[Cite as *State v. Cisternino*, 2011-Ohio-2453.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-031**
- vs -	:	
PASQUALE J. CISTERNINO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000544.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Edward M. Heindel, 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Pasquale J. Cisternino burglarized four homes in his neighborhood in Madison Township, Lake County. Under a plea bargain, he pled guilty to two counts of burglary and two counts of receiving stolen property. On appeal, he challenges the consecutive sentences imposed by the trial court and the amount of restitution he was ordered to pay the victims. After careful consideration of the record and applicable law, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} Between March and June 2008, Mr. Cisternino broke into four residences in his neighborhood in Madison Township. He stole cash, jewelry, a NASCAR collection, and other valuables from these homes, which he then pawned to feed his heroin addiction.

{¶4} Mr. Cisternino was indicted on four counts of burglary, felonies of the second degree, in violation of R.C. 2911.12(A)(2); four counts of receiving stolen property, felonies of the fourth and fifth degrees, in violation of R.C. 2913.51(A); two counts of grand theft, felonies of the fourth degree in violation of R.C. 2913.02(A)(1); and two counts of theft, felonies of the fifth degree in violation of R.C. 2913.02(A)(1). He was indicted additionally on one count of attempted burglary, a felony of the third degree in violation of R.C. 2923.02, for attempting to break into a fifth residence in the area.

{¶5} Mr. Cisternino initially entered a not-guilty plea to the charges, but later entered a plea of guilty to four counts under a plea agreement. He pled guilty to two counts of receiving stolen property, a felony of the fifth degree in violation of R.C. 2913.51(A), and two counts of burglary, a felony of the fourth degree in violation of R.C. 2911.12(A)(4). Under the plea agreement, he was also to pay various amounts of restitution to the victims. A nolle prosequi was entered on the remaining counts of the indictment.

{¶6} On March 3, 2010, the court held a sentencing hearing. The prosecution and the defense jointly recommended a term of two years for his convictions, consecutive to the prison term that he was currently serving for an unrelated conviction.

The trial court, however, sentenced him to the maximum prison term on each count—18 months for each of the two burglary counts and 12 months for each of the two receiving stolen property counts, to run consecutively, for a total of 60 months. The court also ordered him to pay restitution to three of the four victims, the amount of which slightly deviated from that stipulated in the plea agreement.

{¶7} Mr. Cisternino filed a pro se notice of appeal, and this court appointed counsel for his appeal. The two assignments of error state:

{¶8} "[1.] The trial court erred when it imposed maximum and consecutive sentences."

{¶9} "[2.] The trial court erred when it ordered restitution in the amount of $12,150 on Count 9, and doing so without considering Cisternino's present and future ability to pay."

{¶10} Under the first assignment of error, Mr. Cisternino claims that the United States Supreme Court's decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, changed the law regarding consecutive sentencing post *Foster*.

{¶11} **The Impact of *Oregon v. Ice* on *Foster***

{¶12} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that a number of provisions in Ohio's sentencing statutes violated the jury-trial guarantee of the Sixth Amendment to the United States Constitution. The court therefore severed portions of statutes which required judicial finding of facts for the imposition of maximum, consecutive, or more than the minimum sentences. Post *Foster*, judicial findings are no longer required before the court imposes these sentences.

{¶13} Three years after *Foster*, the United States Supreme Court issued its opinion in *Oregon v. Ice*, which upheld an Oregon statute requiring judicial factfinding before a trial court sentences a defendant who committed multiple offenses to consecutive sentences.

{¶14} After *Ice*, appellate courts wrestled with the question of whether Ohio's own consecutive sentence statute, R.C. 2929.14(E)(4), which required judicial factfinding and was held unconstitutional and thus severed by *Foster*, is now automatically reinstated.[1]

{¶15} In a recent decision released on December 29, 2010, the Supreme Court of Ohio resolved this conflict. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, the court addressed the impact of *Ice* on *Foster*. In its three-paragraph syllabus, the court held:

{¶16} "1. The jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. (*Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, construed.)

1. As this court noted in *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, in the wake of *Foster*, the General Assembly neither revised nor repealed R.C. 2929.14(E)(4). Id. at ¶14. Instead, the Ohio legislature kept the statutory provisions in R.C. 2929.14(E)(4) intact through eleven amendments since *Foster*'s release, the latest amendment occurring on April 7, 2009, three months after the issuance of *Ice* on January 14, 2009. Id. There was a split among the appellate courts on whether the post-*Ice* April 7, 2009 amendment, which kept R.C. 2929.14(E)(4) intact, means the provisions of R.C. 2929.14(E)(4) regarding judicial factfinding, previously found to be unconstitutional and severed by *Foster*, are now effectively revived. The panel deciding *Jordan* answered the question in the affirmative. See, also, *State v. Dohm*, 11th Dist. No. 2009-L-076, 2010-Ohio-6567; *State v. Swidas*, 11th Dist. No. 2009-L-104, 2010-Ohio-6436; *State v. Smith*, 5th Dist. No. 09-CA-31, 2009-Ohio-6449; *State v. Vandriest*, 5th Dist. No. 09-COA-032, 2010-Ohio-997. An opposite view is held by another panel from this court, in *State v. Dunford*, 11th Dist. No. 2009-A-0027, 2010-Ohio-1272. See, also, *State v. Lynn*, 5th Dist. No. CT2009-0041, 2010-Ohio-3042; *State v. Lenoir*, 5th Dist. No. 10CAA010011, 2010-Ohio-4910.

