

[Cite as *State v. Moore*, 2011-Ohio-2220.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARCUS D. MOORE

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. CT2010-0048

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. CR2010-0065

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 6, 2011

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Defendant-appellant Marcus D. Moore appeals his conviction and sentence entered by the Muskingum County Court of Common Pleas on one count of trafficking drugs with a forfeiture specification following a plea.

{¶2} Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} On April 1, 2010, Appellant Marcus D. Moore was indicted on one count of drug trafficking, in violation of R.C. §2925.03(A)(1), a second degree felony, with a forfeiture specification, after being arrested in a sting operation for selling nine ounces of cocaine to a confidential informant.

{¶4} On July 19, 2010, Appellant entered a guilty plea as part of a negotiated plea agreement wherein the State agreed to recommend a sentence of five (5) years of incarceration. (Plea T. at 7-9).

{¶5} At sentencing, the State made its recommendation of a five year sentence. (Sent. T. at 4). Appellant requested the imposition of a two year sentence, the minimum sentence for a second degree felony. *Id.* at 5. The trial court followed the State's recommendation and imposed a five-year sentence. *Id.* at 6-7.

{¶6} Appellant subsequently filed a motion to reconsider the sentence, which the trial court overruled.

{¶7} Defendant-Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶8} "I. THE TRIAL COURT ERRED WHEN IT ACCEPTED THE STATE'S RECOMMENDATION FOR A FIVE-YEAR PRISON SENTENCE WITHOUT

EXERCISING ITS OWN JUDICIAL DISCRETION REQUIRED WHEN IMPOSING A SENTENCE. THIS VIOLATED THE DEFENDANT'S RIGHT TO HAVE A PROPORTIONATE SENTENCE IMPOSED BY A FAIR AND NEUTRAL JUDGE AND ALSO VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, THE EQUAL PROTECTION OF THE LAW, AND THE SEPARATION OF POWERS DOCTRINE."

I.

{¶9} In his sole assignment of error, Appellant asserts that the trial court abused its discretion in sentencing him to the minimum sentence and for not stating its reasons for such on the record. We disagree.

{¶10} The Ohio Supreme Court held, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, that judicial fact finding is not required before a court imposes non-minimum, maximum or consecutive prison terms. See, e.g., *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296, ¶19, citing *State v. Hanning*, Licking App.No. 2007CA00004, 2007-Ohio-5547, ¶ 9. Subsequent to *Foster*, in a plurality opinion, the Ohio Supreme Court established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The first step is to "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." *Kalish* at ¶ 4. If this first step is satisfied, the second step requires the trial court's decision be reviewed under an abuse-of-discretion standard. *Id.*

{¶11} In the case sub judice, the trial court stated on the record that it had "received the presentence investigation, reviewed it thoroughly, as well as the

sentencing memorandum as presented and filed by [Appellant] in this matter.” (Sent. T. at 6). Furthermore, the Sentencing Entry states that the court “considered the record, all statements, any victim impact statements, the presentence report prepared, the plea recommendation in this matter, as well as the principles and purposes of sentencing under Ohio Revised Code § 2929.11 and its balance of seriousness and recidivism factors under Revised Code §2929.12. (Sentencing Entry, Sept. 3, 2010).

{¶12} Appellant presently does not direct us to any significant mitigating information in the record, instead arguing that because the trial court imposed the same sentence as that recommended by the State, the court failed to use its discretion. Appellant also claims that the sentence is not proportionate to the crime and that he was therefore deprived of his rights to due process and equal protection, but Appellant fails to support such claims with any supporting argument.

{¶13} In this case, Appellant was charged, pled and found guilty of a second degree felony, the punishment for which is two, three, four, five, six, seven, or eight years. The trial court sentenced Appellant to five years, well within the statutory guidelines for such offense.

{¶14} Based on our review of the record, and pursuant to *Foster* and *Kalish*, we cannot find any evidence that the trial court abused its discretion in rendering more than the minimum sentence under the facts and circumstances of this case.

{¶15} Appellant's sole assignment of error is overruled.

{¶16} For the foregoing reasons, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JUDGES

JWW/d 0426

