

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-792 (C.P.C. No. 07CR-10-7261)
John A. Reed,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 10, 2012

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

John A. Reed, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, John A. Reed, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to vacate sentence. For the following reasons, we affirm.

{¶ 2} In 2008, appellant was found guilty of possession of crack cocaine in violation of R.C. 2925.11 with a major drug specification for possessing an amount equal to or exceeding 100 grams. **The trial court imposed a total prison term of 14 years.**

{¶ 3} Appellant, through counsel, appealed his conviction to this court, challenging the weight and sufficiency of the evidence supporting his conviction and

arguing that the trial court improperly limited his cross-examination of a witness. *State v. Reed*, 10th Dist. No. 09AP-84, 2009-Ohio-6900. We affirmed.

{¶ 4} In July 2011, appellant filed a motion to vacate his sentence, arguing that his sentence was void because the statute authorizing an additional prison term for his major-drug-offender specification was severed by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. After the state filed a memorandum in opposition, the trial court denied appellant's motion in a decision and entry filed August 16, 2011. The trial court reasoned that appellant's arguments were barred by the doctrine of res judicata because his claims were raised or could have been raised at sentencing or in a direct appeal.

{¶ 5} Appellant now appeals, advancing the following assignments of error for our consideration:

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S REQUEST TO ADJUDICATE A VOID JUDGMENT BY RULING THAT APPELLANT'S REQUEST WAS BARRED BY THE DOCTRINE OF RES JUDICATA.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL [COURT] ERRED TO THE PREJUDICE OF THE APPELLANT BY IMPOSING AN ADDITIONAL TERM OF TEN YEARS UNDER THE MAJOR DRUG OFFENDER SPECIFICATION PURSUANT TO OHIO REVISED CODE 2929.14(D)(3)(b), AS THAT PORTION OF THE STATUTE WAS SEVERED BY THE OHIO SUPREME COURT IN FOSTER.

{¶ 6} Appellant's assignments of error challenge the trial court's denial of his motion to vacate, and we will address them together. Specifically, appellant claims his sentence was "void" and therefore not **barred by** res judicata because the Supreme Court of **Ohio's decision in *Foster*** severed former R.C. 2929.14(D)(3)(b), which authorized the additional prison term for his major-drug-offender specification. We disagree.

{¶ 7} Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any

proceeding except an appeal from that judgment, any defense or any claimed lack of due process that "was raised or could have been raised" by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. This doctrine "promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 18, citing *State ex rel. Willys-Overland Co. v. Clark*, 112 Ohio St. 263, 268 (1925).

{¶ 8} While appellant correctly asserts that res judicata does not preclude review of a "void" sentence, the doctrine "still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph three of the syllabus. Thus, to survive the res judicata bar, appellant was required to demonstrate that his sentence was "void."

{¶ 9} Generally, "sentencing errors are not jurisdictional and do not render a judgment void." *Id.* at ¶ 7, citing *State ex rel. Massie v. Rogers*, 77 Ohio St.3d 449, 449-450 (1997); *Majoros v. Collins*, 64 Ohio St.3d 442, 443 (1992). A sentence is "void" only when it is imposed by a sentencing court lacking subject-matter jurisdiction. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 27. Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously. *Id.*

{¶ 10} In this case, appellant's motion failed to demonstrate any error, much less "void" sentencing error. This court has already rejected the argument that *Foster* severed former R.C. 2929.14(D)(3)(b) in its entirety. In *State v. Pena*, 10th Dist. No. 06AP-688, 2007-Ohio-4516, ¶ 20, we explained that "the Supreme Court severed only the portion of [R.C. 2929.14(D)(2)(b) and (D)(3)(b)] requiring judicial fact-finding with an explanation that trial courts could continue to impose the add-on sentence where the jury had found the defendant to be a major drug offender as defined by statute." Other appellate districts have similarly concluded that "R.C. 2929.14(D)(3)(b) is not entirely a nullity after *Foster*" and that "a trial court may use R.C. 2929.14(D)(3)(b) to impose an additional prison term on a major drug offender." *State v. Black*, 1st Dist. No. C-100357, 2011-Ohio-1330, ¶ 29; see also *State v. Newton*, 2d Dist. No. 24154, 2011-Ohio-2188, ¶ 21; *State v. Sims*, 8th

Dist. No. 95979, 2011-Ohio-4819, ¶ 38 (because *Foster* severed only the language requiring judicial fact-finding, the defendant "was subject to an additional sentence as a major drug offender at the trial court's discretion").

{¶ 11} Subsequent decisions from the Supreme Court of Ohio reemphasize that *Foster* did not eliminate the additional prison terms authorized for major drug offenders and repeat violent offenders. In *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, ¶ 17, the court explained, "As [R.C. 2929.14(D)(3)(b)] now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed." In *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, ¶ 27, the court stated the following with regard to the effect of *Foster* on repeat-violent-offender specifications:

Our opinions in *Foster* and [*State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855] patently demonstrate our intent to excise only the portions of former R.C. 2929.14(D)(2)(b) that required judicial fact-finding in violation of the Sixth Amendment and the United States Supreme Court's decisions in [*Apprendi v. N.J.*, 530 U.S. 466, 120 S.Ct. 2348 (2000)] and [*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004)]. We never specifically precluded a trial court from imposing enhanced penalties for a repeat violent offender specification, nor did we excise the definition of a repeat violent offender as set forth in former R.C. 2929.01(DD). Furthermore, none of our decisions after *Foster* indicate that this specification no longer exists. Thus, *Foster* excised judicial fact-finding from former R.C. 2929.14(D)(2) but did not eliminate the repeat violent offender specification, as defined in former R.C. 2929.01(DD).

Although the decision in *Hunter* focused on the additional penalty for repeat violent offenders, its reasoning applies equally to the additional penalty for major drug offenders. See *Newton* at ¶ 20.

{¶ 12} Appellant relies on the Second District's holdings in *State v. Sanchez*, 2d Dist. No. 2006-CA-154, 2009-Ohio-813, and *State v. Dillard*, 173 Ohio App.3d 373, 2007-Ohio-5651 (2d Dist.), for the proposition that *Foster* severed former R.C. 2929.14(D)(3)(b) in its entirety. In *Sanchez*, however, the court did not reach this question; instead, the court dismissed the appeal for lack of a final appealable order. *Id.*

at ¶ 5. Although the *Dillard* court did find former R.C. 2929.14(D)(3)(b) to be severed by *Foster*, the Second District later reconsidered this holding based on the Supreme Court of Ohio's subsequent decision in *Hunter. Newton*. As the court stated in *Newton* at ¶ 21, "[t]he Supreme Court's ruling in *Hunter* * * * rejected the view we expressed in *Dillard* that the specification imposing an enhanced sentence for a major drug offender could never survive *Foster*; *Hunter* made clear that the major drug offender specification contained in R.C. 2929.14(D)(3)(b) was not totally eliminated or rendered unconstitutional by *Foster*." Accordingly, appellant's reliance on *Sanchez* and *Dillard* is misplaced.

{¶ 13} Because appellant failed to prove his sentence was void, the doctrine of res judicata prohibited review of his sentence as his claim was or could have been raised at sentencing or in a direct appeal. Therefore, the trial court properly denied appellant's motion to vacate. Accordingly, appellant's first and second assignments of error are overruled.

{¶ 14} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
