

**[Cite as *State v. Ferguson*, 2011-Ohio-752.]**

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO  
Plaintiff-Appellee

vs.

TIMOTHY FERGUSON  
Defendant-Appellant

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C.A. CASE NO. 23857

T.C. CASE NO. 09-CR-3265

(Criminal Appeal from  
Common Pleas Court)

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O P I N I O N

Rendered on the 18th day of February, 2011.

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Mathias H. Heck, Jr., Prosecuting Attorney, Kirsten A. Brandt,  
Atty. Reg. No. 0070162, Montgomery County Prosecutor's Office,  
Montgomery County Courts Building, P.O. Box 972, 301 West Third  
Street, Dayton, OH 45422

Attorneys for Plaintiff-Appellee

Thomas W. Kidd, Jr., Atty. Reg. No. 0066359, P.O. Box 231,  
Harveysburg, OH 45032

Attorney for Defendant-Appellant

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GRADY, P.J.:

{¶ 1} Defendant, Timothy Ferguson, was found guilty and convicted following a jury trial of three felony offenses,

including R.C. 2905.02(A)(1) and (B), abduction committed with a sexual motivation. The trial court imposed an aggregate prison term of four and one-half years for Defendant's three convictions and a five year period of post-release control based on Defendant's abduction conviction. Defendant filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 2} "THE TRIAL COURT ERRED IN SENTENCING MR. FERGUSON TO A MANDATORY 5 YEARS OF POST-RELEASE CONTROL."

{¶ 3} R.C. 2967.28(B) provides in relevant part:

{¶ 4} "(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. \* \* \* Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

{¶ 5} "(1) For a felony of the first degree or for a felony sex offense, five years;

{¶ 6} "(2) For a felony of the second degree that is not a felony sex offense, three years;

{¶ 7} "(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years."

{¶ 8} The post-release control provisions of R.C. 2967.28(B) are mandatory. The trial court imposed a five year term of post-release control on its understanding that abduction committed with a sexual motivation in violation of R.C. 2905.02(A)(1) and (B) is a felony sex offense. R.C. 2967.28(A)(3) provides: "'Felony sex offense' means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony." Not being a violation of a section of Chapter 2907 of the Revised Code, abduction committed with a sexual motivation in violation of R.C. 2905.02(A)(1) and (B) is not a felony sex offense. Neither is the abduction offense a first degree felony, but is instead a third degree felony. R.C. 2905.02(C). Therefore, the court was authorized and required to impose a three year period of post-release control. R.C. 2967.28(B)(3).

{¶ 9} The State concedes that the trial court erred when it instead imposed a five-year term of post-release control authorized and required by R.C. 2967.28(B)(1).

{¶ 10} The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

{¶ 11} "THE COURT ERRED IN SENTENCING MR. FERGUSON CONTRARY TO LAW BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE FINDINGS SET FORTH IN R.C. 2929.14(E)(4)."

{¶ 12} The findings requirement for imposing consecutive sentences in R.C. 2929.14(E)(4) was severed from that section by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Defendant argues that *Foster's* holding in that respect was effectively overruled by *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, and that as a result the findings requirements of R.C. 2929.14(E)(4) have been revived. That view was more recently rejected by The Supreme Court of Ohio in *State v. Hodge*, \_\_\_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6320.

{¶ 13} Defendant's second assignment of error is overruled

{¶ 14} Having sustained Defendant's first assignment of error, we will modify the judgment of conviction pursuant to R.C. 2953.08(G)(2) to instead impose the three year period of post-release control mandated by R.C. 2967.28(B)(3). *State v. Fisher*, \_\_\_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6238, ¶29. As modified, the judgment will be affirmed.

DONOVAN, J. and FROELICH, J. concur.

Copies mailed to:

Kirsten A. Brandt, Esq.  
Thomas W. Kidd, Jr., Esq.  
Hon. Mary Wiseman