[Cite as *State v. Kvintus,* 2010-Ohio-427.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DARREN M. KVINTUS Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 09 CA 58 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 4
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 8, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
EARL L. FROST ASSISTANT PROSECUTOR 20 South Second Street, 4th Floor Newark, Ohio 43055	DAVID A. SAMS Post Office Box 40 West Jefferson, Ohio 43162

Wise, J.

{¶1} Appellant Darren M. Kvintus appeals his sentence and conviction entered in the Licking County Court of Common Pleas following a jury trial.

{¶2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} Defendant-Appellant Darren M. Kvintus was indicted by the Licking County Grand Jury on one count of Burglary in violation of R.C. §2911.12(A)(3), a felony of the third degree.

{¶4} A jury trial commenced in this matter on April 6, 2009. At trial, the following testimony and evidence was presented:

{¶5} Prosecution witness Marquis Crisp testified as follows:

{¶6} Defendant-Appellant had been at a party with Ms. Crisp and other friends on the evening of December 21, 2008 when Appellant had some type of problem with another guest by the name of Brian Trout, which Ms. Crisp tried to diffuse (T. at 54-58). Ms. Crisp then left with Mr. Trout and went back to her apartment (T. at 58). Appellant also left the party and arrived at her apartment shortly after they did. Id. Appellant pounded on Ms. Crisp's door and she cracked it open, holding her foot in front of it. Id. Appellant then inquired if Mr. Trout was in the apartment, claiming that he was going to assault him. Id. Ms. Crisp told Appellant that Mr. Trout was not there and Appellant replied that he knew Mr. Trout was in the apartment. Id. Appellant then forced his way in. Id. Ms. Crisp and Appellant then argued and Appellant hit Ms. Crisp, although Ms. Crisp later intimated that Appellant did not believe that he had hit her. Id. Ms. Crisp hit Appellant in return, an affray ensued between them and it sprawled out onto the

balcony. Id. Ms. Crisp admitted during cross-examination that Appellant had in the past stayed at her apartment with her permission. (T. at 61-62, 69).

{¶7} Defense witness Randall McPherson testified as follows:

{¶8} Mr. McPherson is the uncle of Appellant. (T. at 139). Mr. McPherson conceded that Appellant had been drinking at the aforementioned party and emphatically claimed that Ms. Crisp had also been drinking as well. (T. at 142). When he and Appellant arrived at Ms. Crisp's apartment, Appellant pounded on her door. (T. at 144). Ms. Crisp opened the door and Appellant took one step in. (T. at 144). Ms. Crisp then shoved Appellant and began to yell at him. (T. at 144-145). Ms. Crisp and Appellant then engaged in a mutual shoving match, when Ms. Crisp threw a punch at Appellant. (T. at 145). Mr. McPherson then grabbed Appellant in an effort to restrain him and prevent him from either assaulting Ms. Crisp, which he feared would be a natural reaction given Ms. Crisp's assault of Appellant, or from any further involvement with her (T. at 145-146). Mr. McPherson also testified that Ms. Crisp shoved Appellant first and threw the first punch. Id.

{¶9} At the conclusion of the trial, following deliberations, the jury found Appellant guilty as charged.

{¶10} Following a pre-sentence investigation, the trial court sentenced Appellant to 2 years in prison.

{¶11} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶12} "I. DEFENDANT-APPELLANT WAS DENIED DUE PROCESS BY AN INSUFFICIENT INDICTMENT WHICH FAILED TO ALLEGE RECKLESSNESS IN

VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTUTITON [SIC] AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶13} "II. DEFENDANT-APPELLANT WAS DENIED DUE PROCESS BY A JUDGMENT OF CONVICTION IN THE ABSENCE OF SUFFICIENT EVIDENCE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶14} "III. DEFENDANT-APPELLANT WAS DENIED DUE PROCESS BY A GUILTY VERDICT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

{¶15} "IV. DEFENDANT-APPELLANT WAS DENIED DUE PROCESS BY INSUFFICIENT JURY INSTRUCTIONS WHICH DID NOT INSTRUCT THE JURY ON RECKLESSNESS IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶16} "V. DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS SENTENCED IN THE ABSENCE OF A PRE-SENTENCE INVESTIGATION TO A NON-MINIMUM TERM IN VIOLATION OF R.C. 2929.14(B), ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION."

I., II., III., IV.

{¶17} We will address Appellant's first four assignments of error together as each is premised on Appellant's argument that the indictment is defective for failing to allege a mental state for the crime of burglary.

{¶18} Appellant herein specifically asserts that his indictment for burglary was defective, arguing that the "mens rea for "force, stealth, or deception" should have been recklessness" pursuant to *State v. Colon I*, 118 Ohio St.3d 26, 2008-Ohio-1624, 2008 (Appellant's Brief at 4).

{¶19} Appellant further argues this alleged deficiency in the indictment in the second, third and fourth assignments of error, arguing that the deficiency in the indictment so permeated the trial as to cause structural error, citing *Colon*, supra, because the evidence did not demonstrate that the crime of burglary was committed with the mental state of recklessness and the judge did not instruct the jury on the mental state of recklessness.

{¶20} Burglary, in violation of R.C. § 2911.12(A)(3), provides:

{¶21} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶22} "(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;" R.C. § 2911.12 (A)(3).

{¶23} R.C. §2911.10 provides that as used in R.C. §2911.12, "trespass" as an element of the offense refers to R.C. §2911.21:

{¶24} "(A) No person, without privilege to do so, shall do any of the following:

{¶25} "(1) Knowingly enter or remain on the land or premises of another;

{¶26} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

{¶27} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

{¶28} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either."

{¶29} Appellant's indictment for attempted burglary states:

{¶30} "Darren M. Kvintus, on or about the 21st day of December, 2008, in the County of Licking aforesaid or otherwise venued in Licking County pursuant to Ohio revised Code Section 2901.12, by force, stealth, or deception, did knowingly trespass in an occupied structure or in a separate secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure, any criminal offense."

{¶31} The *Colon* decision dealt with a robbery statute and did not address burglary statutes. Many Ohio courts have rejected the application of *Colon* to a charge

of aggravated burglary or burglary. See *State v. Goldick*, Montgomery App. No. 22611, 2009-Ohio-2177; *State v. Day*, Clark App. No. 07-CA-139, 2009-Ohio-56; *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453.

{¶32} In the case sub judice, *Colon I* does not apply to Appellant's indictment for burglary under R.C. §2911.11(A)(3) because burglary includes two mens rea elements; knowingly or recklessly trespass and purpose to commit any criminal offense. *State v. Smith,* Montgomery App. No. 07CA139, 2009-Ohio-56, at ¶ 76; *State v. Day,* Clark App. No. 07CA139, 2009-Ohio-56, at ¶ 22-23. An indictment setting forth a charged offense that tracks the language of the statute creating the offense does not have to set forth the elements of predicate offenses separately. *State v. Buehner,* 110 Ohio St.3d 403, 853 N.E.2d 1162, 2006-Ohio-4707. Unlike the robbery statute addressed in *Colon*, the level of intent to commit a burglary offense is clearly expressed in the statute, i.e., "with purpose to commit * * * any criminal offense." Therefore, the R.C. §2901.21 reckless catchall provision does not apply. *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453; *State v. Snow*, Summit App. No. 24298, 2009-Ohio-1336, ¶14.

{¶33} This Court has previously found an indictment for breaking and entering was not defective where the indictment mirrored the statutory language of R.C. §2911.13 and the mental state required for trespassing, namely knowingly, was incorporated by reference into the breaking and entering statute pursuant to R.C. §2911.10. *State v. Chatfield*, Licking App. No. 2008CA0034, 2009-Ohio-856, ¶64, 72.

{¶34} In the instant case, the indictment mirrors the statutory definition of burglary and trespassing. The indictment therefore put Appellant on notice that the

State was required to prove that Appellant knowingly trespassed with the purpose to commit a crime.

{¶35} Based on the foregoing analysis, we find that Appellant's indictment was not defective. As such, we find Appellant's arguments predicated on such assertion to not be well-taken.

{¶36} Appellant's first, second, third and fourth assignments of error are overruled.

V.

{¶37} In his fifth assignment of error, Appellant argues that it was error for the trial court to sentence him to a non-minimum term in the absence of a pre-sentence investigation. We disagree.

