

[Cite as *State v. Cole*, 2010-Ohio-3408.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93271

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MILES COLE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513162

BEFORE: Blackmon, J., McMonagle, P.J., and Sweeney, J.

RELEASED: July 22, 2010

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Miles Cole appeals the juvenile court’s decision to transfer him to the common pleas court and the sentence imposed. He assigns the following errors:

“I. The juvenile division of [the] common pleas court improperly relinquished jurisdiction over the charges against the juvenile appellant where probable cause was not established and therefore the general division of [the]

common pleas court lacked jurisdiction over the juvenile appellant.”

“II. The juvenile division of the common pleas court improperly relinquished jurisdiction over the charges against the fourteen year old juvenile because the record and the factors set forth in R.C. 2125.12 established he was amenable to rehabilitation within the juvenile system.”

“III. The fifteen-year sentence imposed on the juvenile defendant was contrary to law and was not supported by clear and convincing evidence.”

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court’s decision. The apposite facts follow.

{¶ 3} On December 31, 2007, Cole and five others assaulted and robbed a man who was jogging in Shaker Heights. Cole was a juvenile at the time of the offense and was originally charged in juvenile court with a 16-count indictment including attempted murder, felonious assault, and aggravated robbery, all with firearm specifications. The juvenile court conducted a preliminary hearing to determine probable cause and an amenability hearing; subsequently the court transferred the case to the general division of the common pleas court.

{¶ 4} A grand jury indicted Cole for one count of attempted murder, six counts of aggravated robbery, six counts of felonious assault, and one count of kidnapping. All the counts had one- and three-year firearm specifications.

{¶ 5} Cole pleaded guilty to one count each of aggravated robbery and felonious assault along with the attendant firearm specifications. In exchange, the state nolleed the remaining counts. The trial court sentenced Cole to a total of 15 years in prison.

Probable Cause for Bindover

{¶ 6} In his first assigned error, Cole contends the juvenile court erred in concluding probable cause existed that he committed the crimes charged; therefore, the juvenile court was prevented from transferring him to the court of common pleas.¹

{¶ 7} A juvenile court enjoys wide latitude to retain or relinquish jurisdiction. *State v. Watson* (1989), 47 Ohio St.3d 93, 95, 547 N.E.2d 1181. A decision regarding a bindover should not be reversed absent an abuse of discretion. *State v. Golphin*, 81 Ohio St.3d 543, 546, 1998-Ohio-336, 692 N.E.2d 608. “Abuse of discretion” connotes more than an error of law or of

¹We note that Cole has failed to include the juvenile court’s judgment entry in the appellate record. However, because the juvenile court transcripts provide an adequate basis from which we can conduct a review of the court’s decision, we will address his assigned errors pertaining to the bindover decision.

judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 8} Under R.C. 2152.12(B), the juvenile court has discretion to transfer its jurisdiction over a juvenile to the adult court for further proceedings if the juvenile court finds all of the following: 1) the juvenile was at least 14 years old at the time of the act charged; 2) probable cause exists that the juvenile committed the act charged; and, 3) the juvenile is not amenable to care or rehabilitation within the juvenile system and the safety of the community may require that the juvenile be subject to adult sanctions. In this assigned error, Cole focuses on the second finding.

{¶ 9} This court has previously observed that a “juvenile court at a bindover hearing need not find as fact that the accused minor is guilty of the offense charged. It simply finds the existence of probable cause to so believe.” *State v. Bishop*, Cuyahoga App. No. 89184, 2007-Ohio-6197, citing *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292,752 N.E.2d 937. Accordingly, in determining the existence of probable cause, the juvenile court must evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause. *Id.*

{¶ 10} At the probable cause hearing, the victim testified that around 6:00 p.m. on December 31, 2007, he was jogging in the area of Ludlow in Shaker Heights, Ohio. He noticed a group of black males harassing people in the area of the Van Aken RTA station. He continued jogging in the other direction; however, the group followed him. One of the males hit him on his leg and told him “hey, we’re going to f***k you up.” He then saw the group pull out various weapons, including a wooden pole, nunchucks, and a metal pipe. Two of the males jumped on top of him. He was hit by a pole and the nunchucks on the top of the head and neck. One of the males pulled out a knife causing the victim to try to run. However, as he did he was hit on the leg by the metal pipe, which shattered his leg, causing him to fall. At that point, the beating intensified.

{¶ 11} He stated that every one of the boys was kicking, hitting, or punching him as he was on the ground. He could not get up. The male with the knife asked him for his wallet; he told him he did not have one because he was out jogging. In response, one of the boys stated “clip him, clip him.” He observed one of the males reach into his pants pocket to retrieve a gun; however, it appeared the gun was stuck on some threads in the pants and the juvenile was unable to withdraw it. The victim could not see who had the gun because at the time the victim’s head was being kicked.

The beating continued until a neighbor shouted from a window, causing the boys to run.

{¶ 12} As a result of the attack, the victim suffered contusions all over his body, a shattered orbital bone, three broken teeth, and a shattered leg. To save the leg, the doctors put in seven screws and a cadaver bone. At the time of the hearing, he still walked with a cane. When asked at court if he could identify his attackers, he said he definitely remembered Cole because he was the tallest of the group. He could not remember if Cole had a weapon.

{¶ 13} Detective Eric Conwell testified that all the participants admitted to being involved in the robbery and beating, but minimized their participation. Cole had told him that he had kicked the victim and admitted telling the screaming victim, “shut that shit up.”

{¶ 14} Based on the evidence presented, we conclude sufficient evidence was presented in support of the trial court’s probable cause determination. Although Cole contends there was no evidence that he had a weapon, the evidence was uncontroverted that Cole participated in the beating, along with others, and various weapons were used. Although none of the weapons were recovered, this was not surprising considering the arrest of the assailants, except for one, was made several days after the beating. Therefore, we

conclude that the evidence presented supported a probable cause determination.

{¶ 15} Cole also contends the court erred in allowing DNA evidence over his counsel's objection, because the person who prepared the DNA evidence report did not testify as to the report's authenticity. We conclude Cole was not prejudiced by the admission of this evidence as the report indicated that the victim's DNA was found on the clothing of co-defendant Demetrius Lang. The report did not implicate Cole. Accordingly, Cole's first assigned error is overruled.

Amenability

{¶ 16} In his second assigned error, Cole argues the trial court erred in concluding he was not amenable to rehabilitation.

{¶ 17} In addition to finding probable cause that the child committed the acts, the court must find that "[t]he child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions." R.C. 2151.12(B).

{¶ 18} The statute directs the court to consider the factors enumerated in R.C. 2152.12(D) and (E) and to weigh the factors favoring transfer against those opposed. Those factors favoring transfer are:

“(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

“(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

“(3) The child’s relationship with the victim facilitated the act charged.

“(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

“(5) The child had a firearm on or about the child’s person or under the child’s control at the time of the act charged, the act charged is not [carrying a concealed weapon], and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

“(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

“(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

“(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

“(9) There is not sufficient time to rehabilitate the child within the juvenile system.” R.C. 2152.12(D).

{¶ 19} The factors favoring amenability are stated in R.C. 2152.12(E) as follows:

“(1) The victim induced or facilitated the act charged.

“(2) The child acted under provocation in allegedly committing the act charged.

“(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

“(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

“(5) The child previously has not been adjudicated a delinquent child.

“(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

“(7) The child has a mental illness or is a mentally retarded person.

“(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.”

{¶ 20} R.C. 2152.12(B)(3) requires that the record “indicate the specific factors that were applicable and that the court weighed.” The court stated on the record that it considered the following factors against transfer: (1) he had a minimal criminal record that was nonviolent; (2) he had never been

committed to a secured facility or received services through probation; and (3) his age at the time of the hearing was 15 years and 2 months.

{¶ 21} The court found these factors against transfer were outweighed by the following factors in favor of transfer: (1) the victim suffered severe physical and psychological harm; (2) the victim's family suffered economic harm because the victim, who was self-employed, was unable to work for several months; (3) the crime was committed as part of a gang; (4) a firearm was involved in the attack, although it was questionable whether Cole had the firearm; (5) the psychologist concluded Cole was emotionally and physically mature enough for transfer; (6) there was insufficient time in which to rehabilitate him within the juvenile system; (7) Cole had prior adjudications for burglary, uttering, and theft; (8) he had a pending unruly arrest warrant; (9) Cole had a history of drug and alcohol abuse; and (10) Cole had anger management issues.

{¶ 22} Reviewing the record, we conclude the trial court did not abuse its discretion in concluding the factors in favor of transfer outweighed the factors against transfer. Accordingly, Cole's second assigned error is overruled.

Sentence

{¶ 23} In his third assigned error, Cole argues the trial court erred by sentencing him to 15 years in prison. He contends the trial court failed to

consider the proportionality of the sentence; failed to set forth the factors it considered as required by R.C. 2929.14 when imposing consecutive sentences; and that the sentence was contrary to R.C. 2929.11.

{¶ 24} We review sentences pursuant to a two-prong standard set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the court held that:

“In applying *Foster* [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470] to the existing statutes, appellate courts must apply a two-step 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 shall be reviewed under an abuse-of-discretion standard.” *Id.* at ¶4.

{¶ 25} Cole contends his sentence was contrary to law because the trial court failed to set forth its reasons for imposing consecutive sentences. He admits that *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but relies on *Oregon v.*

Ice (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrect and should be overturned.

{¶ 26} This court has repeatedly chosen to apply the holding in *Foster* rather than *Ice* and reserve any reconsideration for the Ohio Supreme Court. Specifically, in *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558, this court stated: “We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart from the pronouncements in *Foster* until the Ohio Supreme Court orders otherwise.” *Id.* at ¶33, citing *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564; *State v. Moore*, Cuyahoga App. No. 92654, 2010-Ohio-770. Until the Ohio Supreme Court addresses the issue, we will continue to follow the precedent established in this district.

{¶ 27} Cole argues that his sentence was also unlawful because the the trial court failed to consider the purposes of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. Although *Foster* no longer requires the trial court to make findings or give reasons for imposing its sentence, R.C. 2929.11 and 2929.12 remain operative. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1; *Kalish*, at ¶13. The court, however, is not required to make findings

pursuant to R.C. 2929.11 and 2929.12; it need only consider these provisions. *State v. Nolan*, Cuyahoga App. No. 90646, 2008-Ohio-5595; *State v. Page*, Cuyahoga App. No. 90485, 2008-Ohio-4244; *State v. McSwain*, Cuyahoga App. No. 90358, 2008-Ohio-3661; *State v. Garrett*, Cuyahoga App. No. 90428, 2008-Ohio-3549.

{¶ 28} In the instant case, the record demonstrates that the trial court considered R.C. 2929.11 and 2929.12. Cole's mother was given the opportunity to address the court and asked for leniency for her son based on the fact he had a difficult childhood, was only 14 years old when he committed the offenses, and was under the influence of the other gang members. Cole's defense counsel reiterated to the court that Cole was 14 years old at the time of the beating. He also stated that Cole had taken responsibility for his actions and had cooperated with the police. Cole also addressed the court and apologized to the victim, the victim's family, and his mother.

{¶ 29} The court stated on the record that it "considered the seriousness and recidivism factors and the purposes and principles of Senate Bill 2, which were to protect the public and punish the offender." The court noted that Cole was accepting responsibility for his actions and had expressed remorse. However, the court also stressed a severe sentence was necessary due to the

serious injuries sustained by the victim; he was beaten so viciously that his neighbor did not recognize him. The court also noted the effect the beating had on the community.

{¶ 30} Additionally, the sentencing journal entry reads in part: “The court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11.” Therefore, the trial court complied with R.C. 2929.11 and 2929.12. Cf. *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873 at ¶103; *State v. Snyder*, Cuyahoga App. No. 90869, 2008-Ohio-5586; *Nolan*, at ¶12 (Court complied with R.C. 2929.11 and 2929.12 because journal entry stated court considered all required sentencing factors and testimony was considered at sentencing hearing). Thus, based on this record, the court clearly considered the seriousness and recidivism factors prior to sentencing Cole.

{¶ 31} Cole also contends the court failed to adhere to the requirement in R.C. 2929.11 that the sentence imposed must be proportional to other sentences for similar offenses. This court has concluded that in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v.*

Edwards, Cuyahoga App. No. 89181, 2008-Ohio-2068; *State v. Nettles*, Cuyahoga App. No. 85637, 2005-Ohio-4990; *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700; *State v. Mercado*, Cuyahoga App. No. 84559, 2005-Ohio-3429; *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510; *State v. Austin*, Cuyahoga App. No. 84142, 2004-Ohio-5736. Cole did not raise in the trial court that his sentence was disproportionate to sentences given to other offenders with similar records, who have committed the same offense. Nor did he present evidence as to what a “proportionate sentence” might be. Therefore, he has not preserved the issue for appeal. Accordingly, Cole’s third assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
JAMES J. SWEENEY, J., CONCUR