

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee,	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 06 COA 42
STEPHEN J. CAUDILL, II,	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Ashland County Court of
Common Pleas Case No. 02-CRI-075

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 14, 2007

APPEARANCES:

For Plaintiff-Appellee:

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Ashland County Prosecutor

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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Stephen J. Caudill, II, appeals his resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, by the Ashland County Court of Common Pleas.

{¶2} Appellant was indicted on two counts of felonious assault and one count of tampering with evidence. On March 13, 2003, a jury returned a verdict of guilty on both counts of felonious assault, in violation of R.C. 2903.11(A) and one count of tampering with evidence, in violation of R.C. 2921.12(A)(1).

{¶3} The trial court ordered that a pre-sentence investigation report be prepared. On May 23, 2003, the trial court held a sentencing hearing. At the hearing, the trial court merged the two counts of felonious assault for sentencing purposes and proceeded to sentence Appellant to seven years of imprisonment for the felonious assault conviction and four years imprisonment for the tampering with evidence conviction. The trial court ordered that the sentences be served consecutively, for a total sentence of eleven years. In addition, the trial court ordered Appellant to pay restitution of \$48,000.00 for the victim's medical bills.

{¶4} Appellant filed an appeal and this court reversed for resentencing pursuant to *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. See, *State v. Caudill*, Ashland App. No. 03COA031, 2004-Ohio-2803.

{¶5} Upon remand, the trial court reimposed the same sentence without hearing. Appellant filed an appeal and this court reversed for resentencing. See, *State v. Caudill*, Ashland App. No. 04COA58, 2005-Ohio-970.

{¶6} Upon remand, the trial court held a resentencing hearing at which all parties were given an opportunity to be heard. The trial court reimposed the same sentence. Appellant filed an appeal and this court reversed pursuant to *State v. Foster*. See, *State v. Caudill*, Ashland App. No. 05COA40, 2006-Ohio-1513.

{¶7} The trial court held a fourth resentencing hearing on October 5, 2006 and continued the hearing to October 12, 2006. Prior to the hearing, Appellant made a motion for an updated presentence investigation report. The trial court denied the motion pursuant to R.C. 2929.19 which allows the offender to present mitigating information relevant to the imposition of the sentence at the sentencing hearing. At the resentencing hearing, Appellant renewed his request for an updated presentence investigation report. He argued that the original presentence investigation report contained inaccurate information. He stated there was evidence that demonstrated Appellant did not initiate the altercation giving rise to the charges, a charge of domestic violence listed in the report was dismissed against Appellant, and the reporter erroneously stated Appellant's prison term was mandatory based on the charges. Appellant also argued, and argues in his appeal to this court, that the victim's injuries were not as permanent as anticipated at the time of the original presentence investigation report and that while the original presentence investigation report indicated that Appellant was completely unremorseful, Appellant was now remorseful.

{¶8} The trial court denied Appellant's oral motion for an updated presentence investigation report. The trial court then sentenced Appellant to seven years of imprisonment for the felonious assault conviction and three years imprisonment for the tampering with evidence conviction. The trial court ordered that the sentences be

served consecutively, for a total sentence of ten years, a reduction of one year from the original sentence. In addition, the trial court ordered Appellant to serve three years post-release control after the completion of his prison term. Finally, the trial court ordered Appellant to pay restitution of \$48,000.00.

{¶9} Appellant now appeals and raises three Assignments of Error:

{¶10} “I. THE TRIAL COURT ERRED BY IMPOSING A SENTENCE WITHOUT MAKING [A] FINDING PURSUANT TO R.C. 2952.03(B)(5) AFTER THE DEFENDANT MADE SPECIFIC OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT.”

{¶11} “II. THE TRIAL COURT ERRED BY IMPOSING POSTRELEASE CONTROL.”

{¶12} “III. THE TRIAL COURT ERRED BY IMPOSING A NON-MINIMUM, CONSECUTIVE PRISON SENTENCES [SIC].”

I.

{¶13} Appellant argues in his first Assignment of Error that when he alleged there were factual inaccuracies in his original presentence investigation report, the trial court erred when it did not make findings pursuant to R.C. 2951.03(B)(5). We disagree.

{¶14} R.C. 2951.03(B) provides in pertinent part:

{¶15} “(5) If the comments of the defendant or the defendant’s counsel, the testimony they introduce, or any of the other information they introduce alleges any factual inaccuracy in the presentence investigation report or the summary of the report, the court shall do either of the following with respect to each alleged factual inaccuracy:

{¶16} “(a) Make a finding as to the allegation;

{¶17} “(b) Make a determination that no finding is necessary with respect to the allegations, because the factual matter will not be taken into account in the sentencing of the defendant.”

{¶18} Prior to his fourth resentencing, Appellant moved the trial court to order an updated presentence investigation report. The trial court denied the motion but allowed Appellant to present mitigating information at the sentencing hearing. Appellant renewed his motion at the sentencing hearing, arguing there were factual inaccuracies in the original presentence investigation report. On appeal, Appellant presents only two of the alleged factual inaccuracies to this court, i.e., the alleged lack of Appellant’s remorse and the severity of the victim’s injuries.

{¶19} As stated above, the reporter indicated that Appellant was not remorseful at the time of the presentence investigation report. (Oct. 5, 2006, Tr. 8). Appellant argued at the resentencing hearing that he was now remorseful. *Id.* Appellant also stated that at the time the reporter interviewed the victim, he expected that the victim would not be able to work at any tree nursery and that there would be permanent disability. *Id.* Appellant argued that he had evidence that the victim’s injury was not as permanent as anticipated and that the victim was still employed in his prior profession. (Oct. 5, 2006, Tr. 9). Appellant attempted to introduce photographic evidence of the victim’s lack of permanent injury but did not have any witnesses that could lay the foundation for the admissibility of the photographs. (Oct. 5, 2006, Tr. 28-32).

{¶20} At the continued sentencing hearing on October 12, 2006, the trial court stated that it had reviewed the entire record and the matters which were admitted during the course of the hearing. (Oct. 12, 2006, Tr. 19). Upon a review of the record, we find

the trial court did not specifically comply with R.C. 2951.03(B)(5). We find, however, any resulting error would be harmless. *State v. Williamson*, 5th Dist. No. 04CA75, 2005-Ohio-3524, at ¶24. As noted by the Fourth District Court of Appeals in *State v. Platz*, 4th Dist. No. 01CA33, 2002-Ohio-6149, at ¶18:

{¶21} “***[A] failure to make the requisite findings pursuant to R.C. 2951.03(B)(95) is harmless error if ‘the record reflects that none of the trial court’s findings or considerations would be affected in the least by the alleged inaccuracies in the report.’ *State v. Griffin* [(Feb. 12, 1998), Washington App. No. 97CA17]; *State v. Parsons* (Apr. 26, 1999), Washington App. No. 98CA19.”

{¶22} In the case sub judice, Appellant failed to establish the trial court specifically relied upon the erroneous information contained in the presentence investigation report when it imposed the sentence in this matter. The trial court did not allege that Appellant’s lack of remorse and victim’s injuries influenced the sentence rendered or that it relied upon the challenged information when sentencing Appellant to a lesser sentence.¹ As such, any error in failing to follow R.C. 2951.03(B)(5) would be harmless because it did not affect a substantive right. See *Williamson*, at ¶26.

{¶23} Appellant’s first Assignment of Error is overruled.

II.

{¶24} In his second Assignment of Error, Appellant argues the trial court erred in imposing postrelease control (“PRC”) upon remand. We disagree.

¹ As mentioned by this court in *State v. Rhoades*, 5th Dist. No. CT2006-0085, 2007-Ohio-1826, it could be argued that judicial fact finding required by R.C. 2951.03(B)(5) could “run afoul of the United States Supreme Court’s holding in *Blakely v. Washington* (2004), 542 U.S. 296.” This statement may especially hold true considering this matter is a resentencing pursuant to the requirements of *Foster*, supra.

{¶25} R.C. 2929.14(F)(1), as amended by H.B. 137, reads in pertinent part as follows: “ *** If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. ***.”

{¶26} Appellant argues the imposition of PRC violates the separation of powers doctrine because of the passage of H.B. 137. This issue has been previously addressed by this court in *State v. Isaac* (Sept. 27, 2007), Ashland App. No. 06 COA 44. In that case, Appellant also challenged his PRC provision under the doctrine of separation of powers, i.e., on the basis that the amended version of R.C. 2929.14(F)(1), *supra*, “now authorizes the executive branch to impose the sanction without a court order.” We found that, “in order for Appellant to have standing to raise this issue, he must show he is postured such that he has been affected as claimed by the amended statute. In this case, appellant’s PRC obligation was duly rendered by the judicial branch via the trial court’s sentencing entry of October 30, 2006. Appellant thus will not be permitted to raise, for purposes of this appeal, a purely theoretical claim that the purported empowerment of the executive branch in R.C. 2929.14(F)(1) is constitutionally infirm. Accord *State v. Pina*, Hancock App.Nos. 5-06-55, 5-06-56, 2007-Ohio-4486, ¶ 3.” *Isaac* at ¶19.

{¶27} Based on our holding in *Isaac*, we overrule Appellant’s second Assignment of Error.

III.

{¶28} In Appellant's third Assignment of Error, he contends the trial court erred in imposing non-minimum, consecutive sentences upon remand. We disagree.

{¶29} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court found certain provisions of Ohio's sentencing statute unconstitutional pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, because said provisions required judicial fact finding to exceed the sentence allowed simply as a result of a conviction or plea. To remedy Ohio's felony sentencing statutes, the Ohio Supreme Court severed the *Blakely*-offending portions that either create presumptive minimum or concurrent terms or require judicial fact finding to overcome the presumption. *Foster* at ¶ 97.

{¶30} Appellant argues the *Foster* remedy of resentencing upon remand violates the ex post facto and due process clauses. However, this court exhaustively addressed the same issue in *State v. Paynter*, Muskingum App.No. CT2006-0034, 2006-Ohio-5542. Based upon our holding in *Paynter*, we find the sentence imposed in the case sub judice did not violate appellant's rights under the due process or ex post facto clauses of the United States Constitution.

{¶31} Appellant's third Assignment of Error is overruled.

{¶32} For the reasons stated in the foregoing opinion, the judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

JUDGES

PAD/sld 110107

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STEPHEN J. CAUDILL, II	:	
	:	
Defendant-Appellant	:	Case No. 06 COA 42
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

JUDGES