**[Cite as *State v. Bowman*, 2010-Ohio-6351.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | Nos. 10AP-403 and 10AP-553 |
| v. | : | (C.P.C. No. 09CR10-6249) |
| Jason R. Bowman, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 23, 2010

*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellee.

*Yeura R. Venters*, Public Defender, and *Paul Skendelas*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

**{¶1}** Jason R. Bowman, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a plea of guilty, of one count of receiving stolen property, a fourth-degree felony and violation of R.C. 2913.51; and one count of receiving stolen property, a fifth-degree felony and violation of R.C. 2913.51.

**{¶2}** On May 26, 2009, two businesses, Mid-Ohio Pediatrics and Norman Morse's law office, were burglarized. On May 28, 2009, appellant's vehicle was stopped

for a traffic violation, and police discovered appellant had Morse's credit card, which had been stolen during the burglary of his office. A search of appellant's residence discovered much of the property stolen from the two businesses, including 129 checks written to Mid-Ohio Pediatrics and bank checks from Morse. Appellant indicated later that he paid $300 to "Mike" for the property on May 27, 2009, and the property also was used to satisfy a debt Mike owed to appellant.

**{¶3}** Appellant was charged with three counts of receiving stolen property. Count 1 alleged that appellant received stolen property from Mid-Ohio Pediatrics on May 28, 2009; Count 2 alleged that appellant received a stolen credit card belonging to Morse on May 28, 2009; and Count 3 alleged that appellant received stolen checks belonging to Morse on May 28, 2009.

**{¶4}** On October 5, 2009, appellant pled guilty to Counts 1 and 2, and Count 3 was dismissed. On March 26, 2010, the trial court sentenced appellant to 17 months in prison on Count 1, and 11 months in prison on Count 2, for a total sentence of 28 months. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] The trial court erred in imposing consecutive terms of incarceration for felony convictions without making findings required by R.C. 2929.14(E)(4) to overcome the statutory presumption favoring concurrent sentences.
>
> [II.] The trial court committed plain error in failing to merge two counts of receiving stolen property, where the property had been received by the defendant in a single lot.

**{¶5}** Appellant argues in his first assignment of error that the trial court erred when it imposed consecutive sentences without first making the factual findings required

by R.C. 2929.14(E)(4) to overcome the statutory presumption in favor of concurrent sentences. Specifically, appellant contends the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, was contrary to the Supreme Court of Ohio's prior decision in *State v. Foster* (2006), 109 Ohio St.3d 1, and demonstrated that Ohio's consecutive sentencing statutes were not unconstitutional and should not have been severed.

**{¶6}** In *Ice*, the United States Supreme Court found state statutory sentencing schemes that presume concurrent sentences but allow consecutive sentences to be ordered based upon the judicial finding of facts to justify such were constitutional. In *Foster*, the Supreme Court of Ohio found that Ohio's sentencing scheme, which provided that sentences be served concurrently unless judicial fact finding permitted consecutive sentencing, was unconstitutional and severed those requirements from the rest of the sentencing statute. Therefore, appellant argues, because *Ice* rendered *Foster's* severance void ab initio and resurrected the Ohio sentencing statutes previously severed by *Foster*, the trial court should have been required to make judicial findings of fact, as required before *Foster*.

**{¶7}** This court has consistently declined to depart from *Foster* in light of *Ice* until the Supreme Court of Ohio directs otherwise. See, e.g., *State v. Anderson*, 10th Dist. No. 09AP-631, 2010-Ohio-626; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566; *State v. Crosky*, 10th

Dist. No. 09AP-57, 2009-Ohio-4216. Therefore, we decline to depart from *Foster* until the Supreme Court directs otherwise. Appellant's first assignment of error is overruled.

**{¶8}** Appellant argues in his second assignment of error that the trial court erred when it failed to merge the two counts of receiving stolen property because the property was received by appellant at one time and in a single lot. R.C. 2913.51(A) provides, in pertinent part:

> No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

**{¶9}** Initially, appellant failed to raise this argument before the trial court; therefore, he has waived all but plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶84. Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has established that the outcome of the trial clearly would have been different but for the alleged error. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166.

**{¶10}** In the case at bar, appellant asserts that the offenses were allied and of similar import and committed together with the same animus. R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

**{¶11}** In arguing that his conviction and sentencing on two counts of receiving stolen property was in error because the crimes were allied offenses of similar import, appellant relies mainly on *State v. Sanders* (1978), 59 Ohio App.2d 187, and *State v. Afshari*, 187 Ohio App.3d 151, 2010-Ohio-325. In *Sanders*, the defendant bought stolen property from a stranger and put it in a friend's car. The property belonged to four different owners and had been taken in three separate theft offenses. The defendant and the friend were later stopped by police for a traffic infraction. The defendant was eventually found guilty on four counts of receiving stolen property. The trial court sentenced the defendant to two to five years on each count, to be served concurrently.

**{¶12}** On appeal, the defendant argued that he could not be convicted of four counts of receiving stolen property when he received all items at the same time, from the same source, in a single transaction. The court of appeals agreed. The court found there was no evidence that the defendant harbored a separate animus toward each individual owner or that he participated in or knew about the original theft offenses, and he received the property in a single, continuous transaction, from the same source, at the same time.

**{¶13}** In *Afshari*, the defendant's car was stopped by police, and police discovered a stolen car stereo, wallet, and credit cards in the vehicle. The defendant plead guilty to two counts of receiving stolen property. The trial court declined to merge the counts. The appellate court reversed the trial court and found that the crimes were allied offenses of

similar import. The court cited *State v. Wilson* (1985), 21 Ohio App.3d 171, paragraph one of the syllabus, in which the court stated that, when a defendant is charged on multiple counts of receiving stolen property, the trial court must merge the counts into a single count when it is shown that the defendant received, retained or disposed of all the items of property at one time in a single transaction or occurrence. The court in *Afshari* concluded that, in its case, the counts must merge because the items were stolen from the victim's vehicle in a single act, and the defendant retained, received or disposed of the items in a single transaction or occurrence.

**{¶14}** However, we find *Afshari* and *Sanders* distinguishable from the present case. In those cases, the defendant received, retained, and disposed of the items in a single transaction. Although, in the present case, appellant contends he received the items from a single source, an acquaintance named "Mike," appellant did not retain or dispose of the items in a single transaction. Here, appellant was stopped by police during a traffic stop and possessed a credit card stolen from the law firm. Later, police found appellant had disposed of a safe door from the thefts in a garbage can in front of his house. Inside the house, police found 129 checks from Mid-Ohio Pediatrics, bank checks from the law firm, and about 50 other assorted pieces of property from the two burglarized businesses. Thus, unlike the defendants in *Afshari* and *Sanders*, appellant retained and disposed of the items at separate times.

**{¶15}** This court's decision in *State v. Early*, 10th Dist. No. 01AP-1106, 2002-Ohio-2590, is instructive. In *Early*, two men broke into several cars, from which they stole checks, credit cards, and other items. Sometime later, the defendant drove one of the men and others to a bank, and they attempted to pass a stolen check. Defendant was

apprehended. The police searched his vehicle and found the stolen checkbooks, credit cards, and other identification cards. The defendant was found guilty of three counts of receiving stolen property, and the trial court sentenced the defendant to 11 months incarceration on two of the counts, which were to run consecutively to each other, and six months incarceration on the third count, which was to run concurrently with the other two counts. On appeal, the defendant argued the three counts of receiving stolen property should have been merged into a single count and that his trial counsel was ineffective in advising him to plead guilty to three separate counts. The defendant contended the counts should have merged because he did not participate in any of the prior thefts, the only evidence in the record was that he drove his passengers to the bank where they attempted to dispose of one of the stolen checks, he was associated with only one act of disposition, and there was no evidence as to how, when or in what manner he acquired possession of the other stolen items found in the vehicle.

**{¶16}** We affirmed the trial court's judgment. This court found that, unlike *Sanders* and *Wilson*, the record did not reveal that the defendant received, retained or disposed of the property at the same time and in the same transaction. The record did not indicate how defendant received the items. However, the record revealed that defendant attempted to dispose of one stolen check in a separate transaction, while retaining the other stolen checks in the vehicle. Thus, this court found, the defendant did not retain and dispose of the stolen property in the same transaction. We noted that it is the defendant who bears the burden of establishing protection, pursuant to R.C. 2941.25, and the defendant could not show that his three counts of receiving stolen property should have merged.

**{¶17}** In the present case, as in *Early*, appellant retained and disposed of the stolen goods at separate times. Like the defendant in *Early*, who attempted to dispose of one stolen check in a separate transaction while separately retaining other stolen items in his vehicle, here, appellant possessed one of the stolen credit cards separately while driving his vehicle, had attempted to dispose of the door of a stolen safe in a garbage can, and separately retained possession of the remaining stolen goods in his home. Thus, similar to the defendant in *Early*, appellant retained and disposed of the stolen property separately. For these reasons, we find appellant has failed to demonstrate that his two counts of receiving stolen property should have merged. Appellant's second assignment of error is overruled.

**{¶18}** Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed*.

FRENCH and CONNOR, JJ., concur.

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