

[Cite as *State v. Gates*, 2010-Ohio-5348.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93789

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DENNIS GATES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-360793

BEFORE: McMonagle, P.J., Blackmon, J., and Jones, J.

RELEASED AND JOURNALIZED: November 4, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Dennis Gates, appeals from the trial court's July 22, 2009, sentencing entry. We affirm.

{¶ 2} The record before us demonstrates that in 1998, Gates was charged in a ten-count indictment for crimes alleged to have occurred in 1996 and 1998. That same year, Gates was convicted of the following counts: Count 1, June 1996 rape of L.J.; Count 2, June 1996 rape of L.J.; Count 5,

January 1998 rape of A.S.; Count 6, June 1998 sexual battery of A.S.; Count 7, February 1998 rape of J.S.; and Count 8, February 1998 rape of J.S.

{¶ 3} Gates was also sentenced in 1998. Initially, the court sentenced him to a term of ten to 25 years on Counts 1 and 2. Gates requested a definite sentence of ten years under Senate Bill 2, however. In accordance with his request, the trial court vacated its sentence on Counts 1 and 2, and sentenced Gates to ten years on those counts, to be served concurrently. The court sentenced him as follows on the remaining counts: ten years on Count 5 and 18 months on Count 6, to be served concurrently, but consecutively to Counts 1 and 2; and ten years on both Counts 7 and 8, to be served concurrently, but consecutively to Counts 1 and 2 and Counts 5 and 6. Gates was therefore sentenced to a 30-year prison term. Postrelease control was not imposed.

{¶ 4} In March 2009, Gates filed a motion for resentencing because no postrelease control had been imposed; the motion was granted. In July 2009, he was resentenced to a term of ten to 25 years on Counts 1 and 2, to be served concurrently, but consecutively to the sentences on the remaining counts, which remained the same. Postrelease control was imposed. Gates now challenges his sentence in his three assignments of error.

{¶ 5} In his first assignment of error, Gates contends that “the trial court erred in imposing a new sentence on Counts 1 and 2 because [he] had

already completed the service of the sentences imposed on [those] counts.”
We disagree.

{¶ 6} Because Gates committed the crimes under Counts 1 and 2 prior to July 1, 1996, the effective date of Senate Bill 2, the pre-Senate Bill 2 sentencing scheme controlled the trial court’s imposition of sentence. *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, 697 N.E.2d 634, paragraph two of the syllabus. The trial court initially properly sentenced Gates under the pre-Senate Bill 2 sentencing scheme, but, upon Gates’s request, vacated that sentence, and sentenced him to a definite term. The sentence was corrected years later at resentencing, which was held upon Gates’s request.

{¶ 7} Under R.C. 5145.01, which governs the duration of sentences, the sentence on Counts 1 and 2 had not been served. In particular, R.C. 5145.01 provides in relevant part that “[i]f a prisoner is sentenced for two or more separate felonies, the prisoner’s term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply. If sentenced consecutively, * * * the prisoner shall be held to be serving one continuous term of imprisonment.” Gates’s initial sentence of 30 years included consecutive sentences. Thus, at the time of his resentencing ten years later, he was still serving his “one continuous term of imprisonment.”

{¶ 8} Further, R.C. 5145.01 provides that “[i]f, through oversight or otherwise, a person is sentenced to a state correctional institution under a definite term for an offense for which a definite term of imprisonment is not provided by statute, the sentence shall not thereby become void, but the person shall be subject to the liabilities of such sections and receive the benefits thereof, as if the person had been sentenced in the manner required by this section.” Thus, Gates’s 1998 definite-term sentence on Counts 1 and 2 was not void and it was deemed, under the statute, as an indefinite sentence.

{¶ 9} In light of the above, the first assignment of error is overruled.

{¶ 10} Gates’s second assignment of error reads, “[t]he trial court erred by imposing consecutive sentences.” His third assignment of error reads, “[t]he trial court erred in imposing more than the minimum terms of imprisonment on Counts [5, 6, 7, and 8].” These assignments of error are interrelated and will be considered together.

{¶ 11} Gates contends that the trial court failed to make the required findings under R.C. 2929.14(E)(4) for the imposition of consecutive sentences.

He acknowledges that in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that those findings are no longer required. Gates cites *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, however, wherein the United States Supreme Court held

that judicial fact-finding with respect to consecutive terms of imprisonment does not violate the Sixth Amendment. *Oregon* was decided in January 2009; Gates was resentenced in July 2009, but did not raise *Oregon*, and, therefore, has forfeited his argument on this issue. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶21. Moreover, this court will continue to follow *Foster* when reviewing felony sentencing issues until the Ohio Supreme Court orders otherwise. See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29.

{¶ 12} Further, the trial court is no longer required to make findings when imposing a more-than-the-minimum sentence post-*Foster*. See, e.g., *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715, ¶47.

{¶ 13} In light of the above, the second and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

**PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J., CONCUR**