[Cite as *State v. Carter*, 2007-Ohio-4953.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2006-P-0056**
- vs -	:	
JAMES W. CARTER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2005 CR 0532.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Sheila M. Sexton, McNamara, Hanrahan, Callender & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} James W. Carter appeals from the judgment of the Portage County Court of Common Pleas, sentencing him to two years imprisonment for possession of cocaine. We affirm.

{¶2} October 6, 2005, the Portage County Grand Jury indicted Mr. Carter for possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(d), a second degree felony. October 11, 2005, Mr. Carter pled "Not Guilty." December 5, 2005, a plea

hearing was held. The state amended count one of the indictment to possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(c), a third degree felony; and Mr. Carter entered a written plea of "Guilty" to the amended indictment.

{¶3} February 27, 2006, sentencing hearing was held. Mr. Carter requested a minimum sentence of one year, noting in support his contrition, his large and supportive family, and his prior criminal record, which included only two traffic offenses, and minor misdemeanor possession of marijuana. The trial court remarked on the fact Mr. Carter had been arrested and charged with driving without a license and possession of marijuana in January 2006, which Mr. Carter admitted. Neither Mr. Carter nor his attorney noted that these charges had been dismissed February 10, 2006 – which fact the trial court would not have known, as the presentence report before it indicated the matter was "open." By a judgment entry filed March 2, 2006, the trial court found that Mr. Carter was not amenable to community control, and that imprisonment was appropriate. The trial court imposed a prison term of two years, along with a $5,000 fine, and six month driver's license suspension.

{¶4} May 19, 2006, Mr. Carter moved to withdraw his "Guilty" plea, pursuant to Crim.R. 32.1. The trial court denied this motion May 31, 2006. June 7, 2006, Mr. Carter moved this court for leave to file a delayed appeal, pursuant to App.R. 5. By a judgment entry filed June 28, 2006, we granted leave. Mr. Carter assigns two errors:

{¶5} "[1.] The trial court erred to the prejudice of the appellant when it sentenced him to more than the minimum prison term which sentence is contrary to law[.]

{¶6} "[2.] The trial court violated appellant's due process rights when the sentence imposed was significantly greater than similarly situated criminal defendants[.]"

{¶7} Under his first assignment of error, Mr. Carter argues that his more-than-minimum, two-year sentence for a third degree felony is unreasonable. In support, he cites to R.C. 2929.13(D), which grants trial courts discretion to impose community control sanctions upon certain felony offenders – including those who plead or are found guilty under Revised Code Chapter 2925 – upon the making of various findings. Mr. Carter asserts the record lacks the seriousness and recidivism factors outlined in R.C. 2929.12 which would justify the trial court giving him a more-than-minimum sentence, as a first-time felon.

{¶8} Under his second assignment of error, Mr. Carter challenges his more-than-minimum sentence pursuant to R.C. 2929.11(B), which requires consistency in sentencing between similarly situated offenders committing similar crimes. Citing to various decisions by this and other Ohio appellate courts, he posits a presumption that first-time, low degree drug felons should receive minimum terms of imprisonment, or community control sanctions.

{¶9} Prior to the landmark decision of the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, Ohio's appellate courts, applying R.C. 2953.08(G)(2), generally reviewed sentencing questions de novo. See, e.g., *State v. Blake*, 11th Dist. No. 2003-L-196, 2005-Ohio-686, at ¶11. Sentences were modified, or vacated and remanded, if the appellate court found, "clearly and convincingly," that the trial court's findings under certain statutory sections were unsupported by the record,

R.C. 2953.08(G)(2)(a); or that, "the sentence [was] otherwise contrary to law." R.C. 2953.08(G)(2)(b).

{¶10} *Foster* has changed the sentencing landscape. One of the sections set forth at R.C. 2953.08(G)(2)(a) – 2929.14(E)(4) – was excised by the Supreme Court as unconstitutional. *Foster*, at paragraphs three and four of the syllabus. R.C. 2929.14(D)(2)(e), also included in R.C. 2953.08(G)(2)(a), was rendered meaningless as the result of other excisions. See, e.g., *Foster*, at paragraphs five and six of the syllabus. The Supreme Court specifically held that R.C. 2953.08(G), "insofar as it refers to the severed sections, no longer applies." *Foster* at ¶99. The imposition of more-than-minimum, maximum, or consecutive sentences is now only to be reviewed for abuse of discretion. Cf. *Foster*, at paragraph seven of the syllabus. See, also, *State v. Fout*, 10th Dist. No. 06AP-664, 2007-Ohio-619, at ¶10; *State v. Schweitzer*, 3d Dist. No. 2-06-25, 2006-Ohio-6087, at ¶18-19; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006-Ohio-6058, at ¶34; *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶29; *State v. Dossie*, 9th Dist. No. 23117, 2006-Ohio-5053, at ¶23-25; *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶5-8, 12.

{¶11} However, we cannot agree with those courts holding that the appellate sentencing statute, R.C. 2953.08(G)(2), is entirely dead. See, e.g., *Firouzmandi* at ¶37; *Windham* at ¶11; cf. *Dossie* at ¶25. *Foster* merely removed its application to the severed sections of the statutory sentencing structure. *Foster* at ¶99. Consequently, we cannot agree that abuse of discretion is the *sole* standard to be applied when reviewing sentencing questions. See, e.g., *State v. Slone*, 2d Dist. Nos. 2005 CA 79 and 2006 CA 75, 2007-Ohio-130, at ¶7; *Schweitzer* at ¶19; *Dossie* at ¶25; *Windham* at

¶12. Indeed, shortly after the announcement of *Foster*, the Supreme Court specifically stated that, "*** the sentencing review statute, R.C. 2953.08(G), remains effective, although no longer relevant with respect to the statutory sections severed by *Foster*." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶4, fn. 1.

{¶12} Rather, our review seems now, like Gaul, to be divided into three parts. Questions of law we review, as always, de novo. The de novo and clear and convincing standards continue to apply to those parts of the statutory sentencing structure unaffected by the *Foster* excisions; for instance, downward departures pursuant to R.C. 2929.13(D), and judicial release pursuant to R.C. 2929.20(H). *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph two of the syllabus. Finally, imposition of more-than-minimum, maximum, or consecutive sentences is reviewed for abuse of discretion. Cf. *Foster*, at paragraph seven of the syllabus. Regarding this last standard, we recall the term "abuse of discretion" is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. See, also, *Firouzmandi* at ¶54-56; accord, *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶46-49.

{¶13} Under his first assignment of error, Mr. Carter contends the trial court misapplied the seriousness and recidivism factors set forth under R.C. 2929.12. He contends there are no factors indicating his crime was "more serious than conduct normally constituting the offense[,]" R.C. 2929.12(B); or that he "is likely to commit future crimes[.]" R.C. 2929.12(D). He believes the factors indicating a low propensity to reoffend predominate. R.C. 2929.12(E).

{¶14} R.C. 2929.12 retains its vitality under *Foster*. See, e.g., *Mathis* at ¶38. Consequently, we continue to review challenges made under it by the de novo standard. See, e.g., *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767, at ¶19-24.[1] Our review of the record in this case does not, "clearly and convincingly[,]" show that the trial court's conclusions were unsupported, or otherwise in error. R.C. 2953.08(G)(2).

{¶15} We agree with Mr. Carter that none of the exacerbating factors relative to seriousness set forth at R.C. 2929.12(B) are present. We further agree that one of the R.C. 2929.12(C) factors mitigating seriousness *is* present: there is no indication that he caused or expected to cause harm to another, or to property.

{¶16} However, three of the five factors indicating a propensity to recidivism are present.

{¶17} R.C. 2929.12(D)(2) requires the court to consider an offender's previous criminal record. Mr. Carter had previously been convicted of or pled guilty to misdemeanor possession of marijuana.

{¶18} R.C. 2929.12(D)(4) requires consideration of whether "[t]he offender has demonstrated a pattern of drug *** abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug *** abuse." Again, Mr. Carter had previously been convicted of or pled guilty to possession of marijuana, and was charged with possession of that substance again, during the pendency of this case. At the sentencing hearing,

1. The issue is peculiar. R.C. 2929.12(A) confides discretion in the trial court "to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11[,]" through application of the seriousness and recidivism factors set forth at R.C. 2929.12. This would indicate intent by the General Assembly that appellate courts should review application of the R.C. 2929.12 factors for abuse of discretion. Nevertheless, this court has applied a de novo review under R.C. 2953.08(G)(2) to R.C. 2929.12 challenges. *State v. McAdams*, 162 Ohio App.3d 318, 2005-Ohio-3895, at ¶6-8. See, also, *Blake* at ¶11-12.

the trial court specifically commented on this last point. There is nothing in the record indicating he was undergoing treatment for this (evidently escalating) problem.

{¶19} It might be argued the dismissal of the marijuana possession charge filed against Mr. Carter between the times of his plea and his sentencing militates against its use by the trial court in determining recidivism. However, nothing in the record indicates the dismissal was brought to the trial court's attention. Certainly, neither Mr. Carter nor his counsel mentioned this at the sentencing hearing, and the presentence report indicates the case was "open." Mr. Carter has moved us to supplement the record of this appeal with the docket for the dismissed case. However, a court of appeals is generally forbidden from considering matters not in the record before the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730.

{¶20} R.C. 2953.08(G)(2) requires either that we find, "clearly and convincingly[,]" error by the trial court before modifying or reversing a sentence, or error of law. "Clear and convincing evidence is that measure or degree of proof *** which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. The trial court's possible consideration of a drug arrest not resulting in conviction for sentencing purposes under R.C. 2929.12 is hardly "clear and convincing" evidence of error. No contrary authority being presented to us, we can hardly find it error of law.

{¶21} Finally, R.C. 2929.12(E)(5) mandates the trial court consider whether the offender shows "genuine remorse." Mr. Carter apologized for his conduct at his sentencing. However, the trial court might very well discount this apology, in view of the

drug arrest occurring during this case. In any case, the trial court is better situated to judge an offender's demeanor than we. *McAdams* at ¶13.

{¶22} Similarly, at least three of the R.C. 2929.12(E) factors, indicating no propensity to re-offend, do not apply to Mr. Carter: R.C. 2929.12(E)(2) (no criminal record); R.C. 2929.12(E)(4) (the crime is unlikely to recur); R.C. 2929.12(E)(5) (remorse). Mr. Carter had a criminal record; he had, at the time of sentencing, an ongoing substance abuse problem; his own actions indicate any remorse to be illusory.

{¶23} A trial court has great latitude in applying the seriousness and recidivism factors, when sentencing. Cf. R.C. 2929.12(A). The trial court herein stated on the record that it had balanced these factors; and nothing in the record indicates that it erred.

{¶24} The first assignment of error lacks merit.

{¶25} Under his second assignment of error, Mr. Carter argues that his sentence violates R.C. 2929.11(B), which requires consistency between "sentences imposed for similar crimes committed by similar offenders." Mr. Carter cites to various opinions of this court, and other appellate courts, wherein minimalist terms of imprisonment, and/or community control sanctions, were affirmed for low degree drug offenders, and postulates an inadmissible inconsistency between his sentence of two years, and the shorter ones in those cases.

{¶26} R.C. 2929.11 remains effective following *Foster*. *Mathis* at ¶38. Consequently, we review challenges made pursuant to R.C. 2929.11 de novo, utilizing a clear and convincing standard. Cf. *Saxon* at ¶4, fn. 1. Our de novo review indicates the trial court's judgment was supported by the record, and is not tinged by error.

{¶27} We have previously indicated that case-by-case comparisons, while possibly helpful to the courts in determining consistency for R.C. 2929.11(B) purposes, are not controlling. *State v. Ashley*, 11th Dist. No. 2006-L-134, 2007-Ohio-690, at ¶29. However, as we stated in *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58: "*** a consistent sentence is not derived from a case-by-case comparison; rather, it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency [pursuant to R.C. 2929.11(B)]." The principle sections of the sentencing guidelines applicable to Mr. Carter's situation are the seriousness and recidivism considerations, set forth at R.C. 2929.12. Cf. *Mathis* at ¶38. We have already determined these were properly applied by the learned and experienced trial judge.

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

{¶29} The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J., concurs in judgment only with a Concurring Opinion, DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

CYNTHIA WESTCOTT RICE, P.J., concurs in judgment only with Concurring Opinion.

{¶30} Although I agree appellant's sentence should be affirmed, I disagree with the standard of review applied in the opinion. The opinion outlines a de novo standard

of review for challenges to felony sentences raised under R.C. 2929.12. I believe the appropriate standard of review is abuse of discretion and therefore write separately.

{¶31} R.C. 2929.12 expressly states that a court that imposes a sentence upon an offender for a felony "has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11."

{¶32} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court held: "[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 that the minimum sentences." Id. at ¶100. Thus, after *Foster,* when a defendant challenges the imposition of non-minimum sentences, the proper standard of review to be applied is that of abuse of discretion. Id. at ¶100 and 102.

{¶33} After the Supreme Court's decision in *Foster*, appellate courts have repeatedly held that an abuse of discretion standard now applies in reviewing felony sentences.

{¶34} The Second Appellate District held that, pursuant to *Foster,* the "appellate court standard of review on sentencing issues is now abuse of discretion." *State v. Slone*, 2d Dist. Nos. 2005 CA 79 and 2006 CA 75, 2007-Ohio-130, at ¶7.

{¶35} In *State v. Schweitzer*, 3d Dist. No. 2-06-25, 2006-Ohio-6087, the Third Appellate District held: "Foster altered the appellate court's standard of review for sentencing appeals from clear and convincing to abuse of discretion. *Foster,* supra, at ¶100 and 102. Accordingly, an appellate court reviews felony sentencing cases under the abuse of discretion standard of review. ***" Id. at ¶19.

{¶36} The Fifth Appellate District also recognized that *Foster* changed the standard of review of felony sentences. In *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, the court held: [W]e conclude that post-*Foster*; this Court reviews the imposition of consecutive sentences under an abuse of discretion standard. Furthermore, when applying the abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court." Id. at ¶40.

{¶37} The Sixth Appellate District has recently held that, pursuant to *Foster,* appellate courts apply an abuse of discretion standard in reviewing sentencing. *State v. Kerr*, 6th Dist. No. WD-05-080, 2006-Ohio-6058. The court held: "A sentence will not be disturbed absent a trial court's abuse of discretion." Id. at ¶36.

{¶38} "The Ninth Appellate District also ruled on the post-*Foster* standard of review in *State v. Dossie*, 9th Dist. No. 23117, 2006-Ohio-5053. The court held: "Foster altered this Court's standard of review which was previously a clear and convincing error standard. *** Accordingly, this Court reviews appellant's sentence utilizing an abuse of discretion standard. ***" Id. at ¶25. (Citations omitted.) See, also, *State v. Jones*, 9th Dist. No. 23316, 2007-Ohio-239.

{¶39} The Tenth Appellate District recently held that post-Foster, appellate courts review sentencing under an abuse of discretion standard. *State v. Fout*, 10th Dist. No. 06AP-664, 2007-Ohio-619. The court held: "In *Foster*, the Supreme Court of Ohio held that R.C. 2953.08(G) no longer applies insofar as it refers to review of findings made pursuant to the severed statutory sections, including, as relevant here, R.C. 2929.14(B), which required judicial fact-finding to overcome presumptive minimum terms in certain circumstances. See *Foster* at ¶97, 99. Now, '*** 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 ¶100. Thus, after *Foster,* when a defendant challenges the imposition of non-minimum sentences, the proper standard of review to be applied is that of abuse of discretion." Id. at ¶10.

{¶40} This Court has held that post-*Foster,* we apply an abuse of discretion standard when reviewing felony sentences that are within the statutory range. *State v. Lloyd,* 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶36. Our holding is consistent with the Second, Third, Fifth, Sixth, Ninth, and Tenth Appellate Districts. Therefore, I would hold that an abuse of discretion standard of review is appropriate in this case.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶41} I respectfully dissent.

{¶42} While justice is not always precise, it should not rest upon the uncertainty of conjecture. The majority characterizes the issue in this case as "[t]he trial court's possible consideration of a drug arrest not resulting in conviction for sentencing purposes." (Emphasis added) There is no issue of possibility in this case. Prior to sentencing, the trial court noted in court that appellant had been subsequently arrested and charged with Driving Without a License and Possession of Marijuana. The presentence report indicated that the matter was "open." The charges actually had been dismissed two weeks before the sentencing hearing. We do not know whether the

trial court would impose a different sentence had the court known that the marijuana possession charge had been dismissed. We do know, from the record, however, that the trial court specifically mentioned that marijuana charge before imposing a sentence on an offense where recidivism is a factor. This raises constitutional due process concerns. See *United States v. Tucker* (1972), 404 U.S. 443, 447 (sentence reversed where the "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue") (citation omitted); *Townsend v. Burke* (1948), 334 U.S. 736, 741 (where a "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue," the result "is inconsistent with due process of law").

{¶43} Our system is premised on the principle that individuals are innocent until proven guilty. R.C. 2901.05(A) ("[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt"); *In re Winship* (1970), 397 U.S. 358, 364 (it is "important in our free society that every individual *** have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilty with utmost certainty"). In this case, the subsequent marijuana possession charge had been dismissed at the time of sentencing.

{¶44} It would be clear and convincing error to impose a more substantial sentence on the basis of a dismissed criminal charge. However, in this matter, we do not know if that is the case, although it appears to be so.

{¶45} Instead of speculating one way or the other, justice dictates that we remand this case to the trial court and allow that court the opportunity to impose a sentence based on the correct facts and a more accurate presentencing report.

{¶46} For these reasons, I would reverse the sentencing ruling of the Portage County Common Pleas Court and remand the case to that court for resentencing.