[Cite as *State v. Meares* , 2011-Ohio-43.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MATTHEW MEARES Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 10-CA-2 O P I N I O N

CHARACTER OF PROCEEDING:	Fairfield County Common Pleas Court, Case No. 09-CR-186
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 7, 2011

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GREG MARX Fairfield County Prosecutor's Office 239 W. Main Street, Suite 101 Lancaster, Ohio 43130	SCOTT P. WOOD Dagger, Johnston, Miller, Ogilvie & Hampson, LLP 144 East Main Street P.O. Box 667 Lancaster, Ohio 43130

Hoffman, P.J.

{¶1} Defendant-appellant/Cross-appellee Matthew Meares appeals his conviction and sentence entered by the Fairfield County Court of Common Pleas. Plaintiff-appellee/Cross-appellant State of Ohio appeals the trial court's December 15, 2009 Judgment Entry finding Appellant/Cross-appellee not guilty of a sexually violent predator specification.

STATEMENT OF THE FACTS AND CASE

{¶2} This matter arises from Appellant/Cross-Appellee's alleged sexual abuse of his two step-daughters over a number of years.

{¶3} On November 24, 2009, a jury found Appellant guilty of gross sexual imposition, a felony of the third degree; rape, a felony of the first degree; unlawful sexual conduct with a minor, a felony of the third degree; sexual battery, a felony of the third degree; gross sexual imposition, a felony of the fourth degree; rape, a felony of the first degree; unlawful sexual conduct with a minor, a felony of the third degree; sexual battery, a felony of the third degree; and gross sexual imposition, a felony of the fourth degree.

{¶4} A sexually violent predator sexual predator specification was tried to the court on December 10, 2009. On December 15, 2009, the trial court entered its verdict finding the State had not proven the specification.

{¶5} On December 22, 2009, the trial court sentenced Appellant/Cross-Appellee to a total of twenty-five years incarceration.

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

{¶7} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A MISTRIAL BASED ON A DISCLOSURE THAT AN ALLEGED VICTIM SUBMITTED TO POLYGRAPH TESTING.

{¶8} "II. THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES WAS CONTRARY TO LAW."

{¶9} The State of Ohio's cross appeal, assigns as error:

{¶10} "I. THE TRIAL COURT ERRONEOUSLY FOUND THE APPELLANT/CROSS-APPELLEE NOT GUILTY OF A SEXUALLY VIOLENT PREDATOR SPECIFICATION."

DIRECT APPEAL

I.

{¶11} In his first assignment of error, Appellant/Cross-Appellee maintains the trial court erred in overruling his motion for mistrial based on a disclosure one of the alleged victims had submitted to polygraph testing.

{¶12} At trial, Sharon Kuss, an outpatient therapist who counseled the victims, testified:

{¶13} "Q. Did she indicate any pressure on recanting, on just saying it wasn't true?

{¶14} "A. Absolutely. She had been told that Mr. Mears was again contemplating suicide. It was going to cause him a heart attack; that his health was at stake here. She was taken to her father's apartment and not allowed to go anywhere. From this one-bedroom apartment, from the window of the apartment, she could see

her family coming and going. She could see the alleged perpetrator coming and going with her family. And she was in that apartment alone.

{¶15} "Her father wouldn't take her anywhere. He threatened to take away her temps, because she was trying to get a driver's license. He told her that if she failed the lie detector test - - - "

{¶16} Tr. at p. 286.

{¶17} Following objection, the trial court instructed the jury:

{¶18} "The Court: What I'll do is instruct the jury to disregard any testimony concerning that polygraph test and we'll hear further argument concerning your motion at a later time.

{¶19} "(Thereupon, the discussion was concluded and the proceedings continued as follows:)

{¶20} "The Court: The jury is instructed to disregard the witness' reference or any testimony by this witness concerning a polygraph examination or polygraph test, and do not consider that for any purpose."

{¶21} Tr. at p. 287- 288.

{¶22} Appellant moved the trial court for a mistrial asserting the testimony was prejudicial, and implied the victim had successfully passed a polygraph examination.

{¶23} Ohio law provides the results of a polygraph examination are inadmissible as evidence in a criminal trial unless the parties agree and stipulate to admissibility. *State v. Souel* (1978), 53 Ohio St.2d 123. A trial court's decision as to whether to grant or deny a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Glover* (1988), 35 Ohio St.3d 18. A mistrial should be granted only when the ends of

justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118.

{¶24} In *State v. Searles*, Morgan App. No. 02CA04, 2003-Ohio-3498, this Court set forth the factors to be considered in determining whether a reversal is warranted where testimony is improperly presented regarding a polygraph examination:

{¶25} "Thus, we conclude the questions asked by the state, to Deputy Fisher, clearly established that the victim took a polygraph examination and further implied that she passed the examination since he continued with his investigation. In *State v. Rowe* (1990), 68 Ohio App.3d 595, 589 N.E.2d 394, the Tenth District Court of Appeals noted that some courts have found the mere mention that a witness or defendant has taken a polygraph examination has been held to be prejudicial error. *Id.* at 611, 589 N.E.2d 394, citing *State v. Smith* (1960) 113 Ohio App. 461, 178 N.E.2d 605; *People v. York* (1975), 29 Ill.App.3d 113, 329 N.E.2d 845; *State v. Harris* (Oct. 3, 1984), Hamilton App. No. C-830927.

{¶26} "In addressing this prejudicial effect of the admission of testimony regarding a polygraph examination, the court, in *Rowe,* stated as follows:

{¶27} " 'In determining whether a defendant was prejudiced by the admission of testimony regarding a polygraph test, '[t]he effect of inadmissible testimony upon the final outcome of any case cannot, of course, be gauged with mathematical certainty, but the manifest weight of the type of testimony erroneously admitted in the present case cannot conscientiously be ignored * * *.' *Id.,* citing *State v. Hegel* (1964), 9 Ohio App.2d 12, 14, 222 N.E.2d 666.

{¶28} "In *State v. Rowe* (1990), 68 Ohio App.3d 595, 589 N.E.2d 394, the court set forth the following factors to determine whether a reversal is warranted where testimony is presented regarding a polygraph examination:

{¶29} " ' * * * (1)[W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact a test had been conducted.' *Id.* at 611, 589 N.E.2d 394, citing *People v. Rocha* (Mich.App.1981), 110 Mich.App. 1, 9, 312 N.W.2d 657."

{¶30} Upon review of the testimony presented in this case, it does not affirmatively state the polygraph test was actually taken or passed. Rather, the testimony referenced J.S. had been instructed had she failed it, there would be consequences. There were no repeated references to the polygraph test, and the reference was apparently inadvertent; not meant to bolster the victim's credibility. Further, we presume the jurors followed the curative instructions of the trial court, and the curative instruction removed any presumed prejudice from the testimony. Accordingly, we find the trial court did not abuse its discretion in overruling Appellant's motion for a mistrial. The first assignment of error is overruled.

II.

{¶31} Appellant's second assignment of error asserts the trial court erred in imposing consecutive sentences pursuant to R.C. 2929.14. Specifically, Appellant maintains the United Supreme Court's decision in *Oregon v. Ice* (2009), 129 S.Ct. 711,

overrules the Ohio Supreme Court's opinion in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856.

{¶32} In *State v. Arnold*, Muskingum App. No. CT2009-21, 2010-Ohio-3125, this Court held:

{¶33} "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.

{¶34} "***

{¶35} "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.

{¶36} "***

{¶37} "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.*"

{¶38} Based upon this Court's holding in *Arnold,* supra, Appellant's second assignment of error is overruled.

CROSS-APPEAL

{¶39} On cross-appeal the State of Ohio argues the trial court erred in finding Appellant/Cross-appellee not guilty of the sexually violent offender specification.

{¶40} Following Appellant/Cross-appellee's conviction on two counts of rape and gross sexual imposition, the trial court conducted a disposition hearing to determine whether or not Appellant/Cross-appellee was likely to engage in sexually violent offenses in the future, and should therefore be classified a sexually violent offender. The trial court found there were two aspects the State was required to prove beyond a

reasonable doubt to support classification of Appellant/Cross-appellee as a sexually violent predator: 1) whether the defendant, on or after January 1, 1997, committed a sexually violent offense, and 2) whether the defendant is likely to engage in the future in one or more sexually violent offenses.

{¶41} In *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, the Ohio Supreme Court held:

{¶42} "A sexually-violent-predator specification must be charged in an 'indictment, count in the indictment, or information charging the sexually violent offense or charging the designated homicide, assault, or kidnapping offense.' R.C. 2941.148(A). Therefore, pursuant to R.C. 2971.01(H)(1), which defines a sexually violent predator, the grand jury must consider whether the person under investigation is 'a person who *has been convicted of* or *pleaded guilty to* committing a sexually violent offense.' (Emphasis added.) These words clearly indicate that at the time of indictment, the person has already been convicted of a sexually violent offense. A grand jury cannot indict based on a conviction that has not occurred and may not ever occur. Consequently, accepting the state's interpretation of R.C. 2971.01(H)(1) would lead to an absurd result. This court will not accept such a construction. *State v. Wells* (2001), 91 Ohio St.3d 32, 34, 740 N.E.2d 1097.

{¶43} "***

{¶44} "In this case, the trial court erred in relying on the jury's convictions of the underlying rape and kidnapping charges to prove the sexually-violent-predator specification alleged in the same indictment. Consequently, the court of appeals was correct in reversing the trial court's finding that Smith is a sexually violent predator.

Accordingly, we affirm the judgment of the court of appeals and remand this cause for a new sentencing hearing consistent with this opinion."

{¶45} Pursuant to *Smith,* supra, the trial court did not err in finding Appellant not guilty of the sexually violent predator specification based upon Appellant's conviction for rape and gross sexual imposition in the same indictment. The underlying offenses in the indictment cannot be used to support the sexually violent predator specification in the same indictment. Here, there was no evidence suggesting Appellant had a prior conviction for a sexually violent offense.

{¶46} Based on *Smith*, Appellee/Cross-Appellant's assignment of error raised on cross-appeal is overruled.[1]

{¶47} Appellant's convictions and sentence in the Fairfield County Court of Common Pleas are affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

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

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

[1] We choose to address this issue even though we doubt the State has a right to appeal the verdict of acquittal by the trial court on this specification under double jeopardy principles.

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MATTHEW MEARES	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-2

For the reasons stated in our accompanying Opinion, Appellant's convictions and sentence entered by the Fairfield County Court of Common Pleas are affirmed. Costs of appeal to Appellant/ Cross-Appellee. Costs of cross appeal to Appellee/Cross-Appellant.

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

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY