[Cite as *State v. Polus*, 2014-Ohio-2321.]

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

State of Ohio

Appellee

v.

Walter Polus

Appellant

Court of Appeals Nos. L-13-1119
L-13-1120

Trial Court Nos. CR0201301430
CR0201301275

DECISION AND JUDGMENT

Decided: May 30, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brad A. Smith, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

JENSEN, J

{¶ 1} Following his convictions on two counts of receiving stolen property, defendant-appellant, Walter Polus, appeals the sentences imposed by the Lucas County Court of Common Pleas on June 3, 2013. For the reasons that follow, we find Polus' assignment of error well-taken and reverse the trial court's judgment.

I. Background

{¶ 2} In Lucas County case No. CR0201301275 ("case No. CR13-1275"), Polus was charged with two counts of receiving stolen property, violations of R.C. 2913.51(A) and (C), fifth degree felonies, after selling allegedly stolen items to an undercover police officer. In a separate case, Lucas County case No. CR0201301430 ("case No. CR13-1430"), Polus was indicted and charged under R.C. 2911.12(A)(1) and (D) with three counts of burglary, all second-degree felonies, in connection with break-ins at several homes. Two additional counts were added by information charging Polus with receiving stolen property, violations of R.C. 2913.51(A) and (C), both fifth-degree felonies.

{¶ 3} Polus agreed to enter a plea of guilty to the receiving stolen property charges in case No. CR13-1275 in exchange for the state's agreement (1) to dismiss the three burglary charges in case No. CR13-1430 and (2) to amend the second receiving stolen property charge to a first-degree misdemeanor. He entered guilty pleas under *North Carolina v. Alford* to the two receiving stolen property charges in case No. CR13-1430. The trial court accepted his pleas.

{¶ 4} In case No. CR13-1275, the court sentenced Polus to 11 months' incarceration on the felony charge and six months' incarceration on the misdemeanor charge, to be served consecutively. In case No. CR13-1430, it sentenced him to 11 months' incarceration on each charge. The court ordered the sentences in case No. CR13-1430 to be served consecutively to each other and to the sentences in case No. CR13-1275.

{¶ 5} Polus now appeals the sentences imposed in case No. CR13-1275, assigning the following error for our review:

> The Trial Court's sentence was contrary to law.

In connection with that assignment of error, Polus asks us to consider two issues:

> Is the Trial Court's sentence contrary to law when it sentences a Defendant to a jail term for a misdemeanor, and runs that sentence consecutive to a felony prison term, contrary to what R.C. §2929.41(A) says?
>
> Is the Trial Court's sentence contrary to law when the Trial Court sentences a Defendant to six months when the maximum sentence permitted is one hundred eighty days?

II. Law and Analysis

{¶ 6} The first issue posed by Polus is whether under R.C. 2929.41(A) the trial court was prohibited from ordering him to serve felony and misdemeanor sentences of incarceration consecutively. Polus argues that under R.C. 2929.41(A), the court was required to order concurrent sentences unless the circumstances described in (B)(3) applied. R.C. 2929.41 provides, in pertinent part:

> (A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of

imprisonment imposed by a court of this state, another state, or the United States. *Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.*

(B)(1) *A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively* or when it is imposed for a misdemeanor violation of section 2907.322 , 2921.34 , or 2923.131 of the Revised Code.

* * *

(3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively. * * * (Emphasis added.)

{¶ 7} There is no dispute that (B)(3) is inapplicable here. The question is whether provision (B)(1) vests the trial court with authority to impose consecutive sentences

despite the language in provision (A) which would appear to prohibit consecutive sentences for a felony and misdemeanor unless provision (B)(3) applies. Polus argues that (A) and (B)(1) contradict one another, thereby creating an ambiguity which must be construed against the state under R.C. 2901.04(A). The state argues simply that (B)(1) authorizes the court to impose consecutive sentences.

{¶ 8} The treatment of R.C. 2929.41 has evolved as it applies to the authority of a trial judge to sentence an offender to consecutive terms of imprisonment for misdemeanor and felony convictions. Before the Ohio Supreme Court decided *State v. Foster,*109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, on February 27, 2006, most courts—including this court—interpreted R.C. 2929.41 as prohibiting the imposition of consecutive sentences. In *State v. Perry,* 6th Dist. Wood No. WD-99-026, 2000 WL 125807 (Feb. 4, 2000), when faced with the same question, we explained as follows:

> R.C. 2929.41(A) clearly prohibits [a court from imposing consecutive sentences for felony and misdemeanor convictions]. R.C. 2929.41(B) does, however, create an ambiguity with respect to the issue. In a criminal context ambiguities in sentencing statutes must be strictly construed against the state. R.C. 2901.04. *Id.* at * 1.

{¶ 9} We considered the issue again in *State v. Garrett,* 6th Dist. Erie No. E-02-015, 2003-Ohio-5185. We recognized that "[a]s to the issue of [a] misdemeanor sentence being served consecutively to [a] felony sentence[], the Supreme Court of Ohio has held that R.C. 2929.41(A) requires that a sentence imposed for a misdemeanor conviction

must be served concurrently with any felony sentence." *Id.* at ¶ 27, citing *State v. Butts*, 58 Ohio St.3d 250, 569 N.E.2d 885 (1991).[1] *See also State v. Elchert*, 3d Dist. Seneca No. 1-04-42, 2005-Ohio-2250, ¶ 9 ("[T]he trial court's order that Elchert's misdemeanor sentence run consecutively to the felony prison sentence is error."); *State v. McCauley*, 8th Dist. Cuyahoga No. 86946, 2006-Ohio-4587, ¶ 8 ("R.C. 2929.41(A) clearly states that a misdemeanor sentence of imprisonment must run concurrently with a sentence of imprisonment for a felony."); *State v. Gatewood*, 1st Dist. Hamilton No. C-000157, 2000 WL 1867374, * 9 (Dec. 22, 2000).

{¶ 10} After *Perry* and *Garrett*, the Ohio Supreme Court decided *Foster*. In that decision, the court excised provision (A) from R.C. 2929.41, holding that it was unconstitutional because it required the trial judge to make findings of facts not proven to a jury beyond a reasonable doubt before imposing consecutive sentences. While provision (A) was excised, the remainder of the statute remained intact. *Foster* at paragraph three of the syllabus.

{¶ 11} With provision (A) excised from the statute, courts presented with the question of the propriety of imposing consecutive sentences for misdemeanors and

[1] We acknowledge that the version of R.C. 2929.41(A) that existed at the time we decided *Perry* provided: "In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal correctional institution." It was revised effective May 17, 2000, to state "Except as provided in division (B)(2) of this section, a sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution." It appears that the revisions to the statute did not change our interpretation given our holding in *Garrett.*

felonies reached a different conclusion. In *State v. Hughley*, 8th Dist. Cuyahoga No. 92588, 93070, 2009-Ohio-5824, ¶ 12, for instance, the court held that because *Foster* excised provision (A) from R.C. 2929.41, "post-*Foster*, * * * R.C. 2929.41(B)(1) authorizes a trial court to order a misdemeanor sentence to be served consecutively to a felony sentence." *See also State v. Walters*, 6th Dist. Lucas No. L-08-1238, 2009-Ohio-3198, ¶ 30-31; *State v. Trainer*, 2d Dist. Champagne No. 08-CA-04, 2009-Ohio-906, ¶ 13; *State v. Farley*, 5th Dist. Ashland No. 11-COA-042, 2012-Ohio-3620, ¶ 30-34; *State v. Stevens*, 10th Dist. Franklin No. 10AP-207 and 208, 2010-Ohio-4747, ¶ 2-4.

{¶ 12} Approximately three years after *Foster*, the United States Supreme Court decided *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009). In *Ice*, the court concluded that states are not prohibited from assigning to judges the findings of fact necessary to the imposition of consecutive sentences. *Id.* at (a) of the syllabus. In response, the Ohio legislature revived provision (A) of R.C. 2929.41 via 2011 Am.H.B. No. 86 ("H.B. 86"), which became effective on September 30, 2011. Since then, two appellate districts have been presented with the issue posed by Polus. The Fifth District Court of Appeals is one of them.

{¶ 13} The Fifth District has twice decided the issue and without resolving the conflict in the language in R.C. 2929.41(A) and (B)(1), it concluded that "a trial court is authorized to make a misdemeanor jail sentence consecutive to a felony prison sentence." *State v. Vanmeter*, 5th Dist. Fairfield No. 2011-0032, 2011-Ohio-6110, ¶ 24. *See also State v. Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193, ¶ 21 ("Pursuant to

R.C. § 2929.41(B)(1), we find that the trial court had the authority to specify that the misdemeanor and felony sentences herein run consecutively."); *State v. Farley,* 5th Dist. Ashland No. 11-COA-042, 2012-Ohio-3620, ¶ 30-34.[2]

{¶ 14} The Eighth District held similarly in *State v. Barker,* 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038, ¶ 18-22, however, the issue was presented less directly. There the trial court sentenced the defendant in connection with his convictions for two felonies and one misdemeanor. It ordered the two felony sentences to run consecutively and with respect to the misdemeanor conviction, the trial court sentenced defendant to "time served" instead of crediting the days he had already spent in jail against his felony sentences. The effect of this was that defendant would serve a misdemeanor sentence consecutive to his felony sentences. The court of appeals affirmed and in reaching its conclusion, the court relied on *Hughley*, which, as explained above, was decided after *Foster* but before H.B. 86 took effect.

{¶ 15} We believe that the legislature, through H.B. 86, has evidenced its intent to vest trial judges with discretion in fashioning appropriate criminal sentences. To that end, we see no reason that the trial courts should have any less discretion when imposing sentences for offenders who commit both felonies and misdemeanors. But because H.B. 86 revived the provision of the statute that *Foster* excised, we believe that pre-*Foster* precedent must be applied. Consistent with *Perry,* 6th Dist. Wood No. WD-99-026,

[2] The Fifth District's decision and reasoning in *Farley* suggests to us that the court did not take into account that R.C. 2929.41(A) had been revived by H.B. 86.

