

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
	:	
STATE OF OHIO	:	Hon. Sheila J. Farmer, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. CT2009-0018
JOE Z. PRESSLEY, JR.	:	
	:	
Defendant-Appellant	:	
	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas Case No. CR2005-0259

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: October 13, 2009

APPEARANCES:

For Plaintiff-Appellee:

Ron Welch
Assistant County Prosecutor
27 North Fifth Street
Zanesville, Ohio 43701

For Defendant-Appellant:

Joe Z. Pressley, Jr.
#518-156
670 Williamsport Rd. E
North Central Correctional Institute
Marion, Ohio 43301-1812

Delaney, J.

{¶1} Appellant Joe Z. Pressley Jr. appeals the decision of the Court of Common Pleas, Muskingum County, which denied his petition for post conviction relief. The State of Ohio is Plaintiff-Appellee.

STATEMENT OF THE CASE AND FACTS

{¶2} In the late summer of 2005, the Muskingum County Sheriff's Department, with the assistance of a confidential informant, made several controlled buys of cocaine and crack cocaine at the Zanesville residence of Appellant and his co-defendant, Marla Rush.

{¶3} In September 2005, Appellant was indicted on ten felony counts, including drug trafficking, drug possession, and having a weapon while under disability. At his arraignment on September 21, 2005, Appellant pled not guilty to all charges. After unsuccessfully seeking suppression of certain evidence against him, Appellant entered a guilty plea to seven counts on February 27, 2006.

{¶4} On April 3, 2006, Appellant was sentenced to an aggregate prison term of thirteen years, as follows:

{¶5} Count 1: Trafficking in Cocaine (F5): Eleven months.

{¶6} Count 4: Complicity to Trafficking in Cocaine (F3): Three years.

{¶7} Count 6: Complicity to Trafficking in Crack Cocaine (F1): Five years.

{¶8} Count 7: Possession of Crack Cocaine (F1): Five years.

{¶9} Count 8: Possession of Cocaine (F5): Eleven months.

{¶10} Count 9: Possession of Crack Cocaine (F5): Eleven months.

{¶11} Count 10: Having a Weapon While Under a Disability (F3): Three years.

{¶12} Counts 1, 4, 6, 8, and 9 were ordered to run concurrently with each other; Counts 7 and 10 were ordered to run consecutively.

{¶13} On May 2, 2006, Appellant filed an appeal of his convictions and sentences with this Court. Appellant then filed a timely petition for post-conviction relief with the trial court on November 28, 2006.

{¶14} In Appellant's direct appeal of his criminal convictions, we affirmed the trial court's decision in *State v. Pressley* (May 2, 2007), 5th Dist. No. CT2006-0033, 2007-Ohio-2171.

{¶15} Thereafter, the trial court denied Appellant's petition for post-conviction relief on May 23, 2007. The trial court's entry stated,

{¶16} "This matter comes before the Court upon Defendant's Petition for Post-Conviction Relief. After consideration, said Motion is Denied." (Judgment Entry, May 23, 2007)."

{¶17} Appellant timely appealed the denial of his motion for post-conviction relief, and raised the following two assignments of error:

{¶18} "I. THE TRIAL COURT COMMITTED PREJUDICIALLY [SIC] ERROR BY FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO REASONS OF DISMISSAL AND AS TO GROUNDS OF RELIEF RELIED UPON IN DEFENDANT-APPELLANT'S PETITION FOR POST-CONVICTION RELIEF.

{¶19} "II. THE TRIAL COURT IN SENTENCING ERRED BY DEPARTING FROM THE MINIMUM AND CONCURRENT SENTENCE WITHOUT SUBMITTING THE JUDICIAL FACTFINDINGS TO A JURY AND PROVEN BEYOND A REASONABLE DOUBT OR ADMISSION BY THE DEFENDANT-APPELLANT, THUS,

VIOLATING DEFENDANT-APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION.”

{¶20} On May 19, 2008, this Court, in *State v. Pressley*, 5th Dist. No. CT2007-0044, 2008-Ohio-2473, initially dismissed the appeal for lack of a final, appealable order and determined that it was therefore unnecessary to reach Appellant's second assignment of error on the merits.

{¶21} In the interim, Appellant filed a Motion to Compel Facts, Findings, and Conclusions of Law with the trial court. On February 17, 2009, the trial court placed an entry on the record containing its findings of fact and conclusions of law regarding Appellant's previously filed petition for post-conviction relief. It is from that entry that Appellant now files his current appeal.

{¶22} Appellant now appeals, raising two assignments of error:

{¶23} “I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO REASONS OF DISMISSAL AND AS TO GROUNDS OF RELIEF RELIED UPON IN DEFENDANT-APPELLANT'S PETITION FOR POST-CONVICTION RELIEF.

{¶24} “II. THE TRIAL COURT IN SENTENCING ERRED BY DEPARTING FROM THE MINIMUM AND CONCURRENT SENTENCE WITHOUT SUBMITTING THE JUDICIAL FACTFINDINGS TO A JURY AND PROVEN BEYOND A REASONABLE DOUBT OR ADMISSION BY THE DEFENDANT-APPELLANT, THUS, VIOLATING DEFENDANT-APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION.”

I & II

{¶25} In his first assignment of error, Appellant contends that the trial court erred and violated his constitutional rights by “failing to make findings of fact and conclusions of law as to reasons of dismissal and as to grounds of relief relied upon in Defendant-Appellant’s petition for post-conviction relief.” Because the trial court provided Appellant with findings of facts and conclusions of law on February 17, 2009 (Journal Entry), Appellant’s argument is moot.

{¶26} In his second assignment of error, Appellant contends the trial court erred and violated his constitutional rights by “departing from the minimum and concurrent sentence without submitting judicial fact findings to a jury.” We disagree.

{¶27} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court found certain provisions of Ohio’s sentencing statute unconstitutional, in light of the United States Supreme Court’s *Blakely* decision. Accordingly, judicial fact finding is no longer required before a court imposes non-minimum, maximum or consecutive prison terms. *State v. Barrett*, 5th Dist. No. 07COA014, 2008-Ohio-191, ¶ 6. Appellant, in the case sub judice, was sentenced in the post-*Foster* era. Because *Foster* “vest[ed] sentencing judges with full discretion” in sentencing (*Foster* at ¶ 100), we review felony sentences under an abuse of discretion standard. *State v. Coleman*, 9th Dist. No. 06CA008877, 2006-Ohio-6329, ¶ 11. An abuse of discretion implies the court’s attitude is “unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144. Here, the trial court’s sentence of eleven months in prison on Count One (trafficking in drugs, Cocaine), a felony of the fifth degree, three years in prison on Count Four (complicity to

trafficking in drugs, Cocaine), a felony of the third degree, five years in prison on Count Six (complicity to trafficking in drugs, Crack Cocaine), a felony of the first degree, five years in prison on Count Seven (possession of drugs, Crack Cocaine), a felony of the first degree, eleven months in prison on Count Eight (possession of drugs, Cocaine), eleven months on Count Nine (possession of drugs, Crack Cocaine), and three years in prison on Count Ten (having a weapon under disability), are within the statutory sentencing ranges under R.C. 2929.14, and as such, are proper. Further, upon review, we find the trial court's sentencing is not unreasonable, arbitrary or unconscionable.

{¶28} For the foregoing reasons, Appellant's second assignment of error is overruled.

{¶29} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOE Z. PRESSLEY, JR.	:	
	:	
Defendant-Appellant	:	Case No. CT2009-0018
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE