

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 APPELLEE, : On Appeal from the Miami
 : County Court of Appeals,
 VS. : Second Appellate District
 :
 ROBERT W. BATES, : Case Nos. 2007-0293 & 2007-0304
 :
 APPELLANT. :

MERIT BRIEF OF APPELLEE STATE OF OHIO

James D. Bennett (0022729)
jdbennett@co.miami.oh.us
First Assistant Prosecuting Attorney
Miami County Prosecutor's Office
201 West Main Street
Troy, Ohio 45373
(937) 440-5960
(937) 440-5961 (fax)

COUNSEL FOR APPELLEE
STATE OF OHIO

Michael R. Gladman (0059797)
mrgladman@jonesday.com
Grant W. Garber (0079541)
gwwgarber@jonesday.com
Jones Day
P.O. Box 165017
325 John H. McConnell Boulevard
Suite 600
Columbus, Ohio 43216
(614) 469-3939
(614) 461-4198

COUNSEL FOR APPELLANT
ROBERT W. BATES

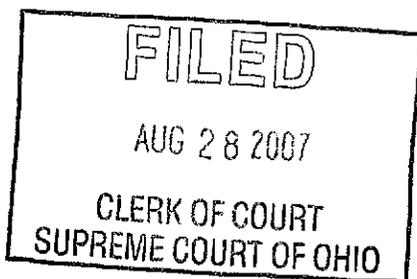


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT.....3

Appellee’s Proposition of Law No. 1: A trial court has the authority to order that a felony sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court.

I. THE REMAINING PORTION OF ORC §2929.14(E)(4) PURSUANT TO THE FOSTER DECISION, AUTHORIZES AN OHIO COURT TO ORDER THAT ITS SENTENCE BE SERVED CONSECUTIVELY WITH A FELONY SENTENCE IMPOSED PREVIOUSLY BY ANOTHER OHIO COURT.....3

II. A TRIAL COURT HAS INHERENT COMMON LAW AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES.....6

CONCLUSION.....9

CERTIFICATE OF SERVICE.....10

APPENDIX.....11

TABLE OF AUTHORITIES

FEDERAL CASES

Apprendi v. New Jersey (2000), 530 U.S. 466.....4
120 S.Ct. 2348, 147 L.Ed. 2d 435

Blakely v. Washington (2004), 542 U.S. 296.....4

STATE CASES

Henderson v. James (1895), 52 Ohio St.2d 242, 254-255.....7

Stewart v. Maxwell (1963), 174 Ohio St.3d 180, 181.....7

Symmes Twp. Board of Trustees v. Smyth (2000), 87 Ohio St.3d 549.....6

State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856.....4,6,7

State v. Gilman, Franklin App. No. 01AP-662, 2001-Ohio-3968.....5,6

State v. Gonzalez, 2007-Ohio-3132.....4,7

State ex. rel. Pennington v. Gundlar (1996), 75 Ohio St.3d 171.....6

State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245.....7

State ex. Rel. Stratton v. Maxwell (1963), 175 Ohio St. 65, 67.....7

State v. Taylor, 2007-Ohio-2850.....4,6

State v. Worrell, 2007-Ohio-2216.....4,7

STATUTES

R.C. 2911.01(A)(1).....1

R.C. 2929.14.....(*passim*)

R.C. 2929.16.....3

R.C. 2929.17.....3

R.C. 2929.18.....3

R.C. 2929.41(A).....7

STATEMENT OF THE CASE AND FACTS

On May 3, 2004, Appellant Robert Bates (“Bates”) entered a guilty plea to two counts of Aggravated Robbery with a firearm specification pursuant to ORC §2929.14(D)(1)(a), and one count of Attempted Aggravated Robbery in the Montgomery County Common Pleas Court. Thereafter, on May 20, 2004, Bates was sentenced to seven years in the Ohio Department of Rehabilitation and Corrections for each count of Robbery. These terms were to run concurrently, however, the court ordered that the three year term for the firearm specification was to run consecutively to the terms imposed for Robbery. In sum, Bates would be incarcerated for ten years barring an early release.

On October 26, 2004, Bates was indicted in the Miami County Common Pleas Court on three counts of Aggravated Robbery, ORC §2911.01(A)(1), being felonies of the first degree. Bates entered a no contest plea to all three counts of the indictment, and waived his right to a presentence investigation. The trial court, thereafter, imposed sentence. Prior to his plea and sentencing, Bates entered into a plea agreement with the State. The parties agreed to recommend to the trial court that Bates be sentenced to three years on each count of the indictment, to run concurrently with each other, but consecutive to the ten years imposed in Montgomery County.

On January 6, 2006, Bates moved for leave to file a delayed appeal which was granted by the Second District Court of Appeals on February 21, 2006. Bates argued on appeal that the trial court unlawfully imposed Bates’ sentence consecutive to his Montgomery County sentence. The Court of Appeals affirmed his conviction and sentence, recognizing that any decision it reached would be in conflict with another court of appeals.

On May 2, 2007, this Court accepted Bates’ discretionary appeal, and certified a conflict on the following question: Whether a trial court have authority, generally, to order that a felony

sentence imposed by it be served consecutively with a felony sentence previously imposed by another Ohio court. As explained more fully below, a trial court does possess such authority and discretion.

ARGUMENT

PROPOSITION OF LAW NO. 1: A TRIAL COURT HAS THE AUTHORITY TO ORDER THAT A FELONY SENTENCE IMPOSED BY IT BE SERVED CONSECUTIVELY WITH A FELONY SENTENCE PREVIOUSLY IMPOSED BY ANOTHER OHIO COURT.

- I. THE REMAINING PORTION OF ORC §2929.14(E)(4) PURSUANT TO THE FOSTER DECISION, AUTHORIZES AN OHIO COURT TO ORDER THAT ITS SENTENCE BE SERVED CONSECUTIVELY WITH A FELONY SENTENCE IMPOSED PREVIOUSLY BY ANOTHER OHIO COURT.

The resolution of the conflict in this case lies in the interpretation of ORC §2929.14(E)(4) which sets forth the permissive provisions for consecutive sentences.

ORC §2929.14(E)(4) states:

“If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

- A. The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to §2929.16, §2929.17, or §2929.18 of the Revised Code, or was under post release control for a prior offense.
- B. At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of the courses of conduct adequately reflects the seriousness of the offender’s conduct.
- C. The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime of the offender.

