

[Cite as *State v. Smith*, 2010-Ohio-5077.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-981
 : (C.P.C. No. 09CR-04-2114)
 Thomas Smith, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on October 19, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Richard Cline & Co., LLC, and *Richard A. Cline*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Thomas Smith ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting appellant of aggravated murder, murder, attempted murder, felonious assault, aggravated burglary, and multiple counts of aggravated robbery, as well as numerous firearm specifications, and sentencing appellant to life without the possibility of parole, consecutive to 36 years. For the reasons that follow, we affirm.

{¶2} On April 9, 2009, appellant was indicted due to an incident that occurred on March 31, 2009, which resulted in the murder of Douglas Lovett and the shooting of

Douglas' younger brother, Aaron Lovett. Specifically, appellant was indicted on one count of aggravated murder, one count of murder, one count of attempted murder, one count of felonious assault, one count of aggravated burglary, and four counts of aggravated robbery. All of these offenses were also indicted with firearm specifications. In addition, appellant was indicted on one count of carrying a concealed weapon. However, that count was dismissed by the State of Ohio prior to trial.

{¶3} At trial, three witnesses who knew appellant – Aaron Lovett, Bryan Goodwin, and Marchael Crowder – all testified that appellant entered the apartment with a gun, committed aggravated robbery against all four men, fired multiple shots at Aaron Lovett, and shot Douglas Lovett in the head, killing him. The jury returned guilty verdicts on all of the counts and also found appellant guilty on all of the firearm specifications.

{¶4} At the sentencing hearing, the trial court heard from counsel as well as one of the victims and several family members. The trial court commented that it was nearly incomprehensible that appellant had engaged in this type of behavior against persons he had known and had been friends with for several years. Although appellant was given an opportunity to speak on his own behalf, appellant simply proclaimed his innocence and offered no further explanation.

{¶5} Without objection from the State, the trial court merged the murder count into the aggravated murder and also merged the felonious assault count into the attempted murder count. The trial court sentenced appellant to life without the possibility of parole on the aggravated murder count. The trial court imposed maximum ten year sentences on the remaining counts. The sentences on the aggravated murder, attempted murder, and aggravated burglary counts were ordered to be served consecutively to each

other and consecutively to the firearm specifications attached to the aggravated murder and attempted murder counts. The trial court ordered that the sentences on the four aggravated robbery counts were to be served concurrently to one another but consecutively to the other counts. All of the remaining firearm specifications were ordered to be run concurrently. In sum, appellant's total sentence was life without the possibility of parole, consecutive to 36 years.

{¶6} Appellant filed a timely appeal asserting a single assignment of error for our review:

ASSIGNMENT OF ERROR

THE OHIO SUPREME COURT DECISION IN *STATE V. FOSTER* HAS BEEN ABROGATED BY THE UNITED STATES SUPREME COURT DECISION IN *OREGON V. ICE*, AND THEREFORE THE TRIAL COURT ERRED BY IMPOSING MAXIMUM CONSECUTIVE SENTENCES WITHOUT FIRST MAKING THE FINDINGS REQUIRED BY R.C. § 2929.14, AND *STATE V. COMER*, 2003-OHIO-4165, ¶ 20, 99 OHIO ST. 3D 463.

{¶7} In his sole assignment of error, appellant contends the Supreme Court of Ohio's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, has been effectively overruled by the decision handed down by the United States Supreme Court in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711. Appellant argues that pursuant to *Ice* and its progeny, R.C. 2929.14(E) and 2929.41, which were severed under *Foster*, are actually constitutional, and that the Supreme Court of Ohio cannot sever a statute that is constitutional. As a result, appellant argues the statutes remain in effect as they were prior to *Foster* without the need for a specific "re-enactment" or "revival" by the General Assembly, and therefore the trial court's failure to engage in judicial factfinding prior to the imposition of consecutive sentences was error. In addition, appellant submits the

Supremacy Clause of the United States Constitution requires the application of *Ice* to the instant case.

{¶8} Prior to *Foster*, Ohio's statutory sentencing scheme required judicial factfinding to overcome the presumption for concurrent sentences and to impose consecutive sentences. After the United States Supreme Court handed down decisions 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, the *Foster* court held that R.C. 2929.14(E)(4) and 2929.41(A), which required the court rather than a jury to make certain findings prior to imposing consecutive sentences, were unconstitutional. In order to remedy this, the Supreme Court of Ohio severed these offending sections from Ohio's statutory sentencing scheme and the previously existing common law presumptions were reinstated. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983. After *Foster*, trial courts possess full discretion to impose a prison sentence within the statutory range and are not required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences. *Foster* at paragraph seven of the syllabus.

{¶9} A few years later, in *Ice*, the United States Supreme Court held that a state statutory sentencing scheme in Oregon that presumed concurrent sentences but permitted consecutive sentences to be imposed where judicial factfinding justified such an imposition was constitutional. As a result of *Ice*, appellant argues Ohio's pre-*Foster* statutory sentencing scheme was in fact constitutional and should be and/or has been reinstated and therefore, judicial factfinding prior to the imposition of consecutive sentences is required.

{¶10} In response, the State of Ohio argues that appellant failed to raise this issue in the trial court and, as a result, appellant forfeited all but plain error. The State of Ohio further argues appellant cannot show any error, let alone plain error. We agree.

{¶11} This court has repeatedly rejected the contention that, without a determination by the Supreme Court of Ohio, *Ice* has rendered *Foster's* severance void ab initio and resurrected the pre-*Foster* statutory sentencing scheme. "The Supreme Court of Ohio has not reconsidered *Foster* * * * and the case remains binding on this court." *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶18. See also *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420; *State v. Nuh*, 10th Dist. No. 10AP-31, 2010-Ohio-4740; *State v. Stevens*, 10th Dist. No. 10AP-207, 2010-Ohio-4747; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372; *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513; and *State v. Busby*, 10th Dist. No. 09AP-1119, 2010-Ohio-4516.

{¶12} Furthermore, in *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, we acknowledged that in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the Supreme Court of Ohio refused to fully address all of the ramifications of *Ice* because neither party sought the opportunity to brief the issue prior to oral argument. Despite this, the Supreme Court of Ohio appeared to continue to adhere to the principles of *Foster* in finding the trial court had the authority to impose consecutive sentences. *Crosky* at ¶8.

{¶13} Although there is currently a case pending before the Supreme Court of Ohio on this issue,¹ that court has not yet issued a decision reconsidering *Foster* in light

¹ *State v. Hodge*, 124 Ohio St.3d 1472, 2010-Ohio-354, 2/10/2010 Case Announcements.

of the United States Supreme Court's opinion in *Ice*. Thus, *Foster* remains binding upon us.

{¶14} Furthermore, we reject appellant's contention that the Supremacy Clause of the United States Constitution and decisions from the Sixth Circuit applying *Ice* to federal rights compel us to apply *Ice* to the *Foster* severance issue here. Severance is a state law issue. See generally *Virginia v. Hicks* (2003), 539 U.S. 113, 123 S.Ct. 2191.

{¶15} Accordingly, we overrule appellant's single assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
