

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090404
		C-090405
Plaintiff-Appellee,	:	TRIAL NOS. B-0705146-B
		B-0709635
vs.	:	
		<i>JUDGMENT ENTRY.</i>
JAMES BROWN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

James Brown appeals his convictions for robbery, kidnapping, escape, and vandalism. We conclude that the trial court erred both when it did not notify Brown about postrelease control and when it imposed separate sentences for two robbery counts, so we reverse the judgment of the trial court in part and remand the case for further proceedings.

In the case numbered B-0705146-B, Brown was indicted for three counts of robbery and three counts of first-degree kidnapping. In the case number B-0709635, Brown was indicted for vandalism and escape. The cases were consolidated and tried before a jury. At the conclusion of the trial, the jury found Brown guilty of two counts of robbery, three counts of kidnapping, vandalism, and escape. Brown was sentenced to one year for vandalism and to eight years for each of the remaining counts. The sentences were consecutive for an aggregate sentence of 49 years.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Brown appealed his convictions in the cases numbered C-080320 and C-080321. The facts of the case and the relevant legal authority are fully discussed in our decision in that appeal.² We reversed the judgment of the trial court to the extent that it had imposed separate sentences for the two robberies and to the extent that it had convicted Brown of two counts of first-degree kidnapping instead of two counts of second-degree kidnapping. In all other respects, we affirmed the judgment of the trial court. We remanded the case for further proceedings.

The trial court held a new sentencing hearing. The court imposed the same sentence, except that it ordered the sentences for the two robberies to “run at the same time” and imposed consecutive eight-year sentences for the three second-degree kidnappings. The new aggregate prison term was 41 years.

In his sole assignment of error, Brown now asserts that the trial court improperly sentenced him. Brown first contends that the trial court erred when it imposed maximum, consecutive sentences. Our review of Brown’s sentences has two parts. First, we must determine whether the sentences were contrary to law.³ Then, if the sentences were not contrary to law, we must review the sentences to determine whether the trial court abused its discretion.⁴

The sentences imposed by the court were within the applicable sentencing guidelines for the offenses. And contrary to Brown’s assertion, there is no indication in the record that the court was objectively unreasonable toward him. We conclude that the trial court did not abuse its discretion.

Brown also urges us to sustain his assignment of error based on *Oregon v. Ice*.⁵ In *State v. Foster*, the Ohio Supreme Court held that R.C. 2929.14 and 2929.41(A) were unconstitutional because they required judicial factfinding.⁶ Brown

² *State v. Brown*, 1st Dist. Nos. C-080320 and C-080321, 2009-Ohio-1889.

³ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶14.

⁴ *Id.* at ¶17.

⁵ (2009), ___ U.S. ___, 129 S.Ct. 711.

⁶ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph three of the syllabus.

argues that *Foster* is no longer valid with respect to consecutive sentences in light of the United States Supreme Court's decision in *Ice*. In that case, the United States Supreme Court concluded that Oregon's sentencing statute, which, like Ohio's, requires judicial factfinding before the presumption of concurrent sentences can be overcome and consecutive sentences can be imposed, was constitutional.⁷ The Ohio Supreme Court has not directly addressed the effect of *Oregon v. Ice* on Ohio's sentencing law. Absent a contrary decision by the Ohio Supreme Court, *Foster* still applies to consecutive sentences.

Brown next argues that the trial court improperly sentenced him for robbery and the three kidnapping offenses. Brown argues that the offenses are allied offenses of similar import for which he could not be separately convicted.⁸ We addressed this argument in Brown's first appeal, and there has been no change in the law regarding allied offenses to convince us to change our conclusion that the offenses were committed with separate animus. Brown was properly convicted of one robbery and three kidnappings.

Finally, Brown argues that the trial court erred when it sentenced him without first informing him that he would be subject to postrelease control. The state concedes that although the journal entry reflects that Brown would be subject to postrelease control, the trial court did not inform him about it during the sentencing hearing. The sentence, therefore, is void. For this reason only, we conclude that the sole assignment of error is well taken. We also note that the trial court improperly indicated that it was imposing sentences for two robberies. This was contrary to our decision in Brown's first appeal, where we concluded that the robberies had to be merged, and that Brown was to be sentenced for only one of the robberies.

⁷ Id. at 719.

⁸ See R.C. 2941.25(A).

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We therefore affirm the judgment in part, vacate the sentence, and remand the case for a new sentencing hearing, so that the trial court can impose only one robbery sentence and appropriately inform Brown about postrelease control.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 10, 2010

per order of the Court _____.

Presiding Judge