[Cite as *State v. Tenney*, 2010-Ohio-6248.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0015**
- vs -	:	
DONALD D. TENNEY, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 235.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Donald D. Tenney, Sr., appeals the judgment of the Ashtabula County Court of Common Pleas sentencing him on one count of sexual battery and one count of gross sexual imposition. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellant was indicted on three counts of rape, two counts of attempted rape, two counts of sexual battery, and two counts of gross sexual imposition.

{¶3} At his arraignment, appellant pled not guilty to the charges. Thereafter, appellant pled guilty, by way of *North Carolina v. Alford* (1970), 400 U.S. 25, to one count of sexual battery, a third-degree felony, in violation of R.C. 2907.03(A)(5), and one count of gross sexual imposition, a fourth-degree felony, in violation of R.C. 2907.05(A)(1).

{¶4} Appellant was sentenced to a five-year term of incarceration on the sexual battery charge and an 18-month term of incarceration on the gross sexual imposition charge. The sentences were ordered to be served consecutively.

{¶5} Appellant sought a delayed appeal, which was permitted by this court.

{¶6} As appellant's first and second assignments of error are interrelated, we address them in a consolidated fashion. On appeal, appellant alleges:

{¶7} "[1.] The trial court erred by imposing a sentence upon appellant that is clearly and convincingly contrary to law.

{¶8} "[2.] The trial court abused its discretion by imposing maximum and consecutive sentences upon appellant."

{¶9} At the outset, we note that appellant was sentenced on December 31, 2008, prior to the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, released on January 14, 2009, as well as the effective date of the General Assembly's reenactment of R.C. 2929.14, effective April 7, 2009. This case, therefore, is not subject to our recent holding in *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, at ¶14 that "a sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster*'s release, make certain specific findings of fact before imposing consecutive sentences on a defendant."

{¶10} As appellant in this case was sentenced prior to the effective date of the reenactment of R.C. 2929.14(E)(4), we are bound by the Supreme Court of Ohio's holding that previously severed this statute, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. After the *Foster* decision, "[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.

{¶11} In *Kalish*, the Supreme Court of Ohio, in a plurality opinion, held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶12} "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.

{¶13} The *Kalish* Court affirmed the sentence of the trial court as not being contrary to law, since the trial court expressly stated that it had considered the R.C. 2929.11 and R.C. 2929.12 factors, post-release control was applied properly, and the sentence was within the statutory range. Id. at ¶18.

{¶14} R.C. 2929.12 provides a list of factors that the trial court "shall consider" when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable

seriousness and recidivism factors (of R.C. 2929.12.)'" *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215. In *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶28, this court acknowledged its adoption of the pronouncement of the Supreme Court of Ohio in *State v. Adams* (1988), 37 Ohio St.3d 295. The Supreme Court of Ohio in *Adams* held: "[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *Adams*, supra, paragraph three of the syllabus. This court recognized that Ohio Appellate Districts have adopted the holding in *Adams*, prior to and after the Supreme Court of Ohio's decision in *State v. Foster*, supra. *Greitzer*, supra, at ¶29.

{¶15} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶61-62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶16} Appellant pled guilty to one count of sexual battery, a felony of the third degree, and one count of gross sexual imposition, a felony of the fourth degree. The statutory range for a third-degree felony is one to five years. R.C. 2929.14(A)(3). Further, the statutory range for a fourth-degree felony is six to 18 months. R.C. 2929.14(A)(4). The trial court sentenced appellant to a prison term of five years on the third-degree felony, and a term of 18 months on the fourth-degree felony, which is within the statutory range. The trial court ordered the prison term for sexual battery to run consecutive to the prison term for gross sexual imposition. However, as previously stated, the trial court was not required to make findings pursuant to R.C. 2929.14(E) before imposing consecutive and maximum sentences.

{¶17} At the sentencing hearing, the trial court heard from one of the victims as well as the victim's grandmother. Additionally, in the judgment entry of sentence, the trial court stated that it "considered the record, oral statements, any victim impact statement, and the Pre-sentence Investigation Report prepared, as well as the principles and purposes of sentencing under O.R.C. 2929.11 and had balanced the seriousness and recidivism factors under O.R.C. 2929.12."

{¶18} Upon a review of the record, we do not determine that the trial court's sentence is clearly and convincingly contrary to law. Furthermore, taking all of the above into consideration, we cannot find that the trial court abused its discretion by sentencing appellant within the statutory range.

{¶19} Appellant's first and second assignments of error are without merit. Accordingly, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶20} I concur in the majority's ultimate decision to affirm the sentence imposed by the Ashtabula County Court of Common Pleas.

{¶21} I write separately because of the majority's reference to the "reenactment of R.C. 2929.14, effective April 7, 2009." Supra, at ¶9.

{¶22} The majority's position that, since R.C. 2929 was amended post-*Ice* with the language of R.C. 2929.14(E)(4) existing as did pre-*Foster*, the General Assembly has, in effect, re-enacted R.C. 2929.14(E)(4) is erroneous and contrary to Ohio law.

{¶23} The Ohio Supreme Court has long held: "Where there is reenacted in an amendatory act provisions of the original statute in the same or substantially the same language and the original statute is repealed in compliance with Section 16, Article II of the Constitution, such provisions will not be considered as repealed and again reenacted, but will be regarded as having been continuous and undisturbed by the amendatory act." *In re Allen* (1915), 91 Ohio St. 315, at paragraph one of the syllabus.

{¶24} Thus, the inclusion of R.C. 2929.14(E)(4) in the April 7, 2009 amendment of R.C. 2929 does not have the effect of re-enacting that provision.

{¶25} This conclusion is demonstrated by considering a similar situation from Ohio legal history. In 1997, the General Assembly enacted R.C. 2744.02(C), which provided that an order denying a political subdivision immunity was a final order. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, the Ohio Supreme Court struck down, in toto, Am.Sub.H.B. No. 350, which had enacted R.C. 2744.02(C). Subsequent amendments to R.C. 2744 included division 02(C), providing that the denial of immunity is a final order.

{¶26} Attorneys for political subdivisions continued to file interlocutory appeals of such orders, arguing that this provision had been re-enacted by subsequent amendments to the statute. This argument was rejected by every appellate court of which I am aware. See, e.g., *Tignor v. Franklin Cty. Bd. of Commrs.*, 10th Dist. No.

99AP-571, 2000 Ohio App. LEXIS 1814, at *7; *Taylor v. Cty. of Cuyahoga*, 8th Dist. No. 75473, 2000 Ohio App. LEXIS 137, at *4.

{¶27} This position was unequivocally rejected by the Ohio Supreme Court in *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, at paragraph two of the syllabus ("R.C. 2744.02(C) was neither enacted nor reenacted by 1997 Am.Sub.H.B. No. 215"), and 195 ("[w]hen this court in *Sheward* struck down Am.Sub.H.B. No. 350, it struck down the version of R.C. 2744.02(C) that Am.Sub.H.B. No. 350 attempted to enact, and R.C. 2744.02(C) remains invalid as a result of *Sheward*"). In addition to the *Allen* case, cited above, the Supreme Court relied on the following precedents: *In re Hesse* (1915), 93 Ohio St. 230, 234 ("provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amendatory act"); and *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 206 ("by observing the constitutional form of amending a section of a statute the Legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated"; "[a]ny other rule of construction would surely introduce unexpected results and work great inconvenience") (citation omitted).

{¶28} Accordingly, I do not agree that R.C. 2929.14(E)(4) has been legislatively re-enacted, rather, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, remains the law of this State.