

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

State of Ohio

Court of Appeals Nos. L-08-1323
L-08-1324

Appellee

Trial Court Nos. CR0200602480
CR0200701101

v.

Tyrone C. Watson

DECISION AND JUDGMENT

Appellant

Decided: August 28, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Patricia C. Hays, Assistant Prosecuting Attorney, for appellee.

Gretchen S. DeBacker, for appellant.

* * * * *

SHERCK, J.

{¶ 1} Appellant, Tyrone C. Watson, appeals two judgments of the Lucas County Court of Common Pleas in this consolidated appeal. Because we find no prejudicial or plain error, the judgments are affirmed.

{¶ 2} On July 5, 2006, Watson was indicted on four, fifth degree felony counts: possession of cocaine, a violation of R.C. 2925.11(A) and (C)(4)(a); trafficking in marijuana, a violation of R.C. 2925.03(A)(2) and (C)(3)(a); aggravated possession of drugs (MDMA), a violation of R.C. 2925.11(A) and (C)(1)(a); and trafficking in cocaine, a violation of R.C. 2925.03(A)(2) and (C)(4)(a). On January 12, 2007, Watson was indicted on one count of nonsupport of dependents, a violation of R.C. 2919.21(B), also a fifth degree felony.

{¶ 3} Watson entered pleas of no contest to the count of nonsupport of dependents, and, pursuant to a written plea agreement, entered a plea of no contest to one count of possession of cocaine. In exchange, the state dismissed the remaining three felony drug counts.

{¶ 4} The trial court accepted Watson's pleas of no contest and found him guilty of both counts. The matters were consolidated for sentencing, and at the sentencing hearing, the trial court imposed terms of 11 months incarceration for each count. The terms were ordered to run consecutively to each other for a total term of 22 months incarceration.

{¶ 5} From that judgment, Watson brings this appeal of right. He assigns the following as error for review:

{¶ 6} "The trial court erred when it made findings pursuant to R.C. 2929.14(C) as to why it was sentencing Mr. Watson to the consecutive sentences for the offenses of

nonsupport of dependents and possession of cocaine in violation of *State v. Foster* (2006), 109 Ohio St.3d 1."

{¶ 7} In support of his assigned error, Watson points to a statement made by the trial court at his sentencing. After hearing from Watson's counsel with arguments in mitigation, the trial court commented on Watson's prior convictions, his continued substance abuse, and the connection of both to his failure to pay child support. Watson did not object or claim a *Foster* error at his sentencing hearing.

{¶ 8} Watson argues that these statements were made by the trial court to support the imposition of consecutive sentences in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the court held that R.C. 2929.14(B) and 2929.19(B)(2) violate the Sixth Amendment to the United States Constitution, pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466. *Foster*, supra, at paragraph one of the syllabus. Under *Foster*, cases were remanded for resentencing where the defendant had been sentenced under the unconstitutional statutory sections. *Foster*, supra, at ¶ 105. Specifically, *Foster* held the following statutory sections unconstitutional: R.C. 2929.14(B), (C), (D)(2)(b), (D)(3)(b), and (E)(4); R.C. 2929.19(B)(2); and R.C. 2929.41(A).

{¶ 9} Because Watson did not raise a *Foster* error at his sentencing hearing, this issue is controlled by *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. In *Payne*, although the defendant did not object to his sentence in the trial court, he appealed his sentence claiming Sixth Amendment and *Blakely* errors. *Payne*, supra, ¶ 5. "[T]he

Supreme Court of Ohio concluded that any defendant who fails to raise an objection in the trial court after sentencing which occurs post-*Blakely*, 'forfeits' a claim on appeal for a *Blakely* error." *State v. Jones*, 6th Dist. Nos. L-07-1023, L-07-1024, ¶ 5, quoting *State v. Nickelson*, 6th Dist. No. WD-06-023, 2007-Ohio-6367, ¶ 72-73. See, also, *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 376-377.

{¶ 10} Watson's sentencing hearing for both cases was held well after the *Blakely* and *Foster* decisions. Watson did not raise any *Blakely* objections at the time of his sentencing, and has therefore waived *Foster* review of his maximum sentence and the consecutive sentences. *State v. Davis*, supra. His assignment of error is therefore subject to "plain error" review. *Payne*, supra, at ¶ 24.

{¶ 11} To prevail on a "plain error" challenge, Watson must show that "(1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial. See *State v. Barnes* (2000), 94 Ohio St.3d 21; Crim.R. 52(B)." *State v. Davis*, supra, at ¶ 378.

{¶ 12} Here, the sentences imposed were within the statutory ranges for each offense. The court did not make the now prohibited findings required by the severed subsections of R.C. 2929.14's consecutive sentencing scheme. The trial court's comments regarding Watson's history, his substance abuse problems, and his current failure to pay child support were proper. No plain error occurred.

{¶ 13} Accordingly, the assignment of error is not well-taken.

{¶ 14} 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, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.