

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-148
SERGIO M. DAVIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000212.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul R. LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Sergio Davis, appeals from the Judgment Entry of Sentence of the Lake County Court of Common Pleas, sentencing him to an aggregate term of twelve years in prison for Aggravated Robbery, Having Weapons While Under Disability, and Grand Theft of a Motor Vehicle. The issue to be decided in this case is whether a trial court’s discussion of all relevant sentencing factors constitutes careful

and substantial deliberation of the statutory considerations for sentencing. For the following reasons, we affirm the decision of the court below.

{¶2} On March 12, 2010, Davis was involved in a robbery incident. According to the victim, when giving Davis a ride home after playing pool together, Davis used a firearm to strike him, and then stole his motor vehicle.

{¶3} On May 17, 2010, Davis was indicted by the Lake County Grand Jury on the following: Aggravated Robbery (Count One), a felony of the first degree, in violation of R.C. 2911.01(A)(1); Aggravated Robbery (Count Two), a felony of the first degree, in violation of R.C. 2911.01(A)(3); Robbery (Count Three), a felony of the second degree, in violation of R.C. 2911.02(A)(2); Felonious Assault (Count Four), a felony of the second degree, in violation of R.C. 2903.11(A)(1); Felonious Assault (Count Five), a felony of the second degree, in violation of R.C. 2903.11(A)(2); Having Weapons While Under Disability (Count Six), a felony of the third degree, in violation of R.C. 2923.13(A)(2); and Grand Theft of a Motor Vehicle (Count Seven), a felony of the fourth degree, in violation of R.C. 2913.02(A)(1). Counts One through Five each had a repeat violent offender specification, pursuant to R.C. 2941.149, as well as a firearm specification, pursuant to R.C. 2941.145. Counts Six and Seven each had a firearm specification.

{¶4} On October 26, 2010, Davis pled guilty to Count Two, Aggravated Robbery, with the repeat violent offender specification, and Count Seven, Grand Theft of a Motor Vehicle. Davis pled guilty, by way of *North Carolina v. Alford* (1970), 400 U.S. 25, to the firearm specification on Count Two and Count Six, Having Weapons While Under Disability. The State filed a Nolle Prosequi on the remaining counts of the

Indictment. The matter was referred to the Probation Department for a presentence investigation report (PSI).

{¶5} A sentencing hearing was held on November 22, 2010. At the hearing, Davis, as well as Davis' mother, fiancée, and a friend, spoke on his behalf. Davis apologized for his actions, explained he was using drugs at the time of the offense, and stated that he had sought treatment for his drug problem. The court noted that Davis “takes no responsibility for his actions.” The court also found that there is a high risk of recidivism due to Davis' past convictions, which included Robbery, and Davis “has not responded favorably in the past to sanctions.” The trial court sentenced Davis to nine years in prison for Aggravated Robbery, three years for Having Weapons While Under Disability, and one year for Grand Theft of a Motor Vehicle, to be served concurrent with each other. The court also sentenced Davis to a three-year mandatory term for the firearm specification, to be served consecutive with the nine-year term, for a total term of imprisonment of twelve years.

{¶6} Davis timely appeals and raises the following assignment of error:

{¶7} “The trial court erred by sentencing the defendant-appellant to a twelve-year prison sentence.”

{¶8} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court held that “[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. In light of *Foster*, this court has held that the trial court has full discretion to sentence within the statutory ranges. *State v. Weaver*, 11th Dist.

No. 2006-L-113, 2007-Ohio-1644, at ¶33; *State v. Martin*, 11th Dist. No. 2006-L-191, 2007-Ohio-2579, at ¶19.

{¶9} “In applying *Foster* 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.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

{¶10} A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11(A). A court imposing a sentence for a felony “has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.” R.C. 2929.12(A). “In the exercise of this discretion, a court ‘shall consider’ the non-exclusive list of seriousness and recidivism factors set forth in R.C. 2929.12(B), (C), (D), and (E).” *State v. Sanders*, 11th Dist. No. 2006-L-222, 2007-Ohio-3207, at ¶15.

{¶11} There is no “mandate” for the sentencing court to engage in any factual finding under these statutes. Rather, “[t]he court is merely to ‘consider’ the statutory factors.” *Foster*, 2006-Ohio-856, at ¶42. Post-*Foster*, this court has adopted the holding of the Ohio Supreme Court in *State v. Adams* (1988), 37 Ohio St.3d 295, that “[a] silent record raises the presumption that a trial court considered the factors

contained in R.C. 2929.12.” *State v. Masterson*, 11th Dist. No. 2009-P-0064, 2010-Ohio-4939, at ¶12, citing *Adams*, 37 Ohio St.3d 295, at paragraph three of the syllabus.

{¶12} Davis does not claim his sentence was contrary to law or dispute that the trial court followed the applicable rules and statutes, as required by the first prong of the *Foster* test. Rather, he argues the trial court failed to give “careful and substantial deliberation to the relevant statutory considerations.” *Kalish*, 2008-Ohio-4912, at ¶20. Specifically, he asserts the court failed to give appropriate consideration to the following mitigating factors: Davis’ expressed remorse for his conduct; his recognition of the role played by drug use in the present offense and his recent success in treatment; and that the victim’s actions contributed to Davis’ conduct on the night of the robbery.

{¶13} We find no abuse of the discretion in the trial court’s decision to impose an aggregate twelve-year sentence. The court noted the seriousness of the crime committed by Davis. The court observed that the victim suffered serious physical harm, was struck in the face with a gun, and required hospital care and treatment. The court found the victim suffered serious psychological and economic harm. The court also noted that Davis used his relationship with the victim to facilitate the offense. These considerations are supported by the information contained in the PSI.

{¶14} In addition, the court emphasized that Davis had a high risk of recidivism because he has been incarcerated several times for theft and robbery related offenses and committed the present offense while awaiting sentencing on separate charges. The court further noted Davis had committed the present offense only three months after being released from prison on a prior felony conviction. As was explained to Davis, the court must sentence him so as to protect the public, not merely to do what might be best

for the offender. See R.C. 2929.11(A); *State v. Gibson*, 11th Dist. No. 2010-L-026, 2010-Ohio-5307, at ¶¶18-20 (holding that a trial court did not abuse its discretion when sentencing a defendant who showed remorse, was willing to seek treatment for a substance abuse problem, and who had mental health issues, to the maximum sentence because he posed a risk to the public due to his repeated criminal convictions).

{¶15} Regarding the mitigating factors asserted by Davis, we note that the trial court did give substantial consideration to these factors. The court considered the statement made by the defendant regarding his remorse but found, based on that statement and statements made to the probation officer, “there was no showing of genuine remorse.” The court also found that Davis, by blaming the victim for the crime, did not accept full responsibility for what he had done. Moreover, “a reviewing court must defer to the trial court as to whether a defendant’s remarks are indicative of genuine remorse because it is in the best position to make that determination.” *State v. Dudley*, 11th Dist. No. 2009-L-019, 2009-Ohio-5064, at ¶22. Regarding Davis’ substance abuse, the court noted that he had been given opportunities for treatment in the past, but has continued to use drugs.

{¶16} In addition, Davis asserts that the judge did not consider his version of the events, as given in the PSI, that Davis committed the Robbery after the victim attempted to push him from the car. However, the court stated it considered the PSI and explicitly addressed the fact that Davis believed the victim was partially responsible. Moreover, the police report contradicts Davis’ story about the events and provides support for the trial court’s determination. Based on the foregoing and on the evidence in the record,

we cannot say the trial court abused its discretion by failing to give substantial and careful deliberation to the relevant factors.

{¶17} Moreover, the sentence given by the trial court is not inconsistent with the mitigating factors urged by Davis. Even the demonstration of genuine remorse, and the recognition of substance abuse issues do not mandate a lesser sentence where the judge determines, in the sound exercise of his discretion, that the maximum or more than minimum sentence is necessary to achieve the purposes of felony sentencing, i.e., protecting the public from future crime by the offender and punishing the offender. *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, at ¶34, (“the trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor”) (citations omitted); *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus (“[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”).

{¶18} The sole assignment of error is without merit.

{¶19} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, sentencing Davis to an aggregate prison term of twelve years for Aggravated Robbery, Having Weapons While Under Disability, and Grand Theft of a Motor Vehicle, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.