IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2007-0651
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate
vs.	:	District
FERNANDO CABRALES	:	Court of Appeals Case Number C050682
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

With but one exception, Cabrales asks this Court to do nothing more than double check the First District Court of Appeal's application of settled law. The one exception deals with Cabrales's fourth proposition of law. But the First District has already certified a conflict to this Court on that issue.[1] It would therefore be redundant for this Court to accept the only meritorious issue under both the certified conflict and in this case.

Therefore, this Court should not accept this matter. Or, in the alternative, should accept only the fourth proposition of law and should then consolidate it with the certified conflict.

[1]See Case No. 2007-0595.

STATEMENT OF THE CASE AND FACTS

a) Procedural History:

Defendant-Appellant Fernando Cabrales was indicted for trafficking in marijuana in violation of R.C. 2925.03(A)(1) and 2925.03(A)(2), possession of marijuana in violation of R.C. 2925.11(A)(1), and of conspiracy in violation of R.C. 2923.01(A)(2). After Cabrales' motions to suppress and to dismiss charges were denied he entered a guilty plea. He later withdrew his guilty plea and proceeded to a jury trial. The State was permitted to amend count four of the indictment before the jury trial began.

The jury found Cabrales guilty as charged. The trial court sentenced Cabrales to a total of 24 years in the department of corrections for his crimes.

Cabrales appealed his conviction. The First District Court of Appeals improperly ruled that trafficking and possession of a controlled substance are allied offenses of similar import. It then remanded the matter for resentencing.

The First District acknowledged that its finding on allied offenses was in conflict with other appellate courts throughout Ohio. It certified that conflict to this Court.[2]

Cabrales has now sought to have this Court review seven other issues. These seven issues related to probable cause for search warrants, jurisdiction, amendment of indictments, jury instructions, sufficiency of the evidence, and two arguments on the constitutionality of *State v. Foster*.

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[2]See Case No. 2007-0595.

b) Statement of the Facts:

James Longenecker had been transporting drugs for Cabrales for money. Longenecker typically drove drugs from California to Denver, Colorado. Cabrales contacted him about a new delivery opportunity from California to Ohio. Realizing it would be a very long drive, Longenecker sought out the assistance of Sean Matthews.

Matthews and Longenecekr met Cabrales at his home in California. They then proceeded to the home of someone named Jessie. Cabrales and Longenecker went to speak to Jessie while Matthews waited in the car. Eventually, Cabrales and Longenecker began loading duffel bags full of marijuana into the car.

After getting some sleep, Longenecker and Matthews began to drive non-stop to Ohio. Throughout the trip Cabrales would call them. As they approached Ohio, Cabrales informed them of a change of plans. They were now to make the delivery in Cincinnati.

Shortly after entering Ohio Matthews and Longenecker were pulled over due to erratic driving. The officer smelled the marijuana. Matthews and Longenecker were arrested and immediately began to cooperate with the police. The police found over 20,000 grams of marijuana in the car.

Longenecker and an undercover officer continued to be in contact with Cabrales. Cabrales continued to direct Longenecker about where to go and who to meet. He directed Longenecker to take the marijuana to the parking lot of a hotel in Kenwood.

Eventually, someone did arrive at the hotel. This person, Mundy Williams, wanted to move things to a house. Longenecker and the undercover officer refused. Cabrales was actively involved in trying to smooth things over so the deal could take place.

In the end, multiple phone calls between Longenecker and Cabrales were recorded by the police. Each call shows Cabrales directing Longenecker while Longenecker was in Ohio.

Cabrales testified in his own defense. He claimed that he had no idea what Longenecker was transporting, but believed they were shirts. While he admitted that he was talking during each phone call, he claimed that he was merely offering translation services. The jury rejected that defense and found him guilty as charged.

ARGUMENTS AGAINST CABRALES' PROPOSITIONS OF LAW

State's First Proposition of Law: Before a search warrant is issued, its affidavit must contain probable cause to support the warrant.

In his first proposition of law, Cabrales asks this Court to reconsider the settled law that a search warrant's supporting affidavit must contain probable cause. This Court has already ruled (repeatedly) that probable cause is required and also the appropriate standard of review: "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant."[3]

The affidavit in this matter was prepared after Longenecker and Matthews were arrested in Ohio and provided the police with detailed information about Cabrales. The affidavit detailed the information that had been provided by Longenecker and Matthews. The affidavit also detailed numerous procedures used by drug dealers, including the use of their primary and other residences. It specified that based on the officer's "training and experience, [he knew] persons involved in large

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[3]*State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317. See, also, *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, at ¶ 38

Mexican national organizations to distribute controlled substances will use their primary residences along with other locations to hold more controlled substances, monies, cell phones, transaction records, and [other items listed in an attachment] to conduct their business."

The officer preparing the affidavit had been given an accurate description of Cabrales' primary residence. That description had been provided by Matthews and Longenecker. While it could not have been known whether any contraband would definitely be obtained at Cabrales home, the affidavit provided probable cause to search his primary residence for any materials that may have been related to dealing drugs. One of the items specifically sought was a cell phone, which was found. The information contained in the affidavit provided probable cause to issue a search warrant for Cabrales' primary residence.

The law related to this issue is settled. Therefore, Cabrales's first proposition of law should be rejected.

State's Second Proposition of Law: A person is subject to criminal prosecution and punishment in Ohio if, while outside of Ohio, they conspire or attempt to commit, or is guilty of complicity in the commission of, an offense in Ohio.

In his second proposition of law, Cabrales argues that the State of Ohio lacked jurisdiction to try him for any crimes. Under R.C. 2901.11(A)(3) states that a "person is subject to criminal prosecution and punishment in this state if . . . [w]hile out of this state, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in this state." Cabrales argues that he never had any knowledge that drugs were being delivered to or being offered for sale in Hamilton County. He argues that he was merely acting as a translator for whomever was really in charge of the drug dealing.

Cabrales' argument, though couched in terms of jurisdiction, truly go to the manifest weight of the evidence. His argument relies upon it being believed that his story about merely acting as a translator was entirely true. He made this argument to the jury and the jury rejected it. There was ample evidence in the recorded phone conversations that Cabrales was actively involved in a conspiracy to have over three hundred pounds of marijuana shipped across the country into Hamilton County where it was to be sold.

The law on Cabrales's second proposition of law is a clearly worded statute. And despite his best efforts to make it appear otherwise, his argument turns on how credible he appeared to the jury. There is nothing new for this Court to consider in this proposition of law, thus it should be rejected.

State's Third Proposition of Law: An indictment may be amended at any time before, during, or after a trial pursuant to Crim. R. 7(D) so long as no change is made in the name or identity of the crime charged.

In his third proposition of law, Cabrales argues that the State should not have been allowed to amend the indictment. Criminal Rule 7(D) provides that "the court may at any time before, during, or after a trial amend the indictment . . . in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." If an indictment does not contain all the essential elements of an offense, it may be amended to include the omitted element, if "the accused has not been misled or prejudiced by the omission of such element from the indictment."[4] Significantly, Crim. R. 7(D) states that "no appeal based upon such action of the court shall be sustained nor reversal had unless,

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[4]*State v. O'Brien* (1987), 30 Ohio St. 3d 122, 508 N.E.2d 144, paragraph two of the syllabus.

from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted."

Count four of the indictment in this matter originally stated that Cabrales "with purpose to commit or to promote or to facilitate the commission of aggravated trafficking and possession, agreed with another person or persons . . . that one or more of them would engage in conduct that facilitates the commission of any of the specified offenses, and subsequent to [their] entrance into such plan or agreement, a substantial overt act, to wit: the transport of marihuana from California to Hamilton County in furtherance of the conspiracy was committed by the defendant or another person or persons."[5]

Conspiracy, as defined in R.C. 2923.01(A), includes the words "a felony drug trafficking, manufacturing, processing, or possession offense" instead of "aggravated trafficking and possession." Aggravated trafficking of marijuana and possession of marijuana are felony drug offenses.

The only change made to the indictment was to change the word aggravated to felony. Considering the original indictment told Cabrales specifically what it was he did in furtherance of the conspiracy he was not prejudiced by either the original indictment or the amended indictment. Cabrales knew exactly what it was that he was being charged with in count four of the indictment. Cabrales suffered no prejudice whatsoever from the amending of the indictment to reflect the statutory language.

Once again, the law on this issue is settled. There is no reason for this Court to accept jurisdiction over this proposition of law.

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[5]Emphasis through capitalization removed.

State's Fourth Proposition of Law: The crimes of trafficking and possession of controlled substances are not allied offenses of similar import. This First District Court of Appeals has certified a conflict on this issue to this Court.

The First District Court of Appeals has certified a conflict on this proposition of law. The State of Ohio, though disagreeing with Cabrales's conclusions on the issue, agrees that this is an issue that this Court should consider. But since the First District ruled in favor of what Cabrales is arguing, the State is confused as to why he is raising this issue in this manner. Because this issue has been certified to this Court there is no reason why this Court should accept it a second time under this case number.

State's Fifth Proposition of Law: There is no such thing as an attempt to traffic marijuana under R.C. 2925.03(A)(1).

In his fifth proposition of law, Cabrales argues that the trial court erred by denying his request for an instruction on attempted trafficking. Trafficking, as defined in R.C. 2925.03(A)(1), makes it a crime to sell or offer to sell marijuana. Because the crime includes both selling and offering to sell it is a legal impossibility for a person to attempt to offer to sell marijuana.

In order to be found guilty of drug trafficking under R.C. 2925.03(A)(1), the State must prove that the defendant knowingly sold or offered to sell a controlled substance. In *State v. Scott* this Court ruled that in order to prove an offer to sell all that is required is evidence of a willingness to transfer the controlled substance to another person.[6]

This Court went on to say that "offer" means to "'to declare one's readiness or willingness'" to sell a controlled substance.[7] In "offering to sell," the proscribed conduct is the offer to sell, not the

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[6]See *State v. Scott* (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798.

[7]Id. at 440.

offering of a controlled substance.[8] An offer is the marketing stage of the entire criminal enterprise of commerce in controlled substances.[9] Therefore, the crime of offering to sell a controlled substance is committed when the offer is made, not when the transaction is consummated.[10]

Either an offer was or was not made. There is no way for a person to attempt to offer to sell drugs to someone. Attempting to sell is the same thing as offering to sell. Therefore, by including "offer to sell" in R.C. 2925.03(A)(1), the Ohio Legislature has made attempting to sell a controlled substance the same as selling a controlled substance.

This issue is resolved using the rules of the English language and common sense. There is no need for this Court to step in to point out the obvious. Therefore, the fifth proposition of law should not be accepted by this Court.

State's Sixth Proposition of Law: The jury's verdict is supported by the sufficient evidence.

In his sixth proposition of law, Cabrales asks this Court to reconsider what is likely the most well settled criminal law in the State – the sufficiency of the evidence. When reviewing the sufficiency of the evidence to support a criminal conviction, a reviewing court must examine the evidence admitted at trial in the light most favorable to the prosecution and determine whether such evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.[11] In deciding if the evidence was sufficient, a reviewing

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[8]Id.

[9]Id. at 441.

[10]*State v. Mosley* (1977), 55 Ohio App.2d 178, 183, 380 N.E.2d 731.

[11]See *State v. Thomkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541.

court neither resolves evidentiary conflicts nor assess the credibility of the witnesses, as both are functions reserved for the trier of fact.[12]

The evidence in this matter showed that Cabrales orchestrated the acquisition, delivery, and trafficking of over 300 pounds of marijuana. The evidence showed that Cabrales was consistently in contact with the members of the conspiracy who were in charge of taking the marijuana from California to Hamilton County, Ohio. The evidence shows that Cabrales consistently directed their actions. The evidence was more than sufficient to support all the jury's findings of guilt.

This Court's function is to review new and unsettled areas of law. It does not double check lower courts. That is all Cabrales wants this Court to do. Therefore, the sixth assignment of error should be rejected.

State's Seventh Proposition of Law: *State v. Foster* does not create a situation where the ex post facto and due process clauses of the United States Constitution are violated.

In his seventh proposition of law, Cabrales argues that this Court crafted an entirely unconstitutional remedy in *State v. Foster*.[13] He argues that this Court's remedy violates the ex post facto and due process clauses of the Constitution.

"[I]t has long been recognized by [the United States Supreme Court] that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them."[14] Not just any "disadvantage" to an offender, however, will run afoul of the Ex Post Facto Clause. The clause implicates only certain types of legislative acts:

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[12]See *State v. Willard* (10th Dist. 2001), 144 Ohio App. 3d 767, 777-778, 761 N.E.2d 688.

