[Cite as *State v. Culgan*, 2010-Ohio-2992.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO Appellee v. CLIFFORD J. CULGAN Appellant	C. A. No. 09CA0060-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 01-CR-0372

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

Per Curiam.

{¶1} Appellant, Clifford Culgan, appeals the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On September 13, 2001, Clifford Culgan was indicted on counts of rape, unlawful sexual conduct with a minor, corrupting another with drugs, and pandering obscenity involving a minor. The State subsequently amended the indictment and Culgan pleaded guilty to two counts of unlawful sexual conduct with a minor, one count of corrupting another with drugs, and one count of attempted pandering obscenity involving a minor. On August 2, 2002, Culgan was sentenced to a total of ten years in prison.

{¶3} On appeal, this Court affirmed the decision of the trial court. *State v. Culgan*, 9th Dist. No. 02CA0073-M, 2003-Ohio-2713. The Supreme Court of Ohio declined further review. *State v. Culgan*, 100 Ohio St.3d 1470, 2003-Ohio-5772.

{¶4} On July 30, 2007, Culgan filed a motion for re-sentencing in which he argued that the judgment entry journalizing his sentence failed to comply with Crim.R. 32(C). On August 1, 2007, the trial court denied the motion. On October 26, 2007, Culgan filed a complaint for a writ of mandamus and/or procedendo with this Court to compel the State and the trial court judge to issue a sentencing entry that complied with Crim.R. 32(C). This Court dismissed the petition. On January 4, 2008, Culgan appealed to the Supreme Court of Ohio. The Supreme Court determined that Culgan's "sentencing entry did not constitute a final appealable order because it did not contain a guilty plea, a jury verdict, or the finding of the court upon which Culgan's convictions were based." *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, at ¶10. The Supreme Court reversed the judgment of this Court and granted the writs of mandamus and procedendo to compel the trial court to issue a sentencing entry that complied with Crim.R. 32(C) and constituted a final appealable order.

{¶5} On October 7, 2008, the trial court issued a nunc pro tunc judgment entry in an attempt to comply with the Supreme Court's mandate. Culgan appealed the order to this Court. On June 15, 2009, this Court vacated Culgan's sentence and remanded the case for re-sentencing. The basis of this Court's decision was that the trial court erred in issuing a nunc pro tunc sentencing entry to comply with the Supreme Court's mandate and, instead, should have re-sentenced Culgan consistent with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Culgan*, 9th Dist. No. 08CA0080-M, 2009-Ohio-2783, at ¶6.

{¶6} On July 31, 2009, the trial court conducted a sentencing hearing. On August 18, 2009, the trial court issued a sentencing entry in which Culgan was again sentenced to an aggregate prison term of ten years and given credit for time served. It is that order from which Culgan appeals, raising five assignments of error.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT WAS WITHOUT SUBJECT MATTER JURISDICTION IN THIS CASE AS IT WAS NOT INVOKED PROPERLY IN THE FIRST INSTANCE AS STATUTORILY MANDATED. THE LACK OF SUBJECT MATTER JURISDICTION RENDERS ALL PROCEEDINGS VOID AB INITIO, VIOLATING APPELLANT'S 5TH, 6TH, & 14TH AMENDMENT RIGHTS."

{¶7} In his first assignment of error, Culgan argues the trial court was without subject matter jurisdiction in this case. This Court disagrees.

{¶8} As an initial matter, we note that a challenge based upon lack of subject matter jurisdiction may be raised at any stage of the proceedings. *In re Byard* (1996), 74 Ohio St.3d 294, 296. We review the determination of subject matter jurisdiction under a de novo standard of review. *State ex rel. Rothal v. Smith*, 151 Ohio App.3d 289, 2002-Ohio-7328, at ¶110. When reviewing a matter de novo, this court does not give deference to the trial court's decision. *Eagle v. Fred Martin Motor Co*., 157 Ohio App.3d 150, 2004-Ohio-829, at ¶11.

{¶9} In support of his assignment of error, Culgan argues that the Medina County Court of Common Pleas never obtained subject matter jurisdiction over this action because no charging affidavit or complaint was filed pursuant to R.C. 2935.09. That statute provides, in part:

> "(B) In all cases not provided by [R.C. 2935.02 to R.C. 2935.08, inclusive], in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer or a private citizen having knowledge of the facts shall comply with this section.
>
> "(C) A peace officer who seeks to cause an arrest or prosecution under this section may file with a reviewing official or the clerk of a court of record an affidavit charging the offense committed.
>
> "(D) A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court of before the magistrate. A private

> citizen may file an affidavit charging the offense committed with the clerk of court of record before or after the normal business hours of the reviewing officials if the clerk's office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official's normal business hours resume."

{¶10} We note that subject matter jurisdiction is conferred upon the court of common pleas by R.C. 2931.03, which provides, "[t]he court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas." This Court has held that "R.C. 2935.09 does not provide the exclusive method for instituting a criminal prosecution." *Peters v. Anderson*, 9th Dist. No. 02CA008096, 2002-Ohio-6766, at ¶18. R.C. 2935.09 requires the filing of an affidavit "in those cases where a peace officer or a private citizen wishes to have the prosecuting attorney file a complaint in order to cause an individual's arrest or prosecution." Id., citing *State v. Manley* (June 21, 1996), 7th Dist. No. 95-CO-54. The applicable statute when proceedings are instituted by indictment, however, is R.C. 2939.22, which states, "[i]ndictments found by a grand jury shall be presented by the foreman to the court of common pleas[.] *** The court shall assign such indictments for trial under [2945.02][.]"

{¶11} Crim.R. 7(A) provides, in a pertinent part:

> "A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court."

The Supreme Court of Ohio has stated that "[a]n accused in a felony case is not tried upon the affidavit filed against him but on the indictment by the grand jury." *Foston v. Maxwell* (1964), 177 Ohio St. 74, 76. The Seventh District has held that Crim.R. 7(A) provides the proper basis

for a trial court's jurisdiction in cases prosecuted by indictment and that no complaint or affidavit is necessary in such cases. *Manley*, supra.

{¶12} On September 13, 2001, Culgan was indicted by the Medina County Grand Jury on charges of rape, unlawful sexual conduct with a minor, corrupting another with drugs, and pandering obscenity involving a minor. The indictment was amended prior to the time Culgan pleaded guilty to two counts of unlawful sexual conduct with a minor, one count of corrupting another with drugs, and one count of attempted pandering obscenity involving a minor. Because the proceedings in this case were properly instituted by indictment and presented to the court of common pleas, Culgan's contention that the court of common pleas was without subject matter jurisdiction in this case is without merit. The first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN IMPOSING MORE THAN THE MINIMUM/CONCURRENT SENTENCES ON APPELLANT WHO ALLEGEDLY COMMITTED THE OFFENSES PRIOR TO THE ANNOUNCEMENT OF *FOSTER*, VIOLATING THE APPELLANT'S CONSTITUTIONAL RIGHTS PURSUANT TO THE FIFTH, SIXTH & FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE EX POST FACTO PROVISIONS OF BOTH THE OHIO & UNITED STATES CONSTITUTIONS."

{¶13} In his second assignment of error, Culgan argues the trial court erred in imposing more than a minimum sentence at a time prior to the Supreme Court of Ohio's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. This Court disagrees.

{¶14} In support of his second assignment of error, Culgan sets forth several arguments which call into question the Supreme Court of Ohio's decision in *Foster*. Culgan contends that the sentencing "remedy" set forth in *Foster* is unconstitutional and void as applied to him because the offenses for which he was convicted occurred prior to February 27, 2006. Culgan also contends that the sentencing remedy created by *Foster* does not comport with the United

States Supreme Court's rulings in *United States v. Booker* (2005), 543 U.S. 220, *Blakey v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466.

{¶15} We emphasize that this Court is bound by the precedent of the Supreme Court of Ohio. See *State v. Thrasher*, 6th Dist. No. WD-06-047, 2007-Ohio-2838, at ¶7. The Supreme Court has held that "[r]sentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 [], for offenses that occurred prior to February 27, 2006, does not violate the Sixth Amendment right to jury trial or the Ex Post Facto or Due Process Clauses of the Unites States Constitution." *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, paragraph one of the syllabus. The Supreme Court further held that "[a] trial court, upon resentencing, pursuant to [*Foster*], has discretion to impose consecutive sentences and, despite the *Foster* severance of statutory presumptions, is not required by rule of lenity to impose a minimum prison term." Id. at paragraph two of the syllabus.

{¶16} On several occasions this Court has rejected challenges to the Supreme Court decision in *Foster*. See *State v. Mullens*, 9th Dist. No. 23395, 2007-Ohio-2893; *State v. Rowles*, 9th Dist. No. 24154, 2008-Ohio-6631; *State v. Bigley*, 9th Dist. No. 08CA0085-M, 2009-Ohio-2943. This Court has stated that "[w]e are obligated to follow the Ohio Supreme Court's directive and we are, therefore, bound by *Foster*." *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082, at ¶11. In *Newman*, we stated that because we "cannot overrule or modify *Foster*, we decline to consider Appellant's challenges thereto." Id. The crux of Culgan's assignment of error is not that the trial court misinterpreted or misapplied the *Foster* sentencing framework. Rather, the arguments offered by Culgan amount to a series of challenges to the legal foundation upon which the Supreme Court's ruling in *Foster* rests. As this Court does not have the authority to modify the Supreme Court's ruling, Culgan's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED WHEN IT FAILED TO INCLUDE THE SEXUAL PREDATOR CLASSIFICATION IN THE APPELLANT'S SENTENCE AND JUDGMENT OF CONVICTION THAT CONTAINED THE SENTENCE PURSUANT TO R.C. 2929.19(B)(4) & R.C. 2950.09(B)(4); AND WHEN IT DIDN'T ADDRESS R.C. 2929.19(B)(3)(f), AS STATUTORILY MANDATED, AS APPLIED TO APPELLANT WHEN HE ALLEGEDLY COMMITTED THE OFFENSE PRIOR TO SENATE BILL 10, THE ADAM WALSH ACT."

{¶17} In his third assignment of error, Culgan argues the trial court erred in not including his classification as a sex offender and drug testing requirement in the sentencing entry. We consider the drug testing requirement first.

R.C. 2929.19(B)(3)(f) – Drug Testing Requirement

{¶18} Culgan argues that the trial court erred by failing to include in his sentence, pursuant to R.C. 2929.19(B)(3)(f), a requirement that he not ingest or be injected with a drug of abuse and that he submit to random drug testing. He argues that this omission rises to the same level as a trial court's failure to advise a defendant about postrelease control in his sentence. We are not persuaded that the absence of the drug testing requirement in Culgan's sentence rises to the level of a trial court's failure to advise a defendant about postrelease control. We agree with other Districts that have decided the trial court's failure to include this provision in a defendant's sentence is harmless error:

> "The requirements that R.C. § 2929.19(B)(3)(f) imposes on a trial court 'were not intended to benefit a defendant, but to facilitate drug testing of prisoners in state institutions by discouraging defendants who are sentenced to prison from using drugs.' *State v. Arnold*, Clark App. No. 02CA0002, 2002-Ohio-4977, ¶37. Because the statute creates no substantive rights, a trial court's failure to comply with its terms results in no prejudice to a defendant and constitutes harmless error. *State v. Woods*, Clark App. No. 05CA0063, 2006-Ohio-2325, ¶29." *State v. Leeson*, 2d Dist. No. 21993, 2007-Ohio-3704, ¶8.

See, also, *State v. Mason*, 3d Dist. No. 9-05-21, 2006-Ohio-1998; *State v. Willet*, 5th Dist. No. CT2002-0024, 2003-Ohio-6357.

{¶19} R.C. 5120.63(B) requires the Department of Rehabilitation and Correction to randomly test prisoners for drugs, without reference to whether the trial court advised the defendant under R.C. 2929.19(B)(3)(f). The sanction imposed by R.C. 5120.63 for a prisoner who tests positive is that the prisoner must pay for the positive drug test and subsequent drug testing. This sanction arises by operation of the drug testing statute, not because of the condition included in the sentencing statute. Thus, the R.C. 2929.19(B)(3)(f) condition is of a different nature than postrelease control, one that does not carry the potential loss of liberty that accompanies a violation of postrelease control.

{¶20} Finally, the Ohio Supreme Court has applied its void-sentence analysis in limited circumstances. This Court will not extend its reach without clear direction from the Supreme Court. Because the Court has not identified the drug-testing term as one that must be included in a defendant's sentence, or else the sentence will be deemed void, this Court will not reach that result in this case. Accordingly, to the extent this assignment of error challenges the absence of the R.C. 2929.19(B)(3)(f) condition in his sentence, it is overruled.

R.C. 2950.09 – Sex Offender Classification

{¶21} Culgan also argues that the trial court erred by failing to state his sex offender classification in the sentencing entry. The State argues that this Court does not have jurisdiction to address any arguments relating to Culgan's classification as a sex offender as that issue is currently before the Supreme Court of Ohio. Because this Court lacks jurisdiction to review Culgan's sex offender classification, this Court cannot address this portion of the assignment of error.

{¶22} As noted above, this case has a lengthy and complex procedural history. The trial court first attempted to properly sentence Culgan on August 2, 2002. On July 30, 2007, Culgan filed a motion for re-sentencing, arguing that the judgment entry failed to comply with Crim.R. 32(C). The trial court denied the motion on August 1, 2007. On October 26, 2007, Culgan filed a complaint for writ of mandamus and/or procedendo with this Court to compel the State and the trial judge to issue a sentencing entry that complied with Crim.R. 32(C). This Court dismissed the petition. The Supreme Court reversed the judgment of this Court and granted the writs of mandamus and procedendo. On October 7, 2008, the trial court issued a nunc pro tunc judgment entry in an attempt to comply with the Supreme Court's mandate. Subsequently, on June 15, 2009, this Court vacated Culgan's sentence and remanded the case for re-sentencing in accord with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Culgan was re-sentenced by the trial court on August 18, 2009.

{¶23} Culgan argues the trial court erred because it failed to include his classification as a sex offender in the August 2009 sentencing entry. In response to the passage of the Adam Walsh Child Protection and Safety Act of 2006 by the United States Congress, the Ohio General Assembly also enacted the law. The new sex offender registration and notification scheme in R.C. Chapter 2950 became effective on July 1, 2007 and replaced the former sex offender legislation know as Megan's Law. Under the new classification scheme, sex offenders are divided into three categories or "tiers" based solely upon the crime committed. Judges no longer possess the discretion to determine which classification best fits the offender. A short time before the effective date of the Adam Walsh Act, the General Assembly directed the attorney general to reclassify existing offenders. R.C. 2950.031(A) and 2950.032(A)(1). Offenders who

had been required to register prior to December 1, 2007, were to be reclassified as Tier I, II, or III sex offenders.

{¶24} Culgan was originally classified as a sexual predator under Megan's Law on August 2, 2002. Culgan was subsequently reclassified by the attorney general as a Tier III sex offender pursuant to the Adam Walsh Act. The parties explained in their briefs that Culgan challenged his reclassification in the Richland County Court of Common Pleas, the court with jurisdiction based on the location of the prison in which he was confined. The trial court found Ohio's sexual offender classification and registration scheme to be unconstitutional in its entirety. The Fifth District Court of Appeals reversed the trial court's decision in *State v. Culgan*, 5th Dist. No. 08-CA-217, 2009-Ohio-3570. The Supreme Court accepted Culgan's appeal and held it for decision in *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424. On June 3, 2010, the Supreme Court held in *Bodyke* that the provisions of the Adam Walsh Act which require the attorney general to reclassify sex offenders who were already classified by judges violated the separation-of-powers doctrine. Id. Culgan's challenge to his classification remains pending before the Supreme Court. Therefore, until the Supreme Court resolves Culgan's appeal, his classification is that of a Tier III sex offender.

{¶25} The issue presented in the assignment of error before this Court involves Culgan's classification as a sex offender. This is the same issue pending before the Ohio Supreme Court. Article IV of the Ohio Constitution created a system of superior and inferior courts. This Court's functions are detailed in the Ohio Constitution. It is clear that the Ohio Constitution does not grant a court of appeals the jurisdiction to review, reverse, or vacate, a decision made by a superior court. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32; Section 5, Article IV, Ohio Constitution; *In re C.S.*, 9th Dist. No. 05CA0079, 2006-Ohio-1909, ¶10.

{¶26} An inferior court has no jurisdictional basis to review the actions and decisions of superior courts. *State v. Hill*, 5th Dist. No. 07-CA-5, 2007-Ohio-6824, ¶12. The Supreme Court exercised its jurisdiction to review Culgan's sex offender classification. *Culgan v. State*, Supreme Court Case No. 2009-1433. If this Court were to exercise jurisdiction to consider the same issue, it would interfere with the Supreme Court's exercise of jurisdiction on the same question. Because this Court lacks the jurisdiction to do so, it cannot consider this portion of Culgan's assignment of error.

{¶27} The third assignment of error is overruled to the extent he argues the trial court erred in failing to include R.C. 2929.19(B)(3)(f) language in his sentencing entry. To the extent Culgan raises any issues about his sex offender classification, this Court lacks jurisdiction to consider the argument and, therefore, this Court cannot address that portion of his assignment of error.

ASSIGNMENT OF ERROR IV

> "MR. CULGAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO MOVE TO DISMISS THE CASE FOR WANT OF A SPEEDY TRIAL AND INSTEAD COERCED APPELLANT TO SIGN A SPEEDY TRIAL WAIVER, FOLLOWED BY COERCIVE INVOLUNTARY PLEAS BARGAIN. IN VIOLATION OF THE 6TH AMENDMENT OF THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶28} In his fourth assignment of error, Culgan argues trial counsel was ineffective. This Court disagrees.

{¶29} In order to prevail on a claim of ineffective assistance of counsel, Culgan must show that "counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's performance." *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. "The benchmark for judging any

claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thus, a two-prong test is necessary to examine such claims. First, Culgan must show that counsel's performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, citing *Strickland*, 466 U.S. at 687. Second, Culgan must demonstrate that but for counsel's errors, there is a reasonable probability that the results of the trial would have been different. Id.

{¶30} The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing in one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.'" *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶31} Here, Culgan argues that defense counsel rendered ineffective assistance by failing to advise him of the possible ramifications of signing a speedy trial waiver. Culgan also contends that defense counsel coercively persuaded Culgan to accept the plea offer of the State.

{¶32} While Culgan makes several claims about the performance of defense counsel, Culgan has not pointed to anything in the record to substantiate these claims. The record indicates Culgan was aware of the ramifications of waiving his right to a speedy trial. The

waiver form which Culgan signed on April 29, 2002, specifically states, "Defendant further understands and waives his rights by virtue of Section 2945.71 of the Ohio Revised Code, to come to trial within 270 days of arrest." Furthermore, a review of the transcript from the May 10, 2002, plea colloquy suggests that Culgan entered his plea knowingly, intelligently, and voluntarily. Culgan indicated that he "talked this case over" with defense counsel and that he did not need any additional time to speak with his attorney. When asked if he was satisfied with the representation afforded to him by his attorney, Culgan responded, "Absolutely." Absent any evidence indicating that defense counsel's performance fell below an objective standard of reasonableness, Culgan cannot prevail on his ineffective assistance claim.

{¶33} Culgan's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED IN IMPOSING SENTENCE ON MR. CULGAN DUE TO THE UNREASONABLE DELAY IN IMPOSING A VALID SENTENCE WHICH RESULTED IN A LOSS OF JURISDICTION, VIOLATING CULGAN'S RIGHT TO DUE PROCESS."

{¶34} In his fifth assignment of error, Culgan argues that the trial court was without jurisdiction to impose a sentence on him due to the unreasonable delay between the time he was found guilty and the time he was re-sentenced. This Court disagrees.

{¶35} In support of his fifth assignment of error, Culgan argues that the seven-year delay in between the time he pleaded guilty and the time he was re-sentenced equated to unreasonable delay pursuant to Crim.R. 32(A) and rendered the trial court without jurisdiction to re-sentence him. Culgan also contends that the previous attempts by the trial court to sentence him resulted in void judgments which have no legal impact on these proceedings.

{¶36} Crim.R. 32(A) states that a sentence "shall be imposed without unnecessary delay." The Supreme Court of Ohio has recognized that delay for a reasonable time does not

invalidate a sentence. *Neal v. Maxwell* (1963), 175 Ohio St. 201, 202. This Court has recently held that Crim.R. 32(A) does not apply in cases where an offender must be re-sentenced. *State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965, at ¶19, citing *State v. Huber*, 8th Dist. No. 85082, 2005-Ohio-2625, ¶8. "This logic, as it relates to Crim.R. 32(A), recognizes the distinction between a trial court refusing to sentence an offender and a trial court improperly sentencing an offender." *Spears* at ¶19. Furthermore, the Supreme Court of Ohio has held that a trial court retains continuing jurisdiction to correct a void sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶19, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶37} The circumstances here do not implicate Crim.R. 32(A) as this is not a case where the trial court refused to sentence Culgan. The trial court has attempted to properly sentence Culgan on three separate occasions. The delay which occurred between the date Culgan pleaded guilty on May 10, 2002, and the time his sentencing was journalized on August 18, 2009, was a result of the need for Culgan to utilize the appellate process. It follows that there has not been unreasonable delay in sentencing Culgan. The fifth assignment of error is overruled.

III.

{¶38} Culgan's first, second, fourth, and fifth assignments of error are overruled. His third assignment of error is overruled to the extent it challenges the absence of R.C. 2929.19(B)(3)(f) language, and, to the extent it challenges his sex offender classification, this Court lacks jurisdiction to consider it. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶39} I concur in the majority's resolution of the first, second, third, and fifth assignments of error. I concur in judgment only, however, in regard to the resolution of the fourth assignment of error. I would hold that this Court cannot reach the merits of the fourth assignment of error as Culgan had an opportunity to raise his ineffective assistance claim on direct appeal and failed to do so.

APPEARANCES:

CLIFFORD J. CULGAN, pro se, Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.