[Cite as *State v. Crosky*, 2009-Ohio-4216.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-57 (C.P.C. No. 04CR-05-2970)
v.	:	(REGULAR CALENDAR)
John R. Crosky,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 20, 2009

Ron O'Brien, Prosecuting Attorney, and *Richard Termuhlen*, for appellee.

John R. Crosky, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} John R. Crosky, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court resentenced him on eight counts of gross sexual imposition, violations of R.C. 2907.05 and third-degree felonies; two counts of rape, violations of R.C. 2907.02 and first-degree felonies; disseminating matters harmful to juveniles, in violation of R.C. 2907.31 and a first-degree misdemeanor; and endangering children, a violation of R.C. 2919.22 and a second-degree felony. Appellant has also filed the following five motions as part of his appeal: June 15, 2009

motion for correction and modification of the record; June 15, 2009 motion to correct errors in the PSI report(s); July 7, 2009 motion to reconsider journal entry on state's motion to strike; July 7, 2009 motion to strike the state's indictment and the verdict forms based on indictment, the state's memorandum contra motion to certify a conflict, and the state's fraudulent memorandum of plaintiff-appellee opposing jurisdiction (to the Ohio Supreme Court) together with all falsified appellate state briefs in this case including the appellate court opinion based upon them all; and July 10, 2009 motion for a supplemental record to be certified and transmitted.

{¶2} A detailed account of the underlying facts in this case is not necessary to address the merits of the present appeal, and a full account is set forth in *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145. Generally, appellant was indicted on eight counts of rape, seven counts of gross sexual imposition, one count of child endangering, and one count of disseminating matter harmful to juveniles. All of the counts involved appellant's sexual abuse of J.S., who was in fifth and sixth grade at the time of the abuse. J.S. was the daughter of Julie Crosky, whom appellant started dating in 1997 or 1998 and married in May 2001. Julie Crosky was also charged with offenses related to sexual abuse of J.S.

{¶3} A trial was held, at which appellant represented himself. The jury eventually found appellant guilty of six counts of gross sexual imposition, seven counts of rape, one count of disseminating matters harmful to a juvenile, and one count of endangering children. The jury found appellant not guilty of one count of rape and one count of gross sexual imposition. Appellant was sentenced to a total prison term of 30 years.

{¶4} Appellant appealed and, in *Crosky*, we reduced two counts of rape to gross sexual imposition, reduced the disseminating matters harmful to a juvenile from a fourth-degree felony to a first-degree misdemeanor, and reversed three of the rape convictions as being unsupported by sufficient evidence. The trial court sentenced appellant to five years on the gross sexual imposition counts, six years on the endangering children count, ten years on the rape counts, and six months on the disseminating matters harmful to a juvenile count. Three of the gross sexual imposition terms and one of the rape terms were to be served consecutively to each other, with all other counts to be served concurrently with each other and concurrently to the consecutive terms, for a total term of incarceration of 25 years. Appellant appeals the judgment of the trial court, and his counsel has asserted the following four assignments of error:

> [I.] Pursuant to the intervening decision of the United States Supreme Court in *Oregon v. Ice* (2009), 129 S.Ct. 711, the Trial Court erred by imposing consecutive sentences without first making the factual findings required by Ohio Revised Code § R.C. 2929.14(E)(4) and § 2929.41. The severance of the aforementioned statutes in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, was void *ab initio*, and as a result the statutes remain in effect.
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> [II.] The Trial Court violated Defendant Crosky's right to trial by jury by imposing non-minimum sentences.
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> [III.] The Trial Court violated the Ex Post Facto Clause by imposing non-minimum sentences.
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> [IV.] The Trial Court violated Defendant Crosky's right to due process of law by imposing non-minimum sentences.

{¶5} Appellant, pro se, has filed the following pro se supplemental assignments of error, which we have renumbered as assignments of error five, six, and seven:

