

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080338
Plaintiff-Appellee,	:	TRIAL NO. B-0303640
vs.	:	
TIMOTHY FERGUSON,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Timothy Ferguson appeals the sentences imposed by the trial court after the Ohio Supreme Court remanded his case for resentencing consistent with *State v. Foster*.²

In 2004, Ferguson was convicted after a jury found him guilty of multiple offenses including aggravated burglary, rape, aggravated robbery, and attempted rape.³ Ferguson's convictions resulted from DNA evidence linking him to break-ins at the homes of three elderly women, Edra Richard, Jane Hamm, and Jane Eyler.⁴ The evidence at trial revealed that once Ferguson was inside the homes, he forced the women to perform sexual acts (including fellatio, cunnilingus, and vaginal sex) and

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

³ *State v. Ferguson*, 1st Dist. No. C-040114, 2004-Ohio-7132, at ¶2.

⁴ Id. at ¶2.

then stole personal items or U.S. currency from them.⁵ Ferguson “also tried to rape [another elderly woman,] Margaret Franks, but she was able to fight him off before he could rape her or steal from her. Several months later, Franks was in her bedroom when she saw a man masturbating outside her window. [The man] left without further incident, but left behind several cigarette butts.”⁶ These cigarette butts were later traced to Ferguson through DNA evidence.⁷

The trial court sentenced Ferguson to two indeterminate terms of 10 to 25 years for the rape and aggravated robbery of Richard. The trial court imposed the maximum prison term of ten years for each of the four offenses relating to Hamm: aggravated robbery, aggravated burglary, and two rape counts. The trial court imposed an eight-year term for the attempted rape of Franks and a ten-year term for the aggravated burglary of Franks. The trial court imposed a 40-year prison term, the maximum term of ten years on each of the two counts of rape, one count of aggravated robbery, and one count of aggravated burglary relating to Eyer. The trial court ordered all these terms to be served consecutively for an aggregate prison term of 98 years. The trial court also designated Ferguson as a sexual predator.

We affirmed Ferguson’s convictions, sentence, and sexual-predator classification upon appeal.⁸ Ferguson then appealed to the Ohio Supreme Court, which vacated his sentence and remanded his case to the trial court for resentencing consistent with *State v. Foster*.⁹ Thereafter, the trial court held a new sentencing hearing and imposed the same sentence that it had originally imposed. This appeal

⁵ Id.

⁶ Id. at ¶3.

⁷ Id. at ¶4-6.

⁸ Id.

⁹ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

followed, with Ferguson raising eight assignments of error for our review. For ease of discussion, we address his assignments of error out of order.

In his first, sixth, and eighth assignments of error, Ferguson argues that the *Foster* decision violates several of his constitutional rights. In his first assignment of error, Ferguson argues that his aggregate 98-year prison sentence constitutes cruel and unusual punishment. He argues that because he had served no prior prison term, the 98-year sentence is grossly disproportionate to the severity of his offenses. We disagree.

Ferguson's sentences were within the statutory range for each of his offenses, and were not disproportionate to his offenses.¹⁰ The trial court had evidence before it that Ferguson had committed multiple aggravated robberies, burglaries, rapes, and an attempted rape involving four elderly women. In view of the facts of the offenses, Ferguson's sentences are not so disproportionate to the offenses that they shock the sense of justice in the community.¹¹ We, therefore, overrule his first assignment of error.

In his sixth assignment of error, Ferguson argues that because his criminal conduct predated the Ohio Supreme Court's decision in *State v. Foster*, ex post facto and due-process protections barred the application of *Foster* to his resentencing.¹² This court, however, has repeatedly held that the retroactive application of *Foster* is

¹⁰ *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70, 203 N.E.2d 334; see, also, *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, at ¶14.

¹¹ *State v. Weitbreicht*, 86 Ohio St.3d 368, 1999-Ohio-113, 715 N.E.2d 167.

¹² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

not an ex post facto or due process violation.¹³ As a result, we overrule his sixth assignment of error.

In his eighth assignment of error, Ferguson argues that the trial court's application of the severance remedy in *Foster* violated the separation-of-powers doctrine. Although we have not addressed this argument, a number of other appellate districts have rejected this claim of error.¹⁴ We agree with their analysis and therefore overrule Ferguson's eighth assignment of error.

In his third, fourth, and fifth assignments of error, Ferguson argues that his sentence is contrary to law. He argues that he was entitled under *Foster* to be resentenced to minimum, concurrent prison terms. He further claims that the trial court failed to consider the factors in R.C. 2929.11 and 2929.12 and to make certain findings.

But following *Foster*, trial courts are no longer required to make findings or to give their reasons for imposing maximum, consecutive, or more than minimum sentences; instead, they have full discretion to impose a prison sentence within the statutory range for each offense.¹⁵ When exercising that discretion, trial courts must still carefully consider the statutes that apply to every felony case, including R.C.

¹³ See *State v. Bruce*, 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44, at ¶10-11; *State v. Lockett*, 1st Dist. No. C-060404, 2007-Ohio-308, at ¶9-12; *State v. Ashipa*, 1st Dist. No. C-060411, 2007-Ohio-2245, at ¶4; *State v. Hundley*, 1st Dist. No. C-060374, 2007-Ohio-3556, at ¶5-6.

¹⁴ *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶32-39; *State v. Daniels*, 3rd Dist. No. 12-06-15, 2007-Ohio-2281, at ¶11-15; *State v. Benton*, 6th Dist. No. L-07-1305, 2008-Ohio-3850, at ¶6; *State v. Hibbitt*, 8th Dist. Nos. 89497 & 89885, 2008-Ohio-680, at ¶12-16.

¹⁵ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraphs four and seven of syllabus.

2929.11, R.C. 2929.12, and any statutes that are specific to the case itself.¹⁶ However, there is no requirement that this be done on the record.¹⁷

Here, the trial court imposed prison terms within the statutory range for each of Ferguson's offenses. Prior to resentencing Ferguson, the trial court heard from the state, which provided it with a synopsis of Ferguson's criminal activity. The trial court also considered statements from Ferguson and his counsel. In resentencing Ferguson, the trial court stated that Ferguson "was a serial rapist, and I think if you got out again, you would rape again. And I don't see any reason not [to] give you the same sentence I gave you before." Although the trial court did not specifically state that it had considered R.C. 2929.11 and 2929.12, we may presume that it did.¹⁸ Given the foregoing, we cannot conclude that Ferguson's sentence is contrary to law. As a result, we overrule his third, fourth, and fifth assignments of error.

In his second assignment of error, Ferguson contends that the trial court erred in failing to merge the multiple offenses relating to each victim. He argues that the aggravated-robbery, aggravated-burglary, rape, and attempted-rape offenses committed against each victim were part of a single transaction that was committed with the same animus, and were, therefore, allied offenses of similar import. But Ferguson's argument ignores the first prong of the two-tiered test for allied offenses of similar import set forth in *State v. Rance*¹⁹ and clarified in *State v. Cabrales*²⁰ because a comparison of the elements of these offenses demonstrates that the

¹⁶ *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

¹⁷ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio 4912, 896 N.E.2d 124, at fn. 4, citing *State v. Adams*, (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus; see, also, *State v. Esner*, 8th Dist. No. 90740, 2008-Ohio-6654, at ¶10.

¹⁸ *Kalish*, *supra*.

¹⁹ (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, paragraph one of the syllabus.

²⁰ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

commission of any one of them will not necessarily result in the commission of any of the others.²¹ Therefore, the trial court properly declined to merge, for purposes of sentencing, the aggravated-burglary, aggravated-robbery, rape, and attempted-rape counts relating to each victim.

Ferguson also asserts that the trial court erred in imposing separate sentences for the two rape counts involving Hamm and the two rape counts involving Eyler. Ferguson, however, was convicted and sentenced for one count of vaginal rape and one count of rape by fellatio with respect to Eyler. Because each of these rape offenses involved distinct and separate sexual acts, the trial court did not err in imposing separate sentences for them.²² And with respect to Hamm, Ferguson stipulated at trial that Hamm had been subjected to two separate acts of cunnilingus. Thus, the trial court did not err in sentencing Ferguson for these two rape offenses. As a result, we overrule the second assignment of error.

In his seventh assignment of error, Ferguson argues that he was denied the effective assistance of counsel because his counsel failed to provide any mitigation at the resentencing hearing. To demonstrate the ineffectiveness of counsel, Ferguson must show that he was prejudiced by his counsel's allegedly deficient performance.²³ Even if we were to assume *arguendo* that counsel's failure to offer any mitigating

²¹ See *State v. Stern* (2000), 137 Ohio App.3d 110, 116-117, 738 N.E.2d 76 (holding that aggravated burglary and aggravated robbery are not allied offenses of similar import); *State v. Bell*, 7th Dist. No. 06-MA-189, 2008-Ohio-3959, at ¶168-176 (holding that aggravated burglary and attempted rape are not allied offenses of similar import); *State v. Parker*, 7th Dist. No. 03-MA-190, 2005-Ohio-4888, at ¶16 (holding that aggravated burglary and rape are not allied offenses of similar import); *State v. Lamberson* (Mar. 19, 2001), 12th Dist. No. CA2000-04-012 (holding that aggravated robbery and rape are not allied offenses of similar import); *State v. Williams*, 74 Ohio St.3d 569, 580, 1996-Ohio-91, 660 N.E.2d 724 (holding that attempted rape is a separate offense from aggravated robbery and aggravated burglary "because it involves separate offense elements and an animus separate from [the other two crimes]").

²² See *State v. Nichols* (1993), 66 Ohio St.3d 431, 435, 613 N.E.2d 225; *State v. Bunch*, 7th Dist. No. 02 CA 196, 2005-Ohio-3309, at ¶193-197.

²³ *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

circumstances amounted to a deficiency under *Strickland v. Washington*,²⁴ we are unable to say that Ferguson was thereby prejudiced. Ferguson spoke on his own behalf at the resentencing hearing. Ferguson told the trial court that he was doing well in prison, that he had taken classes and stayed out of trouble, and that his family was supportive. Nothing in the record indicates that the trial court would have sentenced Ferguson any differently had counsel offered these mitigating circumstances instead of Ferguson. As a result, we overrule his seventh assignment of error. Having found no merit to Ferguson's assignments of error, we affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on January 14, 2009
per order of the Court _____.
Presiding Judge

²⁴ (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052.