

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-09-027

Appellee

Trial Court No. 08CR001391

v.

John H. Donald

DECISION AND JUDGMENT

Appellant

Decided: June 18, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Dean E. Ross, Special Assistant Prosecuting Attorney, for appellee.

Christian R. Moore, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a sentence of the Sandusky County Court of Common Pleas. Appellant's appeal is limited to the propriety of his sentence. It does not dispute the underlying conviction. For the reasons set forth below, this court affirms the sentence of the trial court.

{¶ 2} Appellant, John H. Donald, sets forth the following two assignments of error:

{¶ 3} "I. The trial court abused its discretion by failing to consider the purposes and factors of R.C. § 2929.11 and R.C. § 2929.12.

{¶ 4} "II. The trial court erred when it sentenced defendant-appellant to consecutive sentences without making findings required under R.C. § 2929.14."

{¶ 5} Appellant was indicted on four counts of failure to pay child support, in violation of R.C. 2919.21(B), a felony of the fifth degree. On April 30, 2009, appellant entered a no contest plea on two of the counts in exchange for dismissal of the remaining charges. On July 14, 2009, appellant was sentenced to serve consecutive 11-month terms of incarceration on each count. This sentence was made consecutive to an earlier 11-month sentence imposed by Erie County. The prior Erie County conviction likewise stemmed from another failure to pay child support conviction, in violation of R.C. 2919.21(B).

{¶ 6} In his first assignment of error, appellant asserts that the trial court abused its discretion in sentencing by failing to consider the purposes and factors of R.C. 2929.11 and 2929.12. The Supreme Court of Ohio has established a two-step procedure for reviewing a felony sentence. *State v. Kalish* (2008), 120 Ohio St.3d 23. The first step is to "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. The second step requires the trial court's decision be "reviewed under an abuse-of-discretion standard." Id.

{¶ 7} Appellant has conceded that the trial court sentencing fell within the statutory range and thus meets the criteria of the first step. We note that where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." Id. at 27, fn. 4 (citing *State v. Adams* (1988), 37 Ohio St.3d 295, paragraph three of the syllabus). Nevertheless, the record clearly reflects that the trial court considered appellant's recidivism as the primary factor in crafting the sentence. Furthermore, the trial court reviewed the presentence investigation which appellant's counsel confirmed was substantially accurate. The record is clear that appellant's sentence was based upon the trial court's proper consideration of relevant factors. It cannot be stated that the trial court abused its discretion when imposing consecutive sentencing. Wherefore, we find appellant's first assignment of error not well-taken.

{¶ 8} In his second assignment of error, appellant asserts that the trial court erred when it sentenced defendant-appellant to consecutive sentences without making findings required under R.C. 2929.14(E). Appellant argues that the United States Supreme Court decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, requiring judges to make findings of fact prior to imposing consecutive sentences, should apply to R.C. 2929.14(E). We have repeatedly held that *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, is the controlling law with regards to this issue. It is clear that "*Foster* held several of Ohio's

sentencing statutes unconstitutional in violation of the Sixth Amendment to the United States Constitution in the manner enumerated in *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296." *State v. Calevero*, 6th Dist. No. WD-06-012, 2007-Ohio-1321, ¶ 13. Since that ruling, trial courts have no longer been required to make specific findings of fact or give their reasons for imposing maximum, consecutive, or more than minimum sentences. *Id.* at ¶ 14. Thus, *Foster* vests trial courts with full discretion to impose any duration of prison sentence which falls within the statutory range. *Id.* at ¶ 14. Wherefore, we find appellant's second assignment of error not well-taken.

{¶ 9} The judgment of the Sandusky County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.