

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1215

Appellee

Trial Court No. CR0200802985

v.

Wilbert Johnson

DECISION AND JUDGMENT

Appellant

Decided: July 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, Wilbert Johnson, appeals from the judgment of the Lucas County Court of Common Pleas following a no contest plea to aggravated burglary and felonious assault. Appellant was found guilty and sentenced to five-year terms of

incarceration on each count, to be served consecutively. Appellant does not dispute the underlying conviction. In his sole assignment of error appellant argues that:

{¶ 2} "I. The trial court erred when it ordered sentences to be served consecutively without making the findings required by *State v. Comer* which are required again in light of the recent United States Supreme Court ruling in *Oregon v. Ice*."

{¶ 3} Appellant asserts that the trial court abused its discretion when it ordered sentences to be served consecutively without the former requisite findings of *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. While appellant concedes these required findings were negated by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, he asserts they have been resurrected by the United States Supreme Court decision of *Oregon v. Ice* (2009), ___U.S. ___, 129 S.Ct. 711.

{¶ 4} We disagree.

{¶ 5} This court has addressed this exact issue in *State v. Finn*, 6th Dist. Nos. L-09-1162, L-09-1163, 2010-Ohio-2004, holding that *Foster* remains binding precedent in Ohio as the *Ice* decision pertained to Oregon sentencing statutes. More significantly, this court specifically cited the Ohio Supreme Court decision of *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 35, where the court unambiguously held, "*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." Accordingly, *Foster* still applies to consecutive sentencing. We find appellant's single assignment of error not well-taken.

{¶ 6} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.