[Cite as *State v. Holland*, 2010-Ohio-6456.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. RICHARD T. HOLLAND Appellant	C.A. No. 25369 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 03 0867

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

MOORE, Judge

{¶1} Appellant, Richard T. Holland, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms the trial court's judgment.

I.

{¶2} Holland was convicted of a number of theft offenses in 2009. The trial court sentenced Holland to prison and ordered the sentence for one of those offenses to be served consecutively to the other sentences. Although Holland asked the trial court to make findings of fact to support the imposition of consecutive sentences, the trial court did not. Holland timely appealed the trial court's judgment, asserting one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY NOT ABIDING BY THE PROVISIONS IN ORC 2929.14(E)(4) BEFORE SENTENCING APPELLANT RICHARD HOLLAND TO A CONSECUTIVE SENTENCE LONGER THAN THE

> MAXIMUM POSSIBLE SENTENCE FROM HIS HIGHEST LEVEL OFFENSE."

{¶3} Holland argues that the trial court erred when it sentenced him to consecutive sentences without making the findings required by R.C. 2929.14(E)(4). We do not agree.

{¶4} In *State v. Nieves*, 9th Dist. No. 08CA009500, 2009-Ohio-6374, ¶¶50-52, this Court wrote:

> **"**Nieves argues that, in light of the United States Supreme Court's holding in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, the trial court erred by failing to make findings and state its reasons for imposing consecutive sentences. This Court disagrees.
>
> **{¶5}** "In *Ice*, the Supreme Court considered the following question:
>
> 'When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?' Id. at 714.
>
> "The high court held that a law in those jurisdictions which 'constrain judges' discretion [in sentencing] by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences' is not violative of the Sixth Amendment. Id. at 714-15.
>
> **"**The Ohio Supreme Court clearly held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus: "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." Nieves argues that the United States Supreme Court's holding in *Ice* supersedes the holding in *Foster*. The Tenth District Court of Appeals addressed the same argument in *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, at ¶18, holding '[t]he Supreme Court of Ohio has not reconsidered *Foster*, however, and the case remains binding on this court.' See, also, *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, at ¶25.
>
> **"**This Court agrees with our sister district. The *Ice* court does not mandate that trial courts make findings or give their reasons for the imposition of consecutive sentences. Unless and until the Ohio Supreme Court revisits and reverses its holding in *Foster*, we are bound to follow the law as it currently stands. Nieves' fourth assignment of error is overruled."

{¶6} Holland invites this Court to ignore the Ohio Supreme Court's decision in *Foster* and overrule *Nieves* based on *Oregon v. Ice*. In fact, the 11th District has recently held in a case with similar facts that, in light of the U.S. Supreme Court's holding in *Ice*, R.C. 2929.14(E)(4) is constitutional and the court was duty bound to apply the law as it was written. *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183. The Court arrived at this conclusion, in part, by noting that in the wake of *Foster*, the Ohio legislature never revised or repealed the statutory provisions found by the Ohio Supreme Court to offend the constitution. "In fact, the Ohio legislature has kept the statutory mandates inherent in R.C. 2929.14(E)(4) intact through eleven amendments since *Foster's* release." Id. at ¶ 14. The *Jordan* court reasoned that the legislature, in essence, re-enacted the fact-finding requirements that were previously a part of the provision. Accordingly, it held the trial court was required to make the findings prior to imposing consecutive sentences. Id. The State has appealed *Jordan* to the Ohio Supreme Court and the Court has granted a stay of execution of the 11th District's decision. *State v. Jordan*, Supreme Court Case No. 2010-1868.

{¶7} While the 11th District has made a compelling argument, we have chosen to follow the precedent in *Foster* "until the Ohio Supreme Court revisits and reverses its holding in *Foster*[.]" *Nieves* at ¶ 52. We recognize that this question is also presently pending before the Ohio Supreme Court in *State v. Hodge*, Supreme Court Case No. 2009-1997 (argued September 15, 2010), but the Court has not yet reversed *Foster*.

{¶8} Pursuant to *Foster*, the trial court was not required to make findings prior to imposing consecutive sentences. Accordingly, we hold that the trial court did not err and Holland's assignment of error is overruled.

III.

{¶9} Holland's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

FRENCH, J.
CONCURS

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY

(French, J., of the Tenth District Court of Appeals, sitting by assignment.)

APPEARANCES:

STEPHEN P. HANUDEL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.