[Cite as *State v. Pinkney*, 2010-Ohio-237.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91861

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER PINKNEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504592

BEFORE: Sweeney, J., Rocco, P.J., and Boyle, J.

RELEASED: January 28, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} In this delayed appeal, defendant-appellant, Christopher Pinkney ("defendant"), challenges the imposition of consecutive sentences, the trial court's denial of his request for a mitigation report, the restitution order that was imposed, and contends that the judge's electronic signatures on various orders rendered them invalid, thereby nullifying his plea and resulting in a violation of his speedy trial rights. For the reasons that follow, we affirm.

{¶ 2} Defendant was charged with two counts of rape of a child under the age of 13 with specifications that he compelled the victim to submit by force or threat of force, and one count of kidnapping with a sexual motivation specification.

{¶ 3} On April 10, 2008, he entered a guilty plea to all three counts, each being first degree felonies, and, in exchange, all specifications were deleted. Prior to accepting the plea, the court inquired of defendant about his alleged learning disability. Defendant indicated that he did not have trouble reading or a substantially diminished IQ. The court then stated to defense counsel, "I want to go forward with an intelligent plea. You've [defense counsel] had a chance to consult with your client in this case. Do you find him competent to go forward with this plea agreement?" To which counsel responded, "I do, your Honor. * * * I don't have any reason to believe that he doesn't understand what he is charged with, and we've obviously discussed the allegations and the facts of his case * * *." Defendant confirmed that he understood.

{¶ 4} The court accepted defendant's guilty plea, denied defense counsel's request for a mitigation report, and referred the matter to the probation department for a presentence investigation report ("PSI").

{¶ 5} On May 1, 2008, the court held the sentencing hearing. Defense indicated that the PSI was complete and accurate. Detective Burghardt addressed the court on behalf of the victim and the victim's mother. The victim was an 11-year-old honor student at the time defendant raped her. The victim was in Rape Crisis counseling. Defense counsel expressed defendant's acceptance of responsibility and his remorse. The defense further acknowledged defendant's criminal record but emphasized the lack of violent offenses as well as an absence of sexually-related crimes. Defendant personally addressed the court and apologized and asked forgiveness.

{¶ 6} The court noted defendant's criminal history, including three terms of incarceration with his most recent release being October 2007, while this matter was pending.

{¶ 7} Defendant was involved with the victim's mother, who suffered from multiple sclerosis. Defendant confirmed that he took advantage of the 11-year-old daughter and transmitted sexual diseases to the child. The court recited on the record the factual basis of the offenses. The court then stated:

{¶ 8} "On Count 1, after considering the seriousness and recidivism factors and the purposes and principles of sentencing under Senate Bill 2, I'm going to sentence you to seven years, to run consecutive to eight years on Count 2." The

15-year prison term was imposed concurrent with a seven-year term imposed on Count 3. Court costs were imposed but waived due to defendant's indigence. The court also imposed a restitution order in the amount of $1,500 without objection from the defendant.

{¶ 9} Defendant's five assignments of error will be addressed in the order presented but together where appropriate.

{¶ 10} "I. The trial court erred in imposing consecutive sentences in violation of R.C. 2929.14 and in light of *Oregon v. Ice,* ___ U.S. ___ (January 14, 2009)."

{¶ 11} In this case, defendant maintains that the trial court erred by imposing consecutive sentences because he asserts the trial court was required to make findings under R.C. 2929.14(E)(4). In *Foster*, the Ohio Supreme Court held, in relevant part, "that R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial fact-finding is not required before imposition of consecutive prison terms." *Foster*, 2006-Ohio-856, ¶99.

{¶ 12} Defendant argues that the statutory findings were revived by implication due to the United States Supreme Court's decision in *Oregon v. Ice*[1] and because the legislature never repealed, and subsequently re-enacted, the statutory provisions that were excised by *Foster*. In either case, the trial court did

[1](2009), 129 U.S. 711, 129 S.Ct. 711, 172 L.Ed.2d 517.

not err when it imposed consecutive sentences on defendant at the May 1, 2008 sentencing hearing.

{¶ 13} In addition to determining the length of a prison sentence for each conviction, courts have the discretion to determine whether prison sentences are to be served consecutively or concurrently. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶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"); see, also, *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983.

{¶ 14} In *Ice*, the United States Supreme Court addressed the court's authority to impose consecutive sentences. The court in *Ice* held that Oregon statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. Id. at 714. However, the effect *Ice* may have on Ohio's post-*Foster* sentencing scheme has not been fully addressed by the Ohio Supreme Court. *Elmore*, 2009-Ohio-3478, ¶34-35 (declining to "address fully all ramifications of *Oregon v. Ice*"). Thus, we continue to follow *Foster* when reviewing felony sentencing issues. See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise").

{¶ 15} At the time defendant was sentenced, *Foster* had effectively removed the statutory duty on the trial judge to make findings before imposing consecutive

sentences and the United States Supreme Court had yet to decide *Ice*. Id.[2] Defendant did not request findings from the trial court at the time of sentencing nor did he object to the imposition of consecutive sentences on this basis. For all these reasons, we find that the trial court did not err when it imposed consecutive sentences in this matter.

{¶ 16} Assignment of Error I is overruled.

{¶ 17} "II. The trial court erred when it denied the appellant's request for a mitigation report from the Court Psychiatric Clinic under R.C. 2947.06, R.C. 2951.03, and the Sixth, Eight[h], and Fourteenth Amendments of the [United States] Constitution."

{¶ 18} Defendant requested a mitigation report due to his alleged learning disability. He generally relies upon R.C. 2951.03, R.C. 2947.06, and the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. In this case, the court ordered a presentence investigation report but denied defendant's request for a psychological examination for purposes of mitigation.

{¶ 19} R.C. 2947.06 pertains to testimony after the verdict to mitigate the penalty and provides, in part, as follows:

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[2]Post-*Foster* legislation could not effect a sentence imposed prior to the effective date of the subject legislation. *Foster*; *Elmore*; see, also, *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, ¶14 ("absent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only. R.C. 1.48.")

{¶ 20} "(B) The court may appoint not more than two psychologists or psychiatrists to make any reports concerning the defendant that the court requires for the purpose of determining the disposition of the case. * * *."

{¶ 21} "Psychological reports in support of mitigation of sentence are discretionary with the trial court under R.C. 2947.06." *State v. Peeples* (1988), Cuyahoga App. No. 54708. It is within the court's sound discretion to determine whether additional expert services "'are reasonably necessary for the proper representation of a defendant' at the sentencing hearing." *State v. Esparza* (1988), 39 Ohio St.3d 8. Defendant requested the appointment of an expert on the basis of his alleged learning disability. The court had made a detailed inquiry as to the learning disability whereby the defendant stated it did not substantially diminish his IQ or affect his ability to enter an intelligent plea. Also, defendant indicated he had completed his high school education.

{¶ 22} Having reviewed the record, the trial court did not abuse its discretion by denying defendant's request for a mitigation report to explore the potential effect an alleged learning disability had on the commission of the offenses in this case.

{¶ 23} Assignment of Error II is overruled.

{¶ 24} "III. The trial court improperly imposed a restitution order in the amount of $1500 in violation of Ohio law and the Fourteenth Amendment of the [United States] Constitution."

{¶ 25} R.C. 2929.18(A)(1) provides in relevant part:

{¶ 26} "Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

{¶ 27} "(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, *the court may base the amount of restitution it orders on* an amount recommended by the victim, the offender, *a presentence investigation report*, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. *If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount*. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender." (Emphasis added.)

{¶ 28} The presentence investigation report indicated that the victim was seeking restitution in the amount of $1,500. The trial court ordered restitution in

this amount. Because defendant did not dispute the amount of restitution, the court was not required to hold a hearing.

{¶ 29} Assignment of Error III is overruled.

{¶ 30} "IV. The appellant was denied his statutory right to a speedy trial when the trial court failed to personally sign the journal entries and instead used a rubber stamp or computer-generated signature in violation of Loc.R. 19, Civ.R. 54, Crim.R. 32(C), and the Fourteenth Amendment of the [United States] Constitution.

{¶ 31} "V. The trial court had no authority to sentence the appellant due to the guilty plea journal entry that violated Ohio rules and the Fourteenth Amendment."

{¶ 32} Both of these errors are based upon defendant's belief that various journal entries (specifically, continuances, his speedy trial waiver, and journal entry of the plea) were ineffectual or invalid due to the judge's electronic signature on them. Defendant cites to Loc.R. 19, Civ.R. 58, Crim.R. 54,[3] and Crim.R. 32(C).

{¶ 33} Defendant acknowledges that the sentencing journal entry was personally signed in writing by the judge. Accordingly, there was no violation of

[3]Crim.R. 54 provides: "[a]n amendment to or rescission of any provision of the Ohio Rules of Civil Procedure, which has been incorporated by reference in these rules, shall, without necessity of further action, be incorporated by reference in these rules unless the amendment or rescission specifies otherwise, effective on the effective date of the amendment or rescission." Defendant does not specifically set forth how the electronic signatures on the subject entries violates Crim.R. 54. Accordingly, this portion of the argument is overruled. App.R. 16(A)(7); App.R. 12(A)(2).

Crim.R. 32(C), which directs the judge to sign the judgment of conviction.[4] Likewise, the case upon which defendant relies, *State ex. rel Drucker v. Reichle* (1948), 81 N.E.2d 735, concerns a judgment of conviction and is otherwise not applicable to this matter. In *Drucker*, the court noted that the statute at issue required the court "to approve the journal entries of *judgments in writing* before such journal entry may be filed with the clerk for journalization." (Emphasis added.) The rationale for this was so as not to subject the judgment to chance of "error that might result from the unauthorized use of a rubber stamp." The court in *Drucker* went on to reason that the statute should be "literally complied with" in order to prevent error in court orders of judgments. Notably, *Drucker* pre-dates the advent of computerized court records, involved language that specifically required the court to approve the judgment entry "in writing," and there was nothing that authorized the court to use a "rubber stamp." Conversely, none of the rules cited by defendant in this case have the "in- writing" requirement. Another significant distinction is that the Local Rules specifically permit judges in this district to utilize an electronic signature on entries. Loc.R. 19.

{¶ 34} Loc.R. 19 provides that "[t]he Court shall approve a journal entry deemed by it to be proper, sign it MANUALLY OR APPLY AN ELECTRONIC SIGNATURE TO THE JOURNAL ENTRY PURSUANT TO LOCAL RULE 19.1, and cause it to be filed with the Clerk, and notice of the filing of each journal entry

[4]Civ.R. 58 pertains to entry of judgment in civil cases and was not violated in this case.

for journalization shall on the day following such filing be published in the Daily Legal News." (Emphasis in original.)

{¶ 35} Loc.R. 19.1(B) provides "Electronic transmission of a document with an electronic signature by a judge or magistrate that is sent in compliance with procedures adopted by the court shall, upon the complete receipt of the same by the clerk of court, constitute filing of the document for all purposes of the Ohio Civil Rules, Rules of Superintendence, and the Local Rules of this court."

{¶ 36} Although Loc.R. 19.1(B) does not mention the criminal rules, defendant has not presented any Rule of Ohio Criminal Procedure that directs the trial court to personally sign journal entries in writing. Crim.R. 57 (B) provides: "(B) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

{¶ 37} We find no prohibition to the use of an electronic signature on the type of journal entries at issue. The use of electronic signatures is authorized by the local rules and does not conflict with the criminal rules or any existing law providing it is the judge who authorizes and is in control of its use.

{¶ 38} Defendant acknowledges that the journal entries he is challenging all contain electronic signatures. There is no evidence in this record, nor any contention by the defendant, that would lead us to suspect that the electronic signatures were authorized by anyone other than the judge in this case.

Accordingly, the use of the electronic signature by the judge constituted the attestation of a judicial act. Accordingly, the journal entries at issue comply with the Local Rules, are not inconsistent with the criminal or civil rules of procedure, and were valid under the law of this jurisdiction. See *State v. Nicholson*, Cuyahoga App. No. 91652, 2009-Ohio-3592, ¶9-11.

{¶ 39} Assignments of Error IV and V lack merit and are overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR