[Cite as *State v. Straw*, 2015-Ohio-1059.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0039**
- vs -	:	
SCOTT A. STRAW,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas.
Case No. 2009 CR 0052.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Kristina Drnjevich*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Richard E. Hackerd, 231 South Chestnut Street, Ravenna, OH 44266-3023 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Scott A. Straw, appeals the sentence of the Portage County Court of Common Pleas following his guilty plea to three counts of gross sexual imposition. At issue is whether the trial court committed plain error in imposing consecutive sentences. For the reasons that follow, we affirm the trial court's decision.

{¶2} On January 30, 2009, appellant was indicted by appellee, the state of Ohio, on one count of rape, a felony of the first degree, in violation of R.C.

2907.02(A)(1) and (B); and three counts of gross sexual imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4) and (B). Specifically, the indictments stated that appellant had engaged in sexual conduct and had sexual contact with a female minor, who was not the spouse of appellant and who was less than 13 years of age at the time of the offenses.

{¶3} On February 4, 2009, appellant entered a plea of not guilty to all charges in the indictment. Appellant withdrew his not guilty plea on May 11, 2009, and entered a written plea of guilty to three counts of gross sexual imposition, which the trial court accepted. A nolle prosequi was entered on the remaining count of rape. The trial court deferred sentencing and referred the matter to the Portage County Adult Probation Department for a presentence investigation and written report.

{¶4} A subsequent sentencing hearing was held on June 8, 2009. Pursuant to the trial court's June 9, 2009 sentencing entry (and its June 24, 2009 nunc pro tunc entry), appellant was assessed a fine of $750 plus costs and sentenced to three years imprisonment for each count of gross sexual imposition, to be served consecutively, for an aggregate prison term of 9 years.

{¶5} Appellant filed a timely pro se notice of appeal on July 7, 2009. The trial court appointed appellate counsel on July 15, 2009. However, appointed counsel never filed a notice of appearance with this court, nor did he file any pleadings on behalf of appellant. On October 19, 2009, this court sua sponte dismissed appellant's appeal for failure to prosecute. On February 5, 2014, this court received a handwritten letter from appellant, which was construed as a motion to reinstate his appeal. For the reasons

stated in our June 26, 2014 judgment entry,[1] this court reinstated the appeal and appointed appellate counsel to represent appellant.

{¶6} Appellant assigns one assignment of error for our review:

{¶7} "The Trial Court failed to make the required findings in order to impose consecutive sentences in violation of ORC 2929.14(C)(4)."

{¶8} We initially note that appellant did not raise an objection to the imposition of consecutive sentences at his sentencing hearing. Therefore, appellant has waived all but plain error on review. *State v. Archibald*, 11th Dist. Lake No. 2014-L-005 & 2014-L-006, 2014-Ohio-4314, ¶15.

{¶9} Plain error may be noticed under exceptional circumstances where necessary to prevent a miscarriage of justice, even though the error was never brought to the attention of the trial court. *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. To constitute plain error, an error must be an obvious deviation from a legal rule that affected the outcome. *See State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). The Ohio Supreme Court has held that the defendant has the burden of demonstrating plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17. "A reversal is warranted only if the defendant can prove the outcome would have been different absent the error." *Archibald*, *supra*, at ¶17, citing *Payne*, *supra*, at ¶17. Further, the decision to correct a plain error is discretionary. *Barnes*, *supra*, at 27.

{¶10} Appellant argues the trial court erred in imposing consecutive sentences because R.C. 2929.14(C)(4), as amended by H.B. 86 (effective Sept. 30, 2011),

1. Available at Docket Search, http://www.co.portage.oh.us/pa/pa.urd/pamw2000*docket_lst?47164166 (accessed Jan. 27, 2015).

retroactively required the trial court to make factual findings in support of his June 2009 sentence. We disagree.

{¶11} "In [*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856], decided on February 27, 2006, the Supreme Court excised those portions of R.C. 2929.14 that required judicial findings to support consecutive sentences. Moreover, the Court held that trial courts are no longer required to make findings or give their reasons for imposing consecutive sentences." *Archibald*, *supra*, at ¶26 (internal citations omitted). Thus, at the time of appellant's sentencing on June 9, 2009, the trial court was not required to make findings in support of appellant's consecutive sentences.

