

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92895

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BENJAMIN WAITE

DEPENDANT APPELLANT

**JUDGMENT:
AFFIRMED IN PART; SENTENCE
REVERSED IN PART AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-490494, CR-513417, and CR-515222

BEFORE: Blackmon, P.J., Dyke, J., and Celebrezze, J.

RELEASED: April 22, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).
PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Benjamin Waite appeals his sentence and assigns the following errors for our review:

“I. The trial court erred in imposing a sentence of three years in Case No. 490494 when the court did not originally suspend a term of incarceration as required by R.C. 2929.19(B).”

“II. The trial court erred in imposing consecutive terms of incarceration without providing findings and reasons in support of those findings.”

“III. The trial court erred in its belief that consecutive sentences are required when a defendant is found to be a probation violator.”

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court’s judgment in part and reverse and remand Waite’s sentence for further proceedings consistent with this opinion. The apposite facts follow.

Facts

{¶ 3} On February 12, 2007, Waite pleaded guilty in Case No. CR-490494 to two counts of unlawful sexual conduct with a minor. On March 29, 2007, the trial court sentenced him to two years of community control sanctions. He was also ordered to pay \$1,328.08 in restitution to the victim. The court failed to state in the sentencing entry the specific term of prison that would be imposed if Waite violated the terms of his community control.

{¶ 4} On February 9, 2009, Waite appeared before the court and entered a guilty plea in two separate cases. In Case No. CR-513417, he pleaded guilty to one count of robbery. In Case No. CR-515222, he pleaded guilty to one count of intimidation. The court sentenced Waite to three years in prison for the robbery count and four years in prison for the intimidation count. The court also found Waite violated the conditions of his

community control and sentenced him to three years in prison. Thus, he received a total of ten years in prison.

Sentence for Violating Community Control

{¶ 5} In his first assigned error, Waite argues that the court erred by sentencing him to three years in prison for his violation of community control. He contends that the court failed to impose a suspended sentence when it initially imposed the community control. The state concedes that the trial court erred.

{¶ 6} At the sentencing hearing the trial court informed Waite that if he violated the terms of his community control, the court would impose a ten-year sentence. In its journal entry, however, the trial court failed to notify Waite of the specific prison term that would be imposed if he violated the terms of community control. This court in *State v. Goforth*, Cuyahoga App. No. 90653, 2008-Ohio-5596, quoting *State v. McWilliams*, 9th Dist. No. 22359, 2005-Ohio-2148, addressed an identical situation and stated:

“Based on the continuous goal of “truth in sentencing,” a trial court must first notify a defendant at a sentencing hearing of the specific prison term that it will impose if he violates community control. Notification must also be contained in the accompanying sentencing journal entry.”

{¶ 7} In *Goforth*, we remanded the sentence for the trial court to vacate the sentence imposed for the violation. Thus, in the instant case, because the trial court failed to include in the sentencing entry that Waite would be subject to a specific prison term if he violated the community control sanction, it improperly imposed a sentence for Waite’s community control violation. Accordingly, Waite’s first assigned error is sustained, and

the matter is reversed in part and remanded for the trial court to vacate the prison term imposed for the violation.

Consecutive Sentences

{¶ 8} In his second assigned error, Waite argues the trial court erred by failing to provide findings and reasons for imposing consecutive sentences. Waite admits that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but relies on *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrect and should be overturned.

{¶ 9} This court has repeatedly chosen to apply the holding in *Foster* rather than *Ice* and reserve any reconsideration for the Ohio Supreme Court. Specifically, in *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558, this court stated: “We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart from the pronouncements in *Foster* until the Ohio Supreme Court orders otherwise.” Id. at ¶33, citing *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; and *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. See, also, *State v. Moore*, Cuyahoga App. No. 92654, 2010-Ohio-770. Until the Ohio Supreme Court addresses the issue, we will continue to follow the precedent established in this district.¹ Accordingly, Waite’s second assigned error is overruled.

¹We anticipate that the Ohio Supreme Court will consider the impact of *Ice* on *Foster* in *State v. Hodge*, Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court.

Consecutive Prison Term for the Violation

{¶ 10} In his third assigned error, Waite argues the trial court erred by concluding that the term imposed for the violation had to run consecutive to the other terms. Because we have vacated the term imposed for the violation, Waite’s third assigned error is moot.

{¶ 11} Judgment affirmed in part; sentence reversed in part and remanded for proceedings consistent with this opinion.

{¶ 12} It is ordered that appellant and appellee share equally the costs herein taxed.

{¶ 13} The court finds there were reasonable grounds for this appeal.

{¶ 14} It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR