

[Cite as *State v. Byer*, 2006-Ohio-3093.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

| | | |
|----------------------|---|--------------------|
| STATE OF OHIO, |) | |
| |) | CASE NO. 05 CA 827 |
| PLAINTIFF-APPELLEE, |) | |
| |) | |
| - VS - |) | OPINION |
| |) | |
| DAVID BYER, |) | |
| |) | |
| DEFENDANT-APPELLANT. |) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas,
Court, Case No. 05 CR 4691.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee: Attorney Donald R. Burns, Jr.
Carroll County Prosecutor
11 E. Main Street
Carrollton, OH 44615

For Defendant-Appellant: Attorney John M. Gartrell
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 14, 2006

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Defendant-Appellant, David Byer, appeals the decision of the Carroll County Court of Common Pleas that ordered he serve two consecutive three-year prison terms after Byer pled guilty to two counts of sexual battery. In his appeal, Byer only challenges the sentence the trial court imposed upon him. However, R.C. 2953.08(D) prohibits Byer from making those arguments on appeal.

{¶2} In this case, Byer was indicted for one count of rape and two counts of sexual battery. He eventually pled guilty to the two sexual battery charges and stipulated he was a sexual predator. In exchange, the State nolleed the rape count and agreed to recommend that Byer serve two consecutive three-year prison sentences. The trial court accepted the plea and imposed the recommended sentence.

{¶3} Pursuant to R.C. 2953.08(D), a defendant cannot appeal a sentence which "is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." A sentence is authorized by law if it is within the statutory range of available sentences. *State v. Gray*, 7th Dist. No. 02 BA 26, 2003-Ohio-805, at ¶10.

{¶4} The Ohio Supreme Court's recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, does not change this rule of law. In *Foster*, the Ohio Supreme Court held that portions of Ohio's felony sentencing scheme were unconstitutional and severed those unconstitutional portions from the felony sentencing statutes. In doing so, the Ohio Supreme Court left the range of sentences authorized by law unchanged. Thus, any sentence imposed upon an offender within the statutory range remains a sentence

authorized by law.

{¶5} In this case, the sentence the trial court imposed fell within the statutory range and, therefore, was authorized by law. Since Byer's sentence was jointly recommended, authorized by law, and imposed by the sentencing judge, he cannot appeal that sentence. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.