

[Cite as *State v. Bruce*, 2011-Ohio-1240.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95064

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DARRELL BRUCE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503337

BEFORE: Stewart, J., Kilbane, A.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: March 17, 2011

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Darrell Bruce, appeals from his resentencing on counts of forcible rape of a child less than ten years of age, gross sexual imposition, and failure to provide notice of a change of address. He complains that the court lacked jurisdiction to resentence him because he had an appeal pending before the Supreme Court of Ohio; the court erroneously increased the length of his sentence for gross sexual imposition;

and the court failed to state reasons supporting its decision to run his sentences consecutively.

I

{¶ 2} Bruce first argues that the court lacked jurisdiction to resentence him because he had an appeal pending before the supreme court at the time of his resentencing.

{¶ 3} Bruce did not have an appeal pending before the supreme court at the time of his resentencing — he had pending a motion to certify the record. In *State v. Brown* (Dec. 15, 1988), 8th Dist. No. 54765, we noted that the filing of a memorandum in support of jurisdiction to the supreme court does not divest the trial court of jurisdiction to resentence a defendant as mandated by this court. Unlike a direct criminal appeal to the court of appeals in which jurisdiction is vested with this court upon the filing of a notice of appeal, an appeal to the supreme court is not an appeal of right and jurisdiction does not vest with the supreme court until it accepts an appeal for review. *State v. Thomas* (1996), 111 Ohio App.3d 510, 515, 676 N.E.2d 903. The supreme court had not accepted Bruce's appeal for review at the time the court resentedenced him (it later declined to hear the appeal), so jurisdiction had not vested exclusively with the supreme court. The court had jurisdiction to resentence him as required by our mandate.

II

{¶ 4} The court originally sentenced Bruce to a term of two years to life on the gross sexual imposition counts based on the existence of sexually violent predator specifications listed with those counts. In Bruce’s direct appeal, we found that those specifications were improper because the conviction supporting the specifications predated the effective date of the enhancement statute, R.C. 2971.01(H)(1). See *State v. Bruce*, 8th Dist. No. 92016, 2009-Ohio-6214, at ¶116-118. When the court resentenced Bruce on the gross sexual imposition counts, it imposed a five-year sentence on each count. Bruce now argues that this was an unconstitutional increase in his sentence.

{¶ 5} The court did not increase the length of Bruce’s sentences for gross sexual imposition. The original indefinite sentence of two years to life on each count was statutorily-mandated based on the specifications contained in the indictment. See R.C. 2971.03(A)(3). With the specifications having been vacated on direct appeal, Bruce could only be sentenced to a definite term of incarceration for a third degree felony: one, two, three, four, or five years. See R.C. 2929.14(A)(3). As the state notes, the five-year sentences imposed on each count were significantly shorter than the “life tail” that had originally been imposed as the maximum part of Bruce’s original indefinite sentence. So Bruce was not sentenced to a greater term of incarceration on resentencing.

{¶ 6} Bruce next complains that the failure to provide notice of a change of address charge in Count 7 of the indictment should have been a felony of the fourth degree instead of a third degree felony because the jury failed to make a separate determination as to the degree of felony for the underlying sexually-oriented offense. We rejected this same argument on direct appeal. *Bruce* at ¶120. That holding is now the law of the case and cannot be revisited. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (“the doctrine [of the law of the case] provides that the decision of a reviewing court remains the law of that case in a case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels”).

III

{¶ 7} Finally, Bruce argues that the court arbitrarily imposed consecutive sentences because it did so without stating any reasons for doing so. We summarily overrule this assignment of error on authority of paragraph three of the syllabus to *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768: “Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.” There is no current statutory requirement for trial judges to make findings in support of consecutive sentences, so no error is shown.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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, JUDGE

MARY EILEEN KILBANE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR.