

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2011-P-0019,
	:	2011-P-0020,
SHAWN E. HUTCHINGS,	:	2011-P-0021,
	:	and 2011-P-0022
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case Nos. 2010 CR 0468, 2010 CR 0536, 2010 CR 0658, and 2010 CR 0659.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Patricia J. Smith, 9442 State Route 43, Streetsboro, OH 44241 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Shawn E. Hutchings, appeals his aggregate sixteen-year sentence for Trafficking in Heroin and eleven counts of Burglary. The issue before this court is whether the trial court had adequate justification for the imposition of consecutive sentences. For the following reasons, we affirm the decision of the court below.

{¶2} On July 27, 2010, in Case No. 2010 CR 0468, the Portage County Grand Jury returned an Indictment against Hutchings, charging him with Trafficking in Heroin,

a felony of the fifth degree in violation of R.C. 2925.03(A) and (C)(6)(a), Possession of Heroin, a felony of the fifth degree in violation of R.C. 2925.11(A) and (C)(6)(a), and Possessing Criminal Tools, a felony of the fifth degree in violation of R.C. 2923.24(A) and (C).

{¶3} On August 13, 2010, Hutchings was arraigned and entered a plea of “not guilty” to the charges contained in the Indictment (Case No. 2010 CR 0468).

{¶4} On August 19, 2010, in Case No. 2010 CR 0536, the Portage County Grand Jury returned an Indictment against Hutchings, charging him with Burglary, a felony of the second degree in violation of former R.C. 2911.12(A)(2), (B), and (C).

{¶5} On August 24, 2010, Hutchings was arraigned and entered a plea of “not guilty” to the Indictment (Case No. 2010 CR 0536).

{¶6} On October 5, 2010, in Case No. 2010 CR 0658, the Portage County Grand Jury returned an Indictment against Hutchings, charging him with seven counts of Burglary, felonies of the second degree in violation of R.C. 2911.12(A)(2), (B), and (C).

{¶7} Also on October 5, 2010, in Case No. 2010 CR 0659, the Portage County Grand Jury returned an Indictment against Hutchings, charging him with five counts of Burglary, felonies of the second degree in violation of R.C. 2911.12(A)(2), (B), and (C).

{¶8} On October 14, 2010, Hutchings was arraigned under both Indictments returned on October 5, 2011 (Case Nos. 2010 CR 0658 and 2010 CR 0659), and entered a plea of “not guilty” to the charges contained in them.

{¶9} On December 21, 2010, Hutchings entered Written Pleas of Guilty as follows: In Case No. 2010 CR 0468, he pled guilty to Trafficking in Heroin; in Case No. 2010 CR 0536, he pled guilty to Burglary; in Case No. 2010 CR 0658, he pled guilty to

seven counts of Burglary; in Case No. 2010 CR 0659, he pled guilty to three counts of Burglary. The remaining counts of the Indictments in Case Nos. 2010 CR 0468 and 2010 CR 0659 were dismissed by way of a Nolle Prosequi.

{¶10} On February 7, 2011, Hutchings filed a Sentencing Memorandum, which provided the trial court with the following information for its consideration:

{¶11} Mr. Hutchings grew up in the Portage County area, Garrettsville, Ohio. He attended Maplewood where he learned small mechanic repair. He was married to Michelle Boring at age 18. While married to Ms. Boring, he moved to Pennsylvania where he obtained his GED. Four children resulted from the marriage of Shawn and Michelle. The children currently reside in Pennsylvania with their mother. Shawn and Michelle were divorced after a nine year marriage.

{¶12} Shawn has always provided both emotionally and financially for his ex-wife and children. He has a close relationship with the children despite where they reside.

{¶13} Shawn and Kim Hutchings, (co-defendant) married in 2002. They did not have children. Shawn has always maintained employment. His latest job was with St. Lawrence Steel in Streetsboro. He was a Maintenance Supervisor for 4 years. He was fired in May of 2010 due to his drug addiction.

{¶14} Shawn comes from a stable and healthy home. His parents have always been supportive and remain so during this criminal matter. Although both his parents are extremely disappointed, they are surprised at his criminal conduct as Shawn has never had criminal dealings in the past.

{¶15} The current situation was brought about by one instance of experimental drug use which led to an addiction and ultimate destruction of two law abiding productive citizens. Shawn and Kim experimented with heroin use in December of 2009. That use ultimately led to an immediate addiction and a crime spree for which they are both currently incarcerated.

{¶16} In no way is the purpose of this sentencing memorandum to deny culpability or to demean the seriousness of the crimes Shawn has committed. Shawn would simply ask this Court for mercy and to take into consideration the circumstances surrounding the offenses.

Shawn has immense remorse for his actions and deep regret for the harm he has caused to his victims.

{¶17} Upon arrest for the various burglaries, Shawn immediately cooperated with law enforcement. Shawn drove about with Detective Springer to identify all of the homes which he had illegally entered. Shawn gave statements as well as video statements in order to assist with helping to solve the various thefts from the homes. Shawn has been remorseful from the very start.

{¶18} * * *

{¶19} Shawn did not intend to hurt anyone. In fact he made all efforts to insure that NO PERSON was home when he entered the homes. Shawn did not want to have any confrontation. In addition, Shawn would not take firearms from any of the homes as he did not want them to end up on the streets. The investigative reports indicate that firearms were found in some of the homes but that they were left behind.

{¶20} * * *

{¶21} Shawn begs the court to consider his addiction as a mitigating factor. If the offenses were not felony 2 burglaries, Shawn would be considered a prime candidate for drug rehabilitation. Shawn has NO criminal history until he became addicted to heroin.

{¶22} On February 22, 2011, a joint sentencing hearing was held on all four cases pending against Hutchings. At the conclusion of the hearing, the trial court sentenced him as follows: in Case No. 2010 CR 0468, to twelve months in prison for Trafficking in Heroin; in Case No. 2010 CR 0536, to five years in prison for Burglary; in Case No. 2010 CR 0658, to five years in prison for each of seven counts of Burglary, to be served concurrently with each other; and in Case No. 2010 CR 0659, to five years in prison for each of three counts of Burglary, to be served concurrently with each other. The court ordered the sentences imposed under each Indictment to be served consecutively, for an aggregate prison sentence of sixteen years. Additionally, the court

assessed a fine of \$300 plus court costs, and ordered Hutchings to pay restitution in the aggregate amount of \$3,104.06.

{¶23} On February 25, 2011, the trial court issued its written Order and Journal Entry, memorializing Hutchings' sentence.

{¶24} On March 23, 2011, Hutchings filed Notices of Appeal in all four underlying cases.

{¶25} On April 8, 2011, this court consolidated all four appeals "for purposes of briefing, oral argument, and disposition."

{¶26} On appeal, Hutchings raises the following assignments of error:

{¶27} "[1.] The sentence of the trial court is contrary to law because it failed to reflect any consideration of the purposes and principles of felony sentencing contained in RC 2929.11 or the seriousness and recidivism factors of RC 2929.12. The trial court committed abuse of discretion when it imposed consecutive sentences without adequate justification."

{¶28} "[2.] The trial judge violated the appellant's right to due process when it sentenced the appellant to consecutive prison terms and erred by failing to conduct a proportionality review in determining consecutive sentences to be appropriate."

{¶29} "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. 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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26.

{¶30} Under the first assignment of error, Hutchings argues the sentence imposed is contrary to law, in that the trial court failed to consider the purposes and principles of felony sentencing. Hutchings notes that “the court’s order and journal entry do not mention the revised code provisions guiding felony sentencing,” and, therefore, “the record does not provide adequate reasons for the sentence imposed.” Appellant’s Brief, at 8.

{¶31} In the present case, the trial court’s Order and Journal Entry stated that it “has considered evidence presented by counsel, oral statements, any victim impact statement, the pre sentence report, and/or the Defendant’s statement.” At the sentencing hearing, the trial court addressed Hutchings, stating “I have reviewed your sentencing brief.”

{¶32} The Ohio Supreme Court has held that, “[w]hen imposing a felony sentence, the trial court must consider the overriding purposes of felony sentencing.” *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, ¶ 11. The overriding purposes of felony sentencing in Ohio “are to protect the public from future crime by the offender * * * and to punish the offender.” R.C. 2929.11(A).

{¶33} A sentencing court “has discretion to determine the most effective way to comply with the purposes and principles of sentencing.” R.C. 2929.12(A). “In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender’s recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.” *Id.*

{¶34} This court has held “that R.C. 2929.12(A) does not require a sentencing court to make specific findings regarding the seriousness and recidivism factors.” *State v. Ervin*, 11th Dist. Nos. 2009-L-025 and 2009-L-026, 2009-Ohio-6382, ¶ 21; *State v. Glenn*, 11th Dist. No. 2003-L-022, 2004-Ohio-2917, ¶ 47 (“[a] trial court is only required to *consider* mitigating factors”) (emphasis sic); *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 36-42 (pursuant to the “general guidance statutes,” i.e., R.C. 2929.11 and 2929.12, there is “no mandate for judicial fact-finding,” rather, “the court is merely to ‘consider’ the statutory factors”).

{¶35} Contrary to Hutchings’ position, the trial court’s failure to reference R.C. 2929.11 or 2929.12 in its sentencing entry does not demonstrate its failure to consider the appropriate statutory factors.

{¶36} “A silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12.” *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988), paragraph three of the syllabus; *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) (“[t]he Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors”).

{¶37} Furthermore, we note that the trial court expressly mentioned that it had reviewed Hutchings’ Sentencing Memorandum, which contained a detailed analysis of the seriousness and recidivism facts and their applicability to the facts of the present case. *State v. Bernadine*, 11th Dist. No. 2010-P-0056, 2011-Ohio-4023, ¶ 37 (appellant failed to rebut the presumption that the trial court considered the required statutory facts where the court stated “that it considered all evidence presented by counsel, oral statements, the PSI, and [appellant’s] statement in reaching its decision”).

{¶38} Hutchings also argues, under this assignment of error, that the trial court abused its discretion by imposing an aggregate sixteen-year sentence. Hutchings maintains his sentence is excessive in light of the mitigating circumstances set forth in his Sentencing Memorandum, e.g., his cooperation with law enforcement, the nonviolent nature of his crimes, the absence of a criminal history, and his genuine remorse and acceptance of responsibility for his actions. We disagree.

{¶39} At the time of Hutchings' sentencing, "[t]rial courts [had] full discretion to impose a prison sentence within the statutory range." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. This court recognized this discretion as "plenary." *State v. Ries*, 11th Dist. No. 2008-P-0064, 2009-Ohio-1316, ¶ 13; *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 34 (11th Dist.2007) ("[c]ontrary to [appellant's] position, the trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor").

{¶40} The breadth of this discretion was reaffirmed by the Ohio Supreme Court in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768. In *Hodge*, the court held that "judicial fact-finding is not required before imposition of consecutive prison terms," and "[t]rial courts have full discretion to impose a prison sentence within the statutory range." (Citation omitted.) *Id.* at ¶ 11.

{¶41} In the present case, Hutchings could have received a minimum sentence of two years and a maximum sentence of eighty-nine years. The state recommended a sentence of twenty years. Given the considerable discretion afforded the trial court and the potential eighty-nine year sentence for nine felony convictions, we find no abuse of discretion in the court's imposition of a sixteen-year sentence.

{¶42} The first assignment of error is without merit.

{¶43} In the second assignment of error, Hutchings argues that the trial court erred by failing to engage in a proportionality review of his sentence, as required by R.C. 2929.11(B) (“[a] sentence imposed for a felony shall be * * * consistent with sentences imposed for similar crimes committed by similar offenders”). Appellant’s Brief, at 19.

{¶44} Similar to the consideration of seriousness and recidivism factors contained in R.C. 2929.12, the trial court’s obligation to consider a sentence’s consistency or proportionality under R.C. 2929.11(B) does not require it to make express findings on the record. *State v. Newman*, 11th Dist. No. 2002-A-0007, 2003-Ohio-2916, ¶ 10. As noted above, the Ohio Supreme Court has deemed the mandates of R.C. 2929.11 as part of “a general judicial guide for every sentencing.” *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 36.

{¶45} This court has held “that sentencing consistency is not developed via a trial court’s comparison of the existing matter before the court to prior sentences for similar offenders and similar offenses,” but, rather, by the “proper application of the statutory sentencing guidelines.” *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, ¶ 56, 58. “Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.” *State v. Kalish*, 11th Dist. No. 2006-L-093, 2007-Ohio-3850, ¶ 18.

{¶46} Hutchings’ argument rests on the lack of any express reference to a consistency analysis in the trial court’s judgment. Hutchings does not argue that his sentence is inconsistent and submits no case law suggesting as much. As demonstrated above, R.C. 2929.11(B) does not require a court to make express

findings regarding the consistency of an offender's sentence and is satisfied where the court properly considers the statutory factors and guidelines.

{¶47} In the present case, the trial court had before it the appropriate information to impose a sentence in conformity with the purposes and principles of felony sentencing. Principally, this information consisted of the Presentence Investigation Report, the arguments of counsel, and the Sentencing Brief. At the sentencing hearing, the court observed that Hutchings' sentence was "very fair," given the fact that "these were horrendous break-ins." In light of the record before us, Hutchings cannot demonstrate that the court failed to comply with R.C. 2929.11(B) based on the court's failure to expressly mention consistency. *Swiderski* at ¶ 58 (where "the court properly applied and considered the necessary statutory sentencing factors before issuing appellant's sentence * * *, the court's sentence met the consistency requirement as espoused by R.C. 2929.11(B)"); *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 18, fn. 4 ("where 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").

{¶48} The second assignment of error is without merit.

{¶49} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, sentencing Hutchings to an aggregate prison term of sixteen years, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.