

[Cite as *State v. Banna*, 2010-Ohio-4887.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93871

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

MADHAT T. BANNA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520190-A

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

RELEASED AND JOURNALIZED: October 7, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Madhat T. Banna appeals from the nine-year sentence imposed after he entered guilty pleas to two counts of sexual battery, a second-degree felony.

{¶ 2} Banna presents two assignments of error, claiming the trial court erred in imposing consecutive terms without making statutory findings and, further, his trial counsel rendered ineffective assistance for failing to raise this issue at the sentencing hearing.

{¶ 3} This court finds that the trial court committed no error in sentencing. Therefore, Banna's trial attorney had no reason to object, and Banna cannot demonstrate his claim of ineffective assistance of counsel. Banna's sentence is affirmed.

{¶ 4} Banna originally was indicted in this case on four counts. He was charged with three counts of rape of a child under the age of thirteen, R.C. 2907.02(A)(1)(b), and one count of kidnapping, R.C. 2905.01(A)(4). He pleaded not guilty at his arraignment and received assigned counsel.

{¶ 5} Eventually, the parties entered into a plea agreement. In exchange for Banna's pleas of guilty to counts one and two, amended to the charge of sexual battery, and his understanding that he would not receive a sentence of "probation," the state would dismiss the other two counts.

{¶ 6} The trial court conducted a thorough colloquy with Banna prior to accepting his guilty pleas to the amended charges. The trial court advised Banna he could potentially be sentenced to maximum and consecutive prison terms for the two second-degree felonies, for a "maximum of 16 years." Banna indicated he understood.

{¶ 7} The case proceeded to sentencing approximately three weeks later. The trial court indicated it had reviewed the presentence report, and accepted a letter written by the victim. The prosecutor then outlined the facts of the case in relation to the "seriousness" and "recidivism" factors set forth in R.C. 2929.12. In

so doing, the prosecutor indicated Banna had a long history of misdemeanor criminal convictions, and requested the court impose a “significant” prison term for each offense.

{¶ 8} After listening to defense counsel and Banna, the trial court imposed consecutive terms of three years and six years for Banna’s two convictions.

{¶ 9} Banna appeals his sentence with two assignments of error.

{¶ 10} **“I. The trial court erred by sentencing the appellant to serve consecutive sentences without submitting reasons in support pursuant to R.C. 2929.14(E).**

{¶ 11} **“II. The failure to object to consecutive sentences or to request the findings of the court deprived the appellant of his right to effective**

{¶ 12} assistance of counsel.”

{¶ 13} Banna argues in his first assignment of error that the trial court was required to make findings pursuant to R.C. 2929.14(E)(4) before imposing consecutive terms for his convictions. He claims the court’s failure to do so mandates reversal of his sentence.

{¶ 14} As authority for his argument, Banna cites *Oregon v. Ice* (2009), ___U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, and asserts that the United States Supreme Court’s decision has abrogated *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. He thus contends that the statutory findings

required by R.C. 2929.14(E)(4) were revived by implication, because the Ohio legislature never repealed the statutory provisions that were excised by *Foster*.

{¶ 15} The Ohio Supreme Court acknowledged the decision in *Ice* in *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582, but declined to address fully all of its ramifications.¹ Rather, *Elmore* followed *Foster*, quoting from the earlier decision that trial courts “are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.”

{¶ 16} In addressing Banna’s argument, this court notes he failed in the trial court to either raise this issue or request findings. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237, ¶15. Moreover, until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. See *State v. McCornell*, Cuyahoga App. No. 93274, 2010-Ohio-3086, ¶12; *State v. Rosa*, Cuyahoga App. No. 93108, 2010-Ohio-2215, ¶19.²

{¶ 17} Therefore, the trial court possessed the discretion and inherent authority to determine that Banna’s prison sentences for his two convictions, both of which fell within the statutory range for a second-degree felony, should be

¹The supreme court noted that neither party sought the opportunity to brief this issue before oral argument.

²In so stating, this court is mindful that the Ohio Supreme Court has accepted jurisdiction to decide the issue, and the case is currently pending before the court in *State v. Hodge*, 124 Ohio St.3d 1472, 2010-Ohio-354, 921 N.E.2d 245.

imposed consecutively. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328.

{¶ 18} Accordingly, Banna's first assignment of error is overruled.

{¶ 19} Banna presents a claim of ineffective assistance of counsel in his second assignment of error; it is based upon the argument he raises in his first assignment of error. To sustain such a claim, the defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 20} This court cannot conclude that, simply because trial counsel did not request the court to make findings prior to imposing sentence, his performance was deficient. *Rosa*, ¶33. Similarly, this court cannot conclude that prejudicial error occurred when the trial court did not specifically state its findings and reasons for imposing consecutive sentences. *Id.* Consequently, Banna's claim of ineffective assistance of counsel fails.

{¶ 21} Banna's sentences, accordingly, 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. 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

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR