[Cite as *State v. Ponce*, 2010-Ohio-1741.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91329

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID PONCE

DEFENDANT-APPELLANT

JUDGMENT:
FINDING OF GUILT AFFIRMED;
REMANDED FOR MERGER OF ALLIED OFFENSES

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501245

BEFORE: McMonagle, J., Rocco, P.J., and Boyle, J.

RELEASED: April 22, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Joseph Vincent Pagano
430 White Pond Drive
Suite 400
Akron, OH 44320

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Deborah Naiman
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B)and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} In September 2007, a Cuyahoga County Grand Jury indicted defendant-appellant David Ponce as follows: Count 1, drug trafficking, in violation of R.C. 2925.03(A)(1); Count 2, drug trafficking, in violation of R.C. 2925.03(A)(2); Count 3, possession of drugs, in violation of R.C. 2925.11(A);[1] and Count 4, possession of criminal tools, in violation of R.C. 2923.24(A). All counts contained forfeiture specifications. The jury subsequently found him guilty of all counts, and the trial court sentenced him to 16 years incarceration.

{¶ 2} Ponce appeals from his convictions and raises seven assignments of error, which we address out of order. We affirm the finding of guilt, but remand for resentencing.

I. Trial Testimony

{¶ 3} At trial, Cleveland police detective John Dlugolinski testified that he and his partner, detective Todd Clark, were contacted in August 2007 by an agent of the Bureau of Criminal Investigation ("BCI") regarding information from a confidential informant ("CI") that a large shipment of marijuana was to be delivered to the Cleveland area by a Mexican drug ring. The CI agreed to introduce undercover officers to the supplier, Israel Guerra (Ponce's brother-in-law), who subsequently agreed to sell 1000 pounds of marijuana for $900 a pound to detective Clark.

{¶ 4} Israel came to Cleveland in early August and met with Clark, who showed him a warehouse where the marijuana could be unloaded. The marijuana never arrived,

[1]Counts 1, 2, and 3 all charged an amount equal to or exceeding twenty thousand grams.

however, and after several days, Israel left. A few weeks later, codefendant Ramon Luna and Guellermo Perez (a friend of Israel's) came to Cleveland on Israel's behalf. They met with the CI and undercover detectives Clark and Edwin Cuadra over several days; again the marijuana did not arrive and the men left. On September 20, 2007, however, Perez contacted Clark and advised him that a truck was on its way.

{¶ 5} Abel Avalos, the truck driver and a codefendant, testified that he lived in Houston, Texas and was a truck driver by trade. Avalos said that he was recruited by Luna to transport the marijuana to Ohio in a semi-trailer during one of his regular runs to Ohio, and Luna gave him $10,000 for his services. Avalos testified that he met Luna and Ponce at a house outside of Houston, where he saw Ponce unloading the marijuana from an oil tanker truck into a U-Haul truck. He later met Luna and Ponce at a Houston hotel to make arrangements for transferring the marijuana from the U-Haul to his truck. After the three men loaded the bundles of marijuana into the cab of Avalos's truck, he left for Cleveland. Avalos's understanding was that Ponce and Luna were flying to Cleveland to meet him there when he arrived; he was then to take $1 million dollars back to Houston.

{¶ 6} Codefendant Luna testified that he and Ponce had been best friends for nearly 20 years, and Ponce introduced him to Israel and Perez in June 2007. Luna said that Israel brought marijuana into Texas in oil tankers and offered him $30,000 to complete a sale to the Cleveland buyers. Luna testified that he and Perez met with undercover detectives Clark and Cuadra in Cleveland in late August 2007. Although he had never sold drugs before, at Perez's instruction, Luna told the detectives he was "well connected" and "could get them what they needed." Perez and Luna returned to Texas when the deal

did not go through, but in September, Perez told Luna to go back to Cleveland to arrange a deal.

