

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90555

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK BINGHAM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-468929

BEFORE: Rocco, J., Sweeney, A.J., and Cooney, J.

RELEASED: October 30, 2008

JOURNALIZED:

[Cite as *State v. Bingham*, 2008-Ohio-5589.]
ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: John T. Martin
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Maureen E. Clancy
Pamela Bolton
Assistant Prosecuting Attorneys
The Justice Center
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. Bingham*, 2008-Ohio-5589.]
KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, Mark Bingham, appeals from the judgments of conviction and sentences imposed upon him following his plea of guilty to each count in the twelve-count indictment. He urges that the court erred by imposing a sentence on certain merged counts in excess of the statutory minimum. We find no error in the court's judgment and affirm appellant's convictions and sentences.

{¶ 2} Appellant was charged in a twelve-count indictment filed August 4, 2005, with one count of involuntary manslaughter with a notice of prior conviction and a repeat violent offender specification (Count 1); three counts of failure to comply with the order or signal of a police officer (Counts 2, 3, and 4); one count of failure to stop after an accident (Count 5); two counts of aggravated vehicular homicide, each carrying a notice of prior conviction and a repeat violent offender specification (Counts 6 and 7); two counts of aggravated vehicular assault (Counts 8 and 9); two counts of vehicular assault (Counts 10 and 11); and one count of driving under the influence (Count 12). At a hearing held January 17, 2006, he entered a plea of guilty to (1) the involuntary manslaughter charge (Count 1), which was amended to delete the notice of prior conviction and the repeat violent offender specification, (2) one of the counts charging failure to comply with the order or signal of a police officer (Count 4), (3) one of the counts of aggravated vehicular homicide (Count 6), which was amended to delete the notice of prior conviction and the repeat violent offender specification, (4) two counts of aggravated vehicular assault (Counts 8 and 9), and (5) one count of driving under the influence (Count 12). The remaining counts were nolle. The court subsequently

sentenced appellant to a total of fourteen years' imprisonment, including ten years on the involuntary manslaughter charge (Count 1), four years on the charges of failure to comply (Count 4), eight years on the aggravated vehicular assault charge (Count 6), four years on the aggravated vehicular assault charges (Counts 8 and 9), and six months on the driving under the influence charge (Count 12). The sentences were to run concurrent to one another except for the sentence on Count 4, which ran consecutively.

{¶ 3} On appeal, this court reversed and remanded the case because appellant was not informed at the plea hearing of the length of the period of post-release control. On remand, appellant plead guilty to the indictment. He was sentenced to a total of fourteen years' imprisonment, including ten years on Count 1, eighteen months on Count 2, four years on each of Counts 3 and 4, six months on Count 5, eight years on Count 6, five years on each of Counts 7, 8, 9, 10, and 11, and six months on Count 12. Counts 1, 6, and 7 merged for sentencing, as did Counts 2, 3, and 4, Counts 8 and 10, and Counts 9 and 11. The sentence on Counts 2, 3, and 4 was to run consecutively; the remaining counts were to run concurrently, for a total of fourteen years.

{¶ 4} Appellant appeals only the sentence imposed on merged Counts 2, 3, and 4. He asserts that because he committed his crimes before the Ohio Supreme Court released its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, retroactive application of *Foster* to him would violate his federal due process rights and the state constitutional provision against retroactive laws. Therefore, he claims, the trial court could only sentence him to minimum concurrent terms of one year's imprisonment on those charges.

{¶ 5} A retroactive law is not necessarily unconstitutional. “A substantive retroactive law is unconstitutional, while a remedial retroactive law is not.”*** A statute is substantive if it ‘impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.’” *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, ¶6.

{¶ 6} This court and the other Ohio appellate courts have repeatedly and emphatically rejected appellant’s argument that *Foster* is an unconstitutional retroactive law. The Ohio Supreme Court has declined to revisit *Foster*. See, e.g., *State v. Bruce*, 170 Ohio App.3d 92, 2007-Ohio-175, discretionary appeal not allowed, 113 Ohio St.3d 1492, 2007-Ohio-1496; *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715, discretionary appeal not allowed, 115 Ohio St.3d 1459, 2007-Ohio-5567; *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162, discretionary appeal not allowed, 112 Ohio St.3d 1491, 2007-Ohio-724. Elimination of a presumption does not impair any vested right or affect any accrued substantive right. Furthermore, elimination of a presumption in no way increases the punishment; the range of sentences available is the same. By contrast, appellant’s argument would, in effect, eliminate the range of sentences available under R.C. 2929.14(A) and convert a presumptive sentence into a statutory maximum, a result clearly not intended by the General Assembly. See *Foster*, at ¶88-89; *Mallette*, at ¶46. Accordingly, we overrule the appellant’s assignment of error and affirm the trial court’s judgment.

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

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.

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR