

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No. 06CA72
	:
vs.	: Released: December 14, 2007
	:
STACY R. THOMPSON,	: <u>DECISION AND JUDGMENT</u>
	: <u>ENTRY</u>
Defendant-Appellant.	:

APPEARANCES:

David H. Bodiker, Ohio Public Defender and Barbara A. Farnbacher,
Assistant State Public Defender, Columbus, Ohio, for Defendant-Appellant.

James E. Schneider, Washington County Prosecuting Attorney, Alison L.
Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta,
Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Defendant-Appellant, Stacy Thompson, appeals the sentence of the Washington County Court of Common Pleas which imposed nine months in prison for trafficking in cocaine and illegal use of food stamps. Appellant contends there was error below in that 1) the trial court gave improper written and oral jury instructions; 2) the trial court did not provide the jury separate verdict forms for each count of the indictment; 3) the verdict was against the manifest weight of the evidence, and; 4) the trial

court ordered Appellant to serve a non-minimum prison term in violation of the Due Process and Ex Post Facto clauses of the federal and state constitutions.

{¶2} In our view, neither the allegedly improper jury instructions nor the fact that a single verdict form was provided for a determination of guilt on two counts constituted plain error. As such, Appellant's first and second assignments of error are without merit. Because, after weighing the evidence, we cannot conclude the jury clearly lost its way and created a manifest miscarriage of justice, her third assignment of error is also without merit. Finally, because of the controlling authority of *State v. Foster*, we cannot sustain her fourth assignment of error. Accordingly, we overrule each of Appellant's assignments of error and affirm the decision of the trial court.

I. Facts

{¶3} In June of 2005, Christina Hines became a confidential informant for the Washington County Sheriff's Department. She had been arrested for possession of drug paraphernalia and decided to cooperate with the sheriff's department in order to avoid imprisonment. As part of this cooperation, Hines agreed to make a number of drug purchases from third parties. She gave the names of several people from whom she believed she

would be able to purchase drugs; Appellant was one of these persons. With the complicity of the sheriff's department, Hines arranged a drug transaction with Appellant. Hines agreed to give Appellant a food stamp debit card, worth \$300, in exchange for an "eight-ball" of crack cocaine.

{¶4} On July 15, 2005, in a phone conversation taped by the sheriff's department, Hines asked Appellant where she wanted to meet for the proposed transaction. Appellant named a location, a grocery store, and Hines, wearing a wire from the sheriff's department, drove there at approximately 10:00 p.m. and waited for her arrival. Law enforcement officers, traveling in two other cars, also drove to the location in order to monitor the transaction.

{¶5} Appellant drove to the location with two other women and, by chance, parked in close proximity to one of the two vehicles driven by police officers. An officer in this car, Detective Tilton, immediately recognized Appellant. Appellant was in the driver's seat, stayed in her car during the entire transaction, and remained in Tilton's direct surveillance throughout the events which followed.

{¶6} Hines gave the two women accompanying Appellant the food stamp debit card. They went into the grocery store, confirmed the value of the card, which was \$300, and returned the card to Hines. Hines then gave

the card to Appellant who in return gave her a plastic baggie containing crack cocaine. Detective Tilton was able to directly observe the exchange between Hines and Appellant. After the exchange, Hines turned over the baggie to law enforcement who determined it contained .68 grams of crack cocaine, valued at approximately \$60.

{¶7} On June 13, 2006, the Washington County Grand Jury issued a two-count felony indictment against Appellant: count one of the indictment was drug trafficking, a fourth degree felony, including a charge that Appellant sold drugs within 1000 feet of a school; count two was illegal use of food stamps, a fifth degree felony. On October 18, 2006, a jury found Appellant guilty on both counts, including a finding that the drug sale happened within 1000 feet of a school. The trial court sentenced Appellant to nine months of imprisonment on each count, the sentences to be served concurrently. On December 1, 2006, Appellant filed the current appeal.

II. Assignments of Error

- {¶8} 1. THE TRIAL COURT ERRONEOUSLY INCLUDED INAPPLICABLE INSTRUCTIONS IN ITS WRITTEN INSTRUCTIONS TO THE JURY, AND PROVIDED CONFUSING AND ERRONEOUS JURY INSTRUCTIONS REGARDING THE ELEMENTS OF ONE OF THE OFFENSES CHARGED, AND REGARDING RENDERING A VERDICT. THESE INSTRUCTIONAL ERRORS CONSTITUTED PLAIN ERROR, CRIM.R. 52(B), AND DEPRIVED MS. THOMPSON OF HER RIGHT TO A FAIR TRIAL BEFORE A PROPERLY INSTRUCTED JURY.

- {¶9} 2. THE TRIAL COURT ERRED WHEN IT DID NOT PROVIDE THE JURY WITH SEPARATE VERDICT FORMS FOR EACH COUNT ALLEGED IN THE INDICTMENT. THE FAILURE TO PROVIDE THE JURY WITH SEPARATE VERDICT FORMS CONSTITUTED PLAIN ERROR, CRIM.R. 52(B), AND DEPRIVED MS. THOMPSON OF HER FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL AND UNANIMOUS JURY VERDICT, AND TO HAVE HER GUILT PROPERLY PROVEN BEYOND A REASONABLE DOUBT.
- {¶10} 3. MS. THOMPSON’S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
- {¶11} 4. THE TRIAL COURT ERRED WHEN IT ORDERED MS. THOMPSON TO SERVE A PRISON TERM, AND WHEN IT IMPOSED A NONMINIMUM PRISON TERM. THIS ERROR DEPRIVED MS. THOMPSON OF HER FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS, AND HER SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

III. First Assignment of Error

{¶12} In her first assignment of error, Appellant contends the trial court erred by giving a number of improper jury instructions. She argues the trial court erred in this regard by 1) including in the written jury instructions language concerning Appellant’s credibility when she did not testify; 2) erroneously instructing the jury on the standard required to reach a not-guilty verdict, and; 3) including confusing, imprecise and redundant instructions regarding the elements of illegal use of food stamps.

{¶13} Because Appellant failed to object to the jury instructions at trial, we can only review this assignment of error for plain error. Under

Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Plain error may be found only when (1) there was an error in the proceedings; (2) the error was plain, i.e., the error was an “obvious” defect in the trial proceedings; and (3) the error must have affected a “substantial right,” i.e., the trial court’s error must have affected the outcome of the trial. *State v. Parish*, 4th Dist. Nos. 05CA14 and 05CA15, 2005-Ohio-7109, at ¶18. Additionally, Crim.R. 52(B) will be invoked only “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.*, quoting *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710. Reviewing courts should not notice plain error unless it seriously affects “the fairness, integrity, or public reputation of judicial proceedings.” *Parish* at ¶18, quoting *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240.

{¶14} Appellant objects to the written jury instructions which stated, in pertinent part, “[t]o weigh the evidence, you must consider the credibility of the witnesses *including the defendant*.” (Emphasis added.) The Appellant did not testify and she argues the instruction improperly emphasized to the jury that she declined to do so. This argument is not persuasive.

{¶15} First, the trial court orally corrected the written jury instruction by stating “ * * * since the Defendant did not testify, you eliminate the words, ‘including the Defendant.’” Subsequently, the trial court also properly charged the jury with the following instruction: “It is not necessary that the Defendant take the witness stand in her own defense. She has an absolute Constitutional right not to testify. The fact that she did not testify must not be considered for any purpose.” Accordingly, the trial court properly instructed the jury that no inferences could be drawn from Appellant’s decision not to testify. As such, there was no plain error regarding the written jury instruction concerning credibility of witnesses.

{¶16} Appellant next contends the trial court incorrectly instructed the jury, regarding reaching a verdict on count one, by stating the following: “If you find that the State proved each and every element of this offense beyond a reasonable doubt, you would find the Defendant guilty. If the State *failed to prove each and every element* of the offense beyond a reasonable doubt, then you would find the Defendant not guilty.” (Emphasis added.) Appellant argues this is an incorrect statement of law, that a correct instruction would have informed the jury that it must acquit the defendant if the State fails to prove a single element of the offense charged.

{¶17} The Eighth District Court of Appeals addressed this issue in *State v. Conner* (June 27, 1996), Cuyahoga App. No. 65385. “[T]he defense argues the language in the second instruction could mislead a jury into believing that it may only acquit if it finds that all elements were *not proved* when in fact, the jury must acquit if any one element is *not proved*. (Emphasis added.) We believe it is equally conceivable that the jury was not misled; since the language in the instruction is technically correct; ‘when each and every element * * * has not been proved * * *, he shall be acquitted.’ The use of the word ‘each’ embodies individualized elements. Besides, the court said the state must prove each and every essential element of the charge, thereby leading the jury to conclude if one element is missing, it must acquit.”

{¶18} In the case sub judice, the trial court stated, immediately before the instruction in question, that Appellant could only be found guilty if each and every element of the offense was proved beyond a reasonable doubt. Further, earlier in it’s instructions the trial court had stated, “[t]he Defendant must be acquitted, unless the State produces evidence which convinces you beyond a reasonable doubt of every essential element of the offenses charged in the indictment.” In such circumstances, we agree with

the holding in *Conner* and find no plain error in the trial court's instructions on reaching a verdict as to count one.

{¶19} Appellant also contends the trial court's instructions, regarding the elements of illegal use of food stamps, was "confusing, redundant and imprecise." Specifically, she states "[t]here was no evidence to support an instruction that [Appellant] 'bought' any 'electronically transferred benefit in a manner not authorized by the Food Stamp Act * * *.'" She further contends the definition of the offense was confusing because it failed to "specifically and articulately identify each element of the offense as elements." Additionally, Appellant claims the instructions were imprecise and contained assertions for which there was no legal authority.

{¶20} Appellant, however, cites no authority to support her argument that the instructions concerning the illegal use of food stamps were in error. Though she argues the definition of the offense was confusing, she provides no authority stating the language used was inadequate. Further, Appellant provides no evidence that the jury found the instructions confusing. In giving its jury instructions, the trial court was only required to summarize and paraphrase the relevant sections of the Food Stamp Act. *State v. Scott*, 7th Dist. No. 99 CA 324, 2001-Ohio-3417, at ¶70. The trial court properly did so.

{¶21} None of the allegedly improper jury instructions affected the fairness, integrity, or public reputation of the proceedings. Further, nothing in the instructions constituted a manifest miscarriage of justice and the alleged errors did not affect the outcome of the trial. Accordingly, there was no plain error and we overrule Appellant's first assignment of error.

IV. Second Assignment of Error

{¶22} Appellant contends, in her second assignment of error, that the trial court erred by not providing the jury with separate verdict forms for each count of the indictment. Because the jurors signed a single verdict form yet found her guilty on two counts, Appellant argues she was deprived of her rights to a unanimous, impartial jury and to have her guilt proven beyond a reasonable doubt.

{¶23} As in her first assignment of error, Appellant did not object to this alleged error at the time of trial. As such, we can only sustain this assignment of error upon a finding of plain error under Crim.R. 52(B).

{¶24} The single verdict form was divided into two sections clearly marked "COUNT ONE – TRAFFICKING IN DRUGS, COCAINE" and "COUNT TWO – ILLEGAL USE OF FOOD STAMPS." Each section listed the relevant Revised Code sections that applied to the count in

question. Each section had a space for the jury to enter “guilty” or “not guilty.” At the end of the form was a single signature block.

{¶25} We have previously noted that the better practice may be to have separate signature blocks for each individual charge and specification. *State v. Messineo* (Jan. 6, 1993), 4th Dist. Nos. 1488, 1493, at *11; *State v. Martinez* (Sept 28, 1992), 4th Dist. No. 91 CA 1, at *3. However, in the case sub judice, during trial, Appellant did not object to the jury instructions detailing the verdict form. “A defendant who fails to object to jury instructions before the jury retires to deliberate waives any error in the jury instructions.” *Martinez* at *3.

{¶26} The trial court instructed the jury at length concerning the verdict form. The instructions were sufficient to inform the jury that it was to make a determination of guilt on each count individually. Further, we find no evidence that the verdict form caused the jury to decide the case improperly. In such circumstances, we have found there is no reversible error. *Messineo* at *11; *Martinez* at *4. Accordingly, we find the use of the single verdict form did not constitute a manifest miscarriage of justice and, as such, was not plain error. Thus, we overrule Appellant’s second assignment of error.

V. Third Assignment of Error

{¶27} In her third assignment of error, Appellant contends her conviction is against the manifest weight of the evidence. When reviewing such claims, appellate courts should weigh the evidence and all reasonable inferences and also consider witness testimony. *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814. “However, this review is tempered by the principle that questions of weight and credibility are primarily for the trier of fact.” *Id.* at 371. A reviewing court should only reverse the conviction if it appears that the fact finder, in resolving evidentiary conflicts, “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶28} Appellant contends a number of circumstances surrounding the drug transaction demonstrate that her conviction was against the manifest weight of the evidence. For example, she states it is “incredible” to believe that Appellant would make arrangements to sell \$300 worth of crack yet deliver an amount worth only \$60. She states that Hines, the confidential informant, had motive to give false testimony concerning the transaction. She further states it is difficult to believe that Detective Tilton was able to

observe the drug exchange at 10:30 pm on a rainy night. She also claims the State failed to prove the transaction was within 1000 feet of a school because the distance was not adequately measured. None of her arguments are sufficient to sustain a claim that the verdict was against the manifest weight of the evidence.

{¶29} After a thorough review of the record below, we find the jury did not lose its way and create a manifest miscarriage of justice. It is reasonable to believe that, in a drug buy, one party might not give another the full, previously agreed to, amount of drugs. It was reasonable for the jury to believe that Detective Hilton, parked in close proximity to Appellant, was able to directly observe the drug exchange. It was also reasonable for the jury to believe that the State's evidence was sufficient to establish that the transaction took place within 1000 feet of a school. Further, weight of the evidence and witness credibility are issues primarily for the trier of fact. Here, the jury was able to hear the testimony and evaluate the credibility of Hines, Tilton and the State's other witnesses. Accordingly, we find the verdict was not against the manifest weight of the evidence and we overrule Appellant's third assignment of error.

VI. Fourth Assignment of Error

{¶30} In her fourth assignment of error, Appellant argues the trial court erred when it imposed a prison term. She further argues that, even if a prison term was warranted, the court erred by imposing a non-minimum sentence.

{¶31} Initially, we note Appellant's sentencing argument is controlled by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. In *Foster*, the Supreme Court of Ohio held that Ohio's felony sentencing scheme, under R.C. 2929.14(B) and (C), which required the sentencing court to impose a minimum sentence unless certain requirements were met, was unconstitutional. *Foster* at ¶¶75-78, 97. Pursuant to the holding in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, the remedy was to sever the unconstitutional provisions of the Revised Code. *Foster* at ¶96. Accordingly, after *Foster*, judicial fact-finding is no longer required before imposing more than the minimum sentence. *Id.*

{¶32} Appellant first argues that, instead of a prison sentence, the trial court should have imposed community control sanctions. She alleges the court erred by making a factual finding that her drug offense "was committed for hire or as a part of an organized criminal activity. She also

states the court erred in finding there were “no factors present that make this crime less serious than the norm * * * ” and there were “no factors that make this defendant less likely to recidivate.”

{¶33} After *Foster*, we have held the appropriate standard of appellate review concerning felony sentencing is the clear and convincing standard. *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, at ¶15. “Under this statutory standard, we neither substitute our judgment for that of the trial court nor simply defer to its discretion. (Internal citations omitted.) Rather, we look to the record to determine whether the sentencing court considered and properly applied the statutory guidelines and whether the sentence is otherwise contrary to law.” *Id.* at ¶16. The sentencing court has discretion to determine the most effective way to comply with the two purposes of felony sentencing, protecting the public and punishing the offender. However, it must consider factors listed in R.C. 2929.12(B) and (C), regarding the seriousness of the offender's conduct, and the factors in R.C. 2929.12(D) and (E), regarding the likelihood of recidivism. *Id.* at ¶17.

{¶34} In the case sub judice, the trial court noted the following factors during sentencing: Appellant’s trafficking offense was for hire or part of organized criminal activity; she had multiple prior arrests, both as a juvenile and an adult; there was a pattern of drug and alcohol abuse; she had

a long-standing and very serious opiate addiction, and; she expressed no remorse and still denied the events leading to her conviction. The court further found that a prison term was consistent with the purposes of protecting the public and punishing Appellant.

{¶35} After reviewing the record below, we find the trial court properly considered the guidelines set forth in R.C. 2929.12 regarding the seriousness of Appellant's conduct and the likelihood of recidivism. After considering these factors, the trial court determined that a prison term would best serve the twin aims of protecting the public and punishing Appellant. Accordingly, the trial court had discretion to sentence Appellant to a prison term instead of community control sanctions.

{¶36} Appellant next contends that, even if a prison sentence was proper, the trial court was required to impose a minimum six-month prison term instead of the nine-month term she received. In making this argument she states the *Foster* remedy violates both the Due Process and Ex Post Facto clauses of the state and federal constitutions. As such, she states we should remand her convictions for the imposition of minimum sentences. For the following reasons, we disagree.

{¶37} This court has considered the same ex post facto and due process arguments numerous times since the *Foster* decision. Each time we

have addressed them, we have rejected them. See *State v. Thompson*, 4th Dist. Nos. 06CA43, 06CA50, 2007-Ohio-2724; *State v. Cross*, 4th Dist. No. 06CA47, 2007-Ohio-2252; *State v. Ellis*, 4th Dist. No. 06CA3071, 2007-Ohio-2177; *State v. Bruce*, 4th Dist. No. 06CA40, 2007-Ohio-1938; *State v. Clagg*, 4th Dist. No. 06CA44, 2007-Ohio-1661; *State v. Edwards*, 4th Dist. No. 06CA830, 2007-Ohio-1516. *State v. Henry*, 4th Dist. No. 06CA8, 2006-Ohio-6942; *State v. Grimes*, 4th Dist. No. 04CA17, 2006-Ohio-6360.

{¶38} Similarly, other Ohio appellate courts have determined the application of *Foster*, to defendants who committed their offenses before that decision was released, does not violate due process and does not function as ex post facto law. See *State v. Thrasher*, 6th Dist. No. WD06047, 2007-Ohio-2838, *State v. Coleman*, 6th Dist. No. S06023, 2007-Ohio-448; *State v. Dawson*, 8th Dist. No. 88486, 2007-Ohio-2761; *State v. Cunningham*, 10th Dist. No. 06AP317, 2007-Ohio-2785; *State v. Rosado*, 8th Dist. No. 88504, 2007-Ohio-2782; *State v. Bengal*, 11th Dist. No. 2006L123, 2007-Ohio-2691; *State v. Mallette*, 8th Dist. No. 87984, 2007-Ohio-715; *State v. Lowe*, 10th Dist. No. 06AP673, 2007-Ohio-504; *State v. Shield*, 3rd Dist. No. 90616, 2007-Ohio-462; *State v. Hildreth*, 9th Dist. No. 06CA8879, 2006-Ohio-5058.

{¶39} Appellant argues her due process rights were violated because the Ohio Supreme Court's *Foster* decision was unexpected. However, the range of prison terms for Appellant's offenses remained the same both before and after *Foster*. "By demanding application of a presumption in favor of a minimum sentence, but not allowing any means by which the presumption can be overcome, 'appellant essentially seeks the benefit of a state of law that never existed.'" *Rosado* at ¶7, quoting *State v. Paynter*, 5th Dist. No. CT2006-0034, 2006-Ohio-5542.

{¶40} Here, Appellant had notice of the sentencing range at the time she committed her offenses. *Foster* neither judicially increased the range of her sentences nor retroactively applied a new statutory maximum. Because the range of penalties for Appellant's offenses remained the same post-*Foster* as it was pre-*Foster*, the application of the *Foster* remedy does not violate her due process rights or act as an ex post facto application of the law.

{¶41} Most importantly, as an Ohio appellate court, we are bound to follow the *Foster* decision. The United States Supreme Court denied certiorari on *Foster* on October 16, 2006. *Foster v. Ohio* (2006), 127 S.Ct. 442, 166 L.Ed.2d 314. The Supreme Court of Ohio has also refused to reconsider the *Foster* decision. See *State v. Foster*, 109 Ohio St.3d 1408,

2006-Ohio-1703 (Table, No. 2004-1568); *State v. Quinones*, 109 Ohio St.3d 1408, 2006-Ohio-1703 (Table, No.2004-1771). Thus, the Supreme Court of Ohio has expressly determined the severance remedy of *Foster* best preserves the objectives of the General Assembly. As an intermediate appellate court, we must follow the decisions of the Supreme Court of Ohio and can neither overrule nor declare *Foster* unconstitutional. Accordingly, we overrule Appellant's fourth assignment of error.

VII. Conclusion

{¶42} We find there was no plain error in any of the trial court's jury instructions. Similarly, it was not plain error for the court to provide a single verdict form for two separate offenses when there was no evidence it caused the jury to decide the case improperly. Additionally, after a thorough review of the record below, we find the jury did not decide the case against the manifest weight of the evidence. Finally, following the holding in *State v. Foster*, we find the trial court did not err in sentencing Appellant to a non-minimum sentence. Accordingly, we affirm the decision of the trial court and overrule each of Appellant's assignments of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.