2000 WL 125807 and *Garrett,* 6th Dist. Erie No. E-02-015, 2003-Ohio-5185, we, therefore, hold that the ambiguity created by provisions (A) and (B)(1) of R.C. 2929.41 must be construed against the state and that the trial court should have ordered that Polus' felony and misdemeanor sentences be served concurrently.[3] We further find that our decision is in conflict with the Fifth District's decision in *Vanmeter* and *Varney* and the Eighth District's decision in *Barker.*

{¶ 16} Article IV, Section 3(B)(4) of the Ohio Constitution states that "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

{¶ 17} In order to qualify for certification to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, a case must meet the following three conditions:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict

[3] It is worth noting that in *State v. Leach, infra*, discussed below, the appellant appealed a sentence where the court ordered him to serve a term of incarceration "in prison" for a misdemeanor offense. Although the appellant did not present the issue of the court's authority to impose consecutive sentences for felony and misdemeanor convictions, the state noted in its brief that the trial court had authority to order consecutive sentences under R.C. 2929.41(B). As it was not pertinent to the issue appealed, we did not address that contention.

must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

{¶ 18} We find that our holding today is in conflict with the Fifth District Court of Appeals' decisions in *State v. Vanmeter*, 5th Dist. Fairfield No. 2011-0032, 2011-Ohio-6110 and *State v. Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193. It is also in conflict with the Eighth District's decision in *State v. Barker*, 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038. Accordingly we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue:

Whether a trial court may impose consecutive sentences for felony and misdemeanor convictions under R.C. 2929.41(B)(1).

{¶ 19} The parties are directed to S.Ct.Prac.R. 5.03 and S.Ct.Prac.R. 8.01 for guidance.

{¶ 20} We now turn to the second argument raised by Polus in this appeal. Under R.C. 2929.24(A)(1), a trial court may impose a jail sentence of not more than 180 days for an offense constituting a first-degree misdemeanor. The trial court sentenced Polus to six months' incarceration—in excess of the 180 days permitted under the statute. *See, e.g., State v. Pierce*, 4th Dist. Meigs No. 10CA10, 2011-Ohio-5353, ¶ 10 (recognizing that "six months is not the same as one hundred eighty days because each month has a

different number of days."); *see also State v. Pippen*, 4th Dist. Scioto No. 12CA3526, 2013-Ohio-2239, ¶ 20.

{¶ 21} The state does not appear to disagree that the sentence should have been "180 days" instead of "six months." The disagreement between Polus and the state is whether the matter should be remanded to the lower court for resentencing or whether this court should simply correct the sentence under App.R. 12(B).

{¶ 22} Polus argues that remand is necessary. He cites *Pierce*. In that case, the Fourth District vacated the sentence and remanded the matter to the trial court for resentencing. The state cites our decision in *State v. Leach*, 6th Dist. Lucas No. L-09-1327, 2011-Ohio-866, where rather than remanding the matter to the trial court for resentencing, we corrected a judgment entry under the authority of App.R. 12(B) in order to clarify that the term of the defendant's sentence was to be served "in jail" as opposed to "in prison."

{¶ 23} Because a term of 6 months exceeds 180 days, we can reasonably assume that the trial court intended to impose the maximum sentence permitted under R.C. 2929.24(A)(1). Thus, under the circumstances of this case, where the trial court's intent is clear, it is appropriate and is in the interest of judicial economy for us simply to modify the judgment entry in case No. CR13-1275 to substitute "180 days" for "six months." In light of our ruling on the first issue raised by Polus, we must also modify the judgment entry insofar as it imposes consecutive sentences for Polus' felony and misdemeanor convictions. The entry should now read:

It is ORDERED that defendant serve a term of 11 months in prison as to count 1 and serve a term of 180 days in the Corrections Center of Northwest Ohio as to count 2. The sentences imposed in count 1 and count 2 are ordered served concurrently to each other. * * *

III. Conclusion

{¶ 24} We find that Polus was improperly ordered to serve consecutive sentences for his felony and misdemeanor convictions. Insofar as our decision is in conflict with the Fifth and Eighth District Courts of Appeals, we certify the conflict to the Ohio Supreme Court. We also find that Polus was improperly sentenced to a 6-month sentence instead of a 180-day sentence. We, therefore, reverse the trial court's judgment and modify the June 3, 2013 judgment of the Lucas County Court of Common Pleas as specified above. The costs of this appeal are assessed to the state pursuant to App.R. 24.

Judgment reversed.

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

Arlene Singer, J. _____

JUDGE

Stephen A. Yarbrough, P.J. _____

JUDGE

James D. Jensen, J. _____
CONCUR.

JUDGE