

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

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA6
v.	:	
	:	
Donald E. Smith,	:	<b><u>DECISION AND</u></b>
	:	<b><u>JUDGMENT ENTRY</u></b>
	:	
Defendant-Appellant.	:	File-stamped date: 2-13-09

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**APPEARANCES:**

James R. Kingsley, Esq., Circleville, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Jayme Hartley Fountain, Assistant Pickaway County Prosecutor, Circleville, Ohio, for appellee.

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Kline, P.J.:

{¶1} Donald E. Smith appeals his non-minimum, consecutive prison sentences for aggravated burglary, four counts of kidnapping, and felonious assault imposed by the Pickaway County Common Pleas Court. On appeal, Smith contends that the trial court erred when it imposed his six sentences. Because we find that the sentences are not clearly and convincingly contrary to law and that the trial court did not abuse its discretion, we disagree. Accordingly, we affirm Smith's sentences.

I.

{¶2} In late 2004, a Pickaway County Grand Jury indicted Smith for one count of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.03(A)(1), a felony of the second degree. Later, it also indicted Smith for

aggravated burglary, in violation of R.C. 2911.11(A)(2), a felony of the first degree; four counts of kidnapping, in violation of R.C. 2905.01(B)(2), felonies of the first degree; felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree; and abduction, in violation of R.C. 2905.02(A)(2), a felony of the third degree. Smith entered not guilty pleas to all the charges. In late 2005, a jury heard all charges.

{¶3} The jury returned verdicts finding Smith not guilty of the abduction charge and guilty of all the remaining charges. The court accepted the verdicts and entered judgment accordingly.

{¶4} The court sentenced Smith to serve seven years in prison for illegal use of a minor in nudity-oriented material; eight years in prison for aggravated burglary; eight years in prison on each of the four kidnapping convictions; and seven years in prison on the felonious assault conviction. The court ordered Smith to serve his sentences for aggravated burglary and each of the four kidnapping convictions concurrent to each other. Additionally, the court ordered him to serve his sentence for felonious assault consecutive to his sentences for aggravated burglary and kidnapping and consecutive to the sentence it imposed for illegal use of a minor in nudity-oriented material.

{¶5} After his first appeal, we vacated Smith's conviction and sentence for illegal use of a minor in nudity-oriented material. See *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502. We also remanded his case for re-sentencing of the remaining charges in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-

856. *Id.* On remand, the court again imposed the previous sentences for the remaining charges.

{¶6} Smith again appeals his sentences and asserts the following assignment of error: “Did the trial court commit prejudicial error in the sentences imposed?”

## II.

{¶7} Smith gives four reasons why the trial court improperly imposed his sentences: (1) he was entitled to a presumption of minimum, concurrent sentences; (2) his sentences violated the Due Process and Ex Post Facto clauses; (3) the trial court abused its discretion; and (4) the trial court failed to make the requisite findings.

{¶8} We first set forth our standard of review. Appellate courts “apply a two-step approach [to review a sentence]. First, [we] 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 shall be reviewed under an abuse-of-discretion standard.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4.

{¶9} We again reject that the Foster remedy violates the Due Process and Ex Post Facto clauses. See *State v. Grimes*, Washington App. No. 04CA17, 2006-Ohio-6360. In *Grimes*, we agreed with the observations of the Ninth and Second Districts, which rejected such challenges outright. *Id.* at ¶ 8. In doing so, those courts expressed that it is unlikely that the Supreme Court of Ohio would

have directed lower level courts to violate the Constitution; and, in any event, the Supreme Court of Ohio directives bind the district courts of appeal. *Id.* at ¶ 8, citing *State v. Hildreth*, Lorain App. No. 06CA8879, 2006-Ohio-5058, ¶ 10; *State v. Durbin*, Greene App. No.2005-CA-134, 2006-Ohio-5125, ¶¶ 41-42.

**{¶10}** In finding that the Supreme Court of Ohio's remedy in *Foster* does not violate the Due Process or Ex Post Facto Clauses of the United States Constitution, we also expressed our approval of the reasoning set forth by the Third District in *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162. *Grimes* at ¶ 9, citing with approval *McGhee* at ¶¶ 11, 13-20. Because the range of prison terms for the defendant's offense remained the same both before and after *Foster*, we concluded, "it is difficult to understand how appellant could maintain that an enlargement of the criminal statute occurred, generally, or available punishments, in particular." *Id.* at ¶ 10. Accordingly, we also reject the claim that the court erred by imposing non-minimum sentences for the offenses. *Id.* at ¶ 11.

**{¶11}** We also reject Smith's argument that the trial court is prohibited from imposing consecutive sentences. "Nothing in *Foster* \* \* \* suggests that the Court eliminated consecutive sentencing." *State v. Scott*, Pickaway App. No. 07CA5, 2007-Ohio-3543, ¶ 9; *State v. Thompson*, Washington App. No. 06CA43, 06CA50, 2007-Ohio-2724, ¶¶ 12-13. In *Scott*, we stated that even though *Foster* declared portions of Ohio's consecutive sentencing statutes unconstitutional, those portions were severed. *Id.* at ¶ 9. Following *Foster*, "trial courts retain

discretion to impose consecutive sentences without stating their reasons for doing so.” *Id.*, citing *Foster* at paragraph seven of the syllabus.

{¶12} We now turn to Smith’s remaining arguments. By challenging whether the trial court made the requisite findings before imposing the sentence, Smith is essentially arguing that his sentence is contrary to law. As a result, we examine the record to see if the sentence is clearly and convincingly contrary to law. We find that it is not.

{¶13} The *Foster* court eliminated mandatory judicial fact-finding prior to imposing maximum, non-minimum, or consecutive sentences in felony cases. Nevertheless, trial courts are still required to consider R.C. 2929.11, R.C. 2929.12, and any statute specific to that case. See, e.g., *Kalish*, *supra*, at ¶ 13; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶14} Here, the record shows that the trial court properly considered R.C. 2929.11 and R.C. 2929.12 prior to imposing Smith’s sentences. The sentencing entry also restates that the trial court considered R.C. 2929.12 as well as R.C. 2929.13.

{¶15} In addition, the trial court did not exceed the statutory ranges when imposing the sentences. That is, the court imposed five separate eight-year sentences for the five first degree felonies. The sentencing range for a felony of the first degree is three to ten years. The court imposed a seven-year sentence for the second degree felony, which sentencing range is two to eight years.

{¶16} Therefore, we find that Smith’s sentence is not clearly and convincingly contrary to law.

{¶17} Next, after applying the first prong of the above two-step approach, we address the final question of whether the sentences imposed represent an abuse of discretion. Abuse of discretion means “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Kalish* at ¶ 19, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, in turn quoting *State v. Adams* (1980), 62 Ohio St.2d 151. In the sentencing context, we review the trial court’s selection of the sentence within the permissible statutory range. *Kalish* at ¶ 17.

{¶18} We find that the trial court did not abuse its discretion when it imposed the non-minimum, consecutive sentences. Smith was involved in three incidents here, each worse than the one before. The charge of illegal use of a minor in nudity-oriented material arose because Smith surreptitiously placed a camera in the bathroom. From its position, the camera would film people using the toilet and the shower. Smith’s girlfriend’s sister discovered the camera, after she used the toilet. Next, in October of 2004, Smith kidnapped his girlfriend and left a note with her parents telling them that they were leaving together and abandoning their children. His girlfriend testified that he threatened to kill their children if she did not go with him.

{¶19} Arguably the most serious and potentially deadly incident happened on November 27, 2004. Smith broke into the home of his girlfriend’s parents, where she was staying. He smashed a glass door and entered the house with a 12-inch knife. His girlfriend’s mother saw him first outside her sons’ rooms. She screamed, and Smith chased her down the stairs. Smith prevented anyone in

the home from dialing 911 on the land line phone by cutting the lines before he entered the home. Meanwhile, his girlfriend and her sister had locked themselves in a room with the baby.

{¶20} Smith demanded to have a “family meeting.” If they refused to meet with him or if they called the cops, he said that he would hurt them. Smith then forced her parents to go back up stairs, and he had the father ask his daughter to come out. When she refused, Smith kicked down the door. He then held his girlfriend at knife point and positioned her sister into the closet, keeping her pinned there. If his girlfriend had not dialed 911 from her cell phone, before Smith broke into the room, the outcome could have easily become deadly. Fortunately, the police arrived quickly and took Smith into custody.

{¶21} Therefore, based on this record, we find that the trial court’s attitude regarding the non-minimum, consecutive sentences was not unreasonable, arbitrary or unconscionable. Consequently, we find that the trial court did not abuse its discretion.

{¶22} Accordingly, we overrule Smith’s sole assignment of error and affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
Roger L. Kline, Presiding 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.**