[Cite as *State v. Eatmon*, 2009-Ohio-4564.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92048

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AMEER EATMON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506832

BEFORE: Rocco, P.J., Dyke, J., and Jones, J.

RELEASED: September 3, 2009

JOURNALIZED:

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Ameer Eatmon appeals from his convictions and the sentences imposed after a jury found him guilty of trafficking in marijuana and possession of criminal tools.

{¶ 2} Eatmon presents three assignments of error. The first two present a claim that his trial counsel provided ineffective assistance; his third challenges the trial court's decision to impose consecutive terms.

{¶ 3} Upon a review of the record, this court finds none of his assignments of error has merit. Therefore, Eatmon's convictions and sentences are affirmed.

{¶ 4} Eatmon's convictions result from an incident that occurred on the afternoon of December 13, 2007. According to the testimony presented at trial, Cleveland police Sixth District Vice Detectives Robert Glover and Kevin Freeman were on patrol in an unmarked car, watching for illegal activity. Glover turned the car down Tacoma Avenue, traveling the wrong way on the one-way street.

{¶ 5} Glover looked ahead to see a truck stopped in the middle of the street. A man was leaning into the driver's side window. Glover continued, intending to warn the driver to stop impeding traffic, and saw the man hand some cash to the driver, later identified as Eatmon. As Glover came closer, he saw Eatmon hand the man a plastic bag that contained a green material.

{¶ 6} Believing he observed a drug transaction, Glover stopped his car in front of Eatmon's and exited. The man outside Eatmon's car looked up, understood the police had arrived, and hurriedly went into the nearest house.

{¶ 7} Glover pursued him as Freeman watched over Eatmon and his passenger. However, the man refused to answer Glover's demand to open the door, so Glover returned to Eatmon's truck.

{¶ 8} Glover recognized Eatmon as a man he recently had stopped and who lacked a valid driver's license. He ordered Eatmon out of the truck, intending to cite him.

{¶ 9} Glover then performed a cursory search of the area where Eatmon had been sitting for weapons; instead, he found six packages of marijuana. The total weight proved to be in excess of 58 grams. Eatmon was arrested at that point for "VSDL," i.e., "violation of state drug laws." The pat-down search yielded a wad of cash from his right pants-pocket that totaled $1760, and Eatmon carried two cell phones.

{¶ 10} Eatmon subsequently was indicted on two separate counts of drug trafficking, i.e., sale and preparation for sale, and one count of possession of criminal tools. Each count contained two forfeiture specifications.

{¶ 11} Eatmon received assigned counsel, who filed a motion to suppress evidence. At the outset of the hearing, counsel indicated the purpose of the motion was to challenge whether the police had a legitimate basis to conduct the stop and the search. After hearing Glover's testimony, the trial court denied the motion.

{¶ 12} Eatmon's case proceeded to a jury trial approximately a month later. The state presented the testimony of both Glover and Freeman. After his motion for acquittal was denied, Eatmon presented three witnesses of his own; they asserted that only his passenger was selling drugs.

{¶ 13} The jury found Eatmon guilty of the charges. The trial court also found him guilty of the specifications. Eatmon was sentenced to a one-year prison term for each count; counts one and two were to be served concurrently, but count three was ordered to be served consecutively to them, for a total of two years.

{¶ 14} Eatmon presents three assignments of error. His first and second assignments of error will be addressed together, since they both present a claim of ineffective assistance of counsel.

{¶ 15} Eatmon asserts counsel's decisions to cross-examine Glover at trial without a transcript of the suppression hearing in hand, and to permit the prosecutor to ask extensive leading questions on direct examination of the witnesses, fell below an objective standard of reasonable representation.

{¶ 16} A claim of ineffective assistance of counsel requires a demonstration that, first, trial counsel's performance fell below an objective standard of reasonable representation, and, second, the defendant was prejudiced thereby. *State v. Bradley* (1989), 42 Ohio St.3d 136. The burden is on the appellant to prove ineffectiveness of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98. Trial

counsel is strongly presumed to have rendered adequate assistance, and an appellate court will not second-guess what could be considered to be a matter of trial strategy. Id.

