

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92189

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE LIPSCOMB

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-476264

BEFORE: Cooney, P.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: September 2, 2010

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COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Andre Lipscomb (“Lipscomb”), appeals his classification as a Tier III sex offender and his sentences for rape and kidnapping. Finding some merit to the appeal, we reverse in part and affirm in part.

{¶ 2} This case arose in January 2006, when Lipscomb was charged with 26 offenses related to the sexual abuse of three children under age ten. A jury found him guilty of two counts of rape and two counts of kidnapping with sexual motivation specifications related to two child victims. The trial

court sentenced him to two consecutive life terms in prison on the rape convictions and two concurrent nine-year prison terms on the kidnapping convictions, to run consecutively to the life terms. The trial court also declared Lipscomb a sexual predator.

{¶ 3} Lipscomb appealed. In *State v. Lipscomb*, Cuyahoga App. No. 88831, 2007-Ohio-5945, (“*Lipscomb I*”), this court reversed in part and remanded the case so that the trial court could merge the kidnapping and rape convictions and resentence. We affirmed the rape convictions and sexual predator determination. In September 2008, the trial court merged the kidnapping convictions into the rape convictions and resentenced Lipscomb to two consecutive life sentences in prison. It also reclassified him as a Tier III sex offender under Ohio’s Adam Walsh Act, despite our having affirmed his classification as a sexual predator in the first appeal. See *Lipscomb I* at ¶1, 51.

{¶ 4} Based upon this court’s holding in *Lipscomb I* and the recent decision by the Ohio Supreme Court in *State v. Bodyke*, __ Ohio St.3d __, 2010-Ohio-2424, we find merit to Lipscomb’s argument. His sexual predator classification was affirmed, and he cannot be reclassified once this judgment was final. Therefore, his first assignment of error is sustained.

{¶ 5} In the second assignment of error, Lipscomb argues that the trial court violated the Ex Post Facto and Due Process Clauses of the United States

Constitution when the court failed to impose the presumptive minimum concurrent sentences, as he claims *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, dictates. Lipscomb, however, does not set forth any argument explaining how *Foster* supports his claims, thereby violating App.R. 16(A)(7), which requires that appellants explain each assignment of error and the reasons supporting their claims, with citations to relevant authorities, statutes, and portions of the record. He concedes, however, that he received the required life sentences for rape.

{¶ 6} Nevertheless, the Ohio Supreme Court rejected Lipscomb's interpretation of *Foster* in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, holding that *Foster* does not require judges to impose minimum sentences. *Elmore* at ¶7-8. As Lipscomb never explains why his sentence violates the Due Process and Ex Post Facto Clauses of the U.S. Constitution, we decline to address that issue.¹ Accordingly, we overrule the second assignment of error.

{¶ 7} Judgment is affirmed in part and reversed in part. Lipscomb's original sexual predator classification is reinstated.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

¹Lipscomb concedes that this court and the Ohio Supreme Court have found no merit in this argument, but he maintains his position on appeal to "preserve the issue."

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

COLLEEN CONWAY COONEY, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, J., CONCUR