

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	Nos. 10AP-207
	:	(C.P.C. No. 09 CR 1266)
Roxie M. Stevens,	:	and 10AP-208
	:	(C.P.C. No. 09CR 6846)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 30, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Keith O'Korn, for appellant.

APPEALS from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Roxie Stevens entered guilty pleas to a charge of receiving stolen property as a felony of the fourth degree and to a charge of attempted forgery as a misdemeanor of the first degree. When she was sentenced, she was ordered to be incarcerated for 18 months on the receiving stolen property charge and six months on the attempted forgery charge. The sentences were ordered to be served consecutively, with a credit for 71

days of jail-time previously served. She now appeals on issues related to her sentences and assigns four errors for our considerations:

ASSIGNMENT OF ERROR #1

THE IMPOSITION OF CONSECUTIVE[] SENTENCES FOR FELONY AND MISDEMEANOR CONVICTIONS WAS CONTRARY TO LAW, ALONG WITH THE APPLICATION OF JAIL-TIME CREDIT ONLY TO THE FIRST CASE.

ASSIGNMENT OF ERROR #2

APPELLANT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION.

ASSIGNMENT OF ERROR #3

CONTRARY TO LAW, THE TRIAL COURT ERRED BY FOLLOWING *STATE V. FOSTER*, IN CONTRAVENTION OF RECENT U.S. SUPREME COURT PRECEDENT, *OREGON v. ICE*, AND BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. §§ 2929.14(E)(4), 2929.41(A).

ASSIGNMENT OF ERROR #4

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶2} The issue raised in the first assignment of error has been addressed by five other appellate districts, all of which have issued opinions which we find persuasive. See *State v. Hughley*, 8th Dist. No. 92588, 2009-Ohio-5824, ¶10; *State v. Walters*, 6th Dist. No. L-08-1238, 2009-Ohio-3198, ¶30; *State v. Trainer*, 2nd Dist. No. 08-CA-04, 2009-

Ohio-906, ¶10; *State v. Terry*, 171 Ohio App.3d 473, 2007-Ohio-1096, ¶9; and *State v. Elkins*, 5th Dist. No. 05 CA 0008, 2006-OHlo-3997.

{¶3} All five districts agree that the case of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, found R.C. 2929.41(A) to be unconstitutional and therefore severed if from the balance of R.C. 2929.41. This left trial courts to apply R.C. 2929.41(B)(1) which reads:

A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.

When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months.

{¶4} As a result, the trial court did not fail to follow Ohio law in giving consecutive sentences for a felony and a misdemeanor. The jail-time credit then applies to the total sentence.

{¶5} The first assignment of error is overruled.

{¶6} In the second assignment of error, appellate counsel attacks the length of the individual sentences imposed. The prison sentence was the first prison sentence for Stevens, but community control had been imposed on several occasions for misdemeanors and Stevens failed to complete it successfully. Stevens has also served numerous misdemeanor jail sentences, most of which are related to prostitution, drug abuse, or theft.

{¶7} Stevens has two sons in the custody of a relative. She has paid no child support despite a court order to pay \$270 per month. Stevens began an in-patient treatment for substance abuse after being ordered to do so by the Franklin County Municipal Court. She stayed about one week and then checked herself out of the program. She reported that she uses crack cocaine daily, alcohol daily and marijuana weekly.

{¶8} The trial judge who sentenced Stevens could well have concluded that Stevens needed an extended period of time to dry out. Probation had failed. Drug treatment efforts had failed. Incarceration would benefit her medically and would, at least temporarily, stop her criminal activity which is documented in four different states. The judge's sentence was not in any way an abuse of discretion.

{¶9} Given our findings with respect to the first assignment of error, we see no basis for finding the sentences to be contrary to law. The sentences, since the *Foster* case, are basically left to the discretion of the trial judges, and the judge who sentenced Stevens did not abuse his discretion.

{¶10} The second assignment of error is overruled.

{¶11} The Tenth District Court of Appeals has consistently abided by the rulings of the Supreme Court of Ohio in *Foster*. We are not in a position to find that the United States Supreme Court has, by inference, overruled the *Foster* case in its opinion in *Oregon v. Ice* (2009), 129 S.Ct. 711, U.S.Or., 2009. If the Ohio Supreme Court decides that *Oregon v. Ice* changes Ohio law, we will abide by the new decision of the Ohio Supreme Court.

{¶12} The third assignment of error is overruled.

{¶13} We see no basis for finding that trial court counsel for Stevens rendered less than effective assistance. Trial counsel worked out a favorable plea agreement and argued diligently for leniency. Given Stevens' extensive history with the court system, counsel could not save her from a two-year sentence.

{¶14} The fourth assignment of error is overruled.

{¶15} All four assignments of error having been overruled, the judgment of the trial court is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
