[Cite as *State v. Ward*, 2010-Ohio-5164.]

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

State of Ohio — Court of Appeals No. OT-10-005

Appellee — Trial Court No. 08-CR-120

v.

Kai A. Ward — **DECISION AND JUDGMENT**

Appellant — Decided: October 22, 2010

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Matthew S. Schuh, Assistant Prosecuting Attorney, for appellee.

K. Ronald Bailey, for appellant.

* * * * *

HANDWORK, J.,

{¶ 1} In this appeal from a judgment of the Ottawa County Court of Common Pleas, appellant, Kai Ward, asserts the following assignments of error:

{¶ 2} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES WITHOUT MAKING THE NECESSARY FACTUAL FINDINGS AS REQUIRED IN R.C. 2929.14(E)(4) AND 2929.14(A).

{¶ 3} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO MAXIMUM CONSECUTIVE SENTENCES, IMPOSING AN UNNECESSARY BURDEN ON THE STATE IN VIOLATION OF R.C. 2929.13(A).

{¶ 4} "THE TRIAL COURT VIOLATED THE ACCUSED'S EIGHT [sic] AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN SENTENCING APPELLANT TO MAXIMUM SENTENCES."

{¶ 5} On July 30, 2009, appellant pled guilty to three counts of disseminating matter harmful to juveniles; all are violations of R.C. 2907.31(A)(1) and felonies of the fifth degree. He also pled guilty to two counts of gross sexual imposition with a child less than 13 years of age, both are violations of R.C. 2907.05(A)(4) and felonies of the third degree. Appellant was sentenced to five years in prison for each of the violations of R.C. 2907.31(A)(1). The court ordered that these five year terms were to be served consecutively. The judge imposed a 12 month sentence for each violation of R.C. 2907.05(A)(4), ordered that they be served concurrent to each other and consecutive to the five year sentences, for a total of 11 years in prison. The court also notified appellant of the fact that he would be subject to a mandatory five year period of postrelease control.

{¶ 6} In his first assignment of error appellant contends that the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, invalidates the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the court held, in pertinent part, that R.C. 2929.14(E)(4) and 2929.41(A), which required judicial fact finding in imposing consecutive sentences, were

unconstitutional, id. at paragraph three of the syllabus, and severed them from Ohio's statutory sentencing scheme, id. at paragraph four of the syllabus. Therefore, Ward argues that the trial court was required to making factual findings in imposing consecutive sentences.

{¶ 7} If we decline to apply *Ice*, appellant asks, in the alternative, that we stay this cause until such time as the Supreme Court of Ohio addresses this issue in *State v. Hodge*, Supreme Court Case No. 2009-1997, wherein the court certified the following proposition of law: "Before imposing consecutive sentences, Ohio trial courts must make the findings of fact specified by R.C. 2929.14(E)(4) to overcome the presumption favoring concurrent sentences in R.C. 2929.14(A)."

{¶ 8} This court has declined to take such action and found that a re-examination of the law set forth in *Foster* can only be undertaken by the Supreme Court of Ohio. See *State v. Lewis*, 6th Dist. Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 57, citing *State v. Allen*, 6th Dist. No. S-09-033, 2010-Ohio-2381, ¶ 13; *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1698, ¶ 53-54; *State v. Winters*, 6th Dist. Nos. L-08-1195, L-08-1263, L-08-1264, 2009-Ohio-5992, ¶ 7; and *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶ 18. We also decline to hold this case in abeyance until such time that the Ohio Supreme Court decides *Hodge*. Consequently, appellant's first assignment of error is found not well-taken.

{¶ 9} Appellant's second assignment of error urges that imposing maximum, consecutive sentences for his conviction on two counts of gross sexual imposition

violates R.C. 2929.13(A). That statute provides, inter alia, that any sentence for a felony offense "shall not impose an unnecessary burden on state or local government resources." Id. What constitutes a burden on state resources is not defined in the statute; however, the language used "suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration." *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, ¶ 5, abrogated on other grounds by *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124. Moreover, we must keep in mind that R.C. 2953.08(G)(2) allows an appellate court to modify or reverse a sentence only if it is clearly and convincingly contrary to law.

{¶ 10} Here, appellant's trial counsel stated that his client has liver cancer[1], receives chemotherapy at a cost of $4,300 per month, and that the treatment is for a period of nine months. Ostensibly, appellant is paying for the treatments through a "financing program" with "three drug companies." Nonetheless, no documentation or other evidence was offered at the sentencing hearing to show the cost of these treatments or that this cost would impose an unnecessary burden on the state. On the other hand, appellant's incarceration ensures that appellant will not be free to reoffend. Id. The state of Ohio clearly has a significant interest in imprisoning anyone who engages in sexual contact with a seven year old child, the age of the victim in this case. Accordingly, without some evidence in the record that the sentence the trial court imposed would

[1]The presentence investigation report states that appellant has "first stage liver disease." While Ward's appellate counsel maintains that his client also has "lung cancer," the report states that appellant has "[s]pots on his right lung."

create an unnecessary burden on state or local government resources, we cannot clearly and convincingly find that Ward's sentence is contrary to R.C. 2929.13(A). Appellant's second assignment of error is found not well-taken.

{¶ 11} Appellant's third assignment of error maintains that the imposition of maximum sentences constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Art. I, Sec. 9, Ohio Constitution. Specifically, he claims that imposing 11 years in prison on someone who is 56 years old, suffers from purported lung and liver cancer, and was never found guilty of any other felony is cruel and unusual punishment. Appellant also refers to other "facts" that are not in the record of this cause to support this argument, e.g., he did not receive "proper medical care for the treatment of his lungs and liver cancer until ten (10) days after his arrival" at the "London Correctional Institute."

{¶ 12} The Eighth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Section 9, Article I of the Ohio Constitution sets forth the exact same prohibition. In *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, at the syllabus, the Supreme Court of Ohio held:

{¶ 13} "Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting

from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

{¶ 14} Here, each of appellant's individual prison terms is within the appropriate statutory range. See R.C. 2929.14(A)(3) and (A)(5). Because these sentences are within the statutory range authorized by the state legislature, they are not grossly disproportionate or shocking to a reasonable person. Id. at ¶ 23. Therefore, the aggregate of 11 years due to the consecutive imposition of these sentences is not cruel and unusual punishment. Id. Appellant's third assignment of error is found not well-taken.

{¶ 15} Upon consideration whereof, this court finds that justice has been done the party complaining, and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE