[Cite as *State v. Jordan*, 2010-Ohio-5183.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0110**
- vs -	:	
DOMINIQUE G. JORDAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 172.

Judgment: Affirmed in part, reversed in part, and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Stephen A. Turner, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481-1219 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} In this appeal, submitted on the briefs of the parties, appellant, Dominique G. Jordan, contests her conviction, entered by the Trumbull County Court of Common Pleas, on three counts of aggravated trafficking in drugs. For the reasons set forth in this opinion, appellant's conviction is affirmed in part, reversed in part, and remanded.

{¶2} Prior to May of 2007, appellant worked with the Warren Police Department as a confidential informant ("CI"). During her time as an informant, she assisted the

police in gathering evidence via executing "controlled buys." Through her work, officers were able to secure search warrants and eventually obtain indictments against several individuals, including one Craig Smith.

{¶3} Subsequent to police searching Smith's premises, appellant claimed he came to her place of business and dropped off a quantity of oxycodone concealed in a Burger King bag. Although appellant had used Smith as a "supplier" in the past, she stated she did not request the pills on this occasion. She testified, however, that she was afraid to return the pills because doing so would create suspicion that she was a "snitch." Appellant claimed she was equally fearful of the consequences of not paying Smith for the pills. She stated she had once witnessed Smith attack another individual with a Samurai sword after Smith discovered he had been robbed. She resolved to pay Smith for the drugs with her own money.

{¶4} Appellant testified that Smith continued to supply her with quantities of oxycodone (none of which she requested) without demanding money up front. According to appellant, she did not have the money to continue to buy the pills on her own; as a result, she sold the drugs to another CI working for the Warren Police Department. On April 5, 2007, that CI purchased 16 40-milligram tablets containing oxycodone; On April 6, 2007, appellant again sold the CI 16 40-milligram tablets containing oxycodone at a gas station known as the "Pit Stop," located across the street from Warren G. Harding High School. Finally, on April 26, 2007, appellant sold 31 20-milligram tablets containing oxycodone, again at the "Pit Stop."

{¶5} As a result of the April 2007 deals, appellant was indicted in September of 2007 on three counts of aggravated trafficking in drugs, in violation of R.C.

2925.03(A)(1) and (C)(1)(c). Each count in the indictment alleged appellant "did knowingly sell or offer to sell, oxycodone, a Schedule II controlled substance, and the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, and the offense was committed in the vicinity of a school." The state later amended the indictment to remove the school specification as to the April 5, 2007 transaction.

{¶6} Appellant pleaded "not guilty" to the charges and the matter proceeded to trial on August 24, 2009. At the close of evidence, appellant asked the court to instruct the jury on the defense of duress. After a brief hearing on the issue, the trial court concluded appellant had presented insufficient evidence for the instruction and denied her request. Appellant was later found guilty on each count. As to the school specifications, the jury found the offense alleged in Count Three was committed in the vicinity of a school, but the offense alleged in Count Two was not. Appellant was sentenced to three years imprisonment, respectively, on Counts One and Two; eight years on Count Three. The court ordered the prison terms of Counts One and Two to be served concurrently and consecutively with the term ordered for Count Three. In total, appellant was sentenced to 11 years imprisonment.

{¶7} Appellant assigns three errors for our review. Her first assignment of error provides:

{¶8} "The trial court erred when it imposed consecutive sentences without making findings required under R.C. 2929.13(E) of the Ohio Revised Code."

{¶9} Appellant argues that the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, dictates that the Ohio Supreme Court improperly

excised R.C. 2929.14(E)(4) (the statutory subsection which formerly required judicial factfinding prior to imposing consecutive sentences). Thus, appellant claims, those statutory findings remain a prerequisite to imposing consecutive sentences where a defendant is convicted of multiple crimes.

{¶10} In *Ice*, the defendant was sentenced to consecutive sentences pursuant to a statutory scheme, which required the trial judge to make certain factual findings as a precondition to running multiple sentences consecutively. On appeal, the defendant contended that the imposition of consecutive sentences increased the quantum of punishment that the defendant faced. He thus argued, pursuant to *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296, the sentencing statute was unconstitutional because the Sixth Amendment requires a jury, rather than a judge, to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular crime. The state appellate court affirmed the sentence, but the Oregon Supreme Court reversed the sentence based upon appellant's argument. The State of Oregon petitioned the United States Supreme Court to review the decision. Upon accepting jurisdiction, the Court certified the following question: "When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?"

{¶11} In answering the question in the negative, the Court held the Sixth Amendment does not prohibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent,

sentences for multiple offenses. Id. at 717-718. In support of its decision, the Court observed: "[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge." Id. at 717. Hence, the court reasoned, when a court is required to make factual findings before imposing consecutive sentences:

{¶12} "[t]here is no encroachment *** by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice." Id. at 718.

{¶13} Pursuant to *Ice*, the requirement that a judge find specific facts prior to imposing consecutive sentences is constitutionally permissible and does not run afoul of a defendant's Sixth Amendment right to a trial by jury. Appellant utilizes this ruling as a foundation for his claim that an Ohio trial judge who intends on sentencing a defendant to consecutive terms of imprisonment must adhere to the factfinding process codified under R.C. 2929.14(E)(4), despite the Supreme Court's severance of that statutory subsection in *Foster.* For the reasons below, we agree.

{¶14} In the wake of *Foster*, the General Assembly neither revised nor repealed R.C. 2929.14(E)(4). In fact, the Ohio legislature has kept the statutory mandates inherent in R.C. 2929.14(E)(4) intact through eleven amendments since Foster's release. The most recent amendment occurred after the issuance of the decision in *Ice*, on January 14, 2009. The effective date of this amendment was April 7, 2009. In light of *Ice* and the General Assembly's most recent amendment to R.C. 2929.14, we hold a

sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster's* release, make certain specific findings of fact before imposing consecutive sentences on a defendant.[1]

{¶15} We are mindful that this conclusion appears to conflict with several cases previously released by this court. See *State v. Moncoveish*, 11th Dist. No. 2008-P-0075, 2009-Ohio-6227; *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815; *State v. Dunford*, 11th Dist. No. 2009-Ohio-0027, 2010-Ohio-1272. In actuality, however, the offenders in *Moncovish* and *Krug* were each sentenced *prior to* the effective date of the General Assembly's post-*Ice* amendment to R.C. 2929.14. Hence, these cases did not fall within the purview of the amendment.

{¶16} The defendant in *Dunford*, however, was sentenced on May 6, 2009, approximately one month after the effective date of current R.C. 2929.14(E)(4). For the reasons discussed above, we therefore believe *Dunford* was incorrectly analyzed to the extent it held the sentencing mandates of current R.C. 2929.14(E)(4) were not binding on a trial judge sentencing a defendant to consecutive sentences after April 7, 2009. Nonetheless, the defendant in *Dunford* was sentenced to serve life without parole and thus any error in that ruling was harmless.

{¶17} We recognize that other districts have addressed similar issues and held that post-*Foster*, only the Supreme Court of Ohio has the ability to address the statutory requirement of fact-finding before imposition of consecutive sentences. The precise

1. Our research reveals that the foregoing conclusion is supported by at least one other appellate district in Ohio. See *State v. Smith*, 5th Dist. No. 09-CA-31, 2009-Ohio-6449 (accepted for discretionary review by the Ohio Supreme Court in *State v. Smith*, 124 Ohio St.3d 1538, 2010-Ohio-1557.); *State v. Vandriest*, 5th Dist. No. 09-COA-032, 2010-Ohio-997, at ¶9.

issue raised here, however, was not raised in many of those cases. As noted above, the specific issue raised and addressed here is the amendment of R.C. 2929.14 *subsequent* to the United States Supreme Court holding in *Oregon v. Ice.* In essence, the Ohio Legislature re-enacted the requirement that was previously severed by the *Foster* decision.

{¶18} Other districts have taken the position espoused by the Third Appellate District in *State v. Sabo*, 3d Dist. No. 14-09-33, 2010-Ohio-1261. There the court held: "It is not the place of this court to declare unconstitutional a decision of our Supreme Court, and we must defer to the authority of the Ohio Supreme Court regarding the constitutionality of *Foster.*" Id. at ¶41. Notwithstanding this point, we are not passing on the constitutionality of *Foster*, but on the applicability of constitutional legislation passed subsequent to *Foster's* ruling. The trial court considered the issue below and we are simply assessing the validity of its conclusion in light of the legislature's post-*Ice* amendment. See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478. (A case in which the parties asked the Supreme Court to permit post-argument briefing on the effect of *Ice* on *Foster.* The Court denied the motion, in part, because the trial court did not have an opportunity to consider the impact of *Ice* on the case.)

{¶19} If the legislation had not been reintroduced after being severed, it may be that the *Foster* status quo would have to be maintained post-*Ice* until further ruling from the Ohio Supreme Court. Given the timing of the legislature's latest amendment to R.C. 2929.14(E)(4), however, we are compelled to examine whether *Ice* has given the statute new legs upon which to stand.

{¶20} It is the judiciary's role to apply properly enacted laws to the extent they are constitutional. See *State v. Cunningham*, 113 Ohio St.3d 108, 113, 2007-Ohio-1245. In *Ice*, the United States Supreme Court held statutory sentencing provisions that require judicial factfinding as a prerequisite to imposing consecutive sentences to be constitutional. This ruling was based upon *Apprendi* and its progeny, the same body of law upon which the Ohio Supreme Court based its decision in *Foster*. Because *Foster* extrapolated from *Apprendi* and its progeny that laws which require judicial factfinding as a necessary precondition to imposing consecutive sentences are unconstitutional, it, as to this issue, was improperly decided. Subsequent to *Ice*, the legislature re-imposed the requirement that a sentencing judge must make certain findings before imposing consecutive sentences. Pursuant to the holding in *Ice*, this legislation is constitutional and thus it is a trial court's duty to apply that law as it is written.

{¶21} Appellant in this case was sentenced on October 13, 2009, *after* the effective date of the General Assembly's most recent amendment to R.C. 2929.14(E)(4).[2] The trial court, however, did not make the required findings prior to imposing sentence. Thus, we hold the matter must be remanded for resentencing.

{¶22} Appellant's first assignment of error is sustained.

{¶23} For her second assignment of error, appellant alleges:

{¶24} "The trial court erred when it refused to instruct the jury on duress."

{¶25} Duress is an affirmative defense to a criminal charge. *State v. Strickland*,

2. Although not specifically briefed, it follows that R.C. 2929.19(B)(2), requiring the trial court to give reasons for its R.C. 2929.14(E)(4) findings, was also revitalized by *Ice* as it too was amended on April 7, 2009.

11th Dist. No. 2005-T-0002, 2006-Ohio-2498, at ¶25. The defense of duress, however, is extremely limited and applicable only in certain rare circumstances. Id., citing *State v. Cross* (1979), 58 Ohio St.2d 482, 488. A defendant may claim duress when she is compelled to commit a crime by another under threat of immediate imminent death or serious bodily injury. *State v. Getsy*, 84 Ohio St.3d 180, 199, 1998-Ohio-533. The force compelling the defendant must be constant, controlling the will of the unwilling offender during the entire commission of the criminal act and must be of such a nature that the offender is unable to safely withdraw. Id. In *Getsy*, the Court further emphasized that the immediacy of the harm threatened is an essential element of the defense. Id. "All the conditions must be met," before a jury instruction on duress is sufficiently warranted. *Cross*, supra. If these conditions are not met, "[t]he court may refuse to give an instruction which is not applicable to the evidence governing the case ***." Id.

{¶26} A jury instruction is warranted where the evidence shows the defendant subjectively believes she is being threatened with imminent death or serious bodily injury if she does not commit the crime. *Tallmadge v. Robinson* (1952), 158 Ohio St. 333, 340. The law requires, however, that a defendant's subjective belief regarding the danger of imminent death or grave bodily injury be objectively reasonable based upon the evidence submitted in defense of the crime. See *State v. Harkness* (1991), 75 Ohio App.3d 7, 11.

{¶27} It is within the discretion of the trial court to determine whether the evidence presented at trial is sufficient to issue a particular instruction to the jury. *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52. A reviewing court may therefore

reverse a trial court's refusal to provide a jury instruction only if the trial judge abused his or her discretion. *Strickland,* supra, at ¶24. "'Abuse of discretion' is a term of art, describing a judgment neither comporting with the record nor reason." *State v. Thompson*, 11th Dist. No. 2009-A-0028, 2010-Ohio-996, at ¶20, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶28} Under the instant assigned error, appellant argues the trial court abused its discretion in refusing to provide the jury with an instruction on the defense of duress. As the evidence did not support such an instruction, we hold the trial court did not err.

{¶29} At trial, appellant testified she gathered evidence against drug dealer Craig Smith in her capacity as a confidential police informant. On the strength of this evidence, the police searched Smith's home. Subsequent to his home being searched, appellant testified Smith began giving her regular quantities of oxycodone for her to sell. Appellant testified she never asked Smith for the oxycodone supplies. Appellant asserted she believed Smith's actions were an attempt to determine whether she was working with police. She testified she did not want to sell Smith's drugs, but felt compelled because: "*** you just don't return drugs without some type of reason, and the only reason would be is that you're a snitch ***." Appellant testified she was "a nervous wreck" during this period and, because of certain unspecified threats leveled by Smith, she claimed she feared for her life and the lives of her family. We do not agree.

{¶30} First, appellant failed to submit testimony showing Smith or any of his associates compelled her to sell the oxycodone. Although Smith dropped off the drugs, and appellant understood this to mean she was required to move them, there was no indication Smith demanded appellant to commit the crime. Indeed, the evidence

indicates he passively left the drugs in appellant's possession without overt directions. The evidence therefore reveals that appellant, rather than returning the drugs, dealt them voluntarily.

{¶31} Appellant further failed to introduce any specific evidence of the nature of Smith's alleged threat. Without such information, it is impossible to evaluate whether appellant's purported subjective fear was objectively reasonable under the circumstances. Furthermore, even assuming Smith threatened appellant with imminent death or serious bodily harm, she failed to introduce specific evidence of when the threat occurred. Without a temporal connection, we cannot know whether the alleged threat portended immediate, imminent death or serious bodily injury if the crimes were not committed. In short, appellant failed to create a nexus between the criminal act and the purported threat.

{¶32} Finally, appellant failed to establish the manner in which Smith (or his associates) controlled her will such that she could not safely withdraw. Although appellant testified Smith had threatened her at some point, there was no evidence introduced that he ever brandished a weapon in her presence or accompanied her to the buys that eventuated in the underlying charges. As pointed out above, the evidence reflects that appellant acted of her own volition in selling the pills without external pressure from Smith. Without evidence tending to show a continuous, present threat of immediate force from which a defendant cannot safely retreat, duress is not an available defense to a criminal act. See *State v. Dapice* (1989), 57 Ohio App.3d 99, 106-107; see, also, *State v. Good* (1960), 110 Ohio App. 415, 419.

{¶33} We therefore hold appellant has not shown that her criminal conduct occurred as a result of a continuous threat from Smith or others which, because of her fear of immediate bodily harm or death, controlled her will and compelled her to sell Smith's oxycodone on three separate occasions. Therefore, the trial court did not err in refusing to instruct the jury on duress.

{¶34} Appellant's second assignment of error is overruled.

{¶35} Appellant's third assignment of error provides:

{¶36} "The evidence was insufficient to support the finding that drug trafficking alleged in Count III occurred in the vicinity of a school."

{¶37} An inquiry into the sufficiency of the evidence asks whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Ansell*, 11th Dist. No. 2008-P-0111, 2009-Ohio-4802, at ¶43. "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶38} Under this assignment of error, appellant challenges the sufficiency of the evidence submitted by the state only as it relates to the school specification in the aggravated trafficking charge of Count III. The school specification penalty

enhancement statutes require the state to prove the criminal offense at issue was "committed *** in the vicinity of a school ***." See R.C. 2925.04(C)(3)(b) and R.C. 2925.041.(C). "[A]n offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises." R.C. 2925.01(P). The purpose of the school specification is "*** to punish more severely those who engage in the sale of illegal drugs in the vicinity of our schools and our children." *State v. Manley*, 71 Ohio St.3d 342, 346, 1994-Ohio-440.

{¶39} The Supreme Court has observed:

{¶40} "***in order to convict a defendant under the school specification, the state must prove beyond a reasonable doubt that the drug transaction occurred within the specified distance of a school. The state has the burden of establishing all material elements of a crime by proof beyond a reasonable doubt." *Manley*, supra**.**

{¶41} With respect to the school specification, the state offered the testimony of Dave Makery, Executive Director of Business Operations for Warren City Schools. Makery described the Pit Stop's location as "[b]asically, right across the street ***" from Warren G. Harding High School. He also unequivocally testified that the Pit Stop is within 1,000 feet of Harding High School. Mr. Makery further noted that the property on which Warren G. Harding High School is located is owned by the Warren City School Board and has been a Warren City School property for "*** more than 50 years." He also emphasized, for clarity, that Warren Harding was operating as a school in April of

2007, at the time when the criminal offenses at issue were committed. When asked what occurs on a regular, daily basis at Harding high school, Mr. Makery responded: "[e]ducational, learning, teaching, athletics, club activities, it's a State funded institution, federally funded, locally funded for public education."

{¶42} Appellant asserts the foregoing testimony was inadequate to prove the school specification beyond a reasonable doubt because (1) Makery had held his position in Warren City Schools approximately one month prior to trial and (2) he failed to offer adequate testimony for the jury to conclude that Warren Harding was operating as a "school" at the time the crimes were committed.

{¶43} Appellant's first argument is essentially an attack on the believability of Makery's testimony and thus challenges the weight and not the sufficiency of the evidence. Regardless, the argument lacks merit. To the extent he testified both that the Pit Stop is "across the street" from Harding and within 1,000 feet of the school itself, the state met its burden of production on the specification as it relates to the distance.

{¶44} Further, the jury was entitled to give Makery's testimony any weight it felt appropriate. Simply because Makery held his post as Executive Director of Business Operations for Warren City Schools only for a short time prior to trial does not imply his testimony was not credible. Indeed, Makery testified he visited Warren Harding regularly and based his testimony on his "[g]eneral knowledge of distance" and familiarity with the geographical area. Although the state did not provide a specific measurement of the distance, such an omission is inconsequential. This court has held that testimony approximating the necessary distance between a school and a criminal

act is enough for the state to meet both its burden of production and burden of proof. *State v. Speers*, 11th Dist. No. 2003-A-0112, 2005-Ohio-4654, at ¶29.

{¶45} With regard to appellant's second argument, Makery specifically testified that Warren G. Harding High School is an institution where educational activities are ongoing on a "regular daily basis." Although he did not specifically state the school was "in session" at the specific times the criminal activities took place, his testimony was sufficiently detailed and inclusive to meet the statutory requirements of the specification.

{¶46} Appellant's final assignment of error is therefore overruled.

{¶47} For the reasons discussed in this opinion, appellant's second and third assignments of error are overruled. Her first assignment of error, however, is sustained. The judgment of the Trumbull County Court of Common Pleas is therefore affirmed in part, reversed in part, and the matter is remanded for further proceedings.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.