[Cite as *State v. Williams*, 2009-Ohio-5296.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ERIC M. WILLIAMS Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. CT2009-0006 O P I N I O N
CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. CR2008-0261
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 5, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT L. SMITH ASSISTANT PROSECUTOR 27 North Fifth Street Zanesville, Ohio 43701	DAVID A. SAMS Post Office Box 40 West Jefferson, Ohio 43162

Wise, J.

{¶1} Appellant Eric M. Williams appeals his conviction for forgery and theft in the Court of Common Pleas, Muskingum County. The relevant facts leading to this appeal are as follows.

{¶2} On October 1, 2008, appellant was indicted on one count of forgery, R.C. 2913.31(A)(1), a fifth-degree felony, and one count of theft, R.C. 2913.02(A)(3), a first-degree misdemeanor. The charges stemmed from appellant's role in cashing a stolen check at a local store. Appellant initially pled not guilty to the charges.

{¶3} Pursuant to negotiations between appellant and the prosecutor, appellant agreed to plead guilty to both charges in exchange for the State's recommendation that appellant serve an aggregate term of six months in prison. It is undisputed that during the plea colloquy, the trial court did not specifically advise appellant of the requirement that he must be convicted by a unanimous jury.

{¶4} On January 12, 2009, following a presentence investigation, the trial court, despite the State's recommendation, sentenced appellant to a prison term of twelve months (twelve months for forgery, six months for theft, to be served concurrently).

{¶5} On February 11, 2009, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶6} "I. THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS HE WAS NOT APPRISED OF HIS CONSTITUTIONAL RIGHT TO JURY UNANIMITY.

{¶7} "II. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS HIS SENTENCE IS CONTRARY TO LAW."

I.

{¶8} In his First Assignment of Error, appellant contends the trial court failed to ensure that his guilty plea was knowing, voluntary, and intelligent, where appellant was not informed of his right to have the State obtain a unanimous jury verdict.[1] We disagree.

{¶9} Crim.R. 11(C)(2)(a) reads as follows:

{¶10} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶11} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶12} In accepting a guilty plea, a trial court must substantially comply with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Substantial compliance with Crim.R. 11(C) is determined upon a review of the totality of the circumstances. *State v. Carter* (1979), 60 Ohio St.2d 34, 38, 396 N.E.2d 757.

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[1] In Ohio, the unanimity requirement in criminal cases is conveyed in Crim.R. 31(A), which provides: "The verdict shall be unanimous."

{¶13} This Court has rejected the present argument in *State v. Williams* (July 31, 2008), Muskingum App. No. CT2008-0001, and *State v. Imani,* Muskingum App. No. CT2008-0014, 2008-Ohio-4364, ¶ 12. Upon review, and in light of this precedent, we hold appellant's guilty plea was knowingly, voluntarily, and intelligently entered, and the trial court did not err in accepting the plea.

{¶14} Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶15} In his Second Assignment of Error, appellant contends his sentence by the trial court deprived him of his constitutional right to due process. We disagree.

{¶16} Appellant essentially argues that in light of the decision of the United States Supreme Court in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517, it is necessary that Ohio trial courts return to the felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856.

{¶17} In *State v. Elmore*, --- Ohio St.3d ----, 2009-Ohio-3478, the Ohio Supreme Court recently summarized *Oregon v. Ice* as "a case that held that a jury determination of facts to impose consecutive rather than concurrent sentences was not necessary if the defendant was convicted of multiple offenses, each involving discrete sentencing prescriptions." *Elmore* at ¶ 34. However, the Ohio Supreme Court did not therein discuss all of the ramifications of *Ice*, as neither party in *Elmore* had briefed the issue prior to oral argument.

{¶18} In *State v. Mickens*, Franklin App.No. 08AP-743, 2009-Ohio-2554, the Tenth District Court of Appeals indicated that judicial review of some of Ohio's current

sentencing statutes might be necessary in light of *Ice.* Id. at ¶ 25. However, the court was unwilling to tamper with the *Foster* holding, concluding that "such a look could only be taken by the Ohio Supreme Court, as we are bound to follow the law and decisions of the Ohio Supreme Court, unless or until they are reversed or overruled." Id. Accord *State v. Crosky*, Franklin App.No. 09AP-57, ¶ 7, citing *State v. Robinson,* Cuyahoga App.No. 92050, 2009-Ohio-3379, ¶ 29; *State v. Krug,* Lake App.No. 2008-L-085, 2009-Ohio-3815, f.n.1.

{¶19} At this juncture, we concur with the State's position that *Ice* represents a refusal to extend the impact of the *Apprendi* and *Blakely* line of cases, rather than an overruling of them as suggested by appellant. We will thus herein adhere to the Ohio Supreme Court's decision in *Foster,* which holds that judicial fact finding is not required before a court imposes non-minimum, maximum or consecutive prison terms. *State v. Hanning,* Licking App.No. 2007CA00004, 2007-Ohio-5547, ¶ 9. Trial courts have full discretion to impose a prison sentence within the statutory ranges, although *Foster* does require trial courts to "consider" the general guidance factors contained in R.C. 2929.11, and R.C. 2929.12. *State v. Duff,* Licking App. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282.

{¶20} Appellant in this instance was convicted, in addition to the misdemeanor theft charge, of one felony of the fifth degree, i.e., forgery, which carries a potential determinate sentence of six to twelve months. Upon review, we find nothing in the record that would suggest that the trial court selected the sentence arbitrarily, based the sentence on impermissible factors, or failed to consider permissible factors. We are thus

unable to conclude, under an abuse of discretion standard, that the court acted unreasonably, arbitrarily, or unconscionably in its sentencing.

{¶21} Appellant's Second Assignment of Error is therefore overruled.

{¶22} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 0909

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ERIC M. WILLIAMS	:	
	:	
Defendant-Appellant	:	Case No. CT2009-0006

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES