

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93190

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEE BILLI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510063

BEFORE: Boyle, P.J., Celebrezze, J., and Cooney, J.

RELEASED: May 27, 2010

**JOURNALIZED:
ATTORNEYS FOR APPELLANT**

Robert L. Tobik
Cuyahoga County Public Defender
BY: Cullen Sweeney
John T. Martin
Assistant Public Defenders
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Jennifer A. Driscoll
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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).

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Lee Billi, appeals his sentence, raising the following two assignments of error:

{¶ 2} “I. The sentence imposed is contrary to law and must be vacated because the trial court failed to advise appellant about the consequences of violating postrelease control.

{¶ 3} “II. Appellant’s consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate the findings and reasons necessary to justify it.”

{¶ 4} For the reasons discussed below, we find no merit to the second assignment of error and therefore uphold the ten-year prison sentence imposed by the trial court. But because the trial court failed to properly impose postrelease control, an error conceded by the state, we sustain the first assignment of error in part and remand for the trial court to correct the error by applying the procedures set forth in R.C. 2929.191.

Procedural History and Facts

{¶ 5} In February 2009, Billi pled guilty to one count of inciting violence, in violation of R.C. 2903.02 (a felony of the third degree); 38 counts of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(3) (felonies of the second degree); and one count of possession of a criminal tool, in

violation of R.C. 2923.24 (a felony of the fifth degree). All counts carried a forfeiture specification.

{¶ 6} On March 26, 2009, the trial court sentenced Billi to ten years in prison and classified him as a Tier II sex offender. The trial court also informed Billi that his sentence carried a mandatory term of five years of postrelease control. The trial court, however, failed to advise Billi at the sentencing hearing of the ramifications if he violated postrelease control, despite having informed him during the plea colloquy. The sentencing journal entry also incorrectly stated three years of postrelease control as part of the sentence, instead of reflecting the mandatory five years as stated by the trial judge during the hearing.

{¶ 7} Billi now appeals his sentence, urging this court to vacate it and remand for a new sentencing hearing.

Postrelease Control

{¶ 8} In his first assignment of error, Billi argues that the trial court failed to properly impose postrelease control because it failed to advise him of the ramifications if he violated postrelease control. Specifically, he argues that the court failed to comply with R.C. 2929.19(B)(3) and inform him that the parole board may impose a prison term for as much as one-half of his stated prison term originally imposed (i.e., five years) if he violated a condition of postrelease control. The state concedes the error.

{¶ 9} We further recognize plain error in the sentencing journal entry; it incorrectly states that Billi is subject to three years of postrelease control, instead of the mandatory five years required for sex offenses under R.C. 2967.28.

{¶ 10} We now must address, however, the proper mechanism to correct the error. The Ohio Supreme Court recently held that for “sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus. Here, Billi was sentenced in March 2009; he therefore is subject to the “sentence-correction mechanism of R.C. 2929.191.” *Id.* at ¶27. Notably, in *Singleton*, the court specifically recognized that R.C. 2929.191 does not afford a defendant a de novo sentencing hearing:

{¶ 11} “The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender’s sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose postrelease control at the original sentencing.” *Id.* at ¶24.

{¶ 12} Accordingly, we sustain Billi’s first assignment of error in part and remand the case for a R.C. 2929.191 hearing.

Consecutive Sentences

{¶ 13} In his second assignment of error, Billi argues that the sentence is contrary to law because the trial court imposed consecutive sentences without making the findings required by R.C. 2929.14(E)(4). He acknowledges 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 he relies on *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that *Foster* was wrongly decided and should be overturned.¹

{¶ 14} This court, however, has previously addressed this argument many times and consistently rejected it. See, e.g., *State v. Storey*, 8th Dist. No. 92946, 2010-Ohio-1664; *State v. Moore*, 8th Dist. No. 92654, 2010-Ohio-770; *State v. Woodson*, 8th Dist. No. 92315, 2009-Ohio-5558; *State v. Reed*, 8th Dist. No. 91767, 2009-Ohio-2264; *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379; and *State v. Eatmon*, 8th Dist. No. 92048, 2009-Ohio-4564. Indeed, “[t]his court has repeatedly chosen to apply the holding in *Foster* rather than the holding in *Ice* and reserve any reconsideration for the Ohio Supreme Court. * * * As the high court in this state, the Ohio Supreme Court’s decision in *Foster* is binding on lower courts. Accordingly, it is not within our purview to step into the Supreme Court’s

¹We note that the Ohio Supreme Court has accepted jurisdiction to decide this exact issue and that the case is currently pending before the court in *State v. Hodge*, Case No. 2009-1997.

shoes and reconsider *Foster* in light of the decision in *Ice*.” *Moore*, 2010-Ohio-770, ¶14.

{¶ 15} In accordance with this court’s precedent, we overrule the second assignment of error.

Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the 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.

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

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR