

[Cite as *State v. Phillips*, 2010-Ohio-752.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NOS. 08 MA 217
)	08 MA 218
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
RODNEY PHILLIPS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeals from the Court of Common Pleas of Mahoning County, Ohio
Case Nos. 07 CR 772; 08 CR 713A

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
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For Defendant-Appellant: Atty. Wesley A. Johnston
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Dated: February 24, 2010

WAITE, J.

{¶1} In these consolidated appeals, Appellant, Rodney Phillips, appeals his conviction and sentencing involving two crimes: felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree, and attempted robbery, a violation of R.C. 2911.02(A)(3)(B) and 2923.02, a felony of the fourth degree.

{¶2} Appellant contends that the trial court violated Crim.R. 11(C) when it failed to conduct separate hearings as to waiver of his constitutional rights for each of his crimes. Appellant further contends that his sentence is constitutionally infirm because it was imposed pursuant to the severance remedy announced in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶3} There is no evidence on the record that Appellant misunderstood the fact that he was waiving his constitutional rights with respect to both crimes by entering his guilty pleas. Therefore, the plea agreements in both cases are valid. Further, Appellant's challenges to his sentence based upon the alleged unconstitutionality of the *Foster* decision have been previously rejected by both the United States Supreme Court and the Ohio Supreme Court. Hence, Appellant's assignments of error are overruled and both his convictions and their sentence are affirmed.

{¶4} Appellant was indicted on one count of felonious assault on July 12, 2007. While that case was pending, Appellant was indicted in a second matter on one count of robbery, a violation of R.C. 2911.02(A)(3)(B), a felony of the third

degree, and one count of impersonating a peace officer, a violation of R.C. 2921.51(F)(G), a felony of the third degree.

{¶15} On August 5, 2008, Appellant pleaded guilty to one count of felonious assault, as charged in the first indictment, and to one count on a reduced charge of attempted robbery stemming from the second indictment. In exchange for his plea, the state agreed to dismiss the charge of impersonating a police officer, and to recommend a four-year sentence on the felonious assault charge and a concurrent six-month sentence on the attempted robbery charge. The state also agreed to stand silent on Appellant's motion for judicial release. During the plea colloquy, the trial court addressed Appellant's waiver of his constitutional rights simultaneously on both charges.

{¶16} At the sentencing hearing conducted on September 30, 2008, the trial court imposed a four-year sentence for felonious assault and an eighteen-month sentence for attempted robbery, to be served consecutively. The court concluded that Appellant had not responded favorably to previously imposed sanctions based upon Appellant's, "history of criminal convictions," as well as the fact that the attempted robbery was committed while the felonious assault charge was pending. (9/30/08 Hrg., p. 7.) The trial court also predicated the sentence on the fact that the victim of the assault suffered serious physical harm and that Appellant's relationship with the victim facilitated the crime.

Assignment of Error No. 1

{¶7} “The plea should be invalidated because the trial court failed to comply with all parts of Criminal Rule 11(C)(2)(c) in conducting the plea colloquies and that that invalidates the plea in these cases.”

{¶8} A guilty plea to a criminal charge must be made “knowingly, intelligently, and voluntarily.” *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. Failure on any of these points, “renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.” *Id.* A determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351.

{¶9} To ensure that guilty pleas are entered knowingly, intelligently, and voluntarily, Crim.R. 11(C)(2) sets forth certain procedures the trial court must follow before accepting such pleas in felony cases. Before the court can accept a guilty plea on a felony charge, it must conduct a colloquy with the defendant to determine that the defendant understands the plea and the rights he is waiving by entering that plea. Crim.R. 11(C)(2).

{¶10} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives in entering his guilty plea. “A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one’s accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove

guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R.11(C)(2)(c), applied.)” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus.

{¶11} Appellant essentially concedes that the trial court reviewed the constitutional rights that he agreed to waive, but argues that the trial court should have discussed each of these rights separately on each of the two criminal cases against him.

{¶12} The record shows that the trial court did not explicitly state that Appellant's waiver of rights applied to both charges with respect to each and every right addressed. However, it is clear from the record that Appellant understood that his waiver of those rights applied to both charges.

{¶13} The trial court began its colloquy by saying, “[l]et's do [the pleas] together so I only have to do the rights once.” (8/5/08 Hrg., p. 2.) Appellant's trial counsel agreed to the simultaneous pleas. (8/5/08 Hrg., p. 2.) The trial court later told Appellant directly, “I am going to go over these agreements with you at the same time, all right?” (8/5/08 Hrg., p. 4.) The trial court addressed the crimes of felonious assault and attempted robbery separately. (8/5/08 Hrg., p. 5-6.) The trial court specifically referred to the fact that the waiver applied to Appellant's rights with respect to both charges when it discussed the state's burden of proof at trial, and Appellant's right to compulsory process and cross examination of witnesses. The trial court stated, “[t]hese rights apply to both cases.” (8/5/08 Hrg., p. 7.)

{¶14} We addressed a similar challenge to validity of a plea colloquy last year in *State v. Docgrand*, 7th Dist. Nos. 08 MA 249, 08 MA 250, 08 MA 251, 2009-Ohio-5077:

{¶15} “Appellant has pointed to no caselaw or criminal rule that requires the trial court to hold separate change of plea hearings for a defendant who has signed multiple plea agreements, all of which are pending before the court at the same time. Combined plea hearings are a common occurrence in Ohio. *State v. Hartman*, 8th Dist. No. 91611, 2009-Ohio-2876 (one plea hearing for six separate indictments); *State v. Horner*, 6th District No. L-08-1125, 2009-Ohio-1815, ¶5 (one plea hearing for two defendants with separate indictments); *State v. Goyman*, 3rd Dist. Nos. 10-06-23, 10-06-24, 2007-Ohio-215, ¶4 (one plea hearing for two separate criminal cases)”.
Id. at ¶16.

{¶16} As in the *Docgrand* case, Appellant does not argue that there was some difference between the two pending cases that would require a separate or different explanation from the trial court as to the constitutional rights that were being waived. Both cases involved felony charges and the same constitutional rights were being waived in each case. In conformance with Crim.R. 11(C)(2), the court addressed Appellant personally regarding all the constitutional rights that he was waiving by entering a guilty plea. Thus, the court strictly complied with the requirements of the criminal rule. The trial court also reviewed the details of each indictment separately, including the specific charges and potential penalties for each

crime, so there was no confusion that the change of plea hearing was somehow limited to one particular indictment.

{¶17} We characterized the challenge to the plea colloquy in *Docgrand* as a due process claim, rather than a claim based upon the voluntary nature of the plea. Because *Docgrand* could not demonstrate any prejudice as a result of the simultaneous plea colloquies, we rejected the argument on due process grounds. *Id.*, ¶18. Like *Docgrand*, Appellant has not shown any prejudice, nor can any prejudice be gleaned from the record.

{¶18} Accordingly, Appellant's first assignment of error is overruled.

Assignment of Error No. 2

{¶19} "The Trial Court improperly sentenced Appellant to 4 year term, [sic], consecutive to 18 [sic] month prison term, as the Court unconstitutionally found facts by a preponderance of the evidence exposing Appellant to an elevated upper term sentence, that was above and beyond the statutory maximum for that charges [sic] and unconstitutionally ran them consecutively, thus violating Appellant's right to a jury trial."

{¶20} In his second assignment of error, Appellant asserts that the United States Supreme Court's decision in *Cunningham v. California* (2007), 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856, prohibits a state court from applying the severance remedy announced in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, to state sentencing statutes. However, in *State v. Aaron*, 7th Dist. No. 07-HA-1, 2008-Ohio-1186, we recognized that the *Cunningham* Court specifically

authorized state courts, “to permit judges genuinely ‘to exercise broad discretion ... within a statutory range,’ which, ‘everyone agrees,’ encounters no Sixth Amendment shoal.” *Aaron* at ¶11, quoting *Cunningham* at 871. We note that other appellate districts have rejected arguments that *State v. Foster* is inconsistent with *Cunningham*. See *State v. Appenzeller*, 11th Dist. No. 2009-L-027, 2009-Ohio-6384, ¶10; *State v. Montgomery*, 4th Dist. No. 07CA858, 2008-Ohio-4753, at ¶29-31; and *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶48-49.

{¶21} Appellant also argues that, “the court imposed 4 years, way beyond the statutory maximum, minimum (also recognizing that imprisonment time should be served concurrently with other imprisonment time) without consideration of statutory considerations and on the basis of factors outside the charge elements and not proved beyond a reasonable doubt, was unconstitutional for the Courts and an abuse of discretion.” (Appellant’s Brf., p. 10.) To the extent that Appellant appears to argue that the four year sentence exceeds the statutory maximum for a second degree felony, he is incorrect. Eight years is the maximum penalty for a felony of the second degree. R.C. 2929.14.

{¶22} Appellate review of felony sentences involves a two-pronged inquiry. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26 (plurality). First, an appellate court 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.” *Id.*

{¶23} In examining “all applicable rules and statutes,” the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶13-14. If the sentence is not clearly and convincingly contrary to law, the sentencing court’s exercise of discretion “in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion.” *Id.* at ¶17. The Ohio Supreme Court has held that the trial court has the discretion to determine the weight to assign a particular statutory factor. *State v. Arnette* (2000), 88 Ohio St.3d 208, 215, 724 N.E.2d 793.

{¶24} Appellant’s sentence is 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. The individual sentences were not outside the permissible range and Appellant does not contend that the trial court failed to fulfill any specific sentencing notification requirements, i.e. postrelease control. Accordingly, the respective sentences are not clearly and convincingly contrary to law.

{¶25} Next, we must determine whether the trial court abused its discretion. An abuse of discretion is, “ ‘more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’ ” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶26} Here, the trial court relied on several factors listed in R.C. 2929.12(B) and (D) when imposing the sentence. Because the trial court’s sentence is premised on its consideration of the general sentencing statutes, Appellant cannot show that the trial court abused its discretion when it imposed the five and a half year sentence.

{¶27} Accordingly, Appellant's second assignment of error is overruled.

Assignment of Error No. 3

{¶28} "The sentencing of Appellant, without making the finds [sic] required by R.C. 2929.14(B)(C) and R.C. 2929.14(E), after the severance in Foster [sic] operated as an ex post facto law and denied Appellant Due Process."

{¶29} Appellant contends that his sentence, which was imposed based on the Ohio Supreme Court's decision in *Foster*, supra, violates his due process rights as well as his right to be free from ex post facto laws. The Ohio Supreme Court rejected the same arguments last year in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582.

{¶30} As in *Elmore*, Appellant cites *Miller v. Florida* (1987), 482 U.S. 423, 107 S.Ct. 2446, for the proposition that the *Foster* remedy changed the actual terms of the sentencing statutes and must be viewed as an implied legislative change that is barred by ex post facto limitations. However, the Ohio Supreme Court distinguished *Miller*, because the presumptive prison range for the Florida statute at issue in that case was changed by the legislature. *Elmore* at ¶19. Because *Elmore* was always subject to the same sentencing range for his crimes, the Ohio Supreme Court concluded that, where there is no increased presumptive sentence, there is no ex post facto violation. *Id.*, ¶21. The same is true in the case sub judice.

{¶31} *Elmore* also challenged the application of *Foster* as violating his right to due process. However, the Ohio Supreme Court concluded that no due process violation occurred because *Elmore's* sentencing range was the same at the time he

committed the offenses as when he was resentenced. *Id.*, ¶24. Furthermore, Elmore, “never had an irrebuttable presumption of minimum and concurrent sentences.” *Id.* Appellant’s sentencing range did not change from the time he committed the offenses to the time he was sentenced. Consequently, Appellant’s due process claim is meritless.

{¶32} Accordingly, Appellant’s three assignments of error are overruled and his convictions and sentences in these consolidated appeals are affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.