

[Cite as *State v. Busby*, 2010-Ohio-4516.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-1119
Plaintiff-Appellee,	:	(C.P.C. No. 06CR02-1271)
v.	:	
	:	(REGULAR CALENDAR)
Milton S. Busby,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 23, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Milton S. Busby, appeals from a judgment entry entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} In 2006, a Franklin County Grand Jury indicted appellant for ten counts of rape in violation of R.C. 2907.02. The victim of the offenses was appellant's minor daughter. A jury found appellant guilty of seven counts of rape and not guilty of the other three counts. The trial court sentenced appellant on counts three, four, five, and six to

concurrent prison terms of ten years to life. The trial court imposed a consecutive prison term of ten years to life for count ten. Lastly, the trial court sentenced appellant to concurrent ten-year prison sentences for counts seven and nine.

{¶3} On appeal, this court reversed three of appellant's seven rape convictions because they were not supported by sufficient evidence. *State v. M.B.*, 10th Dist. No. 08AP-169, 2009-Ohio-752, ¶19-25, 32. Although we affirmed appellant's four other rape convictions, we found that the trial court erred in sentencing appellant on those convictions. *Id.* at ¶6. Accordingly, we remanded the matter to the trial court "to resentence appellant on counts three through six." *Id.* at ¶43.

{¶4} On remand, a different trial court judge sentenced appellant to consecutive prison terms of 10-25 years on counts three and four and ten years on counts five and six.

{¶5} Appellant appeals and assigns the following errors:

FIRST ASSIGNMENT OF ERROR: IMPOSITION OF CONSECUTIVE SENTENCES WAS BEYOND THE TERMS OF REMAND BY THIS COURT.

SECOND ASSIGNMENT OF ERROR: IMPOSITION OF A GREATER SENTENCE FOLLOWING REVERSAL CONSTITUTES A DENIAL OF DUE PROCESS.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING STATUTORILY REQUIRED FINDINGS IN ACCORDANCE WITH R.C. 2929.14(E)(4).

{¶6} Appellant contends in his first assignment of error that this court's decision prohibited the trial court from imposing consecutive prison terms on remand. We disagree. In our decision, we instructed the trial court to resentence appellant on counts three through six, the only remaining convictions. That decision did not limit the trial

court's sentencing discretion or prohibit the trial court, on remand, from imposing consecutive sentences on appellant. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100 (trial courts retain "full discretion" to sentence offenders). But see *State v. Troglin*, 3d Dist. No. 14-06-57, 2007-Ohio-4368, ¶20 (resentencing court has authority to impose concurrent or consecutive prison terms on remand, subject to principles of vindictiveness). Accordingly, we overrule appellant's first assignment of error.

{¶7} Appellant alleges in his second assignment of error that the trial court's resentencing violated his due process rights. Under this assignment of error, he first argues that the trial court vindictively imposed a harsher sentence as punishment for having successfully pursued his right to appeal. We disagree.

{¶8} A trial court violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution when it resentences a defendant to a harsher sentence when motivated by vindictive retaliation. *N. Carolina v. Pearce* (1969), 395 U.S. 711, 725, 89 S.Ct. 2072, 2080 (holding that due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."); *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, ¶84. A presumption of vindictiveness arises when the same judge resentences a defendant to a harsher sentence following a successful appeal. *Wasman v. United States* (1984), 468 U.S. 559, 564-65, 104 S.Ct. 3217, 3221; *State v. Chandler*, 8th Dist. No. 83963, 2004-Ohio-4242, ¶11.

{¶9} Although appellant received a harsher sentence on remand, the presumption of vindictiveness that would normally arise in such a situation does not arise when the resentencing judge is different than the original sentencing judge. *Texas v.*

McCullough (1986), 475 U.S. 134, 140, 106 S.Ct. 976, 979; *State v. Hall*, 10th Dist. No. 09AP-302, 2009-Ohio-5712, ¶15-16. A different judge resentenced appellant in this case and, therefore, no presumption of vindictiveness arises.

{¶10} Absent a presumption of vindictiveness, appellant must demonstrate vindictiveness from the record. *Id.* at ¶17 (citing *Smith* at ¶86). Here, appellant claims the resentencing judge acted vindictively because he stated at the resentencing hearing that because he was not the original sentencing judge, "whatever I do, there will be no presumption of vindictiveness that can arise * * *" (April 1, 2009 Sentencing Tr. 12). This statement is simply a correct statement of law, not an indication that the sentencing judge acted vindictively. *McCullough*. The trial court stated that appellant's offenses deserved "warehousing," a statement that suggests its sentences were based on the nature of appellant's offenses, not vindictiveness due to appellant's partially successful appeal. There is nothing in the record to suggest that the trial court's resentencing was the result of judicial vindictiveness. Accordingly, appellant's argument fails.

{¶11} Appellant also claims under this assignment of error that the trial court's imposition of consecutive sentences is a manifest injustice. While this is not a recognizable claim on appeal, appellant seems to argue that no evidence justified the trial court's decision to impose a harsher prison sentence than that imposed by the original sentencing judge.¹ This argument is misplaced.

{¶12} When a judge resentences a defendant to a harsher sentence after an appeal, the reasons for the increased sentence must affirmatively appear on the record.

¹ To the extent appellant also argues that the evidence in support of his convictions were "exceedingly weak," we note that this court affirmed his rape convictions on counts 3 through 6, finding them supported by sufficient evidence and not against the manifest weight of the evidence. *M.B.* at ¶26-30, 37-40.

Wasman at 568-69. That requirement is designed to overcome the presumption of vindictiveness that arises when a defendant receives a harsher sentence on remand from the same judge. *Id.* However, as previously noted, when a different judge sentences a defendant after an appeal, there is no presumption of vindictiveness. *McCullough* at 140. Therefore, *Wasman* is inapplicable. A new judge does not need to point to any reasons or evidence that would support a harsher sentence.

{¶13} As noted earlier, the judge stated at appellant's resentencing that these crimes "deserve[d] warehousing." This is a logical, nonvindictive reason for the trial court's sentence. Nothing in the record demonstrates that the trial judge acted vindictively. See *McCullough* at 140. Therefore, the trial court's resentencing did not violate appellant's due process rights. Accordingly, we overrule appellant's second assignment of error.

{¶14} Lastly, appellant argues in his third assignment of error that the trial court could not impose consecutive sentences without making certain findings as required by former R.C. 2929.14(E)(4). We disagree.

{¶15} Simply put, appellant claims that the United States Supreme Court's decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, nullifies the Supreme Court of Ohio's decision in *Foster*, supra, in which the Court severed portions of Ohio's sentencing scheme including R.C. 2929.14(E)(4), which required trial courts to make certain findings before imposing consecutive sentences. Therefore, appellant claims that trial courts are again required to make those findings. This court, however, has repeatedly rejected this argument and continues to follow *Foster*. See *State v. Johnson*, 10th Dist. No. 09AP-1065, 2010-Ohio-3381, ¶7; *State v. Jenkins*, 10th Dist. No. 09AP-

1029, 2010-Ohio-2853, ¶10. Accordingly, we overrule appellant's third assignment of error.

{¶16} In conclusion, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.