{¶17} "2. The United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470.

{¶18} "3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made."

{¶19} In *Hodge*, the appellant maintained that because the severed statutory provisions invalidated in *Foster* have never been repealed by the General Assembly, the statutes have been automatically "revived" or "reinstated" by the *Ice* decision. Id. at ¶21-22. The Supreme Court of Ohio acknowledged that *Ice* has an impact on *Foster*, but specifically declined to hold that the severed statutory provisions have been revived post *Ice*. The court determined that the notion of automatic revival should not apply in this matter; instead, a positive action by the General Assembly to indicate its intent regarding the judicial factfinding provisions would be required. Id. at ¶27 and 30.

{¶20} Regarding the impact of the post-*Foster* amendments to R.C. 2929.14, the court stated the following:

{¶21} "We are aware that the General Assembly has, since *Foster* was decided, enacted a number of bills to modify some aspects of R.C. 2929.14 without repealing the invalidated text in R.C. 2929.14(E)(4), one of the consecutive-sentencing provisions that was struck down and severed in *Foster*. *** However, there has been no affirmative reenactment of R.C. 2929.14(E)(4) indicating an intent by the General Assembly that

that statute was still meant to be effective. See *Stevens v. Ackman* (2001), 91 Ohio St.3d 182, 193-195, 2001 Ohio 249, 743 N.E.2d 901 (discussing the technical requirements, including that new matter inserted into a statute must be capitalized, that indicate the General Assembly's intent in amending or enacting a statute). Consequently, the legislation amending other portions of R.C. 2929.14 has no impact on our resolution of this case."

{¶22} Accordingly, the Supreme Court of Ohio held that the decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio's former consecutive sentencing statutory provisions, and, because the statutory provisions are not revived, "trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." Id. at ¶39.

{¶23} Thus, the trial court here was not required to make judicial fact-finding prior to imposing consecutive sentences for Mr. Cisternino's multiple offenses.[2]

{¶24} **Whether the Court Abused its Discretion in Sentencing**

{¶25} The second issue Mr. Cisternino raises under the first assignment of error concerns his contention that the trial court abused its discretion in imposing maximum and consecutive sentences for his convictions. He complains the court ignored the joint recommendation of a two-year term for all four counts, and also failed to take into consideration that no victim was physically injured; no one was present at the homes he burglarized; and he committed the crimes only to fuel his drug habit.

2. Mr. Cisternino also references maximum sentences in the first assignment of error. However, *Ice* only pertains to consecutive sentences. In any event, the *Hodge* holding would be applicable to all R.C. 2929.14 judicial fact-finding provisions.

{¶26} Pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, appellate courts, post *Foster*, must apply a two-step approach in reviewing a sentence. First, the courts 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. Id. at ¶4. The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id.

{¶27} The court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not factfinding statutes like R.C. 2929.14. Id. at ¶17. Therefore, as part of its analysis of whether the sentence is "clearly and convincingly contrary to law," an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶28} If the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. Id. at ¶17.

{¶29} Here, prior to sentencing Mr. Cisternino, the trial court stated that it considered the record, the victim impact statements, the pre-sentence report, the defendant's statements, as well as the overriding purpose of felony sentencing pursuant

to R.C. 2929.11, which are to protect the public from future crimes and to punish the offender. The trial court also stated it considered the need for incapacitation, deterrence, rehabilitation, restitution, the public burden and governmental resources, and the parties' recommendation; and stated it reasonably calculated the sentence to achieve the two overriding purposes of felony sentencing set forth in R.C. 2929.11, and the seriousness and recidivism factors set forth in R.C. 2929.12. The court in addition properly applied postrelease control, and its sentence was within the permissible range. Therefore, Mr. Cisternino's sentence is not clearly and convincingly contrary to law. *Kalish* at ¶18.

{¶30} Regarding the second prong of the analysis, the record reflects the trial court gave due deliberation to the relevant statutory considerations. Before imposing the consecutive sentences, the court emphasized Mr. Cisternino's lengthy criminal record and noted that he has been preying on society for most of his adult life. Although the sentence exceeds the term jointly recommended by the parties, the court is not required to impose a jointly recommended sentence. See *State v. Zenner*, 11th Dist. No. 2004-L-008, 2005-Ohio-6070, ¶26. After reviewing the record, we cannot say the court's decision to impose consecutive and maximum sentences on Mr. Cisternino was unreasonable, arbitrary, or unconscionable, pursuant to *Kalish*'s abuse-of-discretion standard of review.

{¶31} The first assignment of error is without merit.

{¶32} **Restitution**

{¶33} In the second assignment of error, Mr. Cisternino claims the trial court erred in ordering him to pay restitution in the amount of $12,150 to one of the victims

without considering his present or future ability to pay and despite the fact that he pled guilty to receiving stolen property the value of which being no greater than $5,000.

{¶34} We review an order of restitution for an abuse of discretion. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181.

{¶35} **Ability to Pay**

{¶36} R.C. 2929.18 allows a trial court to impose on a defendant financial sanctions, including restitution and reimbursements. However, R.C. 2929.19(B)(6) requires that, before imposing a financial sanction under R.C. 2929.18, the trial court "shall consider the offender's present and future ability to pay the sanction or fine." Furthermore, R.C. 2929.18(E) states: "A court that imposes a financial sanction upon an offender *may* hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it." (Emphasis added.)

{¶37} "Under R.C. 2929.19(B)(6), a trial court must consider an offender's present and future ability to pay before imposing a financial sanction such as restitution. 'The trial court does not need to hold a hearing on the issue of financial sanctions, and there are no express factors that the court must take into consideration or make on the record.'" *State v. Russell*, 2nd Dist. No. 23454, 2010-Ohio-4765, ¶62, citing *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, ¶57. A trial court need not even state that it considered an offender's ability to pay, but the record should contain some evidence that the trial court considered the offender's ability to pay. Id., citing *State v. Parker*, 2nd Dist. No. 03CA0017, 2004-Ohio-1313, ¶42.

{¶38} Here, in the sentencing entry, the trial court expressly stated: "The court, having determined that the defendant is able to pay a financial sanction of restitution or

is likely in the future to be able to pay a financial sanction of restitution, hereby orders that the defendant is to make restitution to the victim(s) ***. The court's statement that it considered the defendant's ability to pay satisfies the requirement of R.C. 2929.19(B)(6).

{¶39} **Amount of Restitution**

{¶40} Regarding the amount of restitution, R.C. 2929.18(A)(1) requires restitution to be "based on the victim's economic loss." If the offender or the victim disputes the amount, the court "shall hold a hearing on restitution." Id.

{¶41} Moreover, the case law has established that "criminal defendants can stipulate to the amount of restitution to be ordered as a part of a sentence under R.C. 2929.18(A)(1) and that the stipulation itself provides a sufficient basis for the restitution amount under the statute." *State v. Speweike*, 6th Dist. No. L-10-1198, 2011-Ohio-493, ¶39, citing *State v. Hody*, 8th Dist. No. 94328, 2010-Ohio-6020, ¶25-26; *State v. Silbaugh*, 11th Dist. No. 2008-P-0059, 2009-Ohio-1489, ¶21; *State v. Leeper*, 5th Dist. No. 2004CAA07054, 2005-Ohio-1957, ¶46.

{¶42} The record shows that, under the plea agreement, Mr. Cisternino agreed to pay a total of $15,000 in restitution—$5,000 each on the two burglary counts and $2,500 each on the two receiving stolen property counts. The court ordered him, instead, to pay $2,900, $700, and $12,150, respectively, to three victims, based on their actual losses, for a total amount of $15,750. The amount of $12,150 relates to his conviction on count nine, which is receiving stolen property the value of which being more than $500 but *less than* $5,000.

{¶43} The record reveals, however, at the change of plea hearing, the trial court confirmed that Mr. Cisternino *waived any error* in the restitution amount before he pled guilty to count nine. The following colloquy occurred after the court ascertained his understanding regarding his guilty plea to count nine:

{¶44} "[THE COURT]: [Regarding count 9] you waive any error in my awarding restitution in an amount *more than five thousand dollars*, when the charge to which you're pleading guilty caps the value at five thousand dollars, or --

{¶45} "Mr. Cisternino: Yes, sir."

{¶46} At sentencing, when the trial court ordered him to pay restitution to the three victims in the amounts of $2,900, $700, and $12,150, respectively, his counsel did not object; the only objection counsel lodged at the time was the court's imposition of maximum prison terms.

{¶47} We recognize the total amount of restitution ($15,750) Mr. Cisternino was ordered to pay slightly exceeds the total amount stipulated in the plea agreement ($15,000), and, for count nine, the amount imposed exceeds $5,000. However, at the plea hearing the trial court ensured that Mr. Cisternino understood that he was waiving any error in restitution amount regarding count nine, which the court explained could exceed $5,000 even though he was pleading guilty to receiving stolen property, the value of the property being *less than* $5,000.

{¶48} Given this record, the trial court did not abuse its discretion in ordering the amount of restitution. Moreover, at the sentence hearing, after the court imposed the various amounts of restitution to the three victims, Mr. Cisternino's counsel did not

object. Therefore, he waived any claim regarding the slight deviation from the amounts stipulated in the plea bargain. The second assignment is without merit.

{¶49} Judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.