

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	Case No. 08CA23
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
JOHN F. TAYLOR,	:	
	:	
Defendant-Appellant.	:	Released 6/19/09

APPEARANCES:

Michael D. Miller, Athens, Ohio, for appellant.

C. David Warren, ATHENS COUNTY PROSECUTOR, and George Reitmeier, ATHENS COUNTY ASSISTANT PROSECUTOR, Athens, Ohio, for appellee.

Harsha, J.

{¶1} John F. Taylor appeals the trial court’s judgment, entered on remand from the Supreme Court of Ohio, resentencing him to maximum, consecutive prison terms for two counts of rape, in violation of R.C. 2907.02(A)(2). Although the trial court imposed a sentence within the statutory range, Taylor argues that his sentence is clearly and convincingly contrary to law. First, Taylor contends that the trial court violated the Ex Post Facto Clause of the United States Constitution in retroactively applying the remedial holding of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 to crimes predating that decision. However, we adhere to our previous holdings that a trial court does not violate ex post facto principles by following the remedy mandated by the Supreme Court of Ohio in *Foster*.

{¶2} Second, Taylor contends that the trial court’s judgment is contrary to law

because the court failed to adequately consider R.C. 2929.11 and R.C. 2929.12 when it resentenced him. However, the court's Judgment Entry expressly states that the court considered the relevant statutory provisions, and Taylor fails to explain with specificity what information he claims the court failed to take into account. Therefore, we also reject this argument.

{¶3} Third, Taylor contends that his sentence is contrary to law because it violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. Because Taylor failed to make this argument to the trial court and properly preserve the issue for appellate review, he forfeited the right to raise this issue on appeal. Thus, we find that Taylor's sentence is not clearly and convincingly contrary to law.

{¶4} Next, Taylor argues that the trial court abused its discretion in sentencing him to maximum, consecutive prison terms, particularly in light of the fact that these terms are mandatory and not subject to any provisions for early release. According to Taylor, his crimes "cannot be considered 'the worst offenses' that would warrant the imposition of consecutive sentences." However, the court cited valid reasons for imposing Taylor's sentence, i.e. facts demonstrating the seriousness of his crimes and his extensive criminal history. Therefore, the trial court's decision to sentence Taylor to maximum, consecutive prison terms was not unreasonable, arbitrary, or unconscionable. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶5} On January 29, 2004, an Athens County Grand Jury indicted Taylor for two counts of rape in violation of R.C. 2907.02(A)(2), with sexually violent predator

specifications. After a trial, the jury returned a guilty verdict on both counts. Because the jury deadlocked on the sexually violent predator specifications, the trial court dismissed them with prejudice. The court sentenced Taylor to the statutory maximum term of ten years imprisonment on each count and ordered that he serve the sentences consecutively.

{¶6} In his first appeal to this court, Taylor argued in part that the trial court violated his right to a jury trial under the Sixth Amendment to the United States Constitution based on the United States Supreme Court's holding in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Specifically, Taylor contended that the trial court improperly enhanced his sentences beyond the statutory minimum and ordered him to serve each sentence consecutively based on factual determinations made by the judge, rather than by the jury. We affirmed the trial court's judgment in *State v. Taylor*, Athens App. No. 04CA32, 2005-Ohio-3721.

{¶7} Subsequently, the Supreme Court of Ohio concluded in *Foster* that several of Ohio's sentencing statutes were unconstitutional to the extent that they required judicial fact-finding before imposition of maximum, consecutive, or greater-than-minimum sentences. *Foster* at paragraphs one, three, and five of the syllabus. The Court severed the offending unconstitutional provisions from the statutes. See *id.* at paragraphs two, four, and six of the syllabus. The *Foster* court concluded that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus.

{¶8} On May 3, 2006, the Supreme Court of Ohio reversed our judgment in Taylor's first appeal and remanded the action to the trial court for resentencing under *Foster. In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174, at ¶106. Pursuant to the Court's remand, the trial court held a resentencing hearing on September 18, 2008.¹ After the trial court again sentenced Taylor to the statutory maximum term of ten years imprisonment on each count and ordered that he serve the sentences consecutively, Taylor filed this appeal.

II. Assignments of Error

{¶9} Taylor assigns the following errors for our review:

THE TRIAL COURT VIOLATED THE PROHIBITION AGAINST EX POST FACTO ADMINISTRATION OF THE LAW

THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE WHEN IT SENTENCED APPELLANT TO THE MAXIMUM SENTENCE AND IMPOSED THE SENTENCES CONSECUTIVELY

III. Sentencing

{¶10} In his first assignment of error, Taylor contends that his sentence violates the Ex Post Facto Clause of the United States Constitution. In his second assignment of error, Taylor contends that the trial court improperly imposed his sentence because (1) the court failed to adequately consider R.C. 2929.11 and R.C. 2929.12 when it sentenced him; (2) his sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution; and (3) the trial court abused its discretion. Because both assignments of error address the propriety of Taylor's sentence, we address them together.

¹ The more than two-year delay between the Supreme Court of Ohio's remand and the trial court's resentencing hearing appears to be due, in part, to the failure of Taylor's former attorney and the failure of the State to timely take action to schedule this hearing.

{¶11} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio announced the standard for appellate review of felony sentences subsequent to its ruling in *Foster*.² Post-*Foster*, we must employ a two-step analysis to review sentences. First, we “must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.” *Kalish* at ¶4. If this first prong is satisfied, we must review the trial court’s decision under an abuse-of-discretion standard. *Id.*

{¶12} Here, Taylor contends that the trial court’s application of *Foster*’s severance remedy to his case violates the Ex Post Facto Clause of the United States Constitution because the severed provisions in R.C. 2929.14, R.C. 2929.19, and R.C. 2929.41 that required judicial fact-finding before imposition of maximum, consecutive, or greater-than-minimum sentences protected defendants from “arbitrary sentences.” However, “[t]his Court, as well as other intermediate appellate courts in Ohio, has determined that application of *Foster* to defendants who committed their offenses before that decision was released does not violate constitutional principles of due process or operate as an ex post facto law.” *State v. Henthorn*, Washington App. No. 06CA62, 2007-Ohio-2960, at ¶13, citing *State v. Henry*, Pickaway App. No. 06CA8, 2006-Ohio-

² As we noted in *State v. Ross*, Adams App. No. 08CA872, 2009-Ohio-877, at ¶8, fn. 2:

Whether *Kalish* actually clarifies the issue is open to debate. The opinion carries no syllabus[,] and only three justices concurred in the decision. A fourth concurred in judgment only[,] and three justice[s] dissented. As a result, our colleagues on the Cuyahoga County Court of Appeals have announced they simply will not follow the plurality and will continue to apply the standard the Eighth District has used all along. *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873, at ¶99, fn. 1. The same problem has been recognized in the Ninth District, but our colleagues on the Summit County Court of Appeals have applied the two-step *Kalish* analysis regardless. See *State v. Jenkins*, Summit App. No. 24166, 2008-Ohio-6620, at ¶10, fn. 1. We will do the same.

6942, at ¶¶8-11; *State v. Grimes*, Washington App. No. 04CA17, 2006-Ohio-6360, at ¶¶9-10; *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162; *State v. Cain*, Franklin App. No. 06AP-682, 2007-Ohio-945, at ¶6; *State v. Hildreth*, Lorain App. No. 06CA008879, 2006-Ohio-5058, at ¶10; and *State v. Durbin*, Greene App. No. 2005-CA-134, 2006-Ohio-5125, at ¶¶41-42. While recognizing Taylor's need to preserve this issue for further review, we see no reason to revisit or reject our prior decisions. Accordingly, we overrule Taylor's first assignment of error.

{¶13} Next, Taylor contends that his sentence is contrary to law because the trial court failed to adequately consider R.C. 2929.11 and R.C. 292.12 when it resentenced him, as evidenced by the fact that the court imposed the same sentence it imposed prior to the Supreme Court of Ohio's remand. Although sentencing courts are "no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences[.]" *Foster* at paragraph seven of the syllabus, they must still consider R.C. 2929.11 and R.C. 2929.12 before imposing a sentence. *Kalish* at ¶13. The trial court's Judgment Entry expressly states that the court considered these provisions. "Because there is no requirement that the court make specific findings concerning the various factors in these statutes, the court[']s conduct in this regard is not contrary to law." *State v. Woodruff*, Ross App. No. 07CA2972, 2008-Ohio-967, at ¶16, citing *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 729 N.E.2d 793. Even though the trial court imposed the same sentence before and after the remand, that fact standing alone does not establish that the court failed to adequately consider the relevant statutory provisions. Furthermore, Taylor fails to state with specificity what information the trial court failed to consider that would have dictated a

shorter sentence. Therefore, we reject this argument as a basis for concluding that the trial court's judgment is contrary to law.

{¶14} With conclusory analysis and no citation to caselaw, Taylor also argues that his sentence is contrary to law because it violates the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution. Although Taylor could have raised this argument in the trial court so that it could address the issue, he failed to do so. Therefore, Taylor has forfeited the right to raise this issue on appeal. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, at ¶¶21-23. And because Taylor provides only conclusory analysis and no citation to caselaw, he has failed to satisfy his burden of demonstrating plain error. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶378. Taylor cites no other failure of the trial court to comply with “applicable rules and statutes” and we have found none from our review of the record. Accordingly, his sentence is not clearly and convincingly contrary to law.

{¶15} Next, we must determine whether the trial court abused its discretion in selecting Taylor's sentence. “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. As we explained in *State v. Davis*, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶42:

“An “abuse of discretion” has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. * * * Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's [sic] can reverse the sentence. [Id.] This by no means is

an exhaustive or exclusive list of the circumstances under which an appellate court may find that the trial court abused its discretion in the imposition of [a] sentence in a particular case.” [*State v. Elswick*, Lake App. No. 2006-L-075, 2006-Ohio-7011], at ¶49, quoting *State v. Firouzmandi*, Licking App. No. 2006-CA-41, 2006-Ohio-5823, at ¶56.

{¶16} Taylor contends that the trial court abused its discretion in sentencing him to maximum, consecutive prison terms, particularly in light of the fact that these terms are mandatory and not subject to any provision for early release. Taylor argues that his crimes, while serious, “cannot be considered ‘the worst offenses’ that would warrant the imposition of consecutive sentences.” However, the court based its sentence upon reason and the facts before the court. The trial court noted facts demonstrating the severity of Taylor’s crimes. Taylor (1) raped both victims close in time; (2) threatened both victims with a knife; (3) forced both victims, one of whom was a 16-year old virgin, to perform various and multiple sex acts; and (4) was a long-time family friend of one of the victims. The trial court also understood that Taylor had an “extensive prior criminal record,” which the court detailed at length during the sentencing hearing, and had been imprisoned once before. The court felt Taylor’s criminal background “support[ed] the need to protect the public” from him. Under R.C. 2929.14(A)(1), the statutory range for a first-degree felony is three to ten years. The trial court sentenced Taylor to a ten-year prison term for each count of rape. Therefore, the trial court imposed a sentence within the permissible statutory range. The trial court did not arbitrarily, unconscionably, or unreasonably impose Taylor’s sentence. Accordingly, we overrule Taylor’s second assignment of error.

IV. Conclusion

{¶17} Having overruled each of the assignments of error, we affirm the trial

court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.