

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff- Appellee,

v.

WAYNE CHRISTIAN,

Defendant- Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 07 JE 0009

Delayed Application for Reconsideration

BEFORE:

Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Denied.

Wayne Christian, pro se, #521-627, Trumbull Correctional Institute, P.O. Box 901, Leavittsburg, Ohio 44430 for Defendant-Appellant

Atty. Jane M. Hanlin, Atty. Thomas Straus, Prosecuting Attorney, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee.

Dated: March 30, 2020

PER CURIAM.

{¶1} On February 10, 2020, almost 12 years after this court decided his direct appeal, Defendant-Appellant Wayne Christian has filed a delayed application for reconsideration of his appeal in *State v. Christian*, 7th Dist. Jefferson No. 07 JE 9, 2007-Ohio-7205.

{¶2} In the direct appeal, we affirmed the jury verdict convicting Appellant of nine counts of felonious assault in violation R.C. 2903.11(B)(3) for engaging in sexual conduct with a person under the age of eighteen years of age knowing that he had tested positive for HIV. *Id.* at ¶ 1, 58. This court also affirmed the trial court’s decision to impose consecutive sentences for five of the counts. *Id.*

{¶3} An application of reconsideration is governed by App.R. 26(A)(1). To be considered timely, an application for reconsideration must be filed “no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing.” App.R. 26(A)(1). Clearly, this motion for reconsideration is untimely.

{¶4} However, the time for filing an application for reconsideration can be extended upon “a showing of extraordinary circumstances.” App.R. 14(B). Appellant contends that he can show extraordinary circumstances in this case. He cites the Ohio Supreme Court decision in *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127 to support his position that there is extraordinary circumstances.

{¶5} In *Moore*, the Ohio Supreme Court reversed this court’s decision denying Moore’s delayed application for reconsideration. The request for delayed reconsideration was based on the United States Supreme Court decision in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010). *Graham* prohibited the imposition of sentences of life imprisonment without parole on juvenile non-homicide offenders. *Id.* While Moore did not receive a life sentence, his aggregate sentence for the three counts of aggravated robbery, three counts of rape, three counts of complicity to commit rape, one count of kidnapping, one count of conspiracy to commit aggravated robbery and one count of aggravated menacing constituted a functional life sentence. *Moore* at ¶ 96. The Ohio Supreme Court determined that there was extraordinary circumstances for the delay in requesting reconsideration and reversed our decision denying the application for delayed reconsideration. The Ohio Supreme Court found the *Graham* holding and analysis was raised in a timely manner and held:

[W]e have established that Moore's case is controlled by *Graham* and that there is no meaningful distinction between the two cases. A defendant convicted of crimes he committed as a juvenile cannot at the outset be sentenced to a lifetime in prison—whether labeled “life in prison without parole” or consisting of a term of years extending beyond the defendant's life expectancy—without having a meaningful opportunity to establish maturity and rehabilitation justifying release.

Id.

{¶6} Using that case, Appellant argues his basis for extraordinary circumstances in the case at hand is case law from other states, changes in the felonious assault statutes in other states regarding HIV, and scientific and medical research not available at the Appellant's direct appeal. Appellant also makes two arguments regarding the imposition of five consecutive sentences. None of these arguments presented constitutes extraordinary circumstances requiring allowance of a delayed application for reconsideration.

{¶7} Appellant's assertion that the case law, changes in other states statutes, and scientific and medical research indicate that the statute he was convicted of violating, R.C. 2903.11(B)(3), is outdated. Similar arguments were made to the trial court and made on appeal to this court in *State v. Christian*, 7th Dist. Jefferson No. 16 JE 0030, 2017-Ohio-9420. In that case, Appellant argued the scientific and medical research indicate that the transmission through engaging in sexual conduct was remote and that his use of medication further lowered the risk. We rejected that argument indicating that the Ohio Supreme Court has acknowledged that engaging in sexual conduct remains a method of transmission and that any medical advancements in the treatment and transmission of HIV do not affect the rational relationship between the classification and the goal of protecting minors. *Id.* at ¶ 17. As to him taking medication at the time of the offense, this court concluded that there was no evidence to support his claim and even if he was on medication that did not eliminate the possibility of transmission. *Id.* at ¶ 20.

{¶8} Since these arguments were made and presented to this court in 2017, there is no showing of extraordinary circumstances to reconsider our 2007 decision 12 years after it was decided. Furthermore, Appellant does not cite this court to any Ohio Supreme Court or United States Supreme Court case supporting his position or indicating

the degree of the offense and penalty are unconstitutional. Thus, this case is unlike *Moore* where the basis for extraordinary circumstances was based on a recently decided United State Supreme Court decision. Furthermore, there have been no substantial changes to the section of the statute he was convicted of violating. Although other states may have altered their laws on nondisclosure of HIV status prior to engaging in sexual conduct with another, Ohio has not done so.

{¶9} As to the two arguments concerning the imposition of consecutive sentences, those arguments also do not constitute extraordinary circumstances for reconsidering the decision announced in 2007. The first argument presented by Appellant concerns the Ohio Supreme Court’s decision in *Foster* and the United States Supreme Court decision in *Oregon*. In *Foster*, the Ohio Supreme Court held that the statutory requirement for the trial court to give reasons prior to the imposition of consecutive sentences is unconstitutional. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Following *Foster*, the United States Supreme Court determined that it is constitutionally permissible for states to require judges to make findings of fact before imposing consecutive sentences. *Oregon v. Ice*, 555 U.S. 160, 164, 129 S.Ct. 711 (2009). Appellant asserts that had *Foster* been decided correctly, consecutive sentence findings would have been required and a trial court would have been “hard pressed to conjure up a set of finding that would have been sufficiently supported by the facts and circumstances of the case.”

{¶10} Admittedly after *Oregon*, the Ohio Supreme Court acknowledged that the *Ice* decision “undermines some of the reasoning in the *Foster* decision that judicial fact-finding in the imposition of consecutive sentences violates the Sixth Amendment” and that had it had the benefit of the United States Supreme Court's decision in *Ice* prior to *Foster*, it “likely would have ruled differently as to the constitutionality, and continued vitality,” of Ohio's consecutive-sentencing provisions. *State v. Hodge*, 128 Ohio St.3d 1, 2010–Ohio–6320, 941 N.E.2d 768, ¶ 19–20. However, the Ohio Supreme Court also specifically stated the United States Supreme Court's decision in *Ice* did not revive Ohio's former consecutive-sentencing statutory provisions. *Id.* at ¶ 39. “Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.” *Id.*

{¶11} The *Oregon* decision does not provide basis for a finding of extraordinary circumstances. That decision was announced in 2009 and there is no reason for a delay of nearly ten years to raise an argument based on that decision. Furthermore, the Ohio Supreme Court in *Hodge* made it clear that despite *Oregon*, trial courts were not obligated to engage in judicial fact finding prior to imposing consecutive sentences. Therefore, even if it was timely raised, it still would not have provided a basis for reconsideration.

{¶12} Appellant's other consecutive sentence argument is that he has received a de facto life sentence and he directs this court to *Graham* and *Moore* for the assertion that those cases provide both extraordinary circumstances and a basis to reconsider the 2007 decision. This argument lacks merit. *Graham* and *Moore* dealt with juveniles receiving life sentences or de facto life sentences for non-homicide offenses and determined such a sentence violates the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment. Appellant admits he was 37 years old at the time he was sentenced. Accordingly, the *Graham* and *Moore* decisions do not apply to him; those decisions dealt specifically with juveniles. Appellant directs this court to no case law indicating that an adult receiving a de facto life sentence is a violation of the Eighth Amendment. Accordingly, this argument also does not provide a basis for extraordinary circumstances or a basis to reconsider.

{¶13} For the above stated reasons, Appellant has failed to establish extraordinary circumstances for the 12-year delay in filing the motion for reconsideration.

{¶14} Delayed application for reconsideration denied.

JUDGE CAROL ANN ROBB

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.