[Cite as *State v. Jenkins*, 2025-Ohio-1357.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DANNY JENKINS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 HA 0009

Criminal Appeal from the
Court of Common Pleas of Harrison County, Ohio
Case No. CR 97-131

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. Lauren E. Knight, Harrison County Prosecutor, for Plaintiff-Appellee and

Danny Jenkins, pro se.

Dated: April 14, 2025

Robb, P.J.

{¶1} Defendant-Appellant Danny Jenkins appeals the decision of the Harrison County Common Pleas Court denying his motion to vacate the judgment entered after his 1998 convictions for aggravated murder and aggravated robbery. The state points out his sentencing claims are untimely and were not raised in a direct appeal of the sentence. Appellant attempts to avoid these timeliness and res judicata bars by claiming the issues he raises would result in a void (as opposed to merely voidable) judgment. For instance, he claims the sentences were void because they were abrogated by sentencing statutes enacted on July 1, 1996 in Senate Bill 2 (SB 2). However, Appellant committed the offenses in 1997, after the cited sentencing changes, and he was accordingly sentenced under the law he cites as applicable.

{¶2} Appellant also claims the judgment imposing consecutive sentences was void because the requirement of statutory findings was determined in 2006 to be an unconstitutional removal of fact-finding from the jury. However, the Ohio Supreme Court applied this case law only to cases pending on direct appeal, as the issue did not render a sentence void. Any issue Appellant has with statutory findings for a sentence has long been barred by the doctrine of res judicata. In any event, the Supreme Court later recognized its prior decision was no longer valid and consecutive sentence findings were not unconstitutional.

{¶3} For the following reasons, the trial court's judgment denying Appellant's motion to vacate is affirmed.

STATEMENT OF THE CASE

{¶4} On October 31, 1997, Duane and William Lockhard were hunting deer in the woods. Each occupied a separate tree stand a half mile apart. Each victim was shot in the back with a single shotgun blast while in their respective tree stands. Their bodies were discovered on November 2, 1997 by a search party (after they failed to return from their trip the prior day as planned). The victims' pockets were pulled out, and their wallets were not recovered. The wife of one victim saw her husband place thousands of dollars in his wallet before leaving on the hunting trip.

{¶5} On November 5, 1997, the police interviewed the victims' friends, including Appellant. The police learned Appellant's car was in the vicinity of the murders on October 31, 1997; yet, Appellant insisted he was in Akron at the time. Two sets of binoculars were recovered from Appellant's trunk. Relatives of the victims identified which set belonged to which victim and emphasized the victims would not hunt without their binoculars.

{¶6} On November 18, 1997, Appellant was indicted on two counts of aggravated murder in violation of R.C. 2903.01(B) and two counts of aggravated robbery in violation of R.C. 2911.01(A)(3). All counts were accompanied by firearm specifications. A jury found him guilty as charged.

{¶7} The trial court sentenced Appellant to 20 years to life for each aggravated murder count, ten years for each aggravated robbery count, and three years for each of the four firearm specifications. The court imposed all sentences consecutively.

{¶8} Appellant filed a timely appeal from the April 17, 1998 sentencing entry. Appellant's brief raised seven assignments of error. This court affirmed Appellant's conviction but reversed and remanded for resentencing for the purpose of issuing advisements on post-release control and "bad time" under R.C. 2929.19(B)(3). *State v. Jenkins*, 2000 WL 288658 (7th Dist. Mar. 14, 2000).

{¶9} At the March 22, 2000 resentencing hearing, the required notices were provided, as instructed by this court. The trial court reimposed the prior sentence with the exception of one reduction, which was jointly requested by the state and the defense: the trial court ran two of the four firearm specifications concurrently (eliminating six years from the prior sentence). As the court noted, this resulted in an aggregate sentence of 66 years to life (rather than 72 years to life).

{¶10} Twenty-four years later, on August 16, 2024, Appellant filed a pro se "motion to vacate a void judgment with prejudice." He argued the charges and sentences were void ab initio on the face of the record, claiming he was sentenced under statutes repealed on July 1, 1996 by SB 2 and additionally contending consecutive sentences could only be imposed by a jury. The motion was accompanied by various attachments including a table of pre-SB 2 indefinite sentences (which referred to aggravated murder and other

felonies) and a table of post-SB 2 definite sentences (which did not mention unclassified felonies such as aggravated murder).

{¶11} On August 30, 2024, Appellant filed a proposed order to vacate his sentence and discharge him from custody; it was attached to a filing wherein he focused on the July 1, 1996 effective date of SB 2. The state's response to Appellant's motion pointed to res judicata prohibitions and to Appellant's misstatements of the law.

{¶12} On September 25, 2024, the trial court denied Appellant's motion. Appellant filed a timely notice of appeal.

POST-CONVICTION MOTION

{¶13} Defendants often term a post-conviction filing as a motion to vacate a void judgment in an attempt to avoid complying with the strictures of the post-conviction relief statutes. *See* R.C. 2953.21(A)(2) (former version's deadline was 180 days after the trial transcripts were filed in the direct appeal or 180 days after the time for appealing if no direct appeal was filed; current version's deadline is 365 days). One exception for an untimely petition for post-conviction relief requires the petitioner to show (a) he was unavoidably prevented from discovering the facts upon which he must rely or the United States Supreme Court recognized a new federal or state right that applies retroactively to his situation and (b) clear and convincing evidence demonstrates that but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense. R.C. 2953.23(A)(1).

{¶14} Appellant's motion failed to discuss the statute or the exceptions to the strict post-conviction relief deadline in order to justify filing a petition many years after sentencing. The Ohio Supreme Court observes that "a postconviction proceeding is a collateral civil attack on the judgment [and] a petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition." *State v. Apanovitch*, 2018-Ohio-4744, ¶ 35-36, citing R.C. 2953.23(A)(1) ("a court may not entertain a petition filed after the expiration of the period prescribed" in R.C. 2953.21 unless an exception applies). Although a post-conviction petition is generally left to the discretion of the trial court, the issue of whether the trial court has jurisdiction to entertain an untimely petition for postconviction relief is a question of law reviewed de novo. *Id.* at ¶ 24.

{¶15} Furthermore, "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 180 (1967). As noted above, a defendant's motion filed after a criminal conviction will often claim the voidness doctrine applies, seeking to evade timeliness and res judicata prohibitions. *See State v. Amos*, 2024-Ohio-2939, ¶ 24-26 (7th Dist.). A question of law, such as whether a trial court's error rendered a void judgment, is reviewed de novo. *See generally State v. Hudson*, 2022-Ohio-1435 (where the Supreme Court pointed out subject matter jurisdiction was a question of law and thus reviewed de novo).

{¶16} As explained by the Ohio Supreme Court, "a judgment of conviction is void if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject matter, i.e., jurisdiction to try the defendant for the crime for which he was convicted." *State v. Harper*, 2020-Ohio-2913, ¶ 22 (announcing new precedent that an error in the trial court's *exercise* of its subject-matter jurisdiction when imposing post-release control resulted only in a voidable, rather than a void, judgment),[1] quoting *Perry* at 178. The court acquires personal jurisdiction over a criminal defendant where there exists a "lawfully issued process, followed by the arrest and arraignment of the accused and his plea to the charge" or the defendant "submits" to the court's jurisdiction without objecting to it. *State v. Henderson*, 2020-Ohio-4784, ¶ 36 (where the Supreme Court explained both the defendant and the state are prohibited from challenging a voidable sentence through post-conviction motions).

[1] Previously, the Ohio Supreme Court applied a narrow exception in cases where a sentence did not include statutorily-mandated terms, but even then, the voidness doctrine only extended to the specific failure. *See State v. Fischer*, 2010-Ohio-6238, ¶ 8, 25-31 (post-release control failure rendered that part of sentence void and did not taint the conviction or prison term); *State v. Harris*, 2012-Ohio-1908, ¶ 7, 17-18 (failure to impose mandatory driver's license suspension renders the sentence void to the extent of the failure). However, the Court stepped away from such precedent, including *State v. Beasley*, 14 Ohio St.3d 74, 75 (1984), a case cited by Appellant. *Harper*, 2020-Ohio-2913, at ¶ 28-29, 35-40 ("we overrule our precedent to the extent that it holds that the failure to properly impose postrelease control in the sentence renders that portion of a defendant's sentence void . . . .because noncompliance with requirements for imposing postrelease control is best remedied the same way as other trial and sentencing errors—through timely objections at sentencing and an appeal of the sentence").

{¶17} "Subject-matter jurisdiction refers to the constitutional or statutory power of a court to adjudicate a particular class or type of case." *Harper* at ¶ 23. "The issue of a court's subject matter jurisdiction cannot be waived. A party's failure to challenge a court's subject matter jurisdiction cannot be used, in effect, to bestow jurisdiction on a court where there is none." *State v. Wilson*, 73 Ohio St.3d 40, 44, 46 (1995). "A defendant's ability to challenge an entry at any time is the very essence of an entry being void, not voidable . . . If the entry were merely voidable, res judicata would apply." *Harper* at ¶ 18.

{¶18} "Conversely, where a judgment of conviction is rendered by a court having jurisdiction over the person of the defendant and jurisdiction of the subject matter, such judgment is not void, and the cause of action merged therein becomes res judicata as between the state and the defendant." *Id.* at ¶ 22, quoting *Perry* at 178-179. That is, once the court has jurisdiction over both the subject matter of the action and the parties to it, the right to make a decision in the case is perfected so that the decisions on questions thereafter arising in the case simply implicate the exercise of jurisdiction that had already been conferred. *Id.* at ¶ 25-26 (while pointing out a felony case is within the subject matter jurisdiction of a common pleas court).

{¶19} By way of further explanation, it is well-established in Supreme Court law that cases discussing errors related to "jurisdiction" do not always involve a lack of jurisdiction of the type that renders a judgment void. *Pratts v. Hurley*, 2004-Ohio-1980, ¶ 10-12, 21-22. The so-called "third type of jurisdiction" only renders a judgment voidable and involves the trial court's "jurisdiction over a particular case [which] refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction." *Bank of America, N.A. v. Kuchta*, 2014-Ohio-4275, ¶ 19-23.

{¶20} A "voidable" sentence is one imposed in an invalid, irregular, or erroneous manner by a court with jurisdiction to exercise its authority. *State v. Payne*, 2007-Ohio-4642, ¶ 27-29, fn. 3 (while the Supreme Court distinctly noted, "[i]t is axiomatic that imposing a sentence outside the statutory range, contrary to the statute, is outside a court's jurisdiction, thereby rendering the sentence void ab initio"). "Generally, a voidable judgment may be set aside only if successfully challenged on direct appeal." *Harper,* 2020-Ohio-2913, at ¶ 26, citing *Payne* at ¶ 28. In other words, where a trial court has jurisdiction to act but erroneously exercises that jurisdiction, the sentence is not void and

the sentence can be vacated only if successfully challenged on direct appeal. *Payne* at ¶ 27-29 (judicial fact-finding issues, such as consecutive sentencing do not result in a void sentence). "[F]ailure to timely—at the earliest available opportunity—assert an error in a voidable judgment, even if that error is constitutional in nature, amounts to the forfeiture of any objection." *Henderson*, 2020-Ohio-4784, at ¶ 17.

{¶21} In his pro se brief, Appellant raises four assignments of error, all attempting to avoid timeliness and res judicata bars by framing the arguments as rendering the judgment void.

ASSIGNMENTS OF ERROR ONE, TWO, AND FOUR

{¶22} The arguments under Appellant's first, second, and fourth assignments of error all address the sentences available under 1996 legislation known as Senate Bill 2 (SB 2). These assignments read as follows:

"THE COURT WAS IN ERROR AND THE APPELLANT WAS JUDICIALLY PREJUDICE[D] WHEN THE COURT FAILED TO ACKNOWLEDGE, ACCEPT, OBEY, AND ENFORCE THE FACTS THAT AGGRAVATED SENTENCES W[ERE] ABROGATED BY THE LEGISLATION JULY 01ST, 1996."

"THE COURT WAS IN ERROR AND THE APPELLANT WAS JUDICIALLY PREJUDICE[D] WHEN THE COURT FAILED TO ACKNOWLEDGE, ACCEPT, OBEY, AND ENFORCE THE LAW AFTER LIFE SENTENCES W[ERE] ABROGATED, EXPUNGED, REPEALED, AND RESCINDED BY THE LAW MAKER JULY 01ST, 1996."

"THE COURT WAS IN ERROR AND THE APPELLANT WAS JUDICIALLY PREJUDICE[D] WHEN THE COURT REFUSED TO ACKNOWLEDGE, ACCEPT, OBEY, AND ENFORCE THE APPELLANT'S PROPOSED ORDER WITH EXHIBITS."

{¶23} Appellant says the felony sentences in SB 2 were significantly shorter than those prior to its effective date of July 1, 1996. He claims SB 2 did not authorize the sentences he received for aggravated murder and aggravated robbery.

{¶24} First, we point out Appellant committed his crimes on October 31, 1997, after the July 1, 1996 effective date of SB 2. Contrary to Appellant's suggestions under these assignments of error, he was sentenced under SB 2 and not under prior law.

{¶25} Pre-SB 2 law would have entailed indefinite sentences ranging up to 25 years on each of the two aggravated robbery counts. *State v. Thomas*, 2016-Ohio-5567,

¶ 9 ("Under the sentencing scheme in place in 1993 when Thomas committed the offenses, he was subject to prison sentences ranging from 5 to 25 years to 10 to 25 years for each offense."), citing Former R.C. 2929.11(B)(1) (listing indefinite sentences for an aggravated felony of the first degree with and without a prior relevant conviction). Prior to SB 2, the statute defining the offense of aggravated robbery specified it was "an aggravated felony of the first degree." Former R.C. 2911.02(B).

{¶26} After SB 2, the offense of "aggravated robbery" remained, and its label was changed to "a felony of the first degree." R.C. 2911.02(B) (eff. 7/1/96). In addition, SB 2 eliminated indefinite sentences for the felony types listed in R.C. 2929.14(A), including a felony of the first degree such as aggravated robbery. *Thomas* at ¶ 10. Appellant was indicted under post-SB 2 statutes, and he received a definite 10-year sentence on each count of aggravated robbery, which were first-degree felonies under post-SB 2 R.C. 2929.14(A). Thus, contrary to his argument, his aggravated robbery counts received the benefit of SB 2.

{¶27} Contrary to another contention suggested by Appellant's motion to vacate, the offense of aggravated murder was not eliminated by SB 2. And, to the extent Appellant believes his aggravated murder counts should have received sentences under a table he cites as applicable to a first-degree felony, this contention fails to recognize aggravated murder is subject to its own sentencing statutes.[2]

{¶28} "Aggravated murder and murder are felonies." R.C. 2901.02(C). However, they are unclassified felonies and thus not subject to specific sentencing statutes covering first-degree felonies. *See, e.g., State v. Clark,* 2008-Ohio-3748, ¶ 36 (where the Supreme Court pointed out, "an individual sentenced for aggravated murder such as Clark is not subject to postrelease control, because that crime is an unclassified felony to which the postrelease-control statute does not apply"). In distinguishing aggravated murder from degreed felonies, the statute broadly explains: "Offenses include aggravated murder, murder, felonies of the first, second, third, fourth, and fifth degree, misdemeanors of the

[2] We note Appellant makes mention of the offense of murder, which is also subject to its own special sentencing provisions rather than the sentencing statute for ordinary felonies. *See* R.C. 2929.02(B) (fifteen to life for murder). However, the offense of murder and its penalties are not relevant to Appellant's *aggravated* murder case.

first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified." R.C. 2901.02(A) (SB 2).[3]

{¶29} R.C. 2929.14, which was enacted by SB 2 on July 1, 1996, sets forth the penalties for some but not all felonies. This penalty statute is *specifically prefaced with the statement*, "except in relation to an offense for which a sentence of death or life imprisonment is to be imposed" (before setting forth the penalties for a "felony of the first degree" and then for the lesser-degreed felonies). R.C. 2929.14(A).

{¶30} Likewise, the statute defining the offense of aggravated murder specifies the pertinent sentencing statute. Former R.C. 2903.01(D), now (G). That is, this statute under which Appellant was indicted and convicted calls for sentencing under R.C. 2929.02, rather than under R.C. 2929.14. *Id.*, citing R.C. 2929.02.

{¶31} The latter statute expressly provides: "Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code. . ." R.C. 2929.02(A) (eff. 1/1/97). Pursuant to the cited law applicable to a non-capital aggravated murder defendant, "the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender." R.C. 2929.03(A) (maintaining the same language before and after SB 2).[4] Accordingly, Appellant was properly sentenced to 20 years to life in prison on each aggravated murder. There was no lesser sentence available for the aggravated murder offenses.

{¶32} The arguments within assignments of error one, two, and four regarding the available sentences for offenses committed in 1997 are without merit.

ASSIGNMENT OF ERROR THREE

{¶33} Appellant's remaining assignment of error contends:

[3] Prior to SB 2, this statute read: "Offenses include aggravated murder, murder, aggravated felonies of the first, second, and third degree, felonies of the first, second, third, and fourth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified." R.C. 2901.02(A) (pre- SB 2).

[4] After Appellant's sentencing, *longer* sentencing options were added to the statute, allowing the court sentencing for a standard aggravated murder to choose a life sentence with 20, 25, or 30 years before parole eligibility or even life without parole. R.C. 2929.03(A)(1)(a)-(d).

"THE COURT WAS IN ERROR AND THE APPELLANT WAS JUDICIALLY PREJUDICE[D] WHEN THE COURT CONSCIOUSLY REFUSED TO ACKNOWLEDGE, ACCEPT, OBEY, AND ENFORCE APPRENDI VS NEW JERSEY ACCORDING TO THE UNITED STATES SUPREME COURT AS THE ULTIMATE AUTHORITY."

{¶34} Appellant claims the judgment imposing consecutive sentences was void because the jury did not recommend consecutive sentences and the federal constitution requires a jury rather than a judge to make factual findings resulting in an enhanced sentence. In the cited *Apprendi* case, the United States Supreme Court reviewed a statute allowing a sentence above the maximum if the judge found by a preponderance of the evidence that racial bias was a motive for the offense. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Ruling the sentence imposed after judicial fact-finding violated the Sixth Amendment right to a jury, the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

{¶35} As Appellant points out, the Ohio Supreme Court applied United States Supreme Court case law such as *Apprendi* when concluding Ohio's statutory consecutive sentence findings in R.C. 2929.14 violated the Sixth Amendment right to a trial by jury. *State v. Foster*, 2006-Ohio-856, ¶ 83. In ordering a remedy, the *Foster* Court merely severed the requirement of judicial fact-finding from the statute, struck the statutory presumption of concurrent sentences, and *gave judges discretion to impose consecutive sentences*. *Id.* at ¶ 96-106 (applying the rule to and ordering resentencing for cases *pending on direct review* where the judge could impose consecutive sentences without being constrained by any statutory findings or reasoning).

{¶36} Subsequently, the United States Supreme Court ruled a state statute requiring a judge to find certain facts before imposing consecutive sentences was constitutional. *Oregon v. Ice*, 555 U.S. 160 (2009). In refusing to extend the *Apprendi* line of cases to judicial fact-finding required by consecutive sentencing statutes, the Court pointed to historical sentencing principles under which "the jury played no role in the decision to impose sentences consecutively or concurrently." *Id.* at 168.

{¶37} The Ohio Supreme Court thereafter recognized its *Foster* decision on consecutive sentence findings violating the constitutional jury trial right was erroneous

and declared the *Ice* case "effectively overruled" this part of *Foster*. *State v. Bonnell*, 2014-Ohio-3177, ¶ 18-19 (where the Supreme Court discussed newly re-enacted consecutive sentence findings now in division (C) of R.C. 2929.14), citing *State v. Hodge*, 2010-Ohio-6320, ¶ 1 (where the Supreme Court determined it could not reactivate the statutory provisions it struck in *Foster* and pointed out new legislation would be required for future sentences). "After *Ice*, it is now settled law that *Apprendi* and *Blakely* do not control the resolution of this issue and the jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences." *Hodge* at ¶ 19.

{¶38} As Appellant was sentenced prior to the cited consecutive sentencing holdings and had no appeal pending during *Foster*, his case was not affected by the period during which some pending cases were remanded for a resentencing hearing (at which the trial court *would not have been required to make any findings* for consecutive sentences). And now, *Foster* is no longer precedential in the consecutive sentencing arena due to *Ice* and its progeny.

{¶39} Moreover, although the Ohio Supreme Court used the term "void" in *Foster*, the Court later explained the judicial fact-finding issues in *Foster* would only result in a voidable judgment and would not render a judgment void. *See, e.g., State v. Payne*, 2007-Ohio-4642, ¶ 27-30 (therefore, judicial fact-finding issues, including consecutive sentencing, can be forfeited). As discussed in our general law section above: "void and voidable sentences are distinguishable. A void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act. . . . Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously." *Id.* at ¶ 27.

{¶40} Where a trial court had jurisdiction but exercised the jurisdiction erroneously, such a non-void sentence can be set aside only in the direct appeal (as the error is on the record). *Id.* at ¶ 28 (and rejecting the defendant's direct appeal argument by finding no plain error). The Supreme Court emphasized the holding that portions of R.C. 2929.14 were unconstitutional in *Foster* merely "rendered some pre-*Foster* sentences erroneous exercises of trial court jurisdiction. Thus, pre-*Foster* sentences

imposed after judicial fact-finding and falling within the statutory range are *voidable*." (Emphasis added.) *Id.* at ¶ 29. The argument asserted by Appellant here would accordingly not render a sentence void.

{¶41} Consequently, Appellant is barred from raising any *Apprendi/Foster* judicial fact-finding issues in such an untimely manner. *Id.; see also Steele v. Harris*, 2020-Ohio-5480, ¶ 4-5, 18-19 (where a habeas petition claimed a judgment was void based on *Apprendi*, the Supreme Court said such a challenge to the sentencing statute was "not a claim of a jurisdictional defect" as the court in which the defendant was convicted had jurisdiction to determine the constitutional question). And again, even for pending appeals at the time of *Foster*, the remedy was merely resentencing where the trial court could impose non-minimum, maximum, and consecutive sentences without being constrained by *any* statutory requirements on findings or reasons. *Foster*, 2006-Ohio-856, at ¶ 97, 99-100. Lastly, we have likewise applied res judicata to bar a defendant from alleging maximum, consecutive sentences were imposed without considering the required statutory factors when such allegations were untimely raised in a post-conviction motion filed 21 years late. *State v. Mayer*, 2019-Ohio-2725, ¶ 15 (7th Dist.) (barring merger arguments as well).

{¶42} In accordance with the various legal principles set forth above, Appellant's third assignment of error is without merit. Appellant's fourth assignment of error, which refers to the "proposed order" he filed after his motion to vacate, was addressed in the prior section on SB 2. To the extent it intended to also incorporate consecutive sentencing arguments related to *Apprendi* or *Foster*, it is overruled for the reasons rejecting the third assignment of error (in addition to the reasons rejecting the first two assignments of error on SB 2).

{¶43} For the foregoing reasons, the trial court's judgment is affirmed.

Waite, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.