[Cite as *State v. Strickland*, 2009-Ohio-6855.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-172**
- vs -	:	
LEROY E. STRICKLAND,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000408.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Aaron T. Snopek, P.O. Box 338, Mantua, OH 44255 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Leroy E. Strickland, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced Strickland to a prison term of 20 years for his conviction of attempted aggravated murder, with firearm and repeat violent offender specifications.

{¶2} On June 19, 2008, Strickland shot James Reddick, an African-American. The record demonstrates that Strickland was staying with Stephanie Said at the home

of Virginia Gates. Strickland had stated, on numerous occasions, that if he saw an African-American at the home of Gates, he would shoot him or her.

{¶3} On said date, Reddick and Aaron Suder, a Caucasian male, visited Gates' home. Strickland went inside the garage, retrieved a gun, and began shooting at Reddick. Strickland shot Reddick four times, causing injury to his left back, right groin, left thigh, right arm, and both his right and left buttocks. After Reddick escaped the scene of the incident, Strickland was apprehended by the Eastlake Police Department.

{¶4} Strickland pled guilty to one count of attempted aggravated murder, a felony of the first degree, in violation of R.C. 2923.02 and 2903.01, with a firearm specification pursuant to R.C. 2941.145 and a repeat violent offender ("RVO") specification pursuant to R.C. 2941.149.

{¶5} Prior to sentencing, Strickland filed a sentencing brief, and a hearing was held on November 3, 2008. The trial court imposed a prison term of ten years on count one. The trial court also imposed a three-year term for the firearm specification and imposed a seven-year term for the RVO specification. These terms of imprisonment were to be served consecutively to the underlying ten-year term, for a total term of 20 years on the attempted aggravated murder charge.

{¶6} Strickland appeals the judgment of the trial court and, as his first assignment of error, alleges:

{¶7} "The trial court erred in sentencing the Appellant when it improperly made judicial findings of fact in sentencing the Appellant for the repeat violent offender specification."

{¶8} Under this assignment of error, Strickland first maintains that the trial court engaged in impermissible judicial fact-finding during sentencing when it stated: (1) "[t]he Court finds that this offense was in fact motivated by race," and (2) "[t]he Court further finds under recidivism factors, the Defendant's failure to take his medication."

{¶9} After the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶100, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." "Since *Foster*, trial courts no longer must navigate a series of criteria that dictate the sentence and ignore judicial discretion." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶25.

{¶10} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The *Kalish* Court held:

{¶11} "First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶12} "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶13} For the purpose of imposing a sentence, the Supreme Court of Ohio, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶36, determined that the factors in R.C. 2929.11 and R.C. 2929.12 "apply as a general judicial guide for every sentencing." As we stated in *State v. DelManzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, at ¶21:

{¶14} "In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are 'to protect the public from future crime by the offender and others and to punish the offender.' To achieve these two purposes, the court must consider the need for incapacitating the offender, deterring him from future crime, rehabilitating the offender, and making restitution to the victim. Id. R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim. The court must also consider the seriousness and recidivism factors under R.C. 2929.12."

{¶15} A review of the record reveals that, at the sentencing hearing, the trial court stated that it had considered the factors set forth under R.C. 2929.12. Thereafter, in discussing the R.C. 2929.12 factors, the trial court stated that the two above-mentioned factors were considered and made this offense more serious. While specific findings are not required by trial courts under *Foster*, a trial court is not prohibited from stating those factors it considered when imposing a sentence. *State v. Stroud*, 7th Dist. No. 07 MA 91, 2008-Ohio-3187, at ¶17. Consequently, this argument is without merit.

{¶16} While Strickland did not advance the argument below, he maintains the "trial court's sentencing appears to be couched in language from a statute deemed unconstitutional by the Ohio Supreme Court, i.e. former 2929.14(D)(2)(b)."

{¶17} "It is well-settled that a reviewing court will not consider questions that could have been, but were not, presented before the court whose judgment is sought to be reversed." *State v. Smith*, 11th Dist. No. 2007-T-0076, 2008-Ohio-1501, at ¶15. (Citation omitted.) Generally, an appellate court will not consider a constitutional issue that was not raised in the first instance, i.e., at the trial court level. *State v. Awan* (1986), *2*2 Ohio St.3d 120, 122-23. In the interest of justice, however, we will address Strickland's argument on appeal.

{¶18} To support this argument, Strickland cites *State v. Napper*, 4th Dist. No. 07CA2975, 2008-Ohio-2555, at ¶10, where the Fourth Appellate District, in the interest of justice, reversed a sentence of the trial court because it found that the language used in the sentencing entry was "so close to the wording of R.C. 2929.14(D)(2)(b), which was struck down by the Court in *Foster*." However, in a subsequent opinion, the Fourth Appellate District overruled its decision in *State v. Napper*, supra, to the extent it held that the RVO specification in R.C. 2929.14(D)(2)(b) was severed in its entirety by *Foster*. *State v. Napper*, 4th Dist. No. 08CA3081, 2009-Ohio-3922, at ¶15. As stated by the Fourth Appellate District in *Napper III*, "[w]hile paragraph five of the syllabus [in *Foster*] appears to strike the entire provision, paragraph six [in *Foster*] appears to only strike the judicial fact-finding language from the statutory subsection." *State v. Napper*, 2009-Ohio-3922, at ¶12.

{¶19} "[I]n *State v. Adams*, 11th Dist. No. 2006-L-114, 2007-Ohio-2434, we interpreted *Foster*'s discussion and severance of the repeat violent offender statute, R.C. 2941.149. We rejected the appellant's argument that penalty enhancements for repeat violent offenders and major drug offenders have been abolished and said: 'A more legally sound understanding of these words is that only the requirement to make factual findings before imposing "the add-on" has been severed. This understanding of the dicta is consistent with the syllabus and reason of *Foster* and the underlying issue in [*State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285].'" *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, at ¶34, quoting *State v. Adams*, 2007-Ohio-2434, at ¶27.

{¶20} Recently, in *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, at ¶27, the Supreme Court of Ohio stated:

{¶21} "Our opinions in *Foster* and *Mathis* patently demonstrate our intent to excise only the portions of former R.C. 2929.14(D)(2)(b) that required judicial factfinding in violation of the Sixth Amendment and the United States Supreme Court's decisions in *Apprendi* and *Blakely*. We never specifically precluded a trial court from imposing enhanced penalties for a repeat violent offender specification, nor did we excise the definition of a repeat violent offender as set forth in former R.C. 2929.01(DD). Furthermore, none of our decisions after *Foster* indicate that this specification no longer exists. Thus, *Foster* excised judicial factfinding from former R.C. 2929.14(D)(2) but did not eliminate the repeat violent offender specification, as defined in former R.C. 2929.01(DD)."

{¶22} After the decision in *Foster*, the RVO statute was amended and provides, in pertinent part:

{¶23} "(2)(a) *** [T]he court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

{¶24} "(i) The offender *** pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

{¶25} "(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole ***.

{¶26} "(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

{¶27} "(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

{¶28} "(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more

serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense." R.C. 2929.14(D)(2)(a).

{¶29} In *State v. Krug*, this court observed that, as written, the RVO statute allows for mandatory penalty enhancement under (D)(2)(b) and discretionary penalty enhancement under (D)(2)(a). *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815, at ¶142. With respect to the discretionary penalty enhancement, this court stated:

{¶30} "When a RVO does not fit [the] criteria for mandatory penalty enhancement, subsection (D)(2)(a) *permits* the penalty enhancement for RVOs 'if all of the following criteria are met': (1) the offender is convicted or pled guilty to RVO specification; (2) the current offense caused serious physical harm; (3) the court imposes the longest prison term for the underlying offense; (4) the court finds the prison terms are inadequate to punish the offender and protect the public; and (5) the court finds the prison terms are demeaning to the seriousness of the offense." Id. at ¶143. (Emphasis sic.)

{¶31} If the trial court determines that an individual is a RVO, penalty enhancement is permissible under R.C. 2929.14(D) if other requirements are met. In the instant case, the trial court complied with the current version of R.C. 2929.14(D)(2)(a) in sentencing Strickland to an additional term of seven years, to be served consecutively to the underlying offense, for the RVO specification.

{¶32} Strickland's first assignment of error is without merit.

{¶33} As his second assignment of error, Strickland states:

{¶34} "The trial court erred in sentencing the Appellant by increasing the Appellant's sentence based on factors intrinsic to the underlying crime."

{¶35} Strickland alleges the trial court abused its discretion by increasing his sentence based on factors intrinsic to the underlying crime. To support his position, Strickland cites an excerpt of the trial court from the sentencing hearing:

{¶36} "As far as the maximum sentence goes, the defense indicated it is designed for people who have committed the worst form of the offense. While that finding is no longer necessary to make before the maximum imposed, I do believe this is the worst form of the offense of Attempted Aggravated Murder. Certainly the conduct you engaged in, Mr. Strickland, is more than sufficient to constitute Aggravated Murder. The only reason [it] didn't constitute Aggravated Murder had nothing to do with anything you did or that you failed to do, it is strictly, solely because of the will, desire of Mr. Reddick to want to survive and live and go forward."

{¶37} Strickland, however, has taken the trial court's comments out of context, and it is essential to review the trial court's comments in their entirety. When read in its entirety, the trial court was explaining why the instant case is the most serious form of the offense of attempted aggravated murder. The trial court continued, stating:

{¶38} "Again, I have talked about the premeditation that was involved. You also shot him four times. You shot him in the back as he was running away from you. He does absolutely nothing to provoke you or instigate you into doing any of this. You actually caused harm to him. Obviously we reviewed that. But you can commit Attempted Aggravated Murder without even striking someone. Shoot at someone, a plan, that's enough to be Attempted Aggravated Murder. You hit him four times in the

back as he was trying to get away from you. This was one of the worst forms of Attempted Aggravated Murder that this Court has dealt with."

{¶39} The trial court was not indicating that the only reason Strickland was charged with attempted aggravated murder was because the victim survived the shooting, as advocated by Strickland. When read in total, the trial court was providing a record of the details as to why the instant offense was the worst form of attempted aggravated murder, and its justification for the maximum prison term.

{¶40} Strickland's second assignment of error is without merit.

{¶41} Strickland's third assignment of error states:

{¶42} "The trial court erred when it imposed a prison term where its findings under R.C. 2929.12 failed to consider the presence of substantial grounds to mitigate the Appellant's conduct."

{¶43} Initially, we note that Strickland's sentence is within the statutory range, pursuant to R.C. 2929.14(A)(2). Strickland argues that the trial court erred in not considering the factors in R.C. 2929.12.

{¶44} R.C. 2929.12 provides a list of factors that the trial court "shall consider" when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors (of R.C. 2929.12.)'" *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215.

{¶45} R.C. 2929.12(C) provides several factors that suggest an "offender's conduct is less serious" than conduct generally associated with the offense. Pursuant to R.C. 2929.12(C)(4), Strickland argues that the trial court failed to consider the factors enumerated in the sentencing brief, inter alia, sexual abuse at a young age, his mother's abusive relationships, drug abuse, suicide attempts before his 18th birthday, diagnosis of mental, psychiatric, and psychological problems, and the fact that he was off of his psychiatric medication at the time of the incident. At the sentencing hearing, the trial court discussed the recidivism factors as outlined in the sentencing brief and further indicated that it was Strickland's responsibility to take his medication.

{¶46} At the sentencing hearing, the trial court noted that it had taken into consideration the sentencing memorandum. Furthermore, in its judgment entry of sentence, the trial court stated that it had considered "the principles and purposes of sentencing under R.C. 2929.11, and [had] balanced the seriousness and recidivism factors under R.C. 2929.12." This suggests the trial court did, in fact, consider the requisite statutory factors. See *State v. Kearns*, 11th Dist. No. 2007-L-047, 2007-Ohio-7117, at ¶10.

{¶47} In the case sub judice, the record demonstrates the trial court considered the purposes and principles of sentencing in R.C. 2929.11 and the applicable seriousness and recidivism factors of R.C. 2929.12. Thus, we do not determine that the trial court's sentence is clearly and convincingly contrary to law. Taking all of the above into consideration, we cannot say the trial court abused its discretion by sentencing Strickland to an aggregate prison term of 20 years.

{¶48} Strickland's third assignment of error is without merit.

{¶49} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.