

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

V.

EDWARD L. SMITH

Defendant-Appellant

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Appellate Case No. 21833

Trial Court Case No. 04-CR-2777

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 8th day of June, 2007.

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BROGAN, J.

{¶ 1} Edward L. Smith appeals from the trial court’s termination entry imposing an aggregate eight-year prison sentence following our earlier remand for resentencing

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

{¶ 2} In his sole assignment of error, Smith contends the Ohio Supreme Court’s *Foster* decision operates as an ex post facto law and violates his due process rights by removing the presumption of a minimum term of incarceration for first-time offenders.

{¶ 3} The record reflects that Smith was convicted of reckless homicide with a firearm specification. On March 23, 2005, the trial court sentenced him to five years in prison for the reckless homicide and to a consecutive three-year term for the firearm specification. In *State v. Smith*, Montgomery App. No. 21004, 2006-Ohio-4405, we vacated the sentence and remanded the cause for resentencing pursuant to *Foster*. In our opinion, we noted our inability to declare the operation of *Foster* an ex post facto violation. We also rejected the merits of the ex post facto argument raised by Smith. *Id.* at ¶¶31-34. On remand, the trial court resentenced him to consecutive terms of five years and three years for the conviction and accompanying specification.

{¶ 4} In the present appeal, Smith argues that “*Foster*’s removal of the minimum sentence presumption operated as an ex post facto law and violated [his] constitutional due process rights * * * [.]” This court consistently has held, however, that it cannot declare the application of *Foster* to be an ex post facto or due process violation. See, e.g., *State v. Tobin*, Greene App. No. 2005-CA-150, 2007-Ohio-1345, ¶107; *State v. Davis*, Clark App. No. 2006 CA 69, 2007-Ohio-1030, ¶43; *State v. Durbin*, Greene App. No. 2005-CA-134, 2006-Ohio-5125, ¶42; *State v. Eicholtz*, Clark App. No. 06-CA-27, 2007-Ohio-1032, ¶9; see also *State v. Bruce*, 170 Ohio App.3d 92, 2007-Ohio-175.

{¶ 5} Because we cannot declare the operation of *Foster* to be an ex post facto or due process violation, we overrule Smith’s assignment of error and affirm the

judgment of the Montgomery County Common Pleas Court.

Judgment affirmed.

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GRADY and DONOVAN, JJ., concur.

Copies mailed to:

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Hon. Jeffrey E. Froelich