[Cite as *State v. Kincaid*, 2009-Ohio-3211.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1163

Appellee — Trial Court No. CR-2005-1500

v.

Lance Kincaid — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey Lingo, Assistant Prosecuting Attorney, for appellee.

Scott J. Hoffman, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas following appellant's no contest pleas to two offenses related to the death of one person and severe injury to another person as a result of appellant's failure to stop at a red traffic light. Because we conclude that the trial court did not violate appellant's

constitutional rights by imposing consecutive sentences for his subsequent second conviction on two lesser included offenses, we affirm.

{¶ 2} Appellant, Lance E. Kincaid, was originally indicted on two counts: (1) aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a) and (B), a felony of the second degree and (2) aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a) and (B), a felony of the third degree. During the first trial, the trial court denied appellant's motion to suppress drug/alcohol test results. Appellant pled no contest, was convicted and sentenced to five years for the first offense, with a 20 year suspension of his driver's license, and four years for the second offense, with a five year suspension of his driver's license. The sentences were to run concurrently, resulting in an aggregate term of incarceration of five years. On appeal, appellant's conviction was reversed on the basis that the motion to suppress should have been granted and the case was remanded for further proceedings. See *State v. Kincaid*, 6th Dist. No. L-06-1312, 2008-Ohio-376.

{¶ 3} On remand, a new judge was assigned to the case because the original judge had been elected to the Court of Appeals. Appellant ultimately pled no contest to two lesser included offenses: (1) aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2) and (B), a felony of the third degree and (2) vehicular assault, in violation of R.C 2903.08(A)(2)(b) and (C), a felony of the fourth degree. The court sentenced appellant to four years for the now reduced Count 1 and 18 months as to reduced Count 2, but ordered the sentences to run consecutively. This resulted in an aggregate

incarceration period of five and one half years. Appellant's driver's license was also suspended for only 5 years.

{¶ 4} Appellant now appeals from that judgment, arguing the following five assignments of error:

{¶ 5} "I. The trial court erred in imposing a maximum sentence of 18 months in prison as to Count 2 to run consecutively to the 4 year sentence as to Count 1, which said sentence is tantamount to an unconstitutional trial tax.

{¶ 6} "II. The defendant's guilty plea was not knowingly, intelligently, or voluntarily entered into and should in turn be permitted to be withdrawn.

{¶ 7} "III. The trial court violated defendant's constitutional right of due process.

{¶ 8} "IV. The trial court's imposition of a maximum sentence as to Count 2 to run consecutively to Count 1 constitutes an unconstitutional violation of defendant's protection from cruel and unusual punishment.

{¶ 9} "V. The Ohio Supreme Court's decision in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, is an unconstitutional violation of the separation of powers doctrine."

I.

{¶ 10} In his first assignment of error, appellant essentially argues that the trial court's sentence on remand constituted a punishment for his successful appeal from the initial conviction.

{¶ 11} A court may impose a different sentence when a defendant is again convicted after a retrial. See *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334; *North Carolina v. Pearce* (1969), 395 U.S. 711, 723, overruled on other grounds, *Alabama v. Smith*, 490 U.S. 94 (1989). The Due Process Clause of the Fourteenth Amendment requires, however, that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. *Pearce*, supra, at 725. A defendant must be free from apprehension regarding any such retaliatory motivation on the part of the sentencing judge. Id. To assure the absence of such motivation, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for the judge's doing so must affirmatively appear and the factual data upon which the increased sentence is based must be made part of the record for purposes of reviewing the constitutionality of the increased sentence. Id., at 726.

{¶ 12} The holding in *Pearce* concerned the sentencer's personal motivation evidenced by "enhancement [of a sentence] motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights." *Wasman v. United States* (1984), 468 U.S. 559, 568. "Actual vindictiveness" implies an animus against a defendant because he or she exercised his or her right of appeal which resulted in the reversal of the prior conviction based upon an error made by the sentencing judge. *Howard*, supra, ¶ 17. By operation of law, an enhanced or increased sentence, by the same sentencer, after a new trial and conviction, creates a rebuttable presumption of actual vindictiveness. *Wasman*,

supra, at 568-569, citing to *Pearce*, supra. This presumption "may be overcome only by objective information in the record justifying the increased sentence." *Wasman*, supra, at 565.

{¶ 13} The *Pearce* presumption does not apply, however, when different sentencers were involved and each assessed the varying sentences that defendant received. See *Texas v. McCullough* (1986), 475 U.S. 134. When different sentencers are involved, "[i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." *Colten v. Kentucky* (1972), 407 U.S. 104, 117.

{¶ 14} In the present case, on remand, appellant pled to a third degree and a fourth degree felony. R.C. 2929.14(A)(3) and (4) provide that for a felony of the third degree the court may impose a prison sentence of one to five years and for a felony of the fourth degree, may impose a prison term from six to eighteen months.

{¶ 15} Appellant contends that his decision to "go to trial" influenced the court's imposition of sentence on remand after his appeal. In this case, however, appellant entered "no contest" pleas during both the first and second proceedings. Moreover, he was sentenced by two different judges. Therefore, the *Pearce* presumption does not apply and appellant must show that the second sentence was motivated by actual vindictiveness.

{¶ 16} During sentencing after remand, the trial court noted that the appellate court's reversal of appellant's first conviction "in essence removed any alcohol from these proceedings, and although the alcohol was removed, it doesn't remove your actions, which are most egregious." Nothing in the record, however, indicates that the trial court's sentence was based upon appellant's choice to appeal his first conviction. Rather, the second judge commented on appellant's actions, considered the facts, and then imposed sentences which were within the sentencing limits for his offenses. In addition, although appellant's incarceration time may be more, his license suspension was reduced to only five years, instead of the twenty years suspension initially imposed. Therefore, under the facts of this case, we cannot say that appellant's sentence was beyond the discretion of the trial court or that any evidence was presented to show that it was motivated by actual vindictiveness.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 18} In his second assignment of error, appellant claims that his "guilty plea was not knowingly, intelligently, or voluntarily entered into" and, as a result, he should be permitted to withdraw his plea.

{¶ 19} We are limited in our review to only the parts of the record ordered by the parties. When presented with an incomplete record, we must presume the regularity of the trial court proceedings that were not included. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶ 20} In this case, the only transcript provided in the record regarding the appellant's remand and new sentencing is the actual sentencing hearing held on May 19, 2008. No transcript was included in the record for the April 14, 2008 plea hearing. Therefore, since we are unable to review what has not been provided in the record, we must presume the regularity of the trial court proceedings.

{¶ 21} Accordingly, appellant's second assignment of error is not well-taken.

III.

{¶ 22} We will address appellant's third and fifth assignments of error together. In these two assignments of error, appellant argues that the Supreme Court of Ohio's decision, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violates due process and the Ex Post Facto Clause of, and the separation of powers mandated by, the United States Constitution.

{¶ 23} In *State v. Foster*, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held 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." 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. Thus, an appellate court reviews felony sentences for an abuse of discretion. Id. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying an abuse of discretion standard, an appellate court may not

generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 24} We have previously addressed appellant's arguments in these two assignments of error and found them to be without merit. See *State v. Coleman*, 6th Dist. No. S-06-023, 2007-Ohio-448 (sentencing after *Foster* does not violate Ex Post Facto Clause or separation of powers). As a district appellate court, we are bound by and must apply the law as set forth by the Supreme Court of Ohio. As we noted previously, the trial court's sentence was within the ranges for appellant's offenses. Therefore, appellant's arguments are without merit.

{¶ 25} Accordingly, appellant's third and fifth assignments of error are not well-taken.

IV.

{¶ 26} In his fourth assignment of error, appellant contends that the trial court's imposition of a maximum sentence as to Count 2 to run consecutively to Count 1 constitutes an unconstitutional violation of defendant's protection from cruel and unusual punishment.

{¶ 27} To constitute a violation of the constitutional prohibition against "cruel and unusual punishment," a sentence must be "so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Chaffin* (1972), 30 Ohio St.2d 13, paragraph three of the syllabus. "Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison

term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, syllabus.

{¶ 28} When sentencing offenders, a trial court must consider the purposes and principles of felony sentencing and the seriousness and recidivism factors under R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. R.C. 2929.11(A) provides that, when sentencing an offender for a felony conviction, a trial court must be guided by the "overriding purposes of felony sentencing * * * to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(B) states that a felony sentence "must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." Finally, R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors.

{¶ 29} In this case, the sentences imposed for appellant's offenses are within the range provided by statute. See R.C. 2929.14(A)(3) and (4). In addition, the record indicates that the court considered "the record, oral statements, any victim impact statement and presentence report * * *, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C 2929.12." The record also shows that appellant's unsafe and reckless operation of a motor vehicle resulted in the death of one person and the severe,

permanent disability of another. Nothing in the record demonstrates that appellant's sentence is so disproportionate so as to shock the community sense of justice. Therefore, we cannot say that appellant's sentences constitute "cruel and unusual" punishment.

{¶ 30} Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 31} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE