

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-079

Appellee

Trial Court No. 2008CR0384

v.

Joseph Luna

DECISION AND JUDGMENT

Appellant

Decided: November 12, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers and David Romaker, Jr., Assistant
Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

COSME, J.

{¶ 1} On August 7, 2008, defendant-appellant, Joseph W. Luna, was indicted by the Wood County Grand Jury on 13 counts of complicity to burglary in violation of R.C. 2923.03(A)(2) and 2911.12(A)(2) (Counts 1-13), felonies of the second degree, one count of tampering with evidence in violation of R.C. 2921.12(A)(1) (Count 14), a felony of the

third degree, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) (Count 15), a felony of the first degree. On July 21, 2009, pursuant to a plea agreement, appellant pled guilty to Counts 4-15 and the state dismissed Counts 1-3, as well as one count of theft in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, which was pending against appellant in another case (2008-CR-0360).

{¶ 2} On October 6, 2009, the Wood County Court of Common Pleas sentenced appellant to a term of four years on each of the ten complicity counts, one year on Count 14, and five years on Count 15. The trial court ordered the complicity counts to be served concurrently with each other and consecutively to each of the other sentences, for an aggregate prison term of ten years. The court also ordered the aggregate ten year term to run consecutively to a "prison sentence imposed out of Lucas County, Ohio."

{¶ 3} Appellant now appeals that judgment, asserting the following two assignments of error:

{¶ 4} "1. Appellant's consecutive sentence violated Appellant's right to due process under the Sixth and Fourteenth Amendment of the United States Constitution and Section Five and Sixteen, Article I and Section Four, Article IV of the Ohio Constitution.

{¶ 5} "2. The trial court abused its discretion and erred to the prejudice of Appellant at sentencing by imposing a prison term in excess of the minimum in violation of Appellant's right to due process under the Sixth and Fourteenth Amendments of the United States Constitution."

{¶ 6} In these assignments of error, appellant essentially maintains that after the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which struck down and severed the judicial fact-finding sections of Ohio's statutory felony-sentencing scheme, trial courts may no longer impose nonminimum or consecutive sentences. These same arguments, however, have already been considered and rejected by the Supreme Court of Ohio in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478. Moreover, the trial court in this case carefully and expressly considered the sentencing factors contained in R.C. 2929.11 and 2929.12 and, therefore, did not abuse its discretion in that regard. *Id.* at ¶ 9, 17. See, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 37-38.

{¶ 7} Finally, appellant seems to be advancing the now familiar argument that the Ohio Supreme Court's decision in *Foster* is contradicted by the more recent United States Supreme Court's decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, and should therefore be disregarded. However, this court has repeatedly declined to take such action, finding that "such a re-examination can only be taken by the Supreme Court of Ohio. As it stands now, we are bound to follow the law and decisions of the Supreme Court of Ohio, unless or until they are reversed or overruled." *State v. Allen*, 6th Dist. No. S-09-033, 2010-Ohio-2381, ¶13; *State v. Finn*, 6th Dist. Nos. L-09-1162, L-09-1163, 2010-Ohio-2004, ¶ 9-10; *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1698, ¶ 53-54; *State v. Winters*, 6th Dist. Nos. L-08-1195, L-08-1263, L-08-

1264, 2009-Ohio-5992, ¶ 7; and *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶ 18.¹

{¶ 8} Accordingly, appellant's first and second assignments of error are not well-taken

{¶ 9} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

¹On February 10, 2010, the Supreme Court of Ohio accepted jurisdiction to address the impact of *Ice* on *Foster* in *State v. Hodge*, 125 Ohio St.3d 1457, 2010-Ohio-2800.