

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-L-151
MICHAEL A. STALNAKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 03 CR 000650.

Judgment: Affirmed.

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

Michael A. Stalnak, pro se, PID: A464813, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Michael A. Stalnak, appeals from a judgment of the Lake County Court of Common Pleas, denying his petition for relief from judgment.

{¶2} On December 5, 2003, appellant was indicted on five counts of rape, six counts of gross sexual imposition, and six counts of furnishing alcohol to a minor. Appellant pleaded not guilty to all charges.

{¶3} A jury trial was held on May 6, 2004. Appellant was found guilty on all counts. The trial court sentenced appellant consecutively for an aggregate prison term of 33 years.

{¶4} On June 15, 2004, appellant filed his first appeal with this court, Case No. 2004-L-100. On June 24, 2004, while appellant's first appeal was pending, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), finding a violation of the Sixth Amendment right to trial by jury where the state sentencing statute permitted a judge to increase the defendant's sentence based upon factual findings of the judge rather than the jury. On December 29, 2005, this court affirmed appellant's convictions and sentences. *State v. Stalaker*, 11th Dist. No. 2004-L-100, 2005-Ohio-7042.

{¶5} On January 9, 2006, appellant filed a motion for reconsideration which was denied by this court. Appellant also filed a notice to certify a conflict with this court regarding: (1) whether his sentence was unconstitutional under R.C. 2929.14(B) because it was based on improper judicial fact-finding which increased the sentence beyond the statutory minimum; and (2) whether the imposition of consecutive prison terms was unconstitutional. This court found a conflict existed only as to the first issue and certified the question to the Ohio Supreme Court. While the certified question was pending, appellant filed a notice of appeal with the Ohio Supreme Court.

{¶6} On February 27, 2006, the Ohio Supreme Court decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, applying *Blakely* to Ohio's sentencing statutes and finding portions to be unconstitutional, including R.C. 2929.14(B) and (E).

{¶7} On April 26, 2006, the Ohio Supreme Court dismissed the certified question, finding that no conflict existed. *State v. Stalaker*, 109 Ohio St.3d 1420, 2006-Ohio-1967. In addition, the Ohio Supreme Court did not accept appellant's appeal for review. *State v. Stalaker*, 109 Ohio St.3d 1427, 2006-Ohio-1967.

{¶8} On July 23, 2007, appellant filed a federal habeas petition asserting two grounds for relief: (1) that his trial counsel provided ineffective assistance; and (2) that he was sentenced in violation of his constitutional rights contrary to *Blakely*. *Stalaker v. Bobby*, 589 F.Supp.2d 905, 911 (N.D. Ohio 2008). The Northern District granted appellant's petition as to the second ground of his petition resting on a *Blakely* claim that he was improperly sentenced to nonminimum prison terms, and denied the remainder of the petition. *Id.* at 919.

{¶9} This case was remanded for resentencing, and a hearing was held on January 29, 2009. On February 13, 2009, the trial court sentenced appellant consecutively for an aggregate prison term of 33 years, with 1,938 days of credit for time already served. Appellant filed his second appeal with this court, Case No. 2009-L-039, raising five assignments of error all relating to his sentence. This court rejected appellant's arguments and affirmed the decision of the trial court. *State v. Stalaker*, 11th Dist. No. 2009-L-039, 2009-Ohio-5215. Appellant appealed this court's decision to the Ohio Supreme Court which declined to accept the case because it did not involve a constitutional question. *State v. Stalaker*, 124 Ohio St.3d 1419, 2009-Ohio-6816.

{¶10} In October of 2011, appellant filed a motion for a resentencing hearing and a petition for relief from judgment. The trial court denied both motions. Appellant filed the present appeal, asserting the following assignment of error:

{¶11} “The trial court erred when it denied the defendant-appellant relief from judgment pursuant to R.C. 5145.01.”

{¶12} In his sole assignment of error, appellant argues the trial court erred in denying his petition for relief from judgment because R.C. 5145.01 requires that he serve concurrent, not consecutive, sentences.

{¶13} R.C. 5145.01 states, in part: “If a prisoner is sentenced for two or more separate felonies, the prisoner’s term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of [R.C.] 2929.14 and [R.C.] 2929.41 * * * apply.”

{¶14} We find no merit in appellant’s argument. R.C. 5145.01 governs state correctional institutions and does not instruct sentencing courts. *See, State v. Terrell*, 4th Dist. No. 10CA39, 2012-Ohio-1926, ¶10; *State v. Ramsey*, 7th Dist. No. 10 CO 29, 2011-Ohio-2640, ¶12. Also, Ohio courts have uniformly held that ““R.C. 5145.01 does not impose a concurrent sentencing requirement on sentencing courts(.)”” *Terrell* at ¶10, quoting *Ramsey* at ¶18. *See also, State v. Johnson*, 8th Dist. No. 93004, 2010-Ohio-2214, ¶7 fn. 3; *State v. Castle*, 6th Dist. No. OT-08-029, 2008-Ohio-6388, ¶2-8; *State v. Paugh*, 12th Dist. No. CA2008-11-144, 2009-Ohio-4682, ¶5-9; *State v. Smith*, 5th Dist. Nos. 08 CA 42 & 08 CA 43, 2009-Ohio-1684, ¶55-58.

{¶15} In addition, appellant asserts that his sentence should be modified to allow for concurrent prison time due to the passage of House Bill 86 (“H.B. 86”). The General Assembly enacted H.B. 86, effective September 30, 2011, which amends R.C. 2929.14 and requires fact finding for consecutive sentences. This amendment, however, does not apply to appellant, who was originally sentenced on May 18, 2004 and was

resentenced on February 13, 2009, prior to the effective date of H.B. 86. *See, Terrell, supra*, at ¶12; *State v. Du*, 2d Dist. No. 2010-CA-27, 2011-Ohio-6306, ¶23; *State v. McGee*, 8th Dist. No. 96688, 2012-Ohio-1829, ¶5; *State v. Fields*, 5th Dist. No. CT11-0037, 2011-Ohio-6044, ¶2. Thus, H.B. 86 does not apply retroactively as appellant suggests. The trial court did not err in denying appellant's petition for relief from judgment.

{¶16} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.