[Cite as *State v. Bailey*, 2010-Ohio-6155.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94083 and 94084

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY BAILEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, VACATED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-518123 and 518680

BEFORE: Kilbane, P.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: December 16, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Anthony Bailey ("Bailey"), appeals his 18-month sentence in CR-518123 for assaulting a police officer, and his conviction and five-year sentence in CR-518680 for felonious assault. On January 14, 2010, Bailey filed a motion to consolidate the appeals of these cases, which this court granted. CR-518123 stems from Bailey's October 23, 2008 assault on an RTA police officer. CR-518680 stems from his November 19, 2008 attack on several patrons and an employee of the Cleveland Public Library.

Summary of Arguments

{¶ 2} Bailey argues, inter alia, that after he pled guilty to assault with a peace officer specification in CR-518123, he was constitutionally prejudiced when the trial court required his sentence to be served consecutive to his term of civil commitment in CR-518680, since R.C. 2945.40 does not contemplate consecutive sentences for civil commitment and criminal incarceration.

{¶ 3} Bailey also argues that the trial court erred at the conclusion of his bench trial in CR-518680 by finding him guilty of felonious assault on Counts 3 and 4 of the indictment, while simultaneously finding him not guilty by reason of insanity of felonious assault on Counts 1 and 2, even though the assaults all occurred within the same brief course of conduct.

{¶ 4} After reviewing the facts and the pertinent law, we affirm Bailey's sentence in CR-518123, but in CR-518680, we order Bailey's immediate discharge on Counts 1 and 2, since the trial court failed to conduct a civil commitment hearing within ten days of its decision pursuant to R.C. 2945.40(B). Further, in CR-518680, we find Bailey's convictions on Counts 3 and 4 are against the manifest weight of the evidence; accordingly, we remand the case for retrial on those counts.

Factual and Procedural History

{¶ 5} On October 23, 2008, at approximately 7:00 p.m., Bailey, who has been homeless for the better part of two decades and has a lengthy and documented psychiatric history, including diagnoses of undifferentiated

schizophrenia and paranoid schizophrenia, was walking along the RTA tracks near the Cleveland Browns Stadium. He was approached by two RTA police officers who sought to question him in connection with purportedly vandalized windows on nearby parked cars and related property damage to the Browns Stadium. As one of the officers radioed Bailey's identifying information to his dispatcher, Bailey struck one officer in the face. He was immediately arrested.

{¶ 6} On November 5, 2008, Bailey was released from jail. Despite being on postrelease control in CR-482563 (a felonious assault case in which he had just been released from prison in May 2008), Bailey was released with no charges being filed and no notice of a postrelease control violation.

{¶ 7} On November 21, 2008, at approximately 2:30 p.m., Bailey attacked several people with a rock inside the Louis B. Stokes Building of the Cleveland Public Library, causing severe injuries to all of them. That same afternoon, Cleveland Police Officer Martin Lentz ("Officer Lentz") apprehended Bailey on East 17th Street and St. Clair Avenue as he walked from the library to a homeless shelter on East 18th Street and Payne Avenue. Bailey admitted assaulting the victims at the library. The rock that he used to commit the assaults was found in his jacket pocket.

{¶ 8} On November 24, 2008, in CR-518123, a Cuyahoga County Grand Jury charged Bailey with one count of assault with peace officer specification, a fourth degree felony, in violation of R.C. 2903.13(A), for the altercation with the RTA police officer.

{¶ 9} On December 4, 2008, based upon his psychiatric history, the trial court referred Bailey to the court psychiatric clinic to determine his competency to stand trial and his sanity at the time of the act in that case.

{¶ 10} On December 9, 2008, a Cuyahoga County Grand Jury charged Bailey in Case No. CR-518680 with five counts of felonious assault stemming from the incident at the Louis B. Stokes Building of the Cleveland Public Library. Counts 1, 2, 3, and 5 charged Bailey with felonious assault by means of a deadly weapon, a second degree felony, in violation of R.C. 2903.11(A)(2). Count 4 charged Bailey with felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(1).

{¶ 11} On January 9, 2009, Bailey was found not competent to stand trial in case CR-518123, the altercation with RTA police officers. The trial court remanded Bailey to Northcoast Behavioral Healthcare System ("Northcoast") for restoration to competency.

{¶ 12} On April 1, 2009, Bailey was returned to the Cuyahoga County Jail from Northcoast. On April 7, 2009, he was again referred to the court psychiatric clinic for a separate evaluation to determine his competency to stand trial and his sanity at the time of the act in the library incident — CR-518680.

{¶ 13} Notably, the trial court denied the requests of Bailey's counsel that his cases be transferred to the court's mental health docket for further disposition.

{¶ 14} On April 20, 2009, court psychiatrist Stephen Noffsinger, M.D. ("Dr. Noffsinger") opined that Bailey was legally competent to stand trial in both cases.

He further opined that while his mental disease of undifferentiated schizophrenia did not prevent him from knowing the wrongfulness of his acts when he struck the police officer in CR-518123, it *did* prevent him from knowing the wrongfulness of his acts in CR-518680, the library incident, thus making him legally insane at the time of the library incident.

{¶ 15} On May 15, 2009, the trial court granted a continuance to allow Bailey to be independently evaluated by defense psychological expert Matthew Fabian, Ph.D. ("Dr. Fabian").

{¶ 16} On August 10, 2009, both the State and the defense stipulated that Bailey was sane at the time he committed the assault on the police officer as described in CR-518123, and that he was competent to stand trial based upon Dr. Noffsinger's report. The parties stipulated to Bailey's sanity at the time of the act in CR-518123 *only*, based upon the expert reports prepared by Dr. Noffsinger and Dr. Fabian in preparation for CR-518123 and CR-518680. No such stipulation was made with respect to Bailey's sanity at the time of the act in CR-518680, even though both experts opined that Bailey was legally insane when he committed the attacks in the library.

CR-518123 — Plea in the RTA Case

{¶ 17} During the August 10, 2009 hearing, Bailey pled guilty to assault with a peace officer specification as indicted in CR-518123.

CR-518680 — Trial

{¶ 18} On August 11, 2009, Bailey proceeded to a bench trial in CR-518680. Lay witness testimony revealed that on November 19, 2008, Bailey attacked four victims in the Louis Stokes wing of the Cleveland Public Library: William Lee, Joseph Klamar ("Klamar"), Kathryn Cseplo ("Cseplo"), and George Ervin. Bailey was alleged to have struck each victim, sometimes repeatedly, with a rock. The State presented the testimony of six people at trial, including Cseplo, Christine Feczkanin ("Feczkanin"), Klamar, and Officer Lentz.

Kathryn Cseplo

{¶ 19} Cseplo testified that she was sitting at her desk in a workroom adjacent to the main area of the library when she heard a commotion. After getting up to investigate, she caught a glimpse of someone behind a stack of books. She asked her colleague, Feczkanin, what was happening. She also asked Feczkanin, "[d]id you hit the button?" (referring to the library's panic button at the front desk). Immediately after this, Cseplo was struck on the head. She was taken via ambulance to Lakewood Hospital, where she received three staples in her head. (Tr. 24-31.)

Christine Feczkanin

{¶ 20} Feczkanin testified that she saw Bailey walking toward Cseplo, as Cseplo repeatedly asked, "Did somebody hit the button?" (Tr. 74.) Feczkanin testified that after Cseplo asked if anyone had "hit the button," she observed Bailey's facial expression change from "very solemn, expressionless" to "a lot of

rage, and then anger," at which point he hit Cseplo on the head with the rock. (Tr. 76.)

Joseph Klamar

{¶ 21} Klamar testified that he was looking up auto repair information on the third floor of the library when he heard someone shout and then heard a loud clang of metal. (Tr. 39.) He saw someone whom he knew only as "Walter" on the floor, and then he himself was struck on the back of the head with a hard object. The force of the blow threw him out of his chair and onto his knees. (Tr. 39-40.) He was taken via ambulance to Metro Hospital where he received two staples to his head. (Tr. 43.)

Officer Martin Lentz

{¶ 22} Officer Lentz testified that after receiving the call, he observed video footage from the library showing Bailey exiting the library and heading eastbound on Superior. He then began investigating nearby homeless shelters that were east of the library, and he eventually found Bailey on East 18th Street and St. Clair Avenue, while en route to a homeless shelter on East 17th Street and Payne Avenue. Officer Lentz further testified that Bailey admitted assaulting the people at the library, and that Bailey still had the rock that he used to commit the assaults in his pocket.

Rule 29 Motion

{¶ 23} At the conclusion of the State's case-in-chief, the trial court granted Bailey's Crim.R. 29 motion for directed verdict as to Count 5, as there was no evidence presented regarding the alleged assault on George Ervin.

{¶ 24} Bailey presented two witnesses: Dr. Noffsinger and Dr. Fabian. Their respective expert reports were entered into evidence as Exhibits A and C. (Tr. 194.)

Dr. Stephen Noffsinger

{¶ 25} Dr. Noffsinger, the court's own psychiatrist, was qualified without objection from the State. His expertise, including his positions on the faculty at Case Western Reserve University School of Medicine and the University of Akron, and his current position as Associate Director of Forensic Psychiatry at University Hospitals in Cleveland, Ohio, and as Chief of Psychiatry at Northcoast Behavioral Health System, were entered into evidence as Exhibit B.

{¶ 26} Dr. Noffsinger opined in his report, at defendant's Exhibit C, that Bailey was responding to God's command instructions to commit the offenses: "He believed that God's commands outweighed his knowledge that the offenses were illegal. Mr. Bailey believed that the victims were demon-possessed, and if he did not strike them with a rock, that they would possess him. He was convinced that if he failed to act, God would cause worse consequences to occur * * *." (Defendant's Exhibit C at 7.) Dr. Noffsinger concluded to a reasonable degree of medical certainty that Bailey's particular mental disease of

undifferentiated schizophrenia prevented him from knowing the wrongfulness of his actions during the attacks at the library.

Dr. Matthew Fabian

{¶ 27} Dr. Fabian testified that he has conducted over 300 sanity evaluations over the course of his career and has only recommended a patient to be considered insane in less than 10 percent of his evaluations. (Tr. 100.) He stated that he interviewed Bailey five times and reviewed Dr. Noffsinger's report as well as Bailey's criminal history, including the assault on the RTA police officer, the attack at the library, and Bailey's health and psychiatric history.

{¶ 28} It was Dr. Fabian's opinion, to a reasonable degree of psychological certainty, that Bailey did not know the wrongfulness of his offenses during the November 19, 2008 attacks at the library. In his report, Dr. Fabian wrote that Bailey felt he was being commanded by some type of force or spirit:

> **"Essentially he believes that he has had connections with a God-like spirit who has commanded him to do things. These bizarre hallucinations would be aligned with Schizophrenia, Paranoid Type. He has also been diagnosed with Schizophrenia, Undifferentiated Type. There is no question this individual has a history of hearing voices and having disorganized thoughts."** (**Defendant's Exhibit A at 4-5.)**

{¶ 29} With respect to his knowledge of the attacks at the library, Dr. Fabian reported:

> **"He [Bailey] stated that he just complied with the spirit which told him to hit the people. He stated that he did not want to hit the people but God told him to do it. I asked him if he hit the people in order to get a place to stay and he said, 'Well yes,**

> **well, no, no, I don't know, I just did what they told me to do.' I asked him if he knew his offenses were wrong and he said 'Well, God said to do it and so I did it.' * * * I asked him if he knew what he did was wrong at the time of the offense and he continued to state that God told him to do it, it was the spirit that told him and he had to follow the direction." (Defendant's Exhibit A at 9-10.)**

{¶ 30} Dr. Fabian thus opined that Bailey's actions were irrational in nature and based upon a psychotic motive. Dr. Fabian's report further stated, that "he [Bailey] never thought about the consequences or illegality of the offenses, rather [he] felt compelled to assault the victims." (Defendant's Exhibit A at10.)

{¶ 31} Thus, the psychiatric experts for both the court and the defense agreed that Bailey was not guilty by reason of insanity when he committed the attacks at the library. No testimony was ever submitted by the State to rebut or contradict these opinions.

{¶ 32} After closing arguments, the trial court found Bailey not guilty by reason of insanity on Counts 1 and 2, but guilty on Counts 3 and 4.

{¶ 33} On September 14, 2009, the trial court sentenced Bailey to 18 months in CR-518123 and stated in its journal entry that this sentence would run consecutive to any sentence imposed in CR-518680. Thereafter, in CR-518680, the trial court then sentenced Bailey to an indefinite term of civil commitment at Northcoast Behavioral Healthcare System on Counts 1 and 2. After unspecified "further treatment" at Northcoast, the trial court ordered that Bailey be transported to the Lorain Correctional Institution, where he would serve five concurrent years on Counts 3 and 4, which merged for sentencing. The trial court ordered this

sentence to run consecutive to his civil commitment and to his 18-month sentence in CR-518123. He was thus sentenced to six and one-half years in addition to his term of civil commitment. At no time did the trial court hold a civil commitment hearing as required by R.C. 2945.40.

{¶ 34} On October 15, 2009, Bailey appealed both cases, which were designated as App. Nos. 94083 and 94084. This court consolidated the two cases.

{¶ 35} Bailey asserts six assignments of error for our review. For the sake of judicial economy, we address certain assignments of error out of order where appropriate.

{¶ 36} Bailey's second assignment of error states:

> **"Appellant's convictions for felonious assault are against the manifest weight of the evidence."**

{¶ 37} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is *substantial* evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Emphasis in

original; internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 38} Although we consider the credibility of the witnesses in a manifest weight challenge, we are mindful that the determination regarding witness credibility rests primarily with the trier of fact. *State v. Hill* (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068. The trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections. Those observations are critical to a resolution of each witness's credibility. *State v. Antill* (1964), 176 Ohio St. 61, 66, 197 N.E.2d 548.

{¶ 39} Bailey contends that the trial court's guilty findings on Counts 3 and 4 are against the manifest weight of the evidence, given the testimony of Dr. Noffsinger and Dr. Fabian, who found him legally insane at the time he committed these acts.

{¶ 40} The test of legal sanity is whether the defendant is able to recognize the difference between right and wrong in respect to a crime of which he was charged and is able to choose right and abjure wrong. *Krauter v. Maxwell* (1965), 3 Ohio St.2d 142, 209 N.E.2d 571. An accused who knows and recognizes the difference between right and wrong in respect to the crime with which he is charged, and who has the ability to choose the right and

abjure the wrong, is legally sane. *State v. Frohner* (1948), 150 Ohio St. 53, 80 N.E.2d 868.

{¶ 41} Bailey analogizes the facts of the instant case with *State v. Brown* (1983), 5 Ohio St.3d 133, 449 N.E.2d 449, in which the Ohio Supreme Court affirmed the First District's reversal of a murder conviction as against the manifest weight of the evidence where the trial court ignored the findings of expert witnesses who stated appellant was legally insane at the time of the act. *Brown* held that a trial court errs in ignoring conclusions of expert witnesses that a defendant is insane where there is no rebuttal testimony, lay or expert, indicating that the defendant was sane.

{¶ 42} The State does not dispute the holding in *Brown* in its argument under this assignment of error. Instead, it argues that the short time period between the separate attacks allowed Bailey to be temporarily restored to sanity. Given that not only Dr. Fabian, but also the Court's own expert, Dr. Noffsinger, opined Bailey was legally insane at the time he committed these acts, these arguments are unpersuasive.

{¶ 43} The trial court gave great weight to Dr. Fabian's testimony in its guilty verdict regarding the assault on Cseplo in Counts 1 and 2, finding "Dr. Fabian's testimony regarding the assault on Kathryn Cseplo to be credible and worthy of more weight given his lengthy and numerous interviews and in depth interviews with the defendant." (Tr. 208.) However, the trial court

found Feczkanin's testimony regarding Bailey's change in facial expression before striking Cseplo persuasive as well, and supportive of the theory that Bailey was legally sane while assaulting Cseplo, but legally insane when he struck the other victims. (Tr. 208-209.)

{¶ 44} When we view the evidence, including the credibility of all witnesses, we agree with the trial court that the expert testimony in this case is indeed credible. We disagree, however, with the trial court's conclusion that testimony of a witness that a change in facial expression is somehow an indication of temporary sanity, especially when experts from both the court and the defense agree that Bailey was legally insane at the time of these acts.

In its reasoning, the trial court stated:

> **"The court payed very close attention to the testimonies, especially those presented by Dr. Noffsinger and Dr. Fabian. Applying those tests for credibility and weight of each person testifying, the Court finds Dr. Fabian's testimony regarding the assault on Kathryn Cseplo to be credible and worthy of more weight given his lengthy and numerous interviews and in depth interviews with the defendant. Also the testimony of witnesses at the library support the finding that the defendant was — did know the wrongfulness of his act when assaulting Ms. Cseplo insofar as that his expressions went from — changed from being blank at the time of the assault on the others to an expression of rage and other expressions after hearing Ms. Cseplo in a firm voice tell her colleague to hit the panic button." (Tr. 208.)**

{¶ 45} The trial court gave no reason for its findings on Counts 3 and 4, other than the Feczkanin's testimony about Bailey's facial expression. (Tr. 208.)

{¶ 46} First, the trial court's assertion that Cseplo told her coworker to "hit the *panic* button" is not found in the testimony, but only in the State's closing statement. Second, the trial court stated that it found the expert's opinions credible, but disregarded their conclusions in finding Bailey guilty on Counts 3 and 4.

{¶ 47} In finding Bailey guilty on these counts, the trial court committed a manifest miscarriage of justice. Quite simply, one lay witness's testimony about a change in Bailey's facial expression does not outweigh the concurring opinions of both the State and defense expert witnesses that Bailey did not know the wrongfulness of his acts. Bailey's guilty convictions on Counts 3 and 4 were against the manifest weight of the evidence.

{¶ 48} Additionally, we note that after the trial court found Bailey not guilty by reason of insanity in Counts 1 and 2, it was required to hold a civil commitment hearing within ten days pursuant to R.C. 2945.40(B). This statute states: "The court shall hold a hearing * * * to determine whether the person found not guilty by reason of insanity is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order within ten days after the finding of not guilty by reason of insanity." Id. Under the statute, the failure to hold such a hearing within the 10-day period "shall cause the immediate discharge of the respondent * * *." Id.

{¶ 49} According to the docket, instead of conducting the statutorily-required hearing, the trial court issued a sua sponte journal entry on August 18, 2009, stating as follows:

> **"This cause came for trial this 11th day of August 2009. Based upon the evidence presented, the court finds the defendant not guilty by reason of insanity on counts 1 and 2, of the offenses of felonious assault. Defendant is referred to the court psychiatric clinic for determination of whether the defendant is a mentally ill individual subject to hospitalization/institutionalization by court order. Sentencing set for 9-2-09. Report to be delivered to the court by 9-2-09."**

{¶ 50} On September 2, 2009, the trial court then sentenced defendant. At no time did the trial court conduct the required civil commitment hearing prescribed by statute.

{¶ 51} The First District encountered a somewhat similar situation to the instant case in *State v. Ware* (1988), 44 Ohio App.3d 201, 542 N.E.2d 1115. In *Ware*, the court held that when a defendant is simultaneously found guilty of one or more counts of an indictment but not guilty by reason of insanity of remaining counts of indictment, a court may not postpone or stay a hearing on hospitalization or institutionalization that is statutorily mandated pending the defendant's release. Id. Instead, a hearing is statutorily required to be held first in order to accomplish the legislative purpose of treating mentally ill defendants who are found not guilty by reason of insanity, before or in lieu of punishment. Id.

{¶ 52} Here, in contravention of R.C. 2945.40(B), the trial court held no hearing whatsoever outside the sentencing hearing itself. The remedy in such cases is "immediate discharge." R.C. 2945.40(B). Pursuant to that statute, Bailey is therefore ordered immediately discharged on Counts 1 and 2, although his 18-month sentence in CR-518123 remains intact.

{¶ 53} Bailey's second assignment of error is sustained. Based upon the unrebutted evidence in the record from two separate experts, Bailey was not guilty by reason of insanity at the time he committed the felonious assaults on Cseplo in Counts 3 and 4. His convictions in Counts 3 and 4 are against the manifest weight of the evidence. Accordingly, we reverse the trial court's finding of guilt on these two counts. Based upon the trial court's failure to hold a civil commitment hearing within the statutorily prescribed 10-day period with respect to Counts 1 and 2, Bailey is ordered immediately discharged on those counts. We vacate Bailey's sentence and remand the case for retrial on Counts 3 and 4 only.

{¶ 54} Bailey's third assignment of error states:

> **"The trial court violated Ohio law, denied appellant due process of law and equal protection of the laws, and violated the proscription against cruel and unusual punishment by requiring that appellant's terms of imprisonment be served consecutively to his civil commitment."**

{¶ 55} Bailey argues that the trial court committed prejudicial error by imposing his sentence in CR-518123 for assault with a peace officer specification — an offense for which he was found legally sane at the time of the

act — consecutively to his term of civil commitment and his prison sentence in CR-518680. Given our disposition of the previous assignment of error and our vacation of Bailey's prison sentence in CR-518680, it is worth clarifying the general question of whether a trial court errs in requiring a defendant to serve a term of incarceration in one case consecutively with his civil commitment in another. We find it is not error to do so.

{¶ 56} R.C. 2929.41 permits courts to impose consecutive sentences with jail or prison terms. While it is true that the statute does not expressly permit a trial court to impose a consecutive term of incarceration in addition to a civil commitment pursuant to R.C. 2945.40, nothing in the statute forbids it. The facts of these cases clearly indicate that Bailey was determined by both Dr. Noffsinger and Dr. Fabian to be sane at the time he assaulted the police officer in CR-518123, and in fact stipulated to his sanity at the time of the act in that case.

{¶ 57} 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, 912 N.E.2d 582. Bailey provides no evidence in the record to suggest that it is error for a trial court to consecutively sentence a defendant to prison in a case in which he was found competent and sane, and to a term of civil commitment in a case for which a defendant was found not guilty by reason of insanity.

{¶ 58} Bailey's third assignment of error is overruled.

{¶ 59} Bailey's fourth assignment of error states:

> **"The trial court committed prejudicial error by failing to make the findings required to imposed consecutive sentences."**

{¶ 60} Bailey maintains that the trial court erred by failing to make findings under R.C. 2929.14(E)(4). In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, 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* at ¶99.

{¶ 61} Bailey argues that the statutory findings were revived by implication due to the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. _____, 129 S.Ct. 711, 172 L.Ed.2d 517, and because the legislature never repealed the statutory provisions that were excised by *Foster*.

{¶ 62} As we noted above, courts have the discretion to determine whether prison sentences are to be served consecutively or concurrently. *Elmore* at ¶ 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, 887 N.E.2d 328.

{¶ 63} In *Ice*, the United States Supreme Court addressed the court's authority to impose consecutive sentences. The court 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* at ¶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*, 8th Dist. 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"). Bailey's fourth assignment of error is overruled.

{¶ 64} Bailey's sixth assignment of error states:

> **"The trial court abused its discretion and committed prejudicial error by failing to order that Appellant be given full credit for time served prior to his conviction, including time served while being restored to competency."**

{¶ 65} Bailey maintains that the trial court erred when it failed to give him credit for time served prior to his convictions in both cases.

{¶ 66} In *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, the Ohio Supreme Court stated that:

> **"The practice of awarding jail-time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions. * * * 'The Equal Protection Clause requires that *all* time spent in any jail prior to trial and commitment by [a prisoner who is] unable to make bail because of indigency *must* be credited to his sentence.' * * ***

"This principle is codified in Ohio at R.C. 2967.191, which states that '[t]he department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial * * *.'

"The Ohio Administrative Code provides additional details regarding when a prisoner is entitled to jail-time credit and how to calculate a prison term, taking the credit into account. Most relevant to the question before us is Ohio Adm.Code 5120-2-04(F), which states that '[i]f an offender is serving two or more sentences, stated prison terms or combination thereof concurrently, the adult parole authority shall *independently* reduce *each sentence or stated prison* term for the number of days confined for that offense. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail time credit.' (Emphasis added.)

"The Administrative Code provides a different rule for calculating jail-time credit for offenders serving consecutive terms. In such cases, the code instructs that jail-time credit be applied only once, to the total term. See Ohio Adm.Code 5120-2-04(G)." Id. at ¶7-10.

{¶ 67} In the instant case, Bailey was sentenced to 18 months in prison in CR-518123 to be served consecutively to the sentence imposed in CR-518680 (an indefinite term of civil commitment at Northcoast Behavioral Healthcare System on Counts 1 and 2 and five concurrent years on Counts 3 and 4). According to R.C. 2967.191 and *Fugate*, Bailey is entitled to receive credit for time served in confinement as set forth in R.C. 2967.191. Such credit only applies to the 18-month sentence and shortens the total prison term by the

amount of jail time credit. Furthermore, because Bailey's convictions on Counts 3 and 4 are reversed, on remand Bailey is entitled to credit for the time he spent at Northcoast Behavioral Healthcare System.

{¶ 68} Thus, the sixth assignment of error is sustained, and we remand CR-518123 for the trial court to calculate and apply jail time credit for time served.

{¶ 69} Bailey's first assignment of error states:

> **"The trial court abused its discretion and committed prejudicial error by allowing improper cross-examination of the defense psychologist as to the mere possibility that appellant was capable of rational thinking at some particular moment in time. Expert opinions, including alternative theory [sic], must be expressed in terms of probability, not possibility."**

{¶ 70} Based upon our disposition of Bailey's second assignment of error, this assignment of error is moot.

{¶ 71} Bailey's fifth assignment of error states:

> **"Appellant was denied his right to the effective assistance of counsel."**

{¶ 72} Bailey argues that defense counsel was ineffective at trial for failing to timely object to the improper cross-examination of Dr. Fabian, and that counsel was ineffective for calling Dr. Fabian as an expert witness when his insanity defense was supported by a disinterested and highly-qualified expert, Dr. Noffsinger. Bailey further argues that defense counsel was ineffective for failing to object to consecutive sentences. However, based

upon our disposition of Bailey's second, third, and fourth assignments of error, this assignment of error is moot.

{¶ 73} Accordingly, Bailey's sentence in CR-518123 is affirmed, but the case is remanded for the trial court to calculate and apply jail time credit for time served; his conviction on Counts 3 and 4 in CR-518680 is reversed and his sentence is vacated. We order his immediate discharge on Counts 1 and 2 in CR-518680, and we remand the case for retrial on Counts 3 and 4 only.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR