[Cite as *State v. Justice*, 2010-Ohio-4781.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 09-CA-66
ALONZO JUSTICE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Fairfield Couonty Court of Common Pleas, Case No. 08-CR-359
JUDGMENT:	Affirmed in part; reversed in part; and Remanded
DATE OF JUDGMENT ENTRY:	September 29, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GREGG MARX Assistant Prosecuting Attorney 201 South Broad St., 4th Fl. Lancaster, OH 43130	THOMAS R. ELWING 60 West Columbus Streetq Pickerington, OH 43147

Gwin, P.J.

{¶1} Defendant-appellant Alonzo M. Justice appeals his conviction and sentence in the Court of Common Pleas, Fairfield County for two counts of trafficking in crack cocaine. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was indicted by the Fairfield County Grand Jury on two counts of trafficking in crack cocaine. Count One charged appellant with trafficking in an amount equal to or exceeding one gram, but less than five grams of crack cocaine, a felony of the fourth degree in violation of R.C. Sections 2925.03(A)(1) and 2925.03(C)(4)(c). Count Two charged appellant with trafficking in an amount equal to or exceeding five grams, but less than ten grams of crack cocaine, a felony of the third degree in violation of R.C. Sections 2925.03(A)(1) and 2925.03(C)(4)(d).

{¶3} The case proceeded to jury trial on October 20, 2009. At trial, the state introduced evidence that officers of the Fairfield-Hocking Major Crimes Unit employed a confidential informant to purchase crack cocaine from appellant on two separate occasions. The confidential informant testified that he made a $120 purchase of crack cocaine on May 28, 2008. The same informant testified that, on July 21, 2008, he made another purchase of crack cocaine for $500.00

{¶4} Forensic scientists from the Bureau of Criminal Identification and Investigation analyzed the crack cocaine from each purchase. The substance obtained in the $120 transaction was found to contain crack cocaine and was weighed at 1.1 grams. The substance obtained in the $500 transaction was found to contain crack cocaine and was weighed at 6.5 grams.

{¶5} The jury returned a guilty verdict on both counts of trafficking in crack cocaine. A sentencing hearing was held on November 9, 2009. On the fourth degree felony, the trial court imposed a prison sentence of twelve months. For the third degree felony, the trial court ordered a prison term of four years. The two sentences were ordered to be served consecutively, for a total of five years in prison.

{¶6} Prior to sentencing, appellant submitted a financial disclosure affidavit. Based on this financial information, counsel for appellant requested that the trial court waive any type of financial sanctions. The trial court found that appellant was indigent for purposes of a mandatory fine and determined that he did not have the present or future ability to pay a fine. Consequently, no fine was ordered for either offense. While the court found appellant to be indigent for purposes of imposing a fine, the court did find that restitution was owed to the Fairfield-Hocking Major Crimes Unit in the amount of $620.00 for reimbursement of the money spent on the two crack cocaine purchases.

{¶7} Appellant timely filed a notice of appeal and raises the following two Assignments of Error:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES WITHOUT MAKING THE STATUTORY FINDINGS REQUIRED BY R.C. 2929.14(E)(4).

{¶9} "II. THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUTION IN THE AMOUNT OF $620.00 TO BE PAID TO THE FAIRFIELD-HOCKING MAJOR CRIMES UNIT."

I.

{¶10} In his first assignment of error, appellant contends the trial court erred in failing to state its reasoning for imposing the two sentences consecutively. We disagree.

{¶11} Appellant essentially argues that in light of the decision of the United States Supreme Court in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517, the trial court was required to literally comply with the requirements of R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) in imposing consecutive sentences in this matter. In other words, appellant urges that *Ice* has effectively warranted that Ohio trial courts return to the felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856.

{¶12} This Court has recently reviewed arguments identical to those raised by appellant in the case at bar. In *State v. Lynn*, Muskingum App. No. CT2009-0041, 2010-Ohio-3042, this Court reviewed our prior decisions,

{¶13} "In *State v. Elmore,* 122 Ohio St.3d 472, 912 N.E.2d 582, 2009-Ohio-3478, the Ohio Supreme Court cogently summarized *Oregon v. Ice* as 'a case that held that a jury determination of facts to impose consecutive rather than concurrent sentences was not necessary if the defendant was convicted of multiple offenses, each involving discrete sentencing prescriptions.' *Elmore* at ¶ 34.

{¶14} "In *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296, we cited *State v. Mickens*, Franklin App.No. 08AP-743, 2009-Ohio-2554, ¶ 25, for the proposition that an alteration of the *Foster* holding under *Ice* must await further review, if any, by the Ohio Supreme Court, " 'as we are bound to follow the law and decisions

of the Ohio Supreme Court, unless or until they are reversed or overruled.' " We thus elected to continue to adhere to the Ohio Supreme Court's decision in *Foster*, which holds that judicial fact finding is not required before a court imposes non-minimum, maximum or consecutive prison terms *Williams* at ¶ 19, citing *State v. Hanning*, Licking App.No.2007CA00004, 2007-Ohio-5547, ¶ 9.

{¶15} "Since the time of filing of appellant's brief in this matter, this Court has issued additional decisions addressing *Ice.* Two of these cases, *State v. Smith,* Licking App.No. 09-CA-31, 2009-Ohio-6449, and *State v. Vandriest*, Ashland App.No. 09COA-032, 2010-Ohio-997, have apparently determined that the General Assembly's amendments to R.C. 2929.14, effective April 7, 2009, have effectively revived the requirement that a trial court make findings when imposing consecutive sentences. However, our research does not indicate that the General Assembly has expressed an intention to reassert R.C. 2929.14(E)(4) in light of *Ice*; furthermore, *Smith*, supra, has recently been accepted for review by the Ohio Supreme Court. We are thus not inclined to rely on *Smith* and *Vandriest* as precedent in this matter. Until the Ohio Supreme Court revisits the Foster issue, we will consider it binding on Ohio appellate courts. See *State v. Mickens*, supra." *State v. Lynn, supra* at ¶ 10-13.

{¶16} In *State v. Arnold*, Muskingum App. No. CT2009-0021, 2010-Ohio-3125, this Court review the appropriate procedure necessary for the General Assembly to re-adopt a statute that had previously been declared unconstitutional. The court in *Arnold* cited the Ohio Supreme Court's decision in *Stevens v. Ackman*, 91 Ohio St.3d 182, 743 N.E.2d 901, 2001-Ohio-249, wherein the code section in question, R.C. 2744.02(C), had previously been declared unconstitutional in its entirety. *Arnold* at ¶

12. Citing *Ackman*, the Court noted, "Where an act is amended, the part that remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions are to be considered as having become the law only at the time of the amendment. Id. at 194, 743 N.E.2d 901. R.C.1.54 provides that a statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute." *Arnold* at ¶ 13. The *Stevens* court concluded that for the General Assembly to have successfully reenacted R.C. 2744.02(C), the General Assembly must have intended the act to have that effect. Id. at 193, 743 N.E.2d 901. The *Arnold* Court concluded,

{¶17} "H.B. No. 130 amended R.C. 2929.14 effective April 7, 2009. However, there were no changes made to R.C. 2929.14(E)(4), and the only change in R.C. 2929.14 was to R.C. 2929.14(D)(2)(b)(ii). Such amendment served only to substitute subsection (C)(C) for subsection (D)(D) in a reference to R.C. 2929.01(1), to comport with the renumbering of R.C. 2929.01(1) pursuant to an amendment to R.C. 2929.01(1). OH Legis 173(2008). R.C. 2929.14(E)(4) appears in regular type, without any indication pursuant to R.C. 101.53 which would indicate new material.

{¶18} "Therefore, the amendment of R.C. 2929.14 effective April 7, 2009, did not operate to reenact those portions of the statute the Ohio Supreme Court severed in its *Foster* decision. Until the Ohio Supreme Court considers the effect of *Ice* on its *Foster* decision, we are bound to follow the law as set forth in *Foster*." Id. at ¶ 16-17.

{¶19} Accordingly, we herein reject appellant's claim that the trial court was required to make pre-*Foster* findings in sentencing appellant.

{¶20} Appellant's first assignment of error is overruled.

II.

{¶21} In his second assignment of error, appellant complains that the trial court committed error in ordering restitution, since the amount of $620.00 does not reflect any economic loss suffered by any recognized victim of his conduct. Appellant argues that a narcotics agency attempting to recover money used in making a controlled drug buy is not a “victim” as contemplated by R.C. 2929.18(A)(1), the restitution statute.

{¶22} R.C. 2929.18(A) (1) grants a trial court authority to order restitution by an offender to a victim in an amount commensurate with the victim's economic loss. "A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted." *State v. Banks,* Montgomery County App. No. 20711, 2005-Ohio-4488, at paragraph five.

{¶23} "Economic loss" is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense." R.C. 2929.01(M).

{¶24} “A victim of a crime is defined as the person or entity that was the "object" of the crime. *State v. Samuels,* 4th Dist. No. 03CA8, 2003-Ohio-6106, at ¶ 5, citing Black's Law Dictionary (5th Ed.1979) 1405. In certain circumstances, a government entity may be considered a victim of a crime under R.C. 2929.18(A)(1): For example, when government funds are embezzled or when government property is vandalized. Id. However, a government entity voluntarily advancing its own funds to pursue a drug buy through an informant is not one of the scenarios contemplated by R.C. 2929.18(A)(1). Id. at ¶ 10.” *State v. Pietrangelo*, Lake App. No. 2003-L-1686, 2005-Ohio-1686 at ¶ 15.

{¶25} In reviewing the federal counterpart to R.C. 2929.18, the United States Court of Appeal for the Sixth Circuit has noted, “The Act aims to protect victims, not to

safeguard the government's financial interest in funds used as bait to apprehend offenders. *See United States v. Salcedo-Lopez,* 907 F.2d 97, 99 (9th Cir.1990); *see also* S.Rep. No. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536 (restitution ensures "that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being"). Accordingly, this Court has recognized that restitution may not be awarded under the VWPA for investigation or prosecution costs incurred in the offense of conviction. *Ratliff v. United States,* 999 F.2d 1023, 1026 (6th Cir.1993). As the Court recently observed:

{¶26} "Investigative costs are not losses, but voluntary expenditures by the government for procurement of evidence. It is settled in this circuit that where, as here, a restitution award is based solely on the costs of the government's investigation and prosecution of the defendant, it is not a direct loss resulting from the defendant's illegal conduct for which restitution may be awarded pursuant to the VWPA. *Gall v. United States,* 21 F.3d 107, 111-12 (6th Cir.1994) (citing *Ratliff,* 999 F.2d at 1027). In light of these well established principles, the *Gall* court concluded that the government is not entitled to recoup drug 'buy money' from a defendant. Id." *United States v. Meacham* (6th Cir 1994), 27 F.3d 214, 218. (Internal quotation marks omitted).

{¶27} The Eleventh District Court of Appeals has pointed out that many federal courts have held that the government agencies using their funds to purchase drugs are not "victims" as contemplated by the federal statute on restitution. *Pietrangelo,* 11th Dist. No. 2003-L125 at ¶ 16, citing *United States v. Cottman* (C.A.3, 1998), 142 F.3d 160, 168; *United States v. Khawaja* (C.A.11, 1997), 118 F.3d 1454; *United States v.*

Meacham (C.A.6, 1994), 27 F.3d 214, 218-219; *United States v. Gibbens* (C.A.1, 1994), 25 F.3d 28, 32-33; *Gall v. United States* (C.A.6, 1994), 21 F.3d 107, 108.

{¶28} The Eleventh District also pointed out that the majority of state courts addressing this particular issue "have likewise concluded that the government is not a victim entitled to restitution where public moneys are expended in pursuit of solving crimes, as these expenditures represent normal operating costs." *Pietrangelo,* 11th Dist. No.2003-L-125 at ¶ 17, quoting *State v. Sequiera* (Haw.App. 2000), 93 Haw. 34, 995 P.2d 335, 344-345 (listing California, Illinois, Minnesota, Nevada, New Jersey, New York, and Wisconsin among the states following this rule). See, *State v. Jones*, Jefferson App. Nos. 08JE20, 08JE29, 2010-Ohio-2704 at ¶ 46.

{¶29} "In addition, the Third District has followed *Pietrangelo* and *Samuels* to find that the government is not a victim under the restitution statute merely because it expended funds in some manner as a result of the defendant's offense. See, e .g., *State v. Ham,* 3d Dist. No. 16-09-01, 2009-Ohio-3822, 3822 ¶ 48-49 (cannot order restitution of costs incurred by humane society to care for defendant's dog); *State v. Wolf,* 176 Ohio App.3d 165, 2008-Ohio-1483, ¶ 40-41 (fire departments are not victims of the arson and cannot seek restitution for firefighting); *State v. Toler,* 173 Ohio App.3d 335, 2007- Ohio-6967, ¶ 11-12 (cannot order restitution of extradition costs incurred by sheriff's department)." *State v. Jones*, Jefferson App. Nos. 08JE20, 08JE29, 2010-Ohio-2704 at ¶ 47.

{¶30} We agree with the reasoning of the Third District, the Fourth District, the Eleventh District, the federal courts, and the majority of the states that, absent an express statement from the legislature authorizing trial courts to sentence criminal

defendants to pay restitution to law enforcement agencies for this purpose, we should not, as an appellate court, take it upon ourselves to judicially rewrite the statute. Appellant's second assignment of error has merit. *Pietrangelo,* 11th Dist. No.2003-L-125 at ¶ 17.

{¶31} Appellant's second assignment of error is sustained.

{¶32} Accordingly, the judgment of the Fairfield County Court of Common Pleas is affirmed in part and reversed in part and this case is remanded for proceedings in accordance with our opinion and the law.

By Gwin, J.,

Edwards, P.J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. SHEILA G. FARMER

WSG:clw 0824

[Cite as *State v. Justice*, 2010-Ohio-4781.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ALONZO JUSTICE	:	
Defendant-Appellant	:	CASE NO. 09-CA-66

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Court of Common Pleas is affirmed in part and reversed in part and this case is remanded for proceedings in accordance with our opinion and the law. Costs to be divided equally between appellant and appellee.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. SHEILA G. FARMER