[Cite as *State v. Worthy*, 2010-Ohio-6168.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94565

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANIELLE WORTHY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524218

BEFORE: Vukovich, J.,* Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: December 16, 2010

ATTORNEY FOR APPELLANT

Jeffrey S. Richardson, Esq.
Richardson & Kucharski Co., L.P.A.
1200 West Third Street, Suite 190
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Mahmoud Awadallah, Esq.
Thorin Freeman, Esq.
Assistant County Prosecutors
1200 Ontario Street
Cleveland, Ohio 44113

JOSEPH J. VUKOVICH, J.:*

{¶ 1} Defendant Danielle Worthy appeals from the sentence imposed following her guilty plea to two charges of endangering children. For the reasons set forth below, we affirm.

{¶ 2} On May 19, 2009, defendant and Jalal Reed were indicted for three counts of felonious assault, two counts of endangering children, and one count of domestic violence in connection with injuries sustained by J.R. Defendant subsequently pled guilty to the charges of endangering children, a felony of the third degree. On September 30, 2009, the trial court held a sentencing hearing in this matter. The trial court then issued a journal entry that provides in

pertinent part as follows:

{¶ 3} "The court considered all required factors of the law.

{¶ 4} "The court finds that prison is consistent with the purpose of R.C. 2929.11.

{¶ 5} "The court imposes a prison sentence * * * of 10 year(s). Sentenced to a term of 5 years on each count 4 and 5 to be served consecutively to each other. Post release control is part of this sentence for 3 years for the above felony(s) under R.C. 2967.28."

{¶ 6} Defendant now appeals and assigns two errors for our review.

{¶ 7} Defendant's first assignment of error states:

{¶ 8} "The trial court erred in sentencing Danielle Worthy to two consecutive sentences without making the necessary factual findings as required in R.C. 2929.14."

{¶ 9} In this assignment of error, defendant maintains that in accordance with the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, effectively overruled the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and trial courts must therefore make specific factual findings before imposing maximum, consecutive sentences, pursuant to R.C. 2929.14(E).

{¶ 10} Enacted in 1996, R.C. 2929.14(E) directed trial courts to make specified findings of fact before imposing consecutive sentences, and R.C. 2929.14(C) directed that courts make specific findings of fact before imposing

the longest prison term authorized for the offense. Thereafter, in 2006, following the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, the Ohio Supreme Court held that R.C. 2929.14(E)(4) and 2929.14(C) are unconstitutional because they require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant. *State v. Foster*, supra, at paragraph three of the syllabus. The *Foster* Court then severed these, and related provisions from the Revised Code, and further held that trial 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 paragraphs two, four, and seven of the syllabus.

{¶ 11} In *Ice,* the United States Supreme Court upheld an Oregon statute that required judicial factfinding prior to imposing consecutive sentences. This court has determined, however, that notwithstanding the decision in *Ice,* we will continue to apply the pronouncements of *Foster,* until the Ohio Supreme Court[1] orders otherwise. *State v. Robinson,* Cuyahoga App. No. 92050, 2009-Ohio-3379. See, also, *State v. Waite,* Cuyahoga App. No. 92895, 2010-Ohio-1748; *State v. Buitrago,* Cuyahoga App. No. 93380, 2010-Ohio-1984;

[1]We anticipate that in *State v. Hodge,* Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court, the court will decide whether the *Foster* decision remains good law in light of *Oregon v. Ice*.

State v. Alhajjeh, Cuyahoga App. No. 93077, 2010-Ohio-3179; *State v. Moon,* Cuyahoga App. No. 93673, 2010-Ohio-4483; *State v. Hawks*, Cuyahoga App. No. 93582, 2010-Ohio-4345. Accord, *State v. Miller,* Lucas App. No. L-08-1314, 2009-Ohio-3908; *State v. Krug,* Lake App. No. 2008-L-085, 2009-Ohio-3815; *State v. Franklin,*182 Ohio App.3d 410, 2009-Ohio-2664, 912 N.E.2d 1197.

{¶ 12} As explained in *State v. Arnold,* Muskingum App. No. CT2009-0021, 2010-Ohio-3125, there is a procedure that must be followed in order for the General Assembly to re-adopt a statute that had previously been declared unconstitutional, and to date, no legislation from the General Assembly has "operate[d] to reenact those portions of the statute the Ohio Supreme Court severed in its *Foster* decision. Until the Ohio Supreme Court considers the effect of *Ice* on its *Foster* decision, we are bound to follow the law as set forth in *Foster*." Accord *State v. Lenoir,* Delaware App. No. 10CAA010011, 2010-Ohio-4910.

{¶ 13} In accordance with the foregoing, we reject this assignment of error.

{¶ 14} Defendant's second assignment of error states:

{¶ 15} "The trial court committed an abuse of discretion when it imposed maximum consecutive sentences without adequate justification."

{¶ 16} Post *Foster,* trial courts have full discretion to impose any sentence within the statutory range and are no longer required to make findings or give their reasons for imposing more than the minimum sentences. Id.

{¶ 17} In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d

124, the Ohio Supreme Court set forth a two-step procedure for reviewing felony sentences. The *Kalish* Court stated:

{¶ 18} "In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, [appellate courts] 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 is reviewed under the abuse of discretion standard." Id.

{¶ 19} As to the first prong, a sentence is not clearly and convincingly contrary to law where the trial court "consider[s] the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, * * * properly applie[s] postrelease control, and * * * sentence[s] * * * within the permissible range." Id. at ¶18. In addition, so long as the trial court gives "careful and substantial deliberation to the relevant statutory considerations" the court's sentencing decision is not an abuse of discretion. Id. at ¶20.

{¶ 20} R.C. 2929.11(B) provides:

{¶ 21} "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."

{¶ 22} Under R.C. 2929.12, a court must consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors.

{¶ 23} Further, as explained in *State v. Dudley,* Lake App. No. 2009-L-019,

{¶ 24} "By expressly stating that it considered the factors in R.C. 2929.11 and R.C. 2929.12, the court satisfies its duty under those statutes. *State v. Clay,* 7th Dist. No. 08 MA 2, 2009-Ohio-1204, at ¶174. By implication, post-*Foster,* an express articulation of the statutory considerations is unnecessary to the imposition of a felony sentence. *State v. Wilder,* 6th Dist. No. L-06-1321, 2007-Ohio-4186, at ¶39."

{¶ 25} Thus, a sentencing court is not required to use specific language regarding its consideration of the seriousness and recidivism factors. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215, 724 N.E.2d 793; *State v. McAdams,* 162 Ohio App.3d 318, 2005-Ohio-3895, 833 N.E.2d 373; *State v. Patterson,* Cuyahoga App. No. 84803, 2005-Ohio-2003. Further, there is no requirement in R.C. 2929.12 that the trial court state on the record that it has considered the statutory criteria or even discussed them. *State v. Polick* (1995), 101 Ohio App.3d 428, 431, 655 N.E.2d 820.

{¶ 26} As to the second prong of the *Kalish* analysis, we note that an abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 27} In this matter, defendant pled guilty to two counts of endangering children, a violation of R.C. 2919.22(A). The indictment also charged her with causing serious physical harm, which makes child endangering a third degree felony. R.C. 2919.22(E)(2)(c). R.C. 2929.14(A)(3) provides that the prison term for third degree felonies "shall be one, two, three, four or five years." Defendant was sentenced to terms within this range.

{¶ 28} Defendant asserts, however, that the trial court erred by sentencing her without properly considering the factors set forth in R.C. 2929.12. Specifically, defendant contends that the court failed to take into account that defendant had no prior criminal history, has a low risk of recidivism. Further, she asserts that the court failed to consider that she did not inflict the child's injuries, and that she expressed remorse for what had happened.

{¶ 29} We find no error of law, however. The record sufficiently indicates that the court took into account the factors of R.C. 2929.12. The court noted that the child suffered many injuries over different times, that the injuries were very serious, and that defendant did not show sufficient care for her infant. Moreover, we find no abuse of discretion in this matter.

{¶ 30} The second assignment of error is without merit.

Affirmed.

It is ordered that appellee recover from appellant 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 common pleas 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.

JOSEPH J. VUKOVICH, JUDGE*

LARRY A. JONES, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS. (SEE ATTACHED CONCURRING OPINION)

*(Sitting by Assignment: Judge Joseph J. Vukovich of the Seventh District Court of Appeals)

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 31} I concur fully with the majority opinion. I write separately to address concerns raised by appellant's counsel at the oral argument.

{¶ 32} Essentially, appellant asks for application of *Oregon v. Ice*, 129 S.Ct. 711, and a return to pre-*Foster* Senate Bill II standards for sentencing. He believes he is entitled to an explanation for why his client received maximum consecutive sentences.

{¶ 33} The facts of this case are particularly egregious and involved serious

injuries sustained by the appellant's four-month-old son at the hands of the child's natural father who resided with the appellant, their victim son, and her other children. He was convicted and sentenced separately for his role in the crime.

{¶ 34} Appellant's conduct amounted to covering up and lying about the origin of her son's injuries. She pled to two counts of child endangering with possible penalties of one to five years on each count. The trial court sentenced the appellant to a maximum consecutive sentence totaling ten years.

{¶ 35} This case points out that as long as judges have discretion in sentencing, there will never be a complete sense of uniformity or consistency. This is particularly true where the range of a possible sentence is great or the prospect of consecutive sentences, as here, is present. The only way to obtain uniformity and consistency in sentencing is to limit judicial discretion. The presence of a statute requiring "factors or reasons" to be placed on the record to justify the sentence rarely changes anything.

{¶ 36} During the Senate Bill II years, many argued that trial courts, when imposing maximum consecutive sentences, merely paid "lip service" to the supposed analysis required to impose such terms of incarceration. Thus, even with a requirement of "factors or reasons," the results were often the same. Often judges came up with sentences they felt were appropriate and then used the rationale of the statute to justify their imposition.

{¶ 37} The only conceivable way to fairly address this issue is for the legislature to draft and impose new sentencing procedures that put in place a

sentencing grid to establish uniformity and consistency. Such a grid would not have to be as rigid, or as some would say, draconian, as the federal system grid, but it could build in limited discretion and limit the use or application of consecutive sentencing to pre-described types of crime.