

[Cite as *State v. Shie*, 2009-Ohio-5828.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92632

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DAVID ZION SHIE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-458959

BEFORE: Stewart, P.J., Dyke, J., and Jones, J.

RELEASED: November 5, 2009

JOURNALIZED:

FOR APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Appellant, David Zion Shie, appeals from the judgment of the Cuyahoga County Court of Common Pleas denying his pro se motion to correct a void sentence. Finding no error and for the reasons stated below, we affirm.

{¶ 2} In April 2005, as part of a plea agreement, Shie pleaded guilty to four counts of sexual battery. Sixteen sex offense counts remaining against him were dismissed. Shie was originally sentenced to four years imprisonment on each charge, to be served consecutively, followed by five years of postrelease control. In *State v. Shie*, Cuyahoga App. No. 86464, 2006-Ohio-2314, this court affirmed Shie's convictions but remanded for resentencing in light of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶ 3} On remand, the trial court again sentenced Shie to consecutive four-year prison terms followed by five years of postrelease control. Shie again appealed, arguing that his consecutive sentences were contrary to law. Shie maintained that after *Foster* excised R.C. 2929.14(E)(4), the trial court's statutory authority for imposing consecutive sentences was removed and the language of R.C. 5145.01 mandated the court make his sentences concurrent. R.C. 5145.01, found under the Chapter on "State Correctional Institutions," provides in pertinent part that: "If a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply."

{¶ 4} This court rejected Shie's arguments and affirmed the consecutive sentences on the authority of *Foster*, which held that after the severance, 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 the minimum sentences. *State v. Shie*, Cuyahoga App. No. 88677, 2007-Ohio-3773, at ¶11, appeal not accepted for review, 116 Ohio St.3d 1440, 2007-Ohio-6518.

{¶ 5} Shie subsequently filed a motion to correct a void sentence that was denied by the trial court. This appeal followed in which Shie once again argues that the trial court's imposition of consecutive sentences is contrary to law and that R.C. 5145.01 mandates the imposition of concurrent sentences. He claims the trial court violated his constitutional right to due process and deprived him of his liberty interest in concurrent sentences when it ignored R.C. 5145.01 and reimposed consecutive sentences in violation of *Hicks v. Oklahoma* (1980), 447 U.S. 343 and *Kentucky Dep't. of Corr. v. Thompson* (1989), 490 U.S. 454.

{¶ 6} The state of Ohio argues that Shie's claim is barred by res judicata. Shie argues that his sentence is void and that a void sentence is not subject to res judicata. He claims that the Ohio Supreme Court's decision in *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, overturned our prior decision and grants him authority to seek further review of his claim. Shie cites to a footnote in *Bates* where the court noted that it was aware of R.C. 5145.01, but declined to address the effects of the severance of R.C. 2929.14(E)(4) and 2929.41(A) on

R.C. 5145.01 because neither party had raised it. *Bates*, 2008-Ohio-1983, at fn. 2. Shie claims this gives him the authority to raise the issue anew. We disagree.

{¶ 7} “Errors of law that were either previously raised or could have been raised through an appeal may be barred from further review based upon the operation of res judicata.” *State v. Frazier*, Cuyahoga App. No. 91617, 2009-Ohio-1091, at ¶9, citing, *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. As all of the arguments raised by Shie in his motion were either raised and rejected by this court on direct appeal, or could have been raised in the prior appeal, we agree with the state that res judicata bars further appellate review.

{¶ 8} We note also that other Ohio appellate districts have refused to find that R.C. 5145.01 mandates concurrent sentences. See *State v. Paugh*, Warren App. No. CA2008-11-144, 2009-Ohio-4682; *State v. Smith*, Licking App. Nos. 08 CA 42 and 43, 2009-Ohio-1684; *State v. Castle*, Ottawa App. No. OT-08-029, 2008-Ohio-6388.

{¶ 9} Furthermore, we note that when Shie raised the identical arguments in a habeas petition, the federal district court rejected them, stating: “The Court takes this opportunity to note that Shie’s effort to elevate conjecture in a footnote (concerning the effect of the severance of §§ 2929.14(E) and 2929.14(A) on § 5145.01, a statute directed to the governance of state prisons) to a holding that is opposite to the Ohio Supreme Court’s actual holding in *Bates* and the reasoning it

employed is, at best, laughable, and at worst, sanctionable.” *Shie v. Smith* (Feb. 13, 2009), N.D. Ohio No. 1:08 CV 194, unreported.

{¶ 10} The court explained:

{¶ 11} “In *Bates*, the Ohio Supreme Court made clear that the excision of §§ 2929.14(E)(4) and 2929.41(A) ‘leaves no statute to establish * * * presumptions for concurrent and consecutive sentencing or to limit trial court discretion beyond the basic ‘purposes and principles of sentencing’ provision articulated and set forth in R.C. 2929.11 and 2929.12.’ *Bates*, 118 Ohio St.3d at 179, 887 N.E.2d 328; see also *State v. Kalish*, 120 Ohio St.3d 23, 26, 896 N.E.2d 124 (2008). In fact, the *Bates* court noted that one consequence of the *Blakely* decision, which spawned the *Foster* decision, is that it ‘altered Ohio’s sentencing dynamics’ and effectively reinstated the common-law presumption in favor of consecutive sentences. *Bates*, 118 Ohio St.3d at 178-79, 887 N.E.2d 328. It is hard to imagine, after making these unambiguous proclamations with full knowledge of the existence of § 5145.01, that the Ohio Supreme Court would now find that a statute that addresses the governance of state prisons trumps the Ohio sentencing statutes, creates a liberty interest in concurrent sentences and forms a basis for overturning, in less than three years, its decisions in *Foster* and *Bates*.” *Id.* at *5.

{¶ 12} *Shie*’s single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., and
LARRY A. JONES, J., CONCUR