[Cite as *State v. Rowe*, 2010-Ohio-5082.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-150
v.	:	(C.P.C. No. 09CR-08-4796)
Lewis R. Rowe, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 19, 2010

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

Stephen Dehnart, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Lewis R. Rowe, Jr., appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of theft and two counts of retaliation. Defendant assigns a single error:

> In light of Oregon v. Ice, the trial court erred in failing to make the required findings under O.R.C. 2929.14(E)(4) to justify consecutive sentences.

Because the trial court was not required to make the findings specified in R.C. 2929.14(E)(4), we affirm.

I. Facts and Procedural History

{¶2} By indictment filed August 12, 2009, defendant was charged with (1) one count of theft in violation of R.C. 2913.02, a felony of the fourth degree, (2) one count of robbery in violation of R.C. 2911.02, a felony of the second degree, (3) one count of robbery in violation of R.C. 2911.02, a felony of the third degree, and (4) two counts of retaliation in violation of R.C. 2921.05, felonies of the third degree. Pursuant to jury trial, defendant was found guilty of theft and both counts of retaliation; the trial court declared a mistrial on the two robbery counts. Pursuant to the state's request, the trial court entered a nolle prosequi on those two counts.

{¶3} In a sentencing hearing held on January 19, 2010, the trial court sentenced defendant to four years on each of the retaliation charges, ordering the sentences to be served consecutively. The trial court in addition sentenced defendant to 17 months on the theft charge to be served concurrently with the sentenced imposed for the two retaliation charges.

II. Assignment of Error

{¶4} Defendant's assignment of error contends the trial court erred in imposing consecutive sentences because the trial court did not make the findings of fact required under R.C. 2929.14(E)(4).

{¶5} As enacted pursuant to S.B. 2 in 1996, R.C. 2929.14(E) directed trial courts to make specified findings of fact before imposing consecutive sentences. Due to United States Supreme Court decisions which called into question the constitutionality of

provisions like R.C. 2929.14(E), the Ohio Supreme Court considered the requirements of the statute in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856. See *Blakely v. Washington* (2004), 542 U.S. 296, 303, 124 S.Ct. 2531, 2537 (determining judicial fact finding which not only increased a defendant's sentence beyond the statutory maximum for the standard range of sentences but was not based on "the facts reflected in the jury verdict or admitted by the defendant" violated the defendant's Sixth Amendment right to trial by jury); see also *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348.

{¶6} *Foster* found R.C. 2929.14(E) to be unconstitutional. Id. at paragraph three of the syllabus. It concluded R.C. 2929.14(E) violated the principles announced in *Blakely* because "the total punishment increase[d] through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant." Id. at ¶67. The Supreme Court of Ohio accordingly severed R.C. 2929.14(E) and 2929.41(A). Id. at paragraph four of the syllabus. After *Foster*, Ohio trial courts could impose consecutive sentences without making any findings of fact. *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904.

{¶7} Defendant argues the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), 129 S.Ct. 711 effectively overruled *Foster*. In *Ice* the court held, "in light of historical practice and the authority of the States over administration of their criminal justice systems, that the Sixth Amendment does not exclude" a state law requiring a judge to make certain factual findings before imposing consecutive instead of concurrent sentences. Id. at 714-15. Defendant argues *Ice* requires trial courts to comply

with the findings under severed R.C. 2929.14(E). See *Evans v. Hudson* (2009), 575 F.3d 560, 566.

{¶8} Defendant's contentions are unpersuasive. This court, acknowledging *Ice*, concluded that because the "Supreme Court of Ohio has not reconsidered *Foster*, * * * the case remains binding on this court." *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶18. Indeed, this court has recognized on several occasions that we are bound to follow *Foster* until the Supreme Court of Ohio directs otherwise. *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, ¶33; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420, ¶16; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶8; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372, ¶8.

III. Disposition

{¶9} For the reasons set forth above, the trial court did not err in failing to make the findings specified in R.C. 2929.14(E). Accordingly, we overrule defendant's single assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

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