[Cite as *State v. Addis*, 2010-Ohio-1008.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-019
	:	O P I N I O N
- vs -		3/15/2010
	:	
RICHARD K. ADDIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CR2008-2036

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Faris & Faris, Matthew V. Faris, 40 South Third Street, Batavia, Ohio 45103, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Richard K. Addis, appeals the prison sentence imposed by the Brown County Court of Common Pleas for his felony sex offenses.

{¶2} Appellant pled guilty to two counts of gross sexual imposition, both felonies of the third degree, based on allegations that appellant twice had sexual contact with a child under the age of 13. The trial court sentenced appellant to a prison term of five years for each count, to be served consecutively. Appellant filed this sentencing appeal, setting forth two assignments of error for our review. Many of appellant's arguments

regarding his prison sentence overlap, and therefore, we will discuss the two assignments of error together.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT OF FIVE YEARS ON BOTH COUNT II AND COUNT IV, GROSS SEXUAL IMPOSITION[.]"

{¶5} Assignment of Error No. 2:

{¶6} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS WHERE THE RECORD DOES NOT SUPPORT SUCH A SENTENCE[.]"

{¶7} Appellant argues under his first assignment of error that a five-year prison term for each count is excessive and fails to achieve the overriding purposes of felony sentencing. Appellant argues that the consecutive prison term should be reversed as it is not supported by the record and is contrary to law.

{¶8} First, we note that appellant failed to object at the trial level to his prison sentence. When a party forfeits an objection in the trial court, reviewing courts may notice only plain errors or defects affecting substantial rights. *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15; Crim.R. 52(B). An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. Id. at ¶17.

{¶9} The Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, stated that 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. *Foster,* paragraph seven of syllabus.

{¶10} According to R.C. 2929.14, the sentencing range for a felony of the third degree is one, two, three, four, or five years. In determining whether to impose a prison sentence as a sanction for a felony of the third degree, the sentencing court shall comply with the purposes and principles under R.C. 2929.11 and with R.C. 2929.12. R.C. 2929.13(C); see, also, *State v. Gramlich*, Cuyahoga App. No. 84172, 2005-Ohio-503, ¶9.

{¶11} The trial court in the instant case indicated that it considered the purposes and principles of sentencing under R.C. 2929.11, R.C. 2929.12, and R.C. 2929.13, as well as other information in regard to appellant and the specific allegations in the case, including appellant's presentence investigation report.

{¶12} The trial court mentioned appellant's prior record of four convictions for operating a vehicle under the influence. The trial court noted appellant's relationship as the victim's uncle and the fact that the victim was three to five years of age when the conduct occurred. See R.C. 2929.12 (seriousness and recidivism factors, including: court shall consider factors indicating offender's conduct is more serious than conduct normally constituting offense, including that the physical or mental injury suffered by victim due to the conduct of the offender was exacerbated because of physical or mental condition or age of victim and that offender's relationship to victim facilitated the offense); see R.C. 2929.11 (sentence imposed shall be reasonably calculated to protect public from future crime by offender and to punish offender commensurate with and not demeaning to seriousness of the conduct and impact on victim).

{¶13} Appellant also argues that the imposition of maximum and consecutive sentences was erroneous because a lesser sentence would be a "sufficient penalty," when coupled with the requirements and "stigma" of his Tier II sexual offender classification.

{¶14} The record indicates that the trial court engaged in the appropriate analysis under R.C. 2929.11 through R.C. 2929.13 to impose appellant's prison term; we reject appellant's attempt to interject his offender classification requirements into a review of the trial court's sentencing decision. See R.C. 2953.08 (grounds for sentencing appeal).

{¶15} Appellant also challenges the trial court's imposition of maximum and consecutive sentences with the claim that the trial court erroneously made judicial findings after *Foster* severed as unconstitutional those portions of the statutory sentencing scheme that mandated judicial findings to impose maximum, consecutive, or nonminimum sentences. See, generally, *Foster*, 2006-Ohio-856.

{¶16} This court has found error where a trial court specifically cited to and listed excised statutory provisions, as it called into question whether the trial court properly followed *Foster*. See *State v. James*, Clermont App. No. CA2008-04-037, 2009-Ohio-1453, ¶29.

{¶17} However, *Foster* "did not prevent sentencing judges from considering any relevant sentencing factors, even sentencing factors that may have been listed in the statutes that were declared unconstitutional." *James* at ¶24, quoting *State v. Thomas*, Mahoning App. No. 06 MA 185, 2008-Ohio-1176, ¶15. *Foster* only eliminated the statutory requirement of judicial fact-finding as a prerequisite to imposing certain types of sentences. Id. at ¶25; see, also, *State v. Dover*, Stark App. No. 2007-CA-00140, 2008-Ohio-1071, ¶129 (mere fact that the trial court used language from R.C. 2929.14[C] to explain a sentencing decision does not affect appellant's sentence).

{¶18} The record in the case at bar demonstrates no plain error in the sentence imposed. It does not appear that the trial court independently cited to or applied severed portions of Ohio's sentencing statutes in making its decision.

{¶19} The trial court stated that a prison sentence was necessary to serve the purposes and principles of sentencing, that appellant having sexual contact with his niece was the "worst form" of the offense of gross sexual imposition, that consecutive sentences were necessary to protect the public from future crime and to punish appellant, and that one sentence would demean the seriousness of and harmed caused by appellant's conduct. See R.C. 2929.11; R.C. 2929.12; compare *James*, 2009-Ohio-1453 at ¶25-30.

{¶20} We find that the trial court considered the appropriate law and imposed a sentence within the applicable statutory range, and therefore, appellant's sentence is not clearly and convincingly contrary to law and, the trial court did not abuse its discretion in imposing the sentence. See *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶14-19.

{¶21} Appellant's arguments are not well taken and his first and second assignments of error are overruled.

{¶22} We note the record indicates the trial court notified appellant at the sentencing hearing that appellant was subject to a mandatory postrelease control term of five years; however, the trial court's sentencing entry does not consistently reflect that notice as it states that postrelease control for appellant is "mandatory in this case up to a maximum of 5 years."

{¶23} According to R.C. 2967.28, appellant was subject to a mandatory five-year term of postrelease control upon his release from prison, not to a term potentially less than that, as would be indicated by the language of the entry. See R.C. 2967.28(A) (felony sex offense defined); R.C. 2967.28(B) (postrelease control shall be five years for a felony sex offense); cf. *State v. Hagens*, Mahoning App. Nos. 09-MA-2, 09-MA-3, 2009-Ohio-6526, ¶11-12; see, also, R.C. 2929.19.

{¶24} Therefore, we remand this case to the trial court so that it can employ the "sentence-correction mechanism of R.C. 2929.191." See *State v. Wilson*, Cuyahoga App. No. 92148, 2010-Ohio-550, ¶57, citing *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of syllabus; ¶27.

{¶25} Judgment affirmed in part, and reversed in part and remanded for further proceedings regarding the postrelease control provisions of appellant's sentence.

YOUNG, P.J., and RINGLAND, J., concur.