[Cite as *State v. Moncoveish*, 2009-Ohio-6227.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0075**
- vs -	:	
DAVID J. MONCOVEISH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2008 CR 0201.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

J. Dean Carro, University of Akron School of Law, Appellate Review Office, Akron, OH 44325-2901 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} David J. Moncoveish appeals from the judgment of the Portage County Court of Common Pleas, sentencing him to three consecutive terms of eight months each, on two counts of breaking and entering, and one of theft, upon his written plea of guilty. We affirm.

{¶2} April 7, 2007, Mr. Moncoveish was indicted by the Portage County Grand Jury on three counts of breaking and entering, fifth degree felonies, and two counts of

theft, also fifth degree felonies. Mr. Moncoveish was served with an arrest warrant April 9, 2008, and arraigned April 14, 2008. He pleaded "not guilty" to all charges, and was eventually released on bond.

{¶3} On or about May 22, 2008, a plea hearing was held before the trial court. Mr. Moncoveish executed his written plea of guilty to two of the breaking and entering counts, and one of the theft counts. The trial court nolled the remaining counts, and ordered an investigation by the Adult Probation Department and a NEOCAP interview.

{¶4} July 21, 2008, sentencing hearing was held. By a judgment entry filed July 23, 2008, the trial court sentenced Mr. Moncoveish to serve three consecutive eight-month terms of imprisonment, less fifty-seven days jail time credit. It further fined him, ordered him to pay costs and restitution, and to have no contact with the complaining witness.

{¶5} August 21, 2008, Mr. Moncoveish timely noticed this appeal. That same day, the assistant public defender who had filed the appeal, moved this court for leave to withdraw as counsel.[1] This motion was granted by a judgment entry filed August 29, 2008. By the same judgment entry, this court appointed Attorney Richard E. Hackerd to prosecute the appeal.

{¶6} October 17, 2008, Mr. Hackerd filed a "no merits" brief, pursuant to *Anders v. California* (1967), 386 U.S. 738. November 10, 2008, this court filed a judgment entry, noting that Mr. Hackerd had failed to file a certificate of service with his *Anders* brief, indicating the brief had been served upon his client. The judgment entry gave Mr. Hackerd ten days to file a certificate of service. Mr. Hackerd did so; and, by a judgment

1. It appears of record that Mr. Moncoveish is indigent.

entered December 2, 2008, this court granted Mr. Moncoveish thirty days to file his pro se brief in support of the appeal. Mr. Moncoveish has not filed a brief.

{¶7} Pursuant to *Anders*, this court reviewed the entire record in this case. Id. at 744. By a judgment entered March 27, 2009, we determined that, "there are issues pertaining to Mr. Moncoveish's sentencing which may be sufficient to support an appeal. Consequently, this appeal is not 'wholly frivolous,' and new counsel must be appointed for Mr. Moncoveish." This court then granted Attorney Hackerd's motion to withdraw, and appointed Attorney J. Dean Carro to represent Mr. Moncoveish.

{¶8} April 2, 2009, Attorney Carro moved this court to clarify our March 27, 2009 judgment entry, by specifying what issues we have identified as potentially supporting this appeal. By a judgment entered April 24, 2009, we respectfully drew his attention to the recent decision of the United States Supreme Court in *Oregon v. Ice* (2009), 129 S. Ct. 711, and its potential effect upon Ohio's sentencing scheme as modified by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and its progeny. We granted him thirty days to file Mr. Moncoveish's assignments of error and brief. Thereafter, the state moved to supplement the record with the Presentence Investigative Report prepared in this case, which motion we granted by a judgment entered on or about July 2, 2009. We further granted the state's motion to view the report by a judgment entered July 21, 2009.

{¶9} Mr. Moncoveish assigns a single error on appeal:

{¶10} "The trial court erred in sentencing Appellant Moncoveish to consecutive sentences on fifth degree felonies in the absence of findings of fact per R.C.

2929.13(B)(1) and R.C. 2929.14(E)(4) rendering the sentences contrary to law per R.C. 2953.08(A)(4) ***[.]"

{¶11} In support of his assignment of error, Mr. Moncoveish argues that the decision of the United States Supreme Court in *Ice*, supra, overrules, inter alia, the decision of the Supreme Court of Ohio in *Foster*, supra, and reinstates those portions of the Ohio sentencing scheme requiring judicial factfinding before imposition of consecutive felony sentences.

{¶12} In *Foster*, at paragraph three of the syllabus, the Court held that the statutory sections requiring judicial factfinding before imposition of consecutive sentences were unconstitutional pursuant to the decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. Consequently, the *Foster* Court severed them. Id. at paragraph four of the syllabus. In *Ice*, the United States Supreme Court was faced with the question of whether an Oregon statute, similarly requiring judicial factfinding prior to imposition of consecutive sentences, violated the rule of *Apprendi*. *Ice*, supra, at 715-716.

{¶13} Speaking through Justice Ginsburg, the *Ice* Court found the Oregon statute constitutional, as it did not implicate the concerns embodied in the rule of *Apprendi*. *Ice* at 717. In so holding, the Court observed that judges traditionally had the power to impose consecutive sentences for discrete crimes at common law. Id. at 717-718. Consequently, it found that statutes limiting judicial discretion in the imposition of consecutive sentences did not implicate the traditional right of a defendant to have the facts deciding his or her guilt for a discrete crime depend solely on a jury's determination. Cf. id. at 718. The Court further remarked that respect for states' rights

counseled against the extension of the rule of *Apprendi* to the issue of consecutive sentences. Id. at 718-719.

{¶14} This court has previously held that, prior to a decision by the Supreme Court of Ohio concerning the effect of *Ice* on *Foster*, we remain bound by the latter. *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815, at ¶129, fn. 1. The state cites to similar opinions from other Ohio appellate districts. See, e.g., *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379, at ¶27-29; *State v. Franklin*, 10th Dist. No. 08AP-900, 2009-Ohio-2664, at ¶18; *State v. Reed*, 8th Dist. No. 91767, 2009-Ohio-2264, at ¶17, fn. 3; *State v. Mickens*, 10th Dist. Nos. 08AP-743, 08AP-744, and 08AP-745, 2009-Ohio-2554, at ¶25.

{¶15} Mr. Moncoveish cites no authority holding what he *implies*: that the effect of *Ice* is to "re-attach" to the Ohio sentencing scheme those portions regarding consecutive sentences severed by *Foster*. Logically, the idea is appealing. The basis for *Foster*'s conclusion that judicial factfinding regarding the imposition of consecutive sentences is unconstitutional is the rule of *Apprendi*. As the *Ice* Court determined that *Apprendi* and its progeny do not implicate the issue of consecutive sentences, then the statutory sections severed by *Foster* in this regard were not offensive to the federal constitution. Consequently, given the General Assembly's plenary powers concerning criminal law, the mind tends toward filling the void created with the severed sections. And yet, while discovering nothing directly on point, our own research militates against such a finding. Again, as this court recently noted in *State v. Buckmaster*, 11th Dist. No. 2007-L-105, 2008-Ohio-1336, at ¶15:

{¶16} "'(A) decision of a court which has authority to review the decisions of another court is binding upon the latter court.' In re Schott (1968), 16 Ohio App.2d 72, 75, ***. 'The general rule, of such an age that it is beyond dispute, is that the ground, principle, or reason of a decision made by a higher court is binding as authority on the inferior court.' Id. Thus, 'as an intermediate appellate court' we are without authority to 'make a determination that conflicts with a decision of the Supreme Court of Ohio that has not been reversed or overruled.' [*State v.*] *Worrell*, [10th Dist. No. 06AP-706,] 2007-Ohio-2216, at ¶10 (citations omitted)."

{¶17} The *Ice* Court implicitly found the reasoning underlying the severance remedy applied in *Foster* wrong: i.e., that the federal constitution bans judicial factfinding when a court imposes consecutive sentences upon a defendant for discrete crimes. However, the *Ice* Court did not explicitly overrule *Foster*, which was not before it. Consequently, we, like all inferior Ohio courts, must apply the sentencing statutes as severed and construed by *Foster*.[2]

{¶18} We also find the following discussion from *Garrett v. Warden* (S.D. Ohio May 19, 2009), Case No. 3: 09-cv-058, 2009 U.S. Dist. LEXIS 42826, a habeas proceeding, illuminating. Petitioner argued that, in light of *Ice*, the *Foster* Court had severed constitutional presumptions against consecutive sentences. *Garrett* at 12. In rejecting this argument, the Southern District of Ohio held:

{¶19} "Whenever a court applies a severance remedy, its purported objective is to maintain as much of what the legislature adopted as is consistent with whatever constitutional provision is being applied. This always leaves the legislature free to act

2. We further note that the Supreme Court of Ohio might reaffirm *Foster* on the basis of the Ohio Constitution.

again, to say in effect, 'That's not what we meant or wanted.' With *** *Foster*, many expected follow-on legislation, but none has come. But unless the statute without the excised portions itself fall below a constitutional minimum, no defendant is harmed. That is, no Ohio felon was constitutionally entitled to have the presumptions enacted in S.B. 2 ***[.]" *Garrett* at 13; accord, *Torres v. Beightler* (N.D. Ohio July 30, 2009), Case No. : 1: 09 CV 191, 2009 U.S. Dist. LEXIS 76951, at 23-24.

{¶20} As the Fourth Appellate District has observed, pursuant to *Ice*, states are free to require judicial factfinding prior to the imposition of consecutive sentences upon a defendant, or to leave that choice to the discretion of the sentencing judge. Consequently, either pre-*Foster* or post-*Foster*, Ohio's sentencing scheme regarding consecutive sentences was constitutional. *State v. Starett*, 4th Dist. No. 07CA30, 2009-Ohio-744, at ¶35 and fn. 2.

{¶21} Given the foregoing, we decline Mr. Moncoveish's invitation to find those portions of the Ohio sentencing scheme regarding consecutive sentences severed by *Foster* have been revived by the decision in *Ice*. He cites no authority in support of this proposition. It would contravene our duty to apply the law as pronounced by the Supreme Court of Ohio, unless and until it affirms, modifies, or overrules *Foster*. Further, as the Southern District of Ohio pointed out in *Garrett*, the General Assembly, following the announcement of *Ice*, has taken no steps to legislate on the issue of judicial factfinding regarding consecutive sentences. Finally, as the Fourth District noted in *Starett*, both Ohio's pre- and post-*Foster* sentencing schemes, relative to consecutive sentences, are constitutional pursuant to *Ice*.

{¶22} Admitting that no objection was made in the trial court to its failure to make findings under R.C. 2929.13(B)(1) and 2929.14(E)(4), Mr. Moncoveish nevertheless urges us to reach the issue under the doctrine of "plain error."

{¶23} "Pursuant to Crim.R. 52(B), '(p)lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' Plain error exists only if 'but for the error, the outcome of the trial clearly would have been otherwise,' and is applied 'under exceptional circumstances and only to prevent a manifest miscarriage of justice.' *State v. Long* (1978), 53 Ohio St.2d 91, 97, ***." *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, at ¶61.

{¶24} We decline the invitation. Mr. Moncoveish alleges the trial court was required to make one of the findings set forth at R.C. 2929.13(B)(1)(a) through (i), and further find he was not amenable to community control sanctions, prior to sentencing him to prison for fifth degree felonies. We disagree. As the *Foster* court explained, a trial court is free to impose a prison sentence for a fifth (or fourth) degree felony without making any R.C. 2929.13(B)(1)(a) through (i) finding. Id. at ¶68-70.

{¶25} As regards R.C. 2929.14(E)(4) findings, we have already held we shall not declare that statutory section, severed by *Foster*, was automatically revived by *Ice*. Consequently, there is no basis for "plain error" analysis regarding the trial court's failure to apply the statute.

{¶26} Thus, in reviewing Mr. Moncoveish's sentence, we continue to apply the two-pronged test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, we determine if the sentencing court "has adhered to all applicable rules and statutes in imposing the sentence." Id. at ¶14. The standard for this review is whether the trial

court's application of the appropriate rules and statutes is "clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. If the sentence passes this prong of the test, we then review for abuse of discretion. Id. at ¶17.

{¶27} We do not find that the trial court failed to apply any of the applicable statutes or rules in sentencing Mr. Moncoveish. Consequently, the first prong of the *Kalish* test is met. Nor do we find that the trial court abused its discretion in sentencing Mr. Moncoveish, as the eight month sentences imposed for each of his crimes are within the statutory range provided for fifth degree felonies. His presentence investigation report indicates a long history of criminal conduct, for which he had frequently received quite lenient and favorable treatment, without any corresponding improvement in behavior.

{¶28} We respectfully acknowledge the superior briefing submitted on this difficult issue by both the parties.

{¶29} The assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is affirmed.

{¶30} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs in judgment only,

DIANE V. GRENDELL, J., concurs in judgment only.