542 U.S. 296 and *Apprendi v. New Jersey* (2000), 530 U.S. 466. Consequently, the Supreme Court of Ohio severed these provisions from Ohio's sentencing framework and held that the trial courts now "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at ¶ 100. As such, *Foster* did not prevent the trial court from imposing consecutive sentences; instead, it took away a trial court's duty to make findings before imposing a consecutive sentence.

After *Foster*, the Supreme Court of Ohio has expressly stated that *Foster* severed and excised R.C. 2929.14(E) and R.C. 292941(A) in their entirety. See, *State v. Elmore* (2009), 122 Ohio St.3d 472, 2009-Ohio-3478, at ¶32; *State v, Bates* (2008), 118 Ohio St.3d 174, 2008-Ohio-1983. The Court has stated that "[t]hereafter, no statute remained to establish presumptions for concurrent and consecutive sentences." Id.

The United States Supreme Court announced its decision in *Ice* several years after *Foster* was decided. In *Ice,* the United State Supreme Court examined an Oregon statute and held that Oregon's sentencing scheme, which allowed judges, rather than juries to determine the facts necessary to impose consecutive rather than concurrent sentences, was constitutional. *Ice* at 717.

In reaching its decision in *Ice*, the Court noted that the jury historically played no role in a decision to impose sentences consecutively or concurrently. *Ice*, at 717. Furthermore, since the choice of whether to impose consecutive or concurrent sentences historically rested exclusively with the judge, the Oregon sentencing statutes did not erode any traditional function of the jury. *Ice*, at 717. The Supreme Court also noted

that States have sovereign authority over the administration of their criminal justice systems, and there is no compelling reason to diminish the States' roles by curtailing the discretion of judges in imposing consecutive or concurrent sentences. *Ice*, at 718-719.

The United States Supreme Court's decision in *Ice* did not expressly overrule *Foster*. Nor did its decision abrogate *Foster*. Moreover, the *Ice* decision did not revive portions of Ohio's sentencing scheme.

The Supreme Court of Ohio's act of judicial rescission in severing and excising R.C. 2929.14(E) and R.C. 2929.41(A), resulted in the Ohio Revised Code no longer containing those provisions. In light of this judicial action, these provisions can now only be reinstated through legislative reenactment. "An act of the General Assembly, which was unconstitutional at the time of enactment, can be revivified only by re-enactment." *Board Of Elections v. State, ex rel. Schneider* (1934), 128 Ohio St. 273, syllabus, paragraph five. Therefore, the *Ice* decision could not revive these provisions as argued by the appellant. Nor can overruling the *Foster* decision revive these statutory provisions.

Finally, there is no reason for this Court to overturn its prior precedent as set forth in *Foster*. The doctrine of stare decisis is applicable to the instant case and requires that the *Foster* decision be followed.

The *Ice* decision neither overruled nor abrogated *Foster*. And, although the doctrine of stare decisis does not apply with the same force and effect when constitutional interpretation is at issue, the doctrine is essential to the stability of the law. See *City of Rocky River v. State Employment Relations Board*, 43 Ohio St.3d 1, 6-10. Stare decisis is applicable here because "stare decisis applies to rulings rendered in regard to specific statutes, [but] it is limited to circumstances 'where the facts of a

subsequent case are substantially the same as a former case.' " *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 23, quoting *Rocky River* at 5.

The Supreme Court of Ohio articulated the test for departing from precedent in *Westfield Insurance Company v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, at paragraph one of the syllabus. The application of the *Galatis* test in this instant case demonstrates that a departure from precedent is not warranted.

The statue and facts are the same as those presented in precedent. The *Ice* decision did not overrule or abrogate *Foster*. The *Foster* decision was not wrongly decided at the time nor does a change in circumstance exist that no longer justifies a continued adherence to the *Foster* decision. See Id. In addition, the *Foster* decision does not defy practical workability. See Id. Furthermore, abandoning the precedent in *Foster* will create an undue hardship for all those who have relied upon it. See Id. If this Court overrules its prior decision in *Foster*, it will create an undue hardship on the criminal justice system as many of the individuals who have been sentenced after the decision was release in 2006 will require new sentencing hearings. In light of this, no departure from precedent is warranted and the *Foster* decision should be followed.

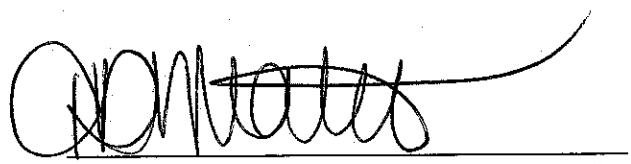
Based on the foregoing, the Ohio Prosecuting Attorneys Association respectfully submits that the Appellant's proposition of law should be overruled. The *Ice* decision does not overrule or abrogate *Foster*. The *Ice* decision did not revive the portions of the sentencing statute that were severed and excised by the Supreme Court of Ohio in *Foster*. Furthermore, the doctrine of stare decisis compels that the *Foster* decision be followed.

CONCLUSION

The Ohio Prosecuting Attorneys Association respectfully submits, pursuant to the argument offered, that the trial court committed no error prejudicial to the Appellant in the instant case. The Ohio Prosecuting Attorneys Association, therefore, contends that the judgment of the trial court should be affirmed.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



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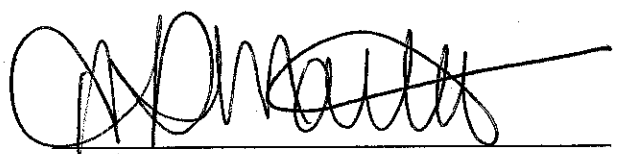

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APPENDIX

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080968 TRIAL NO. B-0805818
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
KENNETH HODGE,	:	
Defendant-Appellant.	:	

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

Kenneth Hodge appeals his convictions for aggravated robbery. We affirm the judgment of the trial court.

Hodge pleaded guilty to five counts of aggravated robbery with specifications. The trial court sentenced him to five consecutive three-year terms for the aggravated-robbery offenses and to a consecutive three-year term for a gun specification. The total sentence was 18 years' confinement.

In his sole assignment of error, Hodge asserts that the trial court erred when it imposed consecutive sentences without making the requisite factual findings under R.C. 2929.14(E) and 2929.41(A).

Hodge acknowledges that, in *State v. Foster*, the Ohio Supreme Court held that R.C. 2929.14 and 2929.41(A) were unconstitutional because they required judicial factfinding.[2] But he urges this court to conclude that *Foster* is no longer

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[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, paragraph three of the syllabus.

valid with respect to consecutive sentences in light of the United States Supreme Court's decision in *Oregon v. Ice*.[3] In that case, the Court concluded that Oregon's sentencing statute, which, like Ohio's, requires judicial factfinding before the presumption of concurrent sentences can be overcome and consecutive sentences can be imposed, was constitutional.[4] But we agree with other Ohio appellate districts that have considered the issue.[5] We remain bound by the Ohio Supreme Court's decision in *Foster*. The Ohio Supreme Court has not directly addressed the effect of *Oregon v. Ice* on Ohio's sentencing law. Absent a contrary decision by the Ohio Supreme Court, *Foster* still applies to consecutive sentences. The trial court did not err when it imposed consecutive sentences without making findings of fact. The sole assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

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 CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 16, 2009

per order of the Court _____.

Presiding Judge

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[3] (2009), ___U.S. ___, 129 S.Ct. 711.

[4] Id. at 719.

[5] See *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908; *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379; *State v. Mickens*, 10th Dist. Nos. 08AP-743, 08AP-744, and 08AP-745, 2009-Ohio-2554; *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815.