

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
PUTNAM COUNTY**

**STATE OF OHIO,**

**CASE NUMBER 12-06-12**

**PLAINTIFF-APPELLEE,**

**v.**

**O P I N I O N**

**MICHAEL BILLINGSLEY,**

**DEFENDANT-APPELLANT.**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: February 20, 2007.**

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**ATTORNEYS:**

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For Appellant.**

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For Appellee.**

**Rogers, P.J.**

{¶1} Defendant-Appellant, Michael Billingsley, appeals the judgment of the Putnam County Court of Common Pleas, re-sentencing him to a seven-year prison term. On appeal, Billingsley argues that the trial court imposed a sentence pursuant to a judicially-created version of Ohio sentencing laws that, applied retroactively, violated his right to freedom from ex post facto laws. For the reasons articulated in *State v. McGhee*, 3d Dist. No. 17-06-05, 2006-Ohio-5162, we affirm the judgment of the trial court.

{¶2} In February 2001, the Putnam County Grand Jury indicted Billingsley on one count of possession of drugs in violation of R.C. 2925.11(A),(C)(1)(a), a felony of the fifth degree; one count of possession of drugs in violation of R.C. 2925.11(A),(C)(4)(a), a felony of the fifth degree; one count of possession of drugs in violation of R.C. 2925.11(A),(C)(7)(a), a felony of the fifth degree; and, one count of illegal manufacturing of drugs in violation of R.C. 2925.04(A),(C)(2), a felony of the second degree.

{¶3} In July 2001, Billingsley pled not guilty to all counts of the indictment. Subsequently, he withdrew his plea of not guilty and entered a negotiated plea of guilty to the count of illegal manufacturing of drugs in violation of R.C. 2925.04(A),(C)(2), a felony of the second degree, in exchange for a dismissal of the remaining counts of the indictment.

{¶4} In September 2001, the trial court sentenced Billingsley to a seven-year prison term with credit for time served and ordered the prison term to run concurrently with sentences imposed in Allen County and Paulding County.

{¶5} In December 2004, Billingsley moved for an allowance of a delayed appeal under App.R. 5(A), which this Court overruled. Subsequently, Billingsley appealed to the Ohio Supreme Court.

{¶6} In September 2005, the Supreme Court declined to accept Billingsley's appeal and dismissed it. See *State v. Billingsley*, 106 Ohio St.3d 1505, 2005-Ohio-4605.

{¶7} In October 2005, Billingsley moved for the Supreme Court to reconsider his appeal, which the Supreme Court granted, see *State v. Billingsley*, 106 Ohio St.3d 1559, 2005-Ohio-5531, and stayed the case pending resolution of its upcoming *State v. Quinones* and *State v. Foster* cases. See *State v. Billingsley*, 106 Ohio St.3d 1460, 2005-Ohio-3490.

{¶8} In May 2006, the Supreme Court reversed and remanded Billingsley's case to the trial court for re-sentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶9} In July 2006, the trial court re-sentenced Billingsley to a seven-year prison term, to run concurrently with his sentences imposed in Allen County and Paulding County.

{¶10} It is from this judgment that Billingsley appeals, presenting the following assignment of error for our review.

**THE SENTENCE IMPOSED ON REMAND WAS IMPOSED PURSUANT TO A JUDICIALLY-CREATED VERSION OF OHIO SENTENCING LAWS THAT, APPLIED RETROACTIVELY TO MR. BILLINGSLEY, VIOLATED HIS RIGHT TO FREEDOM FROM EX POST FACTO LAWS.**

{¶11} In his sole assignment of error, Billingsley contends that the trial court imposed his sentence under a judicially-created sentencing law that violated the ex post facto clause. Specifically, Billingsley asserts that retroactive application of *Foster* violates the ex post facto clause and his right to Due Process by increasing the penalty for the offense he committed prior to *Foster*.

{¶12} However, for the reasons articulated by this Court in *McGhee*, 2006-Ohio-5162, we find no merit in Billingsley's argument that his sentence violates his due process rights.

{¶13} The Supreme Court vacated Billingsley's sentence and remanded the cause to the trial court for re-sentencing based on *Foster*. In July 2006, the trial court re-sentenced Billingsley to the same prison term as before. We note that, as to this case, the offense occurred subsequent to the United States Supreme Court's holding in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, which provided notice that a major shift in sentencing was likely to occur. This supports our conclusion in *McGhee* that the remedy announced in *Foster* does not violate due

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process. Likewise, the sentencing range for Billingsley's felony has remained unchanged, so he had notice of the potential sentence for his offense. Thus, we find Billingsley's assignment of error without merit.

{¶14} Accordingly, we overrule Billingsley's assignment of error.

{¶15} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

*Judgment affirmed.*

**SHAW and PRESTON, JJ., concur.**

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