

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	CASE NO. 2010-L-005
- vs -	:	
SCOTT L. WHITEHAIR,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000218.

Judgment: Affirmed.

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

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

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Scott L. Whitehair, appeals from the December 24, 2009 judgment entry of the Lake County Court of Common Pleas, in which he was sentenced for identity fraud, burglary, breaking and entering, and theft.

{¶2} On June 23, 2009, appellant was indicted by the Lake County Grand Jury on thirteen counts: count one, identity fraud, a felony of the third degree, in violation of R.C. 2913.49(B)(1); count two, burglary, a felony of the second degree, in violation of

R.C. 2911.12(A)(1); count three, possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24; counts four, seven, nine, and twelve, breaking and entering, felonies of the fifth degree, in violation of R.C. 2911.13(A); count five, grand theft, a felony of the fourth degree, in violation of R.C. 2913.02(A)(1); count six, burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2); and counts eight, ten, eleven, and thirteen, theft, felonies of the fifth degree, in violation of R.C. 2913.02(A)(1).¹ On June 26, 2009, appellant filed a waiver of the right to be present at his arraignment and the trial court entered a not guilty plea on his behalf.

{¶3} Appellant filed a motion to suppress statements on August 7, 2009. Appellee, the state of Ohio, filed a brief in opposition on August 14, 2009. Following a hearing, the trial court denied appellant's motion to suppress on November 3, 2009.

{¶4} A change of plea hearing was held on November 16, 2009. Appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to the following seven counts: count one, identity fraud, a felony of the third degree, in violation of R.C. 2913.49(B)(1); count two, burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(1); counts four, seven, nine, and twelve, breaking and entering, felonies of the fifth degree, in violation of R.C. 2911.13(A); and count eleven, theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1). The trial court entered a nolle prosequi on the remaining counts in the indictment. The trial court accepted appellant's guilty plea, referred the matter to the Lake County Adult Probation Department for a presentence investigation and report, a victim impact statement, and a

1. The foregoing charges stem from appellant's three-month crime spree in which he misused his uncle's identity to obtain a credit card in his name. Appellant broke into several properties (at least one was occupied) and he admitted to stealing various items.

drug and alcohol evaluation.

{¶5} Pursuant to its December 24, 2009 judgment entry, the trial court sentenced appellant to three years on count one; five years on count two; nine months on count four; nine months on count seven; nine months on count nine; nine months on count eleven; and nine months on count twelve. The trial court ordered the sentences to run concurrent with each other for a total of five years in prison, with two hundred seventy-six days of credit for time already served. It is from that judgment that appellant filed a timely notice of appeal, asserting the following assignment of error for our review:

{¶6} “THE TRIAL COURT ERRED BY SENTENCING [APPELLANT] TO A FIVE-YEAR PRISON TERM.”

{¶7} In his sole assignment of error, appellant argues that the trial court erred by sentencing him to a five-year prison term. Appellant maintains that the trial court’s findings under R.C. 2929.12 were not supported by the record and it failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶8} This court stated the following in *State v. Jerkovic*, 11th Dist. No. 2009-L-001, 2009-Ohio-4618, at ¶8-18:

{¶9} “This court will review a felony sentence pursuant to the two-prong standard set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ***. The plurality preliminarily noted that ‘(s)ince *Foster*, the courts of appeals have adopted varied standards for reviewing trial court sentencing decisions, ranging from abuse of discretion (***) to a standard that considers whether the sentence is clearly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941.’ *Id.* at ¶3. The plurality held that ‘(i)n 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.' *Id.* at ¶4.

{¶10} “In its analysis, the plurality in *Kalish* indicated the following at ¶9-17:

{¶11} “Prior to *Foster*, there was no doubt regarding the appropriate standard for reviewing felony sentences. Under the applicable statute, appellate courts were to “review the record, including the findings underlying the sentence or modification given by the sentencing court. (***) The appellate court's standard for review (was) not whether the sentencing court abused its discretion.” R.C. 2953.08(G)(2).

{¶12} “The statute further authorized a court of appeals to “take any action (***) if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant; (b) That the sentence is otherwise contrary to law.” Former R.C. 2953.08(G)(2), 2004 Am.Sub.H.B. No. 473, 150 Ohio Laws, Part IV, 5814.

{¶13} “The obvious problem with the statute as written and its relation to *Foster* is the references to “the findings underlying the sentence” and to the determination “(t)hat the record does not support the sentencing court's findings.” *Foster's* result was to sever the portions of the statute that required judicial fact-finding to warrant a sentence beyond the minimum term in order to make Ohio's sentencing scheme compatible with the United States Supreme Court's decisions in *Blakely v. Washington*

(2004), 542 U.S. 296, *** (***) , and *United States v. Booker* (2005), 543 U.S. 220, *** (***) . Therefore, 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.*” (Emphasis added.) *Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, *** (***) , ¶100.

{¶14} “As the passage cited above clearly indicates, *Foster* does not require a trial court to provide any reasons in imposing its sentence. For example, when imposing consecutive sentences prior to *Foster*, the trial court had to find that the sentence was necessary to protect the public and was not disproportionate to the seriousness of the offense and the danger the defendant posed to the public. R.C. 2929.14(E)(4). After *Foster*, a trial court can simply impose consecutive sentences, and no reason need be stated. Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under R.C. 2953.08(G)(2).

{¶15} “Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, *** (***) , ¶38. “In addition, the sentencing court must be guided by statutes that are specific to the case itself.” *Id.* Furthermore, the trial court must still be mindful of imposing the correct term of postrelease control.

{¶16} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial-fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant’s sentence. Instead, the appellate court must ensure that the trial court has

adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).

{¶17} “If on appeal the trial court’s sentence is, for example, outside the permissible statutory range, the sentence is clearly and convincingly contrary to law, and the appellate court’s review is at an end. The sentence cannot stand. However, if the trial court’s sentence is not contrary to law, what is the effect of R.C. 2929.11 and 2929.12 and their relevance to R.C. 2953.08(G)(2) and *Foster*.’

{¶18} “Because *Foster* now gives judges full discretion to impose a sentence within the statutory range without having to “navigate a series of criteria that dictate the sentence,” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, *** (***) , ¶25, the state’s position that an abuse-of-discretion standard must be used is understandable. Although R.C. 2953.08 did not allow appellate courts to use the abuse-of-discretion standard of review, the statute prior to *Foster* was concerned with review of the trial court’s factual findings under the now excised portions of the statute.

{¶19} “R.C. 2929.11 and 2929.12, however, are not fact-finding statutes like R.C. 2929.14. (***) Instead, they serve as an overarching guide for (a) trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. (***) Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion. Cf. *State v. Stroud*, 7th

Dist. No. 07 MA 91, 2008-Ohio-3187, at ¶63 (Donofrio, J., concurring in judgment). Therefore, assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster*.’ (Footnotes and parallel citations omitted.)”

{¶20} In the case at bar, appellant does not assert that his sentence was contrary to law. Rather, he alleges that the trial court failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶21} “Abuse of discretion” is a term of art, describing a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. Further, an abuse of discretion may be found when the trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at ¶15.

{¶22} Appellant specifically contends that the trial court did not give adequate weight and consideration to the alleged genuine remorse he demonstrated, as well as to other mitigating factors, including his drug and alcohol addiction and his cooperation with police. Appellant’s contentions, however, are unpersuasive.

{¶23} At the sentencing hearing in this case, before proceeding to the actual sentence, the trial court stated the following:

{¶24} “THE COURT: The Court has considered the overriding purposes and principles of felony sentencing as set forth in Revised Code Section 2929.11, those being to punish this Defendant as well as to protect the public from future crimes

committed by this Defendant as well as by others. In determining the most effective way to comply with those purposes and principles, the Court has considered all relevant factors, including but not limited to those set forth in 2929.12 of the code. And also, the factors in 2929.13 of the code as they relate to the felony fours and felonies fives. I guess they're just felony fives.

{¶25} “The Court has also considered the presentence investigation report, and the recommendations of the Lake County Adult Probation Department. I have also considered the psychological and drug and alcohol evaluation report and the recommendations of the Court psychologist. I also received, reviewed, and have considered six separate victim impact statements. And I also received, reviewed, and have considered a written letter received directly from Mr. Whitehair, and I’ve considered all statements made here in open Court today.”

{¶26} In addition, in its December 24, 2009 judgment entry, the trial court indicated the following:

{¶27} “The Court has also considered the record, oral statements, any victim impact statement, pre-sentence report and/or drug and alcohol evaluation submitted by the Lake County Adult Probation Department of the Court of Common Pleas, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶28} “In considering the foregoing, and for the reasons stated in the record, this Court finds that a prison sentence is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11 and that Defendant is not amenable to an available community control sanction.”

{¶29} The record before us reflects that appellant's sentence was within the statutory ranges for the offenses to which he pleaded guilty. R.C. 2929.14(A)(2), (3), and (5). In addition, the trial court considered the relevant statutory provisions before imposing appellant's sentence, as evidenced from the sentencing hearing as well as its judgment entry.

{¶30} Specifically, the trial court noted that it considered appellant's drug and alcohol evaluation, his substance abuse problems, and the court psychologist's diagnosis. The trial court gave appellant's apology to the court and his victims consideration, but found its weight unpersuasive, particularly since treatment had been unsuccessful in the past. Also, appellant's cooperation with police was considered when a plea bargain was reached, resulting in the dismissal of six of the thirteen counts in the indictment. Also, the trial court considered appellant's criminal history, which began in 1993 and has been ongoing despite serving two prior prison terms. Appellant committed the offense at issue while on parole.

{¶31} The trial court gave appropriate consideration and weight to the relevant statutory factors. The trial court did not abuse its discretion in imposing a five-year prison sentence upon appellant.

{¶32} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.