[Cite as *State v. Benard*, 2010-Ohio-5128.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93987

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VONETTA N. BENARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517202-D

BEFORE: Gallagher, A.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEYS FOR APPELLANT

Timothy Young
Ohio Public Defender

BY: Melissa M. Prendergast
Assistant Ohio Public Defender
Office of Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, OH 43215

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: James A. Gutierrez
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

Amicus Curiae
For Appellant
John S. Pyle
Gold and Pyle, L.P.A.
1140 Leader Building
526 Superior Avenue, East
Cleveland, OH 44114

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Vonetta Benard appeals her sentence by the Cuyahoga County Common Pleas Court. For the reasons stated herein, we affirm in part, reverse in part, and remand.

{¶ 2} On March 30, 2009, Benard pleaded guilty to 16 counts of uttering and one count of theft, all fifth-degree felonies. As part of her plea agreement, Benard agreed to make restitution in the amount of $2,500. The parties also agreed that her sentence would run concurrent to the 18-month federal sentence she received in N.D. Ohio Case No. 1:06-CR-00316.

{¶ 3} On August 27, 2009, the trial court sentenced Benard to 12-month sentences for each of four groups of uttering convictions, and one 12-month sentence for theft.[1] The court ran all the uttering sentences consecutive to each other, and concurrent to the federal sentence; it ran the theft sentence concurrent to the uttering and federal sentences. In total, Benard was sentenced to four years on all convictions in this case. Further, the trial court imposed three years of postrelease control.

{¶ 4} Benard filed this timely appeal of her sentence, raising two assignments of error for our review.

---

[1] Benard pleaded guilty to Counts 68-71 (uttering); Counts 72-77 (uttering); Counts 78-79 (uttering); Counts 80-83 (uttering); and Count 101 (theft).

{¶ 5} "I. The trial court erred by incorrectly notifying Ms. Benard of postrelease control, rendering Ms. Benard's sentences void."

{¶ 6} Benard argues that because of the trial court's failure to properly inform her of postrelease control, her sentence must be vacated and her case remanded for a de novo sentencing hearing. The state concedes that Benard was sentenced improperly, but argues that the trial court is only required to correct her sentence, not hold a new sentencing hearing.

{¶ 7} Trial courts have a duty to notify a felony offender at the sentencing hearing about postrelease control. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. The failure to do so results in a sentence that is contrary to law and void, and the cause must be remanded for resentencing. Id.

{¶ 8} At Benard's sentencing hearing, the court stated, "In each of these cases you'll be on three years postrelease control." In its journal entry, the court stated "Postrelease control is part of this prison sentence for 3 years for the above felony(s) under R.C. 2967.28."

{¶ 9} The problem here is that the trial court did not properly advise Benard of postrelease control, and not that the court failed to mention postrelease control at the sentencing hearing. In fact, the trial court should have imposed a discretionary period of postrelease control for up to three years.

{¶ 10} Therefore, Benard must be resentenced pursuant to the sentence-correction mechanism of R.C. 2929.191 to the correct term of postrelease control. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus. However, Benard is not entitled to a de novo sentencing hearing as she contends.

{¶ 11} The Ohio Supreme Court recognized in *Singleton*: "[t]he hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose postrelease control at the original sentencing." Id. at ¶ 24. See *State v. McCornell*, Cuyahoga App. No. 93274, 2010-Ohio-3086.

{¶ 12} Benard's first assignment of error is sustained in part, and we remand the case for a R.C. 2929.191 hearing.

{¶ 13} "II. The trial court erred when it imposed consecutive sentences despite failing to make the findings of fact specified in R.C. 2929.14(E)(4)."

{¶ 14} The issue Benard raises in her second assignment of error has been addressed by this district in several cases decided since the United

States Supreme Court decided *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 15} Benard's argument is that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, is no longer good law, in light of *Oregon v. Ice*. In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, the Ohio Supreme Court acknowledged the *Ice* decision, yet chose to follow its *Foster* decision, reiterating that trial courts "'are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.'" *Elmore*, quoting *Foster*. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.[2]

{¶ 16} Accordingly, Benard's second assignment of error is overruled.

Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

[2] We note that the Ohio Supreme Court has accepted jurisdiction to decide this exact issue; that case is currently pending before the court in *State v. Hodge*, Supreme Court Case No. 2009-1997.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court to carry this judgment into execution.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR