

ORIGINAL
ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,
vs.
JAMES MCCRAE,
Defendant-Appellant.

: CASE NO. 11-0790
:
: ON Appeal from the Muskingum
: County Court of Appeals, Fifth
: Appellate District
:
: Court of Appeals
: Case No. CT2010-0037

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JAMES MCCRAE

JAMES MCCRAE #629-278
ROSS CORRECTIONAL INSTITUTION
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MAY 09 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a substantial Constitutional Question because the trial court failed to make the required findings under O.R.C. 2929.14(E)(4) to justify the consecutive sentence placed upon the Appellant, James McCrae.

The Appellant was denied his Sixth and Fourteenth Amendment Rights to the United States Constitution when the trial court and the Appellate Court did not make the required findings in order to impose a consecutive sentence upon the Appellant.

The decision of the Trial Court and the Appellate Court not only threatens the Due Process Rights of this Appellant, but the Rights of all of those who may present a similar case or issue to this Court.

It is clear by the sentence that the Appellant received that his Rights were violated. The Appellant asks that this Honorable Court accept jurisdiction to hear this case and review the erroneous and dangerous decisions of the Trial Court and the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

On April 26, 2010, Appellant James McCrae entered guilty pleas to one count of involuntary Manslaughter in violation of O.R.C. 2903.04(A) with a Firearm Specification and one count of Having a Weapon Under Disability in violation of O.R.C. 2923.13(A). The parties jointly recommended to the Court a sentence of fifteen years in prison.

On June 14, 2010, a sentencing hearing was held and the Court imposed maximum and consecutive sentences on Appellant totaling eighteen years in prison.

The Appellant Appealed his sentence to the Muskingum County Court of Appeals, Fifth District. The Appeal was denied on March 31, 2011. The Appellant now Appeals to this Court for relief.

In support of his position on these issues, the Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: In light of Oregon v. Ice, the Trial Court erred in failing to make the required findings under O.R.C. 2929.14(E)(4) to justify consecutive sentences.

Counsel submits that the United States Supreme Court has overruled the Ohio Supreme Court's decision in State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, as to consecutive sentences. See Oregon v. Ice (2009), ___U.S.___, 129 S.Ct. 711. Foster "severed" R.C. 2929.14(E)(4) holding that the section violated the Fifth and Fourteenth Amendments. Foster at paragraph three of the syllabus. By severing the fact-finding requirements of R.C. 2929.14, the Ohio Supreme Court rendered them invalid, but the statutory provisions have never been repealed. When Oregon v. Ice overruled Foster, the fact-finding provisions of R.C. 2929.14(E)(4) immediately came back into force because when a case declaring a statute unconstitutional is overruled, the underlying statute immediately comes back into effect.

The decision of the United States Supreme Court controls over the Ohio Supreme Court's decisions as to matters of federal constitutional law. Minnesota v. National Tea Co. (1940), 309 U.S. 551, 557 (United States Supreme Court has final authority to determine "the validity under the federal constitution of state action"). See also, State v. Storch, 66 Ohio St. 3d 280, 291, 1993-Ohio-38 ("We know that, as a lesser appellate court for purposes of federal questions, we ignore the United States Supreme Court at our peril as the 'lesser'

courts of Ohio ignore our words at their peril as to questions of state law. Therefore, we must assume that the United States Supreme Court meant what it said.").

In *Ice*, the United States Supreme Court held that *Blakely v. Washington* (2004), 542 U.S. 296 does not apply to consecutive sentencing schemes. As a result, the Court has overruled *Foster* as to consecutive sentences. As the Ohio Supreme Court held in *Storch*, "we must assume that the United States Supreme Court meant what it said." *Storch* at 291.

Even though the United States Supreme Court did not write the words, "State v. *Foster* is overruled," *Foster* is no longer binding law regarding consecutive sentencing. A reviewing court is not required to expressly state that it is overruling a lower court's decision. For example, when the Ohio Supreme Court rules on a certified conflict, it generally does not expressly state that it is overruling the decision of the appellate district on the losing side of the conflict. See *Safeco Ins. Co. of Am v. White*, Slip Op. No. 2009-Ohio-3718, where the court affirmed the decisions of the First District in a conflict certified with the Fifth District's decision in *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781. No court would give any weight to *Torres* on the question resolved on *Safeco*. Likewise, the United States Supreme Court held that *Foster* was in conflict with other state supreme courts, and the United States Supreme Court ruled that the other cases were correct. *Foster* has been overruled as to consecutive sentences and has as much force as to consecutive sentences as does the Fifth District's decision in *Torres* on the issue decided in *Safeco*.

The State will likely assert that under *State v. Bates*, 118 Ohio St. 3d 174, 2008-Ohio-1983, absent a statutory prohibition, courts have the inherent ability to impose consecutive sentences and that R.C. 2929.14(E)(4) requires judges to make findings prior to imposing consecutive terms was severed and excised. *Bates* at para. 18. The *Bates* Court, however, did not consider the implications of *Oregon v. Ice* as that case had not yet been decided and the Supreme Court had no reason to expect a deviation from the holding in *Blakely v. Washington* (2004), 542 U.S. 296.

On July 28, 2009, in *State v. Elmore*, 2009-Ohio-3478, the Ohio Supreme Court acknowledged, but expressly avoided addressing, the effect of *Ice* on its prior holding in *Bates* because the matter had not been properly presented and briefed. Even though the Court reiterated the holding in *Bates*, it noted that the "ramifications" of *Ice* must still be addressed. The Court stated at para. 35 "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. The trial court thus had authority to impose consecutive sentences on Elmore. We will not address fully all ramifications of *Oregon v. Ice*, since neither party sought the opportunity to brief this issue before oral argument." The Court essentially recognized the need to revisit this issue in light of *Ice*, but did not only because the parties failed to raise the issue timely.

Although the Supreme Court of Ohio severed R.C. 2929.14(E)(4) from Ohio's felony sentencing code in *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, the General Assembly has nevertheless kept the statutory mandates inherent in R.C. 2929.14(E)(4) intact through eleven amendments since Foster's release. The effective date of this

amendment was April 7, 2009. In light of *Ice* and the General Assembly's most recent amendment to R.C. 2929.14, the courts held, in *State v. Jordan*, 11th Dist. No.2009-t-0110, 2010-Ohio-5183, at ¶ 14, that a sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster's* release, make certain specific findings of fact before imposing consecutive sentences on a defendant.

It is the judiciary's role to apply properly enacted laws to the extent they are constitutional. See *State v. Cunningham*, 113 Ohio St. 3d 108, 113, 2007-Ohio-1245. In *Ice*, the United States Supreme Court held that statutory sentencing provisions that require judicial factfinding as a prerequisite to imposing consecutive sentences to be constitutional. This ruling was based upon *Apprendi* and its progeny, the same body of law upon which the Ohio Supreme Court based its decision in *Foster*. Because *Foster* extrapolated from *Apprendi* and its progeny that laws which require judicial factfinding as a necessary precondition to imposing consecutive sentences are unconstitutional, it, in this regard was improperly decided. Subsequent to *Ice*, the legislature re-imposed the requirement that a sentencing judge must make certain findings before imposing consecutive sentences. Pursuant to the holding in *Ice*, this legislation is constitutional and thus it is a trial court's duty to apply that law as it is written." *Jordan*, supra, at ¶ 20.

Again, In light of *Oregon v. Ice*, the Appellant believes that he has demonstrated that the trial court erred in failing to make the required findings under O.R.C. 2929.14(E)(4) to justify consecutive sentences and thus violated the Appellant's Sixth and Fourteenth Amendment Rights.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues will be reviewed on the merits.

Respectfully Submitted,

James McCrae

JAMES MCCRAE #629-278

ROSS CORRECTIONAL INSTITUTION

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by regular U.S. mail to D. Michael Haddox, Muskingum County Prosecutor, Counsel for Appellee's, at 27 North Fifth Street, suite 201, Zanesville, Ohio, 43701, on 5-5-11, 2011.

James McCrae

JAMES MCCRAE #629-278

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

MAR 31 2011

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

JAMES MCCRAE

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. CT10-0037

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County Court
of Common Pleas, Case No. CR2009-0089

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant James McCrae appeals his sentence entered by the the Muskingum County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On April 26, 2010, Appellant entered pleas of guilty to one count of involuntary manslaughter, in violation of R.C. 2903.04(A), with a firearm specification; and one count of having a weapon under disability, in violation of R.C. 2923.13(A). The parties jointly recommended a fifteen year prison sentence.

{¶3} Following a hearing, the trial court imposed the maximum, consecutive prison sentence totaling eighteen years.

{¶4} Appellant now appeals, assigning as error:

{¶5} "I. IN LIGHT OF OREGON V. ICE, THE TRIAL COURT ERRED IN FAILING TO MAKE THE REQUIRED FINDINGS UNDER O.R.C. 2929.14(E)(4) TO JUSTIFY CONSECUTIVE SENTENCES."

{¶6} Appellant asserts in the wake of the United States Supreme Court decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, the Ohio Supreme Court decision in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, has been overruled and the fact finding provisions of R.C. 2929.14(E)(4) have been resurrected. We disagree.

{¶7} The Ohio Supreme Court recently addressed this issue in *State v. Hodge* (2010), 128 Ohio St.3d 1, holding:

¹ A rendition of the facts pertaining to the appeal is unnecessary for our disposition.

{118} "The United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470."

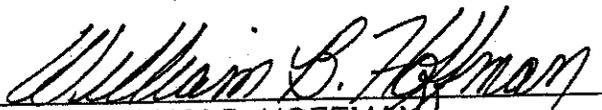
{119} The Ohio Supreme Court concluded trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring findings be made.

{110} Accordingly, Appellant's sole assignment of error is overruled, and the judgment of the Muskingum County Court of Common Pleas is affirmed.

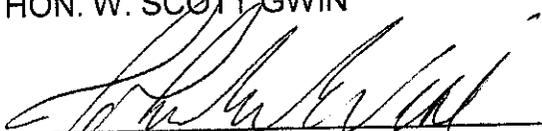
By: Hoffman, J.

Gwin, J. and

Wise, J. concur


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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TODD A. BICKLE, CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

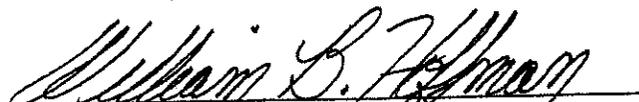
JAMES MCCRAE

Defendant-Appellant

JUDGMENT ENTRY

Case No. CT10-0037

For the reason stated in our accompanying Opinion, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs to Appellant.


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. JOHN W. WISE