**[Cite as *State v. Woodruff*, 2008-Ohio-4884.]**

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | |
| | : | Hon. Sheila G. Farmer, P.J. |
| Plaintiff-Appellee | : | Hon. Julie A. Edwards, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 07CAA100050 |
| JAMES A. WOODRUFF | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Delaware County Court of Common Pleas Court Case No. 07CR-03-162 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | September 24, 2008 |

APPEARANCES:

For Plaintiff-Appellee:
David A. Yost
Marianne T. Hemmeter
Delaware County Prosecuting Attorney's Office
140 N. Sandusky Street
Delaware, Ohio 43015

For Defendant-Appellant:
John R. Cornely
941 Chatham Lane
Columbus, Ohio 43221

*Delaney, J.*

{¶1} Defendant-appellant James Woodruff appeals his sentence imposed by the Delaware County Common Pleas Court following his conviction on multiple counts of rape perpetrated on his two minor daughters.

{¶2} On March 13, 2007, appellant's eleven-year-old daughter disclosed to a counselor at middle school that her father had been raping her over the last several months. She further disclosed instances of vaginal intercourse and fellatio. She also disclosed that her seven-year-old sister was being sexually abused by their father. At her interview, the seven-year-old girl disclosed vaginal intercourse and fellatio with appellant as well as forced sex acts upon her sister.

{¶3} On March 18, 2007, after denying the sexual abuse, appellant admitted to certain sexual acts with his daughters. He further admitted they had performed fellatio on him.

{¶4} The Delaware County Grand Jury indicted appellant on March 23, 2007 on ten counts of rape in violation of R.C. 2907(A)(1)(b), felonies of the first degree. Five counts alleged appellant engaged in sexual conduct with Mary Doe who is less than thirteen years of age and he purposefully compelled her to submit by force or threat of force. The remaining five counts alleged that appellant engaged in sexual conduct with Jane Doe who is less than ten years of age.

{¶5} On July 24, 2007, appellant pleaded guilty to Counts One (as amended), Two (as amended), Nine, and Ten of the indictment. Appellee amended Counts One and Two to reflect rape without the force specification. The amended counts carry a

definite prison term of three to ten years. Counts Nine and Ten carry a definite prison term of fifteen years to life.

{¶6} On September 24, 2007, the trial court held a sexual predator classification and a sentencing hearing. The trial court classified appellant as a sexual predator and sentenced him to nine years in prison on Count One and Two to be served consecutively. The trial court explained that the reason it did not sentence to appellant to the maximum and "knocked" one year off each sentence was because appellant "eliminated the need for the kids to testify." Tr. at 14. The trial court then sentenced appellant to fifteen years to life on Count Nine and fifteen years