

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 09AP-428
		(C.P.C. No. 08CR-06-4689)
Plaintiff-Appellee,	:	No. 09AP-429
		(C.P.C. No. 08CR-10-7658)
v.	:	No. 09AP-430
		(C.P.C. No. 08CR-10-7265)
Karl Russell, Jr.,	:	No. 09AP-431
		(C.P.C. No. 08CR-10-7855)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

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

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Karl Russell, Jr., appeals from judgments of the Franklin County Court of Common Pleas Court finding him guilty, pursuant to guilty pleas, of two counts of violating a protection order or consent agreement in violation of R.C. 2919.27, one count of failure to appear on recognizance bond in violation of R.C. 2937.99, and one count of assault in violation of R.C. 2903.13. Defendant assigns a single error:

The trial court erred by imposing consecutive sentences without making the required statutory findings pursuant to R.C. 2929.14(E)(4).

Because the trial court did not err in imposing consecutive sentences without making the statutory findings in R.C. 2929.14(E)(4), severed under the Supreme Court of Ohio's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, we affirm.

I. Procedural History

A. Case No. 08CR-06-4689 (Appellate No. 09AP-428)

{¶2} By indictment filed June 24, 2008, defendant was charged with one count of violating a protection order or consent agreement in violation of R.C. 2919.27, a felony of the fifth degree due to defendant's prior conviction for violating a protection order. The case arose out of a protection order issued to the victim on September 16, 2004. In violation of the five-year order, defendant wrote a letter to the victim on January 8, 2008.

{¶3} Although defendant initially entered a not guilty plea to the charge, defendant, represented by counsel, changed his plea to guilty on March 16, 2009. In sentencing defendant, the trial court ordered defendant to serve 12 months in an Ohio Department of Rehabilitation and Corrections facility. The court further ordered the sentence be served concurrently with defendant's sentences in cases 08CR-10-7265 and 08CR-10-7658 but consecutively to defendant's sentence in 08CR-10-7855.

B. Case No. 08CR-10-7658 (Appellate No. 09AP-429)

{¶4} By indictment filed on October 12, 2008, defendant was charged with one count of failure to appear on a recognizance bond in violation of R.C. 2937.99, a felony of the fourth degree. Defendant initially entered a not guilty plea to the charge, but at the plea hearing held on March 16, 2009, defendant entered a guilty plea to the stipulated

lesser included offense of failure to appear on a recognizance bond, a misdemeanor of the first degree. The charge apparently arose out of defendant's failure to appear for proceedings in case No. 08CR-06-4689.

{¶5} After accepting defendant's guilty plea, the trial court sentenced defendant to six months in the Franklin County Correctional Center, to be served concurrently with his sentences in 08CR-06-4689, 08CR-10-7855, and 08CR-10-7265.

C. Case No. 08CR-10-7265 (Appellate No. 09AP-430)

{¶6} By indictment filed October 2, 2008, defendant was charged with two counts of intimidating a witness in violation of R.C. 2921.04, felonies of the third degree. The indictment arose out of an incident that occurred on September 8, 2008 in the Franklin County Municipal Court. The victim of the offense appeared with her friend on a case in which defendant was charged with violating a protection order. The victim and defendant, due to their history, exchanged words that led to allegations of physical harm.

{¶7} Although defendant initially entered a not guilty plea, defendant changed his plea at the March 16, 2009 plea proceedings to guilty to the stipulated lesser included offense of the second count of the indictment, assault in violation of R.C. 2903.13, a misdemeanor of the first degree. The trial court sentenced defendant to six months in the Franklin County Correctional Center, to be served concurrently with his sentences in 08CR-06-4689, 08CR-10-7855, and 08CR-10-7658.

D. Case No. 08CR-10-7855 (Appellate No. 09AP-431)

{¶8} By indictment filed October 3, 2008, defendant was charged with one count of menacing by stalking in violation of R.C. 2903.211, a felony of the fourth degree, and three counts of violating a protection order or consent agreement in violation of R.C.

2919.27, felonies of the third degree. The indictment arose out of allegations that defendant caused the victim to fear for her safety and to suffer emotional distress as the result of numerous letters she received from defendant over the course of time, despite defendant's being advised to cease doing so.

{¶9} Although defendant initially entered a not guilty plea, defendant changed his plea and entered a guilty plea at the plea proceedings on March 16, 2009 to the second count of the indictment, violating a protection order, a felony of the third degree. The trial court sentenced defendant to three years at the Ohio Department of Rehabilitation and Corrections, a sentence to be served concurrently with the sentences imposed in case Nos. 08CR-10-7265 and 08CR-10-7658; the trial court, however, ordered the sentence to be served consecutively to the sentence in 08CR-10-4689.

II. Assignment of Error

{¶10} In his single assignment of error, defendant contends the trial court erred in sentencing him to consecutive sentences in the absence of statutory findings pursuant to R.C. 2929.14(E)(4).

{¶11} Pursuant to R.C. 2953.08(G), an appellate court may modify a sentence or may remand for resentencing if the court clearly and convincingly finds the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶27. This court held that R.C. 2953.08(G) requires us, in post-*Foster* cases, to continue to review felony sentences under the standard of clearly and convincingly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court

considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.' " *Id.*, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶12} After *Burton*, the Ohio Supreme Court issued its decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In it, the plurality opinion decided 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.*

{¶13} *Kalish* clarified that once an appellate court has determined the sentence is not contrary to law, the court must consider the trial court's application of R.C. 2929.11 and 2929.12 in light of *Foster*, which gave the trial court "full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *Id.* at ¶17. Considering also that R.C. 2929.12 "explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing[.]" *Kalish* concluded that "[i]t naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Id.* The plurality opinion secured a fourth vote, with a separate opinion, that would apply a "contrary to law" standard to determine whether the trial court considered the R.C. 2929.11 and 2929.12 factors, but would apply an abuse of discretion standard to the trial court's consideration of the factors in R.C. 2929.12(B) through (D) since they are discretionary. *Id.* at ¶42 (Willamowski, concurring). Because defendant raises an issue of law in challenging whether the trial court was required to make statutory findings pursuant to R.C. 2929.14(E)(4) before sentencing

defendant to consecutive sentences, we determine if the trial court's decision was clearly and convincingly contrary to law. *Kalish* at ¶14.

{¶14} Defendant acknowledges the Supreme Court of Ohio's decision in *Foster*. In *Foster*, "the Ohio Supreme Court held that, under the United States Supreme Court's 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, portions of Ohio's sentencing scheme were unconstitutional because they required judicial fact finding before a defendant could be sentenced to more than the minimum sentence, the maximum sentence, and/or consecutive sentences." *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904. To remedy the situation, "the Ohio Supreme Court severed the offending sections from Ohio's sentencing code. Thus, pursuant to *Foster*, trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive or more than minimum sentences." *Id.*, citing *Foster* at ¶100.

{¶15} Defendant nonetheless contends the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, controls here and dictates that the Ohio Supreme Court wrongly excised portions of R.C. 2929.14. As a result, defendant argues, those statutory findings remain a prerequisite to consecutive sentencing.

{¶16} In *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, this court acknowledged *Ice*, but noted the Supreme Court of Ohio has not reconsidered *Foster*, and *Foster* thus remains binding on this court. *Id.* at ¶18. Accordingly, we rejected the

defendant's argument in *Franklin*. Similarly, in *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, we concluded that only the Ohio Supreme Court could review Ohio's current sentencing. *Id.* at ¶25. Since that court has not yet reconsidered *Foster* in view of the United States Supreme Court's opinion in *Ice*, we concluded *Foster* remains binding. *Id.* See also *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216; and *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815 (concluding *Foster* binds the court until the Supreme Court revisits it in light of *Ice*).

{¶17} Consistent with the prior decisions in this court, we, too, conclude defendant's argument is unpersuasive, finding *Foster* is controlling in this matter until the Supreme Court chooses to deviate from it. Accordingly, defendant's single assignment of error is overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

FRENCH, P.J., and KLATT, J., concur.
