

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92877

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY SHELINE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501364

BEFORE: Boyle, P.J., Sweeney, J., and Jones, J.

RELEASED: June 3, 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).

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Timothy Sheline, appeals his sentence, raising the following single assignment of error:

{¶ 2} “The lower court erred and denied the appellant due process of law when it imposed consecutive sentences without making findings required by R.C. 2919.14(E)(4) and *Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711.”

{¶ 3} Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 4} Sheline was indicted for four counts of receiving stolen property, in violation of R.C. 2913.51(A), and two counts of unauthorized use of motor vehicle, in violation of R.C. 2913.03. Sheline pled no contest, and the trial court found him guilty on all of the charges. The trial court deferred sentencing to a later date, ordered a presentence investigative report, and allowed Sheline to be released on bond. Sheline failed to appear for his sentencing hearing but was subsequently arrested on a capias warrant and returned to court. Emphasizing Sheline’s failure to appear for the originally scheduled sentencing hearing and his extensive criminal history, the trial court made the following findings prior to imposing a sentence:

{¶ 5} “Therefore I’m going to impose the following sentence based on the fact that you did not return to this courtroom for sentencing, based on the fact that you have an extensive criminal record which involves some crimes of fleeing,

some crimes of never showing up to court, and I find that you still exhibit those patterns of behavior at this point in time.”

{¶ 6} The trial court then merged the first three counts and sentenced Sheline to a total of three-and-one-half years in prison, ordering that counts one, four, and five all run consecutive to one another.

Consecutive Sentences

{¶ 7} In his single assignment of error, Sheline argues that the sentence is contrary to law and “runs afoul of Due Process” 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

{¶ 8} The state counters that the trial court complied with R.C. 2929.14(E)(4) and made findings that justify the imposition of consecutive sentences. Although we cannot say that the trial court made the findings required under R.C. 2929.14(E)(4), we nonetheless find no error. *Foster* is controlling; therefore, the trial court was not required to make R.C. 2929.14(E)

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.

findings before imposing consecutive sentences.

{¶ 9} Notably, this court has repeatedly addressed Sheline’s exact argument raised in this case, i.e., *Foster* is no longer controlling, 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 shoes and reconsider *Foster* in light of the decision in *Ice*.” *Moore* at ¶14.

{¶ 10} In accordance with this court’s precedent, we overrule Sheline’s sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover of 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.

MARY J. BOYLE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR