[Cite as *State v. Humr*, 2010-Ohio-5057.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0004**
- vs -	:	
JAMES C. HUMR, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 0501.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, James C. Humr, Jr., appeals from the December 16, 2009 judgment entry of the Portage County Court of Common Pleas, in which he was resentenced for trafficking in cocaine and illegal manufacture of drugs.

{¶2} On September 7, 2006, appellant was indicted by the Portage County Grand Jury on six counts of trafficking in cocaine, felonies of the fifth degree, in violation of R.C. 2925.03(A) and (C)(4)(a); two counts of illegal manufacture of drugs, felonies of

the second degree, in violation of R.C. 2925.04; and one count of possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24(A) and (C).[1] Appellant entered a not guilty plea at his arraignment on September 15, 2006.

{¶3} A change of plea hearing was held on October 12, 2006. Appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to count three of the indictment, trafficking in cocaine, a felony of the fifth degree, in violation of R.C. 2925.03(A) and (C)(4)(a), and count eight, illegal manufacture of drugs, a felony of the second degree, in violation of R.C. 2925.04. On October 13, 2006, the trial court accepted appellant's guilty plea and entered a nolle prosequi to the remaining counts of the indictment. The trial court referred the matter to the Adult Probation Department for a statutory investigation and written report.

{¶4} Pursuant to its December 7, 2006 judgment entry, the trial court sentenced appellant to ten months in prison for trafficking in cocaine, and five years for illegal manufacture of drugs, to run concurrent to one another, with credit for seventy-seven days for time already served. In addition, the trial court ordered appellant to pay restitution through the Portage County Adult Probation Department in an amount up to $400 within seven years; suspended appellant's driver's license for eight years; and assessed a mandatory drug fine of $7,500, costs of the proceedings, and the indigent assessment and recoupment fee, to be paid within seven years.

{¶5} In its March 7, 2008 nunc pro tunc judgment entry, the trial court changed/added that appellant shall receive credit for ninety-three days for time already served in the Portage County Jail and on house arrest.

1. The foregoing charges stem from appellant selling crack cocaine and powder cocaine to a confidential informant at the Robin Mobile Home Park in February, March, and April of 2006.

{¶6} Appellant filed his first appeal, Case No. 2008-P-0088, from the foregoing December 7, 2006 judgment entry and the March 7, 2008 nunc pro tunc judgment entry, in which he asserted various issues with respect to his guilty plea and sentence, as well as ineffective assistance of counsel.[2]

{¶7} On October 23, 2009, this court vacated appellant's sentence and remanded the matter to the trial court for resentencing. *State v. Humr*, 11th Dist. No. 2008-P-0088, 2009-Ohio-5632. We held that the trial court exceeded its statutory authority by suspending appellant's driver's license for eight years, three years beyond the five-year maximum under R.C. 2925.03(D)(2) & (G) and 2925.04(D)(2). Id. at ¶18. This court indicated that the trial court's restitution order failed to comply with R.C. 2929.18(A)(1), because the order was not made in open court, no victim was identified, and no specific amount was specified. Id. at ¶22-23. Also, we held that appellant's due process rights were violated because he was never informed of his Crim.R. 32(B) rights by the trial court. Id. at ¶36.

{¶8} On remand, appellant filed a motion on November 30, 2009, to withdraw his guilty plea and vacate his conviction, alleging that his plea was based on ineffective

2. On July 2, 2007, appellant filed a pro se petition for postconviction relief. On October 23, 2007, appellant filed a pro se motion to vacate order requiring payment of court costs, fines and/or restitution, which was overruled without a hearing by the trial court on October 25, 2007. On March 3, 2008, appellant filed a pro se motion for jail time credit, which was granted by the trial court pursuant to its March 7, 2008 nunc pro tunc judgment entry. On June 27, 2008, appellant filed a pro se motion to dismiss, which was overruled without a hearing by the trial court on July 1, 2008. On September 4, 2008, appellant filed a pro se motion for sentence reduction and/or modification. On September 18, 2008, appellant filed a pro se motion for a stay of execution, which was overruled without a hearing by the trial court on September 22, 2008. Also on September 22, 2008, appellant filed a pro se motion for the assignment of counsel due to his indigency, as well as a pro se motion for delayed appeal pursuant to App.R. 5(A). A judicial release hearing was held on October 14, 2008. Pursuant to its October 16, 2008 judgment entry, the trial court overruled appellant's pro se motion for judicial release. The trial court granted appellant's pro se motion for the assignment of counsel on October 17, 2008, and counsel was appointed. On December 1, 2008, this court granted appellant's pro se motion for leave to file a delayed appeal and appointed counsel to represent him for purposes of his appeal.

assistance of counsel and, therefore, was not knowingly made. Following a December 14, 2009 hearing, the trial court overruled appellant's motion and proceeded to resentencing.

{¶9} Pursuant to its December 16, 2009 judgment entry, the trial court sentenced appellant to five years in prison for illegal manufacture of drugs and ten months for trafficking in cocaine, to be served consecutively. The trial court ordered appellant to pay a mandatory drug fine in the amount of $7,500 within ten years, and restitution in the amount of $380 within six years. Appellant's driver's license was suspended for three years. The trial court also informed appellant of his right to appeal. Upon his release from prison, appellant will be subject to a three year term of post release control.[3] It is from that judgment that appellant filed the present appeal, asserting the following assignments of error for our review:

{¶10} "[1.] THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S PRE-SENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶11} "[2.] THE TRIAL COURT ERRED BY IMPOSING MORE THAN A MINIMUM SENTENCE BECAUSE IT WAS CONTRARY TO LAW AND AN ABUSE OF DISCRETION."

{¶12} In his first assignment of error, appellant argues that the trial court erred by overruling his presentence motion to withdraw his guilty plea.

{¶13} This court stated in *State v. Johnson*, 11th Dist. No. 2007-L-195, 2008-Ohio-6980, at ¶20-22:

3. In a March 11, 2010 nunc pro tunc judgment entry, the trial court changed the language regarding post release control from "may" to "will."

{¶14} "Motions to withdraw a plea post-sentencing are governed by Crim.R. 32.1. 'However, the rule itself gives no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea.' *State v. Xie* (1992), 62 Ohio St.3d 521, 526, ***. It is accepted that presentence motions to withdraw a plea should be granted liberally. *State v. Peterseim* (1980), 68 Ohio App.2d 211, ***, at paragraph one of the syllabus. However, whether the motion is made before or after sentencing, appellate review is limited to determining whether the trial court abused its discretion. Id. at paragraph two of the syllabus. *** ['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. Further, an abuse of discretion may be found when the trial court 'applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.' *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at ¶15.]

{¶15} "In evaluating presentence motions to withdraw guilty pleas, this court has generally applied the four-part test pronounced by the Eighth District Court of Appeals in *Peterseim*. See, e.g., [*State v.*] *Holin*, [174 Ohio App.3d 1, 2007-Ohio-6255], at ¶16. As stated by the *Peterseim* court, at paragraph three of the syllabus:

{¶16} "'A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court

gave full and fair consideration to the plea withdrawal request.'" (Citations and parallel citations omitted.)

{¶17} In the case at bar, in his November 30, 2009 written presentence motion to withdraw his guilty plea and vacate his conviction, appellant alleged that his plea was based on ineffective assistance of counsel and, therefore, was not knowingly made. At the December 14, 2009 hearing, appellant, who was represented by counsel, testified in support of his motion indicating, inter alia, that he was unaware of the maximum penalty; he had improper legal representation; his mind was not clear due to the fact that he was coming off a very severe drug abuse situation; he improperly believed he had no defense to the charged offenses; and the length of his sentence was improper.

{¶18} On cross-examination, appellant indicated the following: he signed a written plea of guilty form; the trial court went over each of the individual rights with him; the trial court reviewed with him the monetary penalties involved; the trial court reviewed with him the possible prison sentence; he had accepted the plea negotiations and the presentence investigation report; and that the negotiations did not include any agreed prison term or any additional terms that were reduced to writing.

{¶19} With regard to the first *Peterseim* factor, appellant was represented by highly competent counsel. Generally, a properly licensed attorney practicing in this state is presumed to be competent. *State v. Lytle* (1976), 48 Ohio St.2d 391, 397. Here, appellant asserts that his defense counsel was ineffective for not advising him to pursue an entrapment defense. We note, however, that an entrapment defense was not an option in this case. Our review of the record establishes that defense counsel provided highly competent representation.

{¶20} Regarding the second *Peterseim* factor, there is simply nothing to indicate that appellant's guilty plea was not made knowingly, intelligently, and voluntarily. The trial court conducted a thorough colloquy with appellant, determining that he understood each and every right he was waiving. The trial court made absolutely clear to appellant what the maximum sentence it might impose on him could be, if he pleaded guilty. There is nothing to indicate that appellant suffers from any cognitive or emotional disability that might affect his ability to enter a knowing, intelligent, and voluntary plea. Appellant informed the trial court that he understood the effect of his guilty plea, its consequences, and accepted the same. Thus, the plea hearing was fully compliant with the requirements of Crim.R. 11.

{¶21} With respect to the third and fourth *Peterseim* factors, we note that appellant was given a complete and impartial hearing on the motion to withdraw and our review of the transcript reveals that the trial court gave the motion full and fair consideration. The trial court reviewed the mandatory nature of the prison term with appellant and indicated twice that the term could be as great as eight years for the second degree felony offense. Also, appellant's counsel assured the trial court twice that he had reviewed this information with appellant and that appellant understood that two years was a mandatory *minimum* prison sentence, not the actual sentence. Again, the record establishes that appellant's guilty plea was knowingly, intelligently, and voluntarily entered.

{¶22} Pursuant to the *Peterseim* factors, the trial court did not abuse its discretion in denying appellant's presentence motion to vacate his guilty plea.

{¶23} Appellant's first assignment of error is without merit.

{¶24} In his second assignment of error, appellant contends that the trial court erred by imposing more than the minimum sentence because it was contrary to law and an abuse of discretion.

{¶25} This court stated the following in *State v. Jerkovic*, 11th Dist. No. 2009-L-001, 2009-Ohio-4618, at ¶8-18:

{¶26} "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.

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

{¶28} "'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).'

{¶29} "'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.'

{¶30} "'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.'

{¶31} "'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).'

{¶32} "'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.'

{¶33} "'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).'

{¶34} "'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*.'

{¶35} "'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.

{¶36} "'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*.'" (Parallel citations omitted.)

{¶37} In the case sub judice, with respect to the first prong of the *Kalish* analysis, the trial court's sentence with respect to its consideration of the R.C. 2929.11 and 2929.12 factors was not clearly and convincingly contrary to law.

{¶38} The record reflects the trial court considered R.C. 2929.11 and 2929.12. The trial court indicated it received letters from the manager of the trailer park where appellant lived as well as from his neighbors, stating that after appellant's arrest, the

drug trafficking flow had stopped. The amount of drug trafficking that occurred at appellant's trailer park directed the trial court's consideration of the seriousness of the offense and his likelihood of recidivism. The court considered the record as well as the principle and purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12 before imposing sentence. Thus, the trial court sentenced appellant pursuant to *Foster*.

{¶39} "It is important to note that there is no mandate for judicial factfinding in the general guidance statutes. The court is merely to 'consider' the statutory factors." *Foster*, supra, at ¶42. Thus, the trial court was not required to make any findings regarding sentencing appellant to more than the minimum sentence. Id. at ¶100. Also, both appellant's prison terms of ten months for the felony of the fifth degree and five years for the felony of the second degree were within the statutory range for his crimes. R.C. 2929.14(A)(2) and (5). Therefore, appellant's sentence is not clearly and convincingly contrary to law. As the first prong of *Kalish* is satisfied, the next step is to review the record to determine if the trial court abused its discretion in sentencing him.

{¶40} With regard to the second prong of the *Kalish* analysis, the trial court did not abuse its discretion in imposing appellant's sentence.

{¶41} Again, both appellant's prison terms of ten months for the felony of the fifth degree and five years for the felony of the second degree were within the statutory range for his crimes, as he was facing a possible twelve month sentence on the fifth degree felony and a possible eight year sentence on the second degree felony. R.C. 2929.14(A)(2) and (5). Therefore, the record does not support a finding that appellant's sentence was an abuse of discretion.

{¶42} Appellant's second assignment of error is without merit.

{¶43} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.