{¶12} On September 30, 2011, H.B. 86 went into effect and amended R.C. 2929.14(C)(4). This statute now provides:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that

> consecutive sentences are necessary to protect the public from future crime by the offender.

Judicial fact-finding under R.C. 2929.14(C)(4) is now "required to overcome the statutory presumption in favor of concurrent sentences" found in R.C. 2929.41(A). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶23.

{¶13} However, this court has held that H.B. 86 does not apply retroactively. *See Archibald*, *supra*, at ¶27; *State v. Stalnaker*, 11th Dist. Lake No. 2011-L-151, 2012-Ohio-3028, ¶15. Other appellate districts have held the same. *See, e.g.*, *State v. Lay*, 2d Dist. Champaign No. 2011-CA-29, 2012-Ohio-5102, ¶21; *State v. Terrell*, 4th Dist. Washington No. 10CA39, 2012-Ohio-1926, ¶12; *State v. Jones*, 7th Dist. Mahoning No. 13 MA 53, 2014-Ohio-2592, ¶19; *State v. Calliens*, 8th Dist. Cuyahoga No. 97034, 2012-Ohio-703, ¶28. Particularly instructive is the opinion issued by the Second District Court of Appeals in *State v. Clay*, 2d Dist. Miami No. 2011 CA 32, 2012-Ohio-3842. In reaching its conclusion that H.B. 86 does not compel a retroactive application, the *Clay* Court quoted Section 11 of the uncodified portion of H.B. 86:

> In amending division (E)(4) of section 2929.14 and division (A) of section 2929.41 of the Revised Code in this act, it is the intent of the General Assembly to simultaneously repeal and revive the amended language in those divisions that was invalidated and severed by the Ohio Supreme Court's decision in *State v. Foster* (2006), 109 Ohio St.3d 1. The amended language in those divisions is subject to reenactment under the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, and the Ohio Supreme Court's decision [in] *State v. Hodge* (2010), 128 Ohio St.3d 1, 2010-Ohio-6320 and, although constitutional under *Hodge*, *supra*, that language is not enforceable until deliberately revived by the General Assembly.

{¶14} The *Clay* Court went on to state that nothing in this section suggests that the legislature intended the amendments to R.C. 2929.14(E) "to apply retroactively to

those who had been sentenced prior to the effective date of H.B. 86. To the contrary, Section 11's language that those provisions were unenforceable 'until deliberately revived' implies that the revived language would apply prospectively only." *Id*. at ¶12. In addition, this holding is consistent with R.C. 1.48, which provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." *Id*.

{¶15} Appellant also argues that *United States v. Booker*, 543 U.S. 220 (2005) compels a retroactive application. In his brief, appellant includes a dissected quote from *Booker*, to wit: "'[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final * * * .'" *Id*. at 268, quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The case before us is somewhat of a procedural anomaly and is still considered "pending on direct review" over five years from the date of the trial court's entry of sentence. Nevertheless, this holding from the *Booker* Court does not apply to the case sub judice.

{¶16} The *Booker* Court applied a holding from *Griffith*, which stated the "failure to apply a newly declared *constitutional rule* to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, *supra*, at 322 (emphasis added). Both *Booker* and *Griffith* involved the retroactivity of a constitutional ruling. *See Booker*, *supra*, at 268 (explaining why the Court's holding will not result in resentencing hearings for "cases not involving a Sixth Amendment violation"); *Griffith*, *supra*, at 324 (explaining the Court's retroactivity holding was to be applied to convictions affected by "a decision of this Court construing the Fourth Amendment"). *See also Foster*, *supra*, at ¶104 (remanding cases pending on direct review in order to "protect Sixth Amendment principles as they have been articulated [by *Booker*]").

{¶17} This case, on the other hand, involves the retroactivity of newly-enacted legislation, the constitutionality of which is not in question. In fact, the U.S. Supreme Court has held that neither the type of statute under which appellant was sentenced nor the type of statute that was enacted with H.B. 86 is unconstitutional. *See Oregon v. Ice*, 555 U.S. 160, 171 (2009):

> [A] scheme making consecutive sentences the rule, and concurrent sentences the exception, encounters no Sixth Amendment shoal. To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense. Neither [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)] nor our Sixth Amendment traditions compel straitjacketing the States in that manner.

{¶18} For all of the foregoing reasons, appellant's assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.