[Cite as *State v. Gaston,* 2007-Ohio-6251.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2006-P-0071 and 2006-P-0072**
DANIEL E. GASTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case Nos. 2004 CR 0336 and 2004 CR 0324.

Recommendation: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Erik M. Jones, One Cascade Plaza, #1445, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Daniel Gaston, appeals the sentence of the Portage County Court of Common Pleas upon the remand of this court for resentencing pursuant to *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856. At issue is whether appellant's sentence is contrary to law and unconstitutional. For the reasons that follow, we reverse and remand for resentencing.

{¶2} In Common Pleas Case No. 2004 CR 324, the Portage County Grand Jury returned a two-count indictment against appellant charging him with aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01 with a firearm specification, in violation of R.C. 2929.14(D) and 2941.145, and kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(2), with a firearm specification, in violation of R.C. 2929.14(D) and 2941.145.

{¶3} In Case No. 2004 CR 336, the grand jury returned a two-count indictment against appellant charging him with improperly discharging a firearm at or into a habitation, a felony of the second degree, in violation of R.C. 2923.161(A)(1)(c), with a firearm specification, in violation of R.C. 2929.14(D), and 2941.145 and felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2), with a firearm specification, in violation of R.C. 2929.14(D) and 2941.145.

{¶4} The cases were consolidated. Appellant initially entered pleas of not guilty in both cases, which he subsequently withdrew to enter pleas of guilty in both. In Case No. 2004 CR 324, appellant pleaded guilty to aggravated robbery and a one-year mandatory firearm specification, in violation of R.C. 2929.14(D)(iii). In case No. 2004 CR 336, appellant pleaded guilty to complicity to aggravated assault, a felony of the fourth degree, in violation of R.C. 2923.03 and 2903.12, with a mandatory three-year firearm specification, in violation of R.C. 2929.14(D) and 2942.145.

{¶5} Following a joint sentencing hearing on both matters, the trial court sentenced appellant on March 24, 2005. In Case No. 2004 CR 324, appellant was sentenced to four years on the aggravated robbery charge and in Case No. 2004 CR 336, appellant was sentenced to one year on the amended charge of complicity to

aggravated assault. These terms were to be served consecutively to each other and consecutively to the mandatory terms of one and three years for the two firearm specifications, for an aggregate term of nine years.

{¶6} Appellant appealed his sentence in *State v. Gaston*, 11th Dist. Nos. 2005-P-0035 and 2005-P-0036, 2006-Ohio-2149. This court reversed and remanded the cases for resentencing pursuant to *Foster,* supra.

{¶7} Appellant was resentenced on July 10, 2006, pursuant to this court's remand. At that hearing appellant's counsel argued that *Foster* was unconstitutional and requested a sentence lighter than that which was originally imposed. The court stated it had considered appellant's sentencing briefs and memoranda, the comments made by appellant's attorney, the probation report, and appellant's statements. The trial court reimposed the identical sentence it had originally imposed on appellant. The court sentenced appellant in Case No. 04 CR 324 to one year on the firearm specification and in Case No. 04 CR 336 to three years on the firearm specification, to run consecutively to the first firearm specification. In Case No. 04 CR 324, the court sentenced appellant to four years on the aggravated robbery charge and in Case No. 04 CR 336, the court sentenced appellant to one year on complicity to aggravated assault, to run consecutively to the sentence for aggravated robbery.

{¶8} Appellant appeals his resentence, asserting eight assignments of error. For his first assignment of error, appellant asserts:

{¶9} "THE TRIAL COURT ERRED BY FAILING TO CONDUCT A DE NOVO RESENTENCING HEARING."

{¶10} Under his first assignment of error, appellant argues that his sentence on remand is contrary to law because he was not given a de novo sentencing hearing.

{¶11} R.C. 2953.08(G)(2)(b), concerning the appellate standard of review of felony sentencing, provides in pertinent part:

{¶12} "The court hearing an appeal *** shall review the record ***

{¶13} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. *** The appellate court may take any action authorized by this division if it clearly and convincingly finds *** the following:

{¶14} "***

{¶15} "(b) That the sentence is otherwise contrary to law."

{¶16} The court in *Foster* severed only those sections of the appellate review statute, R.C. 2953.08(G), which referred to the severed sections of S.B. 2. The Court in *Foster* held: "The appellate statute R.C. 2953.08(G), insofar as it refers to the severed sections, no longer applies." *Foster* at ¶99. Thus, the sections of the statute concerning review of judicial factfinding no longer apply. However, since R.C. 2953.08(G)(2)(b) does not apply to such factfinding, but instead refers to errors in law, this statute survives with respect to the appellate standard of review of such errors. We therefore apply a clear and convincing standard of appellate review.

{¶17} In *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, the court held: "***any case that is remanded for 'resentencing' anticipates a sentencing hearing de novo, yet the parties may stipulate to the existing record and waive the taking of additional evidence." Id. at ¶37.

{¶18} Appellant argues that comments made by the trial court prior to imposing sentence indicated appellant was not being given a de novo hearing because the court indicated it would not change appellant's sentence regardless of what was presented in mitigation.

{¶19} During the hearing, appellant's counsel argued that appellant could not be sentenced to more than the four year mandatory minimum. The following exchange took place between the court and appellant's counsel:

{¶20} "Mr. Whitney: *** We're indicating any sentence over and above that is expo factor [sic] and I don't expect the court to overrule *State v. Foster* but certainly for the record—

{¶21} "The Court: I don't plan on it. I've consistently done the same thing in all these cases."

{¶22} Later during the same sentencing hearing, after appellant's counsel asked the court to consider a lesser sentence than that which was originally imposed, the court stated: "There is a mandate by *State versus Foster* and this Court has been consistent in all the cases I have handled, I have not increased penalty or decreased penalty."

{¶23} While the trial court was free to impose the identical sentence it originally imposed, or a greater or lesser sentence within it's discretion, a defendant on resentence is entitled to a de novo hearing. When the court expressly stated that in all cases on remand under *Foster,* he has been consistent in not increasing or decreasing the penalty, he was stating that no matter what was presented, he would still impose the original sentence.

{¶24} In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, the Court held that where a defendant had to be resentenced because the trial court failed to notify him about post release control, at resentencing the court could not merely notify the defendant of post release control and reimpose the same sentence. This is because the original sentence was void so it was as if the sentence never occurred. The defendant was entitled to a de novo sentencing hearing.

{¶25} The holding in *Bezak* applies here. The court's sentence on remand in this case was contrary to law because the trial court indicated it was its practice to impose the original sentence in every case on remand pursuant to *Foster.* In effect, the court relied on prior, now void proceedings in imposing "the same" sentence. Therefore, appellant was not given a de novo sentencing hearing.

{¶26} In these circumstances we agree that appellant was not given a de novo sentencing hearing as required by *Mathis* and *Bezak.*

{¶27} Appellant's first assignment of error has merit.

{¶28} For his second assignment of error, appellant states:

{¶29} "THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT WITHOUT HAVING CONSIDERED THE FACTORS AT R.C. 2929.12."

{¶30} For his second assignment of error, appellant argues that because the court did not indicate at the sentencing hearing or in its sentencing entry that it had considered the seriousness and recidivism factors in R.C. 2929.12, his sentence is contrary to law.

{¶31} In light of our ruling under appellant's first assignment of error, this assigned error is moot.

{¶32} For his third assignment of error, appellant asserts:

{¶33} "THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO A DISPROPORTIONATELY LONG TERM OF INCARCERATION, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION."

{¶34} In light of our holding under the first assignment of error, appellant's argument under this assignment of error is moot.

{¶35} For his fourth assignment of error, appellant states:

{¶36} "THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO MORE THAN THE MINIMUM AND CONSECUTIVE TERMS OF INCARCERATION, WHERE THE RECORD REVEALS THAT SUCH TERMS ARE UNREASONABLE."

{¶37} Under this assignment of error, appellant simply argues that the nine-year sentence the trial court imposed was excessive in light of his plea for mercy at his sentencing, and that he should have only received the minimum sentence.

{¶38} In light of our ruling under the first assignment of error, appellant's fourth assigned error is moot.

{¶39} For his fifth assignment of error, appellant asserts:

{¶40} "THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS PURSUANT TO THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION."

{¶41} Under his fifth assignment of error, appellant argues he received ineffective assistance of counsel because his counsel falsely represented to the court at the sentencing that his client had one prior criminal conviction. In fact, appellant had one prior juvenile delinquency adjudication.

{¶42} In light of our holding under the first assignment of error, this assigned error is moot.

{¶43} For his sixth assignment of error, appellant states:

{¶44} "THE TRIAL COURT ABUSED ITS DISCRETION BY CONSIDERING THAT APPELLANT HAD A PREVIOUS CRIMINAL CONVICTION."

{¶45} Appellant argues the trial court abused its discretion in considering that appellant had a prior criminal conviction rather than a prior juvenile delinquency adjudication.

{¶46} In light of our ruling under the first assignment of error, this assigned error is moot.

{¶47} For his seventh and eighth assignments of error, appellant asserts:

{¶48} "[7.] APPELLANT'S RESENTENCING VIOLATES HIS RIGHT TO DUE PROCESS AND AGAINST [SIC] THE EX POST FACTO APPLICATION OF LAW, AS STATE V. FOSTER SUBJECTED APPELLANT TO AN EFFECTIVE RAISE IN THE PRESUMPTIVE SENTENCES FOR A FIRST-TIME OFFENDERS [SIC] AND THOSE CONVICTED OF FIFTH DEGREE FELONIES TO THE STATUTORY MAXIMUM.

{¶49} "[8.] APPELLANT'S RESENTENCING, PURSUANT TO STATE V. FOSTER, VIOLATES HIS RIGHT TO DUE PROCESS THROUGH THE DEPRIVATION OF A LIBERTY INTEREST, AS [SIC] SUBJECTED APPELLANT TO AN EFFECTIVE

RAISE IN THE PRESUMPTIVE SENTENCES FOR A FIRST-TIME OFFENDERS [SIC] AND THOSE CONVICTED OF FIFTH DEGREE FELONIES TO THE STATUTORY MAXIMUM."

{¶50} In light of our ruling under appellant's first assignment of error, these assigned errors are moot.

{¶51} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, dissents with Dissenting Opinion.

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DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶52} I respectfully dissent.

{¶53} While I understand the majority's concern, my reading of the transcript reveals no error when considering the trial court's statements within the context of the sentencing proceeding.

{¶54} As the majority correctly notes, "[a]t the hearing appellant's counsel argued that *Foster* was unconstitutional and requested a sentence lighter than that which was originally imposed." Appellant's argument was based upon the proposition

that the Ohio Supreme Court's holding in *Foster* violated the Ex Post Facto clauses of the United States and Ohio Constitutions, an argument that has been repeatedly considered and rejected by this and other courts. See, e.g., *State v. Johnson*, 11th Dist. No. 2006-L-259, 2007-Ohio-5783, at ¶¶90-92; *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-1783, at ¶¶13-35, and the cases cited therein. The trial court's "comments" were made in response to appellant's argument.

{¶55} As stated by this court, "[an] appellant [is] not per se entitled to the minimum sentence ***. '*Foster* did not hold that a defendant is entitled to receive the shortest sentence authorized under Ohio law.' *** Rather, 'post-*Foster*, a sentencing court is free to impose any sentence from the statutory range of punishment. The court is not required to impose the shortest authorized sentence.'" *Johnson*, 2007-Ohio-5783, at ¶92, quoting *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶7.

{¶56} I also agree with the majority that "any case that is remanded for 'resentencing' anticipates a sentencing hearing de novo." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶37. Ohio's sentencing statutes require that "[the] court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded ***." R.C. 2929.19(A).

{¶57} However, R.C. 2929.19(A), merely "requires a judge to hold a new sentencing hearing, *including all applicable procedures*, whenever a sentence is remanded." *State v. Steimle*, 8th Dist. Nos. 79154 and 79155, 2002-Ohio-2238, at ¶16 (emphasis added). Thus, a de novo sentencing proceeding contemplates only the following:

{¶58} "The defendant and the victim(s) are allowed to present information, a defendant has a right to speak prior to the imposition of sentence, and a judge is required to consider the record, any information presented, any presentence report, and any victim impact statement before imposing sentence. A defendant also is entitled to notice of his right to appeal, to have a lawyer appointed if he is indigent, and must be notified that post-release control is part of his sentence, if, in fact, it is to be part of his sentence." Id.; see also, *State v. Hofmann*, 6th Dist. No. E-03-057, 2004-Ohio-6655, at ¶11.

{¶59} While it is clear Gaston had pled guilty to the charges, rather than go to trial, his attorney was given the opportunity to speak. He argued that a lesser sentence was warranted, based upon "some of the things *** [presented] in the memorandum."

{¶60} A review of the statements made by Gaston's attorney reveal that they were not so much statements in mitigation as they were an attempt by Gaston's attorney to try the case, based upon "things [he had] looked over since [his] representation of [Gaston]," including a comparison of Gaston's actions to those of his co-defendants. Gaston's counsel argued that the court's prior imposition of a greater sentence than Gaston's co-defendants was not warranted, based upon alleged facts,

independent investigations, and statements of witnesses which were never subject to adversarial proceedings.

{¶61} Even considering these statements, it is well-settled that "there is no requirement that co-defendants receive equal sentences." *State v. Torres*, 11th Dist. No. 2006-L-116, 2007-Ohio-3023, at ¶33, citing *State v. Rupert*, 11th Dist. No. 2003-L-154, 2005-Ohio-1098, at ¶11.

{¶62} The record reveals that the prosecution was also allowed to present arguments in response to those made by Gaston's counsel, and that Gaston was allowed to make statements on his own behalf prior to the imposition of his sentence.

{¶63} After each party was given an opportunity to speak, the court indicated, for the record, that it had considered "the statements of counsel, the briefs of counsel, the previous probation report, [and] the statements of the defendant ***," prior to imposing Gaston's new sentence. Since the requirements of R.C. 2929.19 are *procedural*, and were indisputably complied with by the trial court, Gaston's sentencing cannot be "contrary to law" as the majority claims. See *Hofmann*, 2004-Ohio-6655, at ¶¶11-12; *State v. Bennett*, 3rd Dist. No. 5-2000-05, 2000-Ohio-1888, 2000 Ohio App. LEXIS 2713, at *9-10; *State v. Ober* (Oct. 10, 1997), 2nd Dist. No. 97 CA 0019, 1997 Ohio App. LEXIS 4544, at *7; cf. *State v. Bolton (*2001), 143 Ohio App.3d 185, 187-188 (overturning appellant's sentence on the basis of a lack of a de novo sentencing hearing where the trial court solely relied upon "the terms to which [it] had previously sentenced the defendant," and neither appellant, his counsel, nor the prosecutor were given an opportunity to speak at the hearing).

{¶64} After *Foster*, a sentencing court, upon remand for resentencing, possesses "full discretion to impose a prison sentence *within the statutory* range ***." *Foster*, 2006-Ohio-856, at ¶100, accord *Mathis*, 2006-Ohio-855, at paragraph three of the syllabus. By imposing an identical sentence as previously imposed, while following the dictates of R.C. 2929.19, the court was acting within its sound discretion.

{¶65} For the foregoing reasons, the judgment of the trial court should be affirmed.