

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-07-1095

Appellee

Trial Court No. CR-03-3236

v.

Stephen J. Boyd

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Brian J. Hoch, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas. Trial by jury commenced on March 22, 2004. On March 24, 2004, the jury entered a verdict, against appellant, of guilty on four counts of rape, in violation of R.C. 2907.02(A)(2) and (B), felonies of the first degree. On April 28, 2004, the trial court

sentenced appellant to the maximum prison term of ten years on each offense. In sentencing appellant, the court ordered Counts 1 and 2 to be run concurrently, and ordered the same with respect to Counts 3 and 4, for a total sentence of 20 years. Upon appeal, this court applied *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and remanded the case to the trial court for the purposes of resentencing appellant. On February 21, 2007, upon remand, the trial court determined that appellant had been found guilty, at trial, of four counts of rape, in violation of R.C. 2907.02(A)(2) and (B). At the resentencing hearing, the trial court sentenced appellant to serve consecutive prison terms of ten years on each count, for an aggregate sentence of 40 years.

{¶ 2} On appeal, appellant sets forth the following three assignments of error:

{¶ 3} "ASSIGNMENTS OF ERROR

{¶ 4} "ASSIGNMENT OF ERROR NO. 1:

{¶ 5} "APPELLANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION WHEN THE RESENTENCING COURT IMPOSED A HARSHER SENTENCE UPON REMAND.

{¶ 6} "ASSIGNMENT OF ERROR NO. 2:

{¶ 7} "THE RESENTENCING COURT ACTED OUTSIDE OF ITS AUTHORITY WHEN IT MODIFIED ASPECTS OF APPELLANT'S SENTENCE WHICH WERE NOT SUBJECT TO THE ASSIGNMENTS OF ERROR SET FORTH

IN HIS FIRST APPEAL, THEREBY DENYING APPELLANT DUE PROCESS AS PROVIDED BY THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION.

{¶ 8} "ASSIGNMENT OF ERROR NO. 3.

{¶ 9} "THE RESENTENCING COURT COMMITTED AN ABUSE OF DISCRETION BY IMPOSING CONSECUTIVE SENTENCES AGAINST THE APPELLANT."

{¶ 10} The following undisputed facts are relevant to the issues raised on appeal. On October 10, 2003, the grand jury issued an indictment charging appellant with four counts of the offense of rape, in violation of R.C. 2907.02(A)(2) and (B), felonies of the first degree. On March 24, 2004, the jury returned a verdict, against appellant, of guilty on all four counts. On May 3, 2004, the trial court sentenced appellant to the maximum sentence of ten years on each count. At this sentencing hearing, the trial court ordered appellant to serve concurrent prison terms on Counts 1 and 2 and Counts 3 and 4, respectively. In doing so, the trial court classified appellant as a sexual predator.

{¶ 11} Appellant appealed the sentence imposed by the trial court. On August 11, 2006, this court affirmed in part, and reversed in part, the judgment of the trial court, under Judge William J. Skow, and remanded the case to the trial court for resentencing. *State v. Boyd*, 6th Dist. No. L-04-1147, 2006-Ohio-4132. On February 21, 2007, the resentencing hearing, under Judge Stacy L. Cook, was held. At this hearing, the trial

court sentenced appellant to consecutive prison terms of ten years on each of the four counts, for an aggregate sentence of 40 years. It is from this judgment that appellant now appeals.

{¶ 12} In his first and second assignments of error, appellant argues that the trial court erred by imposing a harsher sentence upon appellant in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I, Ohio Constitution.

{¶ 13} In *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, the United States Supreme Court set aside the sentence of a defendant who had successfully appealed his conviction, but on remand was given a harsher sentence. The court held that a defendant's due process rights were violated when a harsher sentence was imposed as a result of vindictiveness in a successful appeal. *Id.* at 726.

{¶ 14} However, the United States Supreme Court eventually narrowed its decision in *Pearce* by holding that in the absence of a "reasonable likelihood" that the enlarged sentence was the product of vindictiveness, the burden was on the defendant to show "actual vindictiveness." *Alabama v. Smith* (1989), 490 U.S. 794, 109 S.Ct. 2201.

{¶ 15} "Actual vindictiveness" implies an animus against a defendant because he or she exercised his or her right of appeal which resulted in the reversal of the prior conviction based upon an error made by the sentencing judge. *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334; *North Carolina v. Pearce* (1969), 395 U.S. 711, 723,

overruled on other grounds, *Alabama v. Smith*, 490 U.S. 94 (1989). The focus of *Pearce* was the sentencer's personal motivation.

{¶ 16} Additionally, the Twelfth District Court of Appeals noted that numerous Ohio courts have not necessarily applied the *Pearce* presumption to cases that have been remanded for resentencing pursuant to *Foster* or have held that the presumption is not applicable in *Foster* remands. *State v. Fernbach*, 12th Dist. Nos. CA2006-11-130, CA2006-11-131, 2008-Ohio-5670, citing *State v. Andrews*, 12th Dist. No. CA2006-06-142, 2007-Ohio-223; *State v. Smith*, 5th Dist. No.2007-CA-0003, 2008-Ohio-2772; *State v. Johnson*, 174 Ohio App.3d 130, 2007-Ohio-6512; *State v. Shaffer*, 11th Dist. No. 2006-P-0115, 2007-Ohio-6404; *State v. Wagner*, 10th Dist. No. 14-06-30, 2006-Ohio-6855. The court further observed that these courts are reluctant to apply the *Pearce* presumption as *Foster* remands are based upon void sentences wherein factors were considered in the original sentencing which the Ohio Supreme Court later found unconstitutional.

{¶ 17} In the case now before the court, appellant was sentenced by another judge after the original judge was elected to the court of appeals, similar to the facts in a recent case before this court. *State v. Kincaid*, 6th Dist. No. L-08-1163, 2009-Ohio-3211.

{¶ 18} In *Texas v. McCullough* (1986), 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104, the United States Supreme Court stated that the *Pearce* presumption of vindictiveness does not apply when different sentencers were involved and each assessed the varying sentences that defendant received. The court stated:

{¶ 19} "When different sentencers are involved, '[i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty.' *Colten v. Kentucky* (1972), 407 U.S. 104, 117, 92 S.Ct. 1953, 32 L.Ed.2d 584." *Id.* at 138, 979.

{¶ 20} In this case, there is no presumption of vindictiveness in the sentence imposed. Appellant also has not provided any evidence of actual vindictiveness on the part of the sentencing judge. For the forgoing reasons, appellant's first and second assignments of error are found not well-taken.

{¶ 21} In his third assignment of error, appellant similarly asserts that the trial court abused its discretion by imposing on appellant a lengthier sentence upon remand.

{¶ 22} Under Ohio law, it is well-settled that "post-*Foster*, in reviewing felony sentences within the statutory range, [appellate courts] apply an abuse of discretion standard." *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, ¶ 36. "An abuse of discretion is more than an error in judgment or law; rather, it implies an attitude on part of the trial court that is unreasonable, arbitrary, or unconscionable." *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} In each of the three assignments of error, appellant essentially asserts that the trial court abused its discretion by sentencing appellant, upon remand, to consecutive prison sentences of ten years on each count. In support, appellant argues that the trial

court should have imposed the same, or a lesser, sentence as originally imposed by the trial court under Judge Skow.

{¶ 24} In the present case, as this court previously determined in *State v. Boyd*, supra, the trial court relied on R.C. 2929.14(C) in the original sentencing of appellant. Specifically, the trial court stated that appellant had committed the worst form of rape, the offense on which appellant was charged. This statutory section has been held unconstitutional by the Supreme Court of Ohio in *Foster*. Accordingly, based on the Supreme Court of Ohio's ruling in *Foster*, this court remanded the improperly determined sentence for resentencing in light of the principles announced in *Foster*.

{¶ 25} Under Ohio law it is well-settled that, with respect to felony offenders, the sentencing court "shall be guided by the overriding purposes of felony sentencing." R.C. 2929.11(A). In particular, "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender * * * and to punish the offender." *Id.* Furthermore, "[t]o achieve [these] purposes, the sentencing court shall consider the need for incapacitating the offender * * * and making restitution to * * * the public * * *." *Id.*

{¶ 26} In the present case, it is undisputed that the trial court, at the resentencing hearing under Judge Cook, properly considered the overriding purposes of felony sentencing. Specifically, the trial court explicitly stated that one of the "overriding purpose[s] of felony sentenc[ing] is to protect the public from future crimes by the offender." Additionally, the trial court properly recognized that in "achiev[ing] [this] purpose the Court shall consider the need for incapacitating the offender."

{¶ 27} In conjunction with the above stated legal principles, the Supreme Court of Ohio has held that, upon remand for resentencing, "[c]ourts shall consider those portions of the sentencing code that are unaffected by [the *Foster*] decision and impose any sentence within the appropriate felony range." *Foster*, supra, at ¶ 105. Most significantly, "[i]f an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively." *Id.* Accordingly, as this court has previously determined, "[p]ursuant to *Foster*, after imposing separate prison terms * * * the judge in [his or her] discretion may consider whether the offender should serve those terms concurrently or consecutively." *State v. Goodell*, 6th Dist. No. L-07-1016, 2007-Ohio-5318, ¶ 23. Moreover, "[w]hile the [appellant] may argue for reductions in [his or her] sentences, nothing prevents the state from seeking greater penalties." *Foster*, supra, at ¶ 105.

{¶ 28} This is precisely what occurred in the present case. The record clearly shows that the trial court, in light of the record and appellant's oral statements, determined that appellant represented "the worst kind of predator * * * [and] that * * * [appellant would] continue to offend * * *." The trial court further recognized, after consideration of the applicable statutory factors, that "protecting the public is first and foremost * * * and [appellant's] repeated history [as a] sex offender put the public at great risk * * *."

{¶ 29} Under Ohio law, it is axiomatic that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to * * *

give their reasons for imposing maximum, consecutive, or more than minimum sentences." *Foster*, 2006-Ohio-856, at paragraph seven of the syllabus. Nonetheless, the trial court, upon remand, explicitly stated that the appellant's likelihood of recidivism left the trial court with "no choice but to protect the public * * *" by sentencing appellant to consecutive sentences of ten years on each of the four counts of rape.

{¶ 30} This court has carefully reviewed the record, particularly the resentencing hearing transcript, and the applicable legal standards. The record clearly shows that, upon remand, the trial court properly considered the relevant statutory and case law sentencing principles. This court finds that in sentencing appellant, on remand, to four consecutive terms of ten years the trial court did not act arbitrarily, unreasonably, or unconscionably. On the contrary, the trial court acted pursuant to clear legal authority granted by the Supreme Court of Ohio's decision in *Foster*. Appellant's assignments of errors are found not well-taken.

{¶ 31} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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