

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2006-L-249</b>
DALE A. MARKIEWICZ, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 05 CR 000299.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*R. Paul LaPlante*, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} In the instant appeal, submitted on the record and briefs of the parties, appellant, Dale A. Markiewicz, Jr. appeals the judgment entered by the Lake County Court of Common Pleas, reimposing a four-year sentence of imprisonment for his convictions for Attempted Rape and Domestic Violence, following our remand to the trial court for resentencing pursuant to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We affirm the judgment of the lower court.

{¶2} Markiewicz was originally indicted on three counts of Rape, three counts of Domestic Violence, and one count of Kidnapping. Markiewicz eventually pled guilty to one count of Attempted Rape, a felony of the second degree, and two counts of Domestic Violence, felonies of the fourth degree. Upon the State’s recommendation, the remaining counts of the indictment were dismissed. *State v. Markiewicz*, 11th Dist. No. 2006-L-034, 2006-Ohio-4663, at ¶2.

{¶3} Following his plea, the trial court sentenced Markiewicz to a four-year prison term for the Attempted Rape conviction, and ten months each for the Domestic Violence convictions, and ordered the sentences to be served concurrently. The trial court additionally adjudicated Markiewicz to be a sexually oriented offender. *Id.* at ¶3.

{¶4} Markiewicz appealed his original sentence on March 13, 2006. This court, on the authority of *Foster*, reversed Markiewicz’ judgment of sentence and remanded the matter to the trial court for resentencing. *Id.* at ¶12.

{¶5} On remand, the trial court imposed an identical aggregate sentence of four years for the aforementioned convictions. Markiewicz now appeals, assigning the following as error for our review:

{¶6} “[1.] The trial court erred in sentencing the defendant-appellant to more-than-the minimum prison terms when the sentences imposed were not available to the court at the time the offenses were committed.

{¶7} “[2.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of defendant-appellant’s right to due process.

{¶8} “[3.] The trial court erred when it sentenced the defendant-appellant to more-than-the minimum prison terms based on the Ohio Supreme Court’s severance of the offending provisions under *Foster*, which was an act in violation of the principle of Separation of Powers.

{¶9} “[4.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the Rule of Lenity.

{¶10} “[5.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the intent of the Ohio Legislators.”

{¶11} For discussion purposes, we will consolidate Markiewicz’ assignments of error one through five. These assignments of error all challenge the retroactive application of *Foster* to his sentencing hearing. The arguments raised in support of this position are identical to the arguments raised and rejected in prior decisions of this court. See *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695, at ¶¶19-29; *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶30; *State v. Asbury*, 11th Dist. No. 2006-L-097, 2007-Ohio-1073, at ¶15; *State v. Anderson*, 11th Dist. No. 2006-L-142, 2007-Ohio-1062, at ¶15; *State v. Spicuzza*, 11th Dist. No. 2006-L-141, 2007-Ohio-783, at ¶¶13-35.

{¶12} These same arguments have also been consistently rejected by other Ohio appellate districts and federal courts. See *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899, at ¶¶15-18; *State v. Moore*, 3rd Dist. No. 1-06-51, 2006-Ohio-6860, at ¶¶7-12; *United States v. Portillo-Quezada* (C.A.10, 2006), 469 F.3d 1345, 1354-1356, and the cases cited therein.

{¶13} Markiewicz’ first through fifth assignments of error are without merit.

{¶14} For these reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

MARY JANE TRAPP, J.,

concur.