

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

State of Ohio

Court of Appeals No. L-08-1037

Appellee

Trial Court No. CR-2007-2547

v.

Gary A. Hoelzer

DECISION AND JUDGMENT

Appellant

Decided: December 4, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

John F. Kirwan, for appellant.

* * * * *

ABOOD, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which sentenced appellant, Gary Hoelzer, on one count of unlawful sexual conduct with a minor and two counts of gross sexual imposition.

{¶ 2} Appellant sets forth two assignments of error.

{¶ 3} "I. The trial court erred in sentencing defendant to consecutive sentences in violation of R.C. 5145.01.

{¶ 4} "II. The trial court abused its discretion in not conducting a hearing to determining [sic] defendant's ability to pay court costs of \$23,144.16."

{¶ 5} The facts that are relevant to the issues raised on appeal are as follows. On July 25, 2007, appellant was indicted on two counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A) and (B)(3), each a felony of the third degree; two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(1) and (B), each a felony of the fourth degree; and two counts of rape, in violation of R.C. 2907.02(A)(2) and (B), each a felony of the first degree. On December 10, 2007, appellant entered no contest pleas to one count of unlawful sexual conduct with a minor, a felony of the third degree and two counts of gross sexual imposition, each a felony of the fourth degree. The court found appellant guilty on the no contest pleas and the remaining charges were dismissed.

{¶ 6} On January 16, 2009, the trial court imposed a sentence of four years incarceration on the unlawful sexual conduct with a minor charge and 16 months incarceration on each of the two counts of gross sexual imposition and ordered the sentences to run consecutively. The trial court also imposed fines of \$10,000 on the unlawful sexual conduct with a minor charge and \$5,000 each gross sexual imposition charge.

{¶ 7} Thereafter, the court found appellant "* * * to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law," and ordered

appellant to " * * * reimburse the state of Ohio and Lucas County for such costs and to pay restitution." No amount of costs was stated at the time of sentencing or in the court's subsequently filed judgment entry.

{¶ 8} In support of his first assignment of error, appellant argues that the trial court erred in imposing consecutive sentences, in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and R.C. 5145.01. In *State v. Castle*, 6th Dist. No. OT-08-029, 2008-Ohio-6388, this court considered an identical assignment of error and found it not well-taken. R.C. 5145.01 provides for a presumption of concurrent sentences, unless the consecutive sentencing provisions of R.C. 2929.14 apply. In *Foster*, however, the Ohio Supreme Court excised the consecutive sentencing portions of R.C. 2929.14 as unconstitutional. *Castle*, 2008-Ohio-6388, ¶ 3.

{¶ 9} "After *Foster*, sentencing courts are to continue to consider 'the statutory considerations' and 'factors' in the 'general guidance statutes' - R.C. 2929.11 and 2929.12 - in imposing sentences, as these statutes do not include a 'mandate for judicial fact finding.' *Foster*, ¶ 36-42. 'Two statutory sections apply as a general judicial guide for every sentencing. The first, R.C. 2929.11 states that the court "shall be guided by" the overriding purposes of felony sentencing * * *.' *Foster* at ¶ 36. R.C. 2929.11 lists matters to be considered 'in achieving those purposes.' *Id.*" *Castle*, 2008-Ohio-6388, ¶ 6, quoting *State v. Like*, 6th Dist. No. WM-08-002, ¶ 9. See, also *State v. Paugh*, 12th Dist. No. CA2008-11, 144, 2009-Ohio-4682; *State v. Smith*, 5th Dist. Nos. 08CA42, 08CA43, 2009-Ohio-1684, applying *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

{¶ 10} At the sentencing hearing and in its judgment entry, the trial court stated that it had " * * * considered the record, oral statements , any victim impact statement and presentence report prepared, 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." Appellate courts review a trial court's consideration and application of R.C. 2929.11 and 2929.12 for an abuse of discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 17. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* at ¶ 19, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 11} Upon consideration of the entire record of proceedings in the trial court and the law, this court cannot find that the trial court acted in abuse of discretion in its consideration of the sentencing alternatives and its decision to impose consecutive sentences. Accordingly, this court finds appellant's first assignment of error not well-taken.

{¶ 12} In support of his second assignment of error, appellant argues that the trial court abused its discretion in imposing fines and costs. As an initial matter, we note that that state has filed a motion to strike appellant's amended brief, arguing that it contains a document not included in the record on appeal, which appellant asserts sets forth evidence of the amount of the costs that will be assessed against appellant. The state is correct in that this document is not a part of the record on appeal. It is well-established that "[a] reviewing court cannot add matter to the record before it, which was not a part

of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Accordingly, this court finds preliminarily that the state's motion to strike is well-taken, in part, and it is hereby ordered that the attachment to appellant's amended brief is stricken from the record of proceedings herein. This court will now proceed to consider appellant's second assignment of error on the merits.

{¶ 13} "Costs are assessed at sentencing and must be included in the sentencing entry. R.C. 2947.23. Therefore, an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. * * * Otherwise, the issue is waived and costs are res judicata." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶ 23.

{¶ 14} In this case, appellant failed to move to waive costs at the time of sentencing and, therefore, may not raise this issue on appeal. Assuming, arguendo, that the issue is appealable, the record demonstrates that the trial court considered appellant's current and future ability to pay fees and costs before ordering him to do so. Contrary to appellant's assertions, the trial court was not required to hold a hearing on this issue. *State v. Phillips*, 6th Dist. No. F-05-032, 2006-Ohio-4135, ¶ 18, citing *State v. Lamonds*, 6th Dist. No. L-03-1100, 2005-Ohio-1219, ¶ 42; *State v. White*, 6th Dist. No. L-07-1196, 2009-Ohio-4587, ¶ 23. Upon consideration of the foregoing, this court finds appellant's second assignment of error is not well-taken.

{¶ 15} On consideration whereof, this court finds that 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

Judge Charles D. Abood, 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:
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