

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	William B. Hoffman, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 08 CA 7
MICHAEL R. POISSANT	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Fairfield County Court Of Common Pleas Case No. 02-CR-321

JUDGMENT: Affirmed In Part and Reversed In Part

DATE OF JUDGMENT ENTRY: August 14, 2009

APPEARANCES:

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Edwards, J.

{¶1} Appellant, Michael R. Poissant, appeals a judgment of the Fairfield County Common Pleas Court re-sentencing him to a term of incarceration of eight years for one count of rape and seven years for a second count of rape, to be served consecutively. Appellee is the state of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On September 13, 2002, appellant Michael Poissant was indicted by the Fairfield County Grand Jury on one count of burglary, one count of kidnapping, one count of abduction and two counts of rape of a child under the age of thirteen, by force. On November 27, 2002, pursuant to a plea agreement, appellant entered pleas of guilty to both charges of rape, which were amended to drop the allegations of force or threat of force. The remaining charges were dismissed. The matter proceeded to sentencing.

{¶3} At the sentencing hearing, appellant represented that he was guilty, but not in the way the victim made him out to be. He told the court that although he knew she was twelve at the time, she did not look or act as young as twelve. He told the court that he was guilty of being an idiot in letting the girl do what she wanted to do, as she was the one who seduced him.

{¶4} Appellant was sentenced to seven years incarceration on one count of rape and eight years incarceration on the second count of rape, to be served consecutively. He appealed the sentence to this Court, arguing that the court failed to make the requisite findings to support consecutive sentencing, the record did not support the court's findings concerning consecutive sentencing and the two acts of rape were not committed with a separate animus. We overruled the assignments of error

and affirmed the consecutive sentences. *State v. Poissant*, Fairfield App. No. 03-CA-14, 2003-Ohio-4578.

{¶5} On September 28, 2007, appellant filed a motion to correct a void sentence because the judgment did not include notification regarding post-release control. On January 11, 2008, the court held a hearing on the motion pursuant to R.C. 2929.191. Following the hearing, the court again sentenced appellant to eight years on one count and seven years on the second count, to be served consecutively. The court notified appellant that post-release control is mandatory in this case for a period of five years. The court also found that based on his plea of guilty to two counts of rape, appellant is a Tier III sex offender, as defined in Section 2950.01(G) of the Revised Code.

{¶6} Appellant filed a notice of appeal from the corrected sentencing entry. Counsel for appellant filed a motion to withdraw accompanied by an *Anders* brief. See *Anders v. California* (1967), 386 U.S. 738 (if appointed appellate counsel believes in good faith that the appeal is wholly without merit, then he must withdraw as counsel and file a brief outlining all possible appealable issues). We overruled the motion to withdraw based on potential assignment of error four, which deals with the constitutionality of the Adam Walsh Act. The case was thereafter set for oral argument on the regular calendar.

{¶7} Counsel for appellant has raised five assignments of error in his *Anders* brief, which he states in his brief are issues appellant directed him to raise:

{¶8} “I. THE TRIAL COURT IS WITHOUT PROPER JURISDICTION TO RENDER ANY JUDGMENT AGAINST APPELLANT, UNLESS PROPER JURISDICTION IS PROVEN.

{¶9} “II. THE TRIAL COURT WAS WITHOUT THE AUTHORITY TO SENTENCE THE APPELLANT TO CONSECUTIVE SENTENCE [SIC], WHERE NO STATUTE EXISTS WHICH WOULD AUTHORIZE SUCH A SENTENCE.

{¶10} “III. APPELLANTS [SIC] SENTENCE IS UNCONSTITUTIONAL AND IN VIOLATION OF *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) AND *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000).

{¶11} “IV. DID THE TRIAL COURT COMMIT ERROR WHEN IT IMPOSED THE NEW SEX OFFENDER REGISTRATION RULES AND REGULATIONS ON THE APPELLANT, IN VIOLATION OF U.S. CONST. ART. I, § 9 CL. 3 AND U.S. CONST. ART. I, § 10 CL 1; EX POST FACTO.

{¶12} “V. THE EVIDENCE IS INSUFFICIENT AND THE TRIAL COURT DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT WAS LIKELY TO COMMIT FURTHER SEXUALLY ORIENTED OFFENSES IN THE FUTURE.”

{¶13} In a pro se amendment to his brief filed April 4, 2008, appellant added the following assignment of error:

{¶14} “VI. TRIAL COURT COMMITTED PLAIN ERROR WHEN SENTENCING APPELLANT TO NON-MINIMUM AND CONSECUTIVE SENTENCES WITHOUT GIVING REASONS FOR THE FINDINGS MADE TO DO SO.”

{¶15} In a pro se amendment to his brief filed May 9, 2008, appellant added the following assignment of error:

{¶16} “VII. APPELLANT’S NON-MINIMUM, CONSECUTIVE SENTENCES ARE CONTRARY TO LAW.”

{¶17} In a pro se reply brief, appellant raises an additional assignment of error:

{¶18} “VIII. APPELLANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO THE NOTICE OF CHARGES BY UNDIFFERENTIATED, CARBON-COPY COUNTS AND WAS DEPRIVED OF ABILITY TO PROTECT HIMSELF FROM DOUBLE JEOPARDY IN VIOLATION OF DUE PROCESS OF LAW.”

I

{¶19} At the time of re-sentencing, when appellant was given an opportunity to speak, appellant advised the court that he had questions he wanted answered relative to jurisdiction. Appellant argued that the trial court lacked jurisdiction to hear his case. Throughout the re-sentencing hearing, appellant repeatedly interrupted the proceedings to question the court’s jurisdiction, until the court informed appellant that if he said one more word, the court would have appellant gagged. Tr. 23.

{¶20} Pursuant to R.C. 2931.03, the court of common pleas has subject matter jurisdiction of criminal cases. *State v. Mitchell*, Guernsey App. No. 07-CA-17, 2008-Ohio-101, ¶32. A common pleas court has original jurisdiction in felony cases, and its jurisdiction is invoked by the return of an indictment. *Click v. Eckle* (1962), 174 Ohio St. 88, 89. The indictment in the instant case was returned served on September 16, 2002. The indictment charged appellant with several felonies which were alleged to have occurred in Fairfield, Ohio where the trial court is located. The trial court had subject

matter jurisdiction over appellant's case. Appellant was convicted in the Fairfield County Common Pleas Court and originally sentenced in the Fairfield County Common Pleas Court. When a trial court fails to notify an offender of post-release control, the sentence must be vacated and the matter remanded to the trial court for re-sentencing. *State v. Jordan*, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085. The court had subject matter jurisdiction to proceed with appellant's re-sentencing, as the court's jurisdiction was properly invoked by the return of a felony indictment alleging acts occurring in Fairfield County, appellant entered guilty pleas to two counts of rape occurring in Fairfield County, and all prior proceedings in the case were conducted by the Fairfield County Common Pleas Court.

{¶21} Further, the court acquired personal jurisdiction over appellant when he appeared before the court throughout the course of the proceedings, beginning with his appearance on September 19, 2002, to enter a plea of not guilty. Personal jurisdiction is not merely waived by failing to raise it at the first general appearance before a court, but it is actually acquired by or conferred upon the court through the voluntary appearance and submission of the defendant or his legal representative. *State v. Smith*, Mahoning App. No. 05-MA-219, 2007-Ohio- 3182, ¶21, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156.

{¶22} Appellant suggested throughout the hearing that the trial court was an admiralty court lacking jurisdiction to hear his case. A similar argument was addressed by the Twelfth District Court of Appeals which held, "Appellant raised various social contract theories in the trial court supporting his argument that the trial court did not have jurisdiction. These arguments, while interesting, do not affect the trial court's

jurisdiction, which is statutory. Appellant's claim that the court is somehow operating under 'admiralty jurisdiction' is completely erroneous and without any basis in law."

State v. Schaeffer, Warren App. No. CA92-04-038, 1993 WL 106146, p. 2.

{¶23} The first assignment of error is overruled.

II

{¶24} In his second assignment of error, appellant argues that the court had no authority to sentence him to consecutive sentences, as the consecutive sentencing statute was held unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant further argues that consecutive sentences were not justified in this case because the age of the victim was the only aggravating factor, and "it was the precocious and sexually aggressive pregnant victim who both induced and facilitated the offense by sexual aggression." Brief of appellant, page 8.

{¶25} The *Foster* decision explicitly vests power with the trial court to impose consecutive sentences. "[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 minimum sentences." *State v. Foster*, 109 Ohio St.3d at 30.

{¶26} Recently in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E. 2d 470, as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶27} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the

judicial fact-finding portions of R.C. 2929.14, holding that “trial 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.” *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100. See also, *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, 873 N.E. 2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13. See also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶28} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant’s sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Kalish* at paragraph 14.

{¶29} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. “First, they 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 shall be reviewed under an abuse of discretion standard." *Kalish* at paragraph 4; *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470.

{¶30} The Supreme Court held, in *Kalish*, that the trial court's sentencing decision was not contrary to law. "The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law." *Kalish* at paragraph 18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable". *Kalish* at paragraph 20.

{¶31} In the case sub judice, appellant pled guilty to two counts of rape, felonies of the first degree, which were punishable by three, four, five, six, seven, eight, nine or ten years in prison on each count. R.C. 2929.14(A)(1). Appellant was sentenced to a term of eight years on one count and seven years on the other count. Both of these sentences were within the range provided in R.C. 2929.14(A)(1). Therefore, the sentences imposed were not contrary to law.

{¶32} Further, the court stated in the sentencing judgment that it had considered the record, oral statements, victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under R.C. 2929.11, and had balanced the seriousness and recidivism factors of R.C. 2929.12. Although not required to make specific findings, the court found that consecutive sentences are necessary to protect

the public from future crime, and the harm caused by the offenses was so great or unusual that no single prison term adequately reflects the seriousness of appellant's conduct. The court further found that appellant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by appellant. Appellant's history as set forth in the judgment entry reflected a Wisconsin conviction for forgery in 2001, convictions for three counts of uttering a forged instrument in 2002 in Florida and a 1999 conviction of burglary in Florida. In addition, the instant crimes were committed while appellant was on probation in Florida and had failed to report to his probation officer.

{¶33} The court's imposition of consecutive sentences was not contrary to law or an abuse of discretion.

III

{¶34} In his third assignment of error, appellant maintains his sentence is unconstitutional and violates the dictates of *Blakely v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, because he received a sentence greater than the minimum and was sentenced to consecutive terms.

{¶35} In *State v. Foster*, supra, the Ohio Supreme Court found that to the extent R.C. 2929.14 required judicial fact-finding prior to sentencing to a consecutive or non-minimum term, the statute was unconstitutional and those portions of the statute requiring judicial fact-finding were severed. 109 Ohio St. 3d at syllabus 1-6. The Court's ruling brought Ohio's sentencing scheme into compliance with the law as set forth by the United States Supreme Court in *Apprendi* and *Blakely*. Ohio courts now have full discretion to impose a prison sentence within the statutory range and are no

longer required to give their findings for imposing non-minimum or consecutive sentences. *Id.* at syllabus 7.

{¶36} The sentencing entry does not reflect that the court engaged in the kind of judicial fact-finding held unconstitutional by *Apprendi*, *Blakely*, and *Foster*. Appellant's sentence fell within the statutory range, and as discussed in assignment of error two, appellant has not demonstrated that the sentence was contrary to law or an abuse of discretion.

{¶37} The third assignment of error is overruled.

IV

{¶38} In his fourth assignment of error, appellant argues that application of the Adam Walsh Act to his case is unconstitutional in violation of the ex post facto clause of the U.S. Constitution. Appellant also argues the act is unconstitutionally retroactive, violates double jeopardy, constitutes cruel and unusual punishment and unconstitutionally interferes with his right of contract, i.e. his plea agreement with the State in the instant case.

{¶39} Appellant's claims that the Adam Walsh Act is unconstitutional in violation of the ex post facto clause and the retroactivity clause, and that the AWA interferes with his right to contract are overruled on the authority of *Sigler v. State of Ohio*, Richland App. 08-CA-79, 2009-Ohio-2010. Appellant's claims that the Act violates the Double Jeopardy Clause and the prohibition against cruel and unusual punishment are overruled on the authority of *In re Adrian R.*, Licking App. No. 08-CA-17, 2008-Ohio-6581.

{¶40} The fourth assignment of error is overruled.

V

{¶41} Appellant argues that the court erred in conducting a sexual predator classification hearing without notifying him in advance, and also argues that the evidence did not support a finding that he was likely to commit further sexually oriented offenses in the future.

{¶42} Pursuant to R.C. 2950.01(G)(1)(a), appellant's classification as a Tier III Sex Offender is automatic upon a conviction of R.C. 2907.02. Unlike R.C. 2950.09(B) pursuant to which appellant was adjudicated to be a sexual predator in 2002 when he was originally sentenced, the new statute requires no finding that appellant was likely to engage in the future in one or more sexually-oriented offenses.

{¶43} However, the trial court was without authority to reclassify appellant as a Tier III sex offender at a resentencing hearing.

{¶44} In *State v. Williams*, 177 Ohio App.3d 865, 2008-Ohio-3586, the defendant was before the trial court for resentencing to allow the court to advise her of post-release control. At the resentencing hearing, the court reclassified the defendant as a Tier III sex offender. The state appealed. The court of appeals held that pursuant to the Adam Walsh Act, the attorney general is to determine the tier classification and duties of any offender who on December 1, 2007, will be serving a prison term in a state correctional institution for a sexually oriented offense. *Id.* at ¶ 12, citing R.C. 2950.032(A)(1)(a). Reclassification occurs without a hearing because the new tier designations are a function of the specific crime an offender has committed and do not depend on any other factors. *Id.* Despite the fact that the defendant's sentence was void and had to be vacated because of the court's failure to advise her of post-release

control, the status of her sentence did not result in the vacation of her legally distinct sexual-offender classification. *Id.* at ¶ 11.

{¶45} In the instant case, appellant was before the trial court for resentencing based on the court's failure to advise him of post-release control. Like the defendant in *Williams*, his sexual-offender classification was intact when he appeared before the court for resentencing. Pursuant to R.C. 2950.032(A)(1)(a), the determination of appellant's new classification under the AWA is the responsibility of the Attorney General because appellant was serving a prison term on December 1, 2007. The trial court erred in reclassifying appellant as a Tier III offender following his resentencing hearing.

{¶46} The fifth assignment of error is sustained.

VI

{¶47} In his sixth assignment of error, appellant argues that the trial court is required to state the reasons and findings supporting a non-minimum, consecutive sentence in its judgment entry, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. The Ohio Supreme Court abrogated *Comer* in *Foster*, *supra*. As stated earlier in this opinion, the trial court has full discretion to impose a prison sentence within the statutory range and is no longer required to give findings for imposing non-minimum or consecutive sentences. *Foster*, 109 Ohio St. 3d at paragraph 7 of the syllabus.

{¶48} The sixth assignment of error is overruled.

VII

{¶49} In his seventh assignment of error, appellant argues that the record does not support the court's imposition of consecutive sentences.

{¶50} In our discussion of appellant’s second assignment of error, we found that the imposition of consecutive sentences was not contrary to law nor an abuse of discretion pursuant to *Kalish*, supra. For the reasons state in the second assignment of error, the seventh assignment of error is overruled.

VIII

{¶51} Appellant’s final assignment of error was raised in his reply brief.

{¶52} App. R. 16(A)(7) provides that assignments of error shall be argued in the brief of appellant. App. R. 16(C) states that a reply brief is to “reply to the brief of the appellee.” New assignments of error cannot be raised in a reply brief. *State v. Nichols*, Coshocton App. No. 01-CA-016, 2002-Ohio-4048, citing *Sheppard v. Mack* (1980), 68 Ohio App. 2d 95.

{¶53} Appellant’s eighth assignment of error is overruled.

{¶54} The judgment of the Fairfield County Common Pleas Court is reversed as to the court’s classification of appellant as a Tier III sex offender and affirmed in all other respects.

By: Edwards, J.

Farmer, P.J. and

Hoffman, J. concur

JUDGES

