

[Cite as *State v. Stewart*, 2011-Ohio-9.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94301**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**WILLIAM STEWART**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-526926 and CR-527929

**BEFORE:** Kilbane, A.J., Sweeney, J., and Cooney, J.

**RELEASED AND JOURNALIZED:** January 6, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} In these consolidated appeals, defendant-appellant, William Stewart, appeals from his guilty plea and sentence for having a weapon while under disability and menacing by stalking. For the reasons set forth below, we affirm.

{¶ 2} On July 30, 2009, defendant was indicted in Case No. CR-526926 for carrying a concealed weapon and having a weapon under disability, with a forfeiture specification; possessing criminal tools; and improperly handling firearms in a motor vehicle.

{¶ 3} On September 1, 2009, defendant was indicted in Case No. CR-527929 for menacing by stalking, with a furthermore clause indicating that he

was at the home, workplace, or school of the victim; violating a protective order; and possessing criminal tools.

{¶ 4} Defendant initially pled not guilty in both matters. Thereafter, he entered into a plea agreement with the State whereby he pled guilty to the charges of having a weapon while under disability, with a forfeiture specification, and menacing by stalking. The remaining charges were dismissed.

{¶ 5} The hearing from the plea proceeding indicates, in relevant part, as follows:

**“MS. KARKUTT: \* \* \* In case No. 526926 \* \* \* Count 2, having a weapon while under disability, a felony of the third degree. This carries a possible penalty of five years in prison and up to a \$10,000 fine. \* \* \***

**In case No. 527929 \* \* \* Count 1, menacing by stalking, a felony of the fourth degree. That carries a possible penalty of six to eighteen months in prison and up to a \$5,000 fine.  
\* \* \***

**THE COURT: Do you understand you have the right to confront and cross-examine through your attorney the State’s witnesses against you?**

**THE DEFENDANT: Yes, your honor.**

**THE COURT: Do you understand you have the right to subpoena witnesses in your defense, that is to have them brought into court to testify on your behalf?**

**THE DEFENDANT: Yes, your honor.**

**THE COURT: Do you understand you have the right to testify yourself or not to testify, and that no one may comment on the**

**fact if you choose not to testify in your own case; further, that you may not be compelled or forced to testify against yourself?**

**THE DEFENDANT: Yes, your honor.”**

**{¶ 6}** The trial court held a sentencing hearing on November 17, 2009.

The trial court subsequently stated:

**“After consideration of the record presented, the oral statements made today, the presentence report, the purposes and principles of sentencing under Ohio Revised Code Section 2929.11, the seriousness and recidivism factors relevant to the offense and the offender pursuant to R.C. 2929.12, and the need for deterrence, incapacitation, rehabilitation, and restitution, after weighing these factors, the Court finds that the defendant’s conduct is more serious than conduct normally constituting the charged offenses. The Court finds that the recidivism factors indicate that the defendant is more likely to commit future crimes.**

**“Therefore the Court finds that a prison sentence is consistent with the purposes and principles of sentencing under Ohio Revised Code Section 2929.12, because a prison sentence is commensurate with the seriousness of the defendant’s conduct and its impact on the victim, because it’s reasonably necessary to deter the offender in order to protect the public from future crimes and because of not placing an unnecessary burden on government resources, it is ordered that the defendant shall serve a stated term of one year in prison in Case No. 527929 and five years in prison in case No. 526926. Those are to be run consecutive.”**

**{¶ 7}** Defendant now appeals and assigns three errors for our review.

**{¶ 8}** Defendant’s first and second assignments of error are interrelated

and state:

**“Appellant did not enter his guilty plea knowingly, intelligently, or voluntarily because the trial court failed to properly inform him of his rights as required by Crim.R. 11, as it did not specifically inform [him] of his constitutional right to compulsory process.”**

**“Appellant did not enter his guilty plea knowingly, intelligently, or voluntarily because the trial court did not properly inform him that part of the plea bargain was a prison sentence.”**

{¶ 9} Crim.R. 11(C) sets forth a trial court’s duties in accepting guilty pleas and states as follows:

**“(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:**

**(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.**

**(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.**

**(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”**

{¶ 10} The trial court must strictly comply with its duties of notifying the defendant of his constitutional rights. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, at paragraph one of the syllabus. “Strict compliance” does not require an exact recitation of the precise language of the rule but instead focuses on whether the trial court explained or referred to the right in a manner reasonably intelligible to that defendant. *Id.*

{¶ 11} With regard to notification of the constitutional right of compulsory process, this court in *State v. Moulton*, Cuyahoga App. No. 93726, 2010-Ohio-4484, stated as follows:

**“In *State v. Cummings*, Cuyahoga App. No. 83759, 2004-Ohio-4470, we stated that ‘[a]lthough a trial court need not specifically tell a defendant that he has the right to ‘compulsory process,’ it must nonetheless ‘inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant’s behalf.’ *Id.* quoting *State v. Wilson*, Cuyahoga App. No. 82770, 2004-Ohio-499, at ¶16, appeal not allowed, 102 Ohio St.3d 1484, 2004-Ohio-3069, 810 N.E.2d 968.**

**In this case, the trial court told Moulton that she had a right to ‘subpoena and call witnesses.’ We have previously held that the use of the word ‘subpoena’ adequately informs the defendant of his right to compulsory process. *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, appeal not allowed by 110 Ohio St.3d 1443, 2006-Ohio-3862, 852 N.E.2d 190; *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082; *State v. Gurley* (June 5, 1997), Cuyahoga App. No. 70586. Therefore, by stating Moulton had a right to subpoena witnesses, the trial**

**court clearly informed her at the time of her plea of her right to compulsory process.” Id. at ¶11.**

{¶ 12} With regard to notification of nonconstitutional rights, the trial court must substantially comply with its notification duties. *Stewart*. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. In addition, there must be some showing of prejudicial effect before a guilty plea may be vacated. *Stewart*.

{¶ 13} The supreme court has observed that there is no easy or exact way to determine what someone subjectively understands. *State v. Carter* (1979), 60 Ohio St.2d 34, 396 N.E.2d 757. The *Carter* court stated:

{¶ 14} “If the defendant receives the proper information, then we can ordinarily assume that he understands that information. [In deciding whether defendant had the required information] we look at all the particular facts and circumstances surrounding the case.”

{¶ 15} The right to be informed of the maximum possible penalty and the effect of the plea are nonconstitutional rights that are reviewed for substantial compliance. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462. In this regard, comments by the prosecutor concerning the maximum penalty are relevant to determining whether the court had reason to believe that

the defendant knew the maximum potential penalty before entering the plea. *State v. Johnson* (Oct. 17, 1996), Cuyahoga App. No. 69972, citing *State v. Gibson* (1986), 34 Ohio App.3d 146, 517 N.E.2d 990.

{¶ 16} In this matter, the trial court met its duties of strictly complying with the mandate that it inform defendant of his right to compulsory process. The court stated that defendant had “the right to subpoena witnesses in your defense, that is, to have them brought into court to testify on your behalf[.]” In providing this information, the trial court clearly informed defendant at the time of his plea of the right to compulsory process. *Moulton*.

{¶ 17} With regard to defendant’s contention that he was not informed that he faced a prison term, the transcript of the plea hearing clearly indicates that under the totality of the circumstances, defendant was informed that the offense of having a weapon while under disability carried a possible penalty of five years in prison and up to a \$10,000 fine, and the offense of menacing by stalking carried a possible penalty of six to 18 months in prison and up to a \$5,000 fine. Based upon this information, there was substantial compliance with the duty of notification of penalty.

{¶ 18} In accordance with the foregoing, the first and second assignments of error are without merit.

{¶ 19} Defendant’s third assignment of error states:



**“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.”**

{¶ 20} In this assignment of error, defendant maintains that the United States Supreme Court’s decision in *Oregon v. Ice* (2009), 555 U.S. \_\_\_\_ , 129 S.Ct. 711, 172 L.Ed.2d 517, effectively overruled the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and trial courts must therefore make specific factual findings before imposing maximum, consecutive sentences, pursuant to R.C. 2929.14(E).

{¶ 21} As enacted in 1996, R.C. 2929.14(E) directed trial courts to make specified findings of fact before imposing consecutive sentences. In 2006, following the United States Supreme Court’s decision in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, the Ohio Supreme Court held that R.C. 2929.14(E)(4) and 2929.14(C) are unconstitutional because they require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant. *Foster* at paragraph three of the syllabus.

{¶ 22} The *Foster* court held that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. *Id.* at paragraphs two, four, and seven of the syllabus.

The court then severed R.C. 2929.14(E) and similar provisions from the Revised Code. *Id.*

{¶ 23} In *Ice*, the United States Supreme Court upheld an Oregon statute that required judicial fact-finding prior to imposing consecutive sentences. This court has determined, however, that notwithstanding the decision in *Ice*, we will continue to apply the pronouncements of *Foster* until the Ohio Supreme Court orders otherwise.<sup>1</sup> *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379. See, also, *State v. Waite*, Cuyahoga App. No. 92895, 2010-Ohio-1748; *State v. Buitrago*, Cuyahoga App. No. 93380, 2010-Ohio-1984; *State v. Alhajjeh*, Cuyahoga App. No. 93077, 2010-Ohio-3179; *State v. Moon*, Cuyahoga App. No. 93673, 2010-Ohio-4483; *State v. Hawks*, Cuyahoga App. No. 93582, 2010-Ohio-4345. Accord, *State v. Miller*, Lucas App. No. L-08-1314, 2009-Ohio-3908; *State v. Krug*, Lake App. No. 2008-L-085, 2009-Ohio-3815; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, 912 N.E.2d 1197.

{¶ 24} The third assignment of error is therefore without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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<sup>1</sup>The Ohio Supreme Court is expected to decide whether the *Foster* decision remains good law in light of *Ice* in *State v. Hodge*, Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court.

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 appeal having been affirmed, any bail pending appeal is terminated.

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

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MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and  
COLLEEN CONWAY COONEY, J., CONCUR