

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-004
- vs -	:	<u>OPINION</u>
	:	9/28/2009
ERIC W. MONTGOMERY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 2008CR00774

Donald W. White Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

**BRESSLER, P.J.**

{¶1} Defendant-appellant, Eric W. Montgomery, appeals his sentence imposed by the Clermont County Court of Common Pleas following his convictions for breaking and entering, vandalism, and theft.

{¶2} On September 17, 2008, in Case No. 08CR00774, a grand jury indicted appellant on 47 counts as follows: Counts 1 through 6, breaking and entering in violation of R.C. 2911.13(B); Counts 7 through 26, vandalism in violation of R.C. 2909.05(B)(1)(a); and Counts 27 through 47, theft in violation of R.C. 2913.02(A)(1). Also, on October 1,

2008, in Case No. 08CR00815, a grand jury indicted appellant on an additional 20 counts as follows: Counts 1 through 6, breaking and entering in violation of R.C. 2911.13(B); Counts 7 through 10, grand theft in violation of R.C. 2913.02(A)(1); Counts 11 through 15, vandalism in violation of R.C. 2909.05(B)(1)(a); and Counts 16 through 20, theft in violation of R.C. 2913.02(A)(1).

{¶13} Before trial, the state dismissed Case No. 08CR00774 Count 47 and Case No. 08CR00815 Counts 7 through 10 and 17 through 20. At the conclusion of the state's case, the trial court dismissed the following counts pursuant to appellant's Crim.R. 29 motion: Case No. 08CR00774 Counts 5, 25, and 45; and Case No. 08CR00815 Counts 2, 3, 5, and 6. Further, the jury found appellant not guilty of the following: Case No. 08CR00774 Counts 6, 26, and 46; and Case No. 08CR00815 Counts 1, 11, and 16.

{¶14} On December 31, 2008, appellant was convicted of and sentenced on the following: Case No. 08CR00774 Counts 1 through 4, 7 through 24, and 27 through 44; and Case No. 08CR00815 Count 4, and 12 through 15. In Case No. 08CR00774, the trial court imposed 12-month sentences on Counts 1 through 4 and ordered these sentences to be served consecutively to each other; 12 months each as to Counts 7 through 14, and 27 through 34, to be served concurrently with each other and consecutively to Counts 1 and 2; and 12 months each as to Counts 15 through 24, and 35 through 44, to be served concurrently with each other and consecutively to Counts 1 through 4. In Case No. 08CR00815, the trial court imposed 12 months as to Counts 4, and 12 through 15, to be served concurrently with each other and consecutively to the aggregate sentence in Case No. 08CR00774. In total, appellant's prison term is 60 months. Appellant appeals his sentences, raising the following assignment of error.

{¶15} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS AS THE RECORD DOES NOT SUPPORT SUCH A

SENTENCE."

{¶16} In his assignment of error, appellant argues that the trial court abused its discretion imposing consecutive sentences. Appellant maintains the trial court's decision imposing consecutive sentences is unsupported by the record and must be reversed.

{¶17} In *Foster*, 2006-Ohio-856, the Ohio Supreme Court held that R.C. 2929.14(E)(4) and 2929.41(A), which required judicial fact-finding before imposition of consecutive sentences, are unconstitutional under *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531; and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348. As a result, the court in *Foster* severed these provisions from Ohio's sentencing scheme and held that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at ¶100.

Further, in *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶11, the Ohio Supreme Court considered whether a sentencing court has the authority, after *Foster*, to impose a sentence consecutive to a sentence already imposed by another Ohio court. In *Bates* at paragraphs one and two of the syllabus, the court held that after *Foster*, "[sentencing courts have] the authority to impose a prison sentence to be served consecutively to a prison sentence previously imposed on the same offender by another state court, and that a trial court now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently."

{¶18} "In applying *Foster* \* \* \*, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23,

2008-Ohio-4912, ¶4.

{¶9} Recently, in *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences. The Court held that the Sixth Amendment to the United States Constitution is not violated when states permit judges, rather than juries, to make the findings of facts necessary for the imposition of consecutive, rather than concurrent, sentences for multiple offenses. *Id.* at 716-720. However, The United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision, and unless or until *Foster* is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme Court. *State v. Lewis*, Warren App. Nos. CA2009-02-012, -016, 2009-Ohio-4684, ¶10. While the Ohio Supreme Court has acknowledged *Ice*, it has not yet addressed the application of *Ice* to *Foster*. See *State v. Elmore*, Slip Opinion No. 2009-Ohio-3478, ¶35; *State v. Hunter*, Slip Opinion No. 2009-Ohio-4147, ¶35.

{¶10} According to the record, appellant did not object to the imposition of consecutive sentences on the basis of *Blakely*. A defendant's failure to object at a sentencing hearing forfeits a *Blakely* error on appeal. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, paragraph one of the syllabus. "[I]f a party forfeits an objection in the trial court, reviewing courts may notice only '[p]lain errors or defects affecting substantial rights.'" *Id.* at ¶15, citing Crim.R. 52(B).

{¶11} Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. Notice of plain error must be taken with utmost caution, under exceptional circumstances, and only to

prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶12} In this case, the record demonstrates that appellant's sentence is not contrary to law, as the trial court expressly stated that it considered the purposes and principles of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. See *Kalish*, 2008-Ohio-4912, ¶18. Moreover, the record demonstrates the trial court sentenced appellant to prison terms within the statutory range for the offenses in question. *Id.*

{¶13} Additionally, after review of the record, we find no abuse of discretion in the trial court's sentencing decision. The trial court gave careful and substantial deliberation to the relevant statutory considerations. *Id.* at ¶19-20. Specifically, the trial court considered the serious nature of the offense, the significant impact appellant's conduct had on the victims, appellant's lack of remorse for the offense, and appellant's lengthy criminal history. *Id.*

{¶14} Accordingly, appellant's assignment of error is overruled.

{¶15} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.