

[Cite as *State v. Johnson*, 2010-Ohio-3381.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-1065
 : (C.P.C. No. 09CR03-1906)
 :
 Skyler D. Johnson, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on July 20, 2010

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

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Skyler D. Johnson ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas imposing consecutive sentences. For the reasons that follow, we affirm.

{¶2} Based on evidence found after a traffic stop of a vehicle in which appellant was a passenger, appellant was indicted on charges of having a weapon while under

disability, possession of cocaine with a firearm specification, carrying a concealed weapon, and improperly handling a firearm in a motor vehicle. Appellant ultimately entered guilty pleas to the charges of possession of cocaine with a one-year firearm specification and carrying a concealed weapon. The remaining two counts were dismissed. The trial court imposed a sentence of four years of imprisonment on the cocaine possession charge and one year of imprisonment on the carrying a concealed weapon charge, to be served concurrently with each other, consecutively to the one-year sentence imposed for the firearm specification, and consecutively to an 11-month sentence imposed in case No. 07CR-8186.

{¶3} Appellant filed a pro se motion seeking leave to file a delayed appeal. We granted the motion, and appointed counsel to represent appellant on appeal. Appellant asserts a single assignment of error:

THE TRIAL COURT ERRED BY IMPOSING
CONSECUTIVE SENTENCES WITHOUT MAKING THE
REQUIRED STATUTORY FINDINGS PURSUANT TO R.C.
2929.14(E)(4).

{¶4} Appellant argues that the trial court could not impose consecutive sentences without making certain findings as set forth in R.C. 2929.14(E)(4), and the trial court in this case did not make the required findings. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio found parts of Ohio's criminal sentencing statutory framework, including R.C. 2929.14(E)(4), unconstitutional because they required judicial fact finding before a criminal defendant could be sentenced to more than the minimum sentence. The *Foster* court relied on decisions by the United States Supreme Court in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348,

and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, which had held that such judicial fact finding violates a defendant's right to trial by jury. The remedy in *Foster* for the constitutional violation was severance of the offending statutory provisions, which left trial courts with full discretion to impose any sentence within the statutory range for an offense, and no longer required the courts to make any findings before imposing maximum, consecutive or non-minimum sentences. *Foster* at paragraph seven of the syllabus.

{¶5} Appellant argues that the provisions of R.C. 2929.14(E)(4) requiring a trial court to find certain facts before imposing consecutive sentences have been revived by the decision of the United States Supreme Court in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711. In *Ice*, the court held that state sentencing provisions requiring judicial factfinding before imposition of consecutive sentences, such as R.C. 2929.14(E)(4), were not unconstitutional under *Apprendi* and *Blakely*. *Id.* at syllabus. Appellant argues that *Ice* requires that we find the trial court erred when it imposed consecutive sentences without making the findings required by R.C. 2929.14(E)(4).

{¶6} Appellant did not argue before the trial court that the court was required to make the findings required by R.C. 2929.14(E)(4) before imposing consecutive sentences, nor did appellant object to the imposition of consecutive sentences, even though *Ice* had been decided approximately five months prior to the date of appellant's sentencing hearing. Because appellant did not object at the trial court, appellant has waived all but plain error. Crim.R. 52(B). A party claiming plain error must show that the outcome of the proceeding would have been different absent the alleged error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17.

{¶7} We find no error, plain or otherwise, in the trial court's imposition of consecutive sentences in this case. We have held in a number of cases that, notwithstanding the apparent abrogation of the Supreme Court of Ohio's decision in *Foster* by the United States Supreme Court's decision in *Ice*, we are bound to continue to follow *Foster* unless and until *Foster* is specifically overruled by the Supreme Court of Ohio. *State v. Anderson*, 10th Dist. No. 09AP-631, 2010-Ohio-626; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216. At this point, the Supreme Court of Ohio has recognized the impact of *Ice* on *Foster*, but has specifically declined to fully address that impact. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478.¹

{¶8} Appellant also argues that even without a decision by the Supreme Court of Ohio specifically overruling *Foster*, the trial court was required to make the findings required by R.C. 2929.14(E)(4) because the General Assembly has reenacted R.C. 2929.14(E)(4) by including that section in a number of bills, including one bill, H.B. No. 130, that was adopted and effective after the United States Supreme Court's decision in *Ice*. However, again, notwithstanding that the reenacted provision of R.C. 2929.14(E)(4) requiring judicial findings before imposition of consecutive sentences would pass muster under the United States Constitution pursuant to *Ice*, as an inferior court, we are still constrained to follow the Supreme Court of Ohio's holding in *Foster* until such time as the court considers *Foster's* continuing validity.

¹ The Supreme Court of Ohio has accepted for review a case addressing whether trial courts must make the findings of fact required by R.C. 2929.14(E) before imposing consecutive sentences. *State v. Hodge*, ___ Ohio St.3d ___, 2010-Ohio-2800 (slip opinion).

{¶9} Accordingly, appellant's single assignment of error is overruled. Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.
