

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-060720
	:	TRIAL NO. B-0408159-A
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DAVID FOSTER,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant David Foster appeals the sentence of the Hamilton County Common Pleas Court. This is Foster's second appeal, and we adopt the facts of our initial decision set forth in *State v. Foster*,² where we affirmed the guilty verdict and remanded for resentencing in light of the Ohio Supreme Court ruling in *State v. Foster*.³ The trial court imposed an identical sentence.

In this appeal, Foster once again challenges his sentence under *State v. Foster*,⁴ alleging error in the trial court's imposition of additional and consecutive seven-year terms under the major-drug-offender section of R.C. 2929.14(D)(3)(b).

Foster alleges that the major-drug-offender add-on was held unconstitutional by the Supreme Court's holding in *State v. Foster*.⁵ Not so. *Foster* explicitly held

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See *State v. Foster*, 1st Dist. No. C-050378, 2006-Ohio-1567.

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

⁴ *Id.*

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that R.C. 2929(D)(3)(b) was capable of being severed. “After severance, judicial factfinding is not required before imposition of additional penalties for major drug offender specifications.”⁶ The seven-year sentences were constitutional. Moreover, a major drug offender means an offender who is convicted of or pleads guilty to possessing, selling, or offering to sell a drug consisting of 250 grams of heroin.⁷ The jury verdict form explicitly asked the jury to decide whether the amount of heroin involved was equal to or greater than 250 grams, and the jury unanimously found that it was. The major-drug-offender sentences were proper.

Foster’s ex-post-facto argument is overruled on the authority of *State v. Bruce*.⁸

But we hold that Foster was improperly convicted for trafficking in heroin⁹ and for possession of heroin¹⁰ because, under *State v. Cabrales*,¹¹ those were allied offenses of a similar import. Consequently we reverse the sentences and remand the case for resentencing in accord with *Cabrales*.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., HENDON and WINKLER, JJ.

To the Clerk:

Enter on the court’s journal on June 27, 2007
per order of the Court _____
Presiding Judge

⁵ Id.

⁶ Id. at paragraph six of the syllabus.

⁷ See R.C. 2929.01(X).

⁸ 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44.

⁹ See R.C. 2925.03(A)(2).

¹⁰ See R.C. 2925.11.

¹¹ 1st Dist. No. C-050682, 2007-Ohio-857.