

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 2-07-20

v.

WILLIAM E. LAND,

OPINION

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: December 26th, 2007

ATTORNEYS:

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For Appellee

ROGERS, P.J.

{¶1} Defendant-Appellant, William Land, appeals the judgment of the Auglaize County Court of Common Pleas, sentencing him to non-minimum, maximum, and consecutive prison terms. On appeal, Land asserts that the trial court violated his due process rights and committed plain error by imposing non-minimum, maximum, and consecutive sentences and that the trial court lacked the authority to impose non-minimum, maximum, and consecutive sentences. Finding that Land's assertions lack merit, we affirm the judgment of the trial court.

{¶2} In November 2006, an Auglaize County Grand Jury indicted Land on two counts of rape in violation of R.C. 2907.02(A)(1)(c), felonies of the first degree; two counts of sexual battery in violation of R.C. 2907.03(A)(2), felonies of the third degree; and, two counts of gross sexual imposition in violation of R.C. 2907.05(A)(5), felonies of the fourth degree. Subsequently, Land entered a plea of not guilty to all charges in the indictment.

{¶3} In February 2007, Land withdrew his not guilty plea and entered a negotiated plea of guilty to one count of rape in violation of R.C. 2907.02(A)(1)(c), a felony of the first degree, and one count of gross sexual imposition in violation of R.C. 2907.05(A)(5), a felony of the fourth degree. The remaining counts were dismissed.

{¶4} In April 2007, the trial court sentenced Land to a ten-year prison term on the rape count and to an eighteen-month prison term on the gross sexual imposition count, to be served consecutively. The trial court also classified Land as a sexual predator.

{¶5} It is from this judgment that Land appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED BY IMPOSING NON-MINIMUM, MAXIMUM, AND CONSECUTIVE SENTENCES IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; *BLAKELY V. WASHINGTON* (2004), 542 U.S. 296; *UNITED STATES V. BOOKER* (2005), 543 U.S. 220; *CUNNINGHAM V. CALIFORNIA* (2007), 127 S.C.T. 856. TRANSCRIPT OF SEXUAL PREDATOR STATUS/SENTENCE AT 51; APRIL 27, 2007, JUDGMENT ENTRY – ORDERS ON STATUS AS A SEXUAL PREDATOR AND SENTENCING AT 2.

Assignment of Error No. II

THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED MR. LAND DUE PROCESS OF LAW BY IMPOSING NON-MINIMUM, MAXIMUM, AND CONSECUTIVE SENTENCES. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION. TRANSCRIPT OF SEXUAL PREDATOR STATUS/SENTENCE AT 51; APRIL 27, 2007, JUDGMENT ENTRY – ORDERS ON STATUS AS A SEXUAL PREDATOR AND SENTENCING AT 2.

Assignment of Error No. III

THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO IMPOSE NON-MINIMUM, MAXIMUM, AND CONSECUTIVE SENTENCES. TRANSCRIPT OF SEXUAL PREDATOR STATUS/SENTENCE AT 51; APRIL 27, 2007, JUDGMENT ENTRY – ORDERS ON STATUS AS A SEXUAL PREDATOR AND SENTENCING AT 2.

{¶6} Due to the nature of Land’s assignments of error, we elect to address them together.

Assignments of Error Nos. I, II, & III

{¶7} In his first assignment of error, Land asserts that the trial court violated his due process rights by imposing non-minimum, maximum, and consecutive sentences. In his second assignment of error, Land asserts that the trial court committed plain error by imposing non-minimum, maximum, and consecutive sentences. In his third assignment of error, Land asserts that the trial court lacked the authority to impose non-minimum, maximum, and consecutive sentences. Essentially, Land contends that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, does not comply with *Blakely*; that, in *Cunningham*, the United States Supreme Court rejected a remedy similar to that employed by *Foster*; that *Foster* severed the provisions authorizing a trial court to impose non-minimum, maximum, and consecutive sentences; that his trial counsel was ineffective for

failing to raise these issues during sentencing; and, that the trial court exceeded its authority by following *Foster*. We disagree.

{¶8} In the aftermath of the United States Supreme Court’s decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, and *Blakely, Foster* addressed constitutional issues concerning felony sentencing and held that portions of Ohio’s felony sentencing framework requiring judicial findings before imposition of more than the minimum, maximum, and consecutive sentences were unconstitutional and void, and severed them. 109 Ohio St.3d at ¶100. In doing so, *Foster* applied the same remedy as the United States Supreme Court in *Booker*. Id. at ¶¶91-92.

{¶9} Here, Land challenges the validity of *Foster* on grounds nearly identical to that raised and rejected in recent cases decided by this Court. See, e.g., *State v. Orwick*, 3d Dist. No. 5-06-59, 2007-Ohio-4488; *State v. Kindle*, 3d Dist. No. 5-07-11, 2007-Ohio-6422. We note at the outset that “this Court is inferior in jurisdiction to the Ohio Supreme Court and must follow its mandates. Accordingly, we lack the jurisdictional authority under Article IV, Section 3(B)(2) of the Ohio Constitution to declare a mandate of the Ohio Supreme Court to be unconstitutional.” *State v. Herbert*, 3d Dist. No. 16-06-12, 2007-Ohio-4496, ¶21, citing *State v. Bulkowski*, 3d Dist. No. 13-06-29, 2007-Ohio-3137, ¶20, *State v. Jefferson*, 2d Dist. No. 21838, 2007-Ohio-3584, ¶9 (citations omitted), *World*

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Diamond, Inc. v. Hyatt Corp. (1997), 121 Ohio App.3d 297, 306, and *Thompson v. Moore* (1943), 72 Ohio App. 539.

{¶10} Moreover, we have previously held on numerous occasions that *Foster* does not violate the Due Process Clause. See *State v. McGhee*, 3d Dist. No. 17-06-05, 2006-Ohio-5162, ¶¶14-20, and subsequent cases citing thereto. For the reasons set forth in *McGhee*, we find that Land’s arguments lack merit. In applying the severance remedy, *Foster* engaged in a lengthy discussion of the possible ways in which to comply with the United States Supreme Court’s decision in *Blakely* before concluding that severance would best preserve the legislative intent of “community safety and appropriate punishment” and “truth in sentencing.” 109 Ohio St.3d at ¶102. Likewise, *Foster* determined that, under the well-established *Geiger* test to determine whether severance is appropriate, *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, the unconstitutional provisions were capable of being severed. 109 Ohio St.3d at ¶¶95-96. Additionally, the General Assembly authorized severance of any provision of a statute that is held invalid and is capable of being severed. See R.C. 1.50.

{¶11} Furthermore, Land argues that the manner in which the Supreme Court of Ohio applied the severance remedy does not comport with *Cunningham*. However, as we noted in *Orwick* and *Kindle*, supra, *Cunningham* struck down California’s three-tiered determinate sentencing law, which required trial courts to

make certain findings of facts before imposing a higher-tier prison term. 127 S.Ct. at 870. *Cunningham* remedied the constitutional infirmity by severing those portions making the scheme mandatory, leaving only advisory guidelines in place, which is the precise remedy adopted by *Foster*. Thus, *Foster* complies with *Cunningham* and Land's argument to the contrary reflects a misunderstanding of *Cunningham*.

{¶12} Next, Land argues that the trial court lacked the authority to impose non-minimum, maximum, and consecutive sentences because, when *Foster* severed the unconstitutional provisions of Ohio's sentencing scheme, it also severed a trial court's authority to impose such sentences. Land's argument ignores the explicit holdings of *Foster*, in which the Court clearly stated 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*." 109 Ohio St.3d at paragraph seven of the syllabus (emphasis added).

{¶13} Additionally, the Court stated "[o]ur remedy does not rewrite the statutes but leaves courts with full discretion to impose a prison term within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant without the mandated judicial findings that *Blakely* prohibits." *Id.* at ¶102. "Courts shall consider those portions of the sentencing code that are

unaffected by today's decision and impose any sentence within the appropriate felony range." Id. at ¶105. The sentencing range for a first degree felony is one to ten years in prison, and the trial court imposed the maximum of ten years. Likewise, the sentencing range for a fourth degree felony is six to eighteen months in prison, and the trial court imposed the maximum eighteen-month prison term and ordered it to be served consecutively to his ten-year prison sentence. We cannot find that the trial court erred in doing so.

{¶14} Finally, Land argues that his trial counsel was ineffective for failing to object to the constitutionality of his sentence during sentencing and that the trial court exceeded its authority by following *Foster*. However, given our finding that his sentence was constitutional and that inferior courts are bound to follow the mandates of the Supreme Court of Ohio, Land's arguments are meritless.

{¶15} Accordingly, we overrule Land's first, second, and third assignments of error.

{¶16} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

SHAW and WILLAMOWSKI, J.J., concur.

/jlr