[13]*State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470.

[14]*Collins v. Youngblood* (1990), 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30.

"'1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.' "[15]

As noted above, the ex post facto clause applies to legislative enactments, not judicial decisions. Generally, this is true. However, there is an exception that has been carved out by the United States Supreme Court. In *Bouie v. City of Columbia*, the Court ruled that when a judicial decision renders formerly innocent conduct to become criminal that it violates the ex post facto and the due process clauses of the Constitution to retroactively punish someone for what was previously innocent behavior.[16]

Bouie does not directly impact this case because *Foster* did not change the definition of any criminal activity. Yet it does tangentially impact it because it does suggest that the ex post facto clause has an impact on judicial decisions. And Cabrales uses that to argue that *Foster* has changed the punishment that he was able to receive for committing his crimes. A plain reading of the law shows he is wrong.

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[15]Id. at 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30, quoting *Calder v. Bull* (1798), 3 U.S. (Dall.) 386, 390, 3 U.S. 386, 1 L. Ed. 648, 3 Dall. 386 (opinion of Chase, J.); see, also, *Carmell v. Texas* (2000), 529 U.S. 513, 521-522, 120 S. Ct. 1620, 146 L. Ed. 2d 577.

[16]*Bouie v. City of Columbia* (1964), 378 U.S. 347, 354-357, 84 S.Ct. 11697, 12 L.Ed.2d 894.

The punishment for felonies in Ohio is set forth in R.C. 2929.14(A). This section was untouched by *Foster*. The potential sentences for all felonies has remained identical. Both before and after *Foster*, Cabrales was facing the same potential sentence for his crimes.

Cabrales correctly points out that *Foster* changed sentencing procedure by removing presumptions and fact-finding. But changing a procedure does not violate the ex post facto or the due process clause of the Constitution. This Court made that clear in *State v. Walls*.[17]

In *Walls*, the defendant was charged as an adult for a murder he committed while he was a juvenile. Changes in the law that occurred after the murder was committed allowed the defendant to be charged as an adult. The defendant challenged that allowing the State to charge him as an adult was an ex post facto violation because, amongst other things, under the law in effect at the time he committed his crime, he would have been entitled to a bindover hearing.

This Court found no ex post facto violation. While the change in the law created a procedural change, it did not change the ultimate punishment proscribed for the offense.[18] "A 'speculative and attenuated' possibility that the statutory change has increased the measure of punishment will *not* constitute an ex post facto violation."[19]

Foster did not change anyone's potential sentences. It changed the procedure used to sentence defendants in Ohio. A procedural change does not amount to an ex post facto or a due process violation. Cabrales faced the same potential sentence before and after *Foster*.

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[17]*State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829.

[18]Id. at ¶ 30.

[19]Id. citing *Cal. Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (emphasis in original).

State v. Foster is constitutional. Therefore, this Court should reject Cabrales's seventh proposition of law.

State's Eighth Proposition of Law: The principal of lenity is not implicated in this matter.

Cabrales concludes by arguing that the rule of lenity requires that he automatically receive a minimum sentence. This is an improper use of the rule. This Court has stated exactly what this rule means: "While we are required to strictly construe statutes defining criminal penalties against the state, see R.C. 2901.04(A), this 'rule of lenity' applies only where there is ambiguity in or conflict between the statutes."[20] There is no ambiguity or conflict between any statutes in this matter. Thus, this Court should reject Cabrales eighth proposition of law.

[20]*State v. Arnold* (1991), 61 Ohio St. 3d 175, 178, 573 N.E.2d 1079.

CONCLUSION

With the sole exception of his fourth proposition of law, which is consumed by the certified conflict, Cabrales asks this Court to do nothing more than to reconsider well settled law. But that is not this Court's function.

The only issue in this case that merits consideration is the one that was certified by the First District. Should this Court feel it is necessary to accept both the certified question and the fourth proposition of law in this matter then the State would suggest that the two should be consolidated together.

Respectfully,

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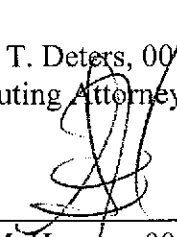

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Elizabeth E. Agar, 1208 Sycamore Street, Cincinnati, Ohio 45210, counsel of record, this 23d day of April, 2007.

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