

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-066
JASON T. MAJERCIK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000785.

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).

MARY JANE TRAPP, P.J.

{¶1} Jason T. Majercik appeals from a judgment of the Lake County Court of Common Pleas sentencing him to seven and one-half years of imprisonment for his convictions of two counts of grand theft and 11 counts of theft. He contends the trial court abused its discretion in imposing the sentence. For the following reasons, we affirm.

{¶2} Mr. Majercik was charged with two counts of grand theft, fourth degree felonies in violation of R.C. 2913.02(A)(1), and 11 counts of theft, fifth degree felonies in violation of R.C. 2913.02(A)(1).

{¶3} These charges stemmed from Mr. Majercik's multi-county crime spree committed in the weeks between November 8, 2008 and November 30, 2008. He stole checks, deposited them in banks, and illegally withdrew money from the accounts. He also stole mail from mailboxes, obtained victims' bank account information, and used the information to illegally withdraw money. In the three-week period, he stole a total of \$35,550 from the various accounts. He used the money to support his use of crack cocaine.

{¶4} Mr. Majercik pled guilty to all counts as charged. The state and the defense counsel made a joint recommendation for a five-year prison term. After a hearing, the court sentenced him to 12 months in prison for each count of grand theft, to be served consecutively, and six months in prison for each of the 11 counts of theft, also to be served consecutively, for a total of 90 months, or seven and one-half years of prison time. In addition, the court ordered him to pay \$35,500 in restitution.

{¶5} Mr. Majercik now appeals, raising the following assignment of error for our review:

{¶6} "The trial court erred by sentencing defendant-appellant to consecutive terms of imprisonment."

{¶7} Although his assignment of error references his consecutive terms of imprisonment, in the body of his argument he contends the trial court erred because its

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} Standard of Review Post-Foster

{¶9} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio, in striking down parts of Ohio’s sentencing scheme, held that the 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 paragraph seven of the syllabus.

{¶10} Subsequently, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the court further clarified the standard of review for felony sentencing after *Foster*. It held:

{¶11} “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.” *Id.* at ¶4.

{¶12} The first prong of the analysis instructs that “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).” *Id.* at ¶14.

{¶13} The court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id.* at ¶17. Therefore, as part of its analysis of whether the sentence is “clearly and convincingly contrary to law,” an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶14} Applying the first prong of the analysis to the underlying case, the court in *Kalish* concluded that the trial court’s sentence was “not clearly and convincingly contrary to law,” because (1) the trial court in that case “expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12,” (2) the trial court properly applied postrelease control, and (3) the sentence was within the permissible range. *Id.* at ¶18.

{¶15} If the first prong is satisfied, that is, the sentence is not “clearly and convincingly contrary to law,” the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶17. The court explained the effect of R.C. 2929.11 and 2929.12 in this regard:

{¶16} “R.C. 2929.11 and 2929.12 *** 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.” *Kalish* at ¶17.

{¶17} Applying the second prong of the analysis to the underlying case, the Supreme Court of Ohio noted that the trial court “gave careful and substantial deliberation to the relevant statutory considerations,” and that “there is nothing in the record to suggest the trial court’s decision was unreasonable, arbitrary, or unconscionable.” *Id.* at ¶20.

{¶18} Here, Mr. Majercik does not argue that his sentence was contrary to law, contending only that the trial court failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶19} At the sentencing hearing, the trial court reviewed Mr. Majercik’s criminal record and characterized him as a serial thief since 1991. Mr. Majercik admitted he had been to the state and federal prisons seven times prior to the instant offenses. The court also noted he had several probation violations. Reviewing his criminal record, the court stated:

{¶20} “***I’m looking at just one page [of your file] here. You’ve got a sentence out of Judge Terrence O’Donnell, who was a Cuyahoga County Common Pleas Judge at the time, of one year. Ralph McAllister, one year. Another case with Ralph McAllister, one year. Another case with Ralph McAllister, one year. And all of those were concurrent with one another. And then out of Wayne County, eighteen months. And that was made concurrent with the Cuyahoga County sentence. You’ve got a number of probation violations here where you were either granted judicial release or a judge went easy on you, and then you ended up violating and then going back to prison

***. You've got such a significant record here – I just can't believe you that this time is different than the other many times you've been in front of a judge. Every time those judges have sentenced you, did you say this time is different?"

{¶21} Prior to sentencing Mr. Majercik, the court stated that it reviewed the record, the victim impact statements, the presentence report, the court's conference in chambers with counsel and the probation officer, and statements of Mr. Majercik and his counsel. The court stated it had considered the overriding purposes of felony sentencing pursuant to R.C. 2929.11 -- to protect the public from future crimes by the defendant and to punish the defendant -- as well as factors such as the need for incapacitation, deterrence, rehabilitation, restitution, and the burden on governmental resources. The court stated furthermore it had considered the joint recommendation of the parties, and calculated the sentence to achieve the two overriding purposes of felony sentencing -- to be commensurate with and not demeaning to the seriousness of the defendant's conduct and its impact on the victims and society, and to be consistent with sentences imposed for similar crimes.

{¶22} The court stated, furthermore, "[i]n using my discretion to determine the most effective way to comply with the purposes and principles of sentencing I have considered all relevant factors, including the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of Revised Code 2929.12."

{¶23} Based on this record, we cannot say the trial court's sentence was unreasonable, arbitrary, or unconscionable. The court apparently placed great weight

on Mr. Majercik's lengthy criminal record and recidivism in sentencing him, which is well within its discretion.

{¶24} Mr. Majercik, in particular, complains that the trial court did not give appropriate consideration and weight, pursuant to R.C. 2929.12(E), to the genuine remorse he expressed. He stresses that the lead detective in this case believed he showed genuine remorse; that he admitted to all his offenses and informed the police of additional incidents they had not been previously aware of; that he agreed to have all his charges consolidated in one county for a quick resolution of the case; and that he wrote letters of apology to his victims.

{¶25} This court has previously held that "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, ¶22, citing *State v. Stewart*, 11th Dist. No. 2008-L-112, 2009-Ohio-921, ¶30. Based on Mr. Majercik's repeated commissions of similar offenses, the trial court below did not believe the remorse he expressed was genuine, and we will defer to its assessment.

{¶26} Mr. Majercik also alleges the trial court failed to give appropriate consideration to his financial troubles and alcohol and drug addiction, which he claimed triggered his criminal activity after a hiatus. As this court has stated, "[a] trial court is not required to give any particular weight or emphasis to a given set of circumstances; it is merely required to consider the statutory factors in exercising its discretion." *State v. Delmanzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, ¶23.

{¶27} The record reflects the trial court considered Mr. Majercik's statements about his financial troubles and drug use but apparently determined that his significant criminal history outweighed his apologies, justifications, and excuses. We find no abuse by the trial court in sentencing Mr. Majercik.

{¶28} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.