

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                      |   |                           |
|----------------------|---|---------------------------|
| State of Ohio,       | : |                           |
|                      | : | No. 09AP-73               |
| Plaintiff-Appellee,  | : | (C.P.C. No. 08CR-07-4890  |
|                      | : | No. 09AP-74               |
| v.                   | : | (C.P.C. No. 08CR-07-3166) |
| Michael Vaughn II,   | : | (REGULAR CALENDAR)        |
| Defendant-Appellant. | : |                           |

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D E C I S I O N

Rendered on September 22, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

*Carpenter Lipps & Leland LLP*, and *Kort Gatterdam*, for appellant.

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APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Michael Vaughn II, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty, pursuant to guilty plea, and sentencing him to a total of 21 years of incarceration. Defendant assigns a single error:

The trial court erred in sentencing Appellant to maximum prison terms for involuntary manslaughter and robbery; and by running these sentences consecutively rather than concurrently to each other; and by sentencing Appellant to more than the minimum sentences, in contravention of the Sixth Amendment to the United States Constitution and the

*Ex Post Facto* and Due Process Clauses of the United States Constitution. *Blakely v. Washington* (2004), 542 U.S. 296; *United States v. Booker* (2005), 543 U.S. 220. The trial court abused its discretion in imposing these sentences on a first time adult felon when the state was not requesting either consecutive or maximum sentences.

Because the trial court (1) properly followed the Ohio Supreme Court's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 and (2) did not abuse its discretion in imposing its sentence on defendant, we affirm.

### **I. Procedural History**

#### A. Case No. 08CR-07-3166

{¶2} Defendant originally was indicted in case No. 07CR-8305, but he was re-indicted in case No. 08CR-07-3166 on April 28, 2008, per *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. The indictment charged defendant with eight counts of robbery in violation of R.C. 2911.02, each with a firearm specification pursuant to R.C. 2941.145. Four counts were charged as felonies of the second degree; four were charged as felonies of the third degree. All arose out of a theft at the Kent Market on November 8, 2007.

{¶3} Although defendant initially entered a not guilty plea, he changed his plea, pursuant to a plea agreement with the prosecution, to guilty to two counts of robbery as felonies of the second degree and one gun specification. In exchange, the state dismissed the remaining charges.

#### B. Case No. 08CR-07-4890

{¶4} By indictment filed on July 2, 2008, defendant was charged with aggravated murder in violation of R.C. 2903.01, and aggravated robbery in violation of R.C. 2911.01,

both with a firearm specification pursuant to R.C. 2941.145 and a repeat violent offender specification pursuant to R.C. 2941.149. In addition, he was charged with one count of having a weapon while under disability in violation of R.C. 2923.13. The charges arose out of the death of Ricky Palmer during a robbery.

{¶5} Although defendant initially entered a not guilty plea, he entered a plea on December 12, 2008 pursuant to *N. Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160 to involuntary manslaughter, the stipulated lesser included offense of aggravated murder, without specifications. As a result of his plea, the state dismissed the remaining charges and the specification.

### C. Sentencing

{¶6} On December 19, 2008, the trial court sentenced defendant in both cases, joined pursuant to the state's motion. After listening to the prosecution, the victim's family, defense counsel, and defendant, the trial court imposed a maximum sentence of eight years on each of the two robbery counts in case No. 08CR-07-3166. Determining that no separate animus existed, the court ordered they be served concurrently, but consecutively to the three years imposed on the gun specification. In case No. 08CR-07-4890, the court imposed a maximum sentence of ten years to be served consecutively to the sentence in case No. 08CR-07-3166. As a result, defendant was sentenced to a total of 21 years of incarceration.

## **II. Assignment of Error**

{¶7} In his single assignment of error, defendant asserts (1) the trial court's sentence is unconstitutional because it violates the Sixth Amendment to the United States Constitution and the ex post facto and due process clauses of the United States

Constitution, and (2) the trial court abused its discretion in imposing the sentences under the circumstances present here.

A. Constitutional Argument

{¶8} In *Foster*, "the Ohio Supreme Court held that, under the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, portions of Ohio's sentencing scheme were unconstitutional because they required judicial fact finding before a defendant could be sentenced to more than the minimum sentence, the maximum sentence, and/or consecutive sentences." *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904. To remedy the situation, "the Ohio Supreme Court severed the offending sections from Ohio's sentencing code. Thus, pursuant to *Foster*, 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 minimum sentences." *Id.* citing *Foster* at ¶100.

{¶9} In *Houston*, this court addressed and rejected the constitutional arguments defendant raises on appeal. "Specifically, in *Houston*, we concluded that the *Foster* severance remedy does not violate a defendant's due process rights and right against ex post facto laws" because defendants "had notice 'of the potential sentences at the time they committed their crimes, and because the remedial holding of *Foster* was not unexpected[.]'" *State v. Lariva*, 10th Dist. No. 06AP-758, 2007-Ohio-1012, ¶11, quoting *Houston* at ¶4.

{¶10} While defendant contends *Foster* is unconstitutional, the Ohio Supreme Court, subsequent to the parties' briefs in this court, issued its decision in *State v. Elmore*, \_\_\_ N.E.2d \_\_\_, 2009-Ohio-3478, ¶11, reaffirming the discretion afforded the trial court in sentencing under *Foster* and rejecting the Sixth Amendment, due process and ex post facto arguments defendant asserts here. Accordingly, under the Supreme Court's most recent pronouncement on the issues defendant raises, the trial court did not violate defendant's rights under the Sixth Amendment, his due process rights or his protections against ex post facto laws when it sentenced him to a maximum term of incarceration.

#### B. Abuse of Discretion Argument

{¶11} Defendant next argues that, even if the sentencing scheme since *Foster* does not violate defendant's constitutional rights, the trial court nonetheless abused its discretion in imposing a maximum sentence. The first issue arising from the parties' briefs is the standard of review to be applied to defendant's contentions.

{¶12} Pursuant to R.C. 2953.08(G), an appellate court may modify a sentence or may remand for resentencing if the court clearly and convincingly finds the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660. This court held that R.C. 2953.08(G) requires us, in post-*Foster* cases, to continue to review felony sentences under the clear and convincing as contrary to law standard. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the

sentence is otherwise contrary to law.' " *Id.* quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶13} After *Burton*, the Ohio Supreme Court issued its decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In it, the plurality opinion decided an "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)." *Id.* at ¶14.

{¶14} *Kalish* clarified that once an appellate court has determined the sentence is not contrary to law, the court must consider the trial court's application of R.C. 2929.11 and 2929.12 in light of *Foster*, which gave the trial court "full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *Id.* at ¶17. Considering also that R.C. 2929.12 "explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing[.]" *Kalish* concluded that "[i]t naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Id.* The plurality opinion secured a fourth vote, with a separate opinion, that would apply a "contrary to law" standard to determine whether the trial court considered the R.C. 2929.11 and 2929.12 factors, but would apply an abuse of discretion standard to the trial court's consideration of the factors in R.C. 2929.12(B) through (D) since they are discretionary. Whether we apply a contrary to law standard or an abuse of discretion standard, defendant's contentions are unavailing.

{¶15} During the plea proceedings, the prosecution recited what its evidence would have shown. According to those statements, defendant in case No. 08CR-07-3166

entered the Kent Street Market at 1656 Kent Street with three other individuals on November 8, 2007 at 6:40 p.m. They displayed handguns and ordered everybody onto the floor; they then demanded money. In the store were Muktar Ibrahim, the night manager of the store, as well as Robert McKinney and Antoine Mills. When Ibrahim and Mills turned over their wallets, the robbers took the wallets, took money from the cash register, and attempted to exit. On seeing police entering the scene, the four suspects dropped their handguns and ran out the back of the store. They were apprehended without incident.

{¶16} According to plea proceedings in case No. 08CR-07-4890, Ricky Palmer, the victim, was sitting in his vehicle on June 19, 2008 at approximately 1:00 a.m. in front of 411 S. Ohio Street. As a woman who earlier had been a passenger in his vehicle returned, defendant and another male standing next to the passenger side of the front door approached. The female was between them and began to ask them why they were next to the victim's vehicle. One of the two pulled a handgun, pointed at the victim through the passenger door window and demanded his car keys. When the victim attempted to drive away, the armed individual fired his weapon. The victim drove southbound to where his vehicle ultimately stopped. Police found him minutes later unconscious. The victim died at 3:00 a.m. from the gunshot wound.

{¶17} Although the trial court considered a presentence investigation, the document was not included in the record on appeal. The record, nonetheless, indicates defendant "had a troubled childhood, that he was in and out of trouble on many different occasions[.]" (Dec. 19, 2008 Tr. 10-11.) Despite those difficulties, he was able to graduate from high school.

{¶18} Dr. Tecklenburg performed a competency evaluation of defendant and in doing so referred to several prior reports. Dr. Tecklenburg indicated defendant, who suffered "severe emotional problems," was a follower who was easily drawn into negative peer intervention. (Tr. 12.) According to Dr. Tecklenburg, defendant "acts impulsively[,] \* \* \* makes poor decisions," and "can only work in complete isolation from others." (Tr. 12.) Counsel for defendant further noted defendant's remorse and his respectful behavior not only to the court but to members of his family.

{¶19} The overriding purposes of felony sentencing must guide a court that sentences an offender for a felony. R.C. 2929.11(A). Those purposes "are to protect the public from future crime by the offender and others and to punish the offender." *Id.* To carry out 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." *Id.* Thus, a felony sentence "shall be reasonably calculated to achieve the two overriding purposes of felony sentencing" set forth in R.C. 2929.11(A). R.C. 2929.11(B). The sentence must be "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." *Id.*

{¶20} In addition to the factors set forth in R.C. 2929.11, a trial court must consider the seriousness and recidivism factors outlined in R.C. 2929.12 to ensure that a sentence complies with the overriding principles of felony sentencing enunciated in R.C. 2929.11. R.C. 2929.12(A); *State v. Arnett*, 88 Ohio St.3d 208, 213, 2000-Ohio-302. R.C.



2929.12(A) allows the trial court to consider also "any other factors that are relevant" to the principles of felony sentencing.

{¶21} Here, the trial court's sentencing entry expressly states that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." This court held such language in a trial court's judgment entry belies a defendant's claim that the trial court failed to consider the purposes of felony sentencing as required in R.C. 2929.11 and 2929.12. *State v. Daniel*, 10th Dist. No. 05AP-564, 2006-Ohio-4627, ¶50. See also *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶27 (stating that "a rote recitation by the trial court that it has considered applicable factors under R.C. 2929.12 is sufficient for the trial court to satisfy its duty"); *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448, ¶6 (noting a judgment entry stating the court considered the purposes and principles of sentencing supports a conclusion that a trial court considered the requisite statutory factors prior to sentencing defendant).

{¶22} Moreover, on the facts of this case, the trial court's maximum sentence was neither contrary to law nor an abuse of discretion. It falls within the range of sentences allowed for violation of the offenses at issue. In addition, the trial court explained its rationale in imposing the sentences recorded in the two judgment entries of December 23, 2008. The trial court acknowledged defendant is not a psychopath, but a "feeling human being." (Tr. 21.) The trial court further acknowledged defendant's psychological problems and difficulties with impulse control. As the court stated, "I do think that in some respects you probably are a decent human being, respectfulness that you have shown to others, your family, that sort of thing." (Tr. 22.)

{¶23} At the same time, however, the court stated defendant had "shown no ability to conform [his] conduct to the norms of society." (Tr. 22.) The court first outlined defendant's criminal record beginning with his 2002 adjudication as a delinquent. It also observed that in the robbery defendant was the only adult among the robbers. Finally, it noted defendant committed the last of the offenses subject to sentencing when defendant inadvertently was released on his own recognizance in one of the two cases before the court. Given those circumstances, the trial court concluded defendant is "as great a danger to society as anybody I have seen." (Tr. 25.)

{¶24} The trial court recognized defendant's cooperation in testifying against his co-defendant in the trial arising from the death of Ricky Palmer. Although the trial court believed defendant did a "great thing" in cooperating, the court advised defendant had reaped the benefits when the prosecution dismissed the aggravated murder charge. The trial court said it would grant defendant no further benefits for his testimony. Ultimately, the trial court concluded it had a duty to impose consecutive sentences "to protect the public from further crime and to punish you for your crime." (Tr. 25.)

{¶25} In the final analysis, we cannot say the trial court either imposed a sentence contrary to law or abused its discretion in sentencing defendant to the maximum term of incarceration in case No. 08CR-07-4890 and in running the sentence consecutive to that imposed for the robbery in case No. 08CR-07-3166. The robbery of the Kent Market had innocent victims handing over their wallets at gunpoint, and the shooting involved a victim with apparently no connection to defendant or his co-defendant. Accordingly, defendant's contentions regarding the sentence imposed are unpersuasive.

{¶26} For the foregoing reasons, defendant's single assignment of error is overruled and the judgments of the trial court are affirmed.

*Judgments affirmed.*

SADLER and TYACK, JJ., concur.

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