[Cite as *State v. Selby*, 2011-Ohio-185.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- KENNETH SELBY Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. W. Scott Gwin, J. Hon. William B. Hoffman, J. Case No. 2010CA00207 O P I N I O N

CHARACTER OF PROCEEDING:	Stark County Court of Common Pleas, Case No. 2004CR2033
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO, STARK COUNTY ATTORNEY, STARK COUNTY, OHIO BY: RENEE M. WATSON Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South – Suite 510 Canton, Ohio 44702-1413	RICHARD DRAKE 303 Courtyard Centre 116 Cleveland Ave. N.W. Canton, Ohio 44702

Hoffman, J.

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

STATEMENT OF THE CASE

{¶2} On December 3, 2004, Appellant was indicted on one count of conspiracy to commit murder, a felony of the first degree. Appellant had previously been indicted on one count of trafficking in drugs, a felony of the third degree.

{¶3} On March 25, 2005, Appellant entered pleas of guilty to both offenses, and the trial court imposed two three year prison sentences, to run consecutively to each other and consecutively to a three year term imposed in another case. However, the sentencing entry failed to inform Appellant of the length of his postrelease control.

{¶4} On June 28, 2010, the trial court resentenced Appellant in order to inform Appellant of the term of postrelease control, otherwise imposing the identical sentence.

{¶5} Appellant now appeals, assigning as error:

{¶6} "I. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING FINDINGS AS REQUIRED BY R.C. 2929.14(E)(4)."

{¶7} In the sole assignment of error, Appellant argues the trial court erred in imposing consecutive sentences without making the required finding pursuant to R.C. 2929.14(E). Specifically, Appellant asserts in the wake of the United States Supreme Court decision in *Oregon v. Ice*, 129 S.Ct.711, the Ohio Supreme Court decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, has been overruled and the fact finding provisions of R.C. 2929.14(E)(4) have been resurrected.

{¶8} In this case, Appellant entered into a negotiated plea agreement for an agreed upon sentence. However, assuming arguendo, Appellant's sentence is properly before this Court on appeal, this Court held in *State v. Arnold,* Muskingum App. No. CT2009-21, 2010-Ohio-3125:

{¶9} "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.

{¶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} Based upon this Court's holding in *Arnold,* supra, and the Ohio Supreme Court's decision in *Foster,* supra, Appellant's sole assignment of error is overruled.

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

By: Hoffman, J.

Edwards, P.J. and

Gwin, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ W. Scott Gwin
HON. W. SCOTT GWIN

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KENNETH SELBY	:	
	:	
Defendant-Appellant	:	Case No. 2010CA00207

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

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ W. Scott Gwin
HON. W. SCOTT GWIN