

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0064
DANIEL T. MASTERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0239.

Judgment: Affirmed in part, reversed in part, and remanded.

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

Gregory T. Stralka, 600-30 Crown Centre, 5005 Rockside Road, Cleveland, OH 44131 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Daniel T. Masterson, appeals the judgment entered by the Portage County Court of Common Pleas. Masterson received an aggregate prison sentence of five years for his convictions for aggravated vehicular assault and operating a vehicle while intoxicated (“OVI”).

{¶2} On July 12, 2008, Masterson was operating an SUV on State Route 5 in Portage County, Ohio. Masterson went left of the centerline and into the path of several oncoming motorcycles. Masterson’s SUV struck two of the oncoming motorcycles. A

third motorcycle took evasive action from Masterson's SUV and struck one of the motorcycles that had collided with Masterson's SUV. In total, five individuals riding on three different motorcycles sustained injuries as a result of Masterson's conduct.

{¶3} An 11-count indictment was issued against Masterson, charging him with five counts of aggravated vehicular assault, in violation of R.C. 2903.08(A)(1) and third-degree felonies; five counts of vehicular assault, in violation of R.C. 2903.08(A)(2) & (C) and fourth-degree felonies; and one count of OVI, in violation of R.C. 4511.19(A)(1)(a) & (G). Masterson initially pled not guilty to these charges.

{¶4} A change of plea hearing was held, and Masterson pled guilty to five counts of aggravated vehicular assault and one count of OVI. Upon request of the state, the remaining charges were dismissed.

{¶5} The trial court referred the matter for a presentence investigation ("PSI"). The PSI report and letters in support of mitigation of sentence were submitted for the trial court's consideration.

{¶6} The trial court sentenced Masterson to five-year prison terms for his convictions for aggravated vehicular assault and a three-day term for his OVI conviction. The trial court ordered these prison terms to be served concurrently, resulting in an aggregate five-year prison sentence. In addition, the trial court indicated that Masterson would be subject to a five-year period of postrelease control following his release from prison.

{¶7} Masterson timely appealed the trial court's judgment entry of sentence and advances the following assignment of error for our consideration:

{¶8} “The defendant’s maximum sentence in this matter is contrary to the guidelines in Ohio’s sentencing statutes.”

{¶9} Masterson challenges the trial court’s imposition of five-year prison terms for his third-degree felony, aggravated vehicular homicide convictions. He does not challenge the sentence he received for his OVI conviction.

{¶10} The Supreme Court of Ohio, in a plurality opinion, has held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The *Kalish* Court held:

{¶11} “First, [appellate courts] 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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.*

{¶12} R.C. 2929.12 provides a list of factors that the trial court “shall consider” when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, “the court is not required to ‘use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors [of R.C. 2929.12.]’” *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215. In *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶28, this court acknowledged its adoption of the pronouncement of the Supreme Court of Ohio in *State v. Adams* (1988), 37 Ohio St.3d 295. The Supreme Court of Ohio in *Adams* held: “[a] silent record raises the presumption that a trial court considered the factors

contained in R.C. 2929.12.” *Adams*, supra, at paragraph three of the syllabus. This court recognized that Ohio Appellate Districts have adopted the holding in *Adams*, prior to and after the Supreme Court of Ohio’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Greitzer*, supra, at ¶29.

{¶13} The record supports the inference that the trial court properly considered the factors in R.C. 2929.12 and adhered to the purposes and principles of sentencing set forth in R.C. 2929.11.

{¶14} In this matter, the trial court stated, “five people were seriously hurt in this case, the Court has to take that into consideration.” Pursuant to R.C. 2929.12(B)(2), this was a factor suggesting that Masterson’s conduct was more serious and was appropriately considered by the trial court.

{¶15} In addition, in regard to the recidivism factors, we note that R.C. 2929.12(D) provides several factors suggesting that the offender is likely to commit future crimes. Specifically, R.C. 2929.12(D)(4) provides, “[t]he offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.” In this matter, the PSI report reveals that Masterson had a drug problem, as he abused prescription pain killers. Further, the report indicates his drug problem was related to the instant offense, as Masterson admitted drinking a beer and snorting an oxycontin prior to driving the SUV. Finally, we note that the PSI report indicates that Masterson abused prescription pills subsequent to the accident and that Masterson was charged with deception to obtain a dangerous drug in Trumbull County after the commission of the instant offenses.

{¶16} Pursuant to R.C. 2929.12(E)(4), Masterson asserts that he posed less of a recidivism risk because the offenses occurred “under circumstances not likely to recur.” However, the fact that Masterson continued to abuse prescription drugs after the commission of the offenses does not support his contention that the circumstances were unlikely to recur.

{¶17} Masterson argues, pursuant to R.C. 2929.12(E)(1) & (2), that he was not likely to commit future crimes because he did not have a prior juvenile or adult criminal record. However, Masterson’s assertion is negated by his subsequent criminal charge in Trumbull County.

{¶18} Masterson contends he showed remorse for his conduct. We note that while remorse is a relevant factor pursuant to R.C. 2929.12(E)(5), it is only one factor to be weighed in the trial court’s ultimate determination. See, e.g., *State v. Goodnight*, 11th Dist. No. 2008-L-029, 2009-Ohio-2951, at ¶23-25.

{¶19} We conclude Masterson’s sentence is not contrary to law.

{¶20} Masterson claims the trial court abused its discretion for imposing the maximum prison term.

{¶21} After the *State v. Foster* decision, “[t]rial 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.” *State v. Foster*, 2006-Ohio-856, at paragraph seven of the syllabus.

{¶22} We have concluded that the trial court’s imposition of sentence was not contrary to law; now we review this assigned error under the abuse of discretion

standard. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶23} Masterson's five-year sentences are within the statutory range for a third-degree felony, pursuant to R.C. 2929.14(A)(3).

{¶24} We note the trial court could have ordered the prison terms to be served consecutively, for an aggregate prison term of 25 years. Thus, while Masterson objects to the trial court's imposition of maximum, concurrent sentences of five years, the trial court could have imposed a much longer aggregate sentence.

{¶25} For the reasons set forth above, including the trial court's specific finding relating to the victim's injuries, we conclude the trial court did not abuse its discretion by imposing an aggregate five-year prison term.

{¶26} Masterson's assignment of error is without merit.

{¶27} In its brief, the state notes that the trial court improperly imposed postrelease control. The trial court imposed a five-year term of postrelease control. Pursuant to R.C. 2967.28(B)(3), Masterson was subject to a three-year term of postrelease control, since he committed third-degree felonies, which were not sex offenses, and which caused physical harm to the victims.¹ See, e.g., *State v. Lester*, 3d Dist. No. 2-06-31, 2007-Ohio-4239, at ¶9.

{¶28} The Supreme Court of Ohio has held, "[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease

1. Even though Masterson was convicted of five separate felonies, the trial court is not permitted to impose multiple terms of postrelease control. See *State v. Maag*, 3d Dist. No. 5-08-35, 2009-Ohio-90, at ¶18. Instead, "[o]ne term of post-release control for multiple convictions is proper." *Id.*, citing *State v. Simpson*, 8th Dist. No. 88301, 2007-Ohio-4301, ¶109.

control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus.

{¶29} Accordingly, pursuant to the directive from the Supreme Court of Ohio, we remand this matter to the trial court to correct its imposition of postrelease control.

{¶30} The judgment of the trial court in relation to Masterson’s underlying prison sentence is affirmed. The trial court’s judgment entry pertaining to postrelease control is reversed. Pursuant to R.C. 2929.191, this matter is remanded to the trial court for the sole purpose of correcting the length of postrelease control. Specifically, the trial court shall conduct a hearing pursuant to R.C. 2929.191(C).² Thereafter, the trial court shall issue a nunc pro tunc judgment entry of sentence, which imposes the correct term of postrelease control.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in part, and dissents in part, with Concurring/Dissenting Opinion.

COLLEEN MARY O’TOOLE, J., concurs in part, and dissents in part, with Concurring/Dissenting Opinion.

{¶31} I concur with the majority’s disposition of Masterson’s assignment of error. I disagree with its disposition of the error noted by the state: i.e., that the trial court improperly imposed mandatory postrelease control. As a result, Masterson’s sentence is incorrect. We should simply vacate it, and remand to the trial court for resentencing.

2. We note that, upon motion of the court or either party, the court may order Masterson to appear at this hearing “by video conferencing equipment if available and compatible.” R.C. 2929.191(C).

We should not advise the trial court on what it should, or should not, do on remand. It is improper for this court to issue advisory opinions. See, e.g., *State v. Constant*, 11th Dist. No. 2008-L-100, 2009-Ohio-3936, at ¶39 (Trapp, P.J., concurring in part, and dissenting in part).

{¶32} Consequently, I concur in part, and dissent in part.