

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 22743
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2007-CR-1651
v.	:	
	:	(Criminal Appeal from
EMERSON COMBS	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 14th day of August, 2009.

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Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Emerson Combs appeals from his conviction on one count of aggravated robbery with a deadly weapon and one count of having a weapon while

under disability. Appointed appellate-counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that there are no non-frivolous issues on which to base an appeal. The brief reveals that counsel did not even find anything in the record that arguably might support an appeal. We advised Combs of counsel's conclusion and told him that he had sixty days in which to file a pro se brief assigning any errors for review. Combs did file a brief. In it he contends that trial counsel rendered ineffective assistance of counsel by failing to object to testimony identifying Combs as the offender. He further contends that counsel was ineffective for failing to object the prison sentence imposed by the trial court. Finally, Combs contends that the indictment was defective because it failed to state the degree of mental culpability for the offense of aggravated robbery. We reject each of these contentions and affirm.

I

{¶ 2} Deeanna Nasser and her husband own, what was then called, Westside Wireless, a cellular phone retailer. One evening in December 2006, Nasser was working in the store behind a display counter when a hooded and masked man came in, climbed over the counter, and shoved a gun in her face. He demanded money from the cash register, which she gave him. He also opened a display case, took some items, and shoved them into a bag. The man then asked Nasser to put some display items into the bag. Nasser indicated that she could not understand what he was saying, so the man pulled the mask down and repeated his instruction. When he did this, Nasser could see his entire face, minus his chin.

She immediately recognized the face as belonging to Emerson Combs.

{¶ 3} Nasser was certain that the man was Combs. In September or October 2006, Combs visited her store for the first time. Nasser and Combs soon realized that they been in middle school together roughly ten years ago. After his first visit, Combs returned regularly, at least once a week.

{¶ 4} Combs was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), with a firearm specification, and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(3). Combs filed a motion to suppress Nasser’s identification testimony. After a hearing, the court overruled the motion. A jury subsequently found Combs guilty on both counts, including the firearm specification. The trial court sentenced Combs to prison for a total of eight years—five years for robbery, three years on the firearm specification, and three years, to be served concurrently, for having a weapon under a disability. Combs now appeals from the conviction and sentence.

II

{¶ 5} Where appointed counsel has filed an *Anders* brief, a pro se defendant-appellant has only the “task of identifying a potential assignment of error having arguable merit; i.e., a potential assignment of error that renders the appeal other than wholly frivolous.” *State v. Hicks*, Montgomery App. No. 22786, 2009-Ohio-2740, at ¶15. If we agree “that there is a potential assignment of error having arguable merit, it is our duty to assign new counsel who can make that argument for [the defendant].” *Id.*

{¶ 6} In his first assignment of error, Combs alleges that trial counsel rendered ineffective assistance by failing to object to Nasser's identification testimony, the admission of which, Combs contends, violated his rights under both the United States Constitution and the Ohio Constitution.

{¶ 7} Trial counsel is ineffective if his performance fell below an objective standard of reasonableness, and this deficient performance prejudiced the defendant. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Here, trial counsel did make an effort to exclude the identification evidence by filing a motion to suppress, which argued that the identification procedure used by the police was unduly suggestive and therefore unconstitutional. The trial court, however, disagreed and overruled the motion. Combs is in essence arguing, then, that counsel should have raised the constitutional issues at trial regarding the reliability of Nasser's identification. We do not think that counsel was ineffective for not doing so. Because the trial court had already deemed the evidence constitutionally admissible, and Combs does not identify any other basis on which it was inadmissible, we reject the first assignment of error as having no arguable merit.

III

{¶ 8} Combs next alleges, in his second assignment of error, that trial counsel was ineffective for failing to object to the trial court's imposition of a five-year sentence. Combs contends that the sentence violated his rights under the Sixth and the Fourteenth Amendments of the U.S. Constitution and his rights under the Ohio

Constitution. Combs contends, too, that counsel should have argued that the Ohio Supreme Court's *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, decision violates the separation of powers doctrine. Citing the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, Combs appears to be arguing that *Foster's* severance remedy is unconstitutional, because the Ohio Supreme Court is not permitted to engage in constitutional interpretation and may not amend laws passed by the General Assembly. The Court's job, rather, is simply to apply what the General Assembly has enacted. Combs appears to be arguing that the trial court was permitted to impose only the minimum prison terms for his offenses and, further, that all the terms must run concurrently.

{¶ 9} While Combs's appeal was pending, the Ohio Supreme Court decided *State v. Elmore*, ___ Ohio St.3d ___, 2009-Ohio-3478, which directly addresses the constitutional questions that Combs raises. The defendant in *Elmore* was convicted by a jury on counts of aggravated murder, with four death specifications, murder, kidnapping, aggravated robbery, aggravated burglary, and grand theft. The defendant's non-capital sentence total was 21 and one-half years. The defendant argued that the trial court should have imposed no more than minimum and concurrent prison terms for a total of three years. He contended that *Foster* and its severance remedy resulted in a sentence that was unlawful in many respects, including that the sentence violated his Sixth Amendment right to a jury trial and was imposed by a court lacking authority to impose consecutive sentences. The

Supreme Court of Ohio rejected both propositions.

{¶ 10} *Foster* found that certain sections of the Revised Code, related to criminal sentencing, violated the Sixth Amendment by requiring a trial court to determine certain facts independently before it could increase the maximum authorized punishment. *Foster*, at ¶82-83. *Foster*, following *Apprendi* and its progeny, held that “a court may not be required to make findings before imposing more than a minimum prison term.” *Elmore*, at ¶7. But as *Elmore* pointed out, the Court has never held that “the presumptive minimum prison term equated to a statutory maximum term.” *Id.* Rather, “[a] defendant convicted of an offense has always been on notice that the statutory maximum is the greatest prison term within a felony range.” *Id.* *Foster* simply “severed the requirement that judges make findings before imposing a nonminimum prison term.” *Id.* This does not mean that defendants receive the minimum sentence if findings are not made, however. *Id.* “[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” *Id.* at ¶10, quoting *Booker*, at 233. Thus, after *Foster*, trial courts retain “full discretion to impose a prison sentence within the statutory range without the mandatory findings.” *Id.* at ¶8.

{¶ 11} The defendant in *Elmore* contended also that trial courts cannot impose consecutive sentences anymore because *Foster* excised R.C. 2929.14(E)(4) and R.C. 2929.41(A), the statutory provisions that authorizes such sentences. The Court pointed out that it had addressed the issue in *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983. *Bates* held that, after *Foster*, a “trial court now has the discretion

and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.” *Elmore*, at ¶33, quoting *Bates*, at ¶19. Thus, “*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge’s duty to make findings before doing so.” *Id.* at ¶35.

{¶ 12} Combs’s sentence is lawful. It is based entirely on the jury’s verdict; the trial court did not make any judicial findings of fact. We note that, contrary to Combs’s assertion, under the separation of powers doctrine the Ohio Supreme Court’s role is not simply to apply the enactments of the General Assembly but also to determine, when asked, the laws’ constitutionality. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462 (“The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers.”); see, also, *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62 (“[i]nterpretation of the state and federal Constitutions is a role exclusive to the judicial branch”). And it is not the trial court’s place, nor indeed the place of this Court, to declare unconstitutional a decision of our Supreme Court. See *State v. Bell*, 176 Ohio App.3d 378, 2008-Ohio-2578, at ¶130 (“a claim that a decision of the Supreme Court of Ohio is unconstitutional is not cognizable in this court”). Thus, we must defer to the authority of the Ohio Supreme Court regarding the constitutionality of *Foster*. *Id.*

{¶ 13} In view of the preceding discussion, trial counsel did not render ineffective assistance by not objecting to Combs’s sentence. Like the first, the

second assignment of error has no arguable merit.

IV

{¶ 14} Finally, the third assignment of error alleges that the indictment was defective because it failed to specify the requisite degree of mental culpability for the crime of aggravated robbery. Combs cites *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, for the proposition that an indictment that fails to charge a culpability state is defective. *Colon* held that robbery under R.C. 2911.02(A)(2), a theft offense in which a person “[i]nflict[s], attempt[s] to inflict, or threaten[s] to inflict physical harm on another,” is not a strict liability offense. Thus, an indictment charging this offense must specify the appropriate culpability state.

{¶ 15} *Colon*, however, does not apply here. Combs was charged with *aggravated* robbery under R.C. 2911.01(A)(1), which while also a theft offense is one where an offender “[has] a deadly weapon on or about the offender's person or under the offender's control and either display[s] the weapon, brandish[es] it, indicate[s] that the offender possesses it, or use[s] it.” Our district, and others, have held that this offense is one that imposes strict liability. *State v. Smith*, Montgomery App. Nos. 21463, 22334, 2008-Ohio-6330, at ¶73 (citing other appellate court decisions holding the same). Because strict liability offenses have no requisite degree of culpability, Combs’s indictment was not defective. The third assignment of error is also rejected as lacking arguable merit.

V

{¶ 16} Finally, performing our duty under *Anders* to review the record independently, we find no potential assignments of error having arguable merit. We conclude that this appeal is wholly frivolous. The judgment of the trial court is Affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

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J. David Turner
Hon. William B. McCracken
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