

[Cite as *State v. Paugh*, 2009-Ohio-4682.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-11-144
- vs -	:	<u>OPINION</u> 9/8/2009
CLARENCE C. PAUGH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR25249

Rachel A. Hutzell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, OH 45036, for plaintiff-appellee

Gregory J. Demos, 12 West South Street, Lebanon, OH 45036, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Clarence C. Paugh, appeals the imposition of consecutive prison sentences by the Warren County Court of Common Pleas.

{¶2} Appellant pled guilty to two fifth-degree felony offenses. The trial court imposed two consecutive ten-month prison terms. Appellant now appeals his sentence, setting forth one assignment of error for this court's review.

{¶3} Assignment of Error:

{¶4} "THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES UPON APPELLANT IS CLEARLY AND CONVINCINGLY CONTRARY TO LAW."

{¶5} Appellant argues that his consecutive prison sentence is contrary to law after the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, excised the statutory provisions that authorized the court to impose consecutive sentences, and therefore, the court was required to impose concurrent sentences.

{¶6} Appellant supports his argument that concurrent sentences are mandated with the language of R.C. 5145.01, which is titled "Duration of Sentences" under the Chapter on "State Correctional Institutions." The applicable portion of the statute states that: "[i]f a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply." R.C. 5145.01.

{¶7} We cannot agree with appellant's assertion because since *Foster*, the Ohio Supreme Court has stated that the trial court has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently. *State v. Elmore*, ___ Ohio St.3d ___, 2009-Ohio-3478, ¶33, citing *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶19; see *State v. Smith*, Licking App. Nos. 08 CA 42, 08 CA 43, 2009-Ohio-1684, ¶57-58 (Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, made it apparent that it finds consecutive sentences permissible after *State v. Foster*); cf. *State v. Castle*, Ottawa App. No. OT-08-029, 2008-Ohio-6388, ¶5 (acknowledging that Ohio Supreme

Court in *Bates* indicated that the severance and excision of R.C. 2929.14[E][4] and R.C. 2929.41[A] by *Foster* left no statute to establish in these circumstances presumptions for concurrent and consecutive sentencing or to limit trial court's discretion beyond basic purposes and principles of sentencing in R.C. 2929.11 and R.C. 2929.12).¹

{¶18} The federal district court in *Shie v. Smith* (N.D. Ohio Feb. 13, 2009), No. 1:08 CV 194, 2009 WL 385617 (habeas petition), noted that the Ohio Supreme Court made several statements in *Bates* in reference to Ohio's statutory scheme after *Foster*. The *Shie* court stated, "It is hard to imagine, after making these unambiguous proclamations with full knowledge of the existence of [R.C.] 5145.01, that the Ohio Supreme Court would now find that a statute that addresses the governance of state prisons trumps the Ohio sentencing statutes, creates a liberty interest in concurrent sentences[,] and forms a basis for overturning, in less than three years, its decisions in *Foster* and *Bates*." *Id.* at *5.

{¶19} Accordingly, we find that the trial court had the discretion and inherent authority to determine that appellant's prison sentence within the statutory range would run consecutively. A review of the record indicates that appellant's sentence was not contrary to law and further, there is nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable. See *Kalish*, 2008-Ohio-4912; see R.C. 2929.11; R.C. 2929.12; R.C. 2929.13; R.C. 2929.14; R.C. 2953.08; *State v. Shull*, Ashland App. No. 2008-COA-036, 2009-Ohio-3105.

{¶10} Judgment affirmed.

1. The Ohio Supreme Court in *Bates* acknowledged in a footnote that it was aware of R.C. 5145.01, but declined to address the effect of the severance of R.C. 2929.14(E)(4) and 2929.41(A) on R.C. 5145.01 because neither party had raised it. *Bates*, 2008-Ohio-1983 at fn. 2.

BRESSLER, P.J., and POWELL, J., concur.