**[Cite as *State v. Howard*, 2009-Ohio-6398.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

| | | |
|---|---|---|
| STATE OF OHIO, | ) | |
| | ) | |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| VS. | ) | CASE NO. 08-MA-121 |
| | ) | |
| PATRICK HOWARD, SR., | ) | OPINION |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

| | |
|---|---|
| CHARACTER OF PROCEEDINGS: | Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio<br>Case No. 04CR1007 |
| JUDGMENT: | Affirmed |
| APPEARANCES:<br>For Plaintiff-Appellee | Paul Gains<br>Prosecutor<br>Ralph M. Rivera<br>Assistant Prosecutor<br>21 W. Boardman St., 6th Floor<br>Youngstown, Ohio 44503-1426 |
| For Defendant-Appellant | Attorney Andrew J. King<br>Assistant State Public Defender<br>8 East Long Street – 11th Floor<br>Columbus, Ohio 43215 |

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 4, 2009

**[Cite as *State v. Howard*, 2009-Ohio-6398.]**
DONOFRIO, J.

**{¶1}** Defendant-appellant, Patrick Howard, Sr., appeals from a Mahoning County Common Pleas Court judgment convicting him of felonious assault and the accompanying firearm specification following a jury trial and the sentence that followed.

**{¶2}** In the late hours of July 23, 2004, appellant and his long-time girlfriend, Barbara Pruitt, got into an argument about money at their Youngstown home. At home with them were the couple's two sons, ages ten and twelve. According to Pruitt, the argument escalated and appellant hit her in the head with a handgun.

**{¶3}** The couple moved their fight outside into the driveway. A neighbor heard them and called 911. When police arrived, appellant and Pruitt were back in the house. Through a window, a police officer noticed appellant holding a handgun. The police announced their presence and appellant and Pruitt came outside.

**{¶4}** Pruitt was bleeding from her head and was taken by ambulance to a hospital. One of the couple's children informed an officer that appellant hid the handgun under a bed. The officer recovered the gun, which was loaded, cocked, and ready to be fired. Appellant was arrested.

**{¶5}** On August 26, 2004, a Mahoning County grand jury indicted appellant on one count of felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2)(B), and two counts of child endangering, first-degree misdemeanors in violation of R.C. 2919.22(A). The felonious assault count also carried with it a firearm specification in violation of R.C. 2941.145(A).

**{¶6}** The matter proceeded to trial on January 4, 2006. The jury returned guilty verdicts on all counts and the firearm specification. The trial court sentenced appellant to a total of ten years in prison. Appellant appealed from this judgment.

**{¶7}** On appeal, this court reversed his felonious assault conviction along with the accompanying firearm specification. *State v. Howard*, 7th Dist. No. 06-MA-31, 2007-Ohio-3170. We found that the trial court gave an improper jury instruction on the felonious assault charge. We affirmed the child endangering convictions and corresponding sentence. Because of the error with the jury instructions, however,

we remanded the matter back to the trial court for a new trial on the felonious assault charge.

**{¶8}** The matter was set again for trial. Once the trial had begun, plaintiff-appellee, the State of Ohio, filed a motion to introduce Pruitt's prior testimony from the first trial in the event that she was unavailable to testify. The motion provided that the state subpoenaed Pruitt at her last known address but was unsuccessful as the house appeared to be abandoned. The state's investigator then located Pruitt at another address and served her with the subpoena. The motion further provided that Pruitt failed to show up for her interview and was likely avoiding her subpoena in order to avoid her arrest on an outstanding warrant.

**{¶9}** The court heard the matter before proceeding with the trial. Appellant objected to the possibility of admitting Pruitt's prior testimony. He argued in part that Pruitt was not "unavailable" under the Evidence Rules because the state failed to use reasonable efforts to secure her presence. The trial court disagreed finding that the state used reasonable diligence to find Pruitt. It ruled that Pruitt's prior testimony was admissible.

**{¶10}** The trial proceeded and the jury found appellant guilty of felonious assault and the firearm specification. The trial court later sentenced appellant to eight years for felonious assault and three years for the firearm specification to be served consecutively for a total of 11 years in prison.

**{¶11}** Appellant filed a timely notice of appeal on June 11, 2008.

**{¶12}** Appellant raises two assignments of error, the first of which states:

**{¶13}** "THE TRIAL COURT ERRED WHEN IT ADMITTED, OVER OBJECTION, THE PRIOR TESTIMONY OF AN ESSENTIAL WITNESS BECAUSE THE WITNESS WAS NOT UNAVAILABLE."

