

NO. 2013-1299

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 98915

STATE OF OHIO
Plaintiff-Appellant

-vs-

DEMETRIUS RICHMOND
Defendant-Appellee

COMBINED MEMORANDUM IN RESPONSE TO APPELLANT/CROSS-APPELLEE'S
MEMORANDUM IN SUPPORT OF JURISDICTION AND APPELLEE/CROSS-
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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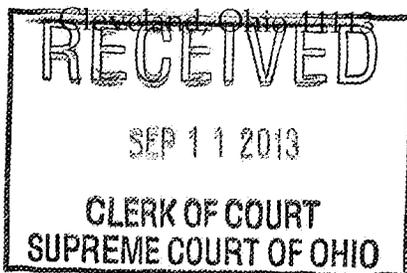
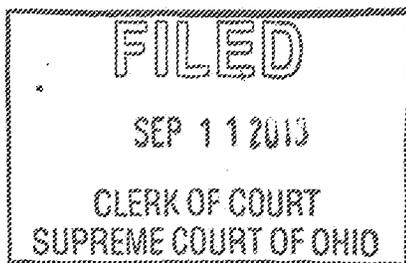


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I. EXPLANATION OF WHY THE CROSS-APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR INVOLVES A QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL INTEREST.

In this case, the Eighth District Court of Appeals held that a trial court erred in not making findings in support of the repeat violent offender specification and ordered that the case be reversed and remanded to make those findings. The Eighth District further determined that the State waived any argument that such findings are unconstitutional. *State v. Richmond*, 8th Dist. No. 98915, 2013-Ohio-2887, ¶20-21, 46 (*Richmond III*).¹ While it is clear from *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768 that consecutive-sentence findings are not unconstitutional; however, if the type of findings required for the repeat violent offender specification remains unconstitutional after *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, then the Eighth District has essentially remanded this case to require unconstitutional findings.

Therefore, this case presents the following substantial constitutional question and issue of great public or general interest: can the requirement of judicial fact-finding for repeat violent offender specifications be constitutional since such findings have been declared unconstitutional by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d

¹ The State originally conceded that with respect to the repeat violent offender specification believing that *State v. Warren*, 8th Dist. No. 97837, 2012-Ohio-4721, but upon closer examination, raised the issue of the constitutionality of the repeat violent offender specifications in a motion for reconsideration, which was denied.

470, *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

The Eighth District Court of Appeals reversed Defendant Demetrius Richmond's repeat violent offender sentence and remanded the matter consistent with the holding in *State v. Warren*, 8th Dist. No. 97837, 2012-Ohio-4721. However, after review of the statutory findings the Eighth District has ordered to be made, the State submits that those repeat violent offender findings remain unconstitutional under *State v. Foster*. In *Foster*, this Court specifically found at syllabus paragraph 5, "Because the specifications contained in R.C. 2929.14(D)(2)(b) and (D)(3)(b) require judicial fact-finding before repeat-violent-offender and major-drug-offender penalty enhancements are imposed, they are unconstitutional. (*Apprendi*, and *Blakely* followed.) As a remedy, this Court severed the unconstitutional findings. *Foster*, at Syllabus, para. 6.

Although the General Assembly renumbered R.C. 2929.14 when it revived findings to be made for imposing consecutive sentences, renumbering former R.C. 2929.14(D)(2) as 2929.14(B)(2), the findings required for imposition of an enhanced penalty for repeat violent offenders remain unconstitutional under *Foster*. Thus, this case cannot be remanded for the trial court to make unconstitutional findings. Moreover, if the issue of constitutionality of R.C. 2929.14(B) findings is left unaddressed, the *Warren* and *Richmond* decisions will create confusion by requiring unconstitutional fact finding on the part of the common pleas court.

II. EXPLANATION OF WHY THE APPELLANT/CROSS-APPELLEE'S APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL INTEREST.

All propositions of law raised by the Appellant/Cross-Appellee were rejected by the Eighth District Court of Appeals, and raise no new rule of law for this court to consider, as Appellant/Cross-Appellee either waived the issue for review or the issue was rejected on settled law.

III. STATEMENT OF THE CASE AND FACTS

Defendant was indicted on July 10, 2010, by the Cuyahoga County Grand Jury in an eleven (11) count indictment. The indictment included one count of felonious assault in violation of R.C. 2903.11(A)(1) with a notice of prior conviction and a repeat violent offender specification, one count of domestic violence in violation of R.C. 2919.25(A), five (5) counts of endangering children in violation of R.C. 2919.22(A), one count of rape in violation of R.C. 2907.02(A)(2), with a sexual violent predator specification, a notice of prior conviction and a repeat violent offender specification. Defendant was also charged with a count of kidnapping in violation of R.C. 2905.01(A)(4), and two misdemeanor counts of endangering children in violation of R.C. 2919.22(A).

Defendant pleaded not guilty, and trial commenced on November 8, 2010. On November 15, 2010, defendant was found guilty on all eleven counts of the indictment. The trial court found Defendant guilty of all the specifications contained in counts 1, 8, and 9 of the indictment, except the sexually violent predator specification. The court

sentence Defendant to eight (8) years for felonious assault with an additional ten (10) year sentence for the repeat violent offender specification for a total of eighteen (18) years. Defendant was sentenced to a six (6) month concurrent sentence for domestic violence and a five (5) year sentence for each of the counts of endangering children, which were to be served concurrently with the eighteen (18) year sentence on count one. Defendant received a ten (10) year sentence for rape, which was to run consecutive to the eighteen (18) year sentence on count one. A sentence of ten (10) years was imposed for kidnapping, five (5) years on count ten of endangering children, and six (6) months on count eleven of endangering children. The sentences were to be served concurrently, totaling twenty-eight (28) years of imprisonment.

In *State v. Richmond*, 8th Dist. No. 96155, 2011-Ohio-6450 (*Richmond I*), the Eight District Court of Appeals affirmed Defendant's conviction, but remanded the case to merge the four counts of endangering children regarding whipping the victim, and separately merge one count each of the felonious assault, domestic violence, and endangering children regarding a shoulder injury to the victim. *Richmond I*, ¶ 91. Subsequently, the Eight District Court of Appeals affirmed the denial of Defendant's petition for post-conviction relief on June 7, 2012, in *State v. Richmond*, 8th Dist. No. 97616, 20120-Ohio-2511 (*Richmond II*).

Defendant was resentenced in CR-540291 on August 1, 2012. In that proceeding, the State elected to merge counts one through three into count one and asked to merge

counts four through seven into count seven; counts eight through eleven into count eight. (Tr. 10-11, 20). The defendant was sentenced to an aggregate sentence of 28 years. (Tr. 22-23).

The facts of the underlying case were detailed in *Richmond I*. See *Richmond I*, ¶ 3-11.

IV. LAW AND ARGUMENT

APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW : JUDICIAL-FACT FINDING TO SUPPORT THE REPEAT-VIOLENT OFFENDER SPECIFICATION IS UNCONSTITUTIONAL. THE TRIAL COURT CANNOT BE REQUIRED TO MAKE UNCONSTITUTIONAL FINDINGS AT A RESENTENCING HEARING.

The Eighth District determined that the trial court erred in not making findings in support of repeat violent offender specifications. See *Richmond III*, ¶20-21, 46. The Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 addressed numerous findings with respect to *Apprendi* and *Blakely*, those findings include: more than a minimum term, consecutive findings, maximum findings, repeat violent offender findings and major drug offender sentences. *Foster*, at ¶28.

Repeat violent offender findings are only required if they are constitutionally permissible and have been revived by legislative enactment. In determining whether repeat violent offender findings are now constitutional it is important to compare the findings found to be unconstitutional in *Foster* with the current statutes under H.B. 86.

Prior to *Foster*, R.C. 2929.14(D)(2) stated:

(2)(a) If an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender, the court shall impose a prison term from the range of terms authorized for the offense under division (A) of this section that may be the longest term in the range and that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person, the court shall impose the longest prison term from the range of terms authorized for the offense under division (A) of this section.

(b) If the court imposing a prison term on a repeat violent offender imposes the longest prison term from the range of terms authorized for the offense under division (A) of this section, the court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to division (D)(2)(a) of this section and, if applicable, divisions (D)(1) and (3) of this section:

(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

R.C. 2929.14(D)(2), 2002 H.B. 130, eff. 4-7-03.

