

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO

Appellee-Plaintiff

-vs-

MICHAEL GUNNER

Appellant-Defendant

) OHIO SUPREME COURT CASE
) CASE NO.

~~08-2202~~

) ON APPEAL FROM THE
) NINTH JUDICIAL DISTRICT
) APPEALS CASE NO. 07CA0074-M

) MEDINA COUNTY COMMON
) PLEAS CASE NO. 05CR0235

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, MICHAEL GUNNER

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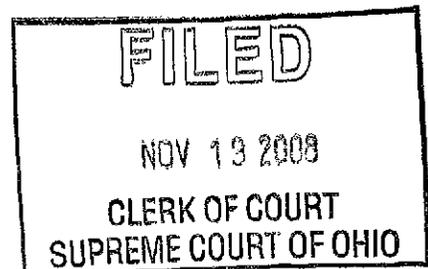


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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL ISSUE, AN ISSUE OF GREAT GENERAL AND PUBLIC
CONCERN AND A FELONY CONVICTION**

The Appellant respectfully submits that this Court should accept jurisdiction of this matter due to the fact that the case involves several felony convictions and concerns sentencing questions which are of a constitutional magnitude. Further, since criminal defendants are sentenced in Ohio courts on a daily basis, the questions presented herein are easily capable of repetition.

The second and fourth Propositions of Law presented by the Appellant concern the question of whether a trial court may modify those portions of a defendant's sentence which have not been challenged by the defendant on appeal and therefore were not the subject of a remand. Further, the Appellant has filed a Motion to certify a conflict with the Court of Appeals concerning two issues in this regard.

In disposing of the issue presented in the Appellants' second and fourth Propositions of Law regarding whether or not the Trial Court exceeded its authority by changing Appellant's individual sentences on a **Foster** remand when all that was appealed by Appellant was the consecutive portion of his sentence, the Court of Appeals held that no excess of authority was exercised by the Trial Court. This court stated that **Foster** required the Trial Court to hold an entirely new hearing on all aspects of sentencing.

However, in **State v. Goodell** (June 30, 2006), Lucas County App. No. L-05-1262, unreported, 2006-Ohio-3386, when faced with the same question of law the Sixth District Court of Appeals held:

While **Foster** noted that 'nothing prevents the state from seeking greater penalties' (citing **United States v. DiFrancesco** (1980), 449 U.S. 117, 134-136), the Trial Court is still constrained to resentencing only that part of Appellant's judgment of conviction impacted by **Foster**, that is, the consecutive aspect of Appellant's sentence.

Identical to Goodell, Appellant appealed only the consecutive nature of his sentence based on the Ohio Supreme Court's decision in **Foster**, not the term of each sentence. However, upon remand Appellant's actual term of incarceration for each offense was increased. Unlike the Sixth District Court of Appeals, the Court of Appeals found that the Trial Court did not exceed its authority by resentencing Appellant to an increased term of incarceration for each offense.

The Court of Appeals' decision is also conflicted with the Twelfth District Court of Appeals decision in **State v. Johnson** (April 17, 2006) Butler Co. App. No. CA2005-06-134, unreported, 2006-Ohio-1896. In **Johnson**, the Twelfth District Court of Appeals held,

While Defendant appealed her consecutive sentences, she did not appeal the nonminimum prison terms imposed for the three felonies.

The Supreme Court thus held that an 'appellate court may only modify or vacate a sentence that's appealed by the defendant and may not modify or vacate the entire multiple offense sentence based upon an appealed error in the sentence of a single offense.' (Citing **State v. Saxon**, 109 Ohio St.3d 176, 2006-Ohio-1245).

Like **Johnson**, Appellant appealed only the consecutive nature of his sentence. However, unlike the Twelfth District, the Court of Appeals found that the Trial Court did not exceed its authority

by changing Appellant's individual sentences when all that was appealed by Appellant was the consecutive portion of his sentence.

Further, the Court of Appeals' decision regarding Appellant's fourth Proposition of Law regarding whether the Trial Court on remand may use the "sentencing-package doctrine" stands in conflict with at least one other district. The Court of Appeals declined to specifically address this issue, but did note that the Trial Court chose these sentences so that Appellant would be eligible for judicial release, as was the case with Appellant's original sentence. Such reasoning is strong support that the Trial Court used the "sentencing-package doctrine" when resentencing Appellant.

The Second District Court of Appeals in **State v. Bradley** (Feb. 11, 2008), Champaign Co. App. No. 06CA31, slip copy, 2008-Ohio-720, found that a Trial Court may not use the "sentencing-package doctrine" to increase a Defendant's individual sentences to achieve a greater aggregate sentence. In **Bradley**, the Defendant was originally sentenced to twenty-seven and one-half years incarceration for fourteen felonies. The Second District reversed and remanded the decision leaving only four convictions for resentencing. The Trial Court subsequently increased the original sentences that were imposed based solely on the fact that at the resentencing the Appellant was subject to far fewer convictions. Bradley appealed the resentencing and the Second District Court of Appeals found:

The Trial Court erred when it imposed harsher sentences in order to serve the purposes and principles of sentencing with respect to the aggregate of the four separate offenses the court imposed, because in doing so the court applied the sentence package doctrine, which Ohio courts may not employ.

While the reasoning for the original remand in **Bradley** differs from the case at bar the use of the “sentence package doctrine” is nevertheless a conflict.

With regard to the Appellant’s first Proposition of Law, the issue presented concerns whether or not the remedy fashioned by this Court in **Foster** is, itself, unconstitutional. The Appellant’s third Proposition of Law concerns the issue of whether a criminal defendant receives constitutionally defective assistance of counsel when trial counsel fails to properly object to sentencing errors and thereby subjects the defendant to a “plain error” standard of review on appeal. Since both of these issues are inextricably intertwined with the other issues presented, the Appellant respectfully submits that this Court should accept jurisdiction of the entire matter.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This is an appeal from the Trial Court’s July 11, 2007, resentencing journal entry increasing Mr. Gunner’s stated terms of incarceration from one and two years to the maximum sentence of five years on each of seven counts of Sexual Battery, all violations of R.C. 2907.03(A)(5). Sexual Battery is a third-degree felony, and carries a penalty of one to five years in prison. On December 16, 2005, the trial court originally sentenced Mr. Gunner to definite terms of two years incarceration on counts 1, 3, and 5 of the indictment, and one year each for counts 7, 9, 11,, and 13 of the indictment, all ordered to be served consecutively, for a total stated prison term of ten years. Mr. Milano objected. to the sentence pursuant to *Blakely v. Washington* (2004), 530 U.S. 296, preserving Mr. Gunner’s right to appeal. Through counsel, Mr. Gunner timely filed a notice of appeal with the Ninth District Court of Appeals. Assignment of Error I addressed the Trial Court’s designation of Mr. Gunner as a sexual predator, which was affirmed on appeal. Assignment of Error II addressed Mr. Gunner’s sentence.

The Appellate court affirmed Appellant's sexual predator designation, but sustained Appellant's second assignment of error, the imposition of consecutive sentences as appealed under *State v. Foster* (2006) 109 Ohio St.3d 1, 2006-Ohio-856. **Gunner did not appeal his stated prison terms.** The consecutive sentences were reversed, and remanded to the Medina court of Common Pleas for resentencing. On remand, the trial court held a resentencing hearing on December 29, 2006, which the court adjourned until February 9, 2007, in order to obtain Gunner's prison file. At the resentencing hearings, Mr. Razavi, on behalf of the State, recited a summary of the alleged facts of Mr. Gunner's offenses, which had not been found to be true by any jury, nor specifically admitted to by Mr. Gunner in open court. Mr. Milano presented the court with favorable information pertaining to Mr. Gunner's asserted low risk of re-offending and his positive accomplishments while incarcerated. The trial court then sentenced Mr. Gunner to **increased terms** of incarceration of the maximum five years on each of the seven counts. The sentences for counts 1, 3, 5, and 7 were ordered to run concurrently with each other, but consecutive to counts 9, 11, and 13, which also run concurrently with each other, for a total sentence of ten years incarceration. Mr. Milano did not object to these increased sentences at the hearing. Mr. Gunner, acting *pro se*, timely appealed the resentencing order in the Ninth District Court of Appeals, Case No. 07 CA 025-M on March 5, 2007. The Court of Appeals subsequently ruled, in a journal entry of May 22, 2007, that the Trial Court's resentencing order failed to set forth a finding of guilt as to each count in the indictment, and therefore was not a final, appealable order pursuant to Crim R. 32(C). Appellant voluntarily dismissed that appeal, pending the Trial Court addressing this error. On July 11, 2007, the Trial Court issued a "Corrected Resentencing Judgment Entry," whereupon Appellant, through counsel, timely filed an appeal. This time, Appellant did not challenge the fact that certain portions of the sentences

were to run consecutively. **Rather, the Appellant only challenged the fact that the trial court had increased the length of the prison terms on each count, an issue which Appellant had never raised in his initial appeal.**

That appeal was dismissed on December 5, 2007, for failure to prosecute after Mr. Gunner's legal counsel, Atty. Holda, failed to timely file a brief. However, an application to re-open the appeal was filed, based on ineffective assistance of counsel. That motion was granted by order of the court on March 12, 2008.

On September 29, 2008, the Court of Appeals issued a decision affirming the Trial Court's changes in sentencing. This appeal follows.

PROPOSITION OF LAW I: A TRIAL COURT COMMITS PLAIN ERROR BY IMPOSING AN UNLAWFUL SENTENCE UPON A CRIMINAL DEFENDANT.

On February 27, 2006, this Court found portions of R.C. 29229.14, 2929.19, and 2929.41 to be unconstitutional. *State v. Foster*, 109 Ohio St.3d I, 2006-Ohio-856. To remedy the constitutional violations, the court severed those portions of the statutes declared to be unconstitutional.

As this Court determined in *Foster*, non-minimum, consecutive prison sentences based on the factors in RC 2929.14 must be reversed and remanded for resentencing. However, the *Foster remedy* violates the Ex Post Facto and Due Process Clauses because it effectively changes the presumptive sentence to the detriment of the defendant. *Miller v. Florida* (1987) 482 US 423, 432, 107 S.Ct. 2246, 96 L. Ed. 2d 351. Since this Court did not analyze the application of the ex post facto and due process implications of its decision in *Foster*, there is no binding state case law to guide the decision in this case. In the absence of binding case law, this Court should

follow the United States Court's opinion in *Miller*, and hold that a remand without the presumption of minimum, concurrent sentences violates the Ex Post Facto and Due Process Clauses of the United State Constitution.

This Court should modify Mr. Guner's sentence to minimum, stated prison terms. RC 2953.08. Under *Foster*, his sentence is illegal. Under, *Foster and Miller v. Florida*, this court should remand for sentencing with a presumption for minimum, concurrent sentences.

PROPOSITION OF LAW II: A TRIAL COURT COMMITS PLAIN ERROR WHEN IT INCREASES A DEFENDANT'S STATED PRISON TERMS ON REMAND, WHERE THE ONLY ISSUE PREVIOUSLY APPEALED BY THE DEFENDANT CONCERNS WHETHER THE SENTENCES INITIALLY IMPOSED SHOULD RUN CONSECUTIVELY OR CONCURRENTLY.

Pursuant to Crim R. 52(B), a plain error that affects a substantial right may be noticed by an appellate court despite not having been brought to the attention of the trial court. The Ohio Supreme Court has explained that a reversible plain error requires that:

“(1) there must be plain error, i.e. a deviation from a legal rule; (2) the error must be plain, which means that it must be an obvious defect in the trial proceedings; and (3) the error must have affected substantial rights, which means that the trial court's error must have affected the outcome of the trial.” (emphasis and internal quotations omitted). *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, quoting *State v. Barnes* (2002), 94 Ohio St. 3d 21.

In the case at bar, the Trial Court committed plain error in its resentencing order by exceeding the mandate of the Court of Appeals and increasing the stated terms of incarceration portion of Gunner's sentence. The Ohio Supreme Court has made it quite clear that an Appellate court cannot consider an error not raised on appeal. “Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” *Nolan v. Nolan* (1984), 11

Ohio St.3d 1, 462 NE2d 410, syllabus, approving and following *State ex rel. Potain v. Matthews* (1979), 59 Ohio St. 2d 29, 32.

The only issue before the trial court on remand in the instant case was resentencing on the **consecutive portion** of Gunner's sentences, in light of *Foster*. The Appellate court did not make any reference whatsoever to the length of Appellant's stated prison terms in its remand order, nor did Appellant raise the length of these terms as an issue in his first appeal. The Appellate court order, affirming the trial court's judgment in part and reversing in part, did **not** state it had vacated Gunner's entire sentence, but gave a narrow mandate to correct only the issue addressed in its opinion. A mandate is defined in Black's Law Dictionary, 8th edition, as "an order from an appellate court to a lower court to take a specific action." In Gunner's case, this specific action was to **re-sentence him on the consecutive portion as appealed**, not a broad grant of authority to the Trial Court to sentence Gunner *de novo*. The situation at bar is strikingly similar to that in *State v. Goodell*, 6th Dist No. L-05-1262, 2006-Ohio-3386. In that case, contrary to that appellate court's order of October 29, 2004, the trial court did not limit its review on remand to the issues of consecutive sentences and the failure to comply with relevant statutes. Instead, the trial court increased appellant's sentence for a rape conviction from five years to seven and increased appellant's sentence for aggravated burglary from four years to five years each; the sentences for two counts felonious assault remained the same at four years each. The trial court then ordered the two four years sentences to be served concurrently to each other, and the two five years sentences to be served concurrently. The five-year and four year terms were ordered consecutively to each other and consecutively to the seven term for rape. Goodell appeal this sentence and the appellate court found the appellant's arguments well-taken and again remanded for resentencing. The trial court was further instructed to resentence appellant in accordance

with the mandate of *Foster*. The separate prison terms initially imposed for each offense were properly not reviewed by the appellate court in Goodell's first appeal, and those terms remained valid on remand, as only the consecutive aspect of Goodell's separate prison terms initially imposed contrary to law. Similarly, in Gunner's separate prison terms initially imposed for each offense were properly not reviewed by the appellate court in his first appeal, and those terms remained valid on remand, as only the consecutive aspect of Gunner's judgment of conviction was contrary to law.

Appellant Gunner in his first appeal only addressed the issue of his consecutive sentences being improperly imposed under *Foster*, not the terms of imprisonment imposed for each offense. Pursuant to *Goodell* and the doctrines of res judicata and "the law of the case," the trial court acted contrary to law when it increased terms of imprisonment imposed at Gunner's resentencing. The original terms of incarceration for each offense must be reinstated. It must further be noted that Appellant Gunner is specifically not appealing the concurrent and consecutive portions of the resentencing order in the instant appeal, thus, those orders will remain in force and undisturbed, should this court remand for another resentencing, or take it upon itself to correct the trial court's error and reinstate the originally imposed prison terms of incarceration. Consequently, Appellant Gunner's resultant sentence would be two years each on counts 1, 3, and 5, and one year on counts 7, 9, 11, and 13; counts 1, 3, 5, and 7 to run concurrently with each other, but consecutive to the remaining counts 9, 11, and 13, which are also to run concurrently with each other, for a total incarceration of three years. Whether or not the trial court intended this result is irrelevant to the outcome herein. The trial court's sentencing errors, reliance on the State's misrepresentation of *Foster* and the remand order in 05CA0111-M, plus the fact that Gunner's definite terms of imprisonment were never at issue in that appeal and

subsequent remand, are factors which all combine to lead to no other conclusion than Gunner's sentence has been unlawfully imposed.

PROPOSITION OF LAW III: A CRIMINAL DEFENDANT IS DENIED HIS DUE PROCESS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS TEN AND SIXTEEN OF THE OHIO CONSTITUTION, DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL FAILS TO OBJECT TO NUMEROUS TRIAL COURT SENTENCING ERRORS AND, THEREBY, FAILS TO PROTECT THE DEFENDANT'S RIGHT TO APPEAL.

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome, that, but for trial counsel's unprofessional errors, the result would have been different. *Strickland v. Washington* (1984) 466 US 668, 687, 104 S. Ct. 2052. Where counsel fails to recognize and object to a trial court error, it constitutes ineffective assistance of counsel. *State v. Lamb* 56 Ohio App.3s. 128, 2004-Ohio-474.

Gunner was denied effective assistance of counsel when his attorney, Mr. Milano, failed to object and preserve Gunner's right to appeal the sentence issuing from the resentencing hearing, failing to recognize that the remand order only addressed the consecutive nature of Gunner's sentence, and therefore not authorizing the court to revisit the definite prison terms imposed for each offense. Counsel at the resentencing hearing was the very same counsel who perfected Gunner's first appeal to the Ninth District, arguing *Foster* required a remand on the consecutive portion of Gunner's original sentence. Mr. Milano was thoroughly aware of the issues raised, and more specifically, those not raised on appeal, and therefore knew or should have known that the narrow parameters of the remand order did not include addressing the prison term lengths.

Mr. Milano had a duty to object to the imposition of the maximum penalty on each offense at rehearing. Mr. Milano also knew or should have known that the Ohio Supreme Court's rejection of the "sentence package doctrine" makes it illegal for the trial court to consider how to modify both the prison term and the running of such terms of incarceration concurrently or consecutively to fashion a packaged sentence of a specified number of years, as the court did here. This error by Mr. Milano not only resulted in Gunner's stated total sentence being more than three times what it should have been under Ohio's existing sentencing guidelines, but also failed to preserve Mr. Gunner's right to appeal this sentence.

Moreover, Mr. Milano failed to object when the trial court clearly lost its way in determining what the remand order permitted it to do, both at the initial resentencing hearing and again at the resumed hearing.

Mr. Milano was also deficient in failing to object to the State's recitation of the alleged "facts" in the case, which were not found to be true by any jury, and only some of which were admitted to by Gunner in the presentence investigation. Specifically, it was prejudicial for the State to confirm the erroneous assumption, when asked by the court, that Gunner "... put himself in a position [that] he was grooming somebody else. Was that the case?" Whereupon the State replied, "probably this springtime." Nowhere in the record is there any testimony, admission, or proper fact-finding by a jury to support this allegation. The State's answer to the court's query is pure fiction, without any basis in fact, clearly demonstrated by the claim that this occurred during a time period when the Defendant was **incarcerated** and thus absolutely unable to be "grooming" anyone. This extremely prejudicial and unsupported allegation could not fail to influence the court in its determinate to impose the maximum prison terms for each offense

charged. Not only did Mr. Milano not object to this recitation, he supported the court's acceptance of the State's recitation as accurate.

Mr. Milano provided ineffective assistance of Appellant Gunner, as defined in *Strickland*, and in *Lamb*, seriously prejudicing his right to appeal the sentence imposed after this court's first remand, and also severely impacting, to Gunner's detriment, the trial court's imposition of maximum prison terms. Mr. Gunner's sentence is illegal. This Court should modify Mr. Gunner's sentence to the originally imposed prison terms of one and two year sentences.

PROPOSITION OF LAW IV: A TRIAL COURT ERRS AND ABUSES ITS DISCRETIONS TO A CRIMINAL DEFENDANT'S PREJUDICE AT RESENTENCING WHEN IT IMPOSES A MAXIMUM STATED PRISON TERM ON EACH COUNT FOR FELONIES OF THE THIRD DEGREE, WHERE SUCH HAD NOT PREVIOUSLY BEEN IMPOSED.

The Ohio Legislature has provided statutory guidance to the courts for sentencing determinations. Although the Ohio Supreme Court mentioned trial courts have "full discretion to impose a prison sentence within the statutory range" (*Foster, supra*, and *State v. Mathis* (2006) 109 Ohio St. 3d 54, 62, 2006-Ohio-855), the court's discretion in setting criminal sentences is not without limits.

In determining the appropriate sentence to impose, the court must consider the need for incapacitating the offender, deterring the offender and others from future crime, and rehabilitating the offender, all in the effort to protect the public from future crime by the offender and others, and to punish the offender. RC 2929.11(A)(B). In imposing a sentence on a felony conviction, the sentencing court has discretion to determine the most effective way to comply with these purposes and principles of sentencing. That discretion must be exercised within the statutory constraints; the court shall consider the factors set forth in 2929.12(B) and (C), relating

to the seriousness of the conduct, and the factors provided in RC 2929.12(D) and (E), relating to the likelihood of the offender's recidivism; the court may also consider any other factors that are relevant to achieving those purposes and principles of sentencing. When following these guidelines, the trial court must also consider RC 2929.14(B) and (C); in order to impose the maximum term of incarceration for an offense, the court must find that the defendant had committed the worst form of the offense, or had the greatest likelihood of committing future crimes. (RC 2929.14(C)).

The trial court in Gunner's original sentencing hearing stated:

"It is difficult for the people in the position of the victim to understand this, or her family, but the court has seen worse cases, unfortunately, that is just the way it goes."

This statement by the court undermines its decision to impose the maximum prison terms on Gunner. Furthermore, the court of appeals received a very positive report of Gunner's activities and accomplishments since being incarcerated in this case. The trial court also noted that the prison had assessed Gunner to have a zero risk of reoffending.

The Court's imposition of increased terms of incarceration was not reflective of any factors in RC 2929.11 and RC 2929.12; to enhance Gunner's sentence beyond the statutory minimum is in violation of the holding in *Apprendi v. New Jersey* (2000), 530 US 466.

The sentence is contrary to Ohio law, fails to meet the legislative mandate for consistency in sentencing, and thus must be remanded for reinstatement of the originally stated terms of imprisonment on each count, or for imposition of the much more consistent and appropriate minimum sentences on all counts.

CONCLUSION

In light of the foregoing, Appellant, Michael Gunner, respectfully submits that this cause presents significant constitutional issues, which are of great general and public interest.

Therefore, this Court should accept jurisdiction of the case.

Respectfully submitted



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction, is being served via regular

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STATE OF OHIO
COUNTY OF MEDINA

COURT OF APPEALS IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
JSS:
08 SEP 29 PM 12:50

STATE OF OHIO
Appellee

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

C. A. No. 07CA0074-M

v.

MICHAEL J. GUNNER
Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 05CR0235

DECISION AND JOURNAL ENTRY

Dated: September 29, 2008

CARR, Presiding Judge.

{¶1} Appellant, Michael Gunner, appeals his sentence imposed by the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} Gunner plead guilty to seven counts of sexual battery, in violation of R.C. 2907.03(A)(5), third-degree felonies, for incidents involving his 14 year old step-daughter that took place over eight months. The trial court sentenced Gunner to a total of ten years in prison by imposing consecutive sentences of two years in prison on Counts One, Three and Five and consecutive sentences of one year in prison on Counts Seven, Nine, Eleven and Thirteen. Gunner appealed his sentences and this Court reversed, pursuant to *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, and remanded for a new sentencing hearing. *State v. Gunner*, 9th Dist.No. 05CA0111-M, 2006-Ohio-5808, ¶28.

{¶3} Upon remand, the trial court held a hearing in December 2006 to resentence Gunner. During that hearing, the trial court indicated it wanted to review Gunner's prison record to consider his conduct while incarcerated before resentencing him. The court continued the sentencing hearing until February 2007 so that it could review Gunner's prison record. At the February hearing, the trial court heard arguments from Gunner and the State about sentencing and then imposed concurrent five year sentences on the first four counts and concurrent five year sentences on the last three counts, with those sentences to run consecutively, for a total prison term of ten years.

{¶4} Gunner timely appealed. His prior appellate counsel failed to timely file his brief and this Court dismissed the appeal. Prior appellate counsel moved to reopen the appeal pursuant to App.R. 26(B). This Court granted the motion to reopen and the appeal proceeded. Current appellate counsel entered a notice of appearance just before oral argument and appeared on Gunner's behalf.

{¶5} Gunner assigned four errors on appeal, as well as one argument related to prior appellate counsel's ineffective assistance, as required by App.R. 26(B).

II.

Assignment of Error I

"THE TRIAL COURT ERRED BY IMPOSING AN ILLEGAL SENTENCE."

{¶6} Gunner argues that the *Foster* remedy violates the *ex post facto* and due process clauses. This Court has repeatedly rejected these arguments. See, e.g., *State v. Reese*, 9th Dist. No. 07CA0066-M, 2008-Ohio-3725; *State v. Meyers*, 9th Dist. Nos. 23864 and 23903, 2008-Ohio-2528; *State v. McShepard*, 9th Dist. No. 06CA009024, 2008-Ohio-1460; *State v. Roper*, 9th Dist. No. 23454, 2008-Ohio-1053; *State v. Bonner*, 9th Dist. No. 23539, 2007-Ohio-7027;

and *State v. Smith*, 9th Dist. No. 06CA0070-M, 2007-Ohio-2841. As this Court has consistently held, we are obligated to follow the Ohio Supreme Court's directive and we are, therefore, bound by *Foster*. And we are confident that the Supreme Court would not direct us to violate the Constitution. *United States v. Wade* (C.A.8, 2006), 435 F.3d 829, 832 (holding that the Eighth Circuit is required to follow the directive of the United States Supreme Court and presumes that the Court would not order a court to violate the Constitution). Because this Court cannot overrule or modify *Foster*, we decline to consider Gunner's challenges. The first assignment of error is overruled.

Assignment of Error II

"THE TRIAL COURT COMMITTED PLAIN ERROR BY INCREASING DEFENDANT'S STATED PRISON TERMS OF ONE (1) AND TWO (2) YEARS TO FIVE (5) YEAR SENTENCES, AS THAT EXCEEDED THE MANDATE FROM THE NINTH DISTRICT COURT OF APPEALS FOR RE-SENTENCING."

¶7 Gunner argues that the trial court exceeded this Court's mandate when it resentenced him. He argues that the "only issue before the trial court on remand in the instant case was resentencing on the *consecutive portion* of [his] sentences, in light of *Foster*." While Gunner's assignment of error in his first appeal challenged the trial court's imposition of consecutive sentences, the *Foster* remedy required the trial court to hold a new sentencing hearing. Pursuant to *Foster*, this Court vacated Gunner's sentences and remanded for a new sentencing hearing. *Gunner* at ¶27. The trial court did not exceed the mandate of the remand order; thus, the trial court did not commit plain error. The second assignment of error is overruled.

Assignment of Error III

"APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND

ARTICLE I, SECTION(S) TEN AND SIXTEEN OF THE OHIO CONSTITUTION, DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE RESENTENCING HEARING, WHEN COUNSEL FAILED TO OBJECT TO NUMEROUS TRIAL COURT ERRORS AND FAILED TO PROTECT APPELLANT'S RIGHT TO APPEAL."

{¶8} Gunner argues that he received ineffective assistance of counsel at his resentencing hearing. This Court does not agree.

{¶9} To establish the existence of ineffective assistance of counsel, Gunner must show that trial counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Upon review of the record, this Court finds that Gunner has failed to meet the first prong of the *Strickland* test.

{¶10} Gunner first argues that trial counsel failed to object to resentencing. As set forth in the analysis of the second assignment of error, this Court's mandate required the trial court to resentence Gunner. Therefore, trial counsel was not ineffective for not objecting to the resentencing.

{¶11} Gunner next argues that trial counsel was ineffective for allowing the trial court judge to rely on the prosecutor's misstatements of this Court's decision in the first appeal. Gunner complains that the trial court asked the prosecutor for his view of the remand order and the prosecutor stated the remand order's terms. The prosecutor properly stated the scope of the remand, so there was nothing for trial counsel to add. As this Court concluded above, the trial court was required to resentence Gunner, so no argument could be made to the contrary. Therefore, trial counsel was not ineffective for not objecting.

{¶12} Gunner further asserts that trial counsel was ineffective for failing to correct the court's and prosecutor's factual misstatement. He points specifically to an exchange between the judge and prosecutor during which he claims the judge incorrectly expressed his memory of the

offenses and the prosecutor agreed. There are several flaws with Gunner's argument. First, the trial court judge did not express his recollection of the *facts* of the case, he stated his memory of the *State's position* about the case. Second, the judge made this statement in the context of stating that he wanted to request Gunner's prison record to consider the positive things he had done while incarcerated when imposing a new sentence. Third, the judge's comment came shortly before he adjourned the sentencing hearing for several weeks to request the prison file. Even if the judge had incorrectly remembered the facts, it was apparent from the context that the judge was about to postpone resentencing to request additional information that would benefit Gunner.

{¶13} Finally, appellate counsel's argument that trial counsel "supported the court's acceptance of the State's recitation as accurate," coupled with a citation to the record, is a misrepresentation of the record. From the argument in the brief, it appears that the trial court misstated the facts, the prosecutor agreed, and "[n]ot only did [trial counsel] not object to this recitation, he supported the court's acceptance of the State's recitation as accurate." What actually happened is far different.

{¶14} As recounted above, the trial court judge stated his recollection of the State's position about the case and the prosecutor responded with three words – hardly a recitation, as Gunner argued. From Gunner's brief, it appears that the next thing that happened was trial counsel agreed with the incorrect statements. In fact, the next thing that happened was the trial court judge said he wanted more information about Gunner – his prison file – before he imposed sentence, trial counsel informed the court that Gunner did not intend to argue about the facts of the offenses, only about what he had done since he was incarcerated, and the trial court adjourned the hearing to obtain the prison file.

{¶15} Over 40 days later, the parties appeared in court to conclude the sentencing hearing. The State provided a brief overview of the facts of the offenses and presented its position on sentencing. Six transcript pages into the second hearing, following the state's review of the facts – taken almost verbatim from the presentence investigation report – trial counsel commented that the State's recitation of facts “is really just an adoption of the pre-sentence report.” This is the comment that Gunner's appellate counsel cited to show that trial counsel accepted the misstatement – from the first hearing on resentencing – as accurate.

{¶16} Trial counsel performed in a reasonable, professional manner. Gunner did not receive ineffective assistance of counsel. The third assignment of error is overruled.

Assignment of Error IV

“THE TRIAL COURT ERRED TO THE APPELLANT'S PREJUDICE AT RESENTENCING WHEN IT IMPOSED THE MAXIMUM STATE PRISON TERM OF FIVE YEARS ON EACH COUNT FOR FELONIES OF THE THIRD DEGREE.”

{¶17} Gunner argues that the trial court abused its discretion by imposing the maximum sentence. This Court does not agree.

{¶18} Gunner recognizes that the trial court was to be guided by R.C. 2929.11 and 2929.12 when it imposed the sentence. However, Gunner argued that “in order to impose the maximum term of incarceration for an offense, the court must find that the defendant had committed the worst form of the offense, or had the greatest likelihood of committing future crimes (R.C. 2929.14(C) Appx. I-1).” These are, of course, the findings that *Foster* eliminated. *Foster*, paragraphs one and two of the syllabus.

{¶19} Gunner further argues that the trial court abused its discretion in imposing maximum sentences. After *Foster*, the trial court possesses “full discretion to impose a prison sentence within the statutory range and [is] no longer required to make findings or give [its]

reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Foster* at paragraph seven of the syllabus. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶20} The trial court imposed five-year sentences on each count to which Gunner plead guilty. Gunner admitted to the conduct that formed the basis of these counts. Specifically, Gunner sexually molested his young step-daughter over an eight-month period. He touched her breasts, performed oral sex, made her perform oral sex, made her masturbate him, used a vibrator on her, made her watch pornographic movies, asked her to imitate the movies, and had anal intercourse with her. Gunner initiated these acts every Wednesday night and every other weekend for eight months. Gunner, an adult, used his position as step-father to continue his assaults on his step-daughter.

{¶21} After considering the facts, this Court cannot conclude that the trial court abused its discretion in imposing five year sentences on each count. This Court notes that the trial court specifically chose these sentences so that Gunner would be eligible for judicial release after serving five years in prison, hardly the act of a trial court acting unreasonably.

{¶22} As a separate attack on his sentences, Gunner argues that the trial court is required to impose a sentence that is consistent with those imposed on similar offenders for similar offenses. Gunner did not raise this argument in the trial court. Thus, he has forfeited this argument on appeal. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23. Gunner has not

argued the trial court committed plain error and he has not demonstrated any reason that this Court should address this issue for the first time on appeal.

{¶23} This Court further notes that Gunner relied on documents attached to his brief called "Summary of Time Served Reports" and "100 Comparison Cases Report." This Court could not rely on these reports when considering Gunner's argument. These were not presented to the trial court before or at sentencing, there is no indication of who prepared these reports, when they were prepared, and they are not authenticated. This Court "cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus.

{¶24} Gunner's fourth assignment of error is overruled.

Assignment of Error V

"APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON HIS APPEAL OF RIGHT TO THIS COURT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ART. 1, §§ 2, 10, AND 16 OF THE OHIO CONSTITUTION."

{¶25} Pursuant to App.R. 26(B)(7) and this Court's December 5, 2007 journal entry, Gunner argues that his representation by prior appellate counsel was deficient and that he was prejudiced by that deficiency. Upon review of the argument presented, we find that counsel was deficient in failing to timely file Gunner's brief and that he was prejudiced by that deficiency. Accordingly, this Court vacates the prior judgment of dismissal dated December 5, 2007.

III.

{¶26} Gunner's first four assignments of error are overruled. The judgment of the

Medina County Court of Common Pleas is affirmed.

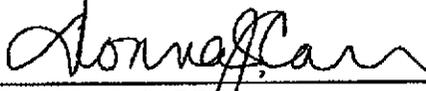
Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.


DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

SHERI L. HOLDA, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL HOPKINS, Assistant Prosecuting Attorney, for Appellee.