[Cite as *State v. Thompson*, 2010-Ohio-996.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0028**
- vs -	:	
MARCEL THOMPSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 502.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Ariana E. Tarighati, 34 South Chestnut Street, #100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Marcel Thompson, appeals from the May 6, 2009 judgment entry of the Ashtabula County Court of Common Pleas, in which he was sentenced for complicity to burglary.

{¶2} On December 19, 2008, appellant was indicted by the Ashtabula County Court of Common Pleas on one count of complicity to aggravated burglary, a felony of the first degree, in violation of R.C. 2923.03/2911.11. Appellant entered a not guilty plea at his arraignment on December 29, 2008.

{¶3} A change of plea hearing was held on April 6, 2009. Appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to the lesser included offense of complicity to burglary, a felony of the second degree, in violation of R.C. 2923.03(A)(2)/2911.12(A). The trial court accepted appellant's guilty plea and deferred sentencing.

{¶4} Pursuant to its May 6, 2009 judgment entry, the trial court sentenced appellant to eight years in prison, with credit for 117 days for time served, and was subjected to post-release control for three years.[1] It is from that judgment that appellant filed the instant appeal, asserting the following assignment of error for our review:[2]

{¶5} "THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT-APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT."

{¶6} In his sole assignment of error, appellant argues that the trial court erred by sentencing him to the maximum term of imprisonment.

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

{¶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

1. Appellant filed a motion for reconsideration and for resentencing with the trial court on June 4, 2009, which was denied the following day.

2. On June 5, 2009, appellant filed a motion for stay of execution of sentence pending appeal, which was overruled by the trial court on June 10, 2009.

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 the case at bar, appellant does not assert that his sentence was contrary to law. Rather, he alleges that the trial court failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶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} "'*** [W]here 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.'" *State v. Mordas*, 11th Dist. No. 2009-P-0028, 2010-Ohio-196, at ¶18, quoting *Kalish*, supra, at ¶18, fn. 4, citing *State v. Adams* (1988), 37 Ohio St.3d 295, at paragraph three of the syllabus.

{¶22} At the sentencing hearing in this case, before proceeding to the actual sentence, the trial court stated the following, which appears to be a direct reference to R.C. 2929.12:

{¶23} "THE COURT: All right. This is breaking into a house with a shotgun, breaking the front door, holding the shotgun on one of the young men, young boys in the house, threatening him while the other two ransacked the house looking for possibly drugs, one of the young boys had enough resourcefulness to try to defend himself, and shot one of the burglars.

{¶24} "This is a very serious offense."

{¶25} Also, in its May 6, 2009 sentencing entry, the trial court indicated it "considered the record, and oral statements, as well as the principles and purposes of sentencing under O.R.C. Section 2929.11."

{¶26} The record before us reflects that the trial court considered the mental injury and psychological harm caused by appellant to the victim. The trial court considered that this activity was organized with others to search for drugs. The trial court further considered that this was a "very serious offense." The trial court also indicated it considered factors already heard in the testimony introduced in the cases of appellant's co-defendants. Thus, the trial court gave appropriate consideration and weight to the relevant statutory factors.

{¶27} In addition, appellant's sentence of eight years falls within the prescribed range for a felony of the second degree, which is anywhere from "two, three, four, five, six, seven, or eight years." R.C. 2929.14(A)(2). Therefore, the trial court did not abuse its discretion in imposing the maximum sentence.

{¶28} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed. The

court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.