2013 WL 1619148

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.

STATE of Ohio, Plaintiff–Appellee,
v.
Darrell J. WILSON, Defendant–Appellant.

No. 12AP–551. | Decided April 16, 2013.

Appeal from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

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

The Koffel Law Firm, and Bradley Koffel, for appellant.

Opinion

McCORMAC, J.

***1** {¶ 1} Defendant-appellant, Darrell J. Wilson, appeals the judgment of the Franklin County Court of Common Pleas which sentenced him to consecutive prison terms for aggravated vehicular assault and vehicular assault. Because the trial court erred in sentencing appellant, we reverse the trial court's judgment.

{¶ 2} On July 27, 2011, appellant was indicted on four counts of aggravated vehicular assault and two counts of operating a motor vehicle under the influence of alcohol or drugs ("OVI"). The charges stemmed from an automobile accident on January 29, 2011.

{¶ 3} On February 7, 2012, appellant entered a guilty plea to one count of aggravated vehicular assault in violation of R.C. 2903.08, a third-degree felony; one count of vehicular assault in violation of R.C. 2903.08, a fourth-degree felony; and one count of OVI in violation of R.C. 4511.19, a first-degree misdemeanor. The trial court accepted appellant's plea, found him guilty, and entered a nolle prosequi on the remaining counts in the indictment. The court then set the matter for sentencing.

{¶ 4} At the sentencing hearing on June 11, 2012, the trial court merged the OVI offense into the aggravated vehicular assault offense and imposed sentence on the aggravated vehicular assault and vehicular assault offenses, stating:

> [THE COURT]: Relative to Count 2 [aggravated vehicular assault], it's a four-year sentence. That's mandatory. Count 3 [vehicular assault] is an 18–month sentence. Those will run consecutive to each other.

(June 11, 2012 Tr. 54.)

{¶ 5} The trial court's judgment entry includes the following provision regarding the prison sentences:

> The Court hereby imposes the following sentence: FOUR (4) YEARS as to Count Two [aggravated vehicular assault]; EIGHTEEN (18) MONTHS as to Count Three [vehicular assault] to be served consecutively to each other at the Ohio Department of Rehabilitation and Correction.

June 14, 2012 Judgment Entry.

{¶ 6} In a timely appeal, appellant presents one assignment of error for our review:

> The trial court erred as a matter of law by sentencing Defendant to consecutive terms of imprisonment without making findings at the time of the sentencing hearing or in the journal entry of sentencing, as required by R.C. § 2929.14(C)(4).

{¶ 7} In his single assignment of error, appellant contends the trial court erred as a matter of law in imposing consecutive sentences without: (1) making the findings mandated by R.C. 2929.14(C)(4), and (2) providing reasons supporting the consecutive sentences.

{¶ 8} Preliminarily, we note that appellant failed to object to the imposition of consecutive sentences at the sentencing hearing and therefore has forfeited all but plain error. *See* Crim.R. 52(B); *State v. Worth*, 10th Dist. No. 10AP–1125, 2012–Ohio–666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to be "plain" within the meaning of Crim.R. 52(B), it " 'must be an "obvious" defect in the trial proceedings.' " *State v. Payne*, 114 Ohio St.3d 502, 2007–Ohio–4642, ¶ 16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A reviewing court notices plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *State v. Long*, 53 Ohio St .2d 91 (1978), paragraph three of the syllabus. "The burden of demonstrating plain error is on the party asserting it." *Payne* at ¶ 17.

***2** {¶ 9} In *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, the Supreme Court of Ohio considered the standard of review applicable to felony sentencing. There, the plurality opinion decided that 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.* Although *Kalish* suggests the actual term of imprisonment imposed in the trial court should be reviewed under an abuse of discretion standard, appellant's argument raises an issue of law in challenging whether the trial court was required to make statutory findings pursuant to R.C. 2929.14(C)(4) before sentencing appellant to consecutive sentences. Accordingly, we determine if the trial court's decision was clearly and convincingly contrary to law. *Id.* at ¶ 14. *See State v. Carse*, 10th Dist. No. 09AP–932, 2010–Ohio4513, ¶ 61.

{¶ 10} The 1996 sentencing reforms passed by the Ohio General Assembly in S.B. No. 2 included a provision, found in R.C. 2929.14(E)(4), requiring trial courts to make certain factual findings before imposing consecutive sentences. In *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, the Supreme Court of Ohio held that this statutory requirement violated the United States Constitution, and severed that requirement from the statute. *Id.* at ¶ 99–102.

{¶ 11} Subsequent to *Foster*, the Supreme Court of the United States decided *Oregon v. Ice*, 555 U.S. 160 (2009), which upheld an Oregon statute requiring judicial fact-finding before imposing consecutive sentences. Several Ohio defendants subsequently argued that *Ice* resurrected the statutory requirement of judicial fact-finding as a prerequisite for the imposition of consecutive sentences. The Supreme Court of Ohio rejected that argument, but held that as a result of *Ice*, the Ohio General Assembly was free to enact new legislation requiring trial courts to again make findings before imposing consecutive sentences. *State v. Hodge*, 128 Ohio St.3d 1, 2010–Ohio–6320.

{¶ 12} The General Assembly subsequently enacted H.B. No. 86, which became effective on September 30, 2011. H.B. No. 86 revived the language in R.C. 2929.14(E)(4) regarding consecutive sentences and codified it as R.C. 2929.14(C)(4). In Section 11 of H .B. No. 86, the General Assembly provided a statement of legislative intent for the revision to R.C. 2929.14. More particularly, the General Assembly explained that in amending R.C. 2929.14(E)(4), it intended "to simultaneously repeal and revive the amended language in [that] division[ ] that was invalidated and severed by the Ohio Supreme Court's decision in *State v. Foster* (2006), 109 Ohio St.3d 1." The General Assembly further explained that the amended language "is subject to reenactment under the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, and the Ohio Supreme Court's decision in *State v. Hodge* (2010), —— Ohio St.3d ——, Slip Opinion No.2010–Ohio–6320 and, although constitutional under *Hodge*, *supra*, that language is not enforceable until deliberately revived by the General Assembly."

***3** {¶ 13} Pursuant to H.B. No. 86, R.C. 2929.14(C)(4) now provides:

> 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:

(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.

(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.

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

{¶ 14} Appellant contends that because he was sentenced after the effective date of H.B. No. 86, the trial court was required to make the findings set forth in R.C. 2929.14(C)(4) before imposing consecutive sentences. In response, plaintiff-appellee, State of Ohio, maintains that because appellant committed the offenses prior to the effective date of H.B. No. 86, the law as announced in *Foster* controlled, and the trial court was not required to articulate any specific statutory findings before ordering appellant's multiple prison terms to be served consecutively.

{¶ 15} In support of its proposition, the state cites R.C. 1.58, which provides:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

***4** {¶ 16} R.C. 1.58(A) provides that an amendment or reenactment of a statute does not apply to pending cases unless R.C. 1.58(B) applies. R.C. 1.58(B) provides that when a statutory penalty or punishment for an offense is reduced by a statutory reenactment or amendment, the reduced penalty or punishment shall apply if the penalty or punishment is not "already imposed."

{¶ 17} In the present case, there is no dispute that appellant's sentence had not been "already imposed" at the time H.B. No. 86 became effective. The state argues, however, that R.C. 1 .58(B) does not apply because "requiring trial courts to make [the consecutive sentencing] findings does not 'reduce [ ] the penalty for any offense.' " Appellee's at brief, 7. We disagree. The penalty or punishment for the offenses might arguably be reduced if the trial court were required to make the findings required by R.C. 2929 .14(C)(4) before imposing consecutive sentences. We further disagree with the state's contention that R.C. 1.58(B) is inapplicable because it applies only to statutory "reenactment[s]" and "amendment[s]," and the General Assembly used the term "revive" in Section 11 of H.B. No. 86. To be sure, the General Assembly utilized the term "revive" in Section 11; however, the General Assembly also employed the term "reenactment" in Section 11. Therefore, by operation of R.C. 1.58(B), H.B. No. 86 applies. Such finding comports with the rule of lenity found in R.C. 2901.04(A), which provides that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

{¶ 18} Because the record demonstrates that the trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences on appellant's multiple offenses, appellant's sentence is contrary to law and constitutes plain error. Accordingly, we must remand the matter to the trial court for resentencing.

{¶ 19} Appellant further contends the trial court erred in failing to provide reasons supporting its imposition of consecutive sentences. Given our determination that the matter must be returned to the trial court for resentencing, appellant's contention is premature. We note, however, that although the enactment of H.B. No. 86 and the language of R.C. 2929.14(C)(4) require trial courts to make factual findings when imposing consecutive sentences, no provision in the new sentencing scheme requires a sentencing court to articulate reasons for imposing consecutive sentences. Notably, in H.B. No. 86, the General Assembly deleted R.C. 2929.19(B)(2)(c), the provision that required sentencing courts to state on the record their reasons for imposing consecutive sentences. Neither R.C. 2929 .14(C)(4) nor 2929.19 as revised by H.B. No. 86 require the trial court to give reasons for the sentence imposed. *See State v. Owens*, 5th Dist. No. 11CA104, 2012–Ohio–4393, ¶ 37. *See also State v. Sullivan*, 10th Dist. No. 11AP–414, 2012–Ohio–2737, ¶ 24 ("the new legislation requires *findings* before imposing consecutive terms, but not *reasons* for imposing said terms").

***5** {¶ 20} Finally, to the extent appellant argues that Crim.R. 32(A)(4) requires the trial court to give reasons for imposing consecutive sentences, we note that the Staff Notes to Crim.R. 32 pertaining to the July 1, 2004 amendments to the rule state, in relevant part:

> Criminal Rule 32(A) was amended to conform with the Supreme Court of Ohio's decision in *State v. Comer*, 99 Ohio St.3d 463, 2003–Ohio–4165. The *Comer* decision mandates that a trial court must make specific statutory findings and the reasons supporting those findings when a trial court, in serious offenses, imposes consecutive sentences * * * pursuant to R.C. 2929.14(B), R.C. 2929.14(E)(4) and 2929.19(B)(2). Crim.R. 32(A) was modified to ensure that there was no discrepancy in the criminal rules and the Court's holding in *Comer*.

{¶ 21} As noted above, neither R.C. 2929.14 nor 2929.19, as revised by H.B. No. 86, require the trial court to give its reasons for imposing consecutive sentences. Accordingly, the rationale of *Comer*, which was the impetus for the amendment to Crim.R. 32, has been superseded by the revisions of H.B. No. 86. Thus, appellant's reliance on Crim.R. 32(A)(4) is misplaced.

{¶ 22} For the foregoing reasons, appellant's sole assignment of error is sustained, and we hereby reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for resentencing in accordance with law and consistent with this decision.

Judgment reversed; cause remanded with instructions.

TYACK, J., concurs.

BROWN, J., concurs in part and dissents in part.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).

BROWN, J., concurring in part and dissenting in part.
{¶ 23} I respectfully dissent from the portion of the majority decision that finds that, because the penalty for the offenses in this case *could* be reduced if the trial court were required to make R.C. 2929.14(C)(4) findings, H.B. No. 86 applies. Application of R.C. 1.58(B) to H.B. No. 86 would indicate that H.B. No. 86 will apply where a penalty, forfeiture or punishment for any offense *is* reduced by a re-enactment or amendment of a statute. Pursuant to R.C. 1.58(A), H.B. No. 86 will not apply to pending cases unless R.C. 1.58(B) applies.

{¶ 24} Although appellant's sentence had not yet been imposed when H.B. No. 86 became effective, because there was no reduction in penalty for the offenses to which he pled guilty, H.B. No. 86 did not apply and the trial court was not required to make the consecutive sentence findings.

Parallel Citations

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