[Cite as *State v. Voycik*, 2009-Ohio-3669.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

The State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case Nos. 08CA33 & 08CA34
	:	
vs.	:	
	:	
Jeffrey R. Voycik,	:	**DECISION AND JUDGMENT ENTRY**
	:	
Defendant-Appellant	:	
	:	File-stamped date: 7-23-09

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Appellant.

James E. Schneider, Washington County Prosecutor, and Alison L. Cauthorn, Assistant Washington County Prosecutor, Marietta, Ohio, for Appellee.

Kline P.J.:

{¶1} Jeffrey R. Voycik (hereinafter "Voycik") appeals his maximum, consecutive prison sentences for Possession of Drugs and Theft from the Washington County Common Pleas Court. On appeal, Voycik contends that the trial court erred when it (1) imposed the maximum available prison sentences and (2) ordered Voycik to serve those sentences consecutively. We disagree. First, we find that Voycik's sentences for Possession of Drugs and Theft are not clearly and convincingly contrary to law. And second, we find that the trial court did not abuse its discretion in imposing the maximum available sentences or by ordering Voycik to serve those sentences consecutively. Accordingly, we affirm Voycik's sentences and the judgment of the trial court.

I.

{¶2} On May 29, 2008, a Washington County Grand Jury indicted Voycik for Tampering with Evidence, a third degree felony, under R.C. 2921.12(A)(1); Possession of Drugs, a fifth degree felony, under R.C. 2925.11(A)&(C)(1)(a); and Possession of Drugs, a third degree misdemeanor, under R.C. 2925.11(A)&(C)(1)(a). These charges all resulted from a February 9, 2008 incident involving Voycik.

{¶3} In March or April 2008, Voycik engaged in a series of thefts unrelated to the February 9, 2008 incident. And on June 26, 2008, a Washington County Grand Jury indicted Voycik for Theft, a fourth degree felony, under R.C. 2913.02(A)(1).

{¶4} Under a plea agreement, Voycik pled guilty to both Possession of Drugs charges in the May 29, 2008 indictment. In return, the state agreed to drop the Tampering with Evidence charge. Voycik also pled guilty to an amended charge of fifth degree felony theft.

{¶5} A pre-sentencing report documented Voycik's extensive criminal history, including a prior prison term. The prosecutors recommended two concurrent prison terms of anywhere from nine-to-twelve months. Despite that recommendation, the trial court imposed the following sentence: (1) twelve months in prison for fifth degree felony Possession of Drugs; (2) sixty days in jail for third degree misdemeanor Possession of Drugs; and (3) twelve months in prison for fifth degree felony Theft. The trial court ordered Voycik to serve the two sentences for Possession of Drugs concurrently to each other, but

consecutively to Voycik's sentence for Theft. Thus, the trial court ordered Voycik to serve a definite period of two years incarceration.

{¶6} Voycik appeals, asserting the following two assignments of error: I. "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THE MAXIMUM AVAILABLE PRISON TERMS IN THIS CASE." And, II. "THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE PRISON TERMS IN THIS CASE."

II.

{¶7} In his first assignment of error, Voycik contends that the trial court erred in sentencing him to the maximum available prison terms for Possession of Drugs and Theft.

{¶8} "Appellate courts 'apply a two-step approach [to review a sentence]. First, [we] 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.'" *State v. Smith*, Pickaway App. No. 08CA6, 2009-Ohio-716, at ¶8, quoting *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4 (alterations in original).

{¶9} Here, we find that Voycik's two twelve-month sentences are not clearly and convincingly contrary to law. In analyzing whether Voycik's sentences are contrary to law, "[t]he only specific guideline is that the sentence[s] must be within the statutory range[.]" *State v. Welch*, Washington App. No. 08CA29,

2009-Ohio-2655, at ¶7, quoting *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at ¶10.

{¶10} Voycik pled guilty to two fifth-degree felonies. First, Voycik pled guilty to Possession of Drugs pursuant to R.C. 2925.11(C)(1)(a). R.C. 2925.11(C)(1)(a) provides: "Whoever violates division (A) of this section is guilty of one of the following: (1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows: (a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree[.]" Voycik also pled guilty to Theft pursuant to R.C. 2913.02(A)(1). R.C. 2913.02(A)(1) provides: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services[.]" The amended indictment charged Voycik with stealing property worth "more than $500.00 but less than $5,000.00." And when "the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars * * * a violation of [R.C. 2913.02] is theft, a felony of the fifth degree." R.C. 2913.02(B)(2).

{¶11} Here, the trial court sentenced Voycik to twelve months in prison for Possession of Drugs and twelve months in prison for Theft. R.C. 2929.14(A)(5) provides: "For a felony of the fifth degree, the prison term shall be six, seven,

eight, nine, ten, eleven, or twelve months." Therefore, both of Voycik's prison sentences are within the statutory range for fifth-degree felonies.

{¶12} Additionally, courts must consider the general guidance factors set forth in R.C. 2929.11 and R.C. 2929.12. *Foster* at ¶42; *Kalish* at ¶13. And in imposing both sentences, the trial court stated that it had considered "the factors set forth in Ohio Revised Code sections 2929.11 through 2929.19[.]" More particularly, the trial court noted that it had "weighed the seriousness and recidivism factors and ha[d] considered the over-riding [sic] purposes of felony sentencing to protect the public from future crime by this offender and others, and the purpose to punish this offender, and ha[d] considered the need for incapacitating this offender and deterring the offender and others from future crime, and for rehabilitating the offender." Therefore, we find that the trial court complied with all applicable rules and statutes in sentencing Voycik. And thus, we find that Voycik's maximum sentences are not clearly and convincingly contrary to law.

{¶13} Next, after applying the first prong of the above two-step approach, we address the second question of whether the sentences imposed represent an abuse of discretion. An abuse of discretion involves more than an error of judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "In the sentencing context, we review the trial court's selection of the sentence within the permissible statutory range." *Smith* at ¶17, quoting *Kalish* at ¶17.

{¶14} Sentencing courts "have full discretion to impose a prison sentence within the statutory range and are [not] required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856 at paragraph seven of the syllabus; see, also, *Kalish* at ¶11. Nevertheless, as mentioned above, courts must still consider the general guidance factors set forth in R.C. 2929.11 and R.C. 2929.12.

{¶15} Here, we find that the trial court did not abuse its discretion when it imposed the maximum sentences for Voycik's two felony convictions. R.C. 2929.11 concerns the purposes of felony sentencing, i.e., "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). R.C. 2929.12 contains the factors courts must consider in determining the seriousness of a crime and the offender's likelihood of recidivism. It provides that a sentencing court "shall consider the factors set forth in [R.C. 2929.12](B) and (C) * * * relating to the seriousness of the conduct and the factors provided in [R.C. 2929.12](D) and (E) * * * 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."

{¶16} In sentencing Voycik, the trial court took particular note of his extensive criminal history and numerous prior convictions. Indeed, Voycik had seventeen (17) prior adult criminal convictions from 2001 through 2008. In 2004, Voycik was placed on community control supervision after pleading guilty to a felony drug offense. But after committing another felony drug offense in 2005, Voycik

had his community control supervision revoked and spent eighteen months in prison (with credit for completing a rehabilitation program). Thus, the record supports the trial court's finding that Voycik is more likely to recidivate. Moreover, based on Voycik's extensive criminal history, the trial court could have reasonably concluded that maximum sentences were necessary to protect the public from Voycik's criminal conduct. And finally, because Voycik had not responded to prior punishments, including prior prison terms, the trial court could have reasonably concluded that maximum sentences were necessary to punish and rehabilitate Voycik.

{¶17} Therefore, under the second step of our analysis, we find that the trial court did not abuse its discretion when it sentenced Voycik to maximum sentences for his two felony convictions. Accordingly, we overrule Voycik's first assignment of error.

III.

{¶18} In his second assignment of error, Voycik contends that the trial court erred in sentencing Voycik to consecutive prison terms for Possession of Drugs and Theft.

{¶19} Generally, we have analyzed a trial court's decision to impose consecutive prison sentences in conjunction with that court's decision to impose non-minimum or maximum prison terms. See, e.g., *State v. Moman*, Adams App. No. 08CA876, 2009-Ohio-2510, at ¶5-12; *State v. O'Daniel*, Highland App. No. 08CA13, 2009-Ohio-2241, at ¶10-17; *Smith* at ¶8-21. However, Voycik has raised the issue of consecutive sentences as a separate assignment of error.

Because of this, and because Voycik has raised different arguments regarding the imposition of consecutive sentences, we will address the issues separately in this case.

{¶20} We review the trial court's decision to impose consecutive sentences under the same two-step approach that we used to review the length of Voycik's prison sentences. See *Moman* at ¶5-12; *O'Daniel* at ¶10-17; *Smith* at ¶8-21. Here, we have already determined that the trial court properly considered the relevant sentencing statutes and that Voycik's two prison sentences are within the statutory range. Therefore, we similarly find that Voycik's two-year aggregate sentence is also within the statutory range and not clearly and convincingly contrary to law. Next, we must determine whether the trial court abused its discretion by imposing consecutive sentences. "To establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will, but perversity of will; not exercise of judgment, but defiance of judgment; and not the exercise of reason, but, instead, passion or bias." *O'Daniel* at ¶14, citing *Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003-Ohio-2181, at ¶13.

{¶21} Voycik contends that the consecutive sentences are disproportionate to the seriousness of his conduct or the danger that he poses to the public. Regarding the Possession of Drugs conviction, Voycik argues that consecutive sentences are not appropriate because he merely possessed a single tablet of methylenedioxymethamphetamine, commonly known as "ecstasy." Voycik further argues that the circumstances of the Theft conviction do not demonstrate

that he is a danger to the public. In support of his arguments, Voycik cites *State v. Lyons*, Cuyahoga App. No. 84377, 2005-Ohio-392. In *Lyons*, the Eighth District Court of Appeals found that the defendant's "convictions for selling $10 worth of drugs did not warrant consecutive sentences and were disproportionate to the seriousness of his conduct." Id. at ¶17.

{¶22} However, we note that *Lyons* was decided before the Supreme Court of Ohio's decision in *Foster*. See, generally, *State v. Steward*, Highland App. No. 08CA7, 2008-Ohio-7010, at ¶9 (discussing the impact of *Foster*). The *Lyons* court based its decision on R.C. 2929.14(E)(4), which *Foster* found to be unconstitutional. See *Foster* at paragraphs three and four of the syllabus. Therefore, the *Lyons* court's findings in relation to R.C. 2929.14(E)(4) do not apply to the present case. Furthermore, *Lyons* used a standard of review made obsolete by *Foster* and *Kalish*. See, generally, *Welch* at ¶6-7 & fn.1 (discussing our standard of review for felony sentences after *Foster* and *Kalish*). The *Lyons* court reviewed the defendant's sentence de novo and found, by clear and convincing evidence, that the record did not support the trial court's findings. *Lyons* at ¶17. In contrast to *Lyons*, we must review Voycik's consecutive sentences under an abuse of discretion standard with no regard for R.C. 2929.14(E)(4).

{¶23} Here, we find that the trial court did not abuse its discretion by imposing consecutive sentences. Trial courts have the "discretion to impose consecutive sentences without stating their reasons for doing so." *State v. Scott*, Pickaway App. No. 07CA5, 2007-Ohio-3543, at ¶9, citing *Foster*, at paragraph

seven of the syllabus; see, also, *Smith* at ¶11. As we discussed in the resolution of Voycik's first assignment of error, the trial court properly considered the general guidance factors for felony sentencing. And for the same reasons that we overruled Voycik's first assignment of error, we also overrule Voycik's second assignment of error. The trial court could have reasonably concluded that consecutive sentences were necessary for the following reasons: (1) because Voycik was likely to recidivate; (2) to protect the public from Voycik's criminal conduct; and (3) to punish and rehabilitate Voycik.

{¶24} Accordingly, we overrule Voycik's second assignment of error. Having overruled both of Voycik's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.