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

{¶39} Recently 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 *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶40} In *Kalish,* the Court discussed the affect 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 paragraphs 1 and 11, citing *Foster* at paragraph 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 paragraph 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 paragraph 13. See also *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶41} "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 paragraph 14.

{¶42} 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 paragraph 4; *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶43} 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 paragraph 18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable". *Kalish* at paragraph 20.

{¶44} Appellant further argues that in light of the decision of the United States Supreme Court in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517, it is necessary that Ohio trial courts return to the felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856.

{¶45} In *State v. Elmore,* 122 Ohio St.3d 472, 2009-Ohio-3478, the Ohio Supreme Court recently summarized *Oregon v. Ice* as "a case that held that a jury determination of facts to impose consecutive rather than concurrent sentences was not necessary if the defendant was convicted of multiple offenses, each involving discrete sentencing prescriptions." *Elmore* at ¶ 34. However, the Ohio Supreme Court did not

therein discuss all of the ramifications of *Ice,* as neither party in *Elmore* had briefed the issue prior to oral argument.

{¶46} In *State v. Mickens,* Franklin App.No. 08AP-743, 2009-Ohio-2554, the Tenth District Court of Appeals indicated that judicial review of some of Ohio's current sentencing statutes might be necessary in light of *Ice. Id.* at ¶ 25. However, the court was unwilling to tamper with the *Foster* holding, concluding that "such a look could only be taken by the Ohio Supreme Court, as we are bound to follow the law and decisions of the Ohio Supreme Court, unless or until they are reversed or overruled." *Id.* Accord *State v. Crosky,* Franklin App.No. 09AP-57, ¶ 7, citing *State v. Robinson,* Cuyahoga App.No. 92050, 2009-Ohio-3379, ¶ 29; *State v. Krug,* Lake App.No. 2008-L-085, 2009-Ohio-3815, f.n.1.

{¶47} We have previously held that *Ice* represents a refusal to extend the impact of the *Apprendi* and *Blakely* line of cases, rather than an overruling of them as suggested by Appellant. *State v. Argyle*, Delaware App. 09 CAA 09 0076. We will thus herein adhere to the Ohio Supreme Court's decision in *Foster,* which holds that judicial fact finding is not required before a court imposes non-minimum, maximum or consecutive prison terms. *State v. Hanning,* Licking App.No. 2007CA00004, 2007-Ohio-5547, ¶ 9. Trial courts have full discretion to impose a prison sentence within the statutory ranges, although *Foster* does require trial courts to "consider" the general guidance factors contained in R.C. §2929.11, and R.C. §2929.12. *State v. Duff,* Licking App. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282.

{¶48} Here, Appellant was found guilty of burglary. The trial court sentenced Appellant within the permissible statutory range for the offenses. See, R.C. §2929.14(A). We therefore find that such sentences were not contrary to law.

{¶49} At the time of sentencing, the trial court stated that it had heard all of the facts and circumstances regarding the case, that it had considered the victim in this case and that the purpose of sentence was to protect the public as well as punish the defendant. (T. at 196).

{¶50} In its Judgment Entry of Sentence, the trial court stated that it had considered its consideration of the record and the principles and purposes of sentences, as well as the seriousness and recidivism factors under R.C. §2929.11 and R.C. §2929.12.

{¶51} Although Appellant argues that the trial court erred by failing to order a presentence investigation report, Ohio law does not require the trial court to do this when sentencing a felon. The Ohio Supreme Court has held that a trial court need not order a pre-sentence report in a felony case when probation or a community control sanction is not granted. *State v. Cyrus* (1992), 63 Ohio St.3d 164, syllabus; see also Crim.R. 32.2; R.C. §2951.03(A)(1). Since the trial court did not order probation or a community control sanction, it did not err by proceeding immediately to sentencing.

{¶52} Based on the foregoing, we do not find the trial court abused its discretion in rendering its sentence.

{¶53} Appellant's fifth assignment of error is overruled.

{¶54} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES

JWW/d 128

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DARREN M. KVINTUS	:	
	:	
Defendant-Appellant	:	Case No. 09 CA 58

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES