

[Cite as *State v. Stockwell*, 2010-Ohio-4890.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93976

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SCOTT STOCKWELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
VACATED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-388748

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: October 7, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Scott Stockwell (“defendant”), appeals the sentence imposed by the trial court in contravention to this Court’s direction in *State v. Stockwell* (July 26, 2001), Cuyahoga App. No. 78501 (“*Stockwell I*”) and *State v. Stockwell*, Cuyahoga App. No. 82345, 2003-Ohio-5495 (“*Stockwell II*”). For the reasons that follow, we affirm in part and vacate in part.

{¶ 2} Defendant was convicted in 2000 of drug possession, failure to comply with the order of a police officer, and possession of criminal tools. He received a mandatory ten-year prison term for drug possession and one year on each of the remaining counts. The trial court also imposed an additional ten years for a major drug offender specification¹ and ran all sentences consecutively for an aggregate sentence of 22 years.

{¶ 3} In *Stockwell I*, this Court determined that the trial court's imposition of an additional ten-year sentence for the MDO specification was not supported by the evidence and, therefore, we vacated it. At the same time, the case was remanded for resentencing specifically on Counts 2 and 3. However, following remand, the trial court not only sentenced defendant on those counts, including an increased sentence on the failure to comply, but also reimposed the ten-year consecutive sentence on the MDO specification.

{¶ 4} In *Stockwell II*, defendant asserted that the trial court was without authority to reimpose a prison term on the MDO specification, a fact that the State conceded. In *Stockwell II*, we sustained the error and again vacated the sentence imposed for the MDO specification because it was not supported by the evidence. The case was remanded for resentencing on the failure to comply count due to the trial court's imposition of a harsher sentence following the reversal in *Stockwell I*. We note that this Court made it quite clear in *Stockwell II*

¹Hereafter referred to as (the "MDO specification").

that the trial court lacked any authority to reimpose a sentence on the MDO specification. *Stockwell II*, 2003-Ohio-5495, ¶8-10. In 2003, the matter was returned to the trial court for resentencing with reference to the failure to comply count.

{¶ 5} In 2009, approximately six years after the remand, the trial court yet again re-imposed a consecutive ten-year sentence on the MDO specification, a sentence this Court had twice explicitly vacated as being unsupported by the evidence. Defendant challenges this component of his sentence in his first assignment of error,² which the State concedes. The first assignment of error is sustained. Pursuant to R.C. 2953.08(G)(2), the ten-year sentence on the MDO specification is hereby vacated and may not be reimposed by the trial court.

{¶ 6} Defendant's remaining assignment of error concerns the trial court's imposition of consecutive sentences in the wake of the United States Supreme Court's decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517. This Court has consistently rejected this assignment of error, deferring the determination of *Ice*'s application to Ohio sentencing law for the Ohio Supreme Court. E.g., see *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"); see, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912

²See appendix.

N.E.2d 582, ¶35 (“*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. The trial court thus had authority to impose consecutive sentences on Elmore”). This assignment of error is overruled.

{¶ 7} Although the State contends there was error concerning the issue of postrelease control, the State did not file a cross-appeal and this issue was not raised by defendant’s appeal. We decline, therefore, to sua sponte address it. If the provisions of R.C. 2929.191 do apply to defendant, as the State believes, there appears no language in the statute that would prohibit the State from pursuing a hearing contemplated by that statute, even absent an order from this Court.

{¶ 8} For the reasons set forth above, we vacate defendant’s ten-year prison sentence on the MDO specification but affirm the sentence in all other respects. Due to the protracted resentencing history in this case and the repeated failure of the trial court to follow clear instructions on multiple remands, we direct the Administrative Judge of the Court of Common Pleas to reassign this matter to a new judge to expeditiously carry this sentence into execution.

{¶ 9} Accordingly, we vacate defendant’s ten-year prison sentence on the major drug offender specification but affirm the sentence in all other respects.

Judgment affirmed in part and vacated in part.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR

Appendix

“I. The trial court erred by imposing a sentence on a major drug offender specification without a reasonable basis.

“II. The trial court erred by failing to make requisite findings to support imposing consecutive sentences.”