{¶ 17} If Eatmon had not been represented by the same attorney at both the suppression hearing and the trial, he might have a more persuasive argument. As it is, the record reflects trial counsel remembered Glover's testimony from the suppression hearing, and challenged the witness's recollections accordingly. This was a matter of trial strategy; having a copy of the transcript would have added little to counsel's arsenal.

{¶ 18} Similarly, the record also reflects trial counsel did make some effort to raise an objection to the leading nature of the prosecutor's questions, but the court overruled his objections when he did so. Under these circumstances, defense counsel ceased his challenges, presumably so as not to appear overly contentious to the jury. The witness's answers, moreover, became more detailed than the prosecutor's questions, which made the point moot.

{¶ 19} Since the record thus fails to demonstrate trial counsel provided ineffective assistance, Eatmon's first and second assignments of error are overruled.

{¶ 20} In his third assignment of error, Eatmon asserts the trial court imposed an improper sentence in choosing to impose consecutive prison terms. He cites as authority for his position cases that predate *State v. Foster*, 109 Ohio

St.3d 1, 2006-Ohio-856. Eatmon claims the United States Supreme Court's opinion in *Oregon v. Ice* (2009), _U.S._, 129 S.Ct. 711 has "abrogated" *Foster*, and, thus, reestablished the constitutionality of the statutes struck down by that case. This court does not agree with Eatmon's claim.

{¶ 21} The Ohio Fourth Appellate District observed in *State v. Jones*, Greene App. No. 08CA0008, 2009-Ohio-694, that *Oregon v. Ice* "held that the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses * * * ." (Emphasis added.)

{¶ 22} From this observation, rather than determining that our supreme court was wrong, the court in *State v. Starett*, Athens App. No. 07CA30, 2009-Ohio-744, at ¶35 has decided that "Ohio's revised sentencing scheme, post-*Foster*, which essentially allows trial judges the discretion to impose or not impose consecutive sentences, passes constitutional muster, according to *Oregon*, supra." (Emphasis added.) The *Starett* court did, however, further note the following:

{¶ 23} "The particular question in *Oregon v. Ice*, supra, however, dealt with whether Oregon's sentencing scheme, which constrains 'judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences[,]' transgresses the Sixth Amendment 'as construed in *Apprendi* and *Blakely*.' In response to that question, the United States Supreme

Court held that 'in light of historical practice and the authority of States over administration of their criminal justice systems, that the Sixth Amendment does not exclude Oregon's choice.' Thus, based upon this reasoning, it appears that Ohio's sentencing scheme, even pre-*Foster*, which required judicial fact-finding, would have passed scrutiny under *Oregon v. Ice*, at least insofar as its application to the imposition of consecutive sentences." Id. at fn. 2.

{¶ 24} These cases have been acknowledged by this court in *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264, fn. 3, but this court declined directly to comment on the propriety of those decisions. Similarly, when presented with an opportunity to address the issue of whether *Oregon v. Ice*, supra, has abrogated *Foster*, the Ohio Supreme Court, while declining to directly do so, nevertheless indicated it did not. See *State v. Elmore*, Slip Opinion No. 2009-Ohio-3478, ¶35.

{¶ 25} Under these circumstances, this court will continue to follow its own precedent, along with the precedent set forth by other Ohio districts courts of appeals, which have determined that, until the Ohio Supreme Court states otherwise, *Foster* remains binding. See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, ¶29; *State v. Miller*, Lucas App. No. L-08-1314, 2009-Ohio-3908, ¶18; *State v. Krug*, Lake App. No. 2008-L-085, 2009-Ohio-3815, fn. 1; *State v. Franklin*, Franklin App. No. 08AP-900, 2009-Ohio-2664, ¶18.

{¶ 26} Accordingly, Eatmon's third assignment of error also is overruled.

{¶ 27} His convictions and sentences are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

LARRY A. JONES, J., CONCURS
ANN DYKE, J., CONCURS IN JUDGMENT ONLY AND
DISSENTS IN PART (SEE ATTACHED OPINION)

ANN DYKE, J., CONCURRING IN JUDGMENT ONLY AND DISSENTING IN PART:

{¶ 28} I concur with the majority's conclusion that appellant's counsel rendered effective assistance. I, however, dissent with regard to whether the trial court erred in failing to consider R.C. 2929.14(E)(4) prior to imposing

consecutive sentences and noting that consideration on the record pursuant to R.C. 2929.19(B)(2).

{¶ 29} Prior to February 2006, trial courts were required to make certain factual findings on the record prior to imposing consecutive sentences pursuant to R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2). In February of 2006, the Supreme Court of Ohio rendered R.C. 2929.14(E)(4) and 2929.19(B)(2) unconstitutional to the extent these statutes required judicial factfinding before imposing consecutive sentences. Id. at 29. The court based its decision on the United States Supreme Court's opinions in *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. *Foster*, supra at 21-22. Accordingly, the *Foster* court severed R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2) and excised the requirement that the trial court make findings of fact and state those findings on the record before imposing consecutive terms. Id. at 29. The Ohio legislature, however, did not repeal these statutes, leaving them still in effect even though not effective.

{¶ 30} Since then, the United States Supreme Court in *Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517, upheld a judicial fact-finding statute similar to R.C. 2929.14 and called into question the *Foster* court's excision of R.C. 2929.14(E)(4) and 2929.19(B)(2). The Court found the rules promulgated in *Apprendi* and *Blakely* not applicable to consecutive sentencing decisions and

held that laws that require judges "to find certain facts before imposing consecutive, rather than concurrent, sentences" do not violate the Sixth Amendment. Id.

{¶ 31} It is undoubtedly clear that the decision in *Oregon v. Ice*, from the superior court of this country, is in direct contradiction to the Ohio court's conclusion in *Foster* regarding R.C. 292914(E)(4) and R.C. 2929.19(B)(2). In *Oregon v. Ice*, the U.S. Supreme Court specifically cited the *Foster* case when it stated "State high courts have divided over whether the rule of *Apprendi* governs consecutive sentencing decisions. We granted review ***to resolve the question.*** 552 U.S. ____, 128 S.Ct. 1657, 170 L.Ed.2d 353 (2008)." Id. (Emphasis added.) The question granted for review and decided in the negative by the U.S. Supreme Court was "Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant."

{¶ 32} The Ohio Supreme Court has not expressly addressed the implications of *Oregon v. Ice*, supra. The court, however, need not do so. It is axiomatic that "[d]ecisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, * * *." *Krause v. State* (1972), 31 Ohio St.2d 132, 148, 285

N.E.2d 736 (Schneider, Justice (concurring)), quoting 21 C.J.S. Courts § 197, p.343. The decision in the *Oregon v. Ice* case is binding upon the Supreme Court of Ohio and is binding upon every lower court thereafter, including this one. Accordingly, this court cannot and should not disregard the decision. Consequently, I would apply the decision in *Oregon v. Ice*, supra, to the instant matter and find that the trial court erred in failing to consider R.C. 2929.14(E)(4) prior to imposing consecutive sentences and noting that consideration on the record pursuant to R.C. 2929.19(B)(2).

{¶ 33} The majority also cited *State v. Elmore*, supra, a recent decision from the Supreme Court of Ohio, and stated, "Similarly, when presented with an opportunity to address the issue of whether *Oregon v. Ice*, supra, has abrogated *Foster*, the Ohio Supreme Court, while declining to directly do so, nevertheless indicated it did not." Despite the majority's broad assertion to the contrary, the Supreme Court of Ohio did not indicate in any way that *Oregon v. Ice* did not affect the *Foster* decision. In *Elmore*, the court specifically stated:

{¶ 34} "*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. We will not address fully all ramifications of *Oregon v. Ice*, since neither party sought the opportunity to brief the issue before oral argument."

{¶ 35} Unlike the *Elmore* case, this court must fully address the ramifications of *Oregon v. Ice*, supra. Here, appellant briefed prior to oral argument the issue of whether the trial court erred when it failed to make certain predicate fact-findings before imposing consecutive sentences and stating those findings on the record pursuant to R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2). In *Elmore*, the defendant never presented this issue prior to oral argument.

{¶ 36} Therefore, while I would affirm appellant's convictions, I would find appellant's third assignment of error with merit and vacate his sentence.