[Cite as *State v. Jerkovic*, 2009-Ohio-4618.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-001**
- vs -	:	
MLADEN JERKOVIC,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000388.

Judgment: Affrmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, *OH 44077* (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Mladen Jerkovic appeals from the judgment of the Lake County Court of Common Pleas sentencing him upon a plea of guilty to three years imprisonment for endangering children. We affirm.

{¶2} August 11, 2008, the Lake County Grand Jury indicted Mr. Jerkovic on one count of endangering children, a second degree felony in violation of R.C. 2919.22(B)(1), and one count of endangering children, a third degree felony in violation

of R.C. 2919.22(A). The charges stemmed from two incidents occurring in June 2008, when Mr. Jerkovic shook his ten-week old son, Adrian, to get him to stop crying. Also on August 11, 2008, Mr. Jerkovic pleaded "not guilty," and signed a written waiver of his right to be present at arraignment.

{¶3} October 27, 2008, a change of plea hearing was held before the trial court. In return for Mr. Jerkovic entering a written plea of "guilty" to the count of third degree endangering children, the state moved to dismiss the second degree felony count. The trial court accepted the plea, and ordered the preparation of a presentence report, a psychological evaluation and report, and a victim impact statement.

{¶4} Sentencing hearing went forward December 1, 2008. Mr. Jerkovic apologized for his actions; his fiancée, Adrian's mother, Dragana Ljulicic, asked that Mr. Jerkovic be allowed to return home. Dr. Sylvester Smarty, M.D., a forensic psychiatrist, testified in mitigation, noting his opinion that with appropriate psychological counseling, Mr. Jerkovic posed no threat, and should be placed under community control sanctions.

{¶5} In passing sentence, the trial court noted Adrian's extremely tender age, an aggravating factor for seriousness pursuant to R.C. 2929.12(B)(1). It noted that Adrian had suffered injuries serious enough to require the planting of a shunt in his head, an aggravating factor for seriousness pursuant to R.C. 2929.12(B)(2). The trial court further indicated that Mr. Jerkovic's father-son relationship with Adrian aggravated the seriousness of his conduct, R.C. 2929.12(B)(6). The trial court admitted as a mitigating factor regarding the seriousness of Mr. Jerkovic's conduct the extreme tension and mental pressure he suffered from at the time of the incidents, resulting from problems at work, with his fiancée, and between her and his family. Cf. R.C.

2929.12(C)(4). Finally, as factors indicating a future propensity to recidivism, the trial court laid great emphasis on the fact that, at the time of these incidents, Mr. Jerkovic was failing to follow through on his duties as a probationer, stemming from a 2005 conviction for cruelty to a juvenile in the courts of Louisiana. See, e.g., R.C. 2929.12(D)(1)-(3).

{¶6} By a judgment entry filed December 8, 2008, the trial court sentenced Mr. Jerkovic to a three-year term of imprisonment, less jail time served. January 5, 2009, Mr. Jerkovic timely noticed this appeal, assigning a single error:

{¶7} "THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT-APPELLANT TO A THREE-YEAR TERM OF IMPRISONMENT."

{¶8} This court will review a felony sentence pursuant to the two-prong standard set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The plurality preliminarily noted that "[s]ince *Foster*, the courts of appeals have adopted varied standards for reviewing trial court sentencing decisions, ranging from abuse of discretion *** to a standard that considers whether the sentence is clearly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941." Id. at ¶3. The plurality held that "[i]n applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. 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 shall be reviewed under an abuse-of-discretion standard." Id. at ¶4.

{¶9} In its analysis, the plurality in *Kalish* indicated the following at ¶9-17:

{¶10} "Prior to *Foster*, there was no doubt regarding the appropriate standard for reviewing felony sentences. Under the applicable statute, appellate courts were to 'review the record, including the findings underlying the sentence or modification given by the sentencing court. (***) The appellate court's standard for review (was) not whether the sentencing court abused its discretion.' R.C. 2953.08(G)(2).

{¶11} "The statute further authorized a court of appeals to 'take any action (***) if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant; (b) That the sentence is otherwise contrary to law.' Former R.C. 2953.08(G)(2), 2004 Am.Sub.H.B. No. 473, 150 Ohio Laws, Part IV, 5814.

{¶12} "The obvious problem with the statute as written and its relation to *Foster* is the references to 'the findings underlying the sentence' and to the determination '(t)hat the record does not support the sentencing court's findings.' *Foster's* result was to sever the portions of the statute that required judicial fact-finding to warrant a sentence beyond the minimum term in order to make Ohio's sentencing scheme compatible with the United States Supreme Court's decisions in *Blakely v. Washington* (2004), 542 U.S. 296 ***, and *United States v. Booker* (2005), 543 U.S. 220 ***. Therefore, 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 the minimum sentences.' (Emphasis added.) *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 ***, ¶100.

{¶13} "As the passage cited above clearly indicates, *Foster* does not require a trial court to provide any reasons in imposing its sentence. For example, when imposing consecutive sentences prior to *Foster*, the trial court had to find that the sentence was necessary to protect the public and was not disproportionate to the seriousness of the offense and the danger the defendant posed to the public. R.C. 2929.14(E)(4). After *Foster*, a trial court can simply impose consecutive sentences, and no reason need be stated. Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under R.C. 2953.08(G)(2).

{¶14} "Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855 ***, ¶38. 'In addition, the sentencing court must be guided by statutes that are specific to the case itself.' Id. Furthermore, the trial court must still be mindful of imposing the correct term of postrelease control.

{¶15} "Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial-fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the 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).

{¶16} "If on appeal the trial court's sentence is, for example, outside the permissible statutory range, the sentence is clearly and convincingly contrary to law,

and the appellate court's review is at an end. The sentence cannot stand. However, if the trial court's sentence is not contrary to law, what is the effect of R.C. 2929.11 and 2929.12 and their relevance to R.C. 2953.08(G)(2) and *Foster*[.]

{¶17} "Because *Foster* now gives judges full discretion to impose a sentence within the statutory range without having to 'navigate a series of criteria that dictate the sentence,' *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642 ***, ¶25, the state's position that an abuse-of-discretion standard must be used is understandable. Although R.C. 2953.08 did not allow appellate courts to use the abuse-of-discretion standard of review, the statute prior to *Foster* was concerned with review of the trial court's factual findings under the now excised portions of the statute.

{¶18} "R.C. 2929.11 and 2929.12, however, are not fact-finding statutes like R.C. 2929.14. *** Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. *** Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion. Cf. *State v. Stroud*, 7th Dist. No. 07 MA 91, 2008-Ohio-3187, at ¶63 (Donofrio, J., concurring in judgment). Therefore, assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster*." (Footnotes and parallel citations omitted.)

{¶19} In support of his assignment of error, Mr. Jerkovic does not allege the trial court failed to meet the first prong of the *Kalish* test – i.e., that it failed to apply the appropriate laws in arriving at his sentence. Rather, he urges that the trial court abused its discretion in balancing the seriousness and recidivism factors, R.C. 2929.12. Specifically, he asserts the trial court failed to consider that he did not intend to harm his son, which is a mitigating factor regarding seriousness, R.C. 2929.12(C)(3). He further asserts the trial court failed to consider his genuine remorse; or, that his actions occurred under circumstances unlikely to reoccur. These are mitigating factors for recidivism pursuant to R.C. 2929.12(E)(4) and (E)(5).

{¶20} An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. "Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶21} We cannot find the trial court abused its discretion. As noted above, at the sentencing hearing, the trial court made a very thorough review of the R.C. 2929.12 factors it found most significant on the record. It allowed Mr. Jerkovic to express his remorse, and made no finding it was insincere; it agreed that Mr. Jerkovic, at the time of his crime, was suffering under extraordinary pressures. However, it laid great emphasis on the fact that he had not followed through with his duties as a probationer for his former conviction. The trial court remarked that this failure made it difficult to conclude that Mr. Jerkovic would follow the treatments suggested by Dr. Smarty if placed under

community control sanctions.

{¶22} The assignment of error lacks merit. The judgment of the Lake County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.