

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS
CASE NO. CR 437437

STATE OF OHIO,)
)
)
Plaintiff)
)
vs.)
)
AZZAM AHMED,)
)
Defendant)

OPINION

Shirley Strickland Saffold, Judge:

This matter came before this Honorable Court upon Defendant’s, Azzam Ahmed (hereinafter “Defendant”), Petition for Post-Conviction Relief and Motion for Leave to Amend Petition. This Honorable Court finds said Motion for Leave to be well-taken, and thus, it is hereby granted. This Honorable hereby makes the following Findings of Fact with regard to the Amended Petition:

1. On May 21, 2003, Defendant was indicted on two (2) counts of rape, twenty-four (24) counts of sexual battery, and twenty-seven (27) counts of sexual imposition.
2. The charges against the Defendant stemmed from Defendant’s sexual assaults committed during gynecological examinations of his medical patients.
3. The matter proceeded to trial on January 5, 2004, and on February 11, 2004, the jury convicted Defendant of two (2) counts of rape in violation of RC § 2907.02, first degree felonies; seven (7) counts of sexual battery in violation of RC § 2907.03, third degree felonies; and eleven (11) counts of sexual imposition in violation of RC § 2907.06, third degree misdemeanors. Defendant was found not guilty of seventeen (17) counts of sexual battery and thirteen (13) counts of sexual imposition. Three (3) counts of sexual imposition had been dismissed by the State during the trial.
4. On February 18, 2004, this Honorable Court sentenced Defendant as follows: ten (10) years imprisonment on each of the two rape counts, five (5) years imprisonment on five of the sexual battery counts, and sixty (60) days in jail on each of the sexual imposition counts. Two of the sexual battery counts were merged into the rape counts. Maximum

finer of \$20,000 were imposed on the rape counts, maximum fines of \$10,000 were imposed on the sexual battery counts, and \$500 fines were imposed on the sexual imposition counts. The sentences for the rape counts and the sexual battery counts were to run consecutively, for a total prison sentence of forty-five (45) years. The sentences for the sexual imposition counts were to run concurrently to the prison sentence.

5. On July 27, 2005, in *State v. Ahmed*, Case No. 84220, 2005-Ohio-2999, the Eighth District Court of Appeals affirmed Defendant's convictions, but vacated the sentences and remanded the matter for resentencing holding that this Court's findings were not sufficient to warrant the imposition of consecutive sentences pursuant to RC § 2929.14(E)(4).
6. On November 30, 2005, Defendant filed a Motion to Stay Defendant's Resentencing, seeking a stay of the resentencing hearing pending the outcome of *State v. Foster*, which was pending in the Supreme Court of Ohio. The sentencing was stayed over the objection of the State.
7. On February 28, 2006, in *State v. Foster* (2006), 109 Ohio St. 3d 1, the Supreme Court of Ohio held that RC § 2929.14(E)(4) was unconstitutional. The Court determined that the findings required by the statute violated a defendant's right to jury trial, as defined by the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004).
8. On May 23, 2006, this Court conducted a resentencing hearing pursuant to the remand of the Eighth District Court of Appeals. Defendant was sentenced to the same forty-five (45) year sentence. Although the Court followed the statutory framework for sentencing contained in RC § 2929.11 and § 2929.12, it did not make findings of fact under RC § 2929.14(E)(4), because the provision had been held unconstitutional in *Foster*.
9. On January 9, 2008, the United States Supreme Court held in *Oregon v. Ice*, 129 S. Ct. 711 (2009), that, contrary to the holding of the Supreme Court of Ohio in *Foster*, there was no constitutional bar to a legislature's requiring judges to make findings of fact before imposing consecutive sentences. The Court specifically referenced *Foster* in its decision, evidencing that the holding in *Foster* was erroneous.
10. On June 29, 2011, Governor John Kasich signed HB 86 which had been passed by the Ohio General Assembly, and became effective on September 30, 2011. One of the provisions of HB 86 was the revival of the requirement that judges make findings of fact before imposing consecutive sentences. That provision was included in HB 86 as RC § 2929.14(C)(4), which was worded identically to RC § 2929.14(E)(4), the provision that was erroneously found to be unconstitutional in *Foster*.
11. The notes of HB 86 specifically state that this revival of the exact same wording would cause issues regarding retroactivity for Ohio courts. The Notes state in pertinent part:

The bill expressly “revives” pre-existing language verbatim. That was the phrasing struck down by the *Foster* case but allowed to return by the *Hodge* case. Since the provisions were never removed from the RC after being severed by *Foster*, and were “revived” (as opposed to reenacted) using the same words, one might argue that this continuity makes the consecutive sentencing findings retroactive.

12. This revival of the original language placed the Defendant in this matter in a position unlike any other Defendant in Ohio:

- Defendant had been given consecutive sentences
- The Court of Appeals had vacated those sentences because the findings and reasons supporting them were insufficient
- The Supreme Court held in *State v. Foster* that findings were not permitted
- Defendant was then re-sentenced, without any findings being made
- The United States Supreme Court held that the Ohio Supreme Court was wrong, and that there was nothing unconstitutional about requiring judges to make findings before imposing consecutive sentences
- The Ohio legislature, via HB 86, revived the exact same statute, requiring a judge to make findings for imposing consecutive sentences, as existed at the time of Defendant’s original sentencing

Based upon the foregoing findings of fact, the Court makes the following conclusions

of law:

13. At the time Defendant committed the instant offenses, Defendant was entitled to concurrent sentences upon conviction unless the trial court made certain findings of fact and gave supporting reasons for the imposition of consecutive sentences. Therefore, Defendant had a due process liberty interest in being sentenced according to that sentencing procedure pursuant to *Hicks v. Oklahoma*, 447 U.S. 343 (1980).
14. Defendant was deprived of said liberty interest as a result of the Ohio Supreme Court’s wrongful application of *Blakely* and *Apprendi* in *Foster*. Both the United States Supreme Court (in *Oregon v. Ice*) and the Supreme Court of Ohio (in *State v. Hodge*) have recognized that *Foster* incorrectly interpreted *Blakely* and *Apprendi* to prohibit findings of fact before the imposition of consecutive sentences.
15. As determined by the Eighth District Court of Appeals, the findings of fact and supporting reasons given at Defendant’s initial sentencing were not sufficient to warrant the imposition of consecutive sentences.
16. But for the incorrect decision in *Foster*, Defendant would have been entitled to concurrent sentences at his resentencing, unless the trial court made findings of fact and gave supporting reasons sufficient to impose consecutive sentences.

17. As a result of the erroneous decision in *Foster*, this Court did not make findings of fact and did not give supporting reasons for the imposition of consecutive sentences at the Defendant's resentencing on May 23, 2006.
18. As a result, Defendant was deprived of his due process liberty interest in being sentenced according to the state's constitutional sentencing procedures.
19. This deprivation of the Defendant's due process liberty interest rendered the May 23, 2006 sentencing void.
20. HB 86 expressly revived the existing language regarding consecutive sentencing verbatim. The legislature even acknowledged that this revival would create concerns about its retroactivity, as these provisions were never removed from the Revised Code after being severed by *Foster*. The revival of the verbatim language can be interpreted as the legislature's intent for the provisions to be retroactive.
21. Because of the deprivation of Defendant's due process liberty interest in being sentenced according to the state's constitutional sentencing procedures resulted in the sentence of May 23, 2006 being void, the Defendant is entitled to a *de novo* resentencing.

Based upon the foregoing, the Defendant is hereby entitled to a *de novo* resentencing, to be done at the resentencing hearing set before this Honorable Court on June 19, 2012 at 11:00 am.

IT IS SO ORDERED.

SHIRLEY STRICKLAND SAFFOLD, JUDGE

Date: _____, 2012

CERTIFICATE OF SERVICE

A true copy of the foregoing Opinion was forwarded to the following via regular mail

service on this _____ day of June, 2012:

Michael C. Hennenberg
Of Counsel—Dinn, Hochman & Potter, LLC
5910 Landerbrook Drive, Suite 200
Cleveland, Ohio 44124
Counsel for the Defendant

Mary H. McGrath
James Gutierrez
Assistant Prosecuting Attorneys
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

Judge Shirley Strickland Saffold