

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89856

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CURTIS BRADLEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-459805

BEFORE: Calabrese, J., Cooney, P.J., and Rocco, J.

RELEASED: July 24, 2008

JOURNALIZED:

[Cite as *State v. Bradley*, 2008-Ohio-3669.]

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Chief Public Defender
John T. Martin, Assistant
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Pamela Bolton, Assistant
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

[Cite as *State v. Bradley*, 2008-Ohio-3669.]
ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant, Curtis Bradley (appellant), appeals the court’s resentencing him to four years in prison for drug related charges as being unconstitutional based on ex post facto principles. After reviewing the facts of the case and pertinent law, we affirm.

I.

{¶ 2} On June 29, 2006, we affirmed appellant’s drug related convictions, but remanded his case for resentencing under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. See *State v. Bradley*, Cuyahoga App. No. 86351, 2006-Ohio-3660. On April 6, 2007, the court resentenced appellant to the same four-year prison term, and it is from this order that appellant appeals.

II.

{¶ 3} In his sole assignment of error, appellant argues that he “was deprived of his liberty without due process of law when he was sentenced under a judicially altered, retroactively applied, and substantially disadvantageous statutory framework.” Specifically, appellant argues that because his criminal conduct predates *Foster*, the remedial portion of that decision should not apply to him.

{¶ 4} The Ex Post Facto Clause of Section 10, Article I, of the United States Constitution prohibits, inter alia, “every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed.” *Mallett v. North Carolina* (1901), 181 U.S. 589, 593, citing *Calder v. Bull* (1798), 3 U.S. 386.

{¶ 5} In the instant case, appellant was convicted of two, first degree felonies, which carry prison terms of between three and ten years, and a fifth degree felony, which carries a prison term of between six and 12 months. See R.C. 2929.14. The court sentenced appellant to an aggregate term of four years, which is one year more than the three-year minimum sentence he could have received.

{¶ 6} Appellant's ex post facto argument, as it relates to *Foster*, has been expressly addressed and rejected by this court in such cases as *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715. Appellant argues, however, that *Mallette* was "wrongly decided and should not be followed." In *Mallette*, we held that *Foster's* retroactive application to cases on direct appeal and those pending in the trial court at the time of its release, was constitutional:

**** [M]allette had notice that the sentencing range was the same at the time he committed the offenses as when he was sentenced. *Foster* did not judicially increase the range of his sentence, nor did it retroactively apply a new statutory maximum to an earlier committed crime, nor did it create the possibility of consecutive sentences where none existed. As a result, we conclude that the remedial holding of *Foster* does not violate Mallette's due process rights or the ex post facto principles contained therein." *Mallette*, supra, at ¶47.

{¶ 7} Appellant now argues that *Mallette* cannot be reconciled with *Miller v. Florida* (1987), 482 U.S. 423. In *Miller*, the defendant committed various sex offenses on April 25, 1984. On May 8, 1984, Florida's sentencing guidelines were revised, and these revisions went into effect on July 1, 1984. The defendant in *Miller* was sentenced on October 2, 1984, under the new guidelines. The 1984 Florida sentencing revisions increased the points assigned to sexual offenses. Before the guidelines, the defendant would have been subject to

a three and one-half to a four and one-half year presumptive prison sentence. After the guidelines, the defendant was subject to a presumptive sentence of five and one-half to seven years. The *Miller* court held the retroactive application of this revision unconstitutional because it “substantially disadvantaged” the defendant’s position. *Id.* at 432. “Thus, even if the revised guidelines law did not ‘technically *** increase *** the punishment annexed to [petitioner’s] crime,’ it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law.” *Id.* at 433.

{¶ 8} In *Mallette*, on the other hand, pre-*Foster*, the defendant was subject to a three-to ten-year sentence, with a presumption of the minimum three years, unless the court found certain sentence-enhancing facts. Post-*Foster*, the defendant is subject to a three- to ten-year sentence, at the court’s discretion. Notably, there is no increased presumptive sentence under Ohio’s *Foster* scheme, which is the very thing that the United States Supreme Court found violated ex post facto principles in *Miller*.

{¶ 9} In summary, Ohio courts have exhaustively rejected appellant’s arguments herein, and the Ohio Supreme Court has repeatedly declined to revisit this issue. See, e.g., *State v. Miller*, Licking App No. 2007-CA-21, 2008-Ohio-2641; *State v. Napper*, Ross App. No. 07CA2975, 2008-Ohio-1555; *State v. Long*, Belmont App. No. 07BE27, 2008-Ohio-1531; *State v. McGhee*, Shelby App. No.17-06-05, 2006-Ohio-5162.

{¶ 10} Appellant presents no arguments not already considered by this court, and we, once again, reaffirm our holding in *Mallette*. Appellant’s assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas 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.

ANTHONY O. CALABRESE, JR., JUDGE

COLLEEN CONWAY COONEY, P.J., and
KENNETH A. ROCCO, J., CONCUR