

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

State of Ohio

Court of Appeals No. WD-10-080

Appellee

Trial Court No. 08 CR 229

v.

Jeremy Henry

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen
Howe-Gebers and Jacqueline M. Kirian, Assistant Prosecuting
Attorneys, for appellee.

Lawrence A. Gold, for appellant.

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YARBROUGH, J.

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas finding defendant-appellant Jeremy Henry guilty of endangering children, felonious assault, and possession of heroin, and sentencing him to seven years and eleven months in prison. For the reasons that follow, we affirm.

{¶ 2} On April 30, 2008, appellant was indicted by the Wood County Grand Jury on one count of endangering children in violation of R.C. 2919.22(B)(3) and (E)(3), a felony of the second degree, one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree, and one count of possession of heroin in violation of R.C. 2925.11(A) and (C)(6)(a), a felony of the fifth degree. On July 7, 2008, appellant entered an *Alford* plea to the charges. The trial court accepted the plea, and on August 18, 2008, sentenced appellant to 17 years in prison. On October 30, 2009, this court reversed the trial court in *State v. Henry*, 6th Dist. No. WD-08-057, 2009-Ohio-5729, holding that appellant's *Alford* plea was not knowingly, voluntarily, and intelligently made.

{¶ 3} Upon remand, appellant pleaded no contest to the charges, and was found guilty. In its November 19, 2010 judgment entry, the trial court determined that Counts 1 and 2 were allied offenses, and sentenced appellant to seven years in prison. On the third count, possession of heroin, the trial court imposed an eleven-month prison term, to be served consecutively to the seven-year term, for a total sentence of seven years and eleven months in prison.

{¶ 4} Appellant has timely appealed the November 19, 2010 judgment and now raises a single assignment of error:

{¶ 5} "Appellant's consecutive sentence violated Appellant's right to due process under the Sixth and Fourteenth Amendment of the United States Constitution and Section Five and Sixteen, Article I and Section Four, Article IV of the Ohio Constitution."

{¶ 6} In support of his assignment of error, appellant argues that R.C. 2929.41(A) and 2929.14(E)(4) were the only statutes that authorized the trial court to impose consecutive sentences under the circumstances of this case. However, the Ohio Supreme Court excised those statutes in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Thus, appellant contends that, post-*Foster*, no statutory authority remains in Ohio's sentencing scheme to impose consecutive terms of imprisonment. Consequently, appellant concludes that the consecutive sentence imposed by the trial court was unlawful due to the trial court's lack of statutory authority.

{¶ 7} The issue we must decide is whether in the absence of specific statutory authority, a trial court is still authorized to impose consecutive sentences upon a defendant. This issue has been squarely addressed by the Ohio Supreme Court in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478. In that case, Elmore argued "that the trial court lacked the authority to impose consecutive sentences because *Foster*, as part of its remedy, excised in their entirety R.C. 2929.14(E)(4) and 2929.41(A), the statutory provisions that authorized consecutive sentences. Thus, he contends that the trial court lacked any statutory or constitutional basis to impose consecutive sentences in his case." *Id.* at ¶ 31. In affirming Elmore's sentence, the Ohio Supreme Court relied on its earlier holding in *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, and concluded "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore." *Elmore* at ¶ 35.

{¶ 8} In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶ 12-13, the Ohio Supreme Court summarized the interplay between *Foster*, *Bates*, and *Elmore*, stating:

{¶ 9} "In *State v. Bates*, we recognized that *Foster* severed and excised former R.C. 2924.14(E) [sic] and former R.C. 2929.41(A) in their entirety, and we observed that this action left no specific statute in place to govern the imposition of consecutive sentences beyond the basic statutes regarding the 'purposes and principles of sentencing.' We held that common-law sentencing presumptions were therefore reinstated, giving trial judges 'the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.'

{¶ 10} "We reaffirmed *Foster* and *Bates* in *State v. Elmore*, holding that a trial court has the discretion to impose consecutive sentences in the wake of those decisions and that despite the severance of the statutory presumptions, a trial court is not required by the rule of lenity to impose minimum or concurrent sentences." (Citations omitted.)

{¶ 11} Therefore, based on the Ohio Supreme Court's holdings in *Bates* and *Elmore*, we hold that the trial court did not violate appellant's due process rights when it sentenced him to consecutive sentences, despite the absence of R.C. 2929.14(E)(4) and 2929.41(A). This holding is consistent with our numerous previous decisions addressing the same issue in *State v. Mejia*, 6th Dist. No. WD-10-032, 2011-Ohio-1977; *State v. Gardner*, 6th Dist. No. L-10-1222, 2011-Ohio-1268; *State v. Casares*, 6th Dist. No. WD-09-080, 2010-Ohio-6218; *State v. Luna*, 6th Dist. No. WD-09-079, 2010-Ohio-5509;

and *State v. Gaines*, 6th Dist. No. WD-08-058, 2010-Ohio-91. Accordingly, appellant's assignment of error is not well-taken.

{¶ 12} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

{¶ 13} It is so ordered.

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

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
