[Cite as *State v. Blanton*, 2010-Ohio-6212.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23745
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-1169
v.	:	
	:	
DAVID L. BLANTON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of December, 2010.

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WAITE, J. (Sitting by Assignment)

{¶ 1} Appellant, David L. Blanton, appeals the five year and six month sentence imposed by the Montgomery County Court of Common Pleas. Appellant contends that the trial court failed to make certain statutorily mandated findings and failed to consider sentencing factors, as required by statute, before imposing the

sentence in this case. For the following reasons, Appellant's sentence is affirmed.

{¶ 2} The record reflects that Appellant, in a stolen municipal vehicle, fled from police at a high rate of speed on heavily traveled roadways, ultimately crashing into a bus. He was facing a variety of criminal charges in this matter and chose to enter a plea agreement rather than proceed to trial. After he entered his guilty plea in this matter, Appellant was sentenced to terms of imprisonment of four years on one count of failure to comply with the order or signal of a police officer, a violation of R.C. 2921.331(B) and (C)(5), a felony of the third degree (count one); twelve months on one count of disrupting public services, a violation of R.C. 2909.04(A)(2), a felony of the fourth degree (count two); 18 months on one count of receiving stolen property, a violation of R.C. 2913.51(A), a felony of the fourth degree (count three); and six months respectively on two counts of vandalism, a violation of R.C. 2909.05(B)(1)(A), felonies of the fifth degree (counts four and five).

{¶ 3} Concurrent sentences were imposed in counts two through five. The sentence in count one was to be served consecutively with the sentences on the remaining counts. At the sentencing hearing, conducted on October 8, 2009, the trial court correctly calculated the aggregate sentence in this case to be five years and six months, but the subsequent entry erroneously read that Appellant had been sentenced to a term of six years and six months.

{¶ 4} When the trial court discovered this error, rather than simply entering a nunc pro tunc order in the matter, the trial court set a hearing on November 12, 2009, in order to correct the clerical error.

{¶ 5} At the hearing, the trial court judge clearly stated that the sole purpose of

the hearing was to correct the journalized entry. (11/12/09 Hrg. Tr., p. 8.) When Appellant asked the trial court for a continuance to talk with his attorney at the outset of the hearing, the trial court responded, "I guess if he wants to talk I shouldn't deny him that ability to talk to his lawyer prior to the sentencing, although I've sentenced him already. We're just trying to get it to where it matches the record." (11/12/09 Hrg. Tr., p. 9.)

{¶ 6} In spite of the foregoing and the fact that the trial court was not required to hear from Appellant prior to entering a nunc pro tunc order to correct the record, Appellant predicates his appeal on the theory that this hearing to correct the entry held November 12, 2009, constituted an entirely new sentencing hearing.

{¶ 7} Trial courts generally lack authority to reconsider their own valid final judgments in criminal cases; however, a trial court is authorized to correct a void sentence, and may correct clerical errors in judgments. *State ex rel. Cruzado v. Zaleski* ,111 Ohio St.3d 353, 2006-Ohio-5795, ¶18-19. Thus, while the trial court did not have the authority on November 12, 2009 to reconsider the sentence imposed on October 8, 2009, or to conduct a full resentencing, the trial court did retain full authority to correct a clerical error in the journalized entry. Appellant's underlying assumption that the November 12, 2009 hearing was a "second sentencing hearing" is incorrect. The sentencing hearing conducted on October 8, 2009, is the sole sentencing hearing of record that was conducted in this matter.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "The trial court erred in failing to consider the statutory seriousness factors set forth in R.C. 2921.331 when a sentence was imposed for a violation of the offense

of failure to comply with the order or signal of a police officer."

{¶ 9} In his first assignment of error, Appellant contends that the trial court erred in failing to consider the statutory factors listed in R.C. 2921.331 when the trial court imposed a four year sentence for failure to comply with the order or signal of a police officer. Appellant appears to raise no challenge to the record in his actual sentencing hearing. Instead, Appellant draws our attention to only the record in the second, corrective hearing. As earlier explained, the record reflects that this second hearing was not his sentencing hearing and we will not examine the record of that hearing.

{¶ 10} R.C. 2921.331 reads, in pertinent part:

{¶ 11} "(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

{¶ 12} "(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

{¶ 13} "(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

{¶ 14} "* * *

{¶ 15} "(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

{¶ 16} "(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

{¶ 17} "(ii) The operation of the motor vehicle by the offender caused a

substantial risk of serious physical harm to persons or property.

{¶ 18} "(b) If a police officer pursues an offender who is violating division (B) of this section and division (C)(5)(a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

{¶ 19} "(i) The duration of the pursuit;

{¶ 20} "(ii) The distance of the pursuit;

{¶ 21} "(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

{¶ 22} "(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

{¶ 23} "(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

{¶ 24} "(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

{¶ 25} "(vii) Whether the offender committed a moving violation during the pursuit;

{¶ 26} "(viii) The number of moving violations the offender committed during the pursuit;

{¶ 27} "(ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense."

{¶ 28} Appellant relies on the decision of the Seventh District Court of Appeals in *State v. Oliver*, Mahoning App. No. 07-MA-169, 2008-Ohio-6371, for the proposition that "[t]hese factors do not need to be expressly mentioned nor do specific findings as to the factors need to be made, rather, all that is needed to be shown is that the trial court considered the factors." Id., ¶28. In *Oliver*, the trial court made no mention of the statute or the enumerated factors, and there were no facts adduced at the plea or sentencing hearings. Consequently, the *Oliver* Court concluded that "without any facts and a clear indication that [the trial court] considered the factors espoused in R.C. 2921.331(C)(5)(b), the trial court erred when it sentenced Oliver." Id. at ¶32.

{¶ 29} Although the trial court in this case did not mention the statute at the sentencing hearing, the judge did state that he had "never seen someone put that many lives in jeopardy," referring to the charge of failure to comply in count one. (10/8/09 Sent. Tr., p. 3.) The trial court also stated that "[t]o fly down Main Street in the afternoon with hundreds of people around. [sic] You might as well shoot a gun in this room and see if you hit anybody. It's crazy. This is crazy behavior." (10/8/09 Sent. Tr., p. 3.)

{¶ 30} The record in this case reveals that Appellant stole a Washington Township utility truck and drove the truck down Gettysburg Avenue at a high rate of speed. Appellant was intercepted at the intersection of Interstate 75 and State Route 35 by police, who pursued Appellant to no avail. Appellant failed to stop at several stop signs and red lights, and ignored the overhead lights of the police car. Appellant crossed all lanes of traffic when he merged onto northbound Interstate 75 heading toward the N. Main Street exit. Appellant drove through orange construction barrels

and a dirt construction lot off of N. Main Street, then headed southbound on Main Street into downtown Dayton, where the stolen vehicle he was driving collided with an RTA bus.

{¶ 31} Based on the record, it appears that the trial court considered the factors listed in the statute before imposing the sentence. Some of the trial court's observations obviously refer to the risks Appellant undertook due to the rate of speed that he was traveling, the moving violations he committed during the pursuit, the number of potential victims he put in harm's way, and the fact that the truck he was driving ultimately collided with a public transit bus. The record adequately reflects that the trial court considered the requisite factors at sentencing. Accordingly, Appellant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 32} "The court erred in sentencing Mr. Blanton contrary to law by imposing consecutive sentences without making the findings set forth in R.C. 2929.14(E)(4)."

{¶ 33} In his second assignment of error, Appellant contends that the trial court erred when it imposed consecutive sentences in this case without engaging in the judicial fact-finding mandated by R.C. 2929.14(E)(4). Although Appellant recognizes that Ohio courts have not been required to make these findings since mandatory fact-finding was severed from that statute in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, he nonetheless urges this Court to abandon *Foster* based upon the United States Supreme Court's decision in *Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517. In *Ice*, the U.S. Supreme Court upheld an Oregon statute that required judicial fact-finding when imposing consecutive sentences. The Court

concluded that the Sixth Amendment to the United States Constitution is not violated when states permit judges, instead of juries, to make the findings of fact necessary for the imposition of consecutive, rather than concurrent, sentences for multiple offenses. Id. at 716-720.

{¶ 34} However, R.C. 2929.14(E)(4) is not relevant here, because the trial court relied on independent statutory authority in imposing the consecutive sentences in this case. R.C. 2921.331(D) reads, in pertinent part, "[i]f an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender."

{¶ 35} Pre-*Foster* courts recognized that R.C. 2921.331(D) "requires a sentencing court to follow that statute's dictates independently from R.C. 2929.14(E)(4) and, as such, the trial court need not state its reasons for imposing consecutive sentences because R.C. 2921.331(D) mandates as much." See *State v. Mooney*, Stark App. No. 2005CA00072, 2005-Ohio-5655, ¶25, quoting *State v. Hicks*, Cuyahoga App. No. 82574, 2003-Ohio-6902, ¶20. Accordingly, the constitutionality of R.C. 2929.14(E)(4) has no bearing on the consecutive sentences imposed in this case, because those sentences were imposed pursuant to independent statutory mandate. Appellant's second assignment of error is overruled.

{¶ 36} In conclusion, the trial court's inclusion of Appellant and his counsel at a hearing to correct the journal entry appears to be an act of courtesy on the part of the judge. The court's actions do not impact the valid sentencing hearing held on October

8, 2009. The trial court's statements at this sentencing hearing reveal that it considered the specific factors listed in R.C. 2921.331 in sentencing Appellant for failure to comply with the order or signal of a police officer. The consecutive sentences imposed in this case were statutorily mandated by R.C. 2921.331(D), and, therefore, do not implicate the statutory fact-finding requirements set forth in R.C. 2929.14(E)(4). The trial court retained jurisdiction for the sole purpose of correcting a clerical error in the original entry and the court properly exercised that jurisdiction. Accordingly, the amended termination entry is affirmed.

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GRADY and FROELICH, JJ., concur.

(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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