{¶ 7} Luna testified that he secured the truck driver for the deal and described how he and Ponce, after meeting with Israel, transferred the marijuana from the oil tanker to the U-Haul truck and then to Avalos's semi-trailer. Luna testified that he and Ponce flew to Cleveland on September 19, 2007, and, on September 20, Ponce contacted the CI and detective Clark. The CI and detectives Clark and Cuadra then met with Luna and Ponce in their hotel room.

{¶ 8} After learning that Avalos was south of Cleveland on I-71 and wanted an escort to the warehouse, the undercover officers took Luna and Ponce to meet up with him. The truck then followed the officers to a warehouse in Lakewood, where, according to Luna, everyone "formed a chain" to unload the bundles of marijuana from the truck. Luna testified that he and Ponce planned to put the money from the sale in duffle bags that Avalos would then bring to Israel in Texas.

{¶ 9} Detective Clark testified that although he initially agreed to pay $900 a pound for the marijuana, after learning there would be varying grades of marijuana on the truck, he and Israel agreed they would negotiate the price after he saw the marijuana. Hence, after the marijuana was stacked in the warehouse, detective Scott Moran, who was working undercover in the warehouse, opened one of the bundles to inspect it. Clark then called detective Dlugolinski and told him, "It's here; bring a scale to weigh it," which was the signal for the SWAT team to move in and arrest Luna, Ponce, and Avalos.

{¶ 10} Codefendant Luna also testified about a surveillance recording that was made while the undercover officers were at the hotel with him and Ponce. Specifically, he identified Ponce's voice on the recording telling him there were around 620 pounds of marijuana on the truck and about 30 bundles. Detective Cuadra likewise testified about the recording; he identified Ponce's voice telling him that he and Israel "started getting this thing rolling months ago."

{¶ 11} Codefendant Luna also testified about State's Exhibit 15, which was a list of two columns of numbers. Luna testified that the numbers in one column represented the bundles of marijuana and the numbers in the other column were the weights associated with each bundle; Luna said that he had seen the list in Houston when he and Ponce were loading the marijuana into the U-Haul.

{¶ 12} Detective Clark testified that State's Exhibit 15, along with Ponce's baggage claim receipt, was found in Ponce's suit jacket in the hotel room. Clark testified that, based upon his experience, Exhibit 15 was a ledger similar to that used by other drug dealers and itemized the weights of each of the 29 bundles of marijuana on the truck and the dollar amounts the sellers hoped to get for each. The bottom of the ledger contained the letter "I" next to the number $35,200 and the letter "D" next to the number $37,376, which Clark interpreted, based on other numbers on the ledger, to be the projected profit that Israel and David (Ponce) would realize from the sale.

{¶ 13} Cleveland police officer Detective Michael Connelly, who was part of the take-down squad and executed the search warrant at the hotel , testified that he

spot-checked several of the bundles of marijuana and that the numbers and weights on the bundles matched the ledger.

{¶ 14} After the arrest, the officers searched Luna and Ponce's hotel room pursuant to a warrant. Among other things, they recovered the previously discussed ledger, cell phones, identification cards, Luna and Ponce's boarding passes, and a credit card.

II. Sufficiency and Manifest Weight of the Evidence

{¶ 15} In his second and fifth assignments of error, Ponce contends that his convictions were not supported by sufficient evidence and against the manifest weight of the evidence.

{¶ 16} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶12. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 942, paragraph two of the syllabus.

{¶ 17} A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. A reviewing court may reverse the judgment of conviction if it appears that the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. A finding that a conviction was

supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. Id. at 388.

{¶ 18} Ponce was convicted of drug trafficking in violation of R.C. 2925.03(A)(1) and (2), which provide that no person shall knowingly "sell or offer to sell a controlled substance," or "prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

{¶ 19} He argues that his convictions for drug trafficking were against the manifest weight of the evidence because there was no evidence he ever offered to sell the marijuana, transported the marijuana for shipment, or knew that it was intended for sale. He contends that he never engaged in any negotiations with the CI or undercover officers for the sale of the marijuana, and there was no evidence that he knew the value of the marijuana or the price at which it would be sold, or even that it was for sale. He also challenges the credibility of Luna and Avalos's testimony, asserting that they had a motive to lie about his involvement because they both made plea agreements with the State in exchange for their testimony.

{¶ 20} Ponce's arguments have no merit. In order to prove an offer to sell a controlled substance, the State need only show evidence of one's willingness to transfer drugs to another person. *State v. Scott* (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798. Ponce demonstrated his willingness to transfer marijuana to the undercover officers throughout his participation in the transaction. In Texas, he unloaded the marijuana from

the oil tanker, transferred it to a U-Haul, and then helped load it into the cab of Avalos's truck. In Cleveland, he contacted the CI and undercover detective Clark, whom he thought were the prospective buyers, and then met with them for several hours in the hotel room while they waited for Avalos to arrive. During this meeting, he told detective Clark that he and Israel got this "thing" (that could only refer to the drug sale) "rolling months ago" and further, that there were about 30 bundles on the truck weighing about 620 pounds, instead of the 1000 pounds as originally agreed. He went with the officers/buyers to meet Avalos and then to the warehouse, where he helped unload the marijuana and count the bundles. Subsequently, a ledger reflecting the bundles, their corresponding weights, and the profit he would realize from the sale was found in his suit jacket in the hotel room. Clearly, Ponce knew the marijuana was for sale and intended to sell it to the undercover officers. In light of this evidence, the jury did not lose its way in finding that Ponce both offered to sell drugs and transported them for shipment in violation of R.C. 2925.03(A)(1) and (2).

{¶ 21} It likewise did not lose its way in finding him guilty of possession of drugs in violation of R.C. 2925.11, which provides that no person "shall knowingly obtain, possess, or use a controlled substance." Despite Ponce's argument that the only evidence of his contact with the drugs was when he unloaded the drugs in the warehouse at the purported instruction of the undercover officers, both Luna and Avalos testified that he handled the marijuana several times during its transport by unloading and loading different vehicles. Although Ponce asserts that neither Luna nor Avalos were credible, credibility

determinations are primarily for the trier of fact. *State v. DeHaas* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 22} Finally, we find no merit to Ponce's claim that his conviction for possession of criminal tools was against the manifest weight of the evidence. Under R.C. 2923.24(A), "no person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." The alleged criminal tools were a cell phone, the tractor-trailer, and rubber gloves. Contrary to Ponce's argument that there was no evidence he used any of these items in furtherance of either drug trafficking or drug possession, the evidence established that Ponce helped load the marijuana into the tractor-trailer, and used his cell phone to contact the CI and Clark when he and Luna arrived in Cleveland. Furthermore, detective Cuadra testified that prior to unloading the marijuana from the truck in Lakewood, Luna passed out rubber gloves to Ponce and the others to wear while unloading the bundles, some of which were still oily. Thus, the evidence established that Ponce possessed and used these items to facilitate the drug deal.

{¶ 23} In sum, this is not a case where the evidence weighs heavily against the conviction or where the jury lost its way. Ponce's convictions are supported by the manifest weight of the evidence; thus, they are also supported by sufficient evidence. The second and fifth assignments of error are therefore overruled.

III. Motion to Suppress

{¶ 24} After he was indicted and pled not guilty, Ponce filed a motion to suppress evidence and dismiss the indictment, which the trial court denied after a hearing. In his

first assignment of error, Ponce contends that the trial court committed reversible error in denying his motion to suppress.

{¶ 25} Appellate review of a suppression ruling presents a mixed question of law and fact. *State v. Singleton*, Cuyahoga App. No. 90003, 2008-Ohio-3557, ¶6-7. Accepting the properly supported findings of the trier of fact as true, an appellate court must determine as a matter of law, without deference to the trial court's conclusion, whether the trial court erred in applying the substantive law to the facts of the case. Id. See, also, *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 26} In his motion to suppress, Ponce argued that his arrest was unlawful, and the subsequent seizures unconstitutional, because (1) the Cleveland police were outside their jurisdiction when they arrested him in Lakewood, Ohio, and (2) the police did not comply with the requirements of Crim.R. 41 in executing the search warrant. He asserted that because the officers seized evidence as result of an unlawful arrest, any evidence should have been suppressed. Further, he contended that the charges against him should have been dismissed because his arrest was illegal.

