[Cite as *State v. Lynn*, 2010-Ohio-3042.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL D. LYNN

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. CT2009-0041

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. CR2009-0116

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 30, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Michael D. Lynn appeals his conviction and sentence, in the Court of Common Pleas, Muskingum County, for rape and pandering sexually oriented material involving a minor. The relevant facts leading to this appeal are as follows.

{¶2} On June 10, 2009, the Muskingum County Grand Jury handed down a twenty-seven count indictment against appellant. On June 17, 2009, appellant appeared for his arraignment and entered pleas of not guilty to all counts.

{¶3} On July 30, 2009, pursuant to a plea deal, appellant entered pleas of guilty to Count 1, rape (R.C. 2907.02(A)(2)) and Count 25, pandering sexually oriented material involving a minor (R.C. 2907.322(A)(1)). The State of Ohio agreed to drop the other twenty-five counts. However, no agreement was reached as to a sentencing recommendation. The court thereupon accepted appellant's pleas.

{¶4} On September 21, 2009, appellant appeared before the court for sentencing. Following a hearing, the court sentenced appellant to a maximum sentence of ten years in prison for rape (felony of the first degree) and a maximum sentence of eight years in prison for pandering sexually oriented material involving a minor (felony of the second degree). The two terms were ordered to be served consecutively. Appellant was also classified as a Tier III sex offender. A sentencing entry was issued on September 29, 2009.

{¶5} Appellant timely filed a notice of appeal and herein raises the following two Assignments of Error:

{¶6} "I. THE TRIAL COURT ERRED BY FAILING TO MAKE THE REQUISITE FINDINGS OF FACT TO SUPPORT THE IMPOSITION OF A CONSECUTIVE

SENTENCE, PURSUANT TO ORC 2929.14(E)(4), AND FAILING TO STATE ITS REASONING SUPPORTING SUCH STATUTORILY ENUMERATED FINDINGS ON THE RECORD AT THE SENTENCING HEARING, PURSUANT TO ORC 2929.19(B)(2)(c).

{¶7} "II. THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN SENTENCING MICHAEL D. LYNN TO MAXIMUM AND CONSECUTIVE SENTENCES."

I.

{¶8} In his First Assignment of Error, appellant contends the trial court erred in failing to state its reasoning for imposing the two sentences consecutively. We disagree.

{¶9} 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, the trial court was required to literally comply with the requirements of R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) in imposing consecutive sentences in this matter. In other words, appellant urges that *Ice* has effectively warranted that Ohio trial courts return to the felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foste*r, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856.

{¶10} In *State v. Elmore,* 122 Ohio St.3d 472, 912 N.E.2d 582, 2009-Ohio-3478, the Ohio Supreme Court cogently 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.

{¶11} In *State v. Williams,* Muskingum App. No. CT2009-0006, 2009-Ohio-5296, we cited *State v. Mickens,* Franklin App.No. 08AP-743, 2009-Ohio-2554, ¶ 25, for the proposition that an alteration of the *Foster* holding under *Ice* must await further review, if any, 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.' " We thus elected to continue to 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. *Williams* at ¶ 19, citing *State v. Hanning*, Licking App.No. 2007CA00004, 2007-Ohio-5547, ¶ 9.

{¶12} Since the time of filing of appellant's brief in this matter, this Court has issued additional decisions addressing *Ice.* Two of these cases, *State v. Smith*, Licking App.No. 09-CA-31, 2009-Ohio-6449, and *State v. Vandriest*, Ashland App.No. 09COA-032, 2010-Ohio-997, have apparently determined that the General Assembly's amendments to R.C. 2929.14, effective April 7, 2009, have effectively revived the requirement that a trial court make findings when imposing consecutive sentences. However, our research does not indicate that the General Assembly has expressed an intention to reassert R.C. 2929.14(E)(4) in light of *Ice*; furthermore, *Smith*, supra, has recently been accepted for review by the Ohio Supreme Court. We are thus not inclined to rely on *Smith* and *Vandriest* as precedent in this matter. Until the Ohio Supreme Court revisits the *Foster* issue*,* we will consider it binding on Ohio appellate courts. See *State v. Mickens*, supra.

{¶13} Accordingly, we herein reject appellant's claim that the trial court was required to make pre-*Foster* findings in sentencing appellant. Appellant's First Assignment of Error is overruled.

II.

{¶14} In his Second Assignment of Error, appellant argues the imposition of maximum and consecutive prison sentences in this case constituted an abuse of the trial court's discretion. We disagree.

{¶15} Under Ohio's present felony sentencing scheme, trial courts have full discretion to impose a prison sentence within the statutory ranges, although post-*Foster* trial courts must to "consider" the general guidance factors contained in R.C. 2929.11 and R.C. 2929.12. See *State v. Duff,* Licking App. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282.

{¶16} Here, appellant was found guilty of rape and pandering sexually oriented material involving a minor. The trial court sentenced appellant within the permissible statutory range for the offenses (see R.C. 2929.14(A)), albeit the maximum on each count, to run consecutively. We initially find that such sentences were not contrary to law.

{¶17} Appellant concedes that he had a relationship with the minor victim prior to the offenses being committed, and that this relationship may have facilitated the crimes. See R.C. 2929.12(B). Appellant nonetheless maintains that no violence was involved in the offenses and that there was no indication appellant used drugs or alcohol to inhibit the victim. We are directed to *State v. Perales*, Delaware App.No. 06-CA-A-12-0093, 2008-Ohio-58, and *State v. Bannister*, Licking App.No. 07CA33, 2008-

Ohio-3901, which involved, respectively, lesser sentences of five years and four years against rape defendants who used coercion or physical force in their offenses. Appellant also maintains, in light of the factors under R.C. 2929.12(E) that he has no prior felonies or sex offenses on his record, and that he is a parent and has been gainfully employed.

{¶18} In the sentencing entry in this case, the trial court stated that it had considered the record and the principles and purposes of sentencing, as well as the seriousness and recidivism factors, under R.C. 2929.11 and R.C. 2929.12. Based on our review of the record, we do not find the trial court abused its discretion in rendering its sentence.

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

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

By: Wise, J.

Gwin, P. J., concurs.

Hoffman, J., concurs separately.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

JUDGES

JWW/d 616

Hoffman, J., concurring

{¶21} I agree with the majority's analysis and disposition of Appellant's second assignment of error.

{¶22} I further concur in the majority's disposition of Appellant's first assignment of error but do so for the reasons set forth in this Court's opinion in *State v. Arnold* (June 25, 2010) Muskingum County No. CT2009-0021.

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HON. WILLIAM B. HOFFMAN

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MICHAEL D. LYNN	:	
	:	
Defendant-Appellant	:	Case No. CT2009-0041

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/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES