

IN THE SUPREME COURT OF OHIO

08-0837

STATE OF OHIO,

Supreme Court Case No.:

Plaintiff-Appellee,

On Appeal from The Lucas County Court
Of Appeals, Sixth Appellate District

v.

CHAD BORK

Court of Appeals No. L-07-1080

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, CHAD BORK

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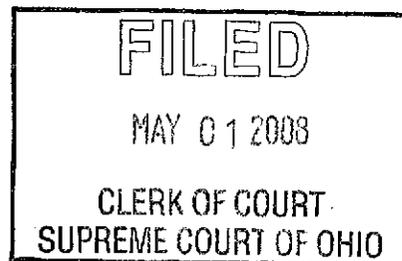


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents a straightforward question about how Blakely v. Washington (2004), 542 U.S. ---, 124 S.Ct. 2531, 2536, applies to Ohio's sentencing scheme and trial counsel's obligation to preserve meritorious issues for review by appellate courts, including this Court. Accordingly, this Court should accept this appeal.

STATEMENT OF THE CASE AND THE FACTS

Chad Bork was named in a two-count indictment handed down by a Lucas County Grand Jury on November 22, 2006. Count One alleged a violation of R.C. 2907.02(A)(1)(b) (rape), while Count Two alleged a violation of R.C. 2905.02(A)(2) (abduction). On December 14, 2006, Mr. Bork, with counsel entered not guilty plea to both counts. The parties, on January 17, 2007, reached an agreement in which Mr. Bork would to enter no contest plea to rape, a felony of the first degree, rather than as indicted, which provided for a sentence of life imprisonment. Mr. Bork also entered a no contest plea to the abduction charge. The trial court accepted the pleas and continued the matter for sentencing and for a sexual offender classification hearing.

Sentencing was held on February 5, 2007. The trial court imposed a sentence of ten years as to Count One and five years as to Count Two, and ordered the sentences to be served consecutively to the other, for a total sentence of fifteen years. The trial court also found that Mr. Bork is a sexual predator as defined in R.C. 2950.01(E).

Mr. Bork filed a timely notice of appeal on February 21, 2007. On appeal, Mr. Bork argued that his consecutive and non minimum sentences violated his Sixth Amendment right to a trial by jury or, in the alternative, trial counsel was ineffective in failing to preserve the Sixth Amendment

issue. In an opinion and judgement entry decided March 31, 2008, the Court of Appeals rejected his appeal and affirmed the sentence of the trial court.

ARGUMENT

Proposition of Law Number One:

A trial court may not impose non-minimum, consecutive prison terms in the absence of jury findings of the factors set forth in R.C. 2929.14 (B) and (E)(4).

The trial court did not have authority to sentence Mr. Bork to non-minimum prison, consecutive terms. This Court should accept jurisdiction and remand this case to the trial court with instructions to impose minimum, concurrent three year prison term.

Only a jury may consider “any particular fact which the law makes essential to the punishment. . . .” Blakely v. Washington (2004), 542 U.S. ---, 124 S.Ct. 2531, 2536, quoting, 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872); Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ Bishop, supra, §87, at 55, and the judge exceeds his proper authority.” Id.

The imposition of non-minimum, consecutive sentences in Ohio suffers from the same infirmity as the imposition of the enhanced sentence imposed by the State of Washington in Blakely. For purposes of Blakely, the Ohio requirement of factual findings to support the imposition of these types of sentences is the same as the Washington requirement of factual findings to support the imposition of a sentence beyond the presumptive range. Compare R.C. 2929.14(B) (minimum sentences required absent specified factual findings) with Blakely, 124 S.Ct. at 2535 (“[o]ther provisions of [Washington] state law . . . further limit the range of sentences a judge may impose.”).

Mr. Bork received near-maximum, consecutive prison terms. But he did not admit, nor did the indictment allege, the facts needed to support anything but the minimum; concurrent prison terms. A trial court cannot impose non-minimum, consecutive sentences unless it finds the factors set forth in R.C. 2929.14(B) and (E)(4).

Proposition of Law Number Two:

A criminal defendant is denied effective assistance of counsel where trial counsel does not preserve an objection to a meritorious claim that would result in a reduction of the defendant's sentence.

At the time of Mr. Bork's sentencing the United States Supreme Court had decided Blakely v. Washington (2004), 542 U.S. 296, 124 S.Ct. 2531 and United States v. Booker (2005), 543 U.S. 220, 125 S.Ct. 738. Ohio courts, including this Court, were addressing this issue as well. Certainly competent counsel would have known that this issue was present and either made the trial court aware of the objection prior to the actual sentencing or immediately after the non-minimum, consecutive sentences were announced. There is certainly nothing "strategic" or "tactical" in failing to raise the applicable United States and Ohio Constitution provisions. Indeed, a properly made objection may have resulted in a different decision from the trial court.

To obtain a reversal on the basis of ineffective assistance of counsel, the defendant must prove that (1) in light of all the circumstances, counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. Strickland v. Washington (1984), 466 U.S. 668, 687; State v. Madrigal (2000), 87 Ohio St.3d 387, 388-389.

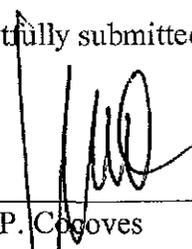
To overcome the presumption, the defendant must show that counsel made errors so serious that counsel failed to function as counsel guaranteed by the Sixth Amendment. Strickland, supra, at 692. Here, there was no objection to the sentence based on a violation of the Sixth Amendment by trial counsel, nor did counsel cite to the applicable Ohio Constitution clause.

It is clear that under established Ohio Supreme Court precedent, as well as precedent in this Court, a properly made objection would have resulted in a remand to the trial court for resentencing. There are issues that can be preserved in the trial court at a resentencing, such as ex post facto and due process violations if a sentence other than a minimum, concurrent sentence is imposed. Thus, under Strickland the requisite prejudice has been established and this Court should accept jurisdiction on this proposition of law.

CONCLUSION

This Court should accept jurisdiction and remand this case to the trial court with instructions to modify Mr. Bork's prison sentence to concurrent, terms, with a maximum sentence of three years.

Respectfully submitted,



Spiros P. Cocoves

CERTIFICATION

This is to certify that a copy of the foregoing was hand delivered to the Lucas County Prosecutor, this 28th day of April 2007.



Spiros P. Cocoves

FILED
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COMMON PLEAS COURT
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-07-1080

Appellee

Trial Court No. CR-0200603585

v.

Chad Bork

DECISION AND JUDGMENT ENTRY

Appellant

Decided: MAR 31 2008

* * * * *

Spiros P. Cocoves, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following pleas of no contest to rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b), and abduction, a felony of the third degree, in violation of R.C. 2905.02(A)(2), found appellant, Chad Bork, guilty and sentenced him to ten years imprisonment for rape, and five years for abduction, to be served consecutively. The trial court additionally found appellant to be a sexual predator,

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MAR 31 2008

as defined by R.C. 2950.01(E). Appellant timely appealed his sentence and sexual predator classification. The state failed to respond to appellant's appeal.

{¶ 2} On appeal, appellant raises the following assignments of error:

{¶ 3} "Assignment of Error No. 1

{¶ 4} "The trial court erred to the prejudice of Mr. Bork by sentencing him to consecutive, non-minimum sentences in violation of his right to protection from Ex Post Facto sentencing and his right to due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution or, in the alternative, trial counsel was ineffective in not raising the Ex Post Facto issue.

{¶ 5} "Assignment of Error No. 2

{¶ 6} "The trial court erred to the prejudice of Mr. Bork by failing to make an adequate record to support its finding that he should be classified as a sexual predator in violation of his right to due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

{¶ 7} "Assignment of Error No. 3

{¶ 8} "The trial court erred to the prejudice of Mr. Bork when it ordered him to pay unspecified costs, including court appointed fees, without first determining the ability to pay those costs."

{¶ 9} The offense in this case took place on August 12, 2004. Through DNA testing, appellant was identified as the potential assailant. He was indicted on November 22, 2006, pled no contest on January 17, 2007, and was sentenced on February 7, 2007, in compliance with the Ohio Supreme Court's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Pursuant to his pleas, the state asserted that the facts at trial would have established that the victim was an 11 years-old girl, who was abducted from a Toledo park by appellant while playing hide-and-seek with her cousin and appellant; that appellant performed cunnilingus on the victim and made her perform fellatio; and that appellant threatened the victim and would not let her leave until she promised to return the following day.

{¶ 10} In his first assignment of error, appellant argues that the trial court violated his rights to due process and protection from ex post facto sentencing by ordering him to serve consecutive, non-minimum sentences. In the alternative, appellant argues that he was denied the effective assistance of trial counsel because counsel failed to object to his sentence on these bases.

{¶ 11} This court has repeatedly rejected ex post facto and due process challenges to *Foster*. See *State v. Coleman*, 6th Dist. No. S-06-023, 2007-Ohio-448, ¶ 23; *State v. Barber*, WD-06-036, 2007-Ohio-2821; *State v. Johnson*, L-06-1364, 2007-Ohio-3470; *State v. Robinson*, L-06-1205, 2007-Ohio-3577. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 686, to establish that he was provided ineffective assistance of counsel, appellant must demonstrate that counsel's performance was deficient and that he

was prejudiced by the deficient performance. Assuming arguendo that trial counsel's representation was deficient for failing to object, we nevertheless find that appellant was not prejudiced by the alleged deficiency because, even if trial counsel had objected, appellant would not have prevailed on the due process or ex post facto arguments on appeal. See *Coleman*. Accordingly, we find appellant's first assignment of error not well-taken.

{¶ 12} Appellant argues in his second assignment of error that the trial court erred to his prejudice by failing to make an adequate record to support its finding that he should be classified as a sexual predator. Appellant asserts that although the trial court made reference to the psychologist's report, who conducted a review for sexual classification purposes, the trial court failed to refer to any specific factor on the record that would establish by clear and convincing evidence that appellant is likely to engage in the future in one or more sexually oriented offenses.

{¶ 13} In *State v. Eppinger* (2001), 91 Ohio St.3d 158, 166-167, the Ohio Supreme Court adopted a model procedure for trial courts, prosecutors, and defense attorneys to adhere to for sexual offender classification hearings: (1) "it is critical that a record be created for review," meaning that "those portions of the trial transcript, victim impact statements, presentence report, and other pertinent aspects of the defendant's criminal and social history that relate to the factors set forth in R.C. 2950.09(B)(2) and are probative of the issue of whether the offender is likely to engage in the future in one or more sexually oriented offenses" should be identified on the record; (2) "an expert may be required

* * * to assist the trial court in determining whether the offender is likely to engage in the future in one or more sexually oriented offenses"; and (3) "the trial court should consider the statutory factors listed in R.C. 2950.09(B)(2),¹ and should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of recidivism." The Ohio Supreme Court noted that each criteria listed in R.C. 2950.09 does not need to be listed by the trial court, but held that the factors considered by the trial court in making its determination should be identified by the trial court for purposes of appeal and to "ensure a fair and complete hearing for the offender." *Id.* at 167.

{¶ 14} The version of R.C. 2950.09(B)(3) applicable to appellant's sentencing stated that, in determining whether appellant is a sexual predator, the court must consider the following factors: (1) the offender's age; (2) the offender's prior criminal record, including, but not limited to, all sexual offenses; (3) the age of the victim; (4) whether the offense involved multiple victims; (5) whether the offender used drugs or alcohol to impair the victim; (6) if the offender that has previously been convicted of a sex offense or a sexually oriented offense participated in available programs for sexual offenders; (7) mental illness or disability of the offender or victim; (8) if the offender's conduct was a demonstrated pattern of abuse; (9) if the offender displayed cruelty or made threats of cruelty during the commission of the sexually oriented offense; and (10) any additional

¹At the time of appellant's sentencing, the factors referenced in *Eppinger* were located at R.C. 2950.09(B)(3).

behavioral characteristics that contribute to the offender's conduct. There is no requisite number of these factors that must apply before a trial court may find that an offender is a sexual predator, and the trial court may place as much or as little weight on any of the factors as it deems to be appropriate. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 19; *State v. Umbel*, 6th Dist. No. WD-06-074, 2008-Ohio-476, ¶ 22.

{¶ 15} The state is required to establish that an offender is a sexual predator by clear and convincing evidence. R.C. 2950.09(B)(4). Clear and convincing evidence is evidence that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469. Nonetheless, because sexual predator proceedings are civil in nature, our standard of review on appeal is civil manifest weight. *State v. Wilson*, 2007-Ohio-2202, ¶ 32. Therefore, we must affirm the trial court's judgment if some competent, credible evidence exists to support the trial court's finding that the state proved, by clear and convincing evidence, that appellant is a sexual predator. *Id.* at ¶ 41 and 42. See, also, *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. When reviewing a judgment under a manifest-weight-of-the-evidence standard, this court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81.

{¶ 16} In this case, the trial court stated that it relied on the report of Gregory E. Forgac, Ph.D., submitted by the Court Diagnostic and Treatment Center, in finding that appellant should be classified as a sexual predator. Dr. Forgac determined that

appellant's actuarial risk assessment indicated that appellant had a "medium-high" risk of sex offense recidivism. In arriving at his recommendation that appellant be classified a sexual predator, Dr. Forgac considered the victim's age, which was 11 years-old at the time of the offense; the reported threats made by appellant during the offense to get the victim to comply; and the number of incarcerations appellant has served, beginning when he was a juvenile. Additional factors available for the court's consideration included the victim's allegation that appellant would not let her leave until she promised to return the following day. Accordingly, we find that there was some competent, credible evidence to support the trial court's finding that appellant was a sexual predator. Appellant's second assignment of error is therefore found not well-taken.

{¶ 17} Appellant argues in his third assignment of error that the trial court erred by ordering him to pay unspecified costs, including court appointed fees, without first determining his ability to pay those costs. Appellant asserts that there must be some evidence of a criminal defendant's present and future ability to pay such sanctions before they can be imposed.

{¶ 18} Appellant failed to move the court to waive costs at the time of sentencing and, therefore, did not preserve the issue of costs on appeal. *State v. Berry*, 6th Dist. No. L-05-1048, 2007-Ohio-94, ¶ 53; and *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 23. Even if appellant had not waived this issue, "costs of prosecution must be assessed against all defendants." *Id.*

{¶ 19} We next determine whether the court below erred in imposing fees pursuant to R.C. 2929.18. R.C. 2929.19(B)(6) requires a trial court to consider an offender's present and future ability to pay before imposing any sanction under R.C. 2929.18. "While a court is neither required to hold a hearing to make this determination nor to indicate in its judgment entry that it considered a criminal defendant's ability to pay, there must be some evidence in the record to show that the court did consider this question." *Berry* at ¶ 54, citing *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 18. An appellate court examines the totality of the record when deciding whether this requirement was satisfied. *Id.*

{¶ 20} The trial court stated on the record that appellant was "found to have or reasonably may be expected to have the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law." In its judgment entry, the trial court additionally ordered that appellant was to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18, and 2951.021. This court's review of the record indicates that the trial court had before it information that, in spite of his incarcerations, appellant was employed, for the 12 years prior to his sentencing, in the field of construction work, installed floor coverings, and worked for Sherwin Williams from 1996 to 2006. Accordingly, we find that there was some evidence in the record to demonstrate that the trial court could actually have considered appellant's ability to earn a living and whether he had the present and future ability to pay any sanctions imposed pursuant to R.C. 2929.18.

{¶ 21} In order to impose appointed counsel fees and costs on an offender, that person must have "or reasonably be expected to have, the means to meet some part of the cost of the services rendered to the person." R.C. 2941.51(D); *Phillips*, 2006-Ohio-4135, ¶ 20. As such, this court has previously held that in order to assess the costs of a criminal defendant's appointed counsel, a trial court must make a finding on the record that a criminal defendant has the ability to pay. *Berry*, 2007-Ohio-94, ¶ 56, citing *Phillips*, ¶ 20. We find that the court below made the requisite finding and that its finding was supported by clear and convincing evidence in the record. See *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807, ¶ 7. Accordingly, we find appellant's third assignment of error not well-taken.

{¶ 22} On consideration whereof, this court finds that the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

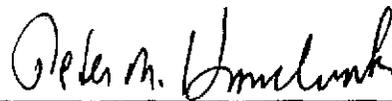
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

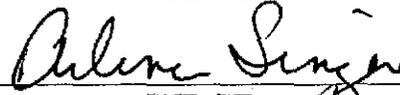
Peter M. Handwork, J.

Arlene Singer, J.

William J. Skow, J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.