

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
DONALD ECKHART	:	Case No. 10-CA-15
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of  
Common Pleas Case No. 09-CR-383

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 30, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Licking County Prosecutor  
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For Defendant-Appellant:

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*Delaney, J.*

{¶1} Defendant-Appellant, Donald Eckhart, appeals from the judgment and conviction of the Licking County Court of Common Pleas on one count of Pandering Obscenity Involving a Minor, a felony of the fourth degree, in violation of R.C. 2907.321(A)(5), one count of Pandering Obscenity Involving a Minor, a felony of the second degree, in violation of R.C. 2907.321(A)(1), one count of Pandering Sexually Oriented Matter Involving a Minor, a felony of the fourth degree, in violation of R.C. 2907.322(A)(5) and one count of Pandering Sexually Oriented Matter Involving a Minor, a felony of the second degree, in violation of R.C. 2907.322(A)(1). The State of Ohio is Plaintiff-Appellee.

{¶2} Between March 9, 2009, and April 11, 2009, Appellant possessed images of minors in varying states of nudity and images of minors engaged in sexual acts on his computer. Appellant took his computer to a computer specialist in Newark, Ohio, in order to have a virus removed from his computer. The specialist discovered the presence of child pornography on the computer and notified law enforcement personnel of such.

{¶3} Appellant was interviewed by the police and admitted that he had these images on his computer. He explained that he was interested in girls between the ages of 10 and 14 years of age.

{¶4} Agents from the Ohio Bureau of Criminal Identification and Investigation conducted a forensic analysis of the computer and located multiple images of pre-pubescent minors in varying states of nudity and engaging in sex acts on Appellant's computer.

{¶5} Appellant initially pled not guilty to the charges at his arraignment on August 18, 2009. On September 24, 2009, Appellant filed a motion requesting a mental health evaluation to determine his competence to stand trial and his sanity at the time of the offense. The trial court ordered that the evaluation be completed.

{¶6} A report was submitted, finding that Appellant was indeed competent and sane at the time of the offenses. The report was stipulated to on December 9, 2009.

{¶7} On January 6, 2010, the court ordered a change of plea hearing and a sexual predator determination hearing to be set for February 10, 2010. On January 27, 2010, Appellant filed a motion requesting to be admitted to the diversion program.

{¶8} On February 10, 2010, Appellant entered a no contest plea to all four counts as specified in the indictment. As part of the plea, the State agreed that counts one and three of the indictment merged for purposes of sentencing, as did counts two and four. The trial court sentenced Appellant to twelve months in prison on count two and twelve months in prison on count four, and ordered the sentences to run consecutive to each other for a total of twenty-four months in prison.

{¶9} Appellant now appeals and raises three Assignments of Error:

{¶10} “I. APPELLANT’S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION.

{¶11} “II. APPELLANT’S SENTENCE WAS NOT SUPPORTED BY THE RECORD AND WAS CONTRARY TO LAW. THE TRIAL COURT’S ADHERENCE TO STATE V. FOSTER VIOLATED NEW SUPREME COURT PRECEDENT.

{¶12} “III. THE COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT’S MOTION FOR ACCEPTANCE INTO THE DIVERSION PROGRAM.”

## I.

{¶13} In Appellant's first assignment of error, he argues that the trial court erred in sentencing Appellant to consecutive sentences and that such sentences were contrary to law. We disagree.

{¶14} The statutes governing felony sentencing in Ohio used to require that a trial court make particular findings before sentencing a criminal defendant to maximum and consecutive sentences. However, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, 845 N.E.2d 470, the Ohio Supreme Court found much of Ohio's felony sentencing scheme unconstitutional because that scheme violated a defendant's right to a jury trial. Now, a trial court which is sentencing a felony offender "must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-0855, 846 N.E.2d 1, at ¶ 38.

{¶15} After *Foster*, trial courts now 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. *Foster*, supra, at paragraph seven of the syllabus.

{¶16} Appellant argues the trial court erred when sentencing him because the trial court did not make any of the findings listed in R.C. 2929.14 and did not give the reasons in support of that finding. However, the statute he is relying on was found

unconstitutional in *Foster* and severed from the statutory scheme. *Foster*, at paragraphs one and two of the syllabus.

{¶17} The trial court, in sentencing Appellant in the present case, noted that it had reviewed the presentence investigation report and that it had also “reviewed all of the purposes and principles of sentencing, taking into consideration the nature of the charges. The Court notes that it is the duty of this Court to protect the public. That’s the first duty of this court. The Court also notes that where it’s appropriate, punishment is appropriate. Defendants are accountable for what they do and there are consequences. The Court determines that given the nature of these charges, the length, the period of time which they occurred, the Court finds that a non-prison sanction would not be appropriate.”

{¶18} Additionally, the court, in its judgment entry, indicated that it had considered the purposes and principles of sentencing under R.C. 2929.11 and had balanced the seriousness and recidivism factors in R.C. 2929.12.

{¶19} The court then sentenced Appellant within the statutory scheme on all counts. Accordingly, Appellant’s argument fails.

{¶20} Appellant’s first assignment of error is overruled.

## II.

{¶21} In his second assignment of error, Appellant contends that the trial court’s continued adherence to *Foster* is misplaced in light of the United States Supreme Court’s ruling in *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, 172 L.Ed.2d 517.

In so claiming, Appellant asserts that the trial court did not make the proper findings before imposing maximum, consecutive sentences.<sup>1</sup>

{¶22} As we stated in disposing of Appellant's first assignment of error, post-*Foster*, trial courts have discretion to impose any sentence within the statutory range, provided they consider the purposes and principles of sentencing as set forth in R.C. 2929.11 and R.C. 2929.12. Trial courts are no longer required to give their reasoning for imposing such sentences or to make findings regarding the sentences they impose.

{¶23} The pronouncement in *Oregon v. Ice* does not change the outcome of this case. Appellant argues that *Ice*, which held that there is no jury-trial right to consecutive-sentences findings, effectively resurrects R.C. 2929.14(E)(4). For the following reasons, Appellant's argument is without merit.

{¶24} Initially, we would note that Appellant did not raise this issue below. The sentencing hearing took place on February 10, 2010—more than one year after *Ice* was decided on January 14, 2009. Thus, Appellant could have argued at the sentencing hearing that *Ice* required the Court to make the findings in R.C. 2929.14(E)(4) before imposing consecutive sentences. Appellant, however, raised no such argument and did not object when the trial court announced that it was imposing consecutive sentences. Appellant has therefore waived all but plain error. Crim.R. 52(B); *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

{¶25} Appellant cannot show any error, let alone plain error. This Court has held that *Ice* did not resurrect R.C. 2929.14(E)(4). *State v. Williams*, 5th Dist. No. CT2009-

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<sup>1</sup> We would note that Appellant was not sentenced to maximum sentences. He pled guilty to two felonies of the fourth degree, the maximum penalty for which is eighteen months. Appellant was sentenced to twelve months on both counts two and four.

0006, 2009-Ohio-5296, ¶¶16-19; see also *State v. Kvintus*, 5th Dist. No. 09 CA 58, 2010-Ohio-427; *State v. Argyle*, 5th Dist. No. 09 CA 09 0076, 2010-Ohio-273. Until the Ohio Supreme Court reverses or overrules its holding in *Foster*, this Court remains bound by *Foster*. While the Ohio Supreme Court acknowledged *Ice* in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the Court expressly declined to fully address the impact of *Ice* on *Foster*. *Id.* at ¶35. Thus, the Ohio Supreme Court has yet to overrule *Foster*. *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4126, ¶8.

{¶26} Other courts have likewise concluded that *Ice* does not require trial courts to now make consecutive-sentence findings under R.C. 2929.14(E)(4). *State v. Long*, 1st Dist. Nos. C-090248, C-090249, 2010-Ohio-162; *State v. Jones*, 2nd Dist. No. 08CA0008, 2009-Ohio-694; *State v. Sabo*, 3rd Dist. No. 14-09-33, 2010-Ohio-1261; *State v. Starett*, 4th Dist. No. 07CA30, 2009-Ohio-744; *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶¶16-18; *State v. Dillard*, 7th Dist. No. 08 JE 35, 2010-Ohio-1407; *State v. Woodson*, 8th Dist. No. 92315, 2009-Ohio-5558, ¶¶32-33; *State v. Nieves*, 9th Dist. No. 08CA009500, 2009-Ohio-6374, ¶¶ 50-52; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4126, ¶¶6-8; *State v. Mickens*, 10th Dist. Nos. 08AP-743, 08AP-744, 08AP-745, 2009-Ohio-2554, ¶¶22-25; *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815, ¶129, n. 1; *State v. Montgomery*, 12th Dist. No. CA2009-01-004, 2009-Ohio-5073, ¶9.

{¶27} Appellee has directed this court's attention to a previous ruling in *State v. Vandriest*, 5th Dist. No. 09-COA-032, 2010-Ohio-997, wherein a panel of this court imposed a cut-off date by which *Foster's* holding would not be applicable, depending on whether the sentencing took place before or after this date. This Court has since

retreated from such a stance. See *State v. Arnold*, 5th Dist. No. CT2009-0021; 2010-Ohio-3125.

{¶28} In *Arnold*, we stated, “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*, 5th Dist. No. 09 CAA 09 0076; *State v. Kvintus*, 5th Dist. No. 09CA58, 2010-Ohio-427; *State v. Mitchell*, 5th Dist. No. CT2006-0090, 2009-Ohio-5251; *State v. Williams*, 5th Dist. 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*, 5th Dist. 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*, 5th Dist. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz*, 5th Dist. No. 05CA008795, 2006-Ohio-3282.” *Arnold*, supra, at ¶9.

{¶29} In *State v. Smith*, 5th Dist. No. 09-CA-31, 2009-Ohio-6449, this Court recognized that the Ohio General Assembly amended R.C. 2929.14 effective April 7, 2009, and restated the requirement that the trial court make findings when imposing consecutive sentences. *Id.* at ¶9. However, we concluded that *Foster* controlled because the appellant was sentenced prior to the effective date of the amendment. *Id.*

{¶30} In *Arnold*, we stated, “R.C. 2929.14 was amended subsequent to the *Ice* decision. While Appellant in the instant case was sentenced after the effective date of the amendment, we conclude that the amendment does not reinstate, pursuant to *Ice*,

the requirement that the court make the statutory findings before imposing consecutive sentences. For purposes of our discussion, it must be kept in mind that whenever any amendment, no matter how small, is made to an Ohio Revised Code section by the legislature, the entire code section is restated. The original bill denotes changes with capital letters and lines through deleted portions.

{¶31} “In *Stevens v. Ackman*, 91 Ohio St.3d 182, 743 N.E.2d 901, 2001-Ohio-249, the code section in question, R.C. 2744.02(C), had previously been declared unconstitutional in its entirety. The legislature later passed legislation restating and purportedly amending R.C. 2744.02. The sole purpose of the amendment was to insert a reference to a statute not previously mentioned in R.C. 2744.02(B)(2), and no other changes were made to R.C. 2744.02 in the amendment. Specifically, no changes were made to R.C. 2744.02(C). However, the appellee in that case argued that the act repealed the version of the statute that the Ohio Supreme Court had found unconstitutional, and replaced it with a new version without the constitutional infirmity. *Id.* at 192, 743 N.E.2d 901.

{¶32} “Where an act is amended, the part that remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions are to be considered as having become the law only at the time of the amendment. *Id.* at 194, 743 N.E.2d 901. R.C. 1.54 provides that a statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute. *Id.*

{¶33} “The *Stevens* court concluded that for the General Assembly to have successfully reenacted R.C. 2744.02(C), the General Assembly must have intended the act to have that effect. *Id.* at 193, 743 N.E.2d 901.

{¶34} “The court noted that the editor's comment in Baldwin's Ohio Revised Code Annotated to Section 15, Article II of the Ohio Constitution states that while that section of the Constitution requires that an act repeal an amended section, R.C. 101.53 provides devices for showing changes to the printed bill or act: matter to be deleted is shown struck through, and new matter to be inserted is shown in capital letters. *Id.* at 194, 743 N.E.2d 901. The court found that the printing format showed no intent to reenact R.C. 2744 .02(C), as it appeared in the printed act in regular type, without capitalization which would indicate new material pursuant to R.C. 101.53. *Id.* Further, Section 15(D), Article II of the Constitution requires that where a law is amended, the new act shall contain the section or sections amended, and the sections so amended shall be repealed. *Id.* However, the provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amending act. *Id.*, citing *In re Allen* (1915), 91 Ohio St. 315, 320-21, 110 N.E. 535, 537. The court concluded that R.C. 2744.02(C) continued forward as the original enactment previously found unconstitutional by the Ohio Supreme Court, as the General Assembly did not intend to reenact the statute. *Id.* at 195, 110 N.E. 535.” *Arnold*, *supra*, at ¶¶10-15

{¶35} H.B. No. 130 amended R.C. 2929.14 effective April 7, 2009. However, there were no changes made to R.C. 2929.14(E)(4), and the only change in R.C. 2929.14 was to R.C. 2929.14(D)(2)(b)(ii). Such amendment served only to substitute

subsection (C)(C) for subsection (D)(D) in a reference to R.C. 2929.01(1), to comport with the renumbering of R.C. 2929.01(1) pursuant to an amendment to R.C. 2929.01(1). OH Legis 173(2008). R.C. 2929.14(E)(4) appears in regular type, without any indication pursuant to R.C. 101.53 which would indicate new material.

{¶36} In *Arnold*, which was decided after *Vandriest*, we held, “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*.” *Arnold*, supra, at ¶17.

{¶37} Appellant’s second assignment of error is overruled.

### III.

{¶38} In Appellant’s third assignment of error, he argues that the trial court erred in failing to permit Appellant to enter into a diversion program. We disagree.

{¶39} Diversion programs are governed by R.C. 2935.36, which states, in pertinent part:

{¶40} “(A) The prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again. The prosecuting attorney may require, as a condition of an accused’s participation in the program, the accused to pay a reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing.\* \* \*”

{¶41} Simply stated, this section permits the prosecuting attorney to allow admission of certain offenders into a diversion program.

{¶42} At the time of Appellant's application to the diversion program, he enjoyed no expectation of being accepted into the program, which is determined based on the prosecutor's discretion.

{¶43} Appellant was only entitled to be considered for participation in the program. The record reveals that he was considered and then rejected for legitimate reasons. Appellant cites no authority which specifically supports their argument that he is entitled to be admitted into a diversion program and we are aware of none.

{¶44} Accordingly, Appellant's third assignment of error is overruled.

{¶45} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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

STATE OF OHIO	:	
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	:	
-vs-	:	JUDGMENT ENTRY
	:	
DONALD ECKHART	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-15
	:	

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

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN