

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-02-012 CA2009-02-016
- vs -	:	<u>OPINION</u> 9/8/2009
MICHAEL R. LEWIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08 CR 25162

Rachel A. Hutzler, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Thomas G. Eagle, 3386 North St. Rt. 123, Lebanon, Ohio 45036, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Michael R. Lewis, appeals his sentence imposed by the Warren County Court of Common Pleas following his guilty pleas to domestic violence, telecommunications harassment, and protection order violations.

{¶2} On December 18, 2008, appellant entered a guilty plea to one charge of domestic violence in violation of R.C. 2919.25(A) in Case No. 08CR25404. Also on that day, he entered a guilty plea to one count of misdemeanor telecommunications harassment in violation of R.C. 2917.21(A)(5), seven counts of felony

telecommunications harassment in violation of R.C. 2917.21(A)(5), and eight counts of violating a protection order in violation of R.C. 2919.27(A)(1) in Case No. 08CR25162. In Case No. 08CR25404, the trial court sentenced appellant to serve three years in prison on the domestic violence conviction. In Case No. 08CR35162, the trial court sentenced appellant to serve six months in jail on the misdemeanor telecommunications harassment conviction, and 12 months in jail on each of the remaining convictions. The trial court ordered all of the convictions in Case No. 08CR35162 to be served concurrently with each other, but that the sentences in that case shall be served consecutively to the sentence in Case No. 08CR25404 and consecutively to a sentence imposed by another court. Appellant appeals his sentences, raising the following assignment of error.

{¶13} "THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES."

{¶14} In his assignment of error, appellant argues that a recent United States Supreme Court case, *Oregon v. Ice* (2009), ____ U.S. ____, 129 S.Ct. 711, invalidates a portion of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant claims that in *Ice*, the United States Supreme Court invalidated the *Foster* court's reasoning with respect to the imposition of consecutive sentences, and because the Ohio General Assembly re-enacted R.C. 2929.14(E)(4) and 2929.41(A) after *Foster* was decided, those statutes are again valid. Appellant maintains that Ohio sentencing courts now must consider and apply these statutes before imposing consecutive sentences for multiple offenses.

{¶15} In *Foster*, 2006-Ohio-856, the Ohio Supreme Court held that R.C. 2929.14(E)(4) and 2929.41(A), which required judicial fact-finding before imposition of

consecutive sentences, are unconstitutional under *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147. As a result, the court in *Foster* severed these provisions from Ohio's sentencing scheme and held that trial 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." *Foster* at ¶100. Further, in *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶11, the Ohio Supreme Court considered whether a sentencing court has the authority, after *Foster*, to impose a sentence consecutive to a sentence already imposed by another Ohio court. In *Bates* at paragraphs one and two of the syllabus, the court held that after *Foster*, sentencing courts have the authority to impose a prison sentence to be served consecutively to a prison sentence previously imposed on the same offender by another state court, and that a trial court now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.

{¶6} In *Oregon v. Ice*, 129 S.Ct. 711, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences. The Court held that the Sixth Amendment to the United States Constitution is not violated when States permit judges, rather than juries, to make the findings of facts necessary for the imposition of consecutive, rather than current, sentences for multiple offenses. *Id.* at 716-720.

{¶7} According to the record, the United States Supreme Court decided *Ice* before the trial court imposed appellant's sentence. However, appellant did not object to the imposition of consecutive sentences on the basis of *Ice* or *Blakely*. A defendant's

failure to object at a sentencing hearing forfeits a *Blakely* error on appeal. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, paragraph one of the syllabus. "[I]f a party forfeits an objection in the trial court, reviewing courts may notice only '[p]lain errors or defects affecting substantial rights.'" *Id.* at ¶15, citing Crim.R. 52(B).

{¶8} Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. Notice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶9} After reviewing the record, including transcripts from the sentencing hearings, we find that the trial court committed no error in imposing consecutive sentences for the offenses to which appellant entered guilty pleas. The Ohio Supreme Court recently acknowledged *Ice* in *State v. Elmore*, Slip Opinion No. 2009-Ohio-3478. In *Elmore* at ¶35, the court stated, "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore. We will not address fully all ramifications of *Oregon v. Ice*, since neither party sought the opportunity to brief this issue before oral argument."¹

{¶10} The United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision. While a re-examination of Ohio's sentencing statutes might be appropriate in light of the decision in *Ice*, such a re-examination can only be performed by the Ohio

1. We note that even more recently, the Ohio Supreme Court again cited *Ice*, but the court did not address

Supreme Court. See *State v. Miller*, Lucas App. No. L-08-1314, 2009-Ohio-3908, ¶18. Unless or until *Foster* is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme Court. *Id.* Several appellate courts have considered the application of *Ice* to *Foster* and have reached similar conclusions. See, e.g., *id.*; *State v. Krug*, Lake App. No. 2008-L-085, 2009-Ohio-3815; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; *State v. Franklin*, Franklin App. No. 08AP-900, 2009-Ohio-2664.

{¶11} Accordingly, appellant's assignment of error is overruled.

{¶12} Judgment affirmed.

POWELL and YOUNG, JJ., concur.