IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio,	:	Sct. No. 11-1858
Appellee,	:	
	:	On Appeal from the Clermont County
vs.	:	Court of Appeals, 12th Appellate District
	:	Case No. 2011-CA-02-009
Richard Matthews,	:	
Appellant,	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RICHARD MATTHEWS

Donald White, Prosecutor

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FILED

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CLERK OF COURT
SUPREME COURT OF OHIO

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CERTIFICATE OF SERVICE ¢

APPENDIX STATE V RICHARD MATTHEWS CA 2011-02-009

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

The constitutional question raised in this case, if allowed to go uncorrected, affects the right's of all Ohioians and any other people who will pass through it's Courts, is the question of whether a criminal defendant's constitutional rights to the due process of law and that of a fair trial are violated when a sentencing Judge uses factors not supported by any evidence in the record much less those found by a jury as required by the U.S. Supreme Court cases of **Booker, Blakley** or **Apprendi** to justify an upward departure in the defendant's sentence to the maximum sentence allowed by lawwhen all of his co-defendant's, similiarly situated with priors and a much greater level of culpability, received minimum or slightly over the minimum sentences in the same case.

In the case at bar, the sentencing Judge stated on the record at the time he imposed the maximum sentence on this Appellant, that the Appellant's conduct was "Probably more serious than conduct normally constituting the offense. The record does not support this contention at all and probably has no place in sentencing. In fact the record clearly shows the Appellant had DeMinis participation in the robbery he was not armed and did not participate at all in any physical attack on the ctim.

The Court's erroneous determination in this case is the same as if a criminal defendant comes before a Judge having been caught stealing $50.00. After pleading guilty, the sentencing Judge disregards the facts, as is the case here, and state's "Well you probably stole millions and thus I impose the maximum sentence. This disparity in sentencing and reliance on facts not supported by the record, violate the legislative intent of 2929.11 and 2929.12 as well as U.S. Supreme Court holdings in **Blakley,Booker** and **Apprendi** to say nothing about a criminal defendant's

constitutional right to a fair trial and the due process of law in both the U.S. and Ohio constitutions. To protect these right's for not only this Appellant but for all Ohioians and those who come before it's Courts, this Honorable Court should accept jurisdiction of this case to send a clear message to all Ohio Common pleas Courts to fallow the law and adhere to the legislative intent of sentencing contained in 2929.11 and 2929.12

STATEMENT OF THE CASE AND THE FACTS

This case stems from an incident on Oct 11, 2010 on that day the Appellant and another man entered the victim's apartment followed by two men wearing masks and on of them was carrying a gun. All four men removed various items from the victim's apartment. The victim was physically assaulted but this Appellant did not participAte in the assault and did not have a gun.

On January 14, 2009 the Clermont County Grand Jury returned a multi-count indictment against the Appellant. At a hearing on December 8, 2010, the Appellant accepted responsibility for his actions and pled guilty to one count of robbery without any specification. This charge carries a penalty of 2-8 years. Based on a improper statement that the actions of the Appelant probably constituted the worst form of the offense, the Court imposed the maximum sentence of 8 years on the Appellant while all others, his co-defendants, who also had prior convictions and whose culpability was much greater than this Appellant received sentences from 2 to 5 years.

The Appellant filed a timely appeal to the 12th District Court of Appeals who upheld the sentence with no discussion of the highly improper reasoning used by

the sentencing Court in imposing the maximum sentence. This timely request to this Honorable Court to accept jurisdiction of this case follows.

FIRST PROPOSITION OF LAW:

WHEN THE TRIAL COURT IMPOSES THE MAXIMUM SENTENCE USING AN ELEMENT WHICH IS NOT SUPPORTED BY THE RECORD OR FOUND BY A JURY, THIS IMPROPER ENHANCEMENT VIOLATES THE APPELLANT'S CONSTITUTIONAL RIGHT'S UNDER THE 5th, 6th & 14th AMENDMENTS AND THE EQUIVALENT OHIO CONSTITUTIONAL ARTICLES AS WELL AS O.R. C. 2929.11 & 2929.12 AND THE UNITED STATES SUPREME COURT HOLDINGS IN BOOKER, BLAKELY AND APPRENDI.

In the case at bar, this Appellant's constitutional right's were violated when the sentencing Court, in justifying the imposition of the maximum sentence, relied on the fact that in the Court's opinion, the Appellant's conduct was "Probably more serious" than conduct normally constituting the offense. This is clearly improper on the face of the record and has no support of any kind and as such constitutes an Abuse of Discretion. In the first instance, the word "Probably" has no place in our American Jurisprudence. Most importantly is the fact that the record absolutely does not support the Court's contention. The Appellant's actions barely even constitute a robbery charge much less the worst form of the offense. The Appellant entered the victim's apartment with no mask or use of force. The Appellant had no weapon and caused no physical injury to the victim.There was no evidence to support the Court's conclusion that the appellant even knew that the victim would be assaulted during the crime. It is more logical to conclude that the Appellant's actions were much less serious than the conduct normally constituting the offense and when viewing the actions of the other three men involved in this incident, the fact that this Appellant did not wear a mask or have a weapon and did not participate in any physical assault on the victim, this conduct would place his actions at the bottom of the culpability chart for the actions which occurred in this offense, yet This Appellant

received nearly as much time as all the sentences of the other three co-defendant's combined.

This disparity in sentencing does not conform with O.R.C. 2929.11 which states;

A) A COURT THAT SENTENCES AN OFFENDER FOR A FELONY SHALL BE GUIDED BY THE OVERRIDING PURPOSES OF FELONY SENTENCING. THE OVERRIDING PURPOSES OF FELONY ARE TO PROTECT THE PUBLIC FROM FUTURE CRIME BY THE OFFENDER AND OTHERS, AND TO PUNISH THE OFFENDER. TO ACHIEVE THOSE PURPOSES, THE SENTENCING COURT SHALL CONSIDER THE NEED FOR INCAPACITATING THE OFFENDER, DETERRING THE OFFENDER AND OTHERS FROM FUTURE CRIME, REHABILITATING THE OFFENDER, AND MAKING RESTITUTION TO THE VICTIM OF THE OFFENSE, THE PUBLIC, OR BOTH.

B) A SENTENCING IMPOSED FOR A FELONY SHALL BE REASONABLY CALCULATED TO ACHIEVE THE TWO OVERRIDING PURPOSES OF FELONY SENTENCING SET FORTH IN DIVISION (A) OF THIS SECTION, COMMENSURATE WITH AND NOT DEMEANING TO THE SERIOUSNESS OF THE OFFENDERS CONDUCT AND IT'S IMPACT UPON THE VICTIM, AND CONSISTANT WITH SENTENCES IMPOSED FOR SIMILAR CRIMES COMMITTED BY SIMILAR OFFENDERS.

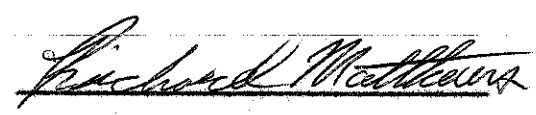
It is apparent that the maximum 8 year sentence imposedupon the Appellant is contrary to the law set forth in O.R.C. 2929.11 and 2929.12 and as such the sentencing Court abused it's discretion in imposing it as described in **Blakemore v Blakemore** 5 OH St. 3d. 217, 450 N.E. 2d. 1140. One does not have to look past the sentences imposed against the other three co-defendants to see that their culpability was at minimum equal to, and greater than that of the Appellant and all were similarly situated yet all of them received less severe sentences that this Appellant to the point that the cumulative sentences of all three barely exceeded that of the Appellant. Now compound that with the fact that the Judge used an improper factor to enhance the Appellant's sentence stating his conduct was probably more serious than conduct normally constituting the offense, when in fact just the opposite is the case. This disparity of sentence imposedcombined with the abuse of discretion and imposition of the maximum sentence violated the Appellant's constitutional right's to a fair trial and the due process of law guaranteed to him under the 5th and 14th amendments.

These facts were brought to the attention of the 12th District Court of Appeals who denied relief citing as authority **State v Foster** 109 Ohio St. 3d. 1, 2006-OHIO-856, claiming the sentence was correctly imposed. **Fosteris** Ohio's response to the U.S. Supreme Court rulings from **Apprendi,** 530 U.S. 494 (2000), **Blakely** 542 U.S. 296 (2004)and **Booker.** While **Foster** allows a sentencing Judge to impose a sentence of his choosing, it does not excuse or allow his reliance upon an incorrect and improper factor to enhance the Appellant's sentence. **Foster** merely allows the Court tonot be required to use any factors to sentence an offender but it does not give them the right to use improper ones. Also **Foster** does not negate the legislative intent of O.R.C. 2929.11 or .12 as it stands in December of 2010 or allow the disparity in sentencing which has occurred in this case. These factors were all ignored by the Court of Appeals. It should also be noted that the Appellant's Grand Jury indictment does not indicate his conduct was more serious than the conduct normally constituting the offense and the record does not support that contention thus violating the U.S. Supreme Court holdings in **Apprendi, Blakely** and **Booker.**

CONCLUSION

As such this Honorable Court should accept jurisdiction of this case to send a mesaage to all Ohio sentencing Courts and Ohio Appellate Districts that they cannot simply raise the shield of **Foster** to allow improper and unconstitutional sentencing.

Respectfully Submitted;



Richard Matthews Pro-se

CERTIFICATE OF SERVICE

I, Richard Matthews, hereby certify that a true and accurate copy of the foregoing was sent to opposing counsel on this 29 day of October, 2011.

Richard Matthews Pro-se

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-02-009
	:	JUDGMENT ENTRY
- vs -	:	(Accelerated Calendar)
RICHARD D. MATTHEWS aka RICHARD D. MATHEWS,	:	
Defendant-Appellant.	:	

COURT OF APPEALS
FILED
SEP 19 2011
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 10-CR-00889

{¶1} This cause is an accelerated appeal by defendant-appellant, Richard D. Matthews, from a decision of the Clermont County Court of Common Pleas convicting him of robbery.[1]

{¶2} On December 8, 2010, appellant pleaded guilty to robbery in violation of R.C. 2911.02(A), a felony of the second degree. Appellant was sentenced to serve a prison term of eight years. Appellant argues this sentence is contrary to law and constitutes an abuse of discretion.

{¶3} Appellant's argument is overruled on the basis of *State v. Foster*, 109 Ohio

1. Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.

St.3d 1, 2006-Ohio-856; and *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In *Foster*, the Ohio Supreme Court stated that trial courts "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." Id. at ¶100. The statutory range of sentence for a second-degree felony is two to eight years. R.C. 2929.14(A)(2).

{¶4} A review of the record demonstrates that in imposing sentence, the trial court considered the purposes and principles of felony sentencing under R.C. 2929.11 and the sentencing factors under R.C. 2929.12. The trial court considered the physical and psychological harm the victim experienced during the robbery. R.C. 2929.12(B)(2). The trial court also considered the seriousness of the offense, the "very high" likelihood of recidivism, and appellant's numerous prior convictions. R.C. 2929.12(A), (C), (E)(2).

{¶5} Moreover, the trial court stated that in imposing sentence, it considered the record, oral statements, any victim impact statements, and the presentence investigation report. *Kalish* at ¶20.

{¶6} Accordingly, appellant's sentence is not contrary to law and the trial court did not abuse its discretion in imposing the maximum sentence. *Foster* at ¶100.

{¶7} Judgment affirmed.

{¶8} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

{¶9} Costs to be taxed in compliance with App.R. 24.

Stephen A. Powell, Presiding Judge

Robin N. Piper, Judge

Rachel A. Hutzel, Judge