

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-163
ANGELO J. FOTI,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 00 CR 00315.

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).

Angelo Foti, pro se, PID: 398-522, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Angelo J. Foti, appeals from the November 24, 2009 judgment entry of the Lake County Court of Common Pleas. For the following reasons, we affirm the trial court's decision.

{¶2} Foti was indicted on September 8, 2000, on two counts of corrupting another with drugs and two counts of receiving stolen property. The matter proceeded to a jury trial in November 2000. On November 20, 2000, the jury found Foti guilty on

both counts of corrupting another with drugs and made a special finding as to both counts that the controlled substance was crack cocaine. Additionally, the jury found Foti guilty on both counts of receiving stolen property.

{¶3} Foti received a prison term aggregating 16 years from the Lake County Common Pleas Court on January 11, 2001. The trial court sentenced Foti to eight years of imprisonment on each of the corruption charges, to be served consecutively, and one year of imprisonment on each of the receiving stolen property charges, to be served concurrently with the other charges. This court affirmed the judgment of the trial court in *State v. Foti*, 11th Dist. No. 2001-L-020, 2003-Ohio-796, at ¶75.

{¶4} Thereafter, Foti filed requests to hear his case in both the Supreme Court of Ohio and the United States Supreme Court. The Supreme Court of Ohio did not accept Foti's appeal for review, and the United States Supreme Court denied certiorari. See *State v. Foti*, 104 Ohio St.3d 1427, 2004-Ohio-6585. (Appeal denied.) *Foti v. Ohio* (2005), 544 U.S. 953. (Certiorari denied.)

{¶5} Foti filed a motion to vacate and/or correct sentence in the Lake County Common Pleas Court in May 2006. The trial court denied Foti's motion, construing it as a petition for postconviction relief. This court affirmed the trial court's judgment entry denying Foti's petition for postconviction relief. *State v. Foti*, 11th Dist. No. 2006-L-138, 2007-Ohio-887, at ¶39.

{¶6} On August 15, 2007, pursuant to Crim.R. 33(B), Foti filed a motion for leave to file a motion for a new trial based upon newly-discovered evidence. On August 31, 2007, the trial court summarily denied the motion. This court affirmed the trial court's decision in *State v. Foti*, 11th Dist. No. 2007-L-152, 2008-Ohio-4767. The

Supreme Court of Ohio did not allow a discretionary appeal. See *State v. Foti*, 120 Ohio St.3d 1508, 2009-Ohio-361.

{¶7} Foti subsequently filed several pro se motions, including a motion to vacate void sentence and for resentencing, a motion to “certify to the court of claims the defendant was wrongfully incarcerated,” a motion for appointed counsel, a motion for leave to supplement authority, a motion for release on personal bond and/or reasonable bond and to convey him to the trial court, and a motion to vacate void sentence and resentencing. In a November 24, 2009 judgment entry, the trial court denied Foti’s motions to certify and for appointed counsel, granted his motion for leave to supplement authority, and determined his motion for release on personal bond was moot.

{¶8} A hearing was held on Foti’s motion to vacate void sentence and resentencing. In said motion, Foti claimed the trial court incorrectly advised him both orally and in the sentencing journal that postrelease control pursuant to R.C. 2967.28 was optional, thus rendering his sentence void. Foti further argued the trial court failed to fully explain postrelease control to him.

{¶9} In its November 24, 2009 judgment entry, the trial court noted that it had reviewed the transcript of the original sentencing hearing, which indicated the sentencing judge correctly notified Foti that he was subject to a term of three years of postrelease control. Further, the trial court stated that the sentencing judge explained the nature of postrelease control; however, the judgment entry incorrectly stated that postrelease control was optional.

{¶10} The November 24, 2009 judgment entry ordered:

{¶11} “That the Judgment Entry of Sentence filed January 11, 2001 be corrected to state that the defendant was notified that three years of postrelease control is mandatory, that the defendant was notified of the consequences for violating postrelease control imposed by the Parole Board under R.C. 2967.28 and that the defendant was ordered to serve as part of his sentence any term of postrelease control imposed by the Parole Board, and any prison term for violation of that postrelease control.”

{¶12} In the event the January 11, 2001 entry of sentence could not be corrected, the trial court, after conducting a sentencing hearing, resentenced Foti to a prison term aggregating 16 years—the same term of imprisonment previously imposed.

{¶13} It is from this judgment that Foti filed a timely notice of appeal. On appeal, Foti alleges 11 assignments of error. For ease of discussion, we address Foti’s alleged errors out of numerical order.

{¶14} As his first, second, and tenth assignments of error are interrelated, we address them in a consolidated analysis. Foti alleges:

{¶15} “[1.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by re-sentencing the appellant pursuant to R.C. 2929.191 et seq., as this remedial statute is in [conflict] with Crim.R. 32(A), Sup.R[.] 39, requiring a defendant to be lawfully sentenced ‘within 15 days’ of the verdict or finding of guilt or [receipt] of the pre-sentence investigation, as the criminal rules prevail divesting the trial court[’]s jurisdiction to re-sentence, *Willoughby v. Lukehart* ***.

{¶16} “[2.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by re-sentencing the appellant to prison terms for criminal cases the appellant had [acquired] a satisfaction of judgment for *In Re Bradley* ***.

{¶17} “[10.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions when the trial court made a pre[-]determination of sentencing the appellant to a maximum consecutive sentence prior to the appellant ever having a sentencing hearing, *State v. Garrett* ***.”

{¶18} Foti alleges that the trial court erred in his resentencing due to a jurisdictional defect, as the resentencing hearing was not held within 15 days of the verdict. Foti further maintains the trial court erred when it resentenced him on counts 1, 2, and 3, as he completed those terms of imprisonment, and when it imposed a sentence aggregating 16 years of imprisonment.

{¶19} Recently, the Supreme Court of Ohio released its opinion in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at ¶1, where it addressed R.C. 2929.191, the statutory remedy to correct the trial court’s failure to properly impose postrelease control. The *Singleton* Court held:

{¶20} “[F]or sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio. However, for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *Id.* at ¶1.

{¶21} In discussing the retroactive application of R.C. 2929.191, the *Singleton* Court, supra, at ¶25, stated:

{¶22} “Before the enactment of R.C. 2929.191, no statutory remedy existed for the correction of a sentence that failed to properly impose postrelease control. In the absence of a statutory remedy, we recognized that a sentence that failed to properly impose a statutorily mandated period of postrelease control was contrary to law when imposed. See [*State v.*] *Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶23; [*State v.*] *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶13. When a sentence is a nullity, it is as though it never occurred. *Id.*, citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267. Accordingly, we directed trial courts to conduct a de novo sentencing.” (Parallel citations omitted.)

{¶23} As Foti’s sentencing entry failed to comply with the mandate of R.C. 2967.28(B)(3) and he was sentenced in 2000, prior to the effective date of R.C. 2929.191, the trial court was required to conduct the de novo sentencing procedure set forth in *Singleton*, supra, at ¶26. As the November 16, 2009 record demonstrates, the trial court properly conducted a de novo sentencing hearing.

{¶24} At the hearing on Foti’s motion, which was held prior to the release of *Singleton*, the trial court engaged in a lengthy discussion as to the appropriate remedy for correcting the failure of properly imposing postrelease control. The trial court stated:

{¶25} “Now, the Court is going to go not only to modify that entry, but I’m going to go one step further in what correction may mean and, in fact, I’m going to resentence the Defendant here today to make sure that the corrective action being taken is, in fact, clear. And in fairness to the Defendant I am going to give him the opportunity to be

heard with respect to that resentencing, thereby granting him the relief he was asking for in terms of resentencing.”

{¶26} At the hearing, the trial court heard from both Foti and one of the victims and stated that it had also reviewed a written victim impact statement from the second victim. The trial court then stated on the record that it had considered the purposes and principles set forth in R.C. 2929.11 and considered the factors set forth in R.C. 2929.12. The trial court noted that it had reviewed the presentence investigation report, dated December 7, 2000. The trial court found that Foti’s relationship with the victims facilitated the commission of the crimes; one of the victims suffered serious psychological harm as a result of Foti’s criminal conduct; Foti has a significant criminal conviction history, including conspiracy to distribute cocaine and drug abuse; Foti has not shown genuine remorse for his actions; and Foti has not responded favorably to sanctions that had previously been imposed. See R.C. 2929.12(B)(2), (B)(6), (D)(3), (D)(4), (D)(5).

{¶27} The record reveals that the trial court sentenced Foti to the same terms of imprisonment as previously imposed, granting Foti credit for “all the time that has previously been served with respect to this case.” The trial court stated, “[o]riginally, there was local time of 92 days of credit that was served, and obviously [Foti] be given credit for the time that he has been continuously incarcerated in prison will be credit against that as well.”

{¶28} Foti further maintains the trial court erred in sentencing him “to a maximum consecutive sentence prior to [him] ever having a sentencing hearing.” To support this argument, Foti points to a judgment entry issued one month prior to the

sentencing hearing directing the Sheriff of Lake County to convey Foti to the hearing on his pending motion. The judgment entry further states that the sheriff shall “reconvey [Foti] back to the custody of the Lake Erie Correctional Institution at the end of said hearing which is held on November 16, 2009 ***.”

{¶29} Contrary to Foti’s assertion, the trial court did not make a “pre-determination of sentencing” prior to the November 16, 2009 hearing. The record clearly establishes that the trial court engaged in a de novo sentencing hearing on November 16, 2009.

{¶30} After the *State v. Foster* decision, “[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.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus.

{¶31} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶32} “First, [appellate courts] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.*

{¶33} The *Kalish* Court affirmed the sentence of the trial court as not being contrary to law, since the trial court expressly stated that it had considered the R.C.

2929.11 and R.C. 2929.12 factors, postrelease control was applied properly, and the sentence was within the statutory range. *State v. Kalish*, at ¶18.

{¶34} “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶35} The jury found Foti guilty of two felonies of the second degree and two felonies of the fifth degree. The statutory range for a second-degree felony is two to eight years. R.C. 2929.14(A)(2). Further, the statutory range for a fifth-degree felony is six to 12 months. R.C. 2929.14(A)(5). The trial court sentenced Foti to a prison term of eight years on each second-degree felony, and a term of 12 months on each of the fifth-degree felonies, which is within the statutory range. Further, as indicated above, the trial court expressly stated that it had considered the R.C. 2929.11 and R.C. 2929.12 factors. The trial court also stated on the record that, upon Foti’s release from prison, he would be subject to postrelease control for a term of three years.

{¶36} Additionally, in its November 24, 2009 judgment entry of sentence, the trial court stated that “a prison sentence is consistent with the purpose and principles of sentencing set forth in R.C. 2929.11” and that it had “balanced the seriousness and recidivism factors under R.C. 2929.12.”

{¶37} Upon a review of the record, we do not determine that the trial court’s sentence is clearly and convincingly contrary to law. Furthermore, taking all of the above into consideration, we cannot find that the trial court abused its discretion by sentencing Foti to an aggregate prison term of 16 years.

{¶38} Based on the foregoing analysis, Foti's first, second, and tenth assignments of error are without merit.

{¶39} In his third, fourth, fifth, sixth, seventh, eighth, ninth, and eleventh assignments of error, Foti alleges:

{¶40} “[3.] The manifest weight of the evidence does not support the appellant[']s convictions in violation of the Ohio and [United] States Constitutions.

{¶41} “[4.] The sufficiency of the evidence does not support the appellant[']s convictions in violation of the Ohio and [United] States Constitutions.

{¶42} “[5.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by failing to conduct an evidentiary hearing on the appellant's motion for a new trial based on documentation the original trial court judge absented himself from the court room on several occasions during the appellant's trial while testimony was being provided, that destroyed the forum and removed the structure rendering the verdict a nullity, *United States v. Mortimer* ***.

{¶43} “[6.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by failing to conduct an evidentiary hearing with an in[-]camera inspection of the grand jury transcripts that would support the appellant's motion for a new trial and/or dismissal based on the state[']s known use of perjured testimony by state[']s [witnesses] before the grand jury to secure an indictment, a transcript that was filed with the trial court under seal.

{¶44} “[7.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions for failing to provide the jury with an ‘anti jury nullification’ jury instruction, *Duncan v. Louisiana* ***.

{¶45} “[8.] The appellant was denied the effective assistance of counsel, in violation of the Ohio and United States Constitutions, by counsel[']s failure to object, investigate, procure discovery and, withdraw when a conflict of interest arose when counsel was named as a material witness in the defendant’s case.

{¶46} “[9.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by not conducting an evidentiary hearing on the appellant’s motion for a new trial when the [appellant] presented competent credible evidence that his conviction was the result of perjured testimony, *U.S. v. Baserto* ***. *State v. Defronzo* ***.

{¶47} “[11.] The appellant is entitled to a new trial based on the cumulative effect of all issues combined.”

{¶48} A review of Foti’s third, fourth, fifth, sixth, seventh, eighth, ninth, and eleventh assignments of error reveals they could have been raised on direct appeal or in Foti’s petition for postconviction relief, and, as a result, they are barred by the doctrine of res judicata.

{¶49} “[P]rinciples of *res judicata* prevent relief on successive, similar motions raising issues which were or could have been raised originally.” *Brick Processors, Inc. v. Culbertson* (1981), 2 Ohio App.3d 478, paragraph one of the syllabus. As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus:

{¶50} “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment.” (Emphasis sic.)

{¶51} As Foti could have raised his third, fourth, fifth, sixth, seventh, eighth, ninth, and eleventh assignments of error in the prior appeals, we find them barred by the doctrine of *res judicata*, and, accordingly, they are without merit.

{¶52} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.