[Cite as *State v. Brody*, 2011-Ohio-4884.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2010-L-095, 2010-L-096, and 2010-L-097**
DAVID E. BRODY,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Court of Common Pleas, Case Nos. 10 CR 000026, 10 CR 000029, and 10 CR 000366.

Judgment: Affirmed.

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

Amy Marie Freeman, 7281 Taft Street, Mentor, OH 44060 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, David E. Brody, appeals his sentence following his guilty plea in the Lake County Court of Common Pleas to multiple counts of burglary, breaking and entering, grand theft, receiving stolen property, misuse of credit cards, and vandalism in three separate cases. At issue is whether the trial court was required to make findings of fact in support of its consecutive sentences. For the reasons that follow, we affirm.

{¶2} Appellant was indicted or charged by way of information in three separate cases. In case No. 10 CR 000026, he was charged in an 11-count indictment with two

counts of forgery, two counts of receiving stolen property, misuse of credit cards, two counts of identity fraud, burglary with a firearm specification, grand theft of a firearm with a firearm specification, having weapons while under disability with a firearm specification, and grand theft of miscellaneous electronics with a firearm specification.

{¶3} In case No. 10 CR 000029, appellant was charged in a 17-count indictment with grand theft of a motor vehicle, five counts of vandalism, four counts of breaking and entering, three counts of receiving stolen property, three counts of possession of criminal tools, and carrying a concealed weapon.

{¶4} Finally, in case No. 10 CR 000366, appellant was charged by way of information with one count of burglary.

{¶5} Appellant entered a plea bargain with the state pursuant to which, on June 23, 2010, he entered a guilty plea in each of these cases. In case No. 10 CR 000026, appellant pled guilty to misuse of credit cards, in violation of R.C. 2913.21(B)(2), a felony of the fifth degree; grand theft of a firearm, in violation of R.C. 2913.02(A)(1), a felony of the third degree; and burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree, with a firearm specification, in violation of R.C. 2941.141.

{¶6} In case No. 10 CR 000029, appellant pled guilty to breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree; receiving stolen property involving a motor vehicle, in violation of R.C. 2913.51(A), a felony of the fourth degree; grand theft of another motor vehicle, in violation of R.C. 2913.02(A)(1), a felony of the fourth degree; and vandalism, in violation of R.C. 2902.05(A), a felony of the fourth degree.

{¶7} Finally, in case No. 10 CR 000366, appellant pled guilty to burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree.

{¶8} Thereafter, the prosecutor outlined the factual basis for appellant's guilty pleas. In case No. 10 CR 000026, with respect to the misuse of credit cards charge, on October 12, 2003, appellant obtained various items of merchandise from Lowe's in Mentor, Ohio, in the amount of $1,109.26 by unlawfully using his former employer's credit card. As to the grand theft and burglary charges with a firearm specification, on October 29, 2004, appellant broke into the home of a police officer. After breaking into the officer's home, appellant stole the officer's 9 mm handgun. The prosecutor noted that appellant left a note for the officer saying, "see what'll happen to you the next time when you give me a ticket."

{¶9} In case No. 10 CR 000029, as to the grand theft and vandalism charges, on December 4, 2009, appellant stole a 2002 Geo Tracker owned by Janice Zappola from her residence in Mentor. Later, while driving the Geo, appellant was involved in a collision in which he extensively damaged the vehicle. Appellant returned the vehicle to the driveway of its owner and, in doing so, he kicked up gravel against the neighbor's house damaging its siding and windows, with damage estimates of $15,000.

{¶10} As to the receiving stolen property and breaking and entering charges, on December 25, 2009, appellant received a 1997 Honda Civic in Mentor owned by Bill Pearson and Ellen Strossure. Appellant later admitted he had reason to believe the car was stolen. That night appellant also threw a rock through a glass door at Pavo's Shoe Repair. He entered the store and stole various items, including $17 in cash.

{¶11} Finally, in case No. 10 CR 000366, on December 21, 2009, appellant broke into three homes in Mentor and stole various items from each. In one home he stole coins and stamps. In another he stole a television, laptop computer, and digital camera. In the third, he stole a CD stereo and speakers.

{¶12} The court found appellant's guilty pleas were knowing, intelligent, and voluntary; accepted the guilty pleas; and found appellant guilty. Specifically, in case No. 10 CR 000026, the court found appellant guilty of misuse of credit cards, burglary with a firearm specification, and grand theft of a firearm. In case No. 10 CR 000029, the trial court found appellant guilty of grand theft of a motor vehicle, vandalism, receiving stolen property involving another motor vehicle, and breaking and entering. Finally, in case No. 10 CR 000366, the trial court found appellant guilty of burglary.

