

[Cite as *State v. McGhee*, 2011-Ohio-619.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95036

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYRAN MCGHEE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529055

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

RELEASED AND JOURNALIZED: February 10, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Tyran McGhee, appeals his sentence and seeks to have the sentence vacated or reversed and remanded for a new sentencing hearing.

For the following reasons, we reject appellant's arguments.

{¶ 2} On September 14, 2009, appellant was arrested and indicted on six counts after the police found him in possession of a loaded AK-47. On March 1, 2010, appellant pled guilty to having a weapon while under disability, a felony of the third degree, and assault on a police officer, a felony of the fourth degree. The remaining counts were nolle or dismissed. On

April 5, 2010, appellant was sentenced to one year on the third-degree felony and six months on the fourth-degree felony, to be run consecutively, for a total of 18 months. In imposing consecutive sentences, the trial court did not make specific findings of fact under R.C. 2929.14(E)(4) and R.C. 2929.41(A), in reliance on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶ 3} At the sentencing hearing, appellant was informed that upon the completion of his prison term, “the State of Ohio Adult Parole Authority will have the choice and not this court as to whether or not the State of Ohio Adult Parole Authority will supervise defendant for up to three years under what is called post release control[,] * * * and if he fails to meet the terms and conditions under post release control supervision, then the Adult Parole Authority can incarcerate the defendant for up to one half of the original sentence imposed by the Court.” The notice of postrelease control was documented in the journal entry, which noted that “post release control is part of this prison sentence for up to 3 years for the above felony under R.C. 2967.28.” It is from these sentencing entries that appellant now appeals. He raises two assignments of error for our review.¹

Law and Analysis

¹Appellant’s assignments of error are contained in the appendix to this opinion.

Validity of Notice of Postrelease Control

{¶ 4} In his first assignment of error, appellant argues that he is entitled to a de novo sentencing hearing because the court did not properly inform him of the result of a violation of postrelease control at his sentencing hearing. We disagree.

{¶ 5} Postrelease control is a “period of supervision by the adult parole authority after a prisoner’s release from imprisonment[.]” *Woods v. Telb*, 89 Ohio St.3d 504, 509, 2000-Ohio-171, 733 N.E.2d 1103, quoting R.C. 2967.01(N). The trial court must inform a defendant at his sentencing hearing that postrelease control is part of his sentence. *Id.* at 513.

{¶ 6} In the present case, appellant plead guilty to a third-degree felony and a fourth-degree felony. The postrelease control notice requirement for such felonies is set forth in R.C. 2929.19(B)(3)(d), which mandates that the court notify an offender at the sentencing hearing that postrelease control may be imposed upon his or her release from prison. Additionally, R.C. 2929.19(B)(3)(e) requires that the court notify an offender at the sentencing hearing that a violation of the postrelease control conditions may result in a prison term of up to one-half the original sentence. *Id.*

{¶ 7} Application of these Revised Code sections was addressed in *State v. Roche*, Cuyahoga App. No. 90089, 2008-Ohio-3560, where this court held that adequate notice of postrelease control is found where the defendant is

informed on felonies of the third, fourth, and fifth degree that postrelease control may be imposed for three years, and where the defendant is informed that a violation of postrelease control can result in a term of incarceration of up to one-half the original prison term. Id. at ¶6-7.

{¶ 8} Appellant's sentencing hearing took place on April 5, 2010. During the sentencing hearing, the court specifically informed appellant that, "[i]f the court imposes a prison term, upon the completion of that term, the State of Ohio Adult Parole Authority will have the choice and not this court as to whether or not the State of Ohio Adult Parole Authority will supervise the defendant *for up to three years* under what is called post release control * * * [i]f he fails to meet the terms and conditions under post release control supervision, then the Adult Parole Authority * * * can incarcerate the defendant *for up to one half of the original sentence* imposed by the court." (Emphasis added.)

{¶ 9} Upon issuing appellant's sentence of 18 months, the court reiterated to appellant, "[y]ou have post release control for up to three years."

The notice of postrelease control given to appellant during his sentencing hearing was documented in the court's journal entry.

{¶ 10} Based on the court's statements during appellant's sentencing hearing, we find that appellant was properly put on notice of postrelease control and the consequences associated with a violation of its conditions. In

accordance with R.C. 2929.19(B)(3)(d) and (e), the court adequately advised appellant during his sentencing hearing that he may be subject to postrelease control at the discretion of the adult parole authority and that a violation could result in a term of incarceration of up to one-half of the original prison term.

{¶ 11} Appellant also argues that the court is required to inform him of “the exact and specific length of post release control” at the sentencing hearing. This argument is without merit. The duration of postrelease control when third, fourth, or fifth degree felonies are involved is set by R.C. 2967.28(C). That section states, “[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree * * * shall include a requirement that the offender be subject to a period of post-release control *of up to three years* after the offender’s release from imprisonment, if the parole board * * * determines that a period of post-release control is necessary for that offender.” (Emphasis added.) The language of R.C. 2967.28(C) clearly indicates that the specific duration of postrelease control in cases involving third, fourth, or fifth degree felonies is discretionary, rather than mandatory. Because this discretion is left to the parole board, and not the court, R.C. 2967.28(C) purposefully does not require the court to inform the appellant of the exact and specific length of postrelease control. Rather, the court is only required to put the appellant on notice that he may be subject to postrelease control for

up to three years. See, also, *State v. Johnson*, Cuyahoga App. No. 83117, 2004-Ohio-4229, ¶58 (“R.C. 2929.19 has so clearly stated what the notice requirements are and has not specified length of post release control as one of them.”).

{¶ 12} Accordingly, appellant’s first assignment of error is overruled.

Consecutive Sentences

{¶ 13} In his second assignment of error, appellant argues that the trial court erred when it imposed consecutive sentences without making findings, as required by R.C. 2929.14(E)(4) and R.C. 2929.41(A). Appellant admits that *Foster*, supra, specifically held that such findings were not required, but he relies on *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrect and should be overturned.

{¶ 14} In *Foster*, the Ohio Supreme Court held some sections and provisions of Ohio’s sentencing statutes unconstitutional based on the principles set out in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. *Foster* at ¶67. Specifically, the Court held that a number of provisions in Ohio’s sentencing statutes violated the jury trial guarantee of the Sixth Amendment to the United States Constitution. *Id.* Among the provisions held unconstitutional in *Foster* were those requiring a trial judge to make certain findings prior to imposing consecutive

sentences, R.C. 2929.14(E)(4), and creating presumptively concurrent terms, R.C. 2929.41(A). *Id.* To remedy this constitutional defect, these provisions were severed from the remaining, valid portions of Ohio’s statutory sentencing framework.

{¶ 15} Following *Foster*, the United States Supreme Court, in *Ice*, upheld the constitutional validity of an Oregon statute, similar to Ohio’s pre-*Foster* sentencing statutes, which required Oregon trial judges to make factual findings prior to imposing consecutive sentences. In *Ice*, the United States Supreme Court considered whether the holdings of *Apprendi* and *Blakely* govern consecutive sentencing decisions. *Ice* at 716. The *Apprendi* and *Blakely* decisions essentially stand for the proposition that “it is within the jury’s province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense.” *Ice* at 714.

{¶ 16} In *Ice*, the United States Supreme Court held otherwise. Specifically, the Court stated: “The decision to impose sentences consecutively is not within the jury function that ‘extends down centuries into the common law.’ Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of the legislature.” (Internal citations omitted.) *Ice* at 717.

{¶ 17} Appellant argues that, in light of *Ice*, Ohio’s consecutive sentencing statutes did not violate the Sixth Amendment, and thus R.C. 2929.14(E)(4) and R.C. 2929.41(A) should not have been severed. 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.

{¶ 18} In *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320, the Ohio Supreme Court addressed the conflicts between *Foster* and *Ice*. *Hodge* at ¶19. The Court found that because *Ice* did not directly overrule *Foster*, the United States Supreme Court’s holding in *Ice* did not automatically and retroactively reinstate the consecutive sentencing statutes invalidated in *Foster*. *Id.* at ¶21. According to the Court, “* * * when this court holds a statute unconstitutional, the statute can no longer have any effect and can be revived only through affirmative action of the General Assembly.” *Id.* at ¶23. Effectively, *Hodge* indicates that R.C. 2929.14(E)(4) and R.C. 2929.41(A)

shall remain null and of no effect absent an affirmative act of the General Assembly to revive those portions of Ohio's statutory sentencing framework. *Id.* at ¶36.

{¶ 19} As the high court in this state, the Ohio Supreme Court's decision in *Hodge* is binding on lower courts. Accordingly, the trial court in this case did not err in imposing consecutive sentences without applying R.C. 2929.14(E)(4) and 2929.41(A). Appellant's second assignment of error is overruled.

Conclusion

{¶ 20} The record indicates that the trial court properly notified appellant during his sentencing hearing of postrelease control and the possible consequences associated with a violation of its conditions. Additionally, the trial court did not err when it sentenced appellant to consecutive sentences without making factual findings. For these reasons, appellant's assignments of error are 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. 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
SEAN C. GALLAGHER, J., CONCUR

APPENDIX

Appellant's assignments of error:

"I. Appellant is entitled to a de novo sentencing hearing as the court did not properly inform appellant the result of a violation of post release control at the sentencing hearing."

"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."