

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	<b>CASE NO. 2009-L-039</b>
- vs -	:	
MICHAEL A. STALNAKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 000650.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Joshua S. Horacek*, 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).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Michael A. Stalnak, appeals from the February 13, 2009 judgment entry of the Lake County Court of Common Pleas, in which he was resentenced for rape, gross sexual imposition, and furnishing alcohol to a minor.

{¶2} On December 5, 2003, appellant was indicted by the Lake County Grand Jury on the following counts: (1) five counts of rape, each a first degree felony in violation of R.C. 2907.02(A)(1)(b); (2) six counts of gross sexual imposition, each a third degree felony in violation of R.C. 2907.05(A)(4); (3) one count of furnishing alcohol to a

minor, a first degree misdemeanor in violation of R.C. 4301.69(C)(1) and 4301.99(C); and (4) five counts of furnishing alcohol to a minor, in violation of R.C. 4301.69(A) and 4301.99(I). At his arraignment, appellant pleaded not guilty to the foregoing charges.

{¶3} The matter proceeded to a jury trial on May 6, 2004.

{¶4} Following trial, the jury returned a unanimous guilty verdict on all counts. The trial court entered judgment accordingly, convicting appellant on all counts. After holding a sentencing hearing, the trial court sentenced appellant to an aggregate prison term of thirty-three years.

{¶5} On June 15, 2004, appellant filed a timely notice of appeal with this court, Case No. 2004-L-100.

{¶6} On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington* (2004), 542 U.S. 296, finding a violation of the Sixth Amendment right to trial by jury where the state sentencing statute permitted a judge to increase the defendant's sentence based upon factual findings of the judge rather than the jury.

{¶7} On December 29, 2005, this court affirmed appellant's convictions and sentences. *State v. Stalaker*, 11th Dist. No. 2004-L-100, 2005-Ohio-7042.

{¶8} On January 9, 2006, appellant filed a motion for reconsideration pursuant to App.R. 26(A), which was denied by this court on January 27, 2006. Also on January 9, 2006, appellant filed a notice to certify a conflict with this court regarding (1) whether his sentence was unconstitutional under R.C. 2929.14(B) because it was based on improper judicial fact-finding which increased the sentence beyond the statutory minimum; and (2) whether the imposition of consecutive prison terms was unconstitutional. This court found a conflict existed only as to the first issue and

certified the question to the Supreme Court of Ohio.<sup>1</sup> While the certified question was pending, appellant filed a notice of appeal with the Supreme Court of Ohio.

{¶9} On February 27, 2006, the Supreme Court of Ohio decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, applying *Blakely* to Ohio's sentencing statutes and finding portions to be unconstitutional, including R.C. 2929.14(B) and (E).

{¶10} On April 26, 2006, the Supreme Court of Ohio dismissed the certified question, finding that no conflict existed. *State v. Stalaker*, 109 Ohio St.3d 1420, 2006-Ohio-1967. In addition, the Supreme Court of Ohio did not accept appellant's appeal for review. *State v. Stalaker*, 109 Ohio St.3d 1427, 2006-Ohio-1967.

{¶11} On July 23, 2007, appellant filed a federal habeas petition asserting two grounds for relief:

{¶12} "1. Petitioner's trial counsel provided ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, by pursuing (sic) a bizarre trial strategy that invited the introduction of an avalanche of 'bad acts' evidence that tended to establish the accused's criminal propensity and, in effect, sealed Petitioner's conviction.

{¶13} "2. Petitioner was sentenced in violation of Petitioner's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution based upon judicial findings which were not admitted by Petitioner or proved to the jury beyond a reasonable doubt, contrary to the rule announced by the United States Supreme Court in *Blakely v. Washington*." *Stalaker v. Bobby* (N.D. Ohio 2008), 589 F.Supp.2d

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1. Specifically, the question certified to the Supreme Court of Ohio was whether the judicial findings mandated under R.C. 2929.14(B) are unconstitutional in light of the United States Supreme Court's decision in *Blakely*.

905, 911.

{¶14} The Northern District granted appellant's petition as to the second ground of his petition resting on a *Blakely* claim that he was improperly sentenced to nonminimum prison terms, and denied the remainder of the petition. *Id.* at 919.

{¶15} This case was remanded for resentencing, and a hearing was held on January 29, 2009.

{¶16} Pursuant to the trial court's February 13, 2009 judgment entry, appellant was ordered to serve an aggregate prison term of thirty-three years, with one thousand nine hundred thirty eight days of credit for time already served. It is from that judgment that appellant filed the present appeal, asserting the following five assignments of error:

{¶17} "[1.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO A MORE-THAN-THE-MINIMUM, CONSECUTIVE PRISON TERM IN VIOLATION OF THE DUE PROCESS AND EX POST FACTO CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶18} "[2.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO A MORE-THAN-THE-MINIMUM, CONSECUTIVE PRISON TERM IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS.

{¶19} "[3.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO A MORE-THAN-THE-MINIMUM, CONSECUTIVE PRISON TERM 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.

{¶20} “[4.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO A MORE-THAN-THE-MINIMUM, CONSECUTIVE PRISON TERM CONTRARY TO THE RULE OF LENITY.

{¶21} “[5.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO A MORE-THAN-THE-MINIMUM, CONSECUTIVE PRISON TERM CONTRARY TO THE INTENT OF THE OHIO LEGISLATORS.”

{¶22} The issues contained in appellant’s five assignments of error have been addressed by this court in numerous prior decisions. *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, discretionary appeal not allowed by *State v. Elswick*, 113 Ohio St.3d 1513, 2007-Ohio-2208; *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695; *State v. Marino*, 11th Dist. No. 2006-L-192, 2007-Ohio-2566; *State v. Nicholson*, 11th Dist. No. 2006-L-210, 2007-Ohio-2058; *State v. Schaub*, 11th Dist. No. 2006-L-126, 2007-Ohio-2853; *State v. Yearian*, 11th Dist. No. 2006-P-0106, 2007-Ohio-2165; *State v. Hall*, 11th Dist. No. 2006-L-226, 2007-Ohio-4950; *State v. Dudas*, 11th Dist. Nos. 2006-L-267 and 2006-L-268, 2007-Ohio-6739. Additionally, similar arguments have been consistently rejected by other Ohio appellate districts and federal courts. See *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899; *State v. Moore*, 3d Dist. No. 1-06-51, 2006-Ohio-6860; *United States v. Portillo-Quezada* (C.A.10, 2006), 469 F.3d 1345. Also, we note that on July 28, 2009, the Supreme Court of Ohio rejected the same arguments in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, finding that application of *Foster’s* severance remedy to defendants who are resentenced after *Foster* does not violate their Sixth Amendment right to a jury trial or the Ex Post Facto or Due Process Clauses of the U.S. Constitution.

{¶23} Accordingly, appellant's assignments of error are without merit.

{¶24} The judgment of the Lake County Court of Common Pleas is affirmed.

The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.