[V.] As ridiculously overbroad as they blatantly are (which, in and of itself, testifies quite clearly to their malicious and suspiciously overreaching fraudulence), the TIME FRAMES for each and every single count of the State's 20 count indictment against we co-defendants, were obviously and artificially created and manufactured by less than ethical prosecutors of State, OUTSIDE OF and actually MOST CONTRARY TO not only reality and to human possibility, but also and especially MOST CONTRARY TO the State's own Discovery and the time frames purported by their one and only witness, whom, for ulterior purposes expedient for the State, was never ever "shown the 20 indictment charges," filed in her name for the working the State's agenda! (Pretrial Transcript, February 22, 2006, at page 85 – which explains quite precisely why the girl was so dumbfounded, when she learned, on that day, that the dubious State even charged HER OWN MOTHER with SEXUALLY RAPING HER! – not even as an Aiding and Abetting Complicitor, the R.C. 2923.03 Statute of which, is nowhere found in the indictment or Bill of Particulars!) It cannot be denied that it was with much premeditated duplicity and calculated artifice of the most criminal pedigree, that these indictment TIME FRAMES were UNLAWFULLY invented, charged, prosecuted, sentenced, and unbelievably "Affirmed" against this Appellant. For the verdicts and sentences imposed upon Appellant, were not – in truth – supported by evidence sufficient to satisfy the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and/or Article I, Sections 10 and 16 of the Ohio Constitution, AND INFINITELY LESS SUFFICIENT STILL to justify denying Appellant justice and relief under the Manifest Weight of Evidence Review. Furthermore, Appellant was also unlawfully denied the protections of the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and/or Article I, Sections 10 and 16 of the Ohio Constitution, while those whom conspired and perpetrated those unlawful time frames of that unlawful indictment, thus arrogantly committed, against Justice and Public Administration, the multiple crimes of Falsification R.C. 2921.13; False Reports of Child Abuse R.C. 2921.32; Dereliction of Duty R.C. 2921.44; Perjury R.C. 2921.11; Tampering with Evidence R.C. 2921.12; Obstructing Justice R.C. 2921.32; Interfering with Civil Rights R.C. 2921.45; Intimidation R.C. 2921.03; Conspiracy R.C. 2923.01; Complicity (Aiding and Abetting) R.C. 2923.03; and Engaging

> in a Pattern of Corrupt Activity R.C. 2923.31(E). And since this Court mocked this Appellant and implied me a liar, let's now see just how "truthful" is the State's "TRUE BILL" indictment. One thing is certain: This unlawful group of sentences of the trial court must be vacated, for this case, with its sentences is "Contrary to Law" R.C. 2953.08. It is void of any justice. It's a stain upon this State and its Judiciary. Indeed, one of the biggest and most cynical cover-ups conceived. In the hypocritical words of this cases' Assistant Prosecutor, Richard Termuhlen himself, "I would encourage you [as his last line to the jury that he personally tampered with] to follow your conscience, follow your oath, and follow the law. Thank you very much."
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> [VI.] The trial court deprived the Defendant/Appellant of his rights to due process and the protections of the Double-Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, by the relitigation of Judicial fact-findings in the Resentencing process, already determined to be Unconstitutional and most insufficient as a matter of Law.
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> [VII.] The trial court denied Defendant-Appellant his rights to due process and trial by jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 5 and 10 of the Ohio Constitution, by imposing non-concurrent sentences.

{¶6} Appellant argues in his first assignment of error that the trial court erred when it imposed consecutive sentences without first making the factual findings required by R.C. 2929.14(E)(4) and 2929.41 pursuant to *Oregon v. Ice* (2009), 129 S.Ct. 711. Specifically, appellant contends the United States Supreme Court's decision in *Ice* was contrary to the Supreme Court of Ohio's prior decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Ice*, the United States Supreme Court found state statutory sentencing schemes that presume concurrent sentences, but allow consecutive sentences, to be ordered based upon the judicial finding of facts to justify such were constitutional. In *Foster*, the Supreme Court of Ohio found that Ohio's sentencing

scheme, which provided that sentences be served concurrently unless judicial fact-finding permitted consecutive sentencing, was unconstitutional and severed those requirements from the rest of the sentencing statute. Therefore, appellant argues, because *Ice* rendered *Foster*'s severance void ab initio and resurrected the Ohio sentencing statutes previously severed by *Foster*, the trial court should have been required to make judicial findings of fact, as required before *Foster*.

{¶7} This court has already addressed this issue in two prior opinions. In *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, this court found that, in light of *Ice*, it may be necessary to take another look at some of Ohio's current sentencing statutes, as well as some of those which immediately preceded the decision in *Foster*. Id. at ¶25. However, we stated that such a look could only be undertaken by the Supreme Court of Ohio, as we are bound to follow the law and decisions of the Supreme Court, unless or until they are reversed or overruled. Id. See also *State v. Franklin*, 10th Dist. No. 08AP-900, 2009-Ohio-2664, ¶18, citing *Mickens* (the Supreme Court of Ohio has not reconsidered *Foster* in light of *Ice*, and *Foster* remains binding on this court). Other appellate courts have found the same. See, e.g., *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379, ¶29 (we decline to depart from the pronouncements in *Foster,* until the Supreme Court orders otherwise); *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815, fn.1 (until the Ohio Supreme Court revisits *Foster* in light of *Ice*, we remain bound by *Foster*).

{¶8} Very recently, in *State v. Elmore*, Slip Opinion No. 2009-Ohio-3478, the Supreme Court of Ohio did briefly discuss *Ice*. Although the court refused to address fully all ramifications of *Ice* because neither party before it sought the opportunity to brief this

issue before oral argument, the court concluded that *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. Thus, the court in *Elmore* stated, the trial court had authority to impose consecutive sentences. Id. Accordingly, although the Supreme Court has not fully addressed the implications of *Ice*, it appears as though it continues to adhere to the principles in *Foster*. Therefore, we decline to depart from *Foster* until the Supreme Court directs otherwise. Appellant's first assignment of error is overruled.

{¶9} We will address appellant's second, third, fourth, sixth, and seventh assignments of error together, as they are related. Appellant argues in these assignments of error that his resentencing to consecutive and non-minimum sentences and the trial court's application of the severance remedy in *Foster* violated his right to a trial by jury, his due process rights, and ex post facto principles. Appellant's counsel has filed a notice of adverse authority, conceding the Supreme Court's decision in *Elmore* is adverse to his second, third, and fourth assignments of error. We also find *Elmore* is adverse to appellant's sixth and seventh pro se supplemental assignments of error. In *Elmore*, the Supreme Court found that "[r]esentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, for offenses that occurred prior to February 27, 2006, does not violate the Sixth Amendment right to a jury trial or the Ex Post Facto or Due Process Clauses of the United States Constitution." Id., paragraph one of syllabus. Furthermore, insofar as appellant contends that, without the judge based fact-finding invalidated by *Foster*, the trial court could only sentence him to concurrent sentences, the Supreme Court held in *Elmore* that *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. Thus, trial courts have authority to impose consecutive sentences. Id. Therefore, based upon *Elmore*, appellant's resentencing to consecutive and non-minimum sentences upon remand did not violate his right to a trial by jury, his due process rights or ex post facto principles. Appellant's second, third, fourth, sixth, and seventh assignments of error are overruled.

{¶10} Appellant argues in his fifth assignment of error, generally, that there was insufficient evidence to demonstrate that he committed the crimes during the time frames alleged in the indictments. However, these issues are res judicata. The doctrine of res judicata bars any claim that was or could have been raised at trial or on direct appeal. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. Here, in appellant's third assignment of error in *Crosky*, appellant challenged the sufficiency of the state's evidence establishing the time frames for the indicted conduct. Our discussion of appellant's manifest weight of the evidence argument under his third assignment of error in *Crosky* also addressed arguments related to the time frames alleged in the indictment. Therefore, as appellant already raised these arguments in his original appeal, he cannot raise them again herein. Appellant's fifth assignment of error is overruled.

{¶11} Appellant has also filed five motions. In appellant's June 15, 2009 motion for correction and modification of the record, appellant requests that the following corrections to the record be permitted: (1) a remark made by the trial court that is present on the audiotape of the hearing, but not in the transcript in which the judge questioned certain dates; (2) errors on the docket regarding hearing dates; (3) misstated words in the transcripts, such as the year of the hearing on the cover page; and (4) errors and gross misrepresentations in the state's sentencing memorandum; for instance, the state's error

when indicating the year he was indicted. However, none of these matters are material to appellant's assignments of error herein. Appellant's assignments of error relate solely to sentencing, which none of the purported errors regard. Therefore, we deny appellant's motion.

{¶12} In his June 15, 2009 motion to correct errors in the presentence investigation report ("PSI"), appellant actually seeks leave to file an additional assignment of error raising a constitutional argument related to alleged errors in his PSI. We deny appellant's motion. Appellant filed a supplemental brief that included pro se assignments of error on June 8, 2009. Appellant should have included any assignments of error related to this issue in his June 8, 2009 supplemental brief. Therefore, this motion is denied.

{¶13} Appellant also filed, pursuant to App.R. 26(A), a July 7, 2009 motion to reconsider our June 29, 2009 journal entry in which we granted the state's motion to strike the appendix to appellant's supplemental brief because the attached exhibits were not a part of the record. The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, paragraph two of the syllabus. Appellant has not called to this court's attention an obvious error in our journal entry or raised an issue that we did not consider or fully consider. It is well-established that we are not permitted to add matter to the record which was not part of the trial court proceedings. *State v. Ishmail* (1978), 54 Ohio St.2d 402. Therefore, we deny appellant's motion.

{¶14} Appellant also filed a July 7, 2009 motion to strike the state's indictment and the verdict forms based on indictment, the state's memorandum contra motion to certify a conflict, and the state's fraudulent memorandum opposing jurisdiction (to the Ohio Supreme Court), together with all falsified appellate state briefs in this case including the appellate court opinion based upon them all. However, appellant's motion relates to motions and matters regarding appellant's initial appeal in *Crosky* and are not germane to the issues in the present appeal. Therefore, we deny this motion.

{¶15} Appellant also has filed a July 10, 2009 motion for a supplemental record to be certified and transmitted. In this motion, appellant requests, pursuant to App.R. 9(E), a 30-day leave to produce a supplemental record to help make the record conform to the truth. We deny this motion. Appellant does not claim that any of this "supplemental" matter would relate to any errors in the sentencing, upon which this appeal solely focuses. Therefore, appellant's motion is denied.

{¶16} Accordingly, appellant's first, second, third, fourth, fifth, sixth, and seventh assignments of error are overruled, appellant's motions are denied, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Motions denied.
Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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