

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2006 CA 27
v.	:	T.C. NO. 03 CR 51
MARK D. SELLS	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 17th day of August, 2007.

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MARK D. SELLS, #A489-105, Lebanon Correctional Institute, P. O. Box 56, Lebanon, Ohio 45036
Defendant-Appellant

DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Mark D. Sells, filed June 8, 2006. On February 13, 2003, Sells was indicted for aggravated murder, in violation of

R.C. 2903.01(B), and aggravated robbery, in violation of R.C. 2911.01(A)(3), both felonies of the first degree. Following a jury trial, Sells was found guilty as charged. On March 9, 2005, Sells was sentenced to life with the possibility of parole after 20 years on the aggravated murder charge, and 10 years on the aggravated robbery charge, to be served consecutively. Sells appealed his conviction and sentence, and we affirmed his conviction and remanded the matter for resentencing consistent with *State v. Foster* (2006), 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. “*Foster* established a bright-line rule that any pre-*Foster* sentence to which the statutorily required findings of fact applied (i.e. more-than-minimum, maximum, and consecutive sentences), pending on direct review at the time that *Foster* was decided, must be reversed, and the cause remanded for re-sentencing in accordance with *Foster*, if the sentence is a subject of the appeal.” *State v. Logsdon*, Clark App. No. 2005-CA-66, 2006-Ohio-6833. The *Foster* court determined that “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences.” *Foster* at 30. On May 10, 2006, the trial court resentenced Sells to 20 years to life for aggravated murder and nine years for aggravated robbery, to be served consecutively, a lighter sentence than the one originally imposed.

{¶ 2} On January 30, 2007, counsel for Sells filed an Anders brief. *Anders v. California* (1967) 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Counsel for Sells avers that he “has conducted an examination of the record and finds no merit to any claim of error sufficient to overturn Appellant’s conviction and sentence.” Counsel then identified three potential issues for review and requested to withdraw as Sells’ counsel. On March 15, 2007, Sells filed a “Merit

Brief and Assignment of Error Pro Se,” asserting four assignments of error.

{¶ 3} We will first address the potential issues for review cited by counsel for Sells.

{¶ 4} The first potential issue for review is as follows: “APPELLANT’S TRIAL COUNSEL’S FAILURE TO OBJECT TO APPELLANT’S EXCESSIVE AND CONSECUTIVE SENTENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 5} In determining whether a defendant has received the effective assistance of trial counsel, we apply the standards set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.*, at 686. “A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.*, at 687.

{¶ 6} At the resentencing hearing herein, Sells’ counsel argued that, while the sentence of 20 years to life on the aggravated murder charge was a statutory sentence, the sentence on the

charge of aggravated robbery should be modified. Counsel asked the court to “not only reconsider the maximum ten years that was imposed on the aggravated robbery but also its consecutive nature.” Counsel asked the court to “take a look at the Defendant’s age, lack of any prior significant criminal history and most importantly * * * that all the offenses occurred during a single course of conduct.”

{¶ 7} Having reviewed the transcript of Sells’ sentencing hearing, Sells has not overcome the strong presumption that his counsel rendered adequate assistance; counsel for Sells argued for a modification of Sells’ aggravated robbery sentence before sentence was imposed, and Sells received a lighter sentence. Sells’ sentence was within the statutory range, and *Foster* does not confer a right to concurrent sentences. In other words, Sells has not shown that his counsel’s performance fell below an objective standard of reasonableness such that Sells was prejudiced thereby, and there is no basis to conclude that Sells’ rights to due process were adversely affected as counsel for Sells asserts. We agree that Counsel’s first potential issue for review lacks arguable merit.

{¶ 8} Counsel’s second potential issue for review is as follows: “THE TRIAL COURT FAILED TO FOLLOW THE REQUIREMENTS OF O.R.C. 2929.11(B), APPELLANT’S SENTENCE IS INCONSISTENT WITH SENTENCES OF SIMILAR OFFENDERS, A LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT Demean THE SERIOUSNESS OF THE OFFENSE AND IMPACT OF THE VICTIM AND CONSECUTIVE SENTENCES ARE NOT JUSTIFIED.”

{¶ 9} Counsel for Sells argues that the “trial court failed to engage in the analysis of consistency. The record is void of any indication that a nine-year, consecutive sentence was

commensurate with and not demeaning to the seriousness of the offender's conduct or its impact upon the victim, and that it is consistent with sentences imposed for similar crimes committed by similar offenders. * * * the trial court's use of the sentencing memoranda and facts not before the jury amounts to prohibited judicial fact finding."

{¶ 10} "When imposing a sentence within the applicable statutory range, per *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court must consider the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. (Internal citation omitted). *Specific findings demonstrating that the court considered the applicable factors are not required.* (Emphasis added) (Internal citation omitted). On appeal, we may not review error assigned with respect to the court's application of R.C. 2929.11 and 2929.12 for an abuse of discretion. R.C. 2953.08(G)(2). Instead, an appellate court may reverse or modify a sentence only if the court 'clearly and convincingly finds' that a sentence is contrary to law. R.C. 2953.08(G)(2)(b). '[Contrary to law' means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider.'"
State v. Hawkins, Greene App. No. 06CA79, 2007-Ohio-3581.

