

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-641
 : (C.P.C. No. 11CR-10-5709)
 Rekey D. Sheehi, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 30, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Watson Law Group, LLP, and *Titus G. Donnell*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Rekey D. Sheehi, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas pursuant to appellant's plea of guilty to one count of aggravated robbery. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} According to the facts as read into the record by the state of Ohio, plaintiff-appellee, the charges herein arose from the following. At approximately midnight on the night of October 20, 2011, the victim was leaving a store and carrying a case of water when he was approached by a female who asked to use his cell phone. When the victim

responded that he did not have one for her to use, a man, later identified as appellant, approached the victim from behind with a knife and demanded the victim's wallet. The victim dropped his purchases and ran back into the store. Appellant and a woman were arrested a short distance away and were identified by the victim.

{¶ 3} On October 28, 2011, appellant was indicted by a Franklin County Grand Jury on one count of aggravated robbery and one count of robbery. Trial on the charges herein was scheduled for June 26, 2012. On this date, appellant entered a plea of guilty to aggravated robbery, a first-degree felony, in violation of R.C. 2911.01. Also on this date, appellant entered a plea of guilty in unrelated case No. 11CR-5981 to one count of burglary as a third-degree felony. The record reflects that, at the time of the underlying offense in this case, appellant was on post-release control arising out of Franklin County case No. 07CR-2785. According to the record, appellant had 922 days remaining on post-release control.

{¶ 4} The trial court proceeded immediately to sentencing. For the aggravated robbery, the trial court imposed a minimum sentence of three-years incarceration to be served concurrent to the sentence imposed in case No. 11CR-5981, but consecutive to the time remaining on post-release control.

II. ASSIGNMENT OF ERROR

{¶ 5} This appeal followed, and appellant brings the following assignment of error for our review:

The trial court erred by imposing consecutive sentences and not imposing the minimum sentence without making the required statutory findings pursuant to R.C. 2929.14(E)(4) and R.C. 2929.14(B)(2).

III. DISCUSSION

{¶ 6} Under this assigned error, appellant argues the trial court erred in imposing consecutive sentences and a non-minimum sentence without making the statutory findings required by R.C. 2929.14(E)(4) and (B)(2), respectively.

{¶ 7} Though appellant complains that the trial court imposed a non-minimum sentence without making the requisite statutory findings, we note that, in this case, the trial court did impose the minimum sentence as appellant was sentenced to a three-year

term of incarceration on the aggravated robbery charge, which is a first-degree felony. *See* R.C. 2929.14(A)(1) (first-degree felony offenses are punishable by imposition of a definite term of imprisonment of three, four, five, six, seven, eight, nine, ten or eleven years).

{¶ 8} We now address appellant's argument that the trial court erred in imposing consecutive sentences without first making the requisite statutory findings.

{¶ 9} Preliminarily, we note that appellant failed to object to the imposition of consecutive sentences at the sentencing hearing and, therefore, has forfeited all but plain error. *See* Crim.R. 52(B); *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to be "plain" within the meaning of Crim.R. 52(B), it " 'must be an "obvious" defect in the trial proceedings.' " *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A reviewing court notices plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. "The burden of demonstrating plain error is on the party asserting it." *Payne* at ¶ 17.

{¶ 10} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio considered the standard of review applicable to felony sentencing. There, the plurality opinion decided that an "appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." *Id.* at ¶ 14. Thus, "[a]s 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.* Although *Kalish* suggests the actual term of imprisonment imposed in the trial court should be reviewed under an abuse of discretion standard, appellant's argument raises an issue of law in challenging whether the trial court was required to make statutory findings pursuant to R.C. 2929.14(C)(4) before sentencing appellant to consecutive sentences. Accordingly, we determine if the trial court's decision was clearly and convincingly contrary to law. *Id.* *See State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 61.

{¶ 11} In support of his argument, appellant relies on *Oregon v. Ice*, 555 U.S. 160 (2009), and argues *Ice* essentially overruled *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, insofar as *Foster* found R.C. 2929.14(E)(4) unconstitutional and severed it from Ohio's sentencing provisions. Though acknowledging this court has already rejected similar arguments, appellant asserts he seeks to preserve the argument for further appeals. We find appellant's argument misplaced as *Ice* and its argued effect on severed R.C. 2929.14(E)(4) is not applicable here because appellant was sentenced after September 30, 2011, the effective date of H.B. No. 86, which revived the language of R.C. 2929.14(E)(4) regarding consecutive sentences and codified it as R.C. 2929.14(C)(4). *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 12.

{¶ 12} Notwithstanding H.B. No. 96 and the recent amendments to R.C. 2929.14, R.C. 2929.141 addresses the commission of an offense by a person under post-release control. R.C. 2929.141 provides:

(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. *A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony.* The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served

concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

(Emphasis added.)

{¶ 13} In this case, the offense of aggravated robbery was committed while appellant was under post-release control. The trial court elected to terminate appellant's post-release control and impose the time remaining thereon, specifically, 922 days. Pursuant to R.C. 2929.141, the sentence for the post-release control violation must be served consecutively to the three-year sentence imposed by the court for aggravated robbery, the new felony offense. As held by the court in *State v. Barron*, 2d Dist. No. 25059, 2012-Ohio-5787, R.C. 2929.141 requires such sentences to run consecutively and "does not require the trial court to make any findings before terminating post-release control and imposing a specific prison sentence for the violation." *Id.* at ¶ 16. *See also State v. Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-304 (2d Dist.) (because it requires the imposition of consecutive sentences, statutory findings for consecutive sentences not implicated under R.C. 2929.141); *State v. Proctor*, 12th Dist. No. CA2006-03-042, 2007-Ohio-909 (statutory provisions requiring findings for consecutive sentences have no application to sentences required to be imposed consecutively under R.C. 2929.141).

{¶ 14} For the foregoing reasons, we find no error, plain or otherwise, in the sentence imposed by the trial court. Accordingly, appellant's assignment of error is overruled.

IV. CONCLUSION

{¶ 15} Having overruled appellant's sole assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and VUKOVICH, J., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by
assignment in the Tenth Appellate District.
