

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-027
RUSSELL E. APPENZELLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 000108.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Robert E. Shea, The Spitz Law Firm, 4568 Mayfield Road, Suite 102, South Euclid, OH 44121 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Russell E. Appenzeller, appeals from the judgment entered by the Lake County Court of Common Pleas. Following a remand from this court, the trial court sentenced Appenzeller to an aggregate prison term of 28 years for his convictions for burglary, attempted burglary, and theft.

{¶2} In 2005, eight residences in the Mentor area were broken into. Appenzeller was indicted with 18 felony counts relating to these break-ins. Appenzeller

pled not guilty to the charges, and a jury trial was held. The jury found Appenzeller guilty on all 18 counts. Thereafter, the trial court entered convictions and imposed sentences for all 18 counts.

{¶3} Appenzeller appealed his convictions and sentences to this court. On appeal, this court concluded that the state presented sufficient evidence to support Appenzeller's convictions. *State v. Appenzeller*, 11th Dist. No. 2006-L-258, 2008-Ohio-7005, at ¶23-35. However, this court held that several of the burglary and attempted burglary counts were allied offenses of similar import to other charged offenses. *Id.* at ¶90-117. Thus, this court affirmed Appenzeller's convictions on counts one, three, five, six, eight, nine, 11, 13, 15, and 17 and reversed Appenzeller's convictions on counts two, four, seven, ten, 12, 14, 16, and 18. *Id.* at ¶124. This court remanded the case to the trial court for the trial court to merge the counts that were allied offenses and to resentence Appenzeller. *Id.*

{¶4} On remand, the trial court conducted a resentencing hearing. The trial court merged count two with count one, count four with count three, count seven with count six, count ten with count nine, count 12 with count 11, count 14 with count 13, count 16 with count 15, and count 18 with count 17. Then the trial court imposed prison terms of four years on count one; four years on count three; one year on count five, to run concurrent with count three; four years on count six; one year on count eight, to run concurrent with count six; four years on count nine; four years on count 11; four years on count 13; two years on count 15; and two years on count 17. The trial court ordered the prison terms for counts one, three, six, nine, 11, 13, 15, and 17 to be served consecutively, for an aggregate prison term of 28 years.

{¶5} Appenzeller now appeals the trial court’s resentencing entry to this court. Appenzeller raises three assignments of error. His first assignment of error is:

{¶6} “The trial court violated Mr. Appenzeller’s due process rights by imposing non-minimum and consecutive sentences.”

{¶7} In his first assignment of error, Appenzeller raises two arguments. First, he argues that the Supreme Court of Ohio’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 does not comply with the United States Supreme Court’s decision in *Blakely v. Washington* (2004), 542 U.S. 296.

{¶8} In rejecting a similar challenge to the *State v. Foster* decision, this court held, “as an intermediate appellate court’ we are without authority to ‘make a determination that conflicts with a decision of the Supreme Court of Ohio that has not been reversed or overruled.’” *State v. Buckmaster*, 11th Dist. No. 2007-L-105, 2008-Ohio-1336, at ¶15. (Citation omitted.) Likewise, the Tenth Appellate District has noted that inferior appellate courts ““lack the jurisdictional authority under Article IV, Section 3(B)(2) of the Ohio Constitution to declare a mandate of the Ohio Supreme Court to be unconstitutional.”” *State v. Ryan*, 10th Dist. Nos. 08AP-481 & 08AP-482, 2009-Ohio-3235, at ¶48. (Citations omitted.) Thus, this court does not have the authority to overturn the Supreme Court of Ohio’s decision in *State v. Foster*.

{¶9} Next, Appenzeller argues that the Supreme Court of Ohio’s decision in *State v. Foster* is incompatible with the United States Supreme Court’s decision in *Cunningham v. California* (2007), 549 U.S. 270.

{¶10} “*Cunningham* struck down California’s three-tiered determinate sentencing law, which required trial courts to make certain findings of facts before

imposing a higher-tier prison term. *Cunningham* remedied the constitutional infirmity by severing those portions making the scheme mandatory, leaving only advisory guidelines in place, which is the precise remedy adopted by *Foster*.” *State v. Moore*, 3d Dist. Nos. 05-07-18, 05-07-20, and 05-07-21, 2008-Ohio-1152, at ¶18, quoting *State v. Land*, 3d Dist. No. 2-07-20, 2007-Ohio-6963, at ¶11. (Secondary citations omitted.)

{¶11} In addition, we note that other appellate districts have rejected arguments that the *State v. Foster* decision is inconsistent with the *Cunningham v. California* decision. See *State v. Montgomery*, 4th Dist. No. 07CA858, 2008-Ohio-4753, at ¶29-31; *State v. Schandel*, 7th Dist. No. 07-CA-848, 2008-Ohio-6359, ¶147-151; and *State v. Ryan*, 2009-Ohio-3235, at ¶48-49.

{¶12} For these reasons, Appenzeller’s first assignment of error is without merit.

{¶13} Appenzeller’s second assignment of error is:

{¶14} “The trial court violated Mr. Appenzeller’s due process rights by imposing non-minimum and consecutive sentences in violation of the Due Process and Ex Post Facto Clauses of the United States Constitution.”

{¶15} Appenzeller argues that, since his crimes were committed in 2005, the trial court should not have applied the *State v. Foster* remedy.

{¶16} Appenzeller notes this court has rejected an identical argument in *State v. Wright*, 11th Dist. No. 2007-L-072, 2008-Ohio-1128. We agree with the *Wright* analysis. Moreover, this court has consistently rejected due process and ex post facto challenges regarding the *Foster* remedy. See *State v. Medina*, 2007-L-025, 2008-Ohio-2511, at ¶11 and cases cited therein.

{¶17} Based on the prior authority of this court, Appenzeller's second assignment of error is without merit.

{¶18} Appenzeller's third assignment of error is:

{¶19} "The trial court violated Mr. Appenzeller's due process rights by imposing consecutive sentences without authority."

{¶20} Appenzeller argues that the trial court did not have authority to impose consecutive sentences after the severance remedy of *State v. Foster*. Appenzeller contends the authority to impose consecutive sentences was contained in the severed portions of the statutes.

{¶21} Appenzeller acknowledges that this court has rejected a similar argument in *State v. Buckmaster*, 2008-Ohio-1336. In *Buckmaster*, this court noted that, despite certain portions of Ohio's sentencing statutes being severed after the *Foster* decision, R.C. 2929.41(B) permitted trial courts to impose felony sentences consecutively. *Id.* at ¶18-23. Moreover, this court held, alternatively, that even without specific statutory authority, trial courts have "inherent power, derived from the common law, to impose consecutive sentences." *Id.* at ¶24, quoting *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-2216, at ¶11. (Secondary citations omitted.)

{¶22} Appenzeller's third assignment of error is without merit.

{¶23} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.