

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

|                      |   |                            |
|----------------------|---|----------------------------|
| STATE OF OHIO,       | : | <b>OPINION</b>             |
| Plaintiff-Appellee,  | : |                            |
| - vs -               | : | <b>CASE NO. 2006-L-152</b> |
| DEVIN D. McDONALD,   | : |                            |
| Defendant-Appellant. | : |                            |

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000113.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Gregory J. Mussman*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*R. Paul LaPlante*, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Devin D. McDonald, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced McDonald to an aggregate prison term of nine years for his convictions for kidnapping and aggravated robbery, with a firearm specification.

{¶2} McDonald was indicted on one count of aggravated robbery, with a firearm specification, a first-degree felony; one count of kidnapping, a first-degree felony; one count of theft, a fifth-degree felony; and one count of safecracking, a fourth-degree felony. McDonald pled guilty to the aggravated robbery count, with a firearm specification, as well as the kidnapping count. The remaining charges were dismissed.

{¶3} The trial court sentenced McDonald to six-year prison terms on the aggravated robbery and kidnapping convictions. These sentences were ordered to be served concurrently. In addition, the trial court imposed a three-year sentence for the firearm specification, to be served consecutively to the six-year terms. Thus, McDonald's aggregate prison sentence was nine years.

{¶4} McDonald appealed his original sentence to this court. This court reversed the judgment entry of sentence and remanded the matter for a resentencing hearing pursuant to *State v. Foster*.<sup>1</sup>

{¶5} On remand, the trial court again sentenced McDonald to six-year prison terms on the aggravated robbery and kidnapping convictions, to be served concurrently. The trial court imposed a three-year sentence for the firearm specification, to be served consecutively to the six-year terms. Upon resentencing, McDonald's aggregate prison sentence was nine years.

{¶6} McDonald has appealed the trial court's resentencing judgment entry to

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1. *State v. McDonald*, 11th Dist. No. 2005-L-113, 2006-Ohio-2495, at ¶13, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶104.

this court, raising the following assignments of error:

{¶7} “[1.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions.

{¶8} “[2.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of defendant-appellant’s right to due process.

{¶9} “[3.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms based on the Ohio Supreme Court’s severance of the offending provisions under *Foster*, which was an act in violation of the principle of separation of powers.

{¶10} “[4.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the rule of lenity.

{¶11} “[5.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the intent of the Ohio Legislators.”

{¶12} Collectively, McDonald asserts his sentence is unconstitutional, because he committed his crime prior to the Supreme Court of Ohio’s decision in *State v. Foster*,<sup>2</sup> but was sentenced pursuant to the post-*Foster* version of R.C. 2929.14. This court has recently addressed McDonald’s exact arguments in the case of *State v. Elswick*.<sup>3</sup> In *State v. Elswick*, this court found the verbatim assignments of error that are raised in this appeal to be without merit.<sup>4</sup>

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2. See *State v. Foster*, *supra*.

3. *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011.

4. *Id.* at ¶5-55.

{¶13} Based on the authority of *State v. Elswick*, McDonald's assignments of error are without merit.

{¶14} The judgment of the trial court is affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.