**{¶14}** Appellant argues that Pruitt was not unavailable for trial and, therefore, the trial court should not have permitted the state to read her testimony from the first trial. He asserts that because Pruitt was the victim in this case, the jury would likely not have convicted him without her testimony.

**{¶15}** The admission or exclusion of evidence rests within the trial court's sound discretion and we will not reverse a trial court's decision to admit evidence absent an abuse of that discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

**{¶16}** The Confrontation Clause of the Constitution provides that all criminal defendants shall enjoy the right to be confronted with the witnesses against them. Additionally, the Confrontation Clause puts limits on the use of hearsay at trial.

**{¶17}** Generally, hearsay is inadmissible. However, Evid.R. 804(B)(1) provides in part:

**{¶18}** "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**{¶19}** "(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, * * * if the party against whom the testimony is now offered, * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

**{¶20}** A witness is unavailable for purposes of Evid.R. 804(B)(1) when, among other things, he or she is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance "by process or other reasonable means." Evid.R. 804(A)(5).

**{¶21}** In order to admit prior testimony of an unavailable witness, the state must make a showing that the declarant is unavailable to testify despite reasonable efforts to secure his or her presence. *State v. Keairns* (1984), 9 Ohio St.3d 228, paragraph one and two of the syllabus. "A showing of unavailability under Evid.R. 804 must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered." Id. at paragraph three of the syllabus. Additionally, the statement sought to be admitted must bear sufficient indicia of reliability. Id. at 230. Prior trial testimony

bears this indicia of reliability. Id.

**{¶22}** In this case, appellant concedes that he had the opportunity to cross examine Pruitt at his first trial. Thus, there is no issue that Pruitt's prior testimony contained the necessary indicia of reliability. Appellant states that the only issue here is whether Pruitt was "unavailable" at his second trial within the meaning of the Rule.

**{¶23}** Appellant first contends that the trial court misapplied this court's holding in *State v. Robinson* (July 10, 1998), 7th Dist. No. 94-CA-42. He asserts that the facts in this case are wholly distinguishable from those in *Robinson* where the defendant conceded unavailability.

**{¶24}** Appellant is correct that the trial court misapplied our holding in *Robinson*. In *Robinson*, the trial court permitted the state to read a witness's prior testimony to the jury. The court had found the witness to be unavailable pursuant to Evid.R. 804(A)(5). On appeal, the defendant argued that because the state did not present witnesses to testify as to the efforts made to secure the witness's presence, the state failed to meet the standards of Evid.R. 804. This court found no error with the admission of the prior testimony because the defendant's counsel conceded that he believed the witness was unavailable. We did not address the reasonableness of the state's efforts to procure the witness at trial.

**{¶25}** In the present case, appellant did not concede that Pruitt was unavailable. Instead, he argued to the trial court that she was not unavailable because the state had not used reasonable efforts to ensure her appearance at trial. However, simply because the trial court misinterpreted *Robinson* does not mean that its decision to admit Pruitt's prior testimony was an abuse of discretion.

**{¶26}** Appellant next contends that the state should have arrested Pruitt on her outstanding warrant in order to secure her appearance at his trial. By not doing so, appellant argues that the state failed to use reasonable means to secure Pruitt's presence. And appellant argues that the state's actions in serving her with a subpoena likely caused her to avoid the courthouse and subpoena in order to avoid her arrest on the warrant.

**{¶27}** In arguing that it made reasonable efforts to procure Pruitt's appearance at trial, the state presented three witnesses.

**{¶28}** Paul Andrews, a secret service officer for the prosecutor's office, testified that about a week and a half prior to trial he attempted to serve a subpoena to Pruitt at an address on La Clede Avenue. (Tr. 137). However, the house was abandoned. (Tr. 137). Andrews reported this information to the prosecutor and began conducting records checks in an attempt to locate Pruitt. (Tr. 137-38). Although he was unable to locate an address for Pruitt, Andrews testified that the prosecutor advised him that someone from the victim/witness office had located Pruitt at an address on Parkview Avenue and had spoken to her on the telephone. (Tr. 138). Andrews went to the Parkview address and served Pruitt with the subpoena on May 30, 2008. (Tr. 138-40). He stated that Pruitt indicated to him that she would contact the prosecutor's office. (Tr. 139).

