[Cite as *State v. Mickens,* 2010-Ohio-2852.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	Nos. 09AP-993 (C.P.C. No. 04CR-01-528)
v.	:	& 09AP-994 (C.P.C. No. 04CR-05-2952)
Montez E. Mickens,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 22, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher,* for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling,* for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Montez E. Mickens, appeals from judgments of the Franklin County Court of Common Pleas sentencing defendant to two years of imprisonment for burglary, a felony of the second degree, and one year of imprisonment for each of ten counts of burglary, felonies of the third degree, all to be served consecutively. Because the trial court (1) did not err in imposing consecutive sentences

without making the statutory findings contained in R.C. 2929.14(E)(4), severed under the Supreme Court of Ohio's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and (2) did not err in its statements regarding concurrent sentences, we affirm.

I. Facts and Procedural History

{¶2} On July 15, 2005, defendant entered a guilty plea to (1) one count of burglary, a felony of the second degree, in case No. 04CR-528, case No. 09AP-993 on appeal; (2) ten counts burglary, a felony of the third degree, in case No. 04CR-2952, case No. 09AP-994 on appeal; and (3) one count of aggravated robbery, a felony of the first degree, with a firearm specification, in case No. 05CR-447. On September 13, 2005, the trial court sentenced defendant to an aggregate term of 18 years in prison ("first sentencing").

{¶3} Defendant did not timely appeal but filed a habeas corpus petition in federal district court. On June 4, 2008, defendant's petition was granted to the extent that the federal district court vacated defendant's sentence because it "violated *Blakely* [*v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531]" and ordered the state to resentence defendant within 60 days or release him. *Mickens v. Moore* (June 4, 2008), S.D. Ohio No. 2:07-CV-421.

{¶4} On July 30, 2008, defendant appeared for resentencing in the Franklin County Court of Common Pleas ("second sentencing"). At that time, the trial court sentenced defendant to consecutive prison terms for his offenses, resulting in an aggregate term of 17 years of incarceration. The trial court explained it felt consecutive sentences were appropriate since each offense involved different victims. Defendant timely appealed his sentence. On June 2, 2009, this court reversed defendant's sentence

because the trial court failed to advise defendant at his resentencing of the terms of post-release control. *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554.

{¶5} On September 23, 2009, defendant again appeared before the Franklin County Court of Common Pleas for resentencing ("third sentencing"). At the sentencing hearing, the trial court imposed an aggregate sentence of 16 years: two years for burglary in case No. 09AP-993, one year for each of the ten burglary counts in case No. 09AP-994, and three years, plus one year on the firearm specification, for case No. 05CR-447, all to be served consecutively.

II. Assignments of Error:

{¶6} Defendant timely appeals his sentences in case Nos. 09AP-993 and 09AP-994, assigning the following errors:

> ASSIGNMENT OF ERROR NUMBER ONE
>
> THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. 2929.14(E)(4).
>
> ASSIGNMENT OF ERROR NUMBER TWO
>
> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT USED, AS A SENTENCING CRITERIA, ITS OWN PERSONAL FEELING THAT CONCURRENT SENTENCES SHOULD NEVER BE IMPOSED ON OFFENSES INVOLVING DIFFERENT VICTIMS.

III. First Assignment of Error – Statutory Findings

{¶7} Defendant's first assignment of error asserts the trial court erred in imposing consecutive sentences without making the statutory findings contained in R.C. 2929.14(E)(4).

{¶8} 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, ¶27. This court held that R.C. 2953.08(G) requires us, in post-*Foster* cases, to continue to review felony sentences under the standard of clearly and convincingly contrary to law. *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.

{¶9} 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." Id. at ¶14. Thus, "[a]s 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.

{¶10} Defendant challenges the Supreme Court of Ohio's decision in *Foster*. 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.

{¶11} Defendant acknowledges *Foster* but nonetheless argues the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), ___ U.S. ___ , 129 S.Ct. 711, controls here. Defendant argues that, because application of *Ice* to Ohio sentencing laws reveals the Ohio Supreme Court wrongly excised portions of R.C. 2929.14, including R.C. 2929.14(E)(4), those statutory findings are a valid and necessary prerequisite to consecutive sentencing.

{¶12} The state first responds that defendant waived his argument by failing to raise it at sentencing. Even if we consider defendant's contention, despite his failure to object in the trial court, his argument is unpersuasive. This court has addressed and rejected defendant's argument and has declined to depart from *Foster* until the Supreme Court of Ohio so directs. See, e.g., id. at ¶7; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664 (noting this court acknowledged *Ice* but concluding *Foster* remains binding upon this court until the Supreme Court of Ohio directs otherwise); *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420; *Mickens*, supra; *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216.

{¶13} Because, under the prior decisions of this court, *Foster* controls the resolution of defendant's argument, we overrule defendant's first assignment of error.

