

[Cite as *State v. Thomas*, 2009-Ohio-4812.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	CASE NO. 08-MA-87
)	
MARCUS THOMAS,)	OPINION
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2005CR1068

JUDGMENT: Affirmed

APPEARANCES:
For Plaintiff-Appellee Paul Gains
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 10, 2009

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DONOFRIO, J.

{¶1} Defendant-appellant, Marcus Thomas, appeals his sentence in the Mahoning County Common Pleas Court for murder and aggravated robbery, both with firearm specifications, following a guilty plea.

{¶2} On October 27, 2005, a Mahoning County grand jury indicted Thomas for aggravated murder, R.C. 2903.01(B)(D), and aggravated robbery, R.C. 2911.01(A)(1)(B), both with separate firearm specifications pursuant to R.C. 2941.145(A). The state alleged that Thomas, along with co-defendant Jawan Johnson, robbed and murdered Mathew Saunders.

{¶3} On October 23, 2006, Thomas entered into a Crim.R. 11 plea agreement, wherein the state agreed to amend the charge of aggravated murder to murder, in violation of R.C. 2901.02 (B)(D). In return, Thomas pleaded guilty to the amended charge of murder, aggravated robbery, and two firearms specifications. On November 23, 2006 the trial court accepted Thomas' plea of guilty, and sentenced him to fifteen years to life in prison for murder, five years for aggravated robbery, and three years for the firearm specifications, all to be served consecutively. The trial court filed its judgment entry on November 7, 2006.

{¶4} On November 13, 2006, Thomas filed an appeal of the trial court's sentence, presenting two assignments of error: (1) "The trial court erred in imposing consecutive sentences for murder and aggravated robbery on defendant-appellant by engaging in impermissible judicial fact-finding in violation of the defendant-appellant's rights as guaranteed by the Sixth Amendment to the United States Constitution; and (2) [t]he trial court erred by imposing consecutive sentences for murder and aggravated robbery on defendant-appellant that are contrary to law." Thomas argued the trial court, in sentencing, engaged in judicial fact-finding pursuant to R.C. 2929.14(B) and R.C. 2929.14(E)(4), Ohio felony sentencing statutes declared unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶5} On March 13, 2008, this court entered an opinion and judgment entry in response to Thomas' appeal. On the second assignment of error, this court held that

the trial court did not rely on the former judicial fact-finding requirement of R.C. 2929.14(E)(4) when it imposed consecutive sentences. *State v. Thomas*, 7th Dist. No. 06-MA-185, 2008-Ohio-1176, ¶15. However, this court did rule that the trial court erred by explicitly relying on R.C. 2929.14(B) in imposing a greater than minimum sentence. *Id.* at ¶23-4, citing *State v. Profanchik*, 7th Dist. No 06-MA-143, 2007-Ohio-6430. This court thus vacated and remanded Thomas' sentence pursuant to *Foster*.

{¶6} On April 9, 2008, Thomas appeared before the Mahoning County Court of Common Pleas for resentencing. In resentencing, the trial court considered the record, the oral statements of counsel, the recommendation of the original presentence investigation, and the court of appeal's opinion. (Resentencing Hearing Tr. 6). The trial court resentedenced Thomas to "15 years to life [for murder], of which 15 years is mandatory. On the firearm specification * * * three years, consecutive to the 15 years to life. On the aggravated robbery charge * * * 5 years, consecutive to the sentence imposed on the murder and firearm specifications, for a total of 23 years." (Resentencing Hearing Tr. 7) Thomas was given credit for all time served up until that hearing and advised of the potential imposition of postrelease control for up to five years. (Resentencing Hearing Tr. 7). This timely appeal followed.

{¶7} On November 7, 2008, Thomas' original appellate counsel's motion for leave to withdraw was granted. On January 26, 2009, Thomas' newly appointed appellate counsel filed a combined *Toney* brief pursuant to *State v. Toney* (1990), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.E.2d 419, and motion to withdraw. On February 6, 2009, this court provided Thomas thirty days to file his own brief, but he did not do so. In *Toney*, this court set forth in its syllabus the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶8} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶9} “4. Court-appointed counsel’s conclusion and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.

{¶10} “5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶11} “* * *

{¶12} “7. Where the Court of Appeals determines that an indigent’s appeal is wholly frivolous, the motion of the court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.”

{¶13} Thomas pleaded guilty pursuant to a Crim.R. 11 plea agreement and was sentenced and resentenced on appeal. Only two main issues can be appealed pursuant to a Crim.R. 11 plea: the plea hearing and sentencing. Since Thomas has already appealed the October 23, 2006 joint plea and sentencing hearing, only one main issue presents itself – the resentencing.

{¶14} Upon resentencing, Thomas was resentenced to the mandatory fifteen years to life for murder, five years for aggravated robbery, and the mandatory three years for the firearm specifications. The sentences were ordered to be served consecutively.

{¶15} It first should be noted that the general felony sentencing requirements do not apply to murder cases. The Ohio Revised Code addresses sentencing for aggravated murder and murder in a special scheme separate from all other felony offenses. R.C. 2953.08(D)(3). R.C. 2929.02 governs the penalties for murder, stating in pertinent part, “[w]hoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life * * *.” R.C. 2929.02(B)(1). Therefore, the trial court was statutorily required to sentence Thomas to an indefinite term of fifteen years to life in prison.

{¶16} Turning to the sentence for the aggravated robbery conviction, aggravated robbery is a first-degree felony. For a first-degree felony, the sentencing

court can impose a prison term of three, four, five, six, seven, eight, nine, or ten years. R.C. 2929.14(A)(1). The trial court here sentenced Thomas to a non-minimum (but not maximum) term of five years in prison for the aggravated robbery conviction.

{¶17} Prior to the Ohio Supreme Court's decision in *Foster*, the trial court was required to make certain findings in order to sentence an offender to a non-minimum term. R.C. 2929.14(B). However, in *Foster* the Court found those provisions unconstitutional because they statutorily required "judicial fact-finding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant." *Id.* at paragraph one of the syllabus. As a remedy, *Foster* severed those provisions in their entirety from the statute. *Id.* at paragraph two of the syllabus. Now, a sentencing court has "full discretion" to sentence an offender within the statutory range and is no longer required to make findings or give its reasons for imposing non-minimum, maximum, or consecutive sentences. *Id.* at paragraph seven of the syllabus. A sentencing court need only consider "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 recidivism of the offender." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38.

{¶18} Recently in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *Foster* as it relates to appellate review of felony sentencing. In *Kalish*, the court held that in applying *Foster* to the review of felony sentences, the appellate courts must use a two-prong approach. "First, they 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 shall be reviewed under an abuse of discretion standard." *Kalish* at ¶4, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶19} Thomas' sentence for aggravated robbery was within the statutory sentencing range. Furthermore, the record reflects that the trial court considered the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors as required by R.C. 2929.12. (Resentencing Hearing Tr. 6). Thomas was also advised of the possibility of postrelease control.

{¶20} Regarding sentencing statutes, Thomas' counsel raises the issue that during resentencing, the trial court never indicates the sentence for the firearm specification was to be served prior to the indefinite sentence for murder and the five-year definite sentence for aggravated robbery. Under R.C. 2929.14(E)(1)(a), the term of imprisonment for a firearm specification must be served "consecutively to and prior to any prison term imposed for the underlying felony."

{¶21} However, R.C. 2929.14(E) does not contain a notification requirement necessitating the sentence to specifically state that the term of imprisonment for a firearm is to be served prior to the term for the underlying felony. Moreover, many courts hold that sentencing statutes, such as R.C. 2929.41 are self executing. See *State ex rel. Hamman v. Ohio Department of Rehabilitation and Correction*, 96 Ohio St.3d 72, 2002-Ohio-3528, 771 N.E.2d (holding that the statutory cap in former R.C. 2929.41(E)(2) is self-executing, so no trial court entry was necessary); see, also, *Yonkings v. Wilkinson* (1999), 86 Ohio St.3d 225, 714 N.E.2d 294. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶22} Having determined that the sentence is not contrary to law we must now review the sentence pursuant to the abuse of discretion standard. *Kalish* at ¶4. In reviewing the resentencing, it is clear the trial court gave careful and substantial deliberation to the relevant statutory considerations. The court considered the record, the oral statements concerning Thomas' disciplinary record in prison and his age (Resentencing Hearing Tr. 4), as well as the original presentence investigation (Resentencing Hearing Tr. 6). The record does not support that the judge acted unreasonably by selecting the sentence arbitrarily, by failing to consider R.C. 2929.11 and R.C. 2929.12 factors, or by giving an unreasonable amount of weight to any one

factor. It appears that the trial court's statements at the resentencing hearing were guided by the overriding purpose of felony sentencing – to protect the public from future crime by the offender and others and to punish the offenders.

{¶23} In sum, Thomas' sentence fell within the statutory range and was not clearly and convincingly contrary to law, nor an abuse of discretion.

{¶24} The judgment of the trial court is hereby affirmed and counsel's motion to withdraw granted.

Waite, J., concurs.

DeGenaro, J., concurs.