

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-00159
TROY MURPHY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Licking County Court of Common Pleas, Case No. 2008-CR-00542

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 10, 2009

APPEARANCES:

For Plaintiff-Appellee

DANIEL HUSTON  
Assistant Prosecuting Attorney  
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For Defendant-Appellant

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*Edwards, J.,*

{¶1} Appellant, Troy Murphy, appeals a judgment of the Licking County Common Pleas Court convicting him of two counts of robbery (R.C. 2911.02(A)(3)) and sentencing him to three years incarceration on each count, to be served consecutively. Appellee is the State of Ohio.

#### STATEMENT OF FACTS AND CASE

{¶2} On August 8, 2008, appellant was charged by indictment with two counts of robbery, each a felony of the third degree. The first count of the indictment alleged that on or about July 21, 2008, appellant recklessly used or threatened the immediate use of force against an employee of Park National Bank in Heath, Ohio, in attempting or committing a theft offense or fleeing immediately after the attempt or offense. The second count of the indictment alleged that on or about July 28, 2008, appellant recklessly used or threatened the immediate use of force against an employee of First Federal Savings and Loan in Heath, Ohio, in attempting or committing a theft offense or fleeing immediately after the attempt or offense.

{¶3} The State filed a bill of particulars on September 26, 2008. The bill stated that on July 21, 2008, appellant and his co-defendant robbed the Park National Bank at 800 S. 30<sup>th</sup> Street, Heath, Ohio. Appellant approached the teller and gave her a note which indicated that he had a gun. The note demanded cash from the teller. As a result, appellant obtained \$15,100.00 in cash. As to count two, the bill stated that on July 28, 2008, appellant robbed the First Federal Savings and Loan Bank at 900 Hebron Road, Heath, Ohio. Appellant approached the teller and gave her a note which stated

that he had a gun and demanded that she empty her drawer and put the cash in his bag. As a result, appellant obtained \$4,851.00 in cash.

{¶4} Appellant appeared before the Licking County Common Pleas Court for a plea hearing on December 19, 2008. At that time, appellant indicated that he wished to plead guilty to both counts. The prosecutor read the indictment and the bill of particulars at the plea hearing. Following the presentation of the facts and a Crim. R. 11 colloquy with the trial court, appellant entered a plea of guilty to each count. He was sentenced to three years incarceration on each count, to run consecutively to each other and consecutively to the sentence imposed in a Muskingum County case. Appellant assigns a single error on appeal:

{¶5} “I. THE SENTENCING OF THE DEFENDANT-APPELLANT WAS UNCONSTITUTIONAL.”

{¶6} Appellant argues that his sentence is unconstitutional under *State v. Foster*, 109 Ohio St. 3d 1, 845 N.E.2d 470, 2006-Ohio-856, because the judge engaged in judicial fact-finding in sentencing him consecutively. As noted in the statement of facts, the prosecutor provided a recitation of the facts including both the indictment and the bill of particulars. In sentencing appellant, the court stated that it had taken into consideration all of the facts and circumstances involved in the case and appellant's prior record. Tr. 21. The court specifically stated, “I can't imagine what it would be like to be confronted by someone who says I have a gun, give me the money.” *Id.* Appellant argues that the sentence was unconstitutional as it involves fact-finding by the trial court “when the same was not made by a jury of his peers.” Appellant's brief, page 6.

{¶17} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *Foster*, supra, as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶18} In *Kalish*, the Court discussed the effect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding that “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.” *Kalish* at ¶ 1 and 11, citing *Foster* at ¶100, See also, *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, 873 N.E. 2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at ¶ 12. However, although *Foster* eliminated mandatory judicial fact-finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at ¶ 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶19} “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).” *Kalish* at ¶ 14.

{¶10} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use 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 in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard.” *Kalish* at ¶ 4, *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470.

{¶11} The Supreme Court held, in *Kalish*, that the trial court’s sentencing decision was not contrary to law. “The trial court 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. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law.” *Kalish* at ¶ 18. The Court further held that the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and that there was “nothing in the record to suggest that the court’s decision was unreasonable, arbitrary, or unconscionable”. *Kalish* at ¶ 20.

{¶12} Appellant argues that in considering the recitation of facts given by the prosecutor, the court engaged in judicial fact-finding, held by the Ohio Supreme Court to be unconstitutional in *Foster*, supra. However, in *Foster* the court held, “Because R.C. 2929.15(E)(4) and 2929.14(A) require judicial finding of facts not proven to a jury beyond a reasonable doubt *or admitted by the defendant* before the imposition of

consecutive sentences, they are unconstitutional. 109 Ohio St. 3d. at syllabus 3, emphasis added.

{¶13} In the instant case, the court addressed appellant before the state began the recitation of facts, which included the facts as alleged in the indictment and in the bill of particulars:

{¶14} “Q. At this time I am going to ask the assistant prosecutor to present the facts of the State’s case against you. I want you to listen to what he is saying. I am going to ask you whether you agree with the facts as presented. If there is a disagreement regarding these facts, I want to clear that up on the record. Before you answer, you may consult with your attorney.” Tr. 8

{¶15} Following the recitation of facts, the court asked appellant if he agreed with the facts as presented, and he responded, “Yes, sir.” Tr. 10. Appellant thereafter entered a plea of guilty. Tr. 13.

{¶16} Because appellant admitted to the entire recitation of facts presented by the prosecutor, the court did not engage in the type of fact-finding found unconstitutional in *Foster*. The assignment of error is overruled.

{¶17} The judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, J.,  
Hoffman, P.J., and  
Wise, J., concur

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

JAE:rad 0901