{¶ 11} The trial court "reviewed the record in this case, * * * the sentencing memoranda that was filed about a year ago as well as all the statutory factors that are applicable to [Sells], the purposes and principles of the sentencing statutes and any recidivism and seriousness factors which may be applicable in your particular case, and also the statements by [the state, counsel for Sells and Sells.]"

{¶ 12} The court clearly considered the general guidance factors in R.C. 2929.11 and 2929.12, and the trial court's sentence is not contrary to law. Further, the only sentencing

memorandum herein was filed by Sells, and there is no indication in the record that the trial court's consideration thereof amounted to "prohibited judicial fact finding," but only that the trial court complied with the relevant statutory guidelines. We agree that Counsel for Sells' second potential issue for review lacks arguable merit.

{¶ 13} Counsel for Sell's third potential issue for review is as follows: "APPELLANT'S SENTENCE VIOLATED APPELLANT'S RIGHTS UNDER THE EX POST FACTO AND DUE PROCESS CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTION."

{¶ 14} Sells argues that the remedy prescribed in *Foster* violates the ex post facto and due process clauses of the United States Constitution. "As an Ohio court inferior in jurisdiction to the Supreme Court of Ohio, we are required to follow its mandates; we lack the jurisdictional power to declare unconstitutional a mandate of the Supreme Court of Ohio." *State v. Jefferson*, Montgomery App. No. 21671, 2007-Ohio-3583 (overruling Appellant's argument that *Foster* violated the ex post facto and due process clauses of the United States Constitution due to lack of jurisdiction). We agree that Counsel's third potential issue for review lacks arguable merit.

{¶ 15} We will now address Sells' assignments of error. Sells' first assignment of error is as follows: "THE COMMON PLEAS COURT'S JUDGMENT ENTRY OF SENTENCE VIOLATES APPELLANT'S RIGHT TO TRIAL BY JURY WHERE APPELLANT WAS SENTENCED TO A TERM OF INCARCERATION WHICH EXCEEDED THE STATUTORY MAXIMUM SENTENCE MANDATED BY THE SIXTH AND FOURTEENTH AMENDMENTS. THE DECISION RENDERED BY THE OHIO SUPREME COURT IN *State v. Foster*, (2006), 109 Ohio St.3d 1, WHICH PURPORTS TO AUTHORIZE SENTENCES IN EXCESS OF THE STATUTORY MAXIMUM IS INCOMPATIBLE WITH

THE CONTROLLING PRECEDENT OF THE U.S. SUPREME COURT AND MUST BE REJECTED.”

{¶ 16} Sells argues, “If appellant was sentenced to the terms of Ohio Revised Code 2929.14(B), the law at the time the offenses were committed, then ipso facto and as a matter of law, Appellant’s total sentence could not have exceeded a term of imprisonment of 15 years to life for the aggravated murder and a concurrent three (3) year term for the underlying aggravated robbery conviction.” Sells’ sentences were within the statutory range, and for the reasons discussed above, we cannot “reject” *Foster*. Sells’ first assignment of error is overruled.

{¶ 17} Sells’ second assignment of error is as follows: “THE COURT OF COMMON PLEAS’ RE-SENTENCING OF APPELLANT TO NON-MINIMUM SENTENCES IN THIS CASE VIOLATES APPELLANT’S ABSOLUTE RIGHT TO PROCEDURAL DUE PROCESS AND THE EX POST FACTO CLAUSE OF THE OHIO AND U.S. CONSTITUTION. THE DECISION BY THE OHIO SUPREME CURT IN STATE V. FOSTER, * * * WHICH PURPORTS TO AUTHORIZE THE SENTENCE RENDERED AGAINST THE APPELLANT IS INCOMPATIBLE WITH THE CONTROLLING PRECEDENT OF THE U.S. SUPREME COURT.”

{¶ 18} For the reasons discussed above, Sells’ second assignment of error is overruled.

{¶ 19} Sells’ third assignment of error is as follows: “DEFENDANT-APPELLANT’S SENTENCE FOR AGGRAVATED ROBBERY IS VOID FOR LACK OF NOTICE AND AN OPPORTUNITY TO BE HEARD IN VIOLATION OF HIS ABSOLUTE RIGHT TO PROCEDURAL DUE PROCESS OF LAW.”

{¶ 20} Sells argues that he “was never put on notice through the complaint, indictment

or information that his maximum/minimum sentence was to be enhanced” pursuant to R.C. 2929.14(B) and that the “sentencing enhancers * * * must be treated for Sixth Amendment purposes as essential elements of the offenses.” As discussed above, *Foster* declared unconstitutional the portions of Ohio’s felony sentencing scheme that required judicial fact-finding before the trial court could impose an enhanced sentence, and the sentences the trial court imposed on resentencing were within the statutory range. Sells’ right to due process was not violated, and his third assignment of error is overruled.

{¶ 21} Sells’ fourth assignment of error is as follows: “DEFENDANT-APPELLANT WAS DEPRIVED OF HIS 6TH AND 14TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE TRIAL AND APPELLATE COURT LEVELS IN THIS CASE.”

{¶ 22} Sells argues that both his trial and appellate counsel failed to argue that his resentencing violated the ex post facto clause of the Ohio and United States Constitution. For the reasons discussed above, we overrule this assignment of error.

{¶ 23} Having reviewed the issues raised by Sells’ appellate counsel and finding them to lack arguable merit along with Sells’ assignments of error, and having conducted an independent review of the sentencing court’s proceedings, Sells’ sentence is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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