[Cite as *State v. Fields*, 2010-Ohio-6233.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. CT2009-0057
	:	
	:	
GERALD D. FIELDS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR2009-0166
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 15, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, Gerald Fields, appeals a judgment of the Muskingum County Common Pleas Court convicting him of trafficking in crack cocaine (R.C. 2925.03(A)(1)) with a forfeiture specification (R.C. 2941.1417) and permitting drug abuse (R.C. 2925.13(A)) upon a plea of guilty. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On August 6, 2009, an informant working for the Zanesville Police Department purchased crack cocaine from appellant in a Bob Evans parking lot in Zanesville, Ohio. Prior to the purchase, police officers observed appellant leave his residence and drive to the scene in a 1990 Cadillac. Immediately after the transaction, officers conducted a traffic stop and recovered the cash used by the informant to purchase the drugs from appellant.

{¶3} The Muskingum County Grand Jury indicted appellant on 13 drug offenses, with the August 6, 2009, controlled buy constituting the first two counts of the indictment. On October 13, 2009, appellant entered pleas of guilty to Counts One and Two of the indictment, trafficking in crack cocaine and permitting drug abuse, and to the forfeiture specification attached to the first count. The state nolled the remaining 11 counts of the indictment. Appellant was sentenced to 8 years incarceration for trafficking in cocaine and 12 months in prison for permitting drug abuse, to be served consecutively. He assigns eight errors on appeal:

{¶4} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ACCEPTING HIS GUILTY PLEAS, AS APPELLANT'S PLEAS WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED, AND WERE

THEREFORE OBTAINED IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE CONSTITUTION OF THE STATE OF OHIO. A GUILTY PLEA TO A SENTENCE CARRYING MANDATORY 3 YEARS POST RELEASE CONTROL IS NOT KNOWING, VOLUNTARY AND INTELLIGENT WHEN THE TRIAL COURT TELLS THE DEFENDANT THAT HE WILL BE SUBJECT TO 'UP TO THREE YEARS' OF POST RELEASE CONTROL DURING THE PLEA COLLOQUY.

{¶5} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ACCEPTING HIS GUILTY PLEAS, AS APPELLANT'S PLEAS WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED, AND WERE THEREFORE OBTAINED IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OT THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE CONSTITUTION OF THE STATE OF OHIO. A GUILTY PLEA TO A SENTENCE CARRYING MANDATORY 3 YEARS POST RELEASE CONTROL IS NOT KNOWING, VOLUNTARY AND INTELLIGENT WHEN THE TRIAL COURT TELLS THE DEFENDANT THAT HE WILL BE SUBJECT TO 'UP TO THREE YEARS' OF POST RELEASE CONTROL DURING THE PLEA COLLOQUY, AND TELLS HIM THAT HE 'COULD BE' SENT BACK TO PRISON FOR VARIOUS VIOLATIONS OF THE 'RULES AND REGULATIONS' OF POST RELEASE CONTROL DURING THE PLEA COLLOQUY, BUT THEN SENTENCES HIM IN ADVANCE TO 'ANY TERM FOR

VIOLATION OF THAT POST-RELEASE CONTROL' IN THE COURT'S SENTENCING ENTRY.

{¶6} "III. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY APPROVING AN ILLEGAL SENTENCING ENTRY. A SENTENCING ENTRY IS ILLEGAL AND THE SENTENCE IS VOID WHEN A DEFENDANT IS CONVICTED OF OR PLEADS GUILTY TO ONE OR MORE OFFENSES AND POST RELEASE CONTROL IS NOT PROPERLY INCLUDED IN THE SENTENCE FOR THE PARTICULAR OFFENSE.

{¶7} "IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY APPROVING AN ILLEGAL SENTENCING ENTRY. A SENTENCING ENTRY IS ILLEGAL AND THE SENTENCE IS VOID WHEN THE TRIAL COURT SENTENCES A DEFENDANT IN ADVANCE TO 'ANY TERM' FOR FUTURE VIOLATIONS OF POST-RELEASE CONTROL IN THE COURT'S SENTENCING ENTRY.

{¶8} "V. THE TRIAL COURT VIOLATED DUE PROCESS, THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, AND R.C. 2941.25, AND COMMITTED ERROR, INCLUDING PLAIN ERROR, BY IMPOSING MULTIPLE CONVICTIONS AND STACKED SENTENCES FOR ONE COUNT OF TRAFFICKING IN DRUGS R.C. 2925.03(A)(1) AND ONE COUNT OF PERMITTING DRUG ABUSE R.C. 2925.13(A) THAT WERE COMMITTED INDIVISIBLY WITH A SINGLE ANIMUS.

{¶9} "VI. THE TRIAL COURT VIOLATED DUE PROCESS AND R.C. 2929.14(E)(4) AND/OR COMMITTED PLAIN ERROR, BY IMPOSING MAXIMUM

CONSECUTIVE SENTENCES THAT WERE DISPROPORTIONATE TO APPELLANT'S CONDUCT, AND IN NOT MAKING THE NECESSARY FINDINGS PURSUANT TO *OREGON V. ICE*.

{¶10} "VII. THE TRIAL COURT VIOLATED DUE PROCESS AND THE 8TH AMENDMENT, AND ABUSED ITS DISCRETION, AND/OR COMMITTED PLAIN ERROR IN IMPOSING MAXIMUM CONSECUTIVE SENTENCES THAT WERE NOT COMMENSURATE WITH APPELLANT'S CONDUCT.

{¶11} "VIII. THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT, AND ACTED IN VIOLATION OF THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, IN DENYING HIS MOTION TO CONTINUE THE JURY TRIAL."

I, II

{¶12} In his first assignment of error, appellant argues that his plea was not knowing, voluntary, and intelligent because during the plea colloquy the court notified him that he could receive up to three years of postrelease control, rather than a mandatory term of three years postrelease control. In his second assignment of error, appellant restates his argument that his plea was not knowing, voluntary and intelligent because he was not properly informed of the term of postrelease control, and also argues that his plea is invalid because after orally informing him of the possibility that he could be sent back to prison for violations of postrelease control, the court then sentenced him in advance to "any term" for violation of postrelease control in the sentencing entry.

{¶13} Criminal Rule 11 governs the process of entering a plea. Criminal Rule 11(C) provides:

{¶14} "(2) 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:

{¶15} "(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."

{¶16} In *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, the Ohio Supreme Court held that a trial court must inform a defendant of mandatory postrelease control as part of the requirements of Crim. R. 11(C). In *Sarkozy*, there was a complete failure by the trial court to notify the defendant that he would be subject to postrelease control. The Supreme Court rejected a substantial compliance test with respect to Crim. R. 11 based on the fact that there was no mention *at all* by the trial court of postrelease control. Id.

{¶17} The *Sarkozy* court at ¶22 stated, "A complete failure to comply with the rule does not implicate an analysis of prejudice." Thereafter, the Supreme Court of Ohio decided the case of *State v. Clark,* 119 Ohio St.3d 239, 2008-Ohio-3748, stating:

{¶18} "When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid 'under a presumption that it was entered involuntarily and unknowingly.' *Griggs,* 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; see also *Nero,* 56 Ohio St.3d 106, 107, 564 N.E.2d 474,

citing *Boykin,* 395 U.S. at 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274. However, if the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. Id. Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that 'the defendant subjectively understands the implications of his plea and the rights he is waiving,' the plea may be upheld. *Nero,* 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶19} "When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied or *failed* to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. See *Nero,* 56 Ohio St.3d at 108, 564 N.E.2d 474, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163, and Crim.R. 52(A); see also *Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 23. The test for prejudice is 'whether the plea would have otherwise been made.' *Nero* at 108, 564 N.E.2d 474, citing *Stewart,* id. If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. See *Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d, 1224, paragraph two of the syllabus. 'A complete failure to comply with the rule does not implicate an analysis of prejudice.' Id. at ¶ 22." *Clark*, 119 Ohio St. 3d 239, at ¶31-32.