The Supreme Court of Ohio held that the language of R.C. 2929.14(D)(2)(a), did not compel a judge, “to make findings before selecting the longest prison term under R.C. 2929.14(D)(2)(A)...” *Foster*, at ¶72. The Court however found, “Subsection (D)(2)(b) [...] another matter.” *Id.*, at ¶73. The Court recited the language of subsection (D)(2)(b) as follows:

“(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

“(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.” (Emphasis added.)

Id. at ¶74-76.

The Ohio Supreme Court determined that the, “section requires the court to make findings before imposing an additional penalty on repeat violent offenders and thus violates *Blakely*.” *Id.* at ¶78. The Ohio Supreme Court deemed severance the proper remedy and excised the findings for repeat violent offenders. *Id.* at ¶97. See also *Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, paragraph one of the syllabus.

Consequently, H.B. 86 version of the repeat violent offender provisions state as follows:

(2)(a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

R.C. 2929.14(B)(2)(a), 2011 H.B. 86, 9-30-11.

As the same language found to be unconstitutional in *Foster* remains in the H.B. 86 version of R.C. 2929.14(B)(2)(a). The language is likewise unconstitutional because it requires the court to make certain findings before imposing an additional penalty upon repeat violent offenders and therefore violates *Blakely*. See *Foster*, at ¶78.

Foster did in fact extend *Apprendi* and *Blakely* to consecutive findings. At the time the Ohio Supreme Court determined that because those provisions required judicial findings of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional. *Foster*, paragraph two of the syllabus. The United States Supreme Court in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), found that the practice in Oregon of “requiring [courts] to find certain facts before imposing consecutive, rather than concurrent, sentences” was not unconstitutional. The United States Supreme Court declined to extend *Blakely* and *Apprendi* declined to such circumstances.

As a result of *Oregon v. Ice*, the issue of judicial fact finding for consecutive sentences was extensively litigated, with defendants now arguing that courts were required to make findings in order to impose consecutive sentences. The culmination was in the Ohio Supreme Court’s decision in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768. The Court in *Hodge* held:

1. The jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. (*Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, construed.)

2. The United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.

Thus, the impact of *Hodge* is limited to consecutive-findings. It cannot be said that all of the findings founds to be unconstitutional in *Foster* are now constitutional based on *Ice*.

Thus, the State contends that the repeat violent offender specifications remain unconstitutional, as the Ohio Supreme Court has not expressly overruled *Foster* with respect to the repeat violent offender findings and requiring trial courts to make findings to impose a sentence on repeat violent offender specifications could cause confusion.

Whether repeat violent offender findings have been revived or otherwise reenacted through H.B. 86 remains immaterial if those findings are still unconstitutional. Here, the H.B. 86 repeat violent offender findings are the exact findings deemed unconstitutional in *Foster*.

As such, because repeat violent offender findings are unconstitutional and excised under *Foster* and *Hunter*, the trial court did not err in failing to make findings before imposing a sentence under the repeat violent offender specification.

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW I: THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSED A CONSECUTIVE SENTENCE IN VIOLATION OF STATUTORY LAW.

Despite specific statutory authority that permits a trial court to impose consecutive sentences, Appellant/Cross-Appellee focuses on a legislative drafting error to argue that no consecutive sentences could be imposed. These arguments were fully analyzed and rejected in *State v. Ryan*, 8th Dist. No. 98005, 2012-Ohio-5070, ¶10-22. See also, *State v. Ryan*, 8th Dist. No. 98101, 2012-Ohio-5732 and *State v. Hess*, 2nd Dist. No. 25144.

Undoubtedly, one of the purposes of H.B. 86 was to revive judicial fact finding that had been previously invalidated under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The General Assembly's actions was consistent with *State v. Hodge*, 128 Ohio St. 3d 1, 2010-Ohio-6320, 941 N.E.2d 768. Moreover, R.C. 2929.41 has since been amended to properly reflect the legislative changes in H.B. 86. See *Richmond III*, ¶8. Therefore, this proposition of law should not be accepted.

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW II: A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSES A CONSECUTIVE SENTENCE WITHOUT MAKING REQUIRED FINDINGS .

Here, the Eighth District reviewed the transcripts and concluded that the trial court made the appropriate findings. *Richmond III*, ¶14. Therefore, this Court should not accept this proposition of law to simply review whether the trial court made consecutive-sentence findings in compliance with R.C. 2929.14(C).

