[Cite as *State v. Miller*, 2009-Ohio-3908.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1314

Appellee — Trial Court No. CR200801911

v.

Damon Miller — **DECISION AND JUDGMENT**

Appellant — Decided: August 7, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Damon Miller, appeals from the decision of the Lucas County Court of Common Pleas in which he was convicted of four felonies. Because we conclude that the trial court committed no reversible error, we affirm.

{¶ 2} On July 7, 2008, appellant entered no contest pleas to one count of aggravated burglary with a firearm specification, a violation of R.C. 2911(A)(1) and a first degree felony; one count of rape with a firearm specification, a violation of R.C.

2907.02(A)(2) and (B) and a first degree felony; and two counts of second degree felony burglary, violations of R.C. 2911.12(A)(1). He was sentenced to seven years in prison for aggravated robbery in addition to three consecutive years for the gun specification. As to the rape conviction, he was sentenced to nine years in prison in addition to three consecutive years for the gun specification. Both gun specification terms were ordered to be served concurrently. Finally, he was sentenced to three years in prison for each robbery conviction. Appellant's entire prison sentence totaled 25 years. He now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court erred when it found Mr. Miller guilty of two firearm specifications.

{¶ 4} "II. The trial court erred when it ordered sentences to be served consecutively without making the findings required by *State v. Comer* which are required again in light of the recent United States Supreme Court ruling in *Oregon v. Ice*.

{¶ 5} "III. Mr. Miller was denied Due Process of law when he was sentenced by a biased court."

{¶ 6} In his first assignment of error, appellant contends that the court erred in finding him guilty of two firearm specifications as the specifications constitute allied offenses of similar import. The charges of aggravated burglary and rape both arose from the same incident in which appellant brandished a gun.

{¶ 7} R.C. 2941.25 provides:

{¶ 8} "(A) Where the same conduct by 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."

{¶ 9} R.C. 2929.14 specifies the mandatory prison terms that a court must impose for various firearm specifications. Appellant's indictment cited R.C. 2941.145 which requires a three-year mandatory prison term if the offender is convicted of having:

{¶ 10} "* * * a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense."

{¶ 11} Appellant's argument is without merit because a penalty enhancement specification is not an offense. *State v. Belcher*, 8th Dist. No. 89254, 2007-Ohio-6317, citing *State v. Turner* (June 11, 1987), 8th Dist. No. 52145. The penalty imposed upon appellant was a more severe penalty, rather than two distinct sentences. *State v. Willingham* (Feb. 16, 1989), 8th Dist. Nos. 54767, 56464.

{¶ 12} "[A] specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached." *State v. Nagel* (1999), 84 Ohio St.3d 280, 286. A specification is not an offense standing alone and ordinarily serves to increase the degree of the crime committed and the attendant penalty. *State v. Hernandez (*Feb. 24, 2000), 8th Dist. No. 74757." *Belcher*, supra.

{¶ 13} The Second District Court of Appeals explained in *State v. Price* (Mar. 12, 1999), 2d Dist. No. 97-CA-6, that while:

{¶ 14} "* * * R.C. 2941.25(A) does not specifically apply to separate specifications as opposed to separate offenses, it seems unlikely that the legislature intended a different result as it applies to specifications which include elements which correspond to such a degree that commission of one specification will result in the commission of another and no separate animus exists for committing each specification."

{¶ 15} Appellant's first assignment of error is found not well-taken.

{¶ 16} In his second assignment of error, appellant contends that the court erred in imposing consecutive sentences without making certain factual findings. Appellant specifically asks us to disregard the Supreme Court of Ohio case, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, in light of a recent United States Supreme Court case, *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 17} The Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held that "[t]rial 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." *Foster*, supra, paragraph seven of the syllabus. In *Oregon v. Ice*, supra, the United States Supreme Court ruled that an Oregon sentencing statute which provided judges with discretion in determining whether a defendant's sentences for distinct offenses should run concurrently

or consecutively, but also required judges to make certain predicate fact-findings before imposing consecutive sentences, was not unfaithful to the goals of the Sixth Amendment and the right to a jury trial. Thus, the Oregon statute was upheld by the court.

{¶ 18} While *Oregon v. Ice* may necessitate a re-examination of Ohio's current sentencing statutes, as well as some of those which immediately preceded the decision in *Foster*, such a re-examination can only be taken by the Supreme Court of Ohio. As it stands now, we are bound to follow the law and decisions of the Supreme Court of Ohio, unless or until they are reversed or overruled. Therefore, appellant's second assignment of error is found not well-taken.

{¶ 19} In his third assignment of error, appellant contends that the trial judge was biased against appellant. Specifically, appellant contends that the judge had decided appellant's sentence before he had all the relevant information before him. Appellant pays particular attention to the fact that the judge stated that he had been thinking about appellant's sentence even before appellant entered his pleas.

{¶ 20} Judicial bias is defined as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." *State v. LaMar*, 95 Ohio St .3d 181, 2002-Ohio-2128, ¶ 34.

{¶ 21} A trial judge is "'presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity.'" *Weiner v. Kwiat*, 2d Dist. No. 19289, 2003-Ohio-3409, ¶ 90, quoting *Eller v. Wendy's Internatl., Inc*. (2000), 142 Ohio App.3d 321, 340. "The existence of prejudice or bias against a party is a matter that is particularly within the knowledge and reflection of each individual judge and is difficult to question unless the judge specifically verbalizes personal bias or prejudice toward a party." Id.

{¶ 22} At sentencing, the judge did in fact state that he had been thinking about appellant's sentence, even before appellant entered his pleas. However, he noted that there had been several pretrial conferences before appellant pled which acquainted him with the case. He explained that he had thoroughly reviewed appellant's presentence and court diagnostic reports. The judge stated that he had read and considered the over 60 letters he had received on appellant's behalf which included letters from family and clergy members. The judge further stated:

{¶ 23} "I have had to think about what your sentence would be and how to balance your incredible family background and support and the unfortunate drug addiction and /or substance abuse addiction that you had fallen into, and take all of that into consideration and balancing it against the offenses that you committed * * *. Your family has gone to extraordinary lengths to make sure I understand who Damon Miller is. To make sure that

I get the sentence right, I've gone over it time and time again, all the information I've had as well as the letters presented to me."

{¶ 24} Contrary to appellant's assertions, our review of the sentencing transcript leads us to the conclusion that the trial judge had not predetermined appellant's fate before considering all of the relevant information. Rather, the transcript in this case reveals quite the opposite. The transcript shows that the judge went to considerable lengths to reflect and digest all of the factors involved in formulating a fair sentence. The fact that the judge spent a great deal of time pondering the various sentencing options available to him in no way indicates to this court that the judge had "fixed his judgment with regard to the appropriate sentence," as appellant alleges. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 25} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

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JUDGE

Arlene Singer, J. _____

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JUDGE

Richard W. Knepper, J. _____
CONCUR.

_____
JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.