**{¶29}** Andrews stated that at the time he served Pruitt with the subpoena, he knew there was an outstanding warrant for her arrest. (Tr. 138). However, he stated that he does not normally arrest people on outstanding warrants when he serves subpoenas. (Tr. 140). Instead, Andrews stated that the practice is to wait until the person shows up at the courthouse and then he notifies security. (Tr. 140). He explained that he is not equipped for arresting people because he does not have a vest, does not have a cage in his car, and does not even have handcuffs. (Tr. 140). Andrews also testified, however, that he is a peace officer and he can make arrests. (Tr. 142).

**{¶30}** Judy Arnaut, an employee of the victim/witness division of the prosecutor's office, testified that she was able to locate the Parkview address where Pruitt was staying. Arnaut stated that the prosecutor called her to help locate Pruitt when the La Clede address turned out to be vacant. (Tr. 148). She stated that she called Children's Services who gave her the Parkview address. (Tr. 148). She then used the reverse phone directory and called the house. (Tr. 149). She spoke to Pruitt and told her that she was needed as a witness. (Tr. 149). Arnaut testified that

Pruitt said she could not come in on Friday but that she would come in to meet with the prosecutor the following Monday at noon. (Tr. 149). However, Pruitt did not show up at the agreed upon time. (Tr. 150). Consequently, Arnaut called the house again and spoke to the woman who lived there. (Tr. 150). The woman told Arnaut that she had not seen Pruitt since Friday. (Tr. 150). Arnaut also spoke to Pruitt's children who likewise had no information on Pruitt's whereabouts. (Tr. 150-51).

**{¶31}** Deputy Eric Ruschak testified that his job is to serve felony warrants. (Tr. 154). He stated that the prosecutor contacted him on Monday and asked him to locate Pruitt. (Tr. 155). After verifying that Pruitt had an outstanding warrant, Deputy Ruschak went to the Parkview address but Pruitt was not there. (Tr. 155). On cross examination, Deputy Ruschak stated that had the prosecutor's office contacted him over the weekend and informed him that Pruitt had an outstanding felony warrant and was at a certain address, he would have gone and arrested her. (Tr. 157).

**{¶32}** In this case, the court did not abuse its discretion in finding that the state used reasonable efforts to secure Pruitt's presence at trial.

**{¶33}** Appellant points out that the state waited until six days before trial to issue a subpoena even though the trial date had been set for over 40 days. Appellant relies on *State v. Reese*, 5th Dist. No. 06CA45, 2007-Ohio-1082, for the proposition that the lapse of time in which the state made no effort to contact the witness negates the argument of reasonable diligence. In *Reese*, the prosecutor waited approximately four months after the first trial date had been set to contact the witness at issue. Additionally, the prosecutor's office had the witness's correct address in its file all along. Based on these two facts, the appellate court held, "[*b]ased on the specific facts in this case*, appellee failed to establish unavailability." (Emphasis added.) Id. at ¶16.

**{¶34}** In the present case, the trial was initially set for February 4, 2008. On January 28, the prosecutor filed a motion for a continuance. The court granted the motion and reset the trial for April 21. On that day, the trial court once again reset the trial for June 2, the day the trial actually commenced. From the record it seems that

the prosecutor attempted to locate Pruitt approximately a week and a half before the June 2 trial date. In this case, unlike in *Reese*, the prosecutor's office did not have Pruitt's correct address in its file all along. The prosecutor was able to locate and personally serve Pruitt with a subpoena through some investigating. And *Reese* limited its holding to the specific facts of its case.

**{¶35}** Furthermore, the state used reasonable efforts to locate Pruitt. The prosecutor first issued a subpoena and attempted to have Pruitt served at her last known address. When the house at this address turned out to be abandoned, the prosecutor enlisted the help of the victim/witness office to find out where Pruitt might be staying. The victim/witness office was able to find the address where Pruitt was staying and even spoke to her on the telephone. The prosecutor was then able to serve Pruitt with the subpoena at the new address.

**{¶36}** The state knew that Pruitt had an outstanding warrant for her arrest. Andrews stated that he knew of the warrant when he served Pruitt. However, he did not arrest her on the warrant because he was not equipped to do so and it is not the practice of the prosecutor's office to make warrant arrests when serving subpoenas.

**{¶37}** When Andrews served Pruitt with the subpoena on Friday, Pruitt indicated to Andrews that she would contact the prosecutor's office. Pruitt additionally talked to Arnaut at the victim/witness office on Friday. Pruitt told Arnaut that she would meet with the prosecutor the following Monday at noon, the day prior to trial. Thus, at this point in time, the state had every reason to believe that Pruitt would meet with the prosecutor on Monday to discuss testifying at appellant's trial the next day.

**{¶38}** Pruitt did not appear at the meeting with the prosecutor nor did she honor her subpoena. As soon as Pruitt did not show up for her meeting with the prosecutor, the prosecutor immediately contacted the sheriff's office and asked them to locate/arrest Pruitt on the warrant.

**{¶39}** The state's efforts to get Pruitt to trial were reasonable. Andrews first looked for Pruitt at her last known address. When he could not find her there he

enlisted the help of the victim/witness office. After some legwork, Arnaut was able to obtain the address where Pruitt was staying. Andrews then successfully served Pruitt there. He spoke to Pruitt and she indicated to him that she would call the prosecutor's office. Further, Pruitt spoke to Arnaut on Friday and told Arnaut that she would meet with the prosecutor that coming Monday at noon, the day before appellant's trial. At this time, the prosecutor believed that Pruitt would meet with him as she agreed. (Tr. 129). Pruitt gave the state no indication that she would not honor her word to appear at the agreed-upon time. And as soon as the state realized that Pruitt was not going to show up for their meeting, it sent Deputy Ruschak to arrest her on her outstanding warrant.

**{¶40}** Because the state's efforts to secure Pruitt's presence at trial were reasonable, we cannot conclude that the trial court abused its discretion in admitting Pruitt's prior testimony. Accordingly, appellant's first assignment of error is without merit.

**{¶41}** Appellant's second assignment of error states:

**{¶42}** "THE TRIAL COURT ERRED BY IMPOSING NON-MINIMUM, CONSECUTIVE SENTENCES IN VIOLATION OF THE DUE PROCESS AND EX POST FACTO CLAUSES OF THE UNITED STATES CONSTITUTION."

**{¶43}** The trial court sentenced appellant to eight years on the felonious assault conviction and three years on the firearm specification. It ordered that appellant serve these sentences consecutively.

**{¶44}** Felonious assault is a second-degree felony. The possible sentences for a second-degree felony are two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Thus, appellant's felonious assault sentence was within the prescribed statutory range. Appellant's three-year sentence on the firearm specification was mandatory. See. R.C. 2929.14(D)(1)(a)(ii).

**{¶45}** Appellant now argues that his sentence violates the ex post facto and due process clauses of the Constitution.

**{¶46}** First, appellant points out that on the date when the offense in this case

occurred, the trial court was required to make factual findings mandated by R.C. 2929.14(B) before imposing a non-minimum sentence. Appellant acknowledges that these findings are no longer required as this statutory section was found to be unconstitutional and severed in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. However, he argues that because the statute was in effect when he committed the crime, the trial court should have followed it in sentencing him. Appellant contends that by failing to make the previously-required factual findings, the trial court violated the ex post facto and due process clauses.

**{¶47}** Second, appellant argues that the severance remedy applied by the Ohio Supreme Court in *Foster* was unconstitutional. He asserts that because *Foster* severed large portions of Ohio's sentencing statutes, it eliminated appellate courts' abilities to effectively review a sentence. He further contends that it disposed of any chance of accomplishing uniformity and proportionality in sentencing.

**{¶48}** As appellee correctly points out, this court has clearly held that *Foster* does not violate the ex post facto or due process clauses. We recently reiterated this point stating:

**{¶49}** "This court has conclusively determined in *State v. Palmer,* 7th Dist. No. 06-JE-20, 2007-Ohio-1572, appeal not allowed by 115 Ohio St.3d 1410, 2007-Ohio-4884, 873 N.E.2d 1315, that application of *Foster* does not violate the ex post facto clause or a defendant's due process of law. *Palmer* relied on our own precedent as well as on decisions from other Ohio appellate districts, including the Second, Third, Ninth, and Twelfth, all of which had reached similar conclusions. The reasoning is primarily two-fold. First, Ohio appellate courts are inferior in judicial authority to the Ohio Supreme Court. Therefore, they are bound by the Supreme Court's decisions and are not in a position to declare one of their mandates as unconstitutional. Second, criminal defendants are presumed to know that their actions are criminal if so defined by statute and the possible sentence they could face if convicted. The statutory range of punishment a criminal defendant faced before *Foster* is the same as they face after *Foster.*" *State v. Haschenburger*, 7th Dist. No. 07-MA-207, 2008-

Ohio-6970, at ¶13.

**{¶50}** Accordingly, appellant's second assignment of error is without merit.

**{¶51}** For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.