IV. Second Assignment of Error – Abuse of Discretion

{¶14} In his second assignment of error, defendant asserts the trial judge abused his discretion when he employed, as a sentencing criterion, his personal conviction that concurrent sentences were inappropriate for offenses involving different victims.

{¶15} After a court determines under *Kalish* that a sentence is not clearly and convincingly contrary to law, "the second step under *Kalish* is to review whether the trial court abused its discretion in imposing the sentence." *State v. Collier*, 184 Ohio App.3d 247, 2009-Ohio-4652, ¶9, citing *Kalish* at ¶14; *State v. Easley*, 10th Dist. No. 08AP-755, 2009-Ohio-2984, ¶15. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (noting "[a]n abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable").

{¶16} According to R.C. 2929.12(A), "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." R.C. 2929.11(A) not only requires a trial court sentencing on a felony "be guided by the overriding purposes of felony sentencing," but the statute articulates those purposes: "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). The statute then provides the 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.

{¶17} Defendant argues the trial court abused its discretion when, at defendant's third sentencing hearing, the trial court imposed consecutive sentences based on its own philosophy. Defendant points to the trial court's statement at the second sentencing hearing, when the court explained that "[a]s far as consecutive versus concurrent, this Court's philosophy has been prior to today, is today, and probably will remain so in the future, unless convinced otherwise, that separate crimes with separate victims deserve separate sentences. I haven't changed from that." (July 30, 2008 Tr. 11-12.)

{¶18} Although this court eventually reversed the sentence imposed on that date, defendant asserts the trial court similarly erred at the third sentencing hearing when it stated, "I believe a consecutive sentence appropriate [sic]. I believed it then; I believe it now." (Sept. 23, 2009 Tr. 12.) Defendant asserts the court's statements, taken together, reveal the trial court "has publicly announced that it has its own personal sentencing policy that it will follow that will preclude it from ever imposing concurrent sentences for offenses involving separate victims." (Defendant's brief, 6.) With that premise, defendant contends the trial court did not exercise the discretion in sentencing that the law allows; instead, defendant argues, the trial court preempted the legislature by using its own sentencing criteria.

{¶19} Defendant relies on *State v. Piotrowski*, 10th Dist. No. 05AP-159, 2005-Ohio-4550 to support his argument. In *Piotrowski*, the defendant entered a guilty plea to one count of operating a motor vehicle while under the influence of alcohol, a drug of abuse, or a combination of them ("OVI"). Id. at ¶3. On appeal, this court found "the trial

court failed to consider the mandatory factors set forth in R.C. 2929.22, as demonstrated by the court's announcing its 'policy' concerning those who violate the OVI statutes." Id. at ¶8. We noted that, even though defense counsel in *Piotrowski* presented many mitigating factors, nothing in the trial court's statements indicated the trial court considered those factors. Instead, "the plain words the court used indicated the trial court sentenced defendant pursuant to its preconceived policy requiring a period of time in jail for OVI offenders." Id. In light of the trial court's reference to its "policy," we concluded "that the trial court failed to consider the mandatory factors set forth in R.C. 2929.22 and thus abused its discretion in sentencing defendant pursuant to its policy." Id. at ¶9.

{¶20} *Piotrowski* does not control resolution of defendant's assigned error. Unlike *Piotrowski*, where the record did not indicate the trial court considered any factors other than its own policy for sentencing OVI offenders, the trial court here not only did not actually reiterate its "philosophy" during the third sentencing but instead stated it "considered the purposes and principles of sentencing." Within that context, the court then explained in detail why it would impose consecutive sentences: because it could not "ignore the fact that there were 12 separate offenses impacting different people. These weren't one event visited where there's multiple charges; these are 12 separate people." (Sept. 23, 2009 Tr. 11.) The trial court also noted defendant's prior felony in 2003 and his pattern of similar behavior. The trial court ultimately concluded "I think each of these separate offenses necessitates for protection of the public to each have their own separate sentence." (Sept. 23, 2009 Tr. 11-12.)

{¶21} Unlike our conclusion in *Piotrowski,* we cannot say here that the trial court sentenced defendant based on an overarching policy or philosophy without deference to

the statutory sentencing guidelines. Instead, the court considered the impact of the separate offenses on the separate victims and concluded consecutive sentences would best serve the public interest under the purposes and principles of sentencing. Although defendant points specifically to the court's statement that "I believed it then; I believe it now," the court statement at best suggests the presence of different victims is a factor it considered among the other factors the trial court voiced at sentencing.

{¶22} Because the trial court did not abuse its discretion in imposing consecutive sentences, defendant's second assignment of error is overruled.

V. Disposition

{¶23} Having overruled defendant's first and second assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

BROWN and KLATT, JJ., concur.

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