

[Cite as *State v. Smith*, 2009-Ohio-6449.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TRAVIS SMITH

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 09-CA-31

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 09-CR-28

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 8, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
Licking County Prosecutor
20 S. Second Street, Fourth Floor
Newark, Ohio 43055

ROBERT E. CALESARIC
35 South Park Place, Suite 150
Newark, Ohio 43055

Hoffman, J.

{¶1} Defendant-appellant Travis A. Smith appeals his consecutive sentence imposed by the Licking County Court of Common Pleas, on one count of aggravated trafficking in drugs and one count of trafficking in cocaine, after Appellant entered a plea of guilty to the Indictment. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On January 16, 2009, the Licking County Grand Jury indicted Appellant on one count of aggravated trafficking in drugs, in violation of R.C. 2925.03, a third degree felony; one count of trafficking in cocaine, in violation of R.C. 2925.03, a third degree felony; and one count of possession of drug paraphernalia, in violation of R.C. 2925.14, a fourth degree misdemeanor as well as an attendant forfeiture specification. Appellant entered a plea of guilty to the Indictment on February 26, 2009.

{¶3} The trial court immediately proceeded to sentencing. The trial court sentenced Appellant to a three year period of incarceration on Count One, a two year period of incarceration on Count Two, and thirty days on Count Three. The trial court ordered the sentences on Counts One and Two be served consecutively with each other, but concurrently with the sentence in Count Three, for a total period of incarceration of five years. The trial court granted forfeiture in the amount of \$33,815.00, and forfeiture of a Glock Model 23 firearm to the Central Ohio Drug Enforcement Task Force. The trial court also imposed a fine of \$5000.

¹ A rendition of the facts is not necessary to our disposition of this appeal; therefore, such shall not be included.

{¶14} It is from this sentence Appellant appeals, raising as his sole assignment of error:

{¶15} “I. THE TRIAL COURT MUST MAKE THE REQUIRED FINDINGS PURSUANT TO RC 2929.14 PRIOR TO IMPOSING CONSECUTIVE SENTENCES.”

I

{¶16} In his sole assignment of error, Appellant argues the recent United States Supreme Court decision in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, invalidates a portion of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant further claims *Ice* invalidates the *Foster* Court's reasoning with respect to the imposition of consecutive sentences, and because the Ohio General Assembly re-enacted R.C. 2929.14(E)(4) and 2929.41(A) after *Foster* was decided, those statutes are once again valid. Appellant maintains Ohio sentencing courts now must consider and apply these statutes before imposing consecutive sentences for multiple offenses.

{¶17} The State contends, although Appellant raised a general objection to his sentence, he did not specifically object to the trial court's failure to make the requisite findings before imposing consecutive sentences. The State concludes Appellant has forfeited his *Blakely* claim, citing *State v. Williams* (1977), 51 Ohio St.3d 112, syllabus; and *State v. Payne* 114 Ohio St.3d 502, 2007 -Ohio- 4642. Although we find the State's argument persuasive, we choose, nonetheless, to address the merits of Appellant's sole assignment of error.

{¶18} In *Oregon v. Ice*, supra, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive

sentences. The Court held the Sixth Amendment to the United States Constitution is not violated when States permit judges, rather than juries, to make the findings of facts necessary for the imposition of consecutive sentences for multiple offenses. *Id.* at 716-720.

{¶9} The United States Supreme Court decided *Ice* on January 14, 2009, before the trial court herein imposed Appellant's sentence. The Ohio General Assembly amended R.C. 2929.14, with said amendment including the requirement the trial court make findings when imposing consecutive sentences, effective on April 7, 2009. Because Appellant was sentenced prior to the effective date of amended R.C. 2929.14, albeit after *Ice*, we find Appellant cannot benefit from the amendment, and *Foster* controls. As such, the trial court was not required to make statutory findings before imposing consecutive sentences on Appellant.

{¶10} Appellant's sole assignment of error is overruled.

{¶11} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

