

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

State of Ohio, :
 :
 Plaintiff-Appellee, : Case No. 08CA876
 :
 v. :
 :
 Robert B. Moman, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. : **Released 5/26/09**

APPEARANCES:

Timothy J. Kelly, Mt. Orab, Ohio, for Appellant.

Aaron E. Haslam, Adams County Prosecuting Attorney, and C. David Kelley, Assistant Adams County Prosecuting Attorney, West Union, Ohio, for Appellee.

Harsha, J.

{¶1} After Robert B. Moman violated five conditions of his community control, the Adams County Common Pleas Court imposed non-minimum, consecutive sentences on two counts of aggravated trafficking in drugs. On appeal Moman argues that the trial court failed to appropriately consider the guidelines established under R.C. 2929.11 and 2929.12, and that the imposition of such a “severe” sentence was unwarranted in light of the trial court’s failure to state its rationale. Because the trial court’s judgment entry reflects that it considered both R.C. 2929.11 and 2929.12 prior to Moman’s sentencing and it sentenced him within the statutory range permitted for two fourth-degree felonies, we affirm the judgment of the trial court.

I. Facts

{¶2} In November 2007, Moman pleaded guilty to two counts of aggravated trafficking in drugs, each a violation of R.C. 2925.03(A)(1) and a fourth-degree felony. The trial court sentenced Moman to three years of community control under the supervision of the Adult Probation Department and any terms and conditions that it deemed appropriate.

{¶3} In March 2008, the Adams County Probation Department filed a detainer for Moman's arrest alleging that Moman had violated his community control. On that same day, the Adams County Prosecutor's Office filed a motion to revoke Moman's community control. Following the probable cause hearing in April, the trial court released Moman on bond and scheduled a revocation hearing for May. Shortly thereafter, however, Moman was arrested in Kentucky on charges of receiving stolen property. Because Kentucky would not release Moman until he was adjudicated on those charges, the revocation hearing did not take place until August. The trial court found Moman guilty of violating five conditions of his community control and sentenced him to eighteen months in prison on the first count and twelve months on the second count, with the sentences to run consecutively.

II. Assignment of Error

{¶4} Moman appeals his sentence and presents one assignment of error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ORDERED DEFENDANT-APPELLANT TO SERVE NON-MINIMUM AND CONSECUTIVE SENTENCES.

III. The Sentences

{¶5} Moman asserts that the trial court erred when it sentenced him because it did not properly consider the overriding purposes in felony sentencing under R.C. 2929.11, or the factors outlined in 2929.12. Moman also argues that the trial court did not follow the statutory requirements under R.C. 2929.19(B)(2) and 2929.14(E)(4) when it ordered him to serve non-minimum, consecutive sentences.

{¶6} When reviewing felony sentencing, we must first determine whether the trial court complied with all the applicable rules and statutes and determine if the “sentence is clearly and convincingly contrary to law.” If we find that the trial court did comply, then we must review the sentencing using an abuse of discretion standard. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

{¶7} At a felony sentencing hearing, the trial court must consider both R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶38. R.C. 2929.11 states:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

* * *

R.C. 2929.12 outlines the factors to be considered in felony sentencing:

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

* * *

{18} In his brief, Moman indicates six factors that the trial court should have considered and cites numerous times to the hearing transcripts. However, we note that Moman did not supplement the record with these transcripts and, therefore, they are unavailable for our review. The duty to file a transcript falls upon the appellant because the appellant bears the burden of showing error by reference to the record. *State v. Prince* (1991), 71 Ohio App.3d 694, 698, 595 N.E.2d 376, citing *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 68-69, 523 N.E.2d 515.

{19} Although the transcripts are not part of the record, the trial court states in its judgment entry that, "The Court has considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12." Because the trial court noted its consideration of the statutes, and the transcripts were not provided for review, we must presume that the trial court

proceedings were valid. *Knapp* at 199. Thus, we find that the trial court complied with all the applicable rules and statutes when sentencing Moman.

{¶10} We turn now to the question of whether the trial court abused its discretion by imposing non-minimum, consecutive sentences. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52; *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶11} In arguing that the trial court did not follow the statutory requirements of R.C. 2929.19(B)(2) and 2929.14(E)(4), Moman relies on our holding in *State v. Berry*, Scioto App. No. 04CA2961, 2006-Ohio-244, which states “[s]entencing courts are required, when imposing sentence, to make certain findings, and, in some cases, state their reasons for making those findings, both at the sentencing hearing and in the sentencing entry.” See, also, *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, at paragraph one of the syllabus. The State, however, contends that Moman’s sentencing is controlled by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶12} The Supreme Court of Ohio’s decision in *Foster* post-dates this court’s decision in *Berry*. In *Foster*, the Supreme Court of Ohio found that several of Ohio’s sentencing statutes were unconstitutional, including R.C. 2929.19(B)(2) and 2929.14(E)(4), in that they required judicial fact-finding before imposition of non-minimum or consecutive sentences. *Foster* at paragraphs one and three of the

syllabus. Further, the court found that R.C. 2929.19(B)(2) and 2929.14(E)(4) were capable of being severed following the remedy used in *United States v. Booker* (2005) 543 U.S. 220. *Foster* at paragraphs two and four of the syllabus. Therefore, “[t]rial 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.” *Id.* at paragraph seven of the syllabus. Clearly, Moman’s sentences are within the statutory range for two fourth-degree felonies. R.C. 2929.14(A)(4). Thus, the trial court did not abuse its discretion when it imposed non-minimum, consecutive sentences.

IV. Conclusion

{¶13} The trial court did not error by imposing non-minimum, consecutive sentences. Thus, we overrule Moman’s sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.