

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-580
v.	:	(C.P.C. No. 2008 CR 4605)
	:	
Michael T. Potter,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on February 4, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Richard Cline & Co., LLC*, and *Richard A. Cline*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Michael T. Potter ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas sentencing him to a maximum aggregate sentence of 18 years' incarceration imposed after his plea of guilty to aggravated robbery, a first-degree felony, in violation of R.C. 2911.01, and felonious assault, a second-degree felony, in violation of R.C. 2903.11.

{¶2} On June 19, 2008, a Franklin County Grand Jury indicted appellant in a two-count indictment for aggravated robbery and felonious assault, both of which

contained a repeat violent offender ("RVO") specification. On March 18, 2009, appellant entered a plea of guilty to both counts of the indictment without the RVO specifications.

{¶3} According to the plea proceedings, on June 9, 2008, appellant and his girlfriend were at the Front Row Sports Bar when appellant exited the bar for the purported reason of retrieving money. However, appellant returned to the bar with a knife in the back of his waistband and, without warning or hesitation, put the knife against the throat of the victim, fellow patron Todd Parker. Though it was the back of the knife blade that was used, Mr. Parker sustained a cut across the width of his throat. After chasing Mr. Parker and the bartender out the front door, appellant locked the door while arguing with his girlfriend about what was happening. Appellant's girlfriend tried unsuccessfully to unlock the front door and was then forced out the rear door by appellant. Appellant also removed the cash register, which he was unable to pry open with his knife, and smashed it so as to remove the cash drawer. Appellant fled and was later apprehended outside of his apartment. In a common area between appellant's apartment building and another building, the locked but pried cash drawer, a knife, and money were found.

{¶4} After appellant entered his guilty pleas to aggravated robbery and felonious assault, a presentence investigation report ("PSI") was ordered. A sentencing hearing was held on April 17, 2009, and appellant was sentenced to a ten-year term of incarceration on the aggravated robbery charge consecutive to an eight-year term of incarceration on the felonious assault charge.

{¶5} This appeal followed and appellant brings the following assignment of error for our review:

The Ohio Supreme Court decision in *State v. Foster* has been abrogated by the United States Supreme Court decision in *Oregon v. Ice*, and therefore the trial court erred by imposing maximum consecutive sentences without first making the findings required by R.C. § 2929.14 and *State v. Comer*, 2003-Ohio-4165, ¶ 20, 99 Ohio St. 3d 463.

{¶6} In his single assignment of error, appellant contends the trial court erred when it imposed consecutive sentences without first making the statutory findings required by R.C. 2929.14(E)(4). Specifically, appellant contends the United States Supreme Court decision in *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, is contrary to the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Supreme Court of Ohio held portions of Ohio's sentencing scheme that provided that sentences be served concurrently unless judicial fact-finding permitted consecutive sentencing were unconstitutional. As a remedy, the *Foster* court severed the offending sections from Ohio's sentencing code resulting in trial courts having full discretion to impose a prison sentence within the statutory range and no longer being required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences. *Id.* at paragraph seven of the syllabus. In *Ice*, the United States Supreme Court found state statutory sentencing schemes that presume concurrent sentences, but allow consecutive sentences to be ordered based upon judicial findings of fact to justify the same, were constitutional. Therefore, it is appellant's contention that the practical implication of *Ice* is a finding that the Supreme Court of Ohio wrongfully excised portions of R.C. 2929.14, and as a result, those statutory findings remain a prerequisite to consecutive sentencing.

{¶7} The fallacy in appellant's argument, however, is that this court has already considered and rejected similar arguments on a number of prior occasions. As just previously stated by this court in addressing the same issue:

Very recently, in *State v. Elmore* [122 Ohio St.3d 472], 2009-Ohio-3478, the Supreme Court of Ohio did briefly discuss *Ice*. Although the court refused to address fully all ramifications of *Ice* because neither party before it sought the opportunity to brief this issue before oral argument, the court concluded that *Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. *Id.* at ¶ 35, 845 N.E.2d 470. Thus, the court in *Elmore* stated, the trial court had authority to impose consecutive sentences. *Id.* Accordingly, although the Supreme Court has not fully addressed the implications of *Ice*, it appears as though it continues to adhere to the principles in *Foster*. Therefore, we decline to depart from *Foster* until the Supreme Court directs otherwise. Appellant's first assignment of error is overruled.

*State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶8, discretionary appeal not allowed by 2009-Ohio-6816, ¶8; see also *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420 (rejecting the defendant's arguments that the United States Supreme Court's decision in *Ice* controlled and that the statutory findings under R.C. 2929.14 remained a prerequisite to consecutive sentencing); *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664 (rejecting the defendant's argument based on *Ice* and finding that *Foster* remains binding on this court until the Supreme Court of Ohio directs otherwise); *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566 (declining to part from *Foster* until the Supreme Court of Ohio directs otherwise).

{¶8} Consistent with the precedent established by this court, we conclude appellant's argument is without merit and decline to part from *Foster* until the Supreme Court of Ohio commands differently. Accordingly, appellant's single assignment of error

is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

TYACK, P.J., and KLATT, J., concur.

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