However, in State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856, this Court addressed the constitutionality of the provisions under subsection (E)(4) requiring judicial findings before imposing consecutive sentences. In reliance upon Blakely v. Washington (2004), 542 U.S. 296, and Apprendi v. New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435, this Court held that subsection (E)(4) was unconstitutional because it required a judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before the imposition of consecutive sentences, in violation of the Sixth Amendment.

The Court excised subsection (E)(4) from §2929.14 in its entirety. Foster at 997. Some courts have interpreted this to mean that all of (E)(4) was excised. State v. Worrell, 2007-Ohio-2216; State v. Taylor, 2007-Ohio-2850; State v. Gonzalez, 2007-Ohio-3132. Others, most notably the Second District Court of Appeals in this case, have interpreted this (Foster) Court's decision to mean that only those parts requiring a judicial finding of facts have been excised.

[Assuming that unconstitutional provisions are excised, §2929.14(E)(4) would read:

“If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively.]”

Assuming for the purposes of argument that the remainder of Division (E) of Section 2929.14 survives, the use of the word “may” is permissive and clearly authorizes the court to exercise its discretion in determining whether to impose consecutive sentences. Bates argues that the other subsections of §2929.14(E) only permit consecutive sentencing in a single proceeding. His reliance on these subsections is misplaced.

Subsections (1), (2), and (3) of ORC §2929.14(E) are sentencing provisions which require that imposed sentences run consecutively under certain circumstances, to wit: where a defendant pleads guilty, or is convicted of a firearm, body armor specifications, an inmate who

commits a crime in jail or prison, or if the stolen property is a firearm or dangerous ordnance. ORC §2929.14(E)(1)-(3). Each of these provisions requires that sentences be imposed consecutively to any other prison sentence previously or subsequently imposed on the offender. Subsection (E)(4), however, as previously stated, is permissive and refers to multiple prison terms from different courts.

Bates, erroneously argues that the “magic words” that appear in sections (E)(1) through (E)(3) do not appear in (E)(4), and, therefore, that subsection cannot apply to sentences imposed previously or subsequently upon the offender. Subsection (E)(4) encompasses a broader spectrum than subsections (E)(1) through (E)(3). The plain language of (E)(4) does not require that multiple prison terms for multiple sentences be imposed in a single proceeding. Subsection (E)(4) provides clear non-restrictive language. Had the legislature desired subsection (E)(4) to apply only to multiple sentences for offenses arising out of the same proceeding, it would have provided those restrictions in plain terms. State v. Gilman, Franklin App. No. 01AP-662, 2001-Ohio-3968. Given its plain meaning, subsection (E)(4) gives the trial court the discretion to order a sentence to be served consecutively to any previous or subsequent sentence.

The absurdity of Appellant’s argument is furthered by the Second District Court of Appeals’ decision below when it reasoned that a contrary interpretation of ORC §2929.14(E)(4) would lead to the result that someone who had already been sentenced to a lengthy term of imprisonment, or who is out on bond, could commit offenses carrying no more punishment than the term of the imprisonment already imposed, with impunity, secure in the knowledge that if he is caught, tried, and convicted, his sentence will be made concurrent with and subsumed by the sentence already pending.

Absent ambiguity, the plain meaning of a statute must guide a reviewing court's interpretation. State ex. rel. Pennington v. Gundlar (1996), 75 Ohio St.3d 171. The rule is that when the language of a statute is plain and unambiguous it conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation. Symmes Twp. Board of Trustees v. Smyth (2000), 87 Ohio St.3d 549; State v. Gilman, supra.

The plain language of §2929.14(E) does not require multiple prison terms for multiple offenses to be imposed only if it is a single proceeding. If the legislature had intended that result, it would have clearly stated so.

Even though this Court found that the judicial fact finding requirement of section 2929.14 was unconstitutional, a reading of the entire statute as it existed prior to Foster is helpful in determining legislative intent. Division (A) contemplated a possible consecutive sentence if the offender was under post release control. Division (C) permitted a court to consider the defendant's history of criminal conduct. There was no requirement that a court consider the offender's criminal conduct only in the county in which he is sentenced, but a court is permitted to consider the offender's entire criminal history. Notwithstanding the Sixth Amendment violation, it is clear that the legislature did not intend to limit the trial court's discretion to imposing consecutive sentences for multiple offenses from a single proceeding.

II. A TRIAL COURT HAS INHERENT COMMON LAW AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES.

Ohio courts have the inherent authority to impose consecutive sentences, even if that sentence is ordered to be served consecutively to a felony sentence previously imposed by another Ohio court.

Some Ohio courts have interpreted the Foster decision to mean that all of division (E) of section 2929.14 was unconstitutional, and was excised in its entirety. See Taylor, supra;

Worrell, supra; Gonzalez, supra. Also in Foster, it is important to note that the court also excised division (A) from ORC §2929.41, which states:

“Except as provided in Division (B) of this section, Division (E) of §2929.14, or Division (D) or (E) of §2971.03 of the Revised Code, prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, other state, or United States. . .”

The Foster court stated that in severing §2929.41(A) and §2929.14(E), “the trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences.” Id. at ¶ 100. The court additionally stated that if an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively. Id. at ¶ 105. In State v. Worrell, supra, the Tenth District Court of Appeals stated that trial courts generally have discretionary power to impose consecutive sentences. State v. Worrell, 2007-Ohio-2216 *citing* State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 9. The Worrell court further relied upon this Court’s prior decisions that endorse the idea that the authority of a court to impose consecutive sentences is derived from common law. Henderson v. James (1895), 52 Ohio St.2d 242, 254-255. See also State ex. rel. Stratton v. Maxwell (1963), 175 Ohio St. 65, 67; and Stewart v. Maxwell (1963), 174 Ohio St.3d 180, 181. Other Ohio districts have also followed the Worrell court’s reasoning. See State v. Gonzalez, supra, and State v. Taylor, supra.

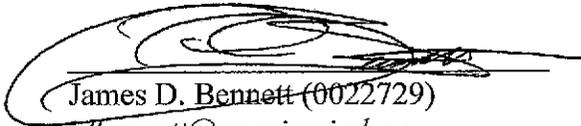
Therefore, the certified question before this Court can be answered in the affirmative on two separate grounds. Assuming that this court interprets its decision in Foster as excising only the unconstitutional provisions of division (E) of section 2929.14, the remainder of the statute is still clear and unambiguous in its meaning, and this Court must give effect to the words used in

the statute. Even if the Court were to find that division (E) of section 2929.14 was excised in its entirety, a trial court still possesses the inherent common authority and discretion necessary to impose consecutive sentences.

CONCLUSION

For all of the foregoing reasons, the Appellee, State of Ohio, respectfully requests that this Court answer the certified question in the affirmative, and sustain the decision of the Second District Court of Appeals.

Respectfully submitted,



James D. Bennett (0022729)

jdbennett@co.miami.oh.us

First Assistant Prosecuting Attorney
Miami County Prosecutor's Office
201 West Main Street
Troy, Ohio 45373
(937) 440-5960
(937) 440-5961 (fax)

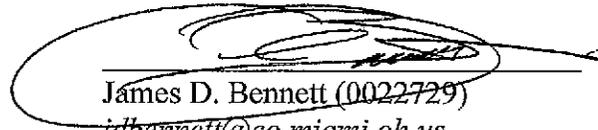
COUNSEL FOR APPELLEE
STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellee State of Ohio was served via first class U.S. mail, postage prepaid, this 28th day of August, 2007, upon:

Michael R. Gladman, Esq.
Jones Day
325 John H. McConnell Blvd., Ste. 600
P.O. Box 165017
Columbus, Ohio 43215-2673

Attorney for Appellant



James D. Bennett (0022729)
jdbennett@co.miami.oh.us
First Assistant Prosecuting Attorney
Miami County Prosecutor's Office
201 West Main Street
Troy, Ohio 45373
(937) 440-5960
(937) 440-5961 (fax)

APPENDIX

APPENDIX

State v. Gilman, Franklin App. No. 01AP-662, 2001-Ohio-3968.....1

State v. Gonzalez, 2007-Ohio-3132.....4

State v. Taylor, 2007-Ohio-2850.....8

State v. Worrell, 2007-Ohio-2216.....12

Westlaw

Not Reported in N.E.2d

Page 1

Not Reported in N.E.2d, 2001 WL 1586688 (Ohio App. 10 Dist.), 2001 -Ohio- 3968
 (Cite as: Not Reported in N.E.2d)

▷

State v. Gillman
 Ohio App. 10 Dist., 2001.

**CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.**

Court of Appeals of Ohio, Tenth District, Franklin
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Danny J. GILLMAN, Defendant-Appellant.

No. 01AP-662.

Dec. 13, 2001.

Appeal from the Franklin County Court of Common
 Pleas.

Ron O'Brien, Prosecuting Attorney, and Scott M.
 Forehand, for appellee.
 Jonathan T. Tyack, for appellant.

DECISION

BROWN, J.

*1 Danny J. Gillman, defendant-appellant, appeals the May 24, 2001 judgment of the Franklin County Court of Common Pleas, in which the trial court, having found appellant violated his community control, sentenced him to serve five years incarceration consecutively to a sentence imposed in a separate case.

On February 27, 1997, appellant pled guilty in case No. 96CR-6802 to one count of attempted felonious assault. The trial court sentenced appellant to community control for a period of three years. On April 2, 2001, appellant pled guilty in case No. 00CR-6082 to two counts of aggravated robbery with a firearm specification. The trial court sentenced appellant to twenty-two years incarceration. On April 18, 2001, appellant stipulated the offense in case No. 00CR-6082

constituted a violation of his community control sanction imposed in case No. 96CR-6802. The trial court revoked appellant's probation and, pursuant to a judgment entry on May 24, 2001, sentenced him to a prison term of five years, to be served consecutively to the prison term imposed in case No. 00CR-6082. Appellant appeals the judgment of the trial court, asserting a single assignment of error: **THE TRIAL COURT ERRED BY ORDERING APPELLANT'S SENTENCE TO BE SERVED CONSECUTIVELY TO CASE NUMBER 00CR-10-6082.**

Appellant argues in his assignment of error the trial court erred in imposing his sentence in case No. 96CR-6802. R.C. 5145.01 provides that if a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment must run concurrently, except if the consecutive sentence provisions of R.C. 2929.14 and 2929.41 apply. R.C. 2929.41(A) provides that a sentence of imprisonment must be served concurrently with any other sentence of imprisonment imposed by a court of Ohio, another state, or the United States, unless the court finds that consecutive sentences are warranted pursuant to R.C. 2929.14(E).

The parties agree that R.C. 2929.14(E)(1), (2), and (3) do not apply to the present circumstances. Therefore, the court could only order the sentences to be served consecutively if subsection (4) permits such. R.C. 2929.14(E)(4) provides, in pertinent part: If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing,

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in N.E.2d

Page 2

Not Reported in N.E.2d, 2001 WL 1586688 (Ohio App. 10 Dist.), 2001 -Ohio- 3968
 (Cite as: Not Reported in N.E.2d)

was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

*2 (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Appellant claims R.C. 2929.14(E)(4) does not permit trial courts to impose a sentence in one case consecutive to a sentence previously imposed in a separate proceeding, but allows consecutive sentences only when a trial court is imposing multiple prison terms arising out of the same proceeding. Appellant puts forth various arguments to support his interpretation. Appellant points out that R.C. 2929.14(E)(1), (2), and (3) conspicuously state that a sentence imposed under any of the particular circumstances detailed in those subsections must be imposed consecutively to any other prison term previously or subsequently imposed upon the offender, while this requirement is absent from subsection (4). Appellant also points out that former R.C. 2929.41(B)(3), which was amended July 1, 1996, required a sentence of imprisonment to be served consecutively to any other sentence of imprisonment when it was imposed for a new felony committed by a probationer; however, amended R.C. 2929.41 deleted this requirement, instead indicating that all sentences must be served concurrently to any other sentences previously imposed in other cases by other courts, except as required by R.C. 2929.14(E).

Absent ambiguity, the plain meaning of a statute must guide an appellate court's interpretation. *State ex. rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171. The rule is that when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation. *Symmes Twp. Bd. of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 553, citing *Meeke v. Papadopoulos* (1980), 62 Ohio St.2d 187, 190. "In such a case, we do not resort to

rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in * * * a particular statute—we rely only on what the General Assembly has actually said." *Muenchenbach v. Preble Cty.* (2001), 91 Ohio St.3d 141, 149.

In the present case, R.C. 2929.14(E)(4) states unambiguously, "[i]f multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively * * *." The plain language of subsection (4) does not require multiple prison terms for multiple offenses to be imposed in the same proceeding or to be based upon the same facts in order for any resulting sentences to be served consecutively. Although appellant relies upon various inferences, interpretations, and assumptions utilizing the language of other subsections and related statutes, such are not necessary given the clear, nonrestrictive language of subsection (4). Had the legislature desired subsection (4) to apply only to multiple sentences and offenses arising out of the same proceeding, it could have simply provided for such restrictions in plain terms.