{¶13} Pursuant to the plea bargain, in exchange for appellant's guilty pleas, the trial court dismissed the remaining counts in the indictments.

{¶14} Appellant is 39 years old and has had four years of college. He admitted he had previously been in prison twice, once in Ohio for burglary and once in Tennessee for burglary. In addition, at the time of the sentencing hearing, it was undisputed there was an outstanding warrant from Tennessee for appellant on a pending case in that state.

{¶15} On July 29, 2010, the matter proceeded to sentencing. Appellant apologized to the victims of his crimes. He told the court that he allowed his drug addiction to cause him to do terrible things and that he regretted the choices he had made. In light of appellant's extensive criminal history, the trial court questioned the genuineness of appellant's expression of remorse.

{¶16} The court then recounted appellant's extensive criminal record. In 1993, he was convicted of attempted carrying concealed weapons in the Franklin County Municipal Court in Columbus, Ohio. In 1997, he was convicted of seven counts of burglary in Lake County. He was placed on four years probation on condition that he serve six months in jail, complete a jail treatment program, complete a six-month in-patient treatment program at Oriana House in Akron, Ohio, attend three AA meetings a week, and obtain a sponsor. Appellant stayed at Oriana House for 41 days, then went to get a haircut, and never returned to complete the program. In 1998, appellant violated his probation. His probation was terminated, and he was sentenced on the probation violation to five years in prison. In 2003, appellant completed an intensive outpatient program at the Lake/Geauga Recovery Center in Mentor. In February 2004, appellant failed to appear for a contempt-of-court proceeding in the Willoughby Municipal Court.

{¶17} Thereafter, appellant went to Tennessee, where, in March 2007, he was convicted in five separate cases. In the first case, he was convicted of three counts of aggravated burglary and three counts of felony theft. In the second case, appellant was convicted of aggravated burglary and three counts of forgery of a credit card. In the third case, appellant was convicted of aggravated burglary and felony theft. In the fourth case, appellant was convicted of five counts of burglary, five counts of theft, attempted burglary, vandalism, and possession of criminal tools. In the fifth case, he was convicted of aggravated burglary, felony theft, and aggravated assault. For these crimes, appellant was sentenced to six years in prison in Tennessee. Five months later, in August 2007, appellant was convicted of breaking and entering in North Carolina.

Appellant then returned to Lake County and in August 2009, he was charged in the Painesville Municipal Court with obstructing official business and falsification.

{¶18} The trial court stated that it considered the purposes of felony sentencing pursuant to R.C. 2929.11, which, it said, are to protect the public from future crime by appellant and others similarly situated and to punish appellant. The court said it calculated appellant's sentence to achieve the purposes of felony sentencing and to be consistent with sentences imposed for similar crimes committed by similar offenders. The court stated it considered all relevant factors, including the seriousness factors in R.C. 2929.12(B) and (C) and the recidivism factors in R.C. 2929.12(D) and (E).

{¶19} The court sentenced appellant in case No. 10 CR 000026 to 11 months for misuse of credit cards; seven years for burglary, to be served consecutively to the one-year term of imprisonment on the related firearm specification; and two years for grand theft of the police officer's 9 mm handgun. The prison terms for misuse of credit cards and grand theft of the firearm were to be served concurrently with one another, but consecutively to the term for burglary with the firearm specification, for a total of ten years in prison.

{¶20} In case No. 10 CR 000029, the court sentenced appellant to 12 months for grand theft of a motor vehicle (the 2002 Geo Tracker), 12 months for vandalism, 12 months for receiving stolen property (the 1997 Honda Civic), and 12 months for breaking and entering, each sentence to be served concurrently with each other, for a total of 12 months in prison.

{¶21} In case No. 10 CR 000366, the trial court sentenced appellant to seven years for burglary.

{¶22} The sentences in each of the three cases were to be served consecutively to one another, for a total of 18 years in prison.

{¶23} Appellant appeals the trial court's sentence. Appellant's three cases were consolidated in this court. Appellant asserts the following for his sole assignment of error:

{¶24} "The trial court erred by sentencing the defendant-appellant to an eighteen-year prison term."

{¶25} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that because R.C. 2929.14(E)(4) and R.C. 2929.41(A) require judicial fact-finding before a court can impose consecutive sentences, they are unconstitutional and ordered them to be severed. Id., paragraph three of the syllabus. In striking down these and other parts of Ohio's sentencing scheme, the 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., paragraph seven of the syllabus.

{¶26} The court in *Foster* also held that R.C. 2929.11 and R.C. 2929.12 still "apply as a general guide for every sentencing." Id. at 12. In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are "to protect the public from future crime by the offender *** and to punish the offender." Id. R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of

the crime and its impact on the victim, and consistent with sentences imposed on similarly-situated offenders. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.

{¶27} The court in *Foster* held that R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. Rather, "[t]he court is merely to 'consider' the statutory factors." Id. at 14. Thus, "in exercising its discretion, a court is merely required to 'consider' the purposes and principles of sentencing in R.C. 2929.11 and the statutory *** factors set forth in R.C. 2929.12." *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶44.

{¶28} Subsequently, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. In the first step, we consider whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." Id. at 25. "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.

{¶29} As the Ninth Appellate District recently observed:

{¶30} "*Kalish* did not specifically provide guidance as to the 'laws and rules' an appellate court must consider to ensure the sentence clearly and convincingly conforms with Ohio law. The specific mandate of *Kalish* is that the sentence fall within the statutory range for the felony of which a defendant is convicted. Id. at ¶15." *State v. Gooden*, 9th Dist. No. 24896, 2010-Ohio-1961, at ¶48.

{¶31} Next, if the first step is satisfied, we consider whether, in selecting the actual term of imprisonment within the permissible statutory range, the trial court

abused its discretion. *Kalish*, supra, at 26. This court has stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court that does not comport with reason or the record. *State v. DelManzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶23, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶32} Appellant argues the sentencing scheme regarding consecutive sentencing severed by the Supreme Court of Ohio in *Foster*, supra, has been revived by the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160. He therefore argues the trial court should have stated its reasons under R.C. 2929.14(E)(4) before imposing consecutive sentences. He argues that because the trial court did not do so, his sentence was contrary to law. We do not agree.

{¶33} In *Ice*, supra, the Supreme Court held that the right to jury trial under the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. Id. at 171-172.

{¶34} Thereafter, in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, paragraph one of the syllabus, the Supreme Court of Ohio adopted the foregoing ruling of the United States Supreme Court in *Ice*, supra. However, the court in *Hodge*, paragraph two of the syllabus, held that *Ice* does *not* revive Ohio's former consecutive-sentencing statutes. As a result, the court in *Hodge* held that trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that such findings be made. Id., paragraph three of the syllabus.

{¶35} Consequently, despite this court's contrary holding in *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, pursuant to *Hodge*, supra, the trial court was not required to make findings of fact pursuant to R.C. 2929.14(E)(4) prior to imposing consecutive sentences on appellant. This court followed the Supreme Court's decision in *Hodge* and overruled *Jordan* in part in *State v. Miller*, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161, at ¶63-67, fn. 2.

{¶36} Turning to the facts of the instant case and addressing the first step of the *Kalish* test, appellant pled guilty to two counts of burglary, which are felonies of the second degree. He was therefore subject to a prison term for each of these two offenses of two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). He also pled guilty to a firearm specification with respect to one of the burglary offenses, providing for an additional term of incarceration of one year. He also pled guilty to grand theft of a firearm, a felony of the third degree, for which he was also subject to a prison term of one, two, three, four, or five years. R.C. 2929.14(A)(3). Appellant also pled guilty to receiving stolen property involving a motor vehicle, grand theft of another motor vehicle, and vandalism, each of which is a felony of the fourth degree. For each of these offenses, he was subject to an additional term of imprisonment of six, seven, eight, nine, ten, 11, 12, 13, 14, 15, 16, 17, or 18 months. R.C. 2929.14(A)(4). He also pled guilty to misuse of credit cards and breaking and entering, each of which is a felony of the fifth degree. He was therefore subject to an additional term in prison on each of six, seven, eight, nine, ten, 11, or 12 months. R.C. 2929.14(A)(5). The maximum sentence that the trial court could have imposed within the statutory limitations for each count to which appellant pled guilty was 28 and one-half years. Appellant's sentence of

18 years was therefore well within the statutory range for these offenses. Thus, appellant's sentence did not go beyond or run afoul of sentencing laws as they existed at the time he was sentenced.

{¶37} Moreover, the trial court expressly stated on the record and in the court's sentencing entries that it had considered the purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶38} Because the sentences imposed were within the statutory range of sentences for appellant's crimes and the court considered the purposes and factors of felony sentencing, appellant's sentence complied with all applicable statutes and therefore was not clearly and convincingly contrary to law. His sentence therefore complied with the first step of the *Kalish* test.

{¶39} We turn now to the second step of the *Kalish* test, i.e., whether the sentence selected by the trial court was an abuse of discretion. Appellant asserts several arguments to support his position that the trial court abused its discretion in sentencing him to 18 years in prison. First, he argues that because the trial court specifically discussed appellant's extensive criminal record, which appellant concedes is a pertinent recidivism factor, this shows the trial court failed to carefully consider the other seriousness and recidivism factors. Appellant cites no authority in support of this argument, and for this reason alone, it lacks merit. App.R. 16(A)(7).

{¶40} Further, in *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, this court held that a trial court's failure to state on the record that it considered the factors in R.C. 2929.11 and R.C. 2929.12 raises a presumption that the trial court considered them. Id. at ¶26, citing *State v. Adams* (1988), 37 Ohio St.3d 295,

paragraph three of the syllabus. In *State v. Cyrus* (1992), 63 Ohio St.3d 164, the Supreme Court of Ohio held that the burden is on the defendant to present evidence to rebut the presumption that the court considered the sentencing criteria. Id. at 166. Here, the trial court actually stated at the sentencing hearing and in its sentencing entries that it had considered and weighed the seriousness and recidivism factors in R.C. 2929.12. Moreover, appellant has failed to reference anything in the sentencing transcript or in the court's entries that demonstrates or even suggests that the court failed to consider all pertinent seriousness and recidivism factors in R.C. 2929.12. The fact that the court highlighted appellant's criminal record is not evidence that the court did not consider the other pertinent factors.

{¶41} As noted above, however, the court also expressly considered other seriousness and recidivism factors. For example, at the sentencing hearing, the court questioned whether appellant's stated remorse was genuine. Further, it was brought to the trial court's attention at sentencing that appellant had not responded favorably to sanctions, including drug programs, previously imposed by other sentencing judges on appellant for his prior criminal convictions. When the trial court asked appellant why he cannot stay out of people's homes, appellant said, "I have no answer for that." We therefore do not agree with appellant's argument that the court failed to carefully consider the remaining seriousness and recidivism factors under R.C. 2929.12.

{¶42} Next, appellant argues that his sentence was not consistent as required by R.C. 2929.11. He argues his 18-year sentence in the instant cases and his 13-year sentence, which, he argues, is "pending" in Tennessee, when combined, in effect constitutes life imprisonment and is therefore "grossly disproportionate."

{¶43} As a preliminary matter, this court has repeatedly held that consistency in sentencing is accomplished by the trial court's application of the statutory sentencing guidelines. See, e.g., *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory purposes and factors of felony sentencing. Because appellant failed to make such showing, his sentence was proportionate and consistent.

{¶44} We note there is no evidence in the record to support appellant's comment that he has been sentenced to 13 years in prison in Tennessee. In fact, the document referenced by appellant in support of his alleged Tennessee sentence, his pre-sentence report, does not support this argument. The report merely notes that Tennessee has a hold out for appellant. There is nothing before us to demonstrate he has been sentenced in Tennessee, let alone that such sentence would be served consecutively to the sentence imposed by the trial court. We do note that the trial court did not order its sentence to be served consecutively to any Tennessee sentence. In any event, even if a Tennessee court had sentenced appellant to 13 years and such sentence was to be imposed consecutively, that does not imply that such sentence, when combined with appellant's Ohio sentence, would amount to life in prison. We rejected a similar argument in *State v. O'Neil*, 11th Dist No. 2010-P-0041, 2011-Ohio-2202, at ¶29.

{¶45} Further, we reject appellant's contention that he should have been given a lighter sentence because his crimes were merely crimes against property and no one was harmed. His offenses included burglary, burglary with a firearm specification, grand theft of a motor vehicle, grand theft of a police officer's firearm, receiving stolen

property involving another motor vehicle, vandalism of the home of a neighbor of one of his victims, and misuse of credit cards. Each of these crimes was committed against an individual or individuals and potentially had serious economic, physical, and psychological consequences for the victims. If any of the homeowners or the business owner would have been present at the time of the burglaries or breaking and entering, the results would potentially have been disastrous. As the trial court correctly noted at sentencing, in addition to the economic harm caused by appellant, he caused "damage to the psychology of these individuals when [he] invade[d] their private sanctum."

{¶46} We further reject appellant's argument that "[b]y denying [appellant] any hope for return to society as a rehabilitated individual, he has been denied due process." First, appellant has, once again, failed to reference any pertinent authority in support of this argument, in violation of App.R. 16(A)(7). Further, there is nothing before us to indicate that appellant has no reasonable expectation of eventually being released from prison after serving the sentence imposed by the trial court.

{¶47} Finally, appellant argues his sentence must be overturned because the trial court's findings under R.C. 2929.11 and R.C. 2929.12 were not supported by the record. We are unclear as to what "findings" appellant is referring. In any event, pursuant to *Foster*, supra, the trial court was not required to make findings under R.C. 2929.11 and R.C. 2929.12. It was merely required to consider the purposes and factors referenced in these sections of the Revised Code, which, as we hold today, the trial court did.

{¶48} The trial court's sentence was therefore not contrary to reason or the record and so did not constitute an abuse of discretion.

{¶49} For the reasons stated in the opinion of this court, appellant's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.