{¶ 27} First, with respect to the alleged illegality of Ponce's arrest, we note that even if Ponce were correct that the officers made an extra-territorial arrest, such fact would not warrant suppressing evidence. As this court has held, the exclusionary rule is used to remedy violations of constitutional rights and not violations of state statutes. *State v. Fannin*, 8th Dist. No. 79991, 2002-Ohio-6312, ¶9. A violation of R.C. 2935.03(D), which authorizes police officers to make warrantless arrests within the territorial jurisdiction in

which the officer is appointed, does not rise to the level of a constitutional violation, thus precluding the suppression of evidence for a violation thereof. Id.

{¶ 28} Further, we find that Ponce's arrest was not illegal. At the suppression hearing, Cuyahoga County sheriff's department captain Reginald Elkins testified that in 2005, then-sheriff Gerald McFaul deputized several Cleveland police officers as deputy sheriffs. Elkins testified that such a commission provides the individual with all the power and authority of a Cuyahoga County sheriff's deputy, and includes both county and statewide arrest powers. Included among the deputized sheriffs were Cleveland police officers Dlugolinski, Clark, and Cuadra, who assisted in the drug investigation that Elkins characterized as a "joint venture" between the Cuyahoga County sheriff's office and the Cleveland police department.

{¶ 29} Cuyahoga County sheriff's deputy Marc Bottone testified that he was detailed to the Cleveland police narcotics unit to assist with drug investigations. He testified that he was present at and assisted in Ponce's arrest and that BCI, which also has statewide jurisdiction, had assisting officers at the scene as well.

{¶ 30} Thus, it is apparent that Ponce's arrest was effectuated by numerous officers who had either state- or county-wide jurisdiction. Further, as Ponce traveled through Cleveland on his way to the warehouse on September 20, 2007, the officers had probable cause to believe that he was committing a felony drug offense and, therefore, had authority to arrest and detain him outside the city limits until a warrant could be obtained. See R.C. 2935.03(D).

{¶ 31} With respect to Ponce's argument that the evidence seized pursuant to the search warrant should have been suppressed because the State did not comply with the requirements of Crim.R. 41, the evidence demonstrated that the officers did not serve either Luna or Ponce with a copy of the warrant, did not make a return of the warrant, and did not file it as required by law, although the information was subsequently turned over to defense counsel.

{¶ 32} Nevertheless, a violation of Crim.R. 41 with respect to filing documents connected with the execution of a search warrant is not a constitutional violation that renders the warrant invalid unless the warrant was facially defective or improperly issued. *State v. Downs* (1977), 51 Ohio St.2d 47, 64-65, 364 N.E.2d 1140; *State v. Martin*, 8th Dist. No. 89030, 2007-Ohio-6062, ¶25. As the officers searched Ponce's hotel room pursuant to a valid search warrant, the trial court did not err in denying the motion to suppress and, accordingly, the first assignment of error is overruled.

IV. Exhibits

{¶ 33} In his third assignment of error, Ponce argues that the trial court erred in admitting various State's exhibits.

{¶ 34} The trial court has broad discretion in the admission or exclusion of evidence. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 434, paragraph two of the syllabus. Absent an abuse of discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld. *State v. Martin* (1985), 19 Ohio St.3d 122, 129, 483 N.E.2d 1157.

{¶ 35} Ponce first objects to State's Exhibits 4A-4L and 5A-5H, photographs that he contends were not properly authenticated. To properly authenticate photographs, the proponent need only produce a witness with knowledge of the purported subject matter of the photographs, who, by way of foundation, can testify that the photographs represent a fair and accurate depiction of the actual item at the time the picture was taken. *State v. Zacharias*, 8th Dist. No. 90209, 2008-Ohio-6140, ¶40. Cleveland police officer Michael Connelly testified that he took the photographs. He and several other witnesses testified as to what the photographs depicted; accordingly, the photographs were properly authenticated.

{¶ 36} Ponce next objects to the admission of State's Exhibits 9 and 10, cell phones seized during the search of the hotel room, which Ponce contends should have been excluded as irrelevant. See Evid.R. 402. The cell phones were relevant, however, because was testimony throughout the trial that Ponce and his codefendants used cell phones to further their illegal activity. Further, because Ponce was charged with possession of criminal tools (including a cell phone), the phones had evidentiary value and were properly admitted.

{¶ 37} Ponce also objects to the admission of State's Exhibit 15, which was the paper that itemized the weights and price of the various bundles of marijuana. Ponce contends that this item should have been excluded as cumulative and that any probative value was outweighed by prejudice. See Evid.R. 403. We disagree. The ledger had obvious probative value. Detective Clark testified that drug traffickers often use this type

of inventory method. Further, the list was found in Ponce's suit jacket in the hotel room, thereby negating his defense that he did not know the marijuana was for sale.

{¶ 38} Ponce next objects to the admission of State's Exhibits 17, 17(A), 18, and 25, which were articles of luggage and clothing seized from Ponce and the codefendants. He contends these exhibits were cumulative, as the State introduced photos of the same items. But even if the articles should have been excluded as cumulative, any error in their admission was harmless because there was no material prejudice to Ponce from their admission.

{¶ 39} Ponce next asserts that State's Exhibit 26, which was Avalos's notebook organizer with paperwork for his truck, should have been excluded as irrelevant. The exhibit was not irrelevant, however, as it corroborated Avalos's testimony

{¶ 40} that he drove his truck from Houston to Cleveland.

{¶ 41} Next, Ponce objects to the admission of State's Exhibits 27-29, which related to the currency taken from the three codefendants. He contends that these receipts constitute hearsay that does not fall under the business records exception. Detective Clark, however, testified that whenever money is confiscated by the police, it goes into an interest-bearing account and the particular amounts are input to a computer database by case name and number. He identified Exhibits 27-29 as computer printouts of the amount of money seized from Ponce, Luna, and Avalos on September 21, 2007. Clark's testimony demonstrated the records were kept in the normal course of business; accordingly, the exhibits were properly admitted under the business records exception.

{¶ 42} Finally, Ponce objects to State's Exhibits 30 and 31, which were recordings of wiretaps made by the undercover officers on September 20-21, 2007. He waived any objection to the tapes, however, because during trial, defense counsel stated that he had no objection to the tapes being put into evidence.

{¶ 43} Appellant's third assignment of error is therefore overruled.

V. Entrapment

{¶ 44} Ponce next argues that the trial court erred in denying his request to instruct the jury on the affirmative defense of entrapment.

{¶ 45} A court's instructions to the jury should be addressed to actual issues in the case as posited by the evidence and the pleadings. *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157. We review a trial court's decision to grant or refuse requested jury instructions for an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. An abuse of discretion occurs when the court's decision is "grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Bowles*, Montgomery App. No. 23037, 2010-Ohio-278, ¶15. We find no abuse of discretion here.

{¶ 46} The defense of entrapment is established "where the criminal design originates with official or agents of the government, who implant in the mind of an innocent person the disposition to commit the alleged offense and then induce its commission in order to prosecute." *State v. Doran* (1983), 5 Ohio St.3d 187, 192, 449 N.E.2d 1295. "However, entrapment is not established when government officials 'merely afford opportunities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense." Id. (Citation omitted.)

{¶ 47} Ponce was not entrapped. There was no evidence that the undercover officers or CI had any contact with Ponce until he arrived in Cleveland and the truck of marijuana was already on its way. In fact, detective Clark testified that the officers did not even know of Ponce until he arrived in Cleveland on September 20, 2007. Ponce's brother-in-law Israel — not any government officials — "afforded him the opportunity" to traffic drugs. Hence, the trial court did not err in denying his requested jury instruction on the defense of entrapment. Appellant's fourth assignment of error is overruled.

VI. Merger

{¶ 48} In his sixth assignment of error, Ponce contends that the trial court erred by not merging his convictions for drug trafficking under R.C. 2925.03(A)(2) and drug possession under R.C. 2925.11, because they are allied offenses.

{¶ 49} The State concedes this argument pursuant to *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶31. Accordingly, the matter is remanded for merger pursuant to *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 99 N.E.2d 152. Appellant's sixth assignment of error is sustained.

VII. Consecutive Sentences

{¶ 50} The trial court sentenced Ponce to eight years incarceration on each of Counts 1, 2, and 3, and 12 months on Count 4, with Counts 1 and 2 to run concurrent, Count 3 to run prior to and consecutive with Counts 1 and 2, and Count 4 to run concurrent to Counts 1, 2, and 3, for a total term of 16 years. In his seventh assignment of error,

Ponce contends that the trial court's imposition of consecutive sentences was contrary to law and an abuse of discretion. We disagree.

{¶ 51} In applying *State v. Foster*, 120 Ohio St.3d 23, 2008-Ohio-4912, 845 N.E.2d 470, the trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. Id. at paragraph seven of the syllabus. Nevertheless, in exercising its discretion, the trial court must consider the statutes that apply to every felony offense, including R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and the recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself. *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, ¶38. "Support for the sentence should appear in the record in order to facilitate the appellate court's review." *State v. Bowshier*, 2nd Dist. No. 08-CA-58, 2009-Ohio-3429, ¶11, citing *Ohio Felony Sentencing Law*, 2007 Edition, Griffin and Katz, at 208.

{¶ 52} When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, to determine whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 986 N.E.2d 124, ¶4. If the sentence is not clearly and convincingly contrary to law, we then review the trial court's decision under an abuse-of-discretion standard. Id.

{¶ 53} Although the court did not specifically mention either R.C. 2929.11 or 2929.12 at the sentencing hearing, and made no mention of how the sentence imposed related to the purposes and principles announced in those statutes, the trial court indicated generally that it had "considered all the purposes and statutory provisions appropriate." Likewise, in its sentencing entry, the court stated, "The court finds that prison is consistent with the purpose of R.C. 2929.11." As the sentences are within the permissible statutory ranges (see R.C. 2925.03(C)(3)(f); 2925.11(C)(3)(f)) and the court stated it had considered the applicable statutes, we find that the sentences are not contrary to law.

{¶ 54} Next, we consider whether the trial court abused its discretion in imposing the sentences. We do not find an abuse of discretion on this record. The sentence is admittedly harsh. Ponce was 34 years of age at the time of the offense and had no prior criminal record. Nevertheless, the sentences were within the statutory range and the trial court indicated that it had considered the purposes and provisions of the applicable statutes. Accordingly, we find no abuse of discretion.

{¶ 55} We agree with Ponce that the trial court's failure to give any reasons for the imposition of consecutive sentences hampers effective appellate review of his sentence. Furthermore, we recognize that in *Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences, calling into question the continuing validity of *Foster*. This court has chosen to apply the holding in *Foster*, however, and reserve any reconsideration for the Ohio Supreme Court. See, e.g., *State v. Moore*, 8th

Dist. No. 92654, 1020-Ohio-770, ¶14.[2] As Ponce's sentence was not contrary to law and the trial court did not abuse its discretion, appellant's seventh assignment of error is overruled. Finding of guilt affirmed; remanded for merger of allied offenses.

{¶ 56} It is ordered that appellee and appellant share costs herein taxed.

{¶ 57} The court finds there were reasonable grounds for this appeal.

{¶ 58} It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for further proceedings consistent with this opinion.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR

[2]We anticipate that the Ohio Supreme Court will consider the impact of *Ice* on *Foster* in *State v. Hodge*, Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court.