{¶20} In the instant case, the court substantially complied with Crim. R. 11 regarding the duration of postrelease control. While the court stated in the plea colloquy

that appellant could receive up to three years of postrelease control, the written plea form specifically states that the mandatory term of postrelease control is three years. Appellant wrote his initials next to the term of postrelease control in the document and signed the document. Likewise, the sentencing entry recites that appellant had been notified that postrelease control is mandatory in this case for three years.

{¶21} Further, appellant has not demonstrated prejudice from the discrepancy between the oral plea colloquy and the written plea form. He has not demonstrated that he would not have entered the plea had the judge correctly stated that the term was a mandatory three years rather than "up to" three years in the oral plea colloquy. The plea bargain in this case resulted in the dismissal of eleven counts of a thirteen count indictment. Sentencing was not a part of the agreement between appellant and the State. The parties agreed in the plea bargain that the state would recommend a sentence of nine years and appellant reserved the right to argue for a lesser sentence. Postrelease control was not a part of the plea bargain.

{¶22} Appellant also argues his plea was invalid because in the sentencing entry, the trial court states:

{¶23} "The Court further notified the Defendant that **"Post Release Control"** is ***mandatory*** in this case **for three years**, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code §2967.28. The defendant is ordered to serve as part of this sentence any term for violation of that post-release control."

{¶24} Appellant argues that the sentence should not be "any term" for violation of postrelease control, but any term *imposed* for violation of postrelease control.

{¶25} The court stated at the plea hearing:

{¶26} "While on post-release control, you will be subject to a variety of rules and regulations. Should you fail to follow those rules and regulations, you could be sent back to prison for a period of up to nine months for each rule violation you may commit. Total amount of time you could be sent back to prison would be equal to one half of your original prison sentence.

{¶27} "If you commit a new felony while on post-release control, in addition to any sentence you receive for the new felony, additional prison time could be added to that sentence in the form of the time you have left on post-release control or one year, whichever is greater. Do you understand that?" Tr. 7.

{¶28} Further, the written plea agreement states:

{¶29} "A violation of any post release control rule, or condition can result in a more restrictive sanction while I am under post release control, and increased duration of supervision or control, up to the maximum term and re-imprisonment even though I have served the entire stated prison term imposed upon me by this Court for all offenses.

{¶30} "If I violate conditions of supervision while under post release control, the Parole Board could return me to prison for up to nine months for each violation, for a total of ½ of my originally stated prison term. If the violation is a new felony, I could receive a prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the offense."

{¶31} The trial court completely explained to appellant the potential consequences of violation of the terms of postrelease control. Contrary to appellant's

argument, the sentencing entry does not give the court unbridled discretion to sentence him to any term of incarceration for violation of postrelease control, but clearly refers to the lawful consequences of violation as set forth in R.C. 2967.28. Further, the legality of any sentence imposed at some point in the future for such violation may be challenged at that time. The court is not sentencing appellant to incarceration in advance for any future violation of postrelease control. Again, appellant has not demonstrated that he would not have entered the plea but for this statement in the sentencing entry.

{¶32} The first and second assignments of error are overruled.

III & IV

{¶33} In his third and fourth assignments of error, appellant argues that the sentencing entry is illegal and void because postrelease control was not properly included in the sentence and the court sentenced him in advance to "any term" of incarceration for violations of postrelease control.

{¶34} As discussed in I & II above, the court substantially complied with the requirements of Crim. R. 11 regarding postrelease control. The sentencing entry clearly states that the term of postrelease control is three years. Further, the court did not sentence him in advance to a term of incarceration for violations of postrelease control, and the court complied with the requirements of R.C. 2967.28 concerning informing appellant of the possible consequences which could be imposed for violation of postrelease control.

{¶35} The sentencing entry was not illegal or void. The third and fourth assignments of error are overruled.

V

{¶36} In his fifth assignment of error, appellant argues that the offenses are allied offenses of similar import.

{¶37} Appellant failed to raise this claim in the trial court. While appellant argued at the sentencing hearing that the counts "appear to be a continuous transaction," appellant made this claim in support of his argument that the court should consider concurrent sentences under *Oregon v. Ice*. Appellant's failure to raise a claim that offenses are allied offenses of similar import in the trial court constitutes a waiver of the claimed error. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, 646. An error not raised in the trial court must be plain error in order for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*, supra. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶38} R.C. 2941.25 defines allied offenses of similar import:

{¶39} "(A) Where the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶40} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or

similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶41} In *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract, which would produce clear legal lines capable of application in particular cases. Id. at 636. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both only if the offenses were committed separately or with a separate animus. Id. at 638-39.

{¶42} However, in 2008 the court clarified *Rance*, because the test as set forth in *Rance* had produced inconsistent, unreasonable and, at times, absurd results. *State v. Cabrales*, 118 Ohio St.3d 54, 59, 886 N.E.2d 181, 2008-Ohio-1625. In *Cabrales*, the court held that, in determining whether offenses are of similar import pursuant to 2941.25(A), courts are required to compare the elements of the offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Id. at syllabus 1. "Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." Id. The court then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or

with a separate animus. Id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶43} The *Cabrales* court noted that Ohio courts had misinterpreted *Rance* as requiring a "strict textual comparison," finding offenses to be of similar import only when all the elements of the compared offenses coincide exactly. Id. at 59. The Eighth Appellate District has described the *Cabrales* clarification as a "holistic" or "pragmatic" approach, given the Supreme Court's concern that *Rance* had abandoned common sense and logic in favor of strict textual comparison. *State v. Williams*, Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 31, citing *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677. This Court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney*, Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶44} The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown*, 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569. The court first found that aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are not allied offenses of similar import when comparing the elements under *Cabrales*, but did not end the analysis there. The court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. Id. at 454. The court concluded that while the two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. Id. In the past, the court had looked to the societal interests protected by the relevant statutes in determining whether two offenses constitute allied offenses. Id., citing *State v. Mitchell* (1983), 6 Ohio St.3d

416. The court concluded in *Brown* that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest of preventing physical harm to persons, and were therefore allied offenses. Id. at 455.

{¶45} The Ohio Supreme Court again addressed this issue in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059. In *Winn*, the court considered whether kidnapping and aggravated robbery are allied offenses of similar import. The court compared the elements of each in the abstract. The elements for kidnapping, R.C. 2905.01(A)(2), are the restraint, by force, threat, or deception, of the liberty of another to facilitate the commission of any felony, and the elements for aggravated robbery, R.C. 2911.01(A)(1), are having a deadly weapon on or about the offender's person or under the offender's control and either displaying it, brandishing it, indicating that the offender has it, or using it in attempting to commit or in committing a theft offense. The court found that in comparing the elements, it is difficult to see how the presence of a weapon, which has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not at the same time forcibly restrain the liberty of another. Id. at ¶ 21. Accordingly, the court found that the two offenses are so similar that the commission of one necessarily results in the commission of the other, citing *Cabrales*, supra. Id. The court held, "We would be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other." Id. at ¶ 24.

{¶46} Having found the offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the

statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at ¶ 6.

{¶47} The Ohio Supreme Court again applied the *Cabrales* test in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147. The court first looked at the elements of attempted felony murder, which required that the offender engage in conduct which, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Because felonious assault is an offense of violence, the court concluded that felonious assault and attempted felony murder are allied offenses. Id. at ¶23. The court then considered whether attempted murder, defined as engaging in conduct which if successful would result in purposely causing the death of another, and felonious assault, defined as causing or attempting to cause physical harm by means of a deadly weapon, are allied offenses. While the elements considered in the abstract do not align exactly, the court concluded that when the defendant in that case attempted to cause harm with a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of a victim, and the offenses were therefore allied. Id. at ¶26. The court then went on to consider whether the offenses were committed with a separate animus. Id. at ¶27.

{¶48} The state relies on *State v. Robbins* (April 29, 1994), Licking App. No. 93-CA-30, unreported, in which this Court found that complicity to aggravated trafficking in drugs and permitting drug abuse are not allied offenses of similar import. However,

Robbins predates *Cabrales* and subsequent decisions from the Ohio Supreme Court attempting to clarify the allied offense test as set forth in *Cabrales*. Similarly, the cases cited by the State from other districts finding the instant offenses to not be allied offenses of similar import predate *Cabrales* and its progeny.

{¶49} R.C. 2925.03(A)(1) defines trafficking:

{¶50} "(A) No person shall knowingly do any of the following:

{¶51} "(1) Sell or offer to sell a controlled substance;"

{¶52} R.C. 2925.13(A) defines permitting drug abuse:

{¶53} "(A) No person who is the owner, operator, or person in charge of a locomotive, watercraft, aircraft, or other vehicle, as defined in division (A) of section 4501.01 of the Revised Code, shall knowingly permit the vehicle to be used for the commission of a felony drug abuse offense."

{¶54} In *Cabrales*, the court found that possessing a controlled substance under R.C. 2925.11(A) and trafficking in a controlled substance under R.C. 2925.03(A)(1) were not allied offenses. "To be guilty of possession under R.C. 2925.11(A), the offender must 'knowingly obtain, possess, or use a controlled substance.' To be guilty of trafficking under R.C. 2925.03(A)(1), the offender must knowingly sell or offer to sell a controlled substance. Trafficking under R.C. 2925.03(A)(1) requires an intent to sell, but the offender need not possess the controlled substance in order to offer to sell it. Conversely, possession requires no intent to sell. Therefore, possession under R.C. 2925.11(A) and trafficking under R.C. 2925.03(A)(1) are not allied offenses of similar import, because commission of one offense does not necessarily result in the commission of the other." Id. at paragraph 29.

{¶55} Similarly, to be guilty of permitting drug abuse under R.C. 2925.13(A), the offender must knowingly permit his vehicle to be used for the commission of a felony drug offense. Trafficking requires an intent to sell, but the offender need not use his vehicle to sell the controlled substance. Conversely, an offender may knowingly permit his vehicle to be used for a felony drug offense without intending to sell a controlled substance. Therefore, permitting drug abuse under R.C. 2925.13(A) and trafficking under R.C. 2925.03(A)(1) are not allied offenses of similar import, because commission of one offense does not necessarily result in the commission of the other.

{¶56} The fifth assignment of error is overruled.

VI

{¶57} In his sixth assignment of error, appellant argues that the court failed to make the necessary findings required by R.C. 2929.14(E)(4).

{¶58} In *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, the Ohio Supreme Court found R.C. 2929.14(E)(4) unconstitutional and severed it from the statute. Appellant argues that United States Supreme Court has overruled *Foster* in *Oregon v. Ice* (2009), 12. S.Ct. 711, 172 L.Ed.2d 517.

{¶59} This Court has previously rejected this argument on several occasions, finding that we do not have the authority to overturn *Foster*. E.g. *State v. Argyle*, Delaware App. No. 09CAA090076, 2010-Ohio-273; *State v. Arnold*, Muskingum App. No. CT2009-0021, 2010-Ohio-3125. For the reasons stated in *Argyle*, supra, and *Arnold*, supra, the assignment of error is overruled.

VII

{¶60} In his seventh assignment of error, appellant argues that his nine year sentence violates the Rule of Lenity and is not commensurate with his conduct.

{¶61} The rule of lenity is a principle of statutory construction that provides that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous. See *Moskal v. United States* (1990), 498 U.S. 103, 107-108, 111 S.Ct. 461, 112 L.Ed.2d 449, quoting *Bifulco v. United States* (1980), 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205, quoting *Lewis v. United States* (1980), 445 U.S. 55, 65, 100 S.Ct. 915, 63 L.Ed.2d 198 (“‘the ‘touchstone’ of the rule of lenity ‘is statutory ambiguity’”); *State v. Arnold* (1991), 61 Ohio St.3d 175, 178, 573 N.E.2d 1079. Under the rule, ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed. *United States v. Lanier* (1997), 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432.

{¶62} The Ohio Supreme Court has held that under the post-*Foster* sentencing scheme, a trial court has discretion to impose consecutive sentences and, despite the *Foster* severance of statutory presumptions, is not required by the rule of lenity to impose a minimum prison term. *State v. Elmore*, 122 Ohio St.3d 472, 912 N.E.2d 582, 2009-Ohio-3478, ¶42. Nothing in the language of R.C. 2929.14 in effect after *Foster* is ambiguous, and the rule of lenity does not apply. Id. at ¶41.

{¶63} Appellant has not pointed to any alleged ambiguity in the sentencing statutes. The rule of lenity therefore does not apply.

{¶64} R.C. 2929.14(C) provides in pertinent part:

{¶65} "[T]he court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section."

{¶66} R.C. 2929.14(C)'s requirement that the trial court make specific findings in support of a maximum sentence was found unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶63-64. In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *Foster* as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶67} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding 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." *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. "Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2)." *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and

2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.[1]

{¶68} "Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." *Kalish* at paragraph 14.

{¶69} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard." *Kalish* at paragraph 4, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶70} The sentence appellant received was within the permissible statutory range, and the court stated in its judgment that it had considered the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and

[1] "[P]ursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are 'to protect the public from future crime by the offender and others and to punish the offender. The court must also consider the seriousness and recidivism factors under R.C. 2929.12." *State v. Murray,* Lake App. No. 2007-L-098, 2007-Ohio-6733, paragraph 18, citing R.C. 2929.11(A).

recidivism factors under R.C. 2929.12. In addition, in our pervious discussion of the first and third assignments of error, we have determined that the appellant was sufficiently informed of post-release control sanctions. The sentence was not clearly and convincingly contrary to law.

{¶71} Further, appellant has not demonstrated that the court abused its discretion in imposing the maximum sentence. The transcript of the sentencing hearing reflects that appellant had several prior felony convictions: receiving stolen property in 1981, two counts of trafficking in cocaine in 2004, and trafficking in cocaine in 2006. Appellant was released from prison on the 2006 conviction in June of 2007, and was arrested on the instant offenses in August, 2009. Tr. 8-9. Appellant represented to the court that he had been unemployed all his life. Tr. 5. The court did not abuse its discretion in sentencing appellant to the maximum sentence.

{¶72} The seventh assignment of error is overruled.

VIII

{¶73} In his eighth assignment of error, appellant argues the court erred in overruling his motion to continue the case. On September 28 and 29, 2009, appellant filed numerous motions, including a motion to continue based on the State's failure to provide discovery and a motion to compel discovery. Trial was set for October 13, 2009. On October 6, 2009, the court held a hearing on all outstanding motions. At this hearing the court overruled the motion to continue, finding that the BCI report appellant recently received in discovery would only serve to benefit appellant, because the report disclosed that some of the tested substances were not in fact controlled substances, which the State represented would result in the dismissal of some charges. Further, the

court recessed the hearing to allow appellant's counsel to participate in a phone call with the prosecutor and police concerning the deal made between the police and the confidential informant. At the conclusion of this telephone call, the deal was placed on the record and counsel for appellant affirmatively represented that her motion to "reveal the deal" had been satisfied by the telephone call. Tr. 26. However, appellant argues that the denial of his motion to continue forced him to enter into a guilty plea because the case was not prepared for trial due to the late discovery of the BCI report and the identity of the confidential informant.

{¶74} Appellant entered a guilty plea as part of a plea bargain. "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States V. Broce* (1989), 488 U.S. 563, 109 S.Ct.757, 102 L.Ed.2d 927. The guilty plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt. *Menna v. New York* (1975), 423 U.S.61, 96 S.Ct. 241, 46 L.Ed.2d 195. Thus, when a defendant enters a plea of guilty as a part of a plea bargain he waives all appealable errors, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658; *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101.

{¶75} While appellant now claims he was "boxed into a corner" by the denial of his motion to continue and forced to defend the case "with only one week to investigate the fragmented and disjointed discovery responses provided by the State." However, nothing in the record supports this claim. The record of the plea hearing reflects that appellant knowingly entered a voluntary plea. He at no point stated that he was

coerced or induced into making the plea because of insufficient time to prepare for trial. Appellant has waived any error in the court's denial of the motion to continuance.

{¶76} The eighth assignment of error is overruled.

{¶77} The judgment of the Muskingum County Common Pleas Court is affirmed.

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES

JAE/r0818

[Cite as *State v. Fields*, 2010-Ohio-6233.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GERALD D. FIELDS	:	
Defendant-Appellant	:	CASE NO. CT2009-0057

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES