

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2009 CA 119
v. : T.C. NO. 09CR0675B
BARBARA MONEY : (Criminal appeal from
Defendant-Appellant : Common Pleas Court)

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OPINION

Rendered on the 17th day of December, 2010.

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Attorney for Defendant-Appellant
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FROELICH, J.

{¶ 1} Barbara Money pled guilty in the Clark County Court of Common Pleas to one count of trafficking in cocaine, a fifth degree felony. The trial court sentenced her to one year in prison, a one-year driver's license suspension, a

\$2,500 fine, \$160 in restitution, and court costs. Money did not request a stay of her sentence.

{¶ 2} Money appeals, raising two assignments of error. They state:

{¶ 3} “I. THE COURT ABUSED HIS DISCRETION BY FAILING TO IMPOSE THE SHORTEST PRISON TERM AUTHORIZED BY SECTION 2929.14(A)(1) AND 2929.14(B) OF THE OHIO REVISED CODE.

{¶ 4} “II. THE SENTENCE IMPOSED WAS CONTRARY TO LAW.”

{¶ 5} In her assignments of error, Money claims that the trial court should have imposed a minimum sentence under R.C. 2929.14(B) and that her sentence was excessive, considering that she was a first-time offender, expressed remorse, indicated that she would not commit further offenses, and had cooperated with the State in its investigation. Money claims that her sentence was contrary to law and an abuse of discretion. She asks that we reduce her sentence to community control or six months in prison and reduce her driver’s license suspension to six months.

{¶ 6} We review a felony sentence using a two-step procedure. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. “The first step is to ‘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.’” *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio-5775, ¶4, quoting *Kalish* at ¶4. “If this step is satisfied, the second step requires that the trial court’s decision be ‘reviewed under an abuse-of-discretion standard.’” *Id.*

{¶ 7} The overriding purposes of felony sentencing are to protect the public

from future crime by the offender and others and to punish the offender. R.C. 2929.11(A). Unless otherwise required by R.C. 2929.13 and R.C. 2929.14, the trial court has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. R.C. 2929.12(A). The trial court must consider the seriousness of the offender's conduct, its impact upon the victim, and the sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B). It may consider any other factors that are relevant to achieving the purposes and principles of sentencing. R.C. 2929.12. See, also, *State v. Arnold*, Clark App. No. 2008 CA 25, 2009-Ohio-3510, ¶8.

{¶ 8} Money was convicted of one count of trafficking in cocaine, in violation of R.C. 2925.03, a fifth degree felony.¹ R.C. 2925.03(C)(4)(a). The statutory range of a prison term for a fifth degree felony is six to twelve months in prison. R.C. 2929.14(A)(5). In imposing a sentence for a violation of R.C. 2925.03(C)(4)(a), the trial court has the discretion to impose a community control sanction or a combination of community control sanctions instead of a prison term. R.C. 2925.03(C)(4)(a). Since Money's offense was a fifth degree felony, there was a presumption of community control. R.C. 2929.13(B)(2)(b); *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶34. In determining whether to impose a prison sentence, the court must comply with the purposes and principles of sentencing under R.C. 2929.11 and with R.C. 2929.12. R.C. 2929.13(C). Money was also

¹Although the indictment alleged that the offense was committed in the vicinity of a school – a fact that would have elevated the offense to a fourth degree felony under R.C. 2925.03(C)(4)(b) – Money's plea did not include that specification.

subject to a non-mandatory fine of \$2,500, pursuant to R.C. 2929.18(A)(3)(e); restitution under R.C. 2929.18(A)(1); and a mandatory driver's license suspension of between six months and five years under R.C. 2925.03(D)(2) and R.C. 2925.03(G).

{¶ 9} The trial court sentenced Money to the maximum term of twelve months in prison, a \$2,500 fine, restitution of \$160, and a one-year driver's license suspension. Each of these sanctions was authorized by statute. The court's sentencing entry stated that the trial court had considered the record, oral statements of counsel, the defendant's statement, the pre-sentence investigation report, the principles and purposes of sentencing under R.C. 2929.11, and had balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶ 10} Although the court did not indicate at the sentencing hearing that it had considered these factors, absent an affirmative showing to the contrary, an appellate court will generally presume that the trial court did consider the statutory factors. This presumption may be rebutted by an affirmative showing that the trial court failed to consider the factors, or by demonstrating the chosen sentence is "strikingly inconsistent" with the applicable factors. *State v. Thompson*, Columbiana App. No. 08-CA-41, 2010-Ohio-3278, ¶93; *State v. Slone*, Greene App. Nos. 2005 CA 79, 2006 CA 75, 2007-Ohio-130, ¶20.

{¶ 11} Since *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court has discretion to impose any sentence within the statutory range and is no longer required to make findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *Id.* at ¶100; *State v. Mathis*, 109 Ohio St.3d 54,

2006-Ohio-855, at ¶37. The judgment entry stated that the trial court had considered the factors set forth in R.C. 2929.11 and R.C. 2929.12 in imposing Money's sentence and imposed a sentence within the statutory range. While such a mechanical recitation does not always reflect reality, we cannot say that Money's sentence is clearly and convincingly contrary to law.

{¶ 12} Although Money does not cite to *Oregon v. Ice* (2009), ____ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, she argues in her brief that the trial court should have imposed the minimum statutory prison term (six months) in the absence of any statutory findings under R.C. 2929.14(B). The Ohio Supreme Court eliminated the need for such findings in *Foster*. Thus, Money appears to assert that *Foster* is no longer viable in light of the United States Supreme Court's holding in *Ice*; this question is currently before the Ohio Supreme Court in *State v. Blackburn*, S.Ct. No. 2009-2314. See *State v. Blackburn*, 124 Ohio St.3d 1505, 2010-Ohio-799 (accepting appeal for review). Regardless, Money did not challenge the constitutionality of the Ohio Supreme Court's holding in *Foster* in the trial court. As the issue was not raised before the trial court, we decline to consider it for the first time on appeal.

{¶ 13} Having concluded that Money's sentence was not contrary to law, we must consider whether the trial court abused its discretion in imposing the sentence that it did. *Stevens* at ¶4; *State v. Watkins*, 186 Ohio App.3d 619, 2010-Ohio-740, ¶41. The abuse of discretion standard is an "appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Boles*, 187 Ohio App.3d 345,

2010-Ohio-278, ¶18, quoting Black's Law Dictionary, Eighth Edition (2004), at 11; *Watkins* at ¶41. "Thus, in the felony sentencing context, '[a]n abuse of discretion can be found if the sentencing court unreasonably or arbitrarily weighs the factors in R.C. 2929.11 and 2929.12.'" *State v. Jordan*, Columbiana App. No. 09 CO 31, 2010-Ohio-3456, ¶12 (internal citation omitted).

{¶ 14} In determining an appropriate sentence, the trial court "is not confined to the evidence that strictly relates to the conviction offense because the court is no longer concerned, like it was during trial, with the narrow issue of guilt." *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, ¶14, citing *Williams v. New York* (1949), 337 U.S. 241, 246-47, 69 S.Ct. 1079, 93 L.Ed. 1337. In addition to statutory factors, the court may consider the contents of a presentence investigation report, facts supporting a charge of which the defendant was ultimately acquitted, allegations of crimes for which the defendant was never prosecuted, and facts supporting a charge that was dismissed in a plea agreement. *Id.* at ¶15-16; *State v. Miller*, Clark App. No. 09-CA-28, 2010-Ohio-2138, ¶47, fn.2.

{¶ 15} At the sentencing hearing, the court was presented with a presentence investigation report for Money, which indicated that Money was 42 years old and has received social security disability for medical reasons since 1999. Money suffers from chronic asthma, COPD, migraines, and a pineal gland tumor. Money had two prior theft charges. The first theft charge occurred in 1986 in Illinois; the disposition of that case was unknown. Money had a second theft charge in March 2005 in Springfield, Ohio; she was sentenced to a \$250 fine and court costs. Money had no other charges pending. Money acknowledged using

cocaine for approximately six to nine months in 2009.

{¶ 16} The investigator notes in the presentence investigation report indicated that Money was involved in a drug transaction on April 2, 2009, when a confidential informant (“CI”) called Bill Money, Money’s husband and the target of the investigation, to purchase cocaine. Bill Money told the CI that he was at work but that he would call his supplier and have the supplier give the drugs to his wife. Bill Money stated that the CI could obtain drugs from his wife in about an hour. Shortly after noon, the CI went to the Moneys’ residence, located at 1342 West Jefferson Street in Springfield, Ohio. The CI entered the residence and Barbara Money sold approximately 2.5 grams of powder cocaine to the CI.

{¶ 17} During the sentencing hearing, Money’s counsel emphasized to the court that Money had never “been before the Court on any previous occasion for any kind of criminal activity.” Counsel also told the court that Money had “some serious health problems, which has resulted in her social security disability.” During her allocution, Money stated: “I don’t know what to say. I know I’ll never be doing this stuff again, and I apologize for doing what I did.”

{¶ 18} The State informed the court that Money had been cooperative, stating:

{¶ 19} “*** I think it’s important that the Court know that at the time this investigation was wrapping up and being completed, these defendants [Money and her husband], in being questioned by the law enforcement agencies that were responsible for the investigation, were cooperative.

{¶ 20} “I believe that they were honest in their participation in these activities.

I think it's also important to know that they were willing, throughout the pendency of these charges, to testify if called upon by the State of Ohio to testify truthfully, regarding their activity and the activity of a codefendant in this matter.

{¶ 21} “And I think that that deserves some consideration by the Court, along with a lack of criminal records here as well. ***”

{¶ 22} The trial court provided no explanation for its sentence. Almost by definition, discretion is “not pernicious if exercised well, but illegitimate factors are more likely to influence decisions when discretion is hidden and impervious to external scrutiny. *** The exercise of discretion should be reasoned, transparent, and subject to review.” Berman and Bibas, Making Sentencing Sensible, 4 Ohio St. J. of Criminal Law 37, 43 (Fall 2006).

{¶ 23} The record reflects that Money was involved in a single drug transaction at her home, apparently at the request of her husband, who was at work and unable to complete the transaction himself. Money was 42 years old, received social security disability, and had no prior felony record; the prior theft offense in 2005 resulted in a \$250 fine. Money had no other pending criminal charges, and nothing in the record suggests that Money had engaged in any uncharged criminal offenses that the State intended to pursue. Money was remorseful at her sentencing hearing, and the State emphasized her openness and willingness to cooperate with its investigation and the prosecution of a co-defendant. Based on the record, we see no circumstances that outweigh the statutory presumption of community control or any reason why Money would not have been amenable to community control, and we certainly see no justification for the imposition of a

maximum sentence.

{¶ 24} We recognize that, as a result of her plea, Money's conviction did not include the specification that the offense occurred within the vicinity of a school. As a result, Money was convicted of a fifth degree felony, not a fourth degree felony. Even considering the resultant decrease in the possible maximum sentence, we see no reasonable justification for the imposition of a one-year sentence in this case. Based on the record, Money's one-year sentence was an abuse of discretion.

{¶ 25} Nevertheless, we cannot reverse Money's sentence and remand for resentencing. Money did not seek a stay of her sentencing, and she has been incarcerated during the pendency of this appeal. The Ohio Department of Rehabilitation and Correction's website, of which we take judicial notice, had indicated that Money's prison term was to expire on November 26, 2010. As of this date, Money is no longer listed as an inmate, and she is not on post-release control. "This court cannot grant relief to an appellant who has served [her] sentence if the underlying conviction is not at issue." *State v. Johnson*, Lake App. No. 2005-L-208, 2007-Ohio-780, ¶7. See, also, *State v. Silvers*, Clark App. No. 09-CA-19, 2010-Ohio-567, ¶4 (taking judicial notice that defendant's name did not appear on the ODRC website and overruling defendant's challenge to his sentence as moot); *State v. Crockran*, Clark App. No. 05-CA-18, 2006-Ohio-3192, ¶7 (noting that the record did not reflect that the trial court had stayed the eleven-month sentence and that "far more than eleven months has since passed;" presuming that defendant had completed serving his sentence; and finding defendant's sole

assignment of error regarding the sentence to be moot). Because Money has completed her term of imprisonment, Money's challenge to her prison sentence is moot and we must dismiss the appeal on that basis.

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DONOVAN, P.J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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