[Cite as *State v. Maffias*, 2009-Ohio-2985.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-1029
v.	:	(C.P.C. No. 07CR-10-7615)
Joseph Maffias,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 23, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard,* for appellee.

Richard Cline & Co., LLC, and *Richard A. Cline,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Joseph Maffias, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a no contest plea, of three counts of trafficking in heroin in violation of R.C. 2925.03, two with major drug offender ("MDO") specifications, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32. Framed as an issue for our review under *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, defendant presents the following:

> DOES THE MANDATORY MINIMUM SENTENCE UNDER R.C. §2929.[14](D)(3)(b) APPLY IN THIS CASE AFTER THE COURT'S HOLDING IN *State* [*v.*] *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856?

Because the trial court did not violate defendant's constitutional rights in imposing the maximum sentence pursuant to R.C. 2929.14(D)(3)(a), we affirm the trial court's judgment and grant defense counsel's motion to withdraw from representing defendant.

I. Procedural History

{¶2} On October 19, 2007, defendant was indicted on three counts of trafficking in heroin, two with MDO specifications pursuant to R.C. 2941.1410, and one count of engaging in a pattern of corrupt activity.

{¶3} Defendant moved to dismiss the MDO specifications, arguing they were unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 because they require judicial fact-finding prohibited by *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. By decision filed on November 13, 2008, the trial court denied defendant's motion. The trial court explained that, because the indicted MDO specifications implicate a statutory provision not requiring the court to engage in fact-finding, the court's imposing sentence pursuant to the specifications did not violate *Blakely* or *Foster*.

{¶4} Defendant subsequently entered no contest pleas to all counts of the indictment. The trial court accepted the pleas and found defendant guilty of all offenses and specifications charged in the indictment. In sentencing defendant, the trial court imposed the maximum penalty of ten years provided in R.C. 2929.14(D)(3)(a) for the two trafficking counts with the MDO specifications; it did not impose an enhanced sentence under R.C. 2929.14(D)(3)(b).

II. Assignment of Error

{¶5} In conformity with *Anders,* supra, defendant's counsel filed a brief indicating that, after a conscientious examination of the record, counsel was unable to find any

issues for appeal, but noted the constitutional issue surrounding the MDO specification. This court's obligation is not only to consider the points set forth in defense counsel's *Anders* brief that suggest the MDO sentencing provisions are unconstitutional, but also to determine whether from the record as a whole such a claim is so frivolous that counsel's motion to withdraw should be granted. *State v. Brown*, 10th Dist. No. 02AP-553, 2003-Ohio-1112.

A. MDO Specification

{¶6} Counts one and two of the indictment charged defendant with trafficking in heroin in violation of R.C. 2925.03. They alleged defendant (1) did sell or offer to sell at least 250 grams of heroin, and (2) did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution or distribute heroin in an amount equal to or exceeding 250 grams, knowing or having reasonable cause to believe the heroin was intended for resale. Each count contained a specification in accordance with R.C. 2941.1410 asserting defendant is a MDO because of the quantity of heroin involved.

{¶7} Supporting the specification, R.C. 2925.03(C)(6)(g) provides that if the amount of heroin involved equals or exceeds 2500 unit doses or 250 grams, "the offender is a major drug offender," requiring the court to "impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree * * * ," which is ten years. R.C. 2929.14(A)(1); see also R.C. 2929.01 (providing that a major drug offender is "an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell * * * at least two thousand five hundred unit doses or two hundred fifty grams of heroin"). R.C. 2929.14(D)(3)(a), the penalty to which R.C. 2929.03(C)(6)(g) refers, specifies that if a defendant violates R.C. 2925.03 and "that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender," then

the trial "court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced" pursuant to R.C. 2929.20 or R.C. Chapters 2967 or 5120.

{¶8} R.C. 2929.14(D)(3)(b), by contrast, allows the trial court to impose an additional prison term of one to ten years if the court makes the findings set forth in R.C. 2929.14(D)(2)(a)(iv) and (v). Such findings include a determination that the additional sentence is necessary to adequately punish the offender and protect the public from future crimes, or that the additional sentence is needed to avoid demeaning the seriousness of the offense.

{¶9} In *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, the Ohio Supreme Court directly addressed the issue raised in defendant's appeal: whether the mandatory sentence under R.C. 2929.14(D)(3)(a) continues to apply after the constitutional challenge to Ohio's felony sentencing scheme in *Foster*. In considering R.C. 2929.14(D)(3), the court reaffirmed that *Foster's* remedy of severing the provisions of R.C. 2929.14(D)(3)(b) does not affect the continued viability of the provisions of R.C. 2929.14(D)(3)(a). The Supreme Court explained it "severed R.C. 2929.14(D)(3)(b) to remedy the constitutional violation" noted in *Foster* at paragraph six of the syllabus. *Chandler,* supra, at ¶17. "As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce." Id. "Only the add-on that had required judicial fact-finding has been severed." Id.

{¶10} Here, defendant, by his no contest plea to counts one and two of the indictment, admitted the amount of heroin involved was at least 250 grams, per the prosecution's factual presentation at the plea hearing. He thus also admitted he is a MDO under R.C. 2925.03(C)(6)(g); the trial court did not have to engage in any fact-finding to determine defendant is subject to sentencing as a MDO. Because defendant is an MDO,

defendant is subject to, and the trial court was obliged to impose, the mandatory ten-year sentence under R.C. 2929.14(D)(3)(a).

{¶11} Although the trial court did not purport to impose sentence under the add-on provision of R.C. 2929.14(D)(3)(b), defendant argues on appeal that this court should concur with the Second District's ruling in *State v. Dillard*, 173 Ohio App.3d 373, 2007-Ohio-5651, ¶100, affirming the unconstitutionality of R.C. 2929.14(D)(3)(b) and finding such an "add-on" provision to be improper. Although we agree with *Dillard*, an outcome *Foster* dictates, the issue proves irrelevant here in light of the sentence the trial court imposed. The trial court properly sentenced defendant to the mandatory term required under R.C. 2929.14(D)(3)(a) for the two counts of trafficking with MDO specifications. In doing so, the court declined to utilize R.C. 2929.14(D)(3)(b) as basis for any additional sentence.

B. Motion to Withdraw as Counsel for Defendant

{¶12} Because our review reveals no non-frivolous issue for appeal, and the issue assigned in defendant's brief lacks merit, we, pursuant to *Brown*, grant the motion of defendant's counsel to withdraw.

{¶13} The judgment of the trial court if affirmed.

Motion to withdraw granted;
judgment affirmed.

McGRATH and TYACK, JJ., concur.

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