[Cite as *State v. Marcano*, 2009-Ohio-6458.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92449

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MADELYNE MARCANO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-366128

BEFORE: Gallagher, P.J., Celebrezze, J., and Sweeney, J.

RELEASED: December 10, 2009

JOURNALIZED:

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Madelyne Marcano, appeals her sentence from the Cuyahoga County Court of Common Pleas.

{¶ 2} In 1998, Marcano pled guilty to drug possession with a major drug offender ("MDO") specification, drug possession, and possession of criminal tools. She was sentenced to a total of 15 years in prison, but was not advised of the mandatory term of postrelease control.

{¶ 3} In 2008, Marcano filed a motion for new sentencing hearing in light of the Ohio Supreme Court's decisions in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197.

{¶ 4} At the new sentencing hearing, Marcano was again sentenced to the mandatory ten years for possession of drugs with a major drug offender specification, with an additional five years pursuant to R.C. 2925.11(C)(6)(f) and R.C. 2929.14(D)(3)(b), which run consecutively, as well as three years for the possession of drugs charge, and eight months for the possession of criminal tools charge, which were to run concurrent to the ten-year sentence in Count 1, for a total of 15 years. She was advised of the mandatory postrelease control.

{¶ 5} Marcano appeals, asserting two assignments of error for our review. Her first assignment of error states the following:

{¶ 6} "The trial court erred in imposing a term of incarceration on the MDO specification as the imposition of such time violates the Sixth Amendment to the United States Constitution."

{¶ 7} Under this assignment of error, Marcano asserts that the trial court erred when it sentenced her to an additional five years in prison pursuant to R.C. 2929.14(D)(3)(b). Marcano argues that in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court held that R.C. 2929.14(D)(3)(b) is unconstitutional under *Aprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296, because it required judicial fact-finding before an additional one to ten years could be imposed. The court severed that section to remedy the constitutional violation.

{¶ 8} Marcano argues that R.C. 2929.14(D)(3)(b) was severed in its entirety, whereas the state argues that only the requirement of judicial fact-finding was severed.

{¶ 9} Marcano pled guilty to possession of heroin in an amount exceeding 250 grams. According to R.C. 2925.11(C)(6)(f), "If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree *and may impose an additional mandatory prison*

term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code." (Emphasis added.) R.C. 2929.14(D)(3)(b) permits the court to sentence an MDO to an additional mandatory term of one to ten years.

{¶ 10} In *State v. Pena*, Franklin App. No. 06AP-688, 2007-Ohio-4516, the Tenth District addressed this same issue and found that *Foster* only severed the fact-finding requirement, not the entire section. In *Pena*, the defendant was found guilty of possession of cocaine in an amount equal to or exceeding 1,000 grams, making him an MDO, requiring a mandatory ten-year prison term. Pena was sentenced to the mandatory ten years, along with an additional ten years for the major drug offender finding pursuant to R.C. 2929.14(D)(3)(b). Pena argued that section R.C. 2929.14(D)(3)(b) was severed in its entirety.

{¶ 11} The court disagreed, stating that *Foster* held "that R.C. 2929.14(D)(2)(b) and (3)(b) are capable of being severed. After the severance, judicial fact-finding is not required before imposition of additional penalties for repeat-violent-offender and major-drug-offender specifications." *Pena*, supra. The court also noted that in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, the Ohio Supreme Court stated that they "severed R.C. 2929.14(D)(3)(b) to remedy the constitutional violation. * * * As the statute now stands, a major drug offender still faces the mandatory maximum

ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed." (Internal citations omitted.) *Pena*, supra. The Tenth District concluded that the effect of the *Foster* judgment was to sever only the language that required judicial fact-finding as a prerequisite to imposing the additional add-on sentence when a defendant is found to be an MDO. Id.

{¶ 12} We agree with the Tenth District and find that *Foster* only severs the language requiring judicial fact-finding in R.C. 2929.14(D)(3)(b). Our decision is consistent with this court's holding in *State v. Roberson*, Cuyahoga App. No. 88338, 2007-Ohio-2772, wherein the court found that *Foster* only severed the offending portion of R.C. 2929.14(D)(2)(b), for repeat violent offenders.

{¶ 13} Finally, the argument that *Oregon v. Ice* (2009), 129 S.Ct. 711, has "abrogated" *Foster* has been addressed by this court in *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. This court did not agree with Eaton's argument and stated that "this court will continue to follow its own precedent, along with the precedent set forth by other Ohio district courts of appeals, which have determined that, until the Ohio Supreme Court states otherwise, *Foster* remains binding." Id.; see, also, *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.

{¶ 14} For the foregoing reasons, we overrule Marcano's first assignment of error.

{¶ 15} Marcano's second assignment of error states:

{¶ 16} "The trial court erred in ordering the appellant to complete a five-year term of post-release control when the appellant had already completed her prison sentence on the underlying offense."

{¶ 17} Marcano argues that she had already completed her mandatory ten years incarceration on Count 1 and, therefore, the trial court was precluded from ordering her to serve a term of postrelease control in connection with that count, citing *State v. Bezak*, supra. We find no merit to Marcano's claim because she was sentenced to a total of 15 years in prison on Count 1, not ten years. Accordingly, Marcano's second assignment of error is overruled.

Judgment 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR