

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

Court of Appeals No. L-09-1162
L-09-1163

Trial Court No. CR0200901108
CR0200901136

v.

Eric D. Finn, Jr.

Appellant

DECISION AND JUDGMENT

Decided: May 7, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which convicted appellant of one count of aggravated burglary and one count of

receiving stolen property. Appellant entered pleas to these two counts in the course of a negotiated plea agreement. In exchange for the pleas, several additional burglary charges and an associated firearm specification were dismissed. Appellant was sentenced to a five-year term of incarceration on the burglary conviction, to be served consecutively with a one-year term of incarceration imposed on the receiving stolen property conviction. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Eric D. Finn Jr., sets forth the following two assignments of error:

{¶ 3} "1. The trial court erred as a matter of law when it based its sentence on facts that served as the bases for a dismissed charge.

{¶ 4} "2. The trial court erred when it ordered sentences to be served consecutively without making the findings required by *State v. Comer* which are required again in light of the recent United States Supreme Court ruling in *Oregon v. Ice*."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. This case stems from two separate indictments against appellant. In case number CR-09-1108, appellant was indicted on two counts of aggravated burglary, in violation of R.C. 2911.11(A). These charges were in connection to incidents occurring on January 4, 2009, and January 10, 2009, respectively. In case number CR-09-1136, appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A), and one count of

receiving stolen property, in violation of R.C. 2913.51. These charges were in connection to incidents occurring on September 10, 2008, and October 29, 2008, respectively.

{¶ 6} On April 6, 2009, in the course of a universal plea agreement, appellant pled no contest to one amended, lesser count of aggravated burglary and the sole count of receiving stolen property. The trial court found appellant guilty. In exchange for these pleas, the remaining burglary charges and an associated firearm specification were dismissed. Appellant was sentenced to five-year and one-year terms of incarceration, to be served consecutively. Timely notice of appeal was filed.

{¶ 7} In his first assignment of error, appellant argues he was improperly sentenced by the trial court, "when it based its sentence on facts that served as the bases for a dismissed charge." Notably, appellant simultaneously concedes that a trial court acts within its R.C. 2929.12 authority in considering the facts and circumstances of dismissed cases in sentencing a defendant. Despite this salient admission, appellant concludes without evidentiary support that the trial court erred in sentencing appellant.

{¶ 8} We note, as acknowledged by appellant, the trial court acts within its statutory purview in considering and referencing the facts and circumstances of a dismissed charge when sentencing a defendant on a remaining, non-dismissed charge. The record of appellant's sentencing in this matter clearly reflects the trial court did not breach the statutory sentencing parameters in considering and referencing compelling

facts and circumstances associated with the dismissed charges in sentencing appellant on the remaining charges. The trial court's permissible references to the facts of dismissed charges did not operate so as to transform its sentencing of appellant to a sentence on the dismissed charges. We find appellant's first assignment of error not well- taken.

{¶ 9} In appellant's second assignment of error, he contends the trial court erred in sentencing him to consecutive sentences without making the former requisite findings of *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. While appellant concedes these required findings were negated by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, he asserts they have been resurrected by the United States Supreme Court decision of *Oregon v. Ice* (2009), 129 S.Ct. 711.

{¶ 10} Pertinent, subsequent caselaw does not comport with appellant's position. In a recent Third District case, *State v. Sabo*, 3d Dist. No. 14-09-33, 2010-Ohio-1261, this precise contention was similarly argued. In rejecting the argument, the Third District emphasized that *Foster* remains binding precedent in Ohio as the *Ice* decision pertained to Oregon sentencing statutes. More significantly, the court underscored that in the post-*Ice* Ohio Supreme Court decision of *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the court unambiguously held, "*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." Accordingly, the Ohio Supreme Court has clearly stated that *Foster*

still applies to consecutive sentencing. We find appellant's second assignment of error not well-taken.

{¶ 11} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.