[Cite as *State v. Payne*, 2007-Ohio-6740.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2006-L-272**
- vs -	:	
WILLIAM A. PAYNE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 000137.

Judgment: Affirmed in part; reversed in part; and remanded.

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

John W. Hawkins, Center Plaza South, 35350 Curtis Boulevard, #350, Eastlake, OH 44095 For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, William A. Payne, appeals from the November 28, 2006 judgment entry of the Lake County Court of Common Pleas, which resentenced him post-*Foster* to a twenty-six year term of imprisonment. For the following reasons, we affirm in part; reverse in part; and remand.

{¶2} **Substantive Facts and Procedural History**

{¶3} Appellant, William A. Payne ("Mr. Payne"), was indicted on May 12, 2003, by the Lake County Grand Jury on nine counts: two counts of aggravated robbery, first

degree felonies, in violation of R.C. 2911.01(A)(1) and R.C. 2911.01(A)(3), with firearm and repeat violent offender ("RVO") specifications; aggravated burglary, a first degree felony, in violation of R.C. 2911.11(A)(1), with firearm and RVO specifications; kidnapping, a first degree felony, in violation of R.C. 2905.01(A)(2), with firearm and RVO specifications; felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(2), with firearm and RVO specifications; conspiracy to aggravated robbery, a second degree felony, in violation of R.C. 2923.01(A)(1), with a RVO specification; conspiracy to aggravated burglary, a second degree felony, in violation of R.C. 2923.01(A)(1), with a RVO specification; conspiracy to kidnapping, a second degree felony, in violation of R.C. 2923.01(A)(1), with a RVO specification, and aggravated theft, a third degree felony, in violation of R.C. 2913.02(A)(1), with a firearm specification.

{¶4} Mr. Payne's convictions result from an incident that occurred on February 27, 2003, in which he was allegedly the "mastermind" of robbing and kidnapping Ms. Gail Kopp ("Ms. Kopp"), the owner of a pawn shop in her own home. Ultimately, the assailants took valuables that were valued at approximately $1,000,000. Ms. Kopp was found by the police on her bed with her wrists and ankles bound. She also suffered burns around her neck area from being stun-gunned twelve times. Mr. Payne was later implicated in the crime by an informant and through his own actions. In the months after the incident Mr. Payne began calling Ms. Kopp to inform her that he could obtain her jewelry and return it to her. In fact, he did set up an arrangement between Ms. Kopp and his cousin, who did return some of the stolen items. Mr. Payne's helpfulness gradually gave way to threats as the charges he faced became imminent. Eventually, Ms. Kopp realized that the voice on one of the assailants' walkie-talkies was Mr. Payne.

Ms. Kopp was familiar with Mr. Payne since he had frequented her pawn shop for several years. Upon a proper warrant, a search of his bedroom revealed two operational and loaded handguns, a stun gun, some jewelry (unrelated to the robbery), marijuana, postal priority mail envelopes, and ski masks, as well as a set of walkie-talkies, which were not taken at that time.

{¶5} Mr. Payne was tried by jury and found guilty on June 17, 2004, on four counts of the indictment: conspiracy to aggravated robbery, a felony of the second degree, in violation of R.C. 2923.01(A)(1); conspiracy to aggravated burglary, a felony of the second degree, in violation of R.C. 2923.01(A)(1); conspiracy to kidnapping, a felony of the second degree, in violation of R.C. 2923.01(A)(1); with a RVO on all three conspiracy convictions, as set forth in R.C. 2941.149; and one count of aggravated theft, a felony of the third degree, in violation of R.C. 2913.02(A)(1), with a firearm specification as set forth in R.C. 2941.145.

{¶6} Subsequent to the jury verdict, on the same day, a sentencing hearing was held. Pursuant to the June 30, 2004 judgment entry, after holding a RVO hearing, the trial court found Mr. Payne to be a RVO under R.C. 2929.14(D)(2), pursuant to R.C. 2941.149(B). Mr. Payne was then sentenced to three eight year terms for the three counts of conspiracy, five years for the count of aggravated theft, three years for the firearm specification, and ten years on the RVO specification, all to be served consecutively for an aggregate term of imprisonment of forty-two years.

{¶7} Mr. Payne timely appealed in *State v. Payne*, 11th Dist. No. 2004-L-118, 2005-Ohio-7043, and raised five assignments of error. Specifically, Mr. Payne argued that the trial court erred by: (1) denying his motion to dismiss; (2) overruling his motion to disclose the identity of the confidential informant; (3) overruling his motion under

Crim.R. 29 (which we reviewed under both a sufficiency of the evidence and manifest weight standard of review); (4) sentencing him to consecutive sentences in violation of R.C. 2945.25; and (5) sentencing him to consecutive sentences that were enhanced based on findings of fact made by the court instead of the jury.

{¶8} We determined that Mr. Payne's fourth and fifth assignments of error had merit in part. First, we found that the three conspiracy charges resulted from one crime, and therefore, they should be merged into one sentence, not to exceed eight years. Second, we determined that the "statutory framework in Ohio for determining whether an offender is a RVO and for enhancing penalties on that determination violates the rule in *Apprendi v. N.J.* (2000), 530 U.S. 466; *Blakely v. Wa.* (2004)*, 542 U.S. 296;* and *U.S. v. Booker* (2005), 543 U.S. 220." Id. at ¶113. Thus, we held that Ohio's RVO statute unconstitutionally required the court to make factual findings in a criminal case that had the effect of enhancing a penalty beyond the prescribed maximum. Id. at ¶114. We remanded and instructed the trial court to correct Mr. Payne's sentence accordingly and further, that the aggregate sentence should not exceed sixteen years.

{¶9} However, in the interim between the remand and the resentencing the Supreme Court of Ohio decided *State v. Foster,* 109 Ohio St. 3d 1, 2006-Ohio-856, which addressed the constitutional challenges to Ohio's sentencing scheme. Pursuant to *Apprendi, Blakely*, and *Booker*, the court ruled portions of the Ohio criminal sentencing scheme were unconstitutional, including portions of the RVO statute, R.C. 2929.14(D)(2), and severed those portions that required the trial court to make factual findings on any penalty, other than prior convictions, that will enhance a sentence beyond the prescribed statutory maximum.

{¶10} On November 9, 2006, a resentencing hearing was held in which the trial court resentenced Mr. Payne per our remand instructions and pursuant to *Foster*. The November 28, 2006 judgment entry resentenced him to serve one eight year term of imprisonment for the three counts of conspiracy, five years for the count of aggravated theft, three years for the firearm specification, and ten years for the RVO specification; for an aggregate term of imprisonment of twenty-six years. In addition, the court notified Mr. Payne that postrelease control is mandatory in this case for a maximum of three years.

{¶11} Mr. Payne timely appealed and now raises the following four assignments of error:

{¶12} "[1.] The trial court erred when it enhanced defendant's sentence based on its finding that defendant was a repeat violent offender and the trial court was free to sentence defendant *de novo* this court's previous opinion notwithstanding.

{¶13} "[2.] The trial court erred when it enhance [sic] defendant's sentence based on its finding that defendant was a repeat violent offender because the Foster opinion had not addressed or resolved the constitutionality of the repeat violent offender provisions regarding sentencing.

{¶14} "[3.] The trial court erred when it enhance [sic] defendant's sentence based on its finding that defendant was a repeat violent offender and the repeat violent offender statute as amended in [sic] August 3, 2006 was applicable to him.

{¶15} "[4.] The trial court erred when it imposed a consecutive five year sentence for aggravated theft."

{¶16} **Standard of Review post-*Foster***

{¶17} In *State v. Foster,* 109 Ohio St.3d 1, 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." Id. at paragraph seven of the syllabus. Thus, post-*Foster,* we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range. *State v. Haney,* 11th Dist. No. 2006-L-253, 2007-Ohio-3712, at ¶24; *State v. Sebring*, 11th Dist. No. 2006-L-211, 2007-Ohio-1637, at ¶9; *State v. Weaver,* 11th Dist. No. 2006-L-113, 2007-Ohio-1644, at ¶33; *State v. Taddie,* 11th Dist. No. 2006-L-098, 2007-Ohio-1495, at ¶12; *State v. Bradford,* 11th Dist. No. 2006-L-140, 2007-Ohio-2575, at ¶11.

{¶18} An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶19} We recognize that although the abuse of discretion standard will govern most post-*Foster* sentencing appeals, there are certain, limited circumstances in which the clear and convincing standard that was left unexcised by *Foster,* pursuant to R.C. 2953.08(G)(2)(b), would still apply. For instance, if it is determined that a sentence is contrary to law because the sentence falls outside the applicable range of sentencing, and the trial court has failed to even consider R.C. 2929.11 and the factors enumerated

in R.C. 2929.12, then the matter must be reviewed under the clear and convincing standard of R.C. 2953.08(G)(2)(b).

{¶20} Since R.C. 2953.08(G)(2)(b) does not apply to such judicial factfinding, but instead refers to errors in law, this statute survives with respect to the appellate standard of review of such errors. Thus, where it is to be argued the trial court's conduct was contrary to law, we are to apply a clear and convincing standard of review. However, if the sentence falls within the statutory range for the offenses for which the defendant was convicted, then we presume that the trial court considered the sentencing criteria in imposing defendant's sentence even where the record is silent on that point. This is because "[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *State v. Adams* (1988), 37 Ohio St.3d 295, paragraph three of the syllabus.

{¶21} In sum, we continue to adhere to our prior holdings in which we have applied the abuse of discretion standard of review in a post-*Foster* appeal where the trial court considered R.C. 2929.11 and the factors set forth in R.C. 2929.12, but recognize that the clear and convincing standard of review remains viable in those very limited circumstances where the sentence is contrary to law.

{¶22} **Law of the Case**

{¶23} In his first assignment of error Mr. Payne argues that the trial court erred since the court did not follow the law of the case upon remand. Specifically, he contends that the trial court erred by following the holding of the Supreme Court of Ohio in *Foster*, instead of the law of the case, which instructed the trial court to sentence Mr. Payne to no more than a sixteen year term of imprisonment. We find this argument to be without merit.

{¶24} "The 'law of the case' doctrine was described by the Supreme Court of Ohio in *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1, 3-4. 'The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *** Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law. *** Moreover, the trial court is without authority to extend or vary the mandate given.'" *Weller v. Weller*, 11th Dist. No. 2004-G-2599, 2005-Ohio-6892, ¶14-15. (Citations omitted.)

{¶25} Thus, "absent extraordinary circumstances, legal determinations made by this court must be followed by inferior courts in subsequent proceedings of that particular case." Id. at ¶16, citing *Lapping v. HM Health Services,* 11th Dist. No. 2004-T-0011, 2005-Ohio-699, ¶18.

{¶26} Mr. Payne argues that "extraordinary circumstances" are not present in this case that would mandate the trial court to depart from our instructions upon remand. He correctly notes that upon remand the trial court is bound to follow the instructions of the appellate court absent extraordinary circumstances. However, what Mr. Payne fails to realize is that the intervening decision of the Supreme Court of Ohio in *Foster* is just such an intervening extraordinary circumstance. Indeed, on remand, a lower court is *obligated* to follow the intervening decision of the Supreme Court that changes the applicable law *regardless of the law of the case.* (Emphasis added.)

{¶27} As the Supreme Court of Ohio explained in *Hopkins v. Dyer*, 104 Ohio St. 3d 461, 2004-Ohio-6769, ¶1: "[A]n 'intervening decision' by the Ohio Supreme Court

'applies as an exception to the law of the case theory of practice and inferior courts are mandated to follow the Supreme Court's decision.' This is, however, a long standing statement of law. We have previously held that 'absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.'" Id. quoting *Nolan*, at syllabus.

{¶28} As the Supreme Court of Ohio stated in *Foster*, which has a direct bearing on Mr. Payne's case: "As the Supreme Court mandated in *Booker*, we must apply this holding to all cases on direct review." *Foster* at ¶106, citing *Booker* at 268, quoting *Griffith v. Kentucky*, 479 U.S. at 328 ("'[a] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases *** pending on direct review or not yet final'").

{¶29} Accordingly, the trial court followed the law of the case insofar as it remained unchanged from the dictates of *Foster*. The trial court sentenced Mr. Payne pursuant to the sentencing dictates of *Foster* in regards to the three merged counts of conspiracy, the count of aggravated theft and the firearm specification. More specifically, the court held a de novo hearing and considered the overriding purposes of felony sentencing pursuant to R.C. 2929.11 and R.C. 2929.12, the record, oral statements made, the victim impact statement, and statements of Mr. Payne and his counsel. The court then sentenced Mr. Payne to five years for the count of aggravated theft, in violation of R.C. 2913.02(A)(1), a felony of the third degree. Pursuant to *Foster,* for a third degree felony, the court now has the discretion to sentence him to a term from one to five years. See R.C. 2929.14(A)(3). Further, the court imposed a mandatory three year term of incarceration for the firearm specification pursuant to R.C.

2929.14(D)(1)(a)(ii). As to the RVO determination, the court was given the discretion to impose an additional prison term of two to ten years since Mr. Payne was previously convicted for aggravated burglary, a first degree felony, in violation of R.C. 2911.11; aggravated robbery, a first degree felony, in violation of R.C. 2911.02; and two counts of kidnapping, felonies of the second degree, in violation of R.C. 2905.01. However, as we more fully explain below, the trial court erred in Mr. Payne's RVO determination since the court engaged in judicial fact-finding, and thus we remand for a de novo resentencing hearing of the RVO specification. Lastly, in accord with the law of the case and unchanged post-*Foster*, the trial court merged the three conspiracy convictions into one eight year term since we held that the three conspiracy convictions for robbery, burglary, and theft arose out of one common scheme to achieve one, common, comprehensive goal. Thus, the law of the case was properly followed, and it cannot be said that the trial court abused its discretion.

{¶30} Mr. Payne's first assignment is without merit.

{¶31} **Repeat Violent Offender Enhancement**

{¶32} In his second and third assignments of error, Mr. Payne contends that the trial court erred by sentencing him post-*Foster* as a repeat violent offender. According to Mr. Payne, *Foster* declined to address and left unresolved the constitutionality of the RVO provisions regarding sentencing. Secondly, in his fourth assignment of error, Mr. Payne argues that the court erred in finding that the repeat violent offender statutes, R.C. 2941.149 and R.C. 2929.14(D), as amended in August 3, 2006, were applicable to him. We find his argument to have some merit in part since the court improperly made judicial findings of fact in sentencing him to the maximum term of ten years for the RVO specification.

{¶33} In *Foster*, the Supreme Court of Ohio severed the unconstitutional portions of R.C. 2929.14(D)(2) that required the trial court to engage in fact finding before enhancing a defendant's sentence for repeat violent offender specifications. Thus, the court stated: "R.C. 2929.14(D)(2)(b) and (D)(3)(b) are capable of being severed. After the severance judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender specifications. (*Booker*, followed.)." *Foster* at paragraph six of the syllabus.

{¶34} Recently, in *State v. Adams*, 11th Dist. No. 2006-L-114, 2007-Ohio-2434, we interpreted *Foster's* discussion and severance of the repeat violent offender statute, R.C. 2941.149. We rejected the appellant's argument that penalty enhancements for repeat violent offenders and major drug offenders have been abolished and said: "A more legally sound understanding of these words is that only the requirement to make factual findings before imposing 'the add-on' has been severed. This understanding of the dicta is consistent with the syllabus and reason of *Foster* and the underlying issue in *Chandler*." Id. at ¶27. See, also, *State v. Roberson*, 8th Dist. No. 88338, 2007-Ohio-2772, ¶10 ("Thus, a judge may impose an additional one to ten-year sentence on the repeat violent offender specification without judicial fact-finding").

{¶35} Thus, the trial court is within full discretion to enhance Mr. Payne's sentence for the repeat violent offender specification up to the maximum of ten years, especially given the circumstances presented here where the court found the instant case to be a "truly heinous crime" and Mr. Payne has previous convictions for first and second degree felonies that were violent offenses. However, we do find that the trial court abused its discretion since the court erred insofar as it made explicit findings of fact in making its determination that Mr. Payne was a RVO.

{¶36} *Foster* and its progeny made clear that judicial fact-finding in sentencing is unconstitutional, and therefore, explicit fact-finding must be distinguished from considerations the court reviews on the record in making its sentencing determination. We addressed this very issue recently in *State v. Curd*, 11th Dist. No. 2006-L-159, 2007-Ohio-3193, where the appellant challenged the trial court's considerations during sentencing. Specifically, the court considered on the record oral statements, the presentence report, drug, alcohol, and psychological evaluations, conferences in chambers with counsel, as well as statements by the defendant and his counsel. We found that the trial court was well within its discretion to consider all of this information. Indeed, we found the trial court's recitation of the factors it considered was specifically validated in *Mathis* where, "the Supreme Court discussed the nature and dimension of the material a trial court may consider when conducting a post-*Foster* resentencing hearing. The Court concluded that '[t]he [trial] court 'shall consider the record,' and information presented at the hearing, any presentence investigation report, and any victim impact statement.'" Id. at ¶28, citing *Mathis* at 37. Thus, we held that the trial court "scrupulously followed the pronouncements of the Ohio Supreme Court and, in doing so, respected appellant's constitutional right to due process." Id.

{¶37} However, when sentencing Mr. Payne the court did not merely express the factors that were considered, but explicitly made findings of fact and accepted into the record matters outside the purview of this case. The court went beyond the determination that Mr. Payne committed a statutorily defined violent offense and considered the victim's medical records from his previous conviction to determine if violence was indeed used in that case. This was unnecessary. It is clear in the present

case from the charge itself that this was a crime of violence. Nothing more was required, but the court went further and engaged in impermissible fact-finding.

{¶38} Moreover, the trial court was expressly clear that it was engaging in judicial fact-finding. At the resentencing hearing on November 9, 2006, the court stated in pertinent part: "The Court, based upon the evidence in the record, does find that serious harm occurred in the current conviction, and that physical harm occurred in the prior conviction. And based upon those findings, the Court finds that the repeat violent offender specification requires the imposition of an additional 10 years, for a total of 26 years in prison with credit for time served to date."

{¶39} Mr. Payne's counsel then asked: "Just for the record, Your Honor, make, would you make it clear that's a finding of fact?"

{¶40} To which the court responded: "Yes."

{¶41} Thus, the court was explicitly clear that it was engaging in the very judicial fact-finding that the Supreme Court of Ohio prohibited and ruled unconstitutional in *Foster*. The Second Appellate District in *State v. Pianowski*, 2d Dist. No. 21069, 2006-Ohio-3372, reversed in a case apposite to the one at bar upon determining that the trial court engaged in judicial fact-finding in determining that the appellant was a RVO. The court remanded and in doing so cogently instructed the trial court, stating: "At the resentencing, the trial court has full discretion to impose sentences within the statutory range, and is no longer required to make findings or give reasons for imposing maximum, consecutive, more than the minimum sentences, or for repeat violence offender enhancement. At this new sentencing hearing, the trial court shall consider the record, any information presented at the hearing, any presentence investigation report, and any victim impact statement. It is presumed that this sentencing hearing is de novo

***." Id. at ¶26, citing *Mathis* at ¶37. "Furthermore, while the defendant may argue for a reduction in his sentence, nothing prevents the state from seeking greater penalties." Id., citing *Foster* at ¶26, quoting *U.S. v. DiFrancesco* (1980), 449 U.S. 117, 134-136.

{¶42} Thus, similarly here, we find that Mr. Payne is entitled to a new sentencing hearing. Upon remand, the court is instructed to sentence Mr. Payne within the one to ten-year range for the RVO specification, since he previously pled guilty to a felony that is classified as an offense of violence pursuant to R.C. 2929.01(DD)(1)(1) and (2).

{¶43} Aggravated robbery is a felony of the first degree, in violation of R.C. 2911.01, and is classified by the legislature as an "offense of violence" pursuant to R.C. 2901.01(A)(9)(a). Thus, there is no doubt that the RVO specification is applicable to this case. However, we do note and can imagine a factual scenario where the trial court will be faced with a RVO specification for an offense that is not specifically defined as a "violent offense," and yet, is a violent offense under the factual circumstances of the case. In such a situation, it is yet unclear without guidance from the Supreme Court of Ohio on how the RVO specification shall be applied post-*Foster* since the court may not engage in judicial fact-finding in determining a RVO specification.

{¶44} In his third assignment of error, Mr. Payne also contends that the trial court erred in finding that he was a RVO and that the RVO statutes, R.C. 2929.149 and R.C. 2929.14(D)(2)(a), as amended August 3, 2006, were inapplicable to him since the statutes were amended after his conviction. In this respect, Mr. Payne argues that the RVO statute as amended is an ex post facto application and that he would not have received ten years under the former statutory RVO regime pre-*Foster.* Further, Mr. Payne argues that even if he was sentenced under the amended versions of R.C.

2929.149 and R.C. 2929.14(D)(2), the trial court erred since he did not receive proper notice and had no opportunity to object. We disagree.

{¶45} In *State v. Elswick*, 11th Dist. No. 2006-L-0075, 2006-Ohio-7011, we determined that "*Foster* did not contravene the federal constitutional guarantee of due process, and prohibition against ex post facto laws, since it did not affect a defendant's right to a sentencing hearing; did not alter the statutory range of sentences available to trial courts for any particular degree of crime; and, because the potential for a judicial declaration that certain portions of Ohio's sentencing statutes were unconstitutional was prefigured by the decisions of the United States Supreme Court in *Apprendi* and *Blakely*." *State v. Lewis*, 11th Dist. No. 2006-L-224, 2007-Ohio-3014, ¶40, citing *State v. Ashley,* 11th Dist. No. 2006-L-123, 2007-Ohio-690, ¶16. See, also, *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2006-A-0070, 2006-Ohio-6695; *State v. Asbury*, 11th Dist. No. 2006-L-097, 2007-Ohio-1073; *State v. Anderson*, 11th Dist. No. 2006-L-142, 2007-Ohio-1062; *State v. Spicuzza*, 11th Dist. No. 2006-L-141, 2007-Ohio-783.

{¶46} As applied to this case, Mr. Payne had proper notice regardless of whether the August 3, 2006 amended version of R.C. 2929.149 was applied since he was properly informed in the indictment raised against him, and further had the opportunity to object at the resentencing hearing, which was properly conducted de novo. Thus, we find Mr. Payne's argument to have little merit in this respect.

{¶47} Mr. Payne's second assignment of error is sustained and remanded in part.

{¶48} Mr. Payne's third assignment of error is without merit.

{¶49} **Consecutive Sentences**

{¶50} In his fourth assignment of error, Mr. Payne argues that the trial court erred by imposing a consecutive five year sentence for aggravated theft. Specifically, he argues that R.C. 2941.26 prohibits separate sentences with the same animus. We reject this argument and note that we found that this same argument to have little merit in Mr. Payne's previous appeal.

{¶51} Specifically, in his previous appeal Mr. Payne argued that pursuant to R.C. 2941.25, "the trial court should not have sentenced him consecutively on each of the three conspiracy charges and on the aggravated theft charge because he maintains that he committed them with the same animus." *Payne* at ¶74.

{¶52} In that case, we reviewed R.C. 2941.25, which provides:

{¶53} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶54} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶55} Furthermore, "[i]n order to determine whether multiple crimes should be merged, the Supreme Court of Ohio has developed a two-step test: first, the court must determine whether the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other. If so, the crimes are allied offenses of similar import. However, the inquiry does not stop there. If the offenses are allied and of similar import for purposes of the first step, the court must

then address the second prong; namely, the court must review the defendant's conduct to determine whether he can be convicted of both offenses. If the court finds that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both." *Payne* at ¶78, citing *State v. While,* 11th Dist. No. 2001-T-0051, 2003-Ohio-4594, at ¶17, citing *State v. Nicholas* (1993), 66 Ohio St. 3d 431, 434, citing *State v. Blankenship* (1988), 38 Ohio St. 3d 116, 117. (Emphasis added.) "Thus, if the answer to the first prong is that the offenses are not of similar import, then the court does not have to reach the second prong." Id.

{¶56} We determined that although Mr. Payne failed to raise the issue with the trial court or on appeal it was plain error for the trial court to sentence Mr. Payne separately on each count of conspiracy since the evidence clearly supported the fact that there was a "common plan or scheme to achieve a common, single, comprehensive goal." *Payne* at 85, quoting *State v. Childs* (2000), 88 Ohio St. 3d 558, 563.

{¶57} However, as for the conviction of aggravated theft, we distinctly found that aggravated theft was not an allied offense of conspiracy. We stated: "Appellant [Mr. Payne] was convicted of aggravated theft pursuant to R.C. 2313.02(A)(1), which provides that, 'no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** without the consent of the owner or person authorized to give consent [.]' R.C. 2923.01(A)(1) governs the crime of conspiracy. It provides that, 'no person, with purpose to commit or to promote or facilitate the commission of *** kidnapping, *** aggravated robbery, *** or aggravated burglary, *** shall *** with another person or persons, plan or aid in planning the commission of any of the specified offenses[.]'" Id. at ¶79.

{¶58} Thus, we concluded that "pursuant to the first step, the crimes involved here are not so similar that commission of one will result in the commission of the other. Thus, they are not allied offenses of similar import. As such, the sentence for aggravated theft should not be merged with the conspiracy offenses." Id.

{¶59} Mr. Payne's fourth assignment of error is without merit.

{¶60} The judgment of the Lake County Court of Common Pleas is affirmed in part; reversed in part; and this case is remanded for proceedings consistent with this opinion.

TIMOTHY P. CANNON, J., concurs with Concurring Opinion,

DIANE V. GRENDELL, J., concurs in part, dissents in part with a Concurring Dissenting Opinion.

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

{¶61} While I concur with the majority's decision to remand the case to the trial court, I believe further analysis on the repeat violent offender statute is warranted.

{¶62} Because of the change in law concerning the definition of repeat violent offender ("RVO"), the case before us presents a very narrow question for review. Pursuant to former R.C. 2929.01(DD), in order to establish the specification in the indictment that appellant was a RVO, both of the following were required: (1) the requisite conviction standard that the state in this case demonstrated (i.e., appellant's prior convictions for first and second-degree felonies), and (2) the fact that death or physical harm resulted from the commission of one of those offenses.

{¶63} The RVO statute was amended on August 3, 2006. Under the amended law, a finding that death or physical harm resulted from the commission of the underlying offense is no longer required. R.C. 2929.01(DD). Therefore, under the current statute, the RVO finding will be capable of determination by public record of a prior conviction. In the instant case, I agree with appellant that the former version of R.C. 2929.01(DD) is to be applied.

{¶64} Further, the requirements of judicial factfinding *for sentencing purposes* contained in the former R.C. 2929.14(B) and (C) and 2929.19(B)(2), severed by the Supreme Court of Ohio in *State v. Foster* (2005), 109 Ohio St. 3d 1, 2006-Ohio-856, and a factual element needed to meet the definition of a RVO set forth in former R.C. 2929.01(DD)(1) and (2) must be distinguished. Prior to *Foster*, in a *felony sentencing review*, certain factual findings were required to be made before the trial court elected to impose certain sentences. *State v. Foster*, at paragraphs one and three of the syllabus. These factfinding requirements were severed by *Foster* and are no longer a limitation on the trial court's ability to exercise its discretion in imposing sentences. Id. at paragraphs two, four, and seven of the syllabus. Thus, the trial court was free, in its discretion, to impose any sentence within the applicable range. Id.

{¶65} However, the issue of "factfinding" raised by the appellant as it narrowly applies to this case is much different. This was recognized by the *Foster* Court in directing us to *Shepard v. United States* (2005), 544 U.S. 13, 24-25. *Foster*, supra, at ¶7, fn. 2. In addressing whether "a fact about" a prior conviction falls within an exemption established by *Apprendi v. New Jersey* (2000), 530 U.S. 466, the *Shepard* Court stated:

{¶66} "We hold that enquiry under the ACCA [Armed Career Criminal Act, the analogous federal counterpart to Ohio's RVO statute] to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. at 26.

{¶67} In the case sub judice, the majority asserts that appellant's prior convictions meet the definition of an "offense of violence." While this is true, the prior offenses for which appellant was found guilty allow for convictions if there was "physical harm" *or* if there was an "attempt to cause physical harm." This means appellant could have been convicted of the offenses if there was no *actual* physical harm to someone. However, at the time of commission of the instant offense, the definition of RVO did not require a finding that appellant committed *an offense of violence*, it required a finding that actual physical harm occurred as a result of the commission of the offense. See former R.C. 2929.01(DD)(2)(a)(i).

{¶68} Therefore, in the present case, in order for the trial court to make a finding that the defendant is a RVO as defined in the statute, it can do so only in a limited number of ways. One way the trial court may establish that the underlying conviction of appellant resulted in "physical harm" would be if appellant stipulated to this fact. In this scenario, the trial court would be free to make a finding without violating appellant's constitutional rights under *United States v. Booker* (2005), 543 U.S. 220, or *Apprendi*, supra.

{¶69} Additionally, based on the discussion by the United States Supreme Court set forth in *Shepard*, it appears the trial court on remand could consider "the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, *or to some comparable judicial record of this information*." (Emphasis added.) *Shepard*, supra, at 26. In the present case, this would allow the state to potentially retrieve a statement of the defendant made on the record at the time of his plea, during sentencing, or as part of his allocution to the trial court in the underlying Cuyahoga County case that resulted in the prior conviction(s). In this particular case on remand, the trial court could use any statement or other stipulation that may not currently be in the record before us.

{¶70} With regard to appellant's third assignment of error, I agree with the state that the trial court did not apply the amended version of 2929.01(DD) to establish appellant as a RVO. Otherwise, the factfinding on the issue of whether there was physical harm caused in the underlying conviction would be simply moot.

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶71} I concur in the majority's opinion, except as to the second assignment of error wherein the majority remands the case for resentencing. For the following reasons, Payne's sentence should stand.

{¶72} In the second assignment of error, Payne argued the trial court erred by determining him to be a repeat violent offender post-*Foster*. As set forth in the majority's analysis, the trial court engaged in judicial factfinding in its determination that

Payne is a repeat violent offender. Specifically, the trial court found "that serious harm occurred in the current conviction, and that physical harm occurred in the prior conviction."

{¶73} These findings are required by R.C. 2941.149(B) and (D), which requires the trial court to "determine the issue of whether an offender is a repeat violent offender" as defined in R.C. 2929.01(DD)." In order to qualify as a repeat violent offender, the offender must be "being sentenced for committing *** a felony of the second degree that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person"; and the offender must have been "previously *** convicted of or pleaded guilty to, and previously served *** a prison term for *** a felony of the first or second degree that resulted in the death of a person or in physical harm to a person ***." Former R.C. 2929.01(DD)(1)(a)(i).

{¶74} As the majority correctly concludes, it was "unnecessary" for the trial court to make findings regarding harm, since "[i]t is clear in the present case from the charge itself that this was a crime of violence." Supra, at ¶34.

{¶75} Although the trial court engaged in unnecessary and impermissible fact-finding in determining Payne to be a repeat violent offender, it is not necessary to remand for resentencing. The majority errs by applying the remedy in *Foster* to a situation where *Foster* does not apply.

{¶76} In *Foster*, the Ohio Supreme Court found the provision for judicial factfinding "contained in R.C. 2929.14(D)(2)(b)" to be unconstitutional and severable. Thus, "judicial factfinding is not required before imposition of additional penalties for [the] repeat violent offender [specification]." 2006-Ohio-856, at paragraphs five and six of the syllabus. However, the factfinding required before the imposition of additional

penalties is separate and distinct from the factfinding required to determine an offender's status as a repeat violent offender. An offender may be determined to be a repeat violent offender without suffering the imposition of additional penalties. See *State v. Payne*, 11th Dist. No. 2004-L-118, 2005-Ohio-7043, at ¶103 (recognizing these as being distinct issues).

{¶77} In the present case, the trial court did not make findings pursuant to the now unconstitutional R.C. 2929.14(D)(2)(b), but pursuant to R.C. 2941.149, which, as applied here, is constitutionally valid.[1] The distinction is an important one. The rationale in *Foster* to remand for resentencing is that ***sentences*** based on unconstitutional statutes are "void." 2006-Ohio-856, at ¶104. As explained above, the question before us does not concern Payne's ***sentence***, but, rather, his ***classification*** as a repeat violent offender. As explained in the majority's opinion, Payne's classification as a repeat violent offender is permissible based solely on prior convictions.

{¶78} Since the issue before us does not concern a "void" sentence, the remedy of remand is not mandated. The general rule where the lower court arrives at the correct judgment for an improper reason is to affirm the judgment. As we have acknowledged previously, a "universal tenet" of Ohio law is the proposition "that a reviewing court has a duty to affirm the trial court's judgment when the judgment is correct albeit based on the wrong reason." *State v. Eschenauer* (Nov. 10, 1988), 11th

1. In *Foster*, the Supreme Court acknowledged the peculiarity of R.C. 2941.149(B) requiring the court to make factual findings in determining and offender to be a repeat violent offender. 2006-Ohio-856, at ¶71 ("Unlike all other penalty enhancing specifications, the court, not the jury, makes the necessary factual findings for convicting the offender of being a repeat violent offender or a major drug offender."). Nowhere in *Foster*, however, is it suggested that R.C. 2941.149(B) is unconstitutional or unenforceable. In a prior appeal of the present case, this court held the factfinding required by R.C. 2941.149(B) to be

Dist. No. 12-237, 1988 Ohio App. LEXIS 4479, at *7 (citation omitted); *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284 ("[i]t is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof").

{¶79} Payne's status as a repeat violent offender is a foregone conclusion. Remanding in this case is neither necessary nor reasonable from the viewpoint of judicial economy. Accordingly, the lower court's judgment should be affirmed.

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unconstitutional, but, noted that the classification of an offender as a repeat violent offender is "permissible," if the court only considers "prior convictions." 2005-Ohio-7043, at ¶114.