

[Cite as *State v. Bigley*, 2009-Ohio-2943.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA0085-M

Appellee

v.

MARK BIGLEY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 06-CR-0313

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 22, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Mark Bigley, appeals from the decision of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} We considered this case in a previous appeal and summarized the facts as follows:

{¶3} “On June 14, 2006, Appellant, Mark Bigley, was indicted on six charges including three counts of felonious assault, in violation of R.C. 2903.11(A)(1), felonies of the second degree and three counts of endangering children, in violation of R.C. 2919.22(B)(1)(E)(1)(d), felonies of the second degree. The charges stemmed from multiple rib fractures sustained by Bigley’s infant son. Bigley initially pled not guilty to all charges. However, on October 6, 2006, Bigley changed his pleas. On that day, the State dismissed the felonious assault charges and Bigley pled guilty to the three counts of endangering children. Bigley was sentenced on November 13, 2006. The trial court noted in its November 16, 2006

judgment entry that it had considered ‘the principles and purposes of sentencing under Ohio Revised Code section 2929.11’. The trial court also stated in its entry that it was sentencing Bigley ‘to a mandatory prison term under division (F) of section 2929.13 of the Ohio Revised Code.’ Bigley was sentenced to eight years of incarceration on each count, to be served concurrently.

{¶4} “Bigley timely appealed the trial court’s order. However, this Court dismissed his appeal for lack of a final, appealable order. On June 1, 2007, the trial court issued a nunc pro tunc entry, in which it again included the language that it was sentencing Bigley ‘to a mandatory prison term under division (F) of section 2929.13 of the Ohio Revised Code.’ Bigley timely appealed from the trial court’s nunc pro tunc entry[.]” *State v. Bigley*, 9th Dist. No. 07CA0091-M, 2008-Ohio-4403, at ¶2-3.

{¶5} In our disposition of his second appeal, we determined that the trial court’s use of the word “mandatory” was erroneous and inconsistent with its statement that it considered “the principles and purposes of sentencing under Ohio Revised Code section 2929.11.” See *Bigley*, supra, at ¶7. Therefore, we reversed for resentencing. *Id.* On October 6, 2008, the trial court held a resentencing hearing and sentenced Bigley to an eight-year sentence on each count to be served concurrently. Bigley timely appealed from this decision. He has raised three assignments of error for our review, some of which we have combined for ease of review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT INCORRECTLY IMPOSED THE EIGHT YEAR CONCURRENT SENTENCE ON EACH COUNT OF CHILD ENDANGERING BECAUSE THE COURT FAILED TO CONSIDER AND IDENTIFY THE FACTORS OF SERIOUSNESS AND RECIDIVISM AS IDENTIFIED IN [R.C.] 2929.12 THAT IT HAD CONSIDERED AND FAILED TO WEIGH THESE FACTORS IN LIGHT OF THE PURPOSE AND PRINCIPLES OF

SENTENCING PER [R.C] 2929.11 AS REQUIRED BY *STATE V. KALISH*, 120 OHIO ST.3D 23, 2008-OHIO-4912.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT IMPROPERLY SENTENCED [BIGLEY] TO [AN] 8 YEAR TERM, AS THE COURT UNCONSTITUTIONALLY FOUND FACTS BY A PREPONDERANCE OF THE EVIDENCE EXPOSING [BIGLEY] TO AN ELEVATED UPPER TERM SENTENCE, THAT WAS ABOVE AND BEYOND THE STATUTORY MAXIMUM FOR THAT CHARGES (SIC), THUS VIOLATING [BIGLEY’S] RIGHT TO A JURY TRIAL.”

{¶6} In his first and second assignments of error, Bigley contends that the trial court improperly sentenced him to an eight-year term as the trial court failed to consider and identify the factors of seriousness and recidivism and because it considered and unconstitutionally found facts exposing him to an elevated upper term sentence, above and beyond the statutory maximum. We do not agree.

{¶7} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Court found that Ohio’s sentencing structure was unconstitutional to the extent that it required judicial fact-finding. *Id.* at paragraphs one through seven of the syllabus. In constructing a remedy, the Court excised the portions of the statute it found to offend the Sixth Amendment and thereby granted full discretion to trial court judges to sentence defendants within the bounds prescribed by statute. See *Id.*; *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶19.

{¶8} The *Foster* Court noted that “there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors.” *Foster*, *supra*, at ¶42. Moreover, post-*Foster*, it is axiomatic 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.* at paragraph seven of the syllabus. Therefore, post-*Foster*, trial courts are still required to consider

the general guidance factors in their sentencing decisions. In its journal entry, the trial court specifically stated that it had considered “the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code section 2929.11.”

{¶9} Following *Foster*, a plurality of the Supreme Court of Ohio declared that appellate courts should implement a two-step test when reviewing sentencing. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court stated:

“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 is reviewed under the abuse-of-discretion standard.” *Id.*

{¶10} Therefore, we must first determine if the sentence is contrary to law. “In so doing, we examine whether the trial court complied with applicable rules and statutes.” *State v. Coryell*, 9th Dist. No. 24338, 2009-Ohio-1984, at ¶12, citing *Kalish*, *supra*, at ¶26. Bigley was convicted of three second degree felonies. Accordingly, the trial court was permitted to utilize its discretion to sentence him within the range of two to eight years of incarceration for each conviction. R.C. 2929.14(A)(2). Bigley was sentenced to eight years on each of his convictions, to be served concurrently. Therefore, Bigley’s sentences fall within the statutory range set forth in R.C. 2929.14. Next, we must determine whether the trial court abused its discretion in imposing the sentence. *Kalish*, *supra*, at ¶26.

{¶11} R.C. 2929.11 provides in pertinent part as follows:

“(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others

from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

“(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶12} In his first assignment of error, Bigley contends that because the trial court did not specifically enumerate the factors that it considered pursuant to R.C. 2929.12, it failed to balance the seriousness and recidivism factors under R.C. 2929.12. This argument is without merit.

{¶13} R.C. 2929.12(A) states, in pertinent part, that

“a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender’s recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.”

{¶14} Although it is clear from the record on appeal that the trial court considered the factors set forth in R.C. 2929.12 regarding the seriousness of Bigley’s conduct and his likelihood of recidivism, there is no requirement under R.C. 2929.12 that the trial court on the record provide an analysis of the factors it considered. Rather, pursuant to *Foster*, the trial court was simply required to *consider* these factors. Further,

“[i]f a sentence is within the statutory range for the particular offense, it is presumed that the court considered the relevant statutory sentencing factors. *State v. Slone*, [2d Dist. Nos.] 2005CA79, 2006CA75, 2007-Ohio-130. ‘A silent record raises the presumption that the trial court considered the factors contained in R.C. 2929.12.’ *State v. Adams* (1988), 37 Ohio St.3d 295, at paragraph three of the [s]yllabus. To rebut the presumption, a defendant must either affirmatively show that the court failed to do so, *State v. Crouse* (1987), 39 Ohio App.3d 18, or that the sentence the court imposed is ‘strikingly inconsistent’ with the statutory factors as they apply to his case. *State v. Garrison* (1997), 123 Ohio App.3d 11; *State v. Flors* (1987), 38 Ohio App.3d 133.” *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, at ¶34.

{¶15} While Bigley does not make an attempt to rebut this presumption in his first assignment of error, he contends in his second assignment of error that the trial court sentenced him to more than the maximum sentence for his convictions.

{¶16} Specifically, he contends that the trial court's sentence of eight years was "way beyond the statutory maximum," and was based on factors outside the charged elements and not proven by a reasonable doubt. Initially, we note that Bigley has not explained what these outside factors were, nor does he cite to any place in the record to support this contention. App.R. 16(A)(7), App.R. 12(A)(2). Further, our review of the record does not support his argument that the trial court improperly considered any outside factors.

{¶17} As we stated above, post-*Foster*, the trial court had the discretion to sentence Bigley within the statutory range. *Foster*, supra, at paragraph seven of the syllabus. We further explained that the trial court was permitted to sentence him within the range of two to eight years of incarceration for each conviction, and therefore his sentence was not contrary to law. R.C. 2929.14(A)(2). As Bigley has failed to rebut the presumption that the trial court properly considered the factors in R.C. 2929.12, we conclude that the trial court did not abuse its discretion in sentencing Bigley. Bigley's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

“THE SENTENCING OF [BIGLEY], WITHOUT MAKING THE FINDS (SIC) REQUIRED BY R.C. 2929.14(B)(C) AND R.C. 2929.14(E), AFTER THE SEVERANCE IN FOSTER OPERATED AS AN EX POST FACTO LAW AND DENIED [BIGLEY] DUE PROCESS.”

{¶18} In his third assignment of error, Bigley contends that the trial court erred by not making the findings required by R.C. 2929.14(B)(C) and (E) in violation of the due process and ex-post facto clauses of the United States Constitution. We do not agree.

{¶19} Bigley contends that the remedy outlined in *Foster* violates the ex-post facto and due process clauses of the United States Constitution because it allowed him to be sentenced to a non-minimum term without the trial court having to make any findings on the record as was previously required by R.C. 2929.14(B), (C), and (E). We have previously determined that the remedy in *Foster* does not violate the due process and ex-post facto clauses of the United States Constitution. *State v. Rowles*, 9th Dist. No. 24154, 2008-Ohio-6631, at ¶10. We have repeatedly stated that “[w]e are obligated to follow the Ohio Supreme Court’s directive and we are, therefore, bound by *Foster*. Furthermore, we are confident that the Supreme Court would not direct us to violate the Constitution.” *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082, citing *U.S. v. Wade* (C.A.8, 2006), 435 F.3d 829, 832 (holding that the Eighth Circuit is required to follow the directive of the U.S. Supreme Court and presumes that the U.S. Supreme Court would not order a court to violate the Constitution). As this Court cannot overrule or modify *Foster*, we decline to consider Bigley’s challenges thereto. Accordingly, Bigley’s third assignment of error is overruled.

III.

{¶20} Bigley’s assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.