[Cite as *State v. Gardner*, 2011-Ohio-1268.]

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

State of Ohio — Court of Appeals No. L-10-1222

Appellee — Trial Court No. CR0200302615

v.

Joseph E. Gardner — **DECISION AND JUDGMENT**

Appellant — Decided: March 18, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from the Lucas County Court of Common Pleas, which sentenced appellant to a mandatory three year sentence for possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f), a felony of the first degree, and a

mandatory four year sentence for possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f), with the sentences to be served consecutively. For the reasons set forth below, this court affirms the sentence imposed by the trial court.

{¶ 2} Appellant, Joseph Gardner, sets forth the following two assignments of error:

{¶ 3} "I. APPELLANT'S CONSECUTIVE SENTENCE VIOLATED APPELLANT'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTIONS FIVE AND SIXTEEN, ARTICLE I AND SECTION FOUR, ARTICLE IV OF THE OHIO CONSTITUTION.

{¶ 4} "II. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT AT SENTENCING BY IMPOSING A PRISON TERM IN EXCESS OF THE MINIMUM IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. On June 17, 2003, the police executed a search warrant on appellant's house. In the course of that search, the police recovered 3.8 ounces of crack cocaine that had been divided into 16 separate bags. Appellant was arraigned and released on bond. While out on bond, appellant was again arrested. During the course of the arrest, appellant was

found to be in possession of 5.7 ounces of crack cocaine, a greater amount than was recovered during the first incident.

{¶ 6} Following this second incident, appellant was indicted on two counts of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f), felonies of the first degree, and two counts of trafficking in cocaine, in violation of R.C. 2925.03(A)(2) and (C)(4)(g), also felonies of the first degree. Appellant pled not guilty to all counts. Trial was set for August 19, 2003.

{¶ 7} Following plea negotiations, appellant reached a plea agreement with appellee whereby appellant entered pleas of no contest to the two counts of possession. In exchange, the remaining two counts of trafficking in cocaine were dismissed. On February 24, 2004, appellant was sentenced to a mandatory three year sentence for the first possession count, and a mandatory four year sentence for the second possession count, with the sentences to be served consecutively.

{¶ 8} On July 8, 2010, appellant appeared for a de novo resentencing necessitated solely due to the absence of post-release control notification in the court's original judgment entry. At that time, the court imposed the same sentence as had been originally imposed, along with the proper post-release control notification. Appellant now appeals the resentencing.

{¶ 9} We note at the onset that appellant's two assignment of error are rooted in the same legal premise and thus will be addressed accordingly. Central to both of

appellant's assertions is the premise that the U.S. Supreme Court's ruling in *Oregon v. Ice* (2009), 555 U.S. 160, which permitted judicial fact finding to impose consecutive sentences, is inconsistent with the Ohio Supreme Court's ruling in *State v. Foster* (2006), 109 Ohio St.3d, 2006-Ohio-586, such that *Foster* cannot stand and must be overruled.

{¶ 10} This court and other courts of appeal have been confronted with this very same argument numerous times subsequent to the *Ice* decision. We have consistently held that "a re-examination of the law set forth in *Foster* can only be undertaken by the Supreme Court of Ohio." *State v. Ward* (Oct. 22, 2010), 6th Dist. No. OT-10-005, 2010-Ohio-5164. See, also, *State v. Payton* (October 22, 2010), 6th Dist. No. E-09-070; *State v. Lenoir* (Oct. 5 2010), 5th Dist. No. 10CAA010011, 2010-Ohio-4910; and *State v. Banna* (Oct. 7, 2010), 8th Dist. No. 93871, 2010-Ohio-4887.

{¶ 11} Subsequent to this, the supreme court conducted its re-examination of *Foster* in *State v. Hodge* (2010), 128 Ohio St.3d 1, 2010-Ohio-6320. In *Hodge*, the supreme court stated that *Ice* solely implicated the portions of *Foster* that dealt with a judge's authority to impose consecutive sentences. The other salient portions of *Foster* were not affected and remain unchanged. Id. at ¶ 27. As to the portions of *Foster* that dealt with consecutive sentences, the supreme court noted that, while *Ice* stands for the proposition that judicial fact finding when imposing consecutive sentences is constitutional, it does not require that such judicial fact finding occur. Id. at ¶ 26. Following from this, the supreme court concluded that, "*Ice* does not revive the disputed

statutory provisions [at issue in *Foster*,] and that defendants who were sentenced by trial judges who did not apply those provisions are not entitled to resentencing." Id. at ¶ 5.

{¶ 12} In light of the decision in *Hodge*, we are compelled to reject appellant's claims relating to the unconstitutionality and inconsistencies of *Foster*. Accordingly, we look to see whether appellant's assertions can stand without this central pillar of his arguments.

{¶ 13} In his first assignment of error, appellant makes an alternative argument that because *Foster* severed those statutes that allow for consecutive sentencing, trial courts lack the authority to impose them.

{¶ 14} While it is true that courts no longer have the *statutory* authority to impose consecutive sentences, *State v. Bates* (2008), Ohio St.3d 174, 2008-Ohio-1983, ¶ 18, trial courts still retain the common law authority to make the determination of whether sentences should be carried out concurrently or consecutively. Id. Stated plainly, "*Foster* [does] not prevent the trial court from imposing consecutive sentences; it merely took away the judge's duty to make findings before doing so." *State v. Elmore* (2009), 122 Ohio St.3d 472, 2009-Ohio-3478. Accordingly, we find appellant's first assignment of error not well-taken.

{¶ 15} In appellant's second assignment of error, he claims that the trial court abused its discretion by sentencing appellant to more than the minimum sentence allowed by statute.

{¶ 16} Since appellant's argument is based almost entirely on the assumption that *Ice* fundamentally altered *Foster*, it is not necessary to delve deeply into this assertion. In light of the finding in *Hodge* that *Foster* remains intact, appellant's pleas to revert to pre-*Foster* parameters are moot. After *Foster*, "trial 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* at ¶ 100. See, also, *Elmore* at paragraph two of the syllabus.

{¶ 17} Appellant was sentenced for two counts of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f), first degree felonies, for three years and four years respectively, for a total of seven years imprisonment. Under R.C. 2929.14(A)(1), felonies of the first degree carry sentences of three, four, five, six, seven, eight, nine, or ten years. Here, appellant's sentences, both separately and combined, were below the maximum for a first degree felony.

{¶ 18} For an appellate court to overturn a sentence imposed by a trial court, there must be "clear and convincing evidence that the sentence was not supported by the record, or is 'otherwise contrary to law'" *State v. Johnson* (Nov. 9, 2007), 6th Dist. No. OT-07-007, 2007-Ohio-6000. We find no such evidence here. Appellant was arrested for possession while out on bond from a previous arrest for possession. *Foster* allows for, and a judge is certainly within his discretion to impose, a sentence above the

minimum in such circumstances. Accordingly, we find appellant's second assignment of error not well-taken.

{¶ 19} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay 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. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE