

[Cite as *State v. Vandriest*, 2010-Ohio-997.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TED A. VANDRIEST

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 09-COA-032

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court of
Common Pleas, Case No. 09-CRI-038

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 12, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

RAMONA FRANCESCONI ROGERS
ASHLAND COUNTY PROSECUTOR

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Hoffman, J.

{¶1} Defendant-appellant Ted A. Vandriest appeals the consecutive sentences imposed by the Ashland County Court of Common Pleas, after Appellant entered pleas of guilty to one count of attempted rape and two counts of gross sexual imposition. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On April 24, 2009, the Ashland County Grand Jury indicted Appellant on one count of rape, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree; and two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), felonies of the third degrees. Appellant appeared before the trial court for arraignment on April 24, 2009, and entered pleas of not guilty to the charges contained in the Indictment. The matter was scheduled for a jury trial on July 14, 2009.

{¶3} On the day trial was to commence, Appellant appeared before the trial court and requested to withdraw his former pleas of not guilty and enter pleas of guilty to one count of attempted rape, a felony of the second degree, and the two counts of gross sexual imposition. After conducting a Crim. R.11 colloquy with Appellant, the trial court accepted Appellant's pleas and found him guilty of the aforementioned charges. The trial court ordered a presentence investigation and scheduled a sentencing hearing for August 24, 2009. The trial court subsequently sentenced Appellant to consecutive sentences totaling eighteen years.

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

{¶15} “I. THE CONSECUTIVE SENTENCES IMPOSED ON APPELLANT ARE CONTRARY TO LAW.”

I

{¶16} In his sole assignment of error, Appellant contends the trial court’s imposition of consecutive sentences was contrary to law. Specifically, Appellant asserts the United States Supreme Court’s decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed. 2d. 517, overruled the Ohio Supreme Court’s decision in *State v. Foster* (2006), 109 Ohio St.3d 1; therefore, Ohio trial courts are now required to make the findings set forth in R.C. 2929.14, prior to imposing consecutive sentences.¹

{¶17} In *Oregon v. Ice* (2009), supra, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences. The High 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. The implication of Appellant’s argument is, that in light of the decision of the United States Supreme Court in *Oregon v Ice*, Ohio trial courts must return to the felony sentencing scheme in place prior to the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856.

{¶18} The State submits this Court has rejected the argument asserted by Appellant herein in *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296; and *State v. Mitchell*, Muskingum App. No. CT2006-0090, 2009-Ohio-5251.

¹ Appellant’s assignment of error is predicated upon, and limited to, the trial court’s alleged failure to identify its reasons to justify the imposition of consecutive sentences.

Although this Court did not accept the arguments raised in those cases, we do not find *Williams* and *Mitchell* to be dispositive of the instant action. In *Williams*, the appellant was indicted on October 1, 2008, and sentenced on January 12, 2009. The United States Supreme Court decided *Ice* on January 14, 2009. Likewise, the appellant in *Mitchell* was indicted and sentenced prior to the United States Supreme Court's pronouncement in *Ice*.² Accordingly, *Ice* would not have retroactive application to those cases.

{¶9} Effective April 7, 2009, the Ohio General Assembly amended R.C. 2929.14, with said amendment including the requirement the trial court make findings when imposing consecutive sentences. Because Appellant was sentenced after the effective date of amended R.C. 2929.14, and after *Ice*, we find the trial court was required to make the requisite statutory findings before imposing consecutive sentences on Appellant. We must now determine if the trial court herein made the appropriate findings.

{¶10} Current R.C. 2929.14(E) provides, in relevant part:

{¶11} “(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

² *Mitchell* was before this Court upon our granting a reopening of the appellant's appeal.

{¶12} “(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶13} “(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶14} “(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.”

{¶15} At the sentencing hearing, the trial court commented:

{¶16} “When I sentence, I have to follow Ohio law, which means I have an obligation to protect the public from future crime committed not only by yourself, but also by others. That particular obligation that I have becomes exceedingly critical, in my opinion, when it comes to crimes committed against children, which is what you are being sentenced for, and it becomes critical because children are the most vulnerable component of our society in terms of committing crimes.

{¶17} “I also have an obligation to appropriately punish you, and that’s an important principle and purpose of the felony sentencing law. * * *

{¶18} “I always start out by looking at the seriousness of the offense. There are, in my opinion, multiple factors which make your offenses more serious. First, and,

perhaps, most important, in my mind, is the fact that you were essentially in a caretaking role with regard to this child at the time the offenses were committed. This child was present in your home under a tacit agreement with his mother that he would spend time in the home and that he would be taken care of by the adults in that home including yourself, and while you were in that role, you molested this child. You violated his trust.

* * * "It was a second home in a lot of senses - - senses to him, so he was violated in a second home, a place where he had a right to be safe. That makes it more serious. It makes your conduct more reprehensible.

{¶19} "The second thing I think makes this more serious is the age of the child. Talking about a nine year old little boy here. Talking about a second or third grader, * * * He's a child in every sense of the word. A child who, as any child, shouldn't be exposed to sexual matters, let alone sexual abuse. This child has suffered psychological damage. He suffered physical harm because of what you've done. This child was hurt, physically hurt, as his mother has said, emotionally hurt also. He will live with this for the rest of his life. He will have to work through this for the rest of his life. That makes it more serious.

{¶20} "There is nothing in this record to indicate your conduct was less serious. The other thing actually that makes it more serious, * * * it has to do with the trust factor in a way, but it goes beyond the trust factor, and that is that you were grooming this child. This wasn't a one time spontaneous spur-of-the-moment sexual abuse. * * * This happened over a course of time, it happened numerous times. This little boy was exposed to it many, many, many times, and the grooming part comes in in terms of making him feel safe, buying him things, treating him as you would a nephew or relative

or a son in a sense by buying him gifts, gifts that will make him more comfortable, gifts that will make it less likely that he will expose you, making him feel more guilty if he does that, and that, I think, makes this more serious because it's hard enough for a little boy, for whatever reason, to expose abuse by a man. * * * this occurred over a period of time from September to April. It's a lot of months out of this little child's life. That's an entire school year. This little boy lost an entire school year to your abuse. * * *

{¶21} “You are standing before the Court for sentencing with regard to sexual offenses committed by you against a child, and it's not your first time here. You were convicted of that back in the mid '80's - - '85. You were convicted of sexual battery, gross sexual imposition and gross sexual imposition, exact same offenses that you're here for today, and if that's not bad enough, the victims' ages were similar and your conduct with regard to those children was identical, * * * You did the exact same things to those children that you did to this little boy. That, to me, says that you pose an extreme risk to children, extreme risk of re-offending, * * * This makes that at least the fourth little boy that we know of that you have molested. * * *

{¶22} “You've shown no remorse, * * * I believe you have committed the worse form of the offense, that consecutive sentences are necessary definitely to protect the public from future crimes that you might commit, and that they are not disproportionate to the seriousness of your conduct and the danger you pose, * * *”

{¶23} Tr. August 24, 2009 Sentencing Hearing at 14-19.

{¶24} Based upon the foregoing, we find the trial court provided sufficient reasons for imposing consecutive sentences; therefore, the sentences were not contrary to law.

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

{¶26} The judgment of the Ashland County court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

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

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

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

