[Cite as *State v. Quinn*, 2014-Ohio-340.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1242

Appellee — Trial Court No. CR0200502529

v.

Jeremy J. Quinn, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: January 31, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac rump, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Jeremy J. Quinn, Jr., appellant, appeals his resentencing by the Lucas County Court of Common Pleas on convictions for kidnapping and rape. The convictions are based on guilty verdicts returned by a jury at trial in November 2005, on one count of

kidnaping, a violation of R.C. 2905.01(A)(4), and six counts of rape, violations of R.C. 2907.02(A)(2). The offenses are all first degree felonies.

{¶ 2} The original sentencing occurred in December 2005, after announcement of the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. In *Foster*, the Ohio Supreme Court "held some sections and provisions of Ohio's sentencing statutes unconstitutional based on the decisions of the United States Supreme Court in *Blakely* * * * and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 1. *Foster* remedied the constitutional defect by severing statutory sentencing provisions it held unconstitutional from the remaining valid sentencing statutes. *Id.* at ¶ 2.

{¶ 3} This appeal is from a trial court judgment resentencing appellant under *Foster*, as required under the grant of federal habeas corpus relief to appellant by the Sixth Circuit Court of Appeals in *Quinn v. Ohio Dept. Rehab. and Corr.*, 6th Cir. No. 10-3490 (Jan. 18, 2012).

{¶ 4} The trial court filed the original sentencing judgment on December 9, 2005. In it, the court sentenced appellant to imprisonment for ten years on each count with the sentences to be served consecutively, resulting in an aggregate total period of incarceration of 70 years. After the grant of federal habeas corpus relief, the trial court

conducted a resentencing hearing on August 2, 2012. In an August 8, 2012 judgment, the trial court reimposed the original sentence. Appellant appeals the resentencing judgment to this court.

Case History

{¶ 5} Appellant made a direct appeal of the December 9, 2005 judgment of conviction and sentence to this court. In a February 29, 2008 judgment, we affirmed. *State v. Quinn*, 6th Dist. Lucas No. L-06-1003, 2008-Ohio-819. The Ohio Supreme Court denied leave for further appeal on August 6, 2008. *State v. Quinn*, 119 Ohio St.3d 1410, 2008-Ohio-3880, 891 N.E.2d 770.

{¶ 6} Appellant filed an App.R. 26(B) application for reopening the direct appeal on June 18, 2008. We denied the application to reopen on July 17, 2008. *State v. Quinn*, 6th Dist. Lucas No. L-06-1003, 2008-Ohio-3579. Appellant filed a second App.R. 26(B) motion for reopening of the direct appeal on May 27, 2011. We denied the application on July 28, 2011. *State v. Quinn*, 6th Dist. Lucas No. L-06-1003, 2011-Ohio-3717. The Ohio Supreme Court denied appellate review of the July 28, 2011 judgment on November 16, 2011. *State v. Quinn*, 130 Ohio St.3d 1440, 2011-Ohio-5883, 957 N.E.2d 301.

{¶ 7} Appellant pursued federal habeas corpus relief. In an April 7, 2010 judgment, the United States District Court for the Northern District of Ohio, Eastern Division, denied appellant's petition for habeas corpus. *Quinn v. Ohio Dept. Rehab. and*

Corr., N.D. Ohio No. 3:09 CV 546, 2010 WL 1433400 (Apr. 7, 2010). Appellant appealed that judgment to the United States Sixth Circuit Court of Appeals.

{¶ 8} In a January 18, 2012 judgment, the Sixth Circuit Court of Appeals reversed the district court judgment and remanded with instructions to grant habeas corpus relief. *Quinn v. Ohio Dept. Rehab. and Corr.*, 6th Cir. No. 10-3490 (Jan. 18, 2012). The Sixth Circuit Court of Appeals held that resentencing was necessary because "Petitioner's sentence under Ohio law violated clearly established federal law as articulated by the Supreme Court in *Blakely v. Washington*, and did not constitute harmless error." *Id.* at 5.

{¶ 9} Appellant asserts five assignments of error on appeal of the August 8, 2012 resentencing judgment:

> Assignment of Error No. I: The trial court erred by not undertaking a de novo resentencing. The federal mandate ordered a resentencing after holding the trial court had committed a constitutional error during the first sentencing that was not harmless.
>
> Assignment of Error No. II: Quinn's counsel provided ineffective assistance of counsel by not being prepared at the resentencing to argue the merger issue, the proportionality issue and whether the trial court could be impartial. He also failed to advise the trial court that the merger issue had, in fact, been raised during the initial sentencing.

Assignment of Error No. III: Even if the trial court was not required to follow the statutory sentencing statutes in effect pre-Foster, the trial court erred by not merging the offenses of conviction for purposes of sentencing.

Assignment of Error No. IV: The trial court violated the Ex Post Facto Clause of the U.S. Constitution and his right to due process of law by not applying R.C. 2929.14(E)(4) and 2929.41(A) when resentencing Quinn.

Assignment of Error No. V: The trial court erred by not recusing itself and seeking assignment of another judge to handle Quinn's resentencing.

{¶ 10} In Assignment of Error No. I, appellant asserts that the trial court failed to conduct "a de novo review of sentence." Appellant did not provide a reference to a place in the record reflecting the error as required under App.R. 16(A)(3) to identify the manner in which appellant claims de novo resentencing was denied. The state argues that the resentencing was, in fact, de novo and conducted in a manner following procedures set forth in Crim.R. 32 and R.C. 2929.19.

{¶ 11} As best the court can determine, the Assignment of Error No. I is directed to the trial court's determination that the issue of merger should have been raised on direct appeal and was not properly before the court at resentencing. Under Assignment of Error No. III, appellant contends the trial court erred in failing to merge the rape and kidnapping convictions into a single offense for resentencing. We consider Assignments

of Error Nos. I and III together to contend that the trial court erred with respect to merger of allied offenses by failing to treat *Foster* resentencing as de novo and to consider merger of allied offenses.

{¶ 12} In *Foster*, the Ohio Supreme Court "examined Ohio's felony-sentencing structure and held that certain statutes violated Sixth Amendment principles as stated in the *Apprendi* [*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] line of cases. * * * [The court] * * * applied the *Booker* [*United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)] remedy and severed the unconstitutional statutes requiring judicial factfinding. *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 90." *State v. Elmore* 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 6.

{¶ 13} In its January 18, 2012 judgment, the United States Court of Appeals for the Sixth Circuit acknowledged Ohio employed the *Booker* remedy in *Foster* and that the remedy authorized sentencing judges "to sentence within the statutory range without making findings justifying sentences in excess of the minimum." *Quinn*, 6th Cir. No. 10-3490 at 4, quoting *Villagarcia v. Warden, Noble Corr. Inst.*, 599 F.3d 529, 537 (6th Cir.2010). The court stated that resentencing was required because "we 'simply cannot know whether the sentencing judge would accord the relevant factors the same weight when reassessing [petitioner's sentence] outside the dictates of the severed provisions.' *Villagarcia*, 599 F.3d at 539." *Id.* at 5.

{¶ 14} Appellant did not raise the issue of merger in his original direct appeal, although he had unsuccessfully argued merger in the trial court. The state asserts that res judicata bars consideration of merger at *Foster* resentencing. It is longstanding law in Ohio that "any issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16. Under traditional analysis, appellant's failure to raise merger on direct appeal would bar under res judicata consideration of the issue now. *See State v. Rice*, 6th Dist. Lucas No. L-12-1127, 2012-Ohio-6250, ¶ 7.

{¶ 15} Procedurally, merger under R.C. 2945.25(A) occurs only after the trial court has ruled that merger is required and the state has selected the allied offense on which sentencing is to proceed. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 21-24. Determination of sentence follows.

{¶ 16} A series of Ohio appellate court decisions have held that *Foster* resentencing does not extend to include consideration of merger of allied offenses for purposes of sentencing and that res judicata remains a bar to consideration of merger claims at *Foster* resentencing. *State v. Strickland*, 11th Dist. Trumbull No. 2012-T-0009, 2012-Ohio-5125, ¶ 12; *State v. Smith*, 3d Dist. Marion No. 9-11-36, 2012-Ohio-1891, ¶ 23-24; *State v. Poole*, 8th Dist. Cuyahoga No. 94759, 2011-Ohio-716, ¶ 11-13 ; *State v. Dillard*, 7th Dist. Jefferson No. 08 JE 35, 2010-Ohio-1407, ¶ 22; *State v. Martin*, 2d Dist. Montgomery No. 21697, 2007-Ohio-3585, ¶ 15.

{¶ 17} We agree that res judicata remains a bar to consideration of merger of allied offenses in *Foster* resentencing.

{¶ 18} We find Assignments of Error Nos. I and III not well-taken.

{¶ 19} We consider the remaining assignments of error out of turn.

{¶ 20} Under Assignment of Error No. IV, appellant contends that the trial court violated the Ex Post Facto Clause of the United States Constitution and his rights to due process of law by not applying R.C. 2929.14(E)(4) and 2929.41(A) when resentencing appellant. Prior to *Foster*, R.C. 2929.14(E)(4) required trial courts to make certain findings prior to imposing consecutive sentences. R.C. 2929.41(A) created a presumption of concurrent sentences. In *State v. Foster*, the Ohio Supreme Court ruled that R.C. 2929.14(E)(4) and 2929.41(A) were unconstitutional. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845-N.E.2d 470 at paragraph three of the syllabus. *Foster* severed both R.C. 2929.14(E)(4) and 2929.14(A) and declared "[a]fter the severance, judicial fact-finding is not required before imposition of consecutive prison terms." *Id.* at ¶ 99.

{¶ 21} In *State v. Elmore*, 122 Ohio St. 472, 2009-Ohio-3478, 912 N.E.2d 582, the Ohio Supreme Court considered and rejected appellant's contentions that the *Foster* remedy violates constitutional prohibitions against ex post facto laws. *Id.* at ¶ 12-22. The court also rejected appellant's contention that the *Foster* remedy violates a defendant's due process rights. *Id.* at ¶ 24.

{¶ 22} The Ohio Supreme Court recognized in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, that the United States Supreme Court decision in

Oregon v. Ice, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) upheld the constitutional validity of an Oregon statute (similar that considered in *Foster*) that requires judges to make factual findings before imposing consecutive sentences. *Id.* at ¶ 3. The court held, however, that the *Ice* decision did not automatically revive Ohio's former consecutive-sentencing provisions severed in *Foster* and new legislation was required to reinstate the requirement of judicial factfinding prior to imposing consecutive sentences. *Hodge* at paragraphs two and three of the syllabus.

{¶ 23} H.B. 86, effective September 30, 2011, revived the requirement that a sentencing judge make certain findings prior to imposing consecutive sentences. *State v. Deeb*, 6th Dist. Erie No. E-12-052, 2013-Ohio-5175, ¶ 5-6; R.C. 2929.14(C)(4). Appellant has not claimed under Assignment of Error No. IV that the trial court failed to meet the requirements of R.C. 2929.14(C) before imposing consecutive sentences at resentencing.

{¶ 24} We find Assignment of Error No. IV not well-taken.

{¶ 25} Under Assignment of Error No. V, appellant argues that the trial court judge erred by not recusing himself and seeking assignment of another judge to preside over appellant's resentencing. The same trial judge presided over the appellant's trial, original sentencing, and *Foster* resentencing.

{¶ 26} Appellant tried unsuccessfully to pursue a grievance against the trial judge alleging that the judge should not be permitted to handle the resentencing due to a

claimed lack of impartiality. Resentencing proceeded afterwards. At resentencing, appellant's attorney also asked the trial judge to consider recusing himself and having another judge sit for resentencing. The court denied the request.

{¶ 27} Appellant argues that statements by the trial judge at the original sentencing hearing demonstrate that the judge held a deep empathy for the victim and hostility for the defendant that prevented the judge from resentencing with an impartial mind. Appellant also contends that the transcript of the resentencing hearing shows a lack of impartiality by the trial court judge.

{¶ 28} The state notes that appellant did not file an R.C. 2701.03 affidavit of disqualification against the trial court judge either at the time of the original sentencing or at resentencing.

R.C. 2701.03(A) provides:

> A) If a judge of the court of common pleas allegedly * * * has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

{¶ 29} Article IV, Section 5(C) of the Ohio Constitution provides that "[t]he chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof."

{¶ 30} Article IV, Section 3 of the Ohio Constitution provides for the organization and jurisdiction of courts of appeals. Article IV, Section 3(B)(2) provides:

> (2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

{¶ 31} R.C. 2701.03 is the exclusive remedy for a litigant to claim that a common pleas judge is biased or prejudiced. *State v. Meza*, 6th Dist. Lucas No. L-03-1223, 2005-Ohio-1221, ¶ 31; *Berdyck v. Shinde*, 128 Ohio App.3d 68, 81, 713 N.E.2d 1098 (6th Dist.1998). Only the Chief Justice of the Ohio Supreme Court or her designee has authority to pass upon the disqualification of a common pleas court judge. *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775 (1978); Ohio Constitution Article IV, Section 5(C). A court of appeals is "without authority to pass upon disqualification

or to void the judgment of the trial court on that basis." *Beer* at 441-442, *Meza* at ¶ 31; *State v. Dougherty*, 99 Ohio App.3d 265, 269, 650 N.E.2d 495 (3d Dist.1994).

{¶ 32} Accordingly, we conclude that this court is without jurisdiction to determine whether the trial court judge should have recused himself at resentencing. We overrule Assignment of Error No. V on that basis.

{¶ 33} Under Assignment of Error No. II, appellant asserts that he was provided ineffective assistance of counsel at resentencing. Appellant asserts that counsel was deficient in three respects, with respect representation as to (1) merger of allied offenses of similar import, (2) proportionality of sentence, and (3) whether the trial court could be impartial.

{¶ 34} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "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." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. A defendant must establish both prongs of the standard to demonstrate ineffective assistance of counsel. *Strickland* at 687.

{¶ 35} In our consideration of Assignment of Error No. III, we concluded that appellant was barred by res judicata from asserting error based upon a claim that appellant's convictions were to be merged for purposes of sentencing as allied offenses of similar import. As the issue of merger was barred by res judicata, we cannot conclude that legal representation on the issue at resentencing was either deficient or prejudicial. Accordingly, we conclude that appellant was not denied effective assistance of counsel at resentencing on the issue of merger of allied offenses of similar import.

{¶ 36} Appellant contends that counsel at resentencing was also deficient in arguing proportionality of sentence. Counsel did not file a sentencing memorandum. Appellant argues that when counsel raised the issue of proportionality, he failed to offer any comparable case on which to base a claim of disproportionate sentence. Appellant acknowledges that evidence of a comparable case showing a lack of proportionality of sentence is a basic requirement to prevail on the issue. *See State v. Burt*, 8th Dist. Cuyahoga No. 99097, 2013-Ohio-3525, ¶ 39; *State v. Ewert*, 5th Dist. Muskingum No. CT2012-0002, 2012-Ohio-2671, ¶ 33-34. The record discloses appellant presented no evidence of what a "proportionate sentence" might be.

{¶ 37} A claim of ineffective assistance of counsel that requires consideration of evidence outside the record of trial court proceedings cannot be considered on direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Carter*, 89 Ohio St.3d 593, 606, 734 N.E.2d 345 (2000). Even if we were to conclude that counsel was deficient in raising arguments concerning proportionality of sentence,

the record must include at least some minimal evidence of other sentences given to other offenders with similar records, who have committed the same offense to provide a starting point for analysis. *See Burt* at ¶ 39. Such a record is lacking here to determine whether appellant was prejudiced by counsel's failure. We overrule Assignment of Error No. II with respect to asserted ineffective assistance of counsel on the issue of proportionality on that basis.

{¶ 38} Appellant next argues that counsel was deficient in representation at resentencing on the issue of claimed lack of impartiality of the resentencing judge. At resentencing, counsel requested the trial court to consider whether given its "contacts and prior statements in the case, whether or not you feel there is an issue * * * that would preclude you from rendering a fair decision in this case, and whether or not you should recuse yourself and have another individual, another judge sit in sentence of Mr. Quinn." The trial court treated the request as a motion and denied the motion. Counsel for appellant did not file an R.C. 2701 affidavit of disqualification to initiate disqualification proceedings against the judge before the Chief Justice of the Ohio Supreme Court.

{¶ 39} On appeal, appellant contends:

> A fair reading of the sentencing and resentencing transcripts would lead one to conclude the trial court judge had a deep empathy for the victim, and a hostility for the defendant. This prevented the trial court judge from approaching the sentencing with an impartial mind * * * further exacerbated by Quinn's filing of a grievance against the judge.

{¶ 40} Even if we were to presume that counsel was deficient in failing to pursue R.C. 2701.03 disqualification of the trial court judge in order to properly present claims that the judge was biased or prejudiced against appellant, the second element of a claim of ineffective assistance of counsel remains. Appellant must show prejudice resulting from the failure.

{¶ 41} The state argues that appellant's claim of ineffective assistance of counsel fails because there is an absence of evidence of bias or prejudice of the trial judge in the record. The state contends that the trial court's statements at the original sentencing hearing were wholly appropriate and the crimes appellant committed were brutal and committed against a sixteen year old girl.

> In *Liteky v. United States* (1994), 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474, the Supreme Court held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." On the other hand, "[t]hey *may* do so [support a bias challenge] if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of

favoritism or antagonism as to make fair judgment impossible." (Emphasis sic.) *Id. State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 49, quoting *Liteky v. United States* (1994), 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474.

{¶ 42} We have reviewed the record, including the trial transcript, the transcripts of the original sentencing hearing and the resentencing hearing, and the presentence investigative report. We also conducted a detailed review of the evidence at trial on direct appeal and incorporate that summary by reference. *See State v. Quinn*, 6th Dist. Lucas L-06-1003, 2008-Ohio-819, ¶ 14-38.

{¶ 43} The jury found the testimony by the 16 year old victim credible and returned guilty verdicts on one count of kidnapping and six counts of rape. We upheld the guilty verdicts on challenges that the verdicts were not supported by sufficient evidence and were against the manifest weight of the evidence on direct appeal. Credibility was a central issue at trial. The variance in testimony between the victim and appellant is not of the type that can be explained by mere mistake, misunderstanding, or misidentification.

{¶ 44} The victim, A.R., testified that she was at her car in the driveway at home intending to leave for work on July 18, 2005, and that a black male, whom she did not then know, approached with a knife. The victim testified that the man threatened to kill her, instructed her to put her head under the dashboard of the car and legs up on the passenger seat, and drove the car three to five minutes away.

{¶ 45} According to the victim, once the vehicle stopped, the man instructed her to remove her clothes. The victim testified that while in the back seat of the car, the man made her put his penis in her mouth and he put his penis in her vagina and anus. The victim testified that the man made her exit the car and put his penis into her vagina two more times and again into her anus. The victim testified that the man then made her get back into the car, where he proceeded to masturbate. The man made the victim swallow his ejaculate. The victim testified that the man also made her kiss him, sucked her breasts, and licked her vaginal area.

{¶ 46} Afterwards they dressed. According to the victim, the man drove the car a distance, again with the victim under the dashboard, to a driveway near her home and exited the car. She drove home.

{¶ 47} When the victim arrived home, neighbors, Andrew and Karen Shilling, were outside. Karen asked whether the victim had hit Andrew's car. The victim stated that the man who raped her had hit the car and that he was probably watching her. Karen Shilling testified that when she asked the victim about her son's car that the girl looked "very nervous, very scared." She described the victim as "absolutely terrified, panicked," and stated that the victim "flipped out and said no, you can't call 911. He said he would kill my family and he'll kill me and now he's going to kill you also."

{¶ 48} Although the victim testified to not knowing her attacker at the time she was raped, she testified as to the clothing he wore, that she saw that he had scratches on his lower arm, and that he had a tattoo of a dog on his chest that said "Fear or feel me."

Detective Robert Cowell of the Sylvania Township Police Department testified that he interviewed appellant after his arrest and that he observed that appellant had scratches on his forearm and a tattoo of a dog that said, "Fear or feel me." Photographs of the scratches and tattoo were in evidence at trial.

{¶ 49} Raquel Ruiz, R.N., a sexual assault nurse examiner, testified at trial that she conducted a sexual assault examination on the victim on the date of the reported attack and preserved evidence for DNA analysis. Expert witness testimony at trial identified certain DNA evidence collected from the victim by Ms. Ruiz was consistent with appellant being a contributor.

{¶ 50} Appellant testified at trial that he and the victim met on July 14, 2005, at a Subway restaurant located at Central Avenue and McCord area in Sylvania Township and that he gave the victim the telephone number for his parent's house. Appellant testified that he was released from prison in Marion, Ohio earlier that morning and was residing with his parents. Appellant was age 23 at the time.

{¶ 51} Appellant testified that later that evening he received a phone call from the victim that lasted one to two hours. He testified that he received another call from the victim on July 16, 2005, and that he and the victim arranged to meet in the afternoon in Toledo in the area of Central and Yates and that he and the victim drove to a Baskin Robbins for ice cream. Afterwards the victim returned appellant to the Yates area.

{¶ 52} Appellant testified that he did not see the victim again until July 18, 2005, the date of the alleged assault. Appellant testified that the victim called him around noon,

picked him up, and took him to a Family Video store to rent videos. Appellant testified that the victim dropped him off at his parent's house and stated she would return later that day.

{¶ 53} According to appellant, the victim picked him up at his residence around 3:00 p.m. and took him to her house. Appellant testified that they were kissing, disrobed down to their underwear, and that the victim was rubbing his penis between her legs. According to appellant, when the victim looked for a condom in her purse, the purse fell open to the floor, disclosing her driver's license. Appellant testified that it was only then (from the license) that he learned that the victim was 16 years of age and not age 19.

{¶ 54} Appellant testified that upon discovering her age, he got dressed to leave. He testified that the victim begged him to stay, but he left and walked home through the woods. Appellant denied repeatedly forcing the victim to engage in vaginal rape, anal rape, forced oral sex, and cunnilingus. He testified that any sexual contact with the victim was voluntary.

{¶ 55} Deputy Sheriff Justin Hayden, who worked in the Lucas County jail, testified at trial to a conversation he had with appellant a couple of months before trial. The deputy testified that appellant told him that he was at his girlfriend's house when the crime occurred and that he didn't know the victim.

{¶ 56} In determining sentence, the trial court reviewed appellant's criminal history as provided in the presentence investigative report:

As already pointed out by this Court, at the age of 12 this defendant was adjudicated with carrying a concealed weapon. At the age of 14 he was adjudicated delinquent for kidnapping and rape and sent to a juvenile detention [facility] and incarcerated for a period of 7 years from the age of 14 to 21. Upon parole on October 22 of '03, within three months he was charged with menacing by stalking. Within – well – while still on parole for his juvenile adjudications, within 7 months, and 2 months after the charge of menacing by stalking he was charged with burglary, both offenses for which he was convicted. He was sentenced to prison for 13 months, and upon release from prison within 4 days committed these felonies.

{¶ 57} The court concluded: "His history has shown a repeat predatory, violent behavior that demands maximum and consecutive sentences."

{¶ 58} With respect to general principles of felony sentencing and the seriousness and recidivism factors set forth in R.C. 2929.11 and 2929.12 the court stated at the December 9, 2005 sentencing hearing:

I've looked at the statutory factors under 2929.11 and 2929.12. I find this crime to be more serious than less serious and recidivism to clearly be more likely than less likely, that after 2 occasions of incarceration this defendant has committed felonies after a short period of time from his release.

{¶ 59} The December 9, 2005 sentencing hearing proceeded under the version R.C. 2929.14(C) then in effect, requiring judicial factfinding to impose maximum prison terms under R.C. 2929.14(A) for felony convictions. The trial court found two circumstances existed under the statute permitting imposition of maximum sentences upon appellant, authorization under R.C. 2929.14(C) to impose maximum prison terms "upon offenders who committed the worst form of the offense" and "upon offenders who pose the greatest likelihood of committing future crimes." R.C. 2929.14(C) (2004). The court found:

> The defendant having been convicted of kidnapping and 6 counts of rape, all felonies of the first degree, the Court finds pursuant to Revised Code Section 2929.14(C) that he's committed the worst form of the offense; that is, 6 rapes, multiple rapes in a period of time, and he poses the greatest likelihood of recidivism, having been let out of prison and having committed these offenses within 4 days of his release and therefore imposes the maximum sentence for each of these 7 counts.

{¶ 60} At that time R.C. 2929.14(E)(4) (a) through (c) provided for judicial findings required to impose consecutive sentences. The court made findings to support consecutive sentences under the statute:

> The Court finds that consecutive sentences are necessary to protect the public from future crime and to punish this predator, and the consecutive sentences are not disproportionate to the seriousness of this

offender's conduct and the danger that he poses to the public, and the Court further finds that at least 2 of these offenses were committed as a part of one or more courses of conduct; that is, these 6 rapes took place over an hour period of time in a car and out of a car, and the harm caused by these multiple offenses was so great both psychologically and physically that no part of the course of conduct would adequately reflect the seriousness of the offender's conduct, and the Court further finds that his defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by this offender.

{¶ 61} In our view, the trial court, in making these findings, did no more than make judicial findings required under Ohio's felony sentencing statutes existing at the time of sentencing as supported by the facts at trial in accordance with the jury verdict and appellant's criminal history as provided in the presentence report

{¶ 62} Appellant exercised his right to speak at sentencing. He denied guilt and claimed the jury verdicts were based upon racial prejudice. Appellant argued, "Everybody want to pass judgment on me, call me a rapist and all this and that, but they don't even know me, * * * the truth will come to light * * *."

{¶ 63} The trial court spoke afterwards:

The 12 jurors in this case along with the Court and others heard your testimony and heard the testimony of the young victim in this case, and besides from you and perhaps your parents there wasn't one person in the

courtroom who believed one word you had to say, and in fact the affirmation of * * * [A.R.'s] * * * story was confirmed by the jury when it found you guilty of 6 counts of rape and one count of kidnapping.

The Defendant: Judge - -

The Court: You've had your opportunity. It's now my turn. I'm struck by a couple of things in the presentence report where once again you raise the race issue or play the race cards and your other statement that if you were a Catholic priest you would receive a slap on the wrist. Your dishonesty, your arrogant attitude is reflected not only in your statement today disavowing any responsibility for your behavior which was confirmed through DNA testing, and your dishonest, arrogant cocky attitude is exceeded only by your predatory, violent and depraved behavior.

You say that we don't know you. We have a history of you beginning at the age of 12 when you were adjudicated [delinquent] for the crime of carrying a concealed weapon. The Court takes note that you had a weapon in this case, and then at the age of 14 you were adjudicated delinquent on a charge of rape and kidnapping, 2 offenses for which you've been convicted and are standing before this Court for sentencing today * * *.

* * *

Having been convicted of those offenses, you go back to the institution for 13 months. Within 4 days, 4 days of being placed out on parole your are – you commit this violent, heinous crime on a young lady who but for being in the wrong place at the wrong time should never have had to suffer this kind of behavior. We know you. We know who you are. We know what you're all about.

* * *

Let me comment on the race card that you've played in this case. There is no race card in this case. There was direct eyewitness testimony. There was DNA evidence in this case, and the only black and white issue in this case is this. And that is that you cannot and will not exist in society. You have to be removed from society as long as possible. That's the only black and white issue in this case. Your predatory behavior over a period of time you've lived, which isn't actually very long, shows that consecutive maximum sentences are appropriate in this case. Otherwise anything less than maximum consecutive sentences in this case would demean the hour of horror that you inflict upon this young lady.

It would demean the courageous efforts of somebody who has been sexually assaulted and has actually gone through the process. It would demean the strength and courage of this family in supporting her, and it would demean the law.

{¶ 64} In our view, the opinions stated by the trial judge at the original sentencing hearing were based upon facts introduced at trial and supported by the jury's verdict that appellant kidnapped and repeatedly raped a 16 year old girl. The jury could not have returned guilty verdicts on the charges without determining that appellant's version of events lacked credibility.

{¶ 65} We have reviewed the record with respect to resentencing including the transcript of the resentencing hearing and find no basis to support a claim of judicial bias.

{¶ 66} We conclude that the record does not support any claim of judicial bias to warrant disqualification of the trial judge from presiding over resentencing. Even had appellant's counsel followed R.C. 2701.03 procedure at resentencing and filed an affidavit of disqualification of the trial court judge, such a request would have been unsuccessful as evidence of judicial bias to warrant disqualification is lacking in the record.

{¶ 67} We find Assignment of Error No. II not well-taken.

{¶ 68} Justice having been afforded the party complaining, we affirm the judgment of the Lucas County Court of Common Pleas and order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE