

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2005-L-070
DARNELL R. SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 000646.

Judgment: Reversed and remanded for resentencing.

Charles E. Coulson, Lake County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Werner G. Barthol, 7327 Center Street, Mentor, OH 44060 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} Appellant, Darnell R. Smith ("Smith"), appeals from the judgment entry of the Lake County Common Pleas Court that imposed sentences for drug-related offenses, which were ordered to be served consecutively to a previous sentence imposed upon him from the Cuyahoga County Common Pleas Court.

{¶2} Smith was indicted by the grand jury on January 12, 2004, for two counts of possession of cocaine, one count of trafficking in cocaine, one count of possession of heroin, one count of trafficking in heroin, and one count of possessing criminal tools.

{¶3} The two counts of possession of cocaine alleged violations of R.C. 2925.11. One count alleged a felony of the third degree, conviction for which requires a mandatory prison term. The other count alleged a felony of the fifth degree. The count of trafficking in cocaine alleged a violation of R.C. 2925.03(A)(2), a felony of the second degree. A conviction under this count also required a mandatory prison term. The count of possession of heroin alleged a violation of R.C. 2925.11, a felony of the third degree. A conviction for this offense carries with it a presumption in favor of a prison term. The count of trafficking in heroin alleged a violation of R.C. 2925.03(A)(2), a felony of the second degree. A conviction for this offense carries with it a presumption in favor of a prison term. The count of possessing criminal tools alleged a violation of R.C. 2923.24, a fifth-degree felony. All of the counts, save for the possession of criminal tools count, contained forfeiture specifications.

{¶4} On May 7, 2004, Smith entered guilty pleas to one count of possession of cocaine, a felony of the third degree, and one count of possession of heroin, a felony of the third degree. Both counts had forfeiture specifications. A nolle prosequi was entered by the state of Ohio with respect to all other counts.

{¶5} On May 14, 2004, Smith received sentences of two years for each of the drug possession convictions. The sentences were ordered to be served concurrently to each other, but consecutively to sentences previously received by Smith from the Cuyahoga County Common Pleas Court. Smith was also ordered to forfeit currency in the amount of \$2,257 that was seized at the time of his arrest.

{¶6} On May 9, 2005, Smith filed a motion for leave to file a delayed appeal, pursuant to App.R. 5(A). On the same date, he also filed a notice of appeal to this

court. His motion asserted that various United States Supreme Court decisions impacted the legality of his sentence; that his counsel was ineffective in failing to advise him of the recent sentencing decisions; and that had he been informed of those decisions he would have filed a timely appeal. This court granted Smith's motion for leave to file a delayed appeal on June 17, 2005.

{¶7} In this court, Smith has raised a single assignment of error:

{¶8} "The trial court erred to the prejudice of appellant when it sentence [sic] appellant above the statutory maximum through imposing consecutive sentences."

{¶9} This assignment of error is raised in response to the United States Supreme Court's opinion in *Blakely v. Washington*.¹

{¶10} The Supreme Court of Ohio has held that an appellate court may only consider the sentences that the appellant challenges on appeal.² Smith's sentences contain "more-than-the-minimum" sentences as well as consecutive sentences.

{¶11} Though Smith has directly challenged the consecutive nature of his sentences, he has not directly challenged his sentences on a "more-than-the-minimum" analysis pursuant to former R.C. 2929.14(B). Pursuant to that section, the court was required to impose the shortest sentence from the range of sentences, unless it made a finding that the shortest sentence would demean the seriousness of the offense, that the shortest sentence would not adequately protect the public from future crime by the defendant, or that the offender had previously served a prison term.

{¶12} However, Smith employs the phrase "statutory maximum" throughout his argument, in conjunction with his primary argument that the trial court improperly made

1. *Blakely v. Washington* (2004), 542 U.S. 296.

2. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at paragraph three of the syllabus.

judicial findings to enhance his sentences beyond the “statutory maximum.” Smith cites the First Appellate District decision in *State v. Bruce* to support his argument that the “statutory maximum [sentence] is not ‘the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.’”³ We hold, therefore, that Smith has not waived the issue of the trial court imposing “more-than-the-minimum” sentences via judicial factfinding.

{¶13} The Supreme Court of Ohio has addressed the implication of *Blakely v. Washington* on Ohio’s sentencing structure.⁴ In *State v. Foster*, the Supreme Court of Ohio held that “[b]ecause R.C. 2929.14(B) and (C) and 2929.19(B)(2) require judicial factfinding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant, they are unconstitutional.”⁵ In addition, the court held “[b]ecause R.C. 2929.14(E)(4) and 2929.41(A) require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before the imposition of consecutive sentences, they are unconstitutional.”⁶

{¶14} To remedy the sentencing statutes, the Supreme Court of Ohio severed the unconstitutional portions requiring judicial factfinding.⁷

{¶15} The trial court imposed sentences that were “more-than-the-minimum” and consecutive in nature. The sentences were arrived at via judicial factfinding. Thus,

3. (Emphasis in original.) *State v. Bruce*, 159 Ohio App.3d 562, 2005-Ohio-373, at ¶8, quoting *Blakely v. Washington*, 542 U.S. at 303-304.

4. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

5. *Id.*, at paragraph one of the syllabus, following *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington*, *supra*.

6. *Id.*, at paragraph three of the syllabus, following *Apprendi v. New Jersey*, *supra*, and *Blakely v. Washington*, *supra*.

7. *Id.*, at paragraphs two and four of the syllabus, following *United States v. Booker* (2005), 543 U.S. 220.

pursuant to *State v. Foster*, the sentences are unconstitutional⁸ and must be vacated.⁹

{¶16} We note that the trial court found, pursuant to R.C. 2929.14(B)(1), that Smith had served a prior prison term. The trial court made this finding in addition to the findings that the shortest prison term would demean the seriousness of the offense and that the shortest sentence would not adequately protect the public from future crime by the appellant, pursuant to R.C. 2929.14(B)(2). Certain decisions from this court have held that a trial court imposing a “more-than-the-minimum” sentence on a defendant who served a prior prison term did not violate *Blakely v. Washington*, because the court was not engaging in judicial factfinding but, rather, was taking judicial notice of the fact that the defendant had served a prior prison term.¹⁰ These cases were released prior to the *State v. Foster* decision. However, the Supreme Court of Ohio declined to adopt this “prior prison term” exception.¹¹ In fact, the court specifically held that judicial findings regarding a prior prison term violate the constitutional guarantees explained in *Blakely v. Washington*.¹²

{¶17} Smith’s assignment of error has merit.

{¶18} The judgment of the trial court is reversed, and this matter is remanded to the trial court for resentencing, pursuant to *State v. Foster*.¹³ Specifically, the trial court is to resentence Smith on both convictions for possession of drugs, since we have vacated the prior sentences on these convictions.

8. Id., at paragraphs one and three of the syllabus.

9. Id. at ¶103-104.

10. See *State v. Acevedo*, 11th Dist. No. 2002-A-0109, 2005-Ohio-3267, at ¶44-45; *State v. Brown*, 11th Dist. No. 2003-A-0092, 2005-Ohio-2879, at ¶88-89; and *State v. Taylor*, 158 Ohio App.3d 597, 2004-Ohio-5939, at ¶25.

11. *State v. Foster*, at ¶56-61.

12. Id. at ¶60-61.

13. Id. at ¶104.

{¶19} Thereafter, the trial court is to determine whether Smith's sentences are to be served consecutively or concurrently to the prison term Smith is currently serving pursuant to the sentence he received from the Cuyahoga County Common Pleas Court. All other motions filed by Smith and now pending before this court are moot as a result of this decision.

DONALD R. FORD, P.J., concurs in judgment only,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

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{¶20} I respectfully dissent.

{¶21} Appellant's sole assigned error attacks the trial court's ruling that appellant's concurrent sentence in this case be served consecutively to sentences previously imposed on appellant by the Cuyahoga Common Pleas Court.

{¶22} Appellant would have had a basis under *Foster* and *Blakely* for its assigned error had the trial court adjudicated consecutive sentences for the two felonies for which he entered guilty pleas in this case. However, neither *Foster* nor *Blakely* prohibit a trial court from ruling that a convicted defendant serve a new sentence after completing a sentence from a prior conviction. In fact, such a ruling would provide the criminally minded with an existing sentence an incentive to commit additional crimes before a prior sentence has been fully served.

{¶23} Appellant's sole assignment of error is without merit.

{¶24} The analysis of this case should end here since appellant *only* appealed the "consecutive" nature of his sentence.

{¶25} The majority, however, crafts another "error" – a "more than the minimum" sentence through the following tortured reading of appellant's brief:

{¶26} "Smith employs the phrase 'statutory maximum' throughout his argument, in conjunction with his primary argument that the trial court improperly made judicial findings to enhance his sentence beyond the 'statutory maximum.'"

{¶27} The majority's reliance on bald factual assertions in appellant's brief is misplaced. Appellant's brief contains no citations to the sentencing transcript and that transcript was not included in the record.¹⁴

{¶28} While an appellate court has discretion to pass upon errors not otherwise assigned or argued, App.R. 12(A)(1)(b); it is *not* the role of the appellate court to act as additional counsel for a convicted appellant. See *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342 ("although a court of appeals may recognize error not assigned by the parties, there must be sufficient basis *in the record* before it upon which the court can *decide* that error"). At most, an appellate court can review a matter under a plain error analysis. *State v. Long* (1978), 53 Ohio St.2d 91, 94 ("[t]he power to notice plain error *** is one which the courts exercise only in exceptional circumstances"). That was not the majority's approach in this case.

{¶29} This court cannot simply assume error by the trial court in its sentencing in this case. A copy of the sentencing hearing transcript is necessary before this court can

14. Appellant specifically indicated that "[n]o transcript of proceeding [is] required" on the Docketing Statement in this case.

find error. Ohio courts have addressed this exact issue, holding that: the duty to provide a transcript for appellate review falls upon appellant. “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.” *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199; see, also *State v. Rehaut*, 10th Dist. Nos. 02AP-570, 02AP-571, 2003-Ohio-884, at ¶13; App.R. 9 (B).

{¶30} In the absence of such transcript, this court must presume that the sentences imposed by the trial court are proper.

{¶31} Finally, in the absence of a record, there is no stated reason by the trial court for the sentences imposed. No stated reason is precisely the standard proscribed by the Ohio Supreme Court in *Foster*. Therefore, on the face of the proceedings before us, the sentences imposed by the trial court are not in conflict with *Foster*.

{¶32} For these reasons, the decision of the Lake County Court of Common Pleas should be affirmed.