

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : 10-2112  
Appellee :  
-vs- : On Appeal from the  
JAMES VARHOLICK : Cuyahoga County Court  
Appellant : of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 94187

---

**MEMORANDUM IN SUPPORT OF JURISDICTION**  
**OF APPELLANT**

---

ROBERT L. TOBIK, ESQ.  
Cuyahoga County Public Defender  
BY: JOHN T. MARTIN, ESQ. (COUNSEL OF RECORD)  
# 0020606  
Assistant Public Defender  
310 Lakeside Avenue  
Suite 200  
Cleveland, OH 44113  
(216) 443-7583  
(216) 443-3632 FAX

COUNSEL FOR APPELLANT, JAMES VAHOLICK

WILLIAM MASON, ESQ.  
Cuyahoga County Prosecutor  
The Justice Center – 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113  
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO

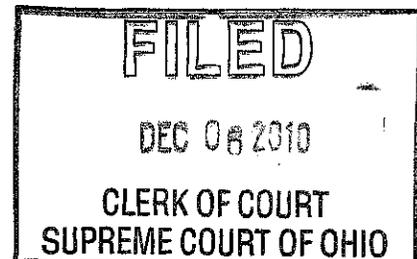


TABLE OF CONTENTS

	PAGES
EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT GENERAL AND GREAT PUBLIC INTEREST .....	1
STATEMENT OF THE CASE AND FACTS .....	1
ARGUMENT .....	2
<i>Proposition of Law I:</i> .....	2
<b>By abrogating <i>State v. Foster</i>, <i>Oregon v. Ice</i> 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)</b>	
CONCLUSION.....	4
SERVICE .....	4
APPENDIX	
Opinion from the Eighth District Court of Appeals.....	A1

**EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL  
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT GENERAL AND  
GREAT PUBLIC INTEREST**

This case raises a single proposition of law which is identical to that which has been briefed and argued, and which is currently under consideration by this Court, in *State v. Hodge*, Case No. 09-1997. The significance and constitutional substance of this issue has already been presented to this Court in Hodge's Memorandum in Support of Jurisdiction, and will not be reiterated herein.

Since *Hodge*, the Eleventh District Court of Appeals has held that the combination of *Oregon v. Ice* (2009), 129 S.Ct. 711 with the General Assembly's most recent amendment to R.C. 2929.14, indicates that there is no Sixth Amendment obstacle to R.C. 2929.14's requirement of findings and reasons in support before consecutive terms of imprisonment are imposed. *State v. Jordan*, Trumbull App. No. 2009-T-0110, 2010-Ohio-5183. *Jordan* is in conflict with the instant case.

It is respectfully requested that this Court accept the instant case and hold it for the disposition of *Hodge*.

**STATEMENT OF THE CASE AND FACTS**

. This is an appeal from a sentence of four years for operating a motor vehicle under the influence of alcohol after a prior felony conviction, a third degree felony. The trial court imposed its four-year sentence consecutively to a 30-month felony sentence that the defendant was already serving. No findings were made, with attendant reasons, as prescribed by R.C. 2929.14.

## ARGUMENT

### *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)**

The trial court erred in imposing consecutive sentences between the two cases. In this regard, R.C. 2929.14 (E)(4) states:

If multiple prison terms are imposed on an offender for convictions of multiple offense, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender *and* that consecutive sentences are not disproportionate to the seriousness of the offender's conduct *and* to the danger the offender poses to the public, *and* if the court also finds any of the following:

(a) The offender committed the multiple offense while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17 or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(Emphasis added). Because Ohio's statutory scheme creates a liberty interest, the trial court, in addition to violating R.C. 2929.14 when it imposed consecutive sentences, also denied Mr. Peoples federal due process under the Fourteenth Amendment to the United States Constitution. *Ford v. Wainwright* (1986), 477 U.S. 399, 428-29 (O'Connor, J., concurring in part and

dissenting in part) (where a state has created a liberty interest, it is constitutionally obliged to provide corresponding procedural protections).

Here, no such findings were made. Thus the sentence must be vacated.

Mr. Varholick is aware that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, held that the findings required by R.C. 2929.14(E) are no longer required to be made. However, *Foster* based this determination on its belief that the United States Supreme Court had interpreted the Sixth Amendment to prohibit any judicial fact-finding in this regard. Accordingly, *Foster* excised the findings required by R.C. 2929.14(E) in order to preserve the constitutionality of Ohio's sentencing scheme. It should be noted that the statute remains unchanged – the General Assembly has never disturbed the findings requirement.

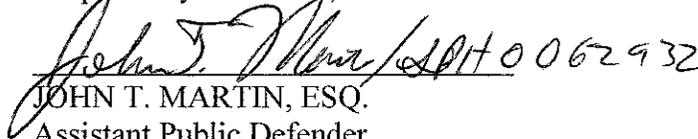
Since *Foster*, the United States Supreme Court, in *Oregon v. Ice* (2009), 129 S.Ct. 711, held that judicial fact-finding with respect to consecutive terms of imprisonment does not violate the Sixth Amendment. Accordingly, the *Foster* remedy regarding consecutive terms, premised upon a belief that it was mandated by the Sixth Amendment, is erroneous and must be reversed. As a result, R.C. 2929.14(E) must be given full effect. And, because the trial court failed to comply with R.C. 2929.14(E), the sentence must be reversed.

Accordingly, the sentence should be reversed and the trial court ordered to resentence the defendant.

**CONCLUSION**

Wherefore, Mr. Varholick prays that this appeal be accepted and held for the disposition of *State v. Hodge*, S. Ct. No. 09-1997.

Respectfully submitted,

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender  
COUNSEL FOR APPELLANT

**SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction was served via U.S. mail upon Hon. William D. Mason, Esq., Cuyahoga County Prosecutor, or his duly authorized assistant, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 6<sup>th</sup> day of December, 2010.

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender

OCT 21 2010

*Judge Donnelly*

*P*

**FILED** Court of Appeals of Ohio

2010 OCT 21 P 2:17

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

FEE  
**3**  
TAXED

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION  
No. 94187

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES VARHOLICK**

DEFENDANT-APPELLANT

**JUDGMENT:  
AFFIRMED**

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. GR-526692

**BEFORE:** Blackmon, J., McMonagle, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** October 21, 2010

YOL0715 860442



PATRICIA ANN BLACKMON, J.:

Appellant James Varholick appeals his sentence for his conviction for operating a motor vehicle under the influence of alcohol and assigns the following error for our review:

“The trial court erred by imposing consecutive sentences.”

Having reviewed the record and pertinent law, we affirm Varholick's sentence. The apposite facts follow.

#### Facts

Varholick was charged in a two-count indictment alleging two counts of driving while under the influence. The second count included a furthermore clause that he had a previous conviction for driving while under the influence. He entered a plea to the second count and in exchange, the first count was dismissed.

At the hearing, Varholick admitted that he was on probation for a prior conviction for driving while under the influence when he committed the charge that was the subject of the plea. He was sentenced to 30 months in prison for his probation violation. ~~The trial court sentenced Varholick to four years in prison~~ to be served consecutive to the 30 months he received for his probation violation.

#### Consecutive Sentence

In his sole assigned error, Varholick contends his sentence was contrary to law because the trial court failed to set forth its reasons for imposing

consecutive sentences. He admits that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but relies on *Oregon v. Ice* (2009), 555 U.S. \_\_\_, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrect and should be overturned.

This court has repeatedly chosen to apply the holding in *Foster* rather than *Ice* and reserve any reconsideration for the Ohio Supreme Court. Specifically, in *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558, this court stated: "We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart from the pronouncements in *Foster* until the Ohio Supreme Court orders otherwise." *Id.* at ¶33, citing *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564; *State v. Moore*, Cuyahoga App. No. 92654, 2010-Ohio-770.

Until the Ohio Supreme Court addresses the issue, we will continue to follow the precedent established in this district.<sup>1</sup> Accordingly, Varholick's assigned error is overruled.

---

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

---

<sup>1</sup>Review of this issue is pending before the Ohio Supreme Court. See *State v. Hodge*, Ohio Supreme Court Case No. 2009-1997.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and  
LARRY A. JONES, J., CONCUR