

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-08-059

Appellee

Trial Court No. 08-CR-025

v.

Jeremiah Johnson

DECISION AND JUDGMENT

Appellant

Decided: December 11, 2009

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Jeremiah Johnson, appeals the December 9, 2008 judgment of the Ottawa County Court of Common Pleas which, following a guilty plea to attempted felonious assault, sentenced appellant to five years of imprisonment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On March 7, 2008, by information, appellant was charged with one count of attempted felonious assault, in violation of R.C. 2903.11(A)(1) and 2923.02(A), a third degree felony. The charge stemmed from an incident on February 28, 2007, when appellant and his brother assaulted and pistol whipped his girlfriend's stepfather. On the same day, appellant entered a guilty plea.

{¶ 3} On December 9, 2008, appellant was sentenced to five years of imprisonment. This appeal followed. Appellant now raises the following assignment of error for our review:

{¶ 4} "Appellant's Assignment of Error No. I: The trial court's decision to impose a maximum sentence was an abuse of discretion."

{¶ 5} In appellant's sole assignment of error he argues that the trial court abused its discretion, at sentencing, by its reliance on facts that were not supported by the record when it ordered that appellant serve a maximum sentence. Specifically, appellant asserts that the court incorrectly stated that appellant refused to acknowledge a drug and alcohol problem; that appellant had a significant criminal record; and that a witness identified appellant as the one who "discharged the weapon."

{¶ 6} Under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[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.

{¶ 7} After *Foster*, sentencing courts are to continue to consider "the statutory considerations" and "factors" in the "general guidance statutes" R.C. 2929.11 and 2929.12 in imposing sentences, as these statutes do not include a "mandate for judicial fact finding." *Foster* at ¶ 36-42. "Two statutory sections apply as a general judicial guide for every sentencing. The first, R.C. 2929.11 states that the court 'shall be guided by' the overriding purposes of felony sentencing * * *." *Id.* at ¶ 36. R.C. 2929.11 lists matters to be considered "in achieving those purposes." *Id.*

{¶ 8} "The second general statute, R.C. 2929.12, grants the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.' R.C. 2929.12(A) directs that in exercising that discretion, the court shall consider, along with any other 'relevant' factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider." *Foster* at ¶ 37.

{¶ 9} At the November 14, 2008 sentencing hearing, the trial court noted that it had "thoroughly" reviewed the presentence report, the principles and purposes set forth in R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12. Appellant acknowledged that he has a drug and alcohol problem and that he has failed to follow through with prior counseling attempts. Appellant's counsel indicated that appellant genuinely wished to make changes in his life because he is the father of two children.

{¶ 10} The court then stated that a person who intends to act responsibly does not "pistol whip the father of one of the girls that is holding the baby in court here today." The court stated that the victim identified appellant and his brother as the individuals who assaulted him and that a witness identified appellant as the one who discharged the weapon. The court then noted that appellant has a significant criminal history and a drug and alcohol problem which appellant has failed to address.

{¶ 11} In the court's December 9, 2008 judgment entry, the court stated:

{¶ 12} "The more serious factors outweigh the less serious factors. The more serious factor is: the victim suffered serious physical, psychological or economic harm.

{¶ 13} "There are no less serious factors.

{¶ 14} "The more likely recidivism factors outweigh the less likely recidivism factors. The recidivism factors indicating recidivism is more likely are: the Defendant's history of criminal convictions or delinquency adjudications; and the Defendant has an alcohol/drug abuse pattern related to the offense and offender does not acknowledge pattern or refuses treatment."

{¶ 15} Based on the foregoing, we cannot say that the trial court abused its discretion in sentencing appellant. We agree that the court did note that a witness identified appellant as the one who discharged the weapon; however, a gunshot residue test failed to corroborate the witness's statement. This statement was not reflected in the sentencing judgment entry. The additional findings made by the court were adequately supported by the record. Appellant's assignment of error is not well-taken.

{¶ 16} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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