

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

ROGER NELSON

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 10-CA-54

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 10CR25

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 23, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
Licking County Prosecutor

By: TRACY F. VAN WINKLE
Assistant Prosecuting Attorney
20 S. Second Street, Fourth Floor
Newark, Ohio 43055

ROBERT D. ESSEX
1654 East Broad Street
Suite 302
Columbus, Ohio 43203

Hoffman, P.J.

{¶1} Defendant-appellant Roger Nelson appeals his sentence entered by the Licking County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} Appellant was indicted by the Licking County Grand Jury on one count of having weapons under disability, in violation of R.C. 2923.13; one count of aggravated possession of drugs, in violation of R.C. 2925.11; one count of aggravated trafficking in drugs, in violation of R.C. 2925.03; one count of aggravated possession of drugs, in violation of R.C. 2925.11; one count of trafficking in marijuana, in violation of R.C. 2925.03; one count of aggravated possession of drugs, in violation of R.C. 2925.11, and assorted misdemeanors; together with a forfeiture specification.

{¶3} Appellant entered a plea of no contest to all of the counts. The trial court found Appellant guilty of the charges, and imposed a four year sentence on count one, twelve months on count two, fifteen months on count three, nine months on count four, nine months on count five, and nine months on count eight. The court further ordered the sentences on counts one, two and three to run consecutively. The court ordered all other sentences to run concurrently to each other and concurrent to the sentences on counts one, two and three. The total term of incarceration was six years and three months.

{¶4} Appellant now appeals his sentence, assigning as error:

{¶5} "I. IN LIGHT OF *OREGON V. ICE*, THE TRIAL COURT ERRED IN FAILING TO MAKE THE REQUIRED FINDINGS UNDER O.R.C. 2929.14(E)(4) TO JUSTIFY CONSECUTIVE SENTENCES."

{¶16} As his sole assignment of error, Appellant maintains the trial court erred in failing to make required findings pursuant to R.C. 2929.14(E)(4) in order to justify consecutive sentences. Specifically, Appellant argues the United States Supreme Court overruled the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, as to consecutive sentences in *Oregon v. Ice* (2009), 129 S.Ct. 711.

{¶17} In *State v. Arnold* (June 25, 2010), Licking App. No. CT 2009-0021, 2010-Ohio-3125, this Court held:

{¶18} "Appellant 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 statutory felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. In *Foster*, the Ohio Supreme Court declared portions of R.C. 2929.14, R.C. 2929.19 and R.C. 2929.41 unconstitutional under *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Specifically, because R.C. 2929.14(E)(4) and R.C. 2929.41(A) require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional. The remedy provided by the Ohio Supreme Court was that R.C. 2929.14(E)(4) and R.C. 2929.41 be severed and excised from the statute. *Foster* at paragraph 97.

{¶19} "In *State v. Elmore*, 122 Ohio St.3d 472, 912 N.E.2d 582, 2009-Ohio-3478, the Ohio Supreme Court 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* on its decision in *Foster*, as neither party in *Elmore* had briefed the issue prior to oral argument.

{¶10} “***

{¶11} “This Court has previously held that *Ice* represents a refusal to extend the impact of the *Apprendi* and *Blakely* line of cases, rather than an overruling of these cases as suggested by appellant. *State v. Argyle*, Delaware App. 09 CAA 09 0076; *State v. Kvintus*, Licking County App. No. 09CA58, 2010-Ohio-427; *State v. Mitchell*, Muskingum App. No. CT2006-0090, 2009-Ohio-5251; *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296. We have adhered 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.

{¶12} “* * *

{¶13} “Therefore, the amendment of R.C. 2929.14 effective April 7, 2009, did not operate to reenact those portions of the statute the Ohio Supreme Court severed in its *Foster* decision. Until the Ohio Supreme Court considers the effect of *Ice* on its *Foster* decision, we are bound to follow the law as set forth in *Foster*.”

{¶14} Pursuant to our previous decision in *Arnold*, Appellant's sole assignment of error is overruled.

{¶15} Appellant's sentence in the Licking County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer

HON. SHEILA G. FARMER

s/ John W. Wise

HON. JOHN W. WISE

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROGER NELSON

Defendant-Appellant

:
:
:
:
:
:
:
:
:
:

JUDGMENT ENTRY

Case No. 10-CA-54

For the reason stated in our accompanying Opinion, Appellant's sentence in the Licking County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer

HON. SHEILA G. FARMER

s/ John W. Wise

HON. JOHN W. WISE