*3 Subsections (1), (2), and (3) pertain to circumstances when there are multiple sentences and one of the sentences was for one of three specific types of conduct. Subsection (4) applies to all other situations when there exists multiple sentences. In subsections (1), (2), and (3), the legislature made it mandatory that sentences for gun specifications, crimes in a detention facility, and certain acts against a law enforcement officer be served consecutively to all other sentences imposed previously or subsequently. The legislature undoubtedly made consecutive sentences mandatory for such crimes to underscore the serious nature of those offenses. Subsection (4) then gives the trial court the discretion to determine whether sentences for multiple offenses that do not fit into subsections (1), (2), or (3) should be served consecutively. As subsections (1), (2), and (3) require sentences to be served consecutively to other sentences imposed previously or subsequently when the offense was of an especially serious nature, we read subsection (4) to give the trial court the discretion to order a

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in N.E.2d

Page 3

Not Reported in N.E.2d, 2001 WL 1586688 (Ohio App. 10 Dist.), 2001 -Ohio- 3968
 (Cite as: Not Reported in N.E.2d)

sentence to be served consecutively to any previous or subsequent sentence when the court makes the required findings indicating that the prison terms should be served consecutively. While we agree R.C. 2929.14(E)(4) is not a model of clarity, we do not believe the legislature intended that the trial court would not have this type of discretion in sentencing.

We find instructive our recent decision in *State v. Washington* (July 17, 2001), Franklin App. No. 00AP-1077, unreported. In *Washington*, the defendant was convicted of several state offenses and sentenced. Subsequently, he was convicted and sentenced for a federal crime. After he was sentenced for the federal crime, we reversed the defendant's state sentence and remanded the matter for resentencing. When the trial court resentedenced the defendant, it ordered him to serve his state sentence consecutively to his federal sentence. On appeal, we found that R.C. 2929.14(E)(4) permitted the trial court to impose a state sentence consecutively to a sentence previously imposed by a federal court. In other words, we found that sentences imposed by different courts in separate proceedings for separate offenses were "multiple prison terms * * * imposed on an offender for convictions of multiple offenses" within the meaning of R.C. 2929.14(E)(4). Likewise, in the present case, appellant's sentence for two counts of aggravated robbery and his subsequent sentence for probation violation constituted "multiple prison terms * * * imposed on an offender for convictions of multiple offenses" within the meaning of R.C. 2929.14(E)(4), so as to permit consecutive sentences.

In support of his argument, appellant cites our decision in *State v. Koon* (Apr. 13, 2000), Franklin App. No. 99AP-869, unreported. However, as a rule, this court does not use a memorandum decision as authority, and it has no binding precedential value. S.Ct.R.Rep.Op. 2(C) and 2(G)(1) ; [State ex rel.] *McDonald v. Indus. Comm.* (Dec. 12, 1995), Franklin App. No. 94APD12-1738, unreported; *State ex rel. Stevenson v. Orient State Institute* (Sept. 30, 1992), Franklin App. No. 91AP-1152, unreported, fn.1. Nevertheless, *Koon* is readily distinguishable. In *Koon*, the defendant pled

guilty to two counts of trafficking in cocaine while on parole for a previous offense. The court sentenced appellant to one year of incarceration for the trafficking counts, and ordered the sentence to be served consecutively with any sentence he may receive in the future as a result of his parole revocation. We found that R.C. 2929.14(E)(4) did not grant the trial court the authority to order the defendant's current sentence to be served consecutively with any future sentence for parole revocation. However, we agree with the state that *Koon* is distinguishable from the present case in that, in *Koon*, at the time the trial court imposed consecutive sentences, the defendant had not yet had his parole revoked and, thus, "multiple prison terms" had not yet been "imposed" on him as required by R.C. 2929.14(E)(4). In the present case, appellant had already been sentenced on the two counts of aggravated robbery when the trial court sentenced him pursuant to his probation revocation. Thus, we find our holding in *Koon* inapplicable to the present circumstances. For the foregoing reasons, we find the trial court did not err, and appellant's assignment of error is overruled.

*4 Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and PETREE, J., concur.
 Ohio App. 10 Dist., 2001.
 State v. Gillman
 Not Reported in N.E.2d, 2001 WL 1586688 (Ohio App. 10 Dist.), 2001 -Ohio- 3968

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Westlaw

Slip Copy

Page 1

Slip Copy, 2007 WL 1805073 (Ohio App. 3 Dist.), 2007-Ohio-3132

(Cite as: 2007 WL 1805073 (Ohio App. 3 Dist.))

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Third District, Hancock County,
STATE of Ohio, Plaintiff-Appellee,

v.

Joseph J. GONZALES, Jr., Defendant-Appellant.
No. 5-06-43.

Decided June 25, 2007.

Criminal Appeal from Common Pleas Court.

David H. Bodiker, State Public Defender,
Katherine A. Szudy, Assistant Public Defender,
Columbus, OH, for Appellant.

Mark C. Miller, Prosecuting Attorney, Findlay,
OH, for Appellee.

ROGERS, P.J.

*1 ¶ 1 Defendant-Appellant, Joseph J. Gonzales, Jr., appeals the judgment of the Hancock County Court of Common Pleas sentencing him to an aggregate term of thirty-four years in prison. On appeal, Gonzales argues that the trial court erred in imposing a sentence in violation of the due process and ex post facto clauses of the United States Constitution; that the trial court did not have authority to impose consecutive sentences; and, that his trial counsel provided ineffective assistance. Finding that Gonzales' sentence did not violate the due process and ex post facto clauses; that the trial court did not err in imposing consecutive sentences; and, that his trial counsel provided effective assistance, we affirm the judgment of the trial court.

¶ 2 In November 2005, the Hancock County Grand Jury indicted Gonzales on two counts of rape

in violation of R.C. 2907.02(A)(2), one count of kidnapping in violation of R.C. 2905.01(A)(4), one count of aggravated robbery in violation of R.C. 2911.01, and one count of aggravated burglary in violation of R.C. 2911.11(A)(1), all felonies of the first degree.

¶ 3 In December 2005, Gonzales entered pleas of not guilty.

¶ 4 In April 2006, after numerous motions and a suppression hearing, Gonzales changed his pleas to guilty as to all five counts and stipulated to being classified as a sexual predator. Additionally, the parties agreed to recommend that the trial court impose a prison sentence between twenty to forty years.

¶ 5 In August 2006, the trial court sentenced Gonzales to nine years in prison for each count of rape in violation of R.C. 2907.02(A)(2), eight years in prison for the count of aggravated robbery in violation of R.C. 2911.01(A)(1), and eight years in prison for the count of aggravated burglary in violation of R.C. 2911.11(A)(1). [FN1] Additionally, the trial court ordered these sentences to be served consecutively and found Gonzales to be a sexual predator.

FN1. We note the trial court found that the count of kidnapping in violation of R.C. 2905.01(A)(4) merged with a rape offense and did not enter a conviction or sentence on that count.

¶ 6 It is from this judgment Gonzales appeals, presenting the following assignments of error for our review.

Assignment of Error No. 1

The trial court erred by imposing non-minimum, consecutive sentences in violation of the Due Process and Ex Post Facto

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 2

Slip Copy, 2007 WL 1805073 (Ohio App. 3 Dist.), 2007-Ohio-3132

(Cite as: 2007 WL 1805073 (Ohio App. 3 Dist.))

Clauses of the United States Constitution. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; *Blakely v. Washington* (2004), 542 U.S. 296; *United States v. Booker* (2005), 543 U.S. 220. (August 24, 2006 Judgment Entry; August 11, 2006 Sentencing Hearing T.pp. 55-66).

Assignment of Error No. II

Trial counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to the trial court's imposition of non-minimum, consecutive sentences. (August 24, 2006 Judgment Entry; August 11, 2006 Sentencing Hearing T.pp. 55-66).

Assignment of Error No. III

*2 The trial court committed plain error and denied Mr. Gonzales due process of law by imposing non-minimum, consecutive sentences. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution. (August 24, 2006 Judgment Entry; August 11, 2006 Sentencing Hearing T.pp. 55-66).

Assignment of Error No. IV

The trial court did not have the authority to impose consecutive sentences. (August 24, 2006 Judgment Entry; August 11, 2006 Sentencing Hearing T.pp. 55- 66).

{¶ 7} Due to the nature of Gonzales' assignments of error, we elect to address them out of order and assignments one and three together.

Assignments of Error Nos. I & III

{¶ 8} In his first and third assignments of error, Gonzales argues that the application of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to his sentence violates the ex post facto clause of the United States Constitution and that his due process rights were violated because the effect of *Foster* is to create an ex post facto law.

{¶ 9} First, we note that Gonzales did not raise any challenge to the application of *Foster* at the trial level. As such, we find that Gonzales waived the issue absent plain error. See Crim.R. 52(B).

{¶ 10} This court recently held in *State v. McGhee*, 3d Dist. No. 17-06-05, 2006-Ohio-5162, that *Foster* does not violate the ex post facto clause of the United States Constitution or notions of federal due process generally. For the reasons set forth in *McGhee*, we conclude that the trial court did not commit plain error when it sentenced Gonzales in accordance with *Foster* and find no merit in Gonzales' argument that the sentence violates his due process rights and the ex post facto clause. Additionally, the sentencing range for his felony offenses, of which he had notice prior to the commission of the crimes, have remained unchanged by the application of *Foster*. Therefore, we find that Gonzales' first and third assignments of error are without merit and are overruled.

Assignment of Error No. IV

{¶ 11} In his fourth assignment of error, Gonzales argues that the trial court did not have authority to impose consecutive sentences upon him. Specifically, Gonzales contends that, before the *Foster* decision, the authority of a trial court to impose consecutive sentences derived from R.C. 2929.14(E) and 2929.41(A). Pursuant to *Foster*, those provisions were severed from Ohio's felony sentencing scheme. See *id.* at paragraph four of the syllabus. According to Gonzales' reasoning, upon the severance of those provisions, trial courts are no longer authorized to impose consecutive sentences under the circumstances found in this case.

{¶ 12} In *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-2216, the Tenth District decided this same issue, providing:

Before the *Foster* decision, judicial fact-finding was required before consecutive sentences could be imposed, except when certain enumerated statutes imposing non discretionary consecutive terms applied. See *Foster*, at ¶ 66. In *Foster*, the Supreme Court of Ohio, following *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and

Slip Copy

Page 3

Slip Copy, 2007 WL 1805073 (Ohio App. 3 Dist.), 2007-Ohio-3132

(Cite as: 2007 WL 1805073 (Ohio App. 3 Dist.))

Apprendi v. New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, found portions of Ohio's felony sentencing scheme, including R.C. 2929.14(E)(4) and 2929.41(A), unconstitutional because those portions required judicial fact-finding in violation of a defendant's Sixth Amendment right to a trial by jury. Concluding that R.C. 2929.14(E)(4) and 2929.41(A) were capable of being severed, the Supreme Court of Ohio severed in their entirety these statutory sections. *Foster*, at ¶ 97, 99; and paragraph four of the syllabus.

*3 In view of the *Foster* court's severance of the unconstitutional provisions, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus. The *Foster* court additionally stated: "If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively." *Id.* at ¶ 105.

Thus, pursuant to *Foster*, trial courts generally have the discretionary power to impose consecutive sentences. See *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio1245, ¶ 9, citing *Foster* ("Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively.") Notwithstanding that general rule, there still remain circumstances that require the imposition of consecutive sentences. See *Foster*, at ¶ 66, citing R.C. 2929.14(E)(1) through (3). In those circumstances, a trial court lacks discretion regarding whether to impose consecutive or concurrent sentences. See *Foster*, at ¶ 66. Nonetheless, this case does not involve one of those circumstances. Thus, pursuant to *Foster*, the trial court in this case had discretion as to whether defendant should serve his sentences consecutively or concurrently.

However, according to defendant, the trial court lacked the authority to impose

consecutive sentences. Thus, despite the *Foster* decision, defendant urges this court to find that the trial court in this case acted contrary to law by imposing consecutive sentences. Such a finding would be contrary to the *Foster* decision. As an intermediate appellate court, we will not make a determination that conflicts with a decision of the Supreme Court of Ohio that has not been reversed or overruled. "A court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled." *Sherman v. Millhon* (June 16, 1992), Franklin App. No. 92AP-89, citing both *Battig v. Forshey* (1982), 7 Ohio App.3d 72, and *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App.2d 17.

Furthermore, to the extent the *Foster* court did not expressly discuss the source of a trial court's authority to impose consecutive sentences, we note that previous Ohio Supreme Court decisions expressly endorsed the idea that the authority of a court to impose consecutive sentences derives from the common law. In *Henderson v. James* (1895), 52 Ohio St. 242, 254-255, the Supreme Court recognized the existence of a trial court's inherent power, derived from the common law, to impose consecutive sentences:

* * * As we have no statute authorizing cumulative sentences for crime, it would seem at first blush that such sentences should not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute. * * * The great weight of authority is in favor of cumulative sentences, and they should be upheld on principle. The severe punishments which induced judges to invent technicalities to aid the acquittal of those on trial, on criminal charges, no longer exist; and, under our just and humane statutes, those who violate the law should be duly punished for each offense. * * *

*4 See, also, *State ex rel. Stratton v. Maxwell* (1963), 175 Ohio St. 65, 67 (citing *Henderson* for the proposition that "a court has the power to

Slip Copy

Page 4

Slip Copy, 2007 WL 1805073 (Ohio App. 3 Dist.), 2007-Ohio-3132

(Cite as: 2007 WL 1805073 (Ohio App. 3 Dist.))

impose consecutive sentences"). Moreover, in *Stewart v. Maxwell* (1963), 174 Ohio St. 180, 181, the Supreme Court stated that "in the absence of statute, it is a matter solely within the discretion of the sentencing court as to whether sentences shall run consecutively or concurrently."

Worrell, at ¶¶ 6-11.

{¶ 13} Finding the Tenth District's rationale persuasive, we apply it to the case before us. Accordingly, we find that the trial court had the authority to impose consecutive sentences upon Gonzales and overrule his fourth assignment of error.

Assignment of Error No. II

{¶ 14} In his second assignment of error, Gonzales argues that his counsel did not provide him effective assistance, because his counsel did not object to the trial court's imposition of non-minimum and consecutive sentences. We disagree.

{¶ 15} A defendant who pleads guilty may only attack the voluntary, knowing, and intelligent nature of the defendant's plea and "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130.

{¶ 16} A defendant asserting a claim of ineffective assistance of counsel must establish both that counsel performed unreasonably under the circumstances and that the unreasonable performance prejudiced the defendant. *State v. Kole*, 92 Ohio St.3d 303, 306, 2001-Ohio-191, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. To establish prejudice when ineffective assistance of counsel relates to a guilty plea, a defendant must show there is a reasonable probability that but for counsel's unreasonable performance the defendant would not have pled guilty. See *Strickland*, 466 U.S. at 687.

{¶ 17} Here, Gonzales argues that his counsel performed unreasonably because his counsel failed to object to the trial court's imposition of an

unconstitutional sentence. As noted above, we determined that the trial court did not improperly sentence Gonzales. Therefore, we find Gonzales has failed to establish that his counsel acted unreasonably in this regard.

{¶ 18} Accordingly, we find that Gonzales' counsel did not perform unreasonably and overrule Gonzales' second assignment of error.

{¶ 19} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW and WILLAMOWSKI, JJ., concur.

Slip Copy, 2007 WL 1805073 (Ohio App. 3 Dist.), 2007-Ohio-3132

END OF DOCUMENT

Westlaw

Slip Copy

Page 1

Slip Copy, 2007 WL 1662049 (Ohio App. 12 Dist.), 2007-Ohio-2850

(Cite as: 2007 WL 1662049 (Ohio App. 12 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Twelfth District, Fayette County,
STATE of Ohio, Plaintiff-Appellee,

v.

Michael E. TAYLOR, Defendant-Appellant.
No. CA2006-09-039.

Decided June 11, 2007.

Criminal Appeal from Fayette County Court of
Common Pleas, Case No. 03CRI0268.

David B. Bender, Fayette County Prosecuting
Attorney, Kristina M. Rooker, Washington C.H.,
OH, for plaintiff-appellee.

Tyack Blackmore & Liston Co., L.P.A., Thomas
M. Tyack, James P. Tyack, Columbus, OH, for
defendant-appellant.

BRESSLER, P.J.

*1 {¶ 1} Defendant-appellant, Michael Taylor,
appeals the decision of the Fayette County Court of
Common Pleas sentencing him to consecutive
three-year sentences after appellant was convicted
of three counts of sexual battery.

{¶ 2} As part of a plea agreement, appellant pled
guilty to three counts of sexual battery in 2004. The
trial court sentenced appellant to three consecutive
three-year prison terms for these convictions and
classified him as a sexual predator. Appellant
appealed his sentence and adjudication as a sexual
predator. This court affirmed both the sentencing
decision and appellant's classification as a sexual
predator. *State v. Taylor*, Fayette App. No.
CA2005-01-004, 2005-Ohio-6426. Appellant

appealed to the Ohio Supreme Court, which vacated
appellant's sentence and remanded the case for
resentencing pursuant to the court's decision in *State
v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470,
2006-Ohio-856. *In re Ohio Criminal Sentencing
Statutes Cases*, 109 Ohio St.3d 313, 847 N.E.2d
1174, 2006-Ohio-2109.

{¶ 3} The trial court held a resentencing hearing
in August 2006 and again imposed three
consecutive three-year prison sentences for
appellant's sexual battery convictions. Appellant
now appeals the trial court's resentencing decision
and raises the following sole assignment of error for
our review

{¶ 4} "THE TRIAL COURT ERRED IN
IMPOSING CONSECUTIVE SENTENCES ON
THE THREE COUNTS OF SEXUAL BATTERY
AS THE RULING IN *STATE V. FOSTER*,
[CITATION OMITTED] DECLARING
2929.11(E)(4) AND 2929.41(A)
UNCONSTITUTIONAL IN EXCISING THEM
FROM THE STATUTORY STRUCTURE
REMOVES THE COURT'S AUTHORITY
UNDER CIRCUMSTANCES SUCH AS THIS TO
IMPOSE CONSECUTIVE SENTENCES. SUCH
IMPOSITION THEREFORE DEPRIVES THE
DEFENDANT OF EQUAL PROTECTION[,] DUE
PROCESS AND OTHER CONSTITUTIONAL
RIGHTS PURSUANT TO THE FEDERAL AND
STATE CONSTITUTIONS."

{¶ 5} Appellant's argument on appeal challenges
the authority of a trial court to impose consecutive
sentences after the Ohio Supreme Court's decision
in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d
470, 2006-Ohio-856. In *Foster*, the court found
certain provisions of Ohio's sentencing statutes were
unconstitutional and as a remedy, excised those
provisions from the statute. *Foster* at ¶ 97. Prior to
the *Foster* decision, with certain limited exceptions,
prison terms were to run concurrently, unless

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 2

Slip Copy, 2007 WL 1662049 (Ohio App. 12 Dist.), 2007-Ohio-2850

(Cite as: 2007 WL 1662049 (Ohio App. 12 Dist.))

certain findings were made by the trial court. See *Foster* at ¶ 66. Two sections of the Revised Code, R.C. 2929.41 and R.C. 2929.14(E)(4), that provided for concurrent prison terms unless certain judicial findings were made, were among the provisions that were severed by the court in *Foster*. Appellant now contends that without a specific statutory provision authorizing the imposition of consecutive prison terms, the trial court in this case was without jurisdiction to impose consecutive sentences. We find appellant's argument without merit.

{¶ 6} The authority to impose consecutive sentences has long been recognized as an inherent power of trial courts in Ohio and other states. See *Henderson v. James* (1895), 52 Ohio St. 242, 254-255, 39 N.E. 805. In *Henderson*, the court found that "[a]s we have no statute authorizing cumulative sentences for crime, it would seem at first blush that such sentences would not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute. * * * The great weight of authority is in favor of cumulative sentences and they should be upheld on principle." *Id.*

*2 {¶ 7} In 1963, the Ohio Supreme Court examined the issue of whether sentences for escape should run concurrently or consecutively when the court's judgment entry does not specify how the sentence is to be served. *Stewart v. Maxwell*, (1963), 174 Ohio St. 180, 187 N.E.2d 888. The court found that "[i]n the absence of statute, it is a matter solely within the discretion of the sentencing court as to whether the sentences shall run consecutively or concurrently." *Id.* at 181, 187 N.E.2d 888; see also *Stratton v. Maxwell* (1963), 175 Ohio St. 65, 67, 191 N.E.2d 549. [FN1] Therefore, as *Foster* severed the provisions of Ohio's sentencing statute addressing the imposition of consecutive sentences, we must follow the long-recognized principle that in the absence of a statute, the imposition of consecutive sentences is a matter within the discretion of the trial court.

FN1. In fact, the court went a step further

in discussing the purpose for imposing consecutive sentences by stating, "[i]nasmuch as making sentences for different crimes run concurrently is in the nature of a reward to the convict, relieving him of paying a part of the penalty for his crimes, it follows that a positive act is required on the part of the sentencing court to cause sentences to run concurrently; and in the absence of such action, if the entry is silent as to how the sentences shall run, it is presumed such sentences will run consecutively." *Id.* See, also, *Stratton v. Maxwell* (1963), 175 Ohio St. 65, 67, 191 N.E.2d 549 ("a provision that sentences shall run concurrently is actually in the nature of a reward").

{¶ 8} Appellant asserts that "Section 2901.01 of the Revised Code makes it clear that there is no such concept as common law applicable to the criminal law structure and thus all proceedings and crimes must be conducted consistent with the requirements of the Ohio Revised Code." However, appellant has not cited any specific authority for this broad proposition, and we find nothing in the Revised Code's sentencing scheme that prohibits or limits the common law principle related to the imposition of consecutive sentences. The Revised Code only specifically abrogates common law offenses, as it states "no conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code." R.C. 2901.03. However, nothing in the Revised Code prohibits or limits a court from imposing consecutive sentences as authorized by common law principles.

{¶ 9} Moreover, the Ohio Supreme Court specifically stated in *Foster* that with the severance of R.C. 2929.41 and R.C. 2929.14(E)(4), courts now have full discretion to order consecutive sentences. [FN2] *Foster* at ¶ 100, ¶ 105, 845 N.E.2d 470; see, also, *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, ¶ 37-38. The court reiterated this principle in *State v. Saxon*, 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1245, ¶ 9, when it stated "[o]nly after the judge has imposed a separate prison term for

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 3

Slip Copy, 2007 WL 1662049 (Ohio App. 12 Dist.), 2007-Ohio-2850

(Cite as: 2007 WL 1662049 (Ohio App. 12 Dist.))

each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively."

END OF DOCUMENT

FN2. With the exception of certain enumerated circumstances in which the court lacks discretion to determine whether sentences are served consecutively or concurrently. See *Foster* at ¶ 66, citing R.C. 2929.14(E)(1).

{¶ 10} A court is bound by and must follow the pertinent decisions of a reviewing court when ruling on issues before it; *Battig v. Forshey* (1982), 7 Ohio App.3d 72, 454 N.E.2d 168; *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App.2d 17, 285 N.E.2d 380. Accordingly, this court is bound by and must follow the decisions of the Ohio Supreme Court. *Durbin v. Schoeber* (Jan. 27, 1992), Butler CA91-03-048; *World Diamond Inc. v. Hyatt Corp.* (1997), 121 Ohio App.3d 297, 699 N.E.2d 980.

{¶ 11} In paragraph seven of the syllabus in *Foster*, the Ohio Supreme Court held, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, 109 Ohio St.3d at paragraph 7 of the syllabus. Therefore, this court and the lower trial courts are bound to follow this directive. See *State v. Pruitt*, Franklin App. No. 06AP-1184, 2007-Ohio-2331.

*3 {¶ 12} Accordingly, we find no merit to appellant's argument that the trial court did not have the authority to impose consecutive sentences after the severance of portions of the sentencing statute in *Foster*. We further note that the Tenth District recently reached the same conclusion when examining this issue. *State v. Worrell*, Franklin App. No. 06Ap-706, 2007- Ohio-2216. Appellant's sole assignment of error is overruled.

{¶ 13} Judgment affirmed.

WALSH and POWELL, JJ., concur.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 06AP-706
	:	(C.P.C. No. 02CR-08-4820)
v.	:	
	:	(REGULAR CALENDAR)
Richard K. Worrell,	:	
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 3, 2007

Ron O'Brien, Prosecuting Attorney, and *Richard A. Termuhlen, II*, for appellee.

Tyack, Blackmore & Liston, and *Thomas M. Tyack*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} Defendant-appellant, Richard K. Worrell, appeals from a judgment of the Franklin County Court of Common Pleas sentencing him to a total of 19 years in prison. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} In August 2002, the Franklin County Grand Jury indicted defendant on three counts of rape, first-degree felonies, in violation of R.C. 2907.02; one count of kidnapping, a first-degree felony, in violation of R.C. 2905.01; one count of abduction, a third-degree felony, in violation of R.C. 2905.02; and one count of felonious assault, a second-degree

felony, in violation of R.C. 2903.11. Defendant pled not guilty to the charges, and the case proceeded to jury trial. The jury found defendant guilty as charged, and the trial court held sexual predator and sentencing hearings. The trial court adjudicated defendant a sexual predator. At the sentencing hearing, the trial court merged the felonious assault and abduction charges into the kidnapping charge. As to each rape charge, the trial court sentenced defendant to five years in prison, and as to the kidnapping charge, the trial court sentenced defendant to four years in prison. The trial court ordered that the sentences be served consecutively and entered its judgment on April 15, 2004.

{¶3} Defendant appealed from that judgment to this court and set forth eight assignments of error, two of which challenged the validity of his non-minimum consecutive sentences. On March 31, 2005, this court overruled all eight of defendant's assignments of error and affirmed the judgment of the trial court. On May 3, 2006, the Supreme Court of Ohio reversed in part the judgment of this court, and remanded the cause to the trial court for resentencing consistent with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Upon remand, the trial court imposed the same sentence that previously was imposed. Specifically, on June 8, 2006, the trial court entered judgment resentencing defendant to consecutive prison terms of five years on each rape charge and four years on the kidnapping charge, for a total sentence of 19 years in prison.

{¶4} Defendant timely appeals from that judgment and asserts the following two assignments of error for our review:

I. THE TRIAL COURT, UPON REMAND BY THE OHIO SUPREME COURT AFTER VACATION OF DEFENDANT'S SENTENCE FOR MULTIPLE FELONY COUNTS PURSUANT TO THE RULING IN STATE V. FOSTER, 109 OHIO ST. 3D 1 (2006) LACKED STATUTORY AUTHORITY TO

IMPOSE CONSECUTIVE SENTENCES AND SAID SENTENCE IS THEREFORE CONTRARY TO LAW.

II. THE SENTENCE IMPOSED BY THE TRIAL COURT UPON REMAND BY THE OHIO SUPREME COURT WHEREIN CONSECUTIVE NON MINIMUM SENTENCES WERE IMPOSED DEPRIVED THE DEFENDANT OF DUE PROCESS, EQUAL PROTECTION AND 6TH AMENDMENT RIGHTS GUARANTEED HIM PURSUANT TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION.

{¶5} Because defendant's two assignments of error are interrelated we will address them together. By his first assignment of error, defendant argues that the trial court lacked the statutory authority to impose consecutive sentences, and, therefore, the sentences are contrary to law. In his second assignment of error, defendant argues that the trial court imposed consecutive non-minimum sentences in violation of due process, equal protection, and the Sixth Amendment to the United States Constitution. Defendant's arguments under his second assignment of error are premised on his contention that the trial court lacked statutory authority to impose consecutive sentences under the circumstances of this case. Defendant does not otherwise develop any argument as to why his sentences were unconstitutional.

{¶6} Defendant contends that, before the *Foster* decision, the authority of a trial court to impose consecutive sentences derived from R.C. 2929.14(E) and 2929.41(A). Pursuant to *Foster*, those provisions were severed from Ohio's felony sentencing scheme. See *id.* at paragraph four of the syllabus. According to defendant's reasoning, upon the severance of those provisions, trial courts no longer are authorized to impose consecutive sentences under the circumstances found in this case.

{¶7} Before the *Foster* decision, judicial fact-finding was required before consecutive sentences could be imposed, except when certain enumerated statutes imposing nondiscretionary consecutive terms applied. See *Foster*, at ¶66. In *Foster*, the Supreme Court of Ohio, following *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, found portions of Ohio's felony sentencing scheme, including R.C. 2929.14(E)(4) and 2929.41(A), unconstitutional because those portions required judicial fact-finding in violation of a defendant's Sixth Amendment right to a trial by jury. Concluding that R.C. 2929.14(E)(4) and 2929.41(A) were capable of being severed, the Supreme Court of Ohio severed in their entirety these statutory sections. *Foster*, at ¶97, 99; and paragraph four of the syllabus.

{¶8} In view of the *Foster* court's severance of the unconstitutional provisions, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus. The *Foster* court additionally stated: "If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively." *Id.* at ¶105.

{¶9} Thus, pursuant to *Foster*, trial courts generally have the discretionary power to impose consecutive sentences. See *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶9, citing *Foster* ("Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively.") Notwithstanding that general rule, there still

remain circumstances that require the imposition of consecutive sentences. See *Foster*, at ¶66, citing R.C. 2929.14(E)(1) through (3). In those circumstances, a trial court lacks discretion regarding whether to impose consecutive or concurrent sentences. See *Foster*, at ¶66. Nonetheless, this case does not involve one of those circumstances. Thus, pursuant to *Foster*, the trial court in this case had discretion as to whether defendant should serve his sentences consecutively or concurrently.

{¶10} However, according to defendant, the trial court lacked the authority to impose consecutive sentences. Thus, despite the *Foster* decision, defendant urges this court to find that the trial court in this case acted contrary to law by imposing consecutive sentences. Such a finding would be contrary to the *Foster* decision. As an intermediate appellate court, we will not make a determination that conflicts with a decision of the Supreme Court of Ohio that has not been reversed or overruled. "A court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled." *Sherman v. Millhon* (June 16, 1992), Franklin App. No. 92AP-89, citing both *Battig v. Forshey* (1982), 7 Ohio App.3d 72, and *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App.2d 17.

{¶11} Furthermore, to the extent the *Foster* court did not expressly discuss the source of a trial court's authority to impose consecutive sentences, we note that previous Ohio Supreme Court decisions expressly endorsed the idea that the authority of a court to impose consecutive sentences derives from the common law. In *Henderson v. James* (1895), 52 Ohio St. 242, 254-255, the Supreme Court recognized the existence of a trial court's inherent power, derived from the common law, to impose consecutive sentences:

* * * As we have no statute authorizing cumulative sentences for crime, it would seem at first blush that such sentences should not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute. * * * The great weight of authority is in favor of cumulative sentences, and they should be upheld on principle. The severe punishments which induced judges to invent technicalities to aid the acquittal of those on trial, on criminal charges, no longer exist; and, under our just and humane statutes, those who violate the law should be duly punished for each offense. * * *

See, also, *State ex rel. Stratton v. Maxwell* (1963), 175 Ohio St. 65, 67 (citing *Henderson* for the proposition that "a court has the power to impose consecutive sentences"). Moreover, in *Stewart v. Maxwell* (1963), 174 Ohio St. 180, 181, the Supreme Court stated that "in the absence of statute, it is a matter solely within the discretion of the sentencing court as to whether sentences shall run consecutively or concurrently."

{¶12} Based on the foregoing, we find defendant's first assignment of error to be without merit and it is accordingly overruled. Additionally, because we find no merit in defendant's first assignment of error, we also overrule his second assignment of error.

{¶13} Having overruled both of defendant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, P.J., and BROWN, J., concur.