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW III: A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW AND HIS RIGHTS UNDER THE SIXTH AMENDMENT WHERE MAXIMUM CONSECUTIVE SENTENCES ARE IMPOSED BASED JUDICIAL FACT-FINDINGS.

Appellant/Cross-Appellee's argument was rejected because the appellate court found that the trial court's dialogue was made in the context of justifying the court's finding supporting the imposition of consecutive sentences. *Richmond III*, ¶24. Review of this proposition of law should not be granted.

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW IV: A DEFENDANT HAS BEEN WAS DENIED DUE PROCESS OF LAW WHEN MAXIMUM CONSECUTIVE SENTENCES ARE IMPOSED BASED ON CONTRADICTORY FINDINGS.

It is true that the sentencing journal entry erroneously indicated "NOT WORST TYPE OF OFFENSE". *Richmond*, ¶26. However, this does not justify reversal as the trial court's colloquy indicates a different story. As the Eighth District correctly noted the transcripts reflect that the trial court disagreed with defense counsel's position that the offense was not the worst form of the offense, and the trial court specifically found that the anal rape of a child is the worst form of the rape. The Eighth District indicated that the trial court could amend the sentencing entry nunc pro tunc to reflect what

transpired at the hearing. *Richmond III*, ¶29. Therefore, review of this proposition of law should not be accepted.

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW V: A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT FAILS TO CONSIDER DEFENDANT'S PRESENT SITUATION IN IMPOSING A MAXIMUM SENTENCES.

The Court of Appeals followed its decision in *State v. Sutton*, 8th Dist. No. 97132, 2012-Ohio-1054, ¶31, and rejected the argument now raised where both counsel and Richmond were afforded an opportunity to address the court and also held a presentence investigation report was not required prior to imposing a prison sentence. *Richmond III*, ¶32-33.

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW VI: A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSES A FIVE YEAR SENTENCE FOR ENDANGERING CHILDREN WHEN THAT MAXIMUM SENTENCE HAS BEEN REDUCED AT THE TIME OF RESENTENCING TO THIRTY-SIX (36) MONTHS.

This argument was rejected because the count of endangering children was properly imposed where it was a second degree felony, and the jury was properly instructed that the victim as a child under 18 and that the jury verdict reflected serious physical harm. *Richmond III*, ¶38-39. Therefore, this Court should not review Appellant/Cross-Appellee's sixth proposition of law.

APPELLANT/CROSS-APPELLEE'S PROPOSITION OF LAW VII: A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT FAILS TO PROPERLY CONSIDER A WAIVER OF COURT COSTS WHERE A DEFENDANT IS IN PRISON AND IS INDIGENT.

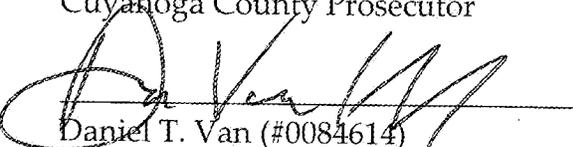
Here, the trial court indicated that the defendant would be in prison for 28 years and earning monthly pay. The Eighth District correctly held that courts may impose court costs upon indigent defendants and that waiver of such costs are not required and properly found that the trial court did not abuse its discretion. *Richmond III*, ¶¶41-42. Accordingly, this court should not accept Appellant/Cross-Appellee's seventh proposition of law.

V. CONCLUSION

The State would ask this Court to accept the cross-appeal but to decline to accept Appellant/Cross-Appellee's appeal.

Respectfully Submitted,

Timothy J. McGinty
Cuyahoga County Prosecutor

A handwritten signature in black ink, appearing to read "D. Van", is written over a horizontal line. The signature is stylized and cursive.

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VII. CERTIFICATE OF SERVICE

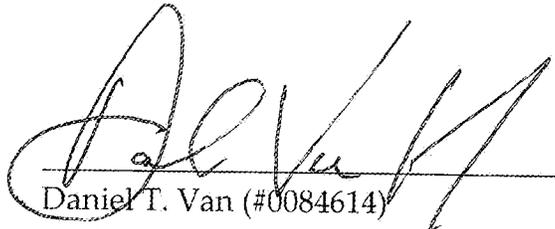
A copy of the foregoing has been sent via U.S. regular mail this the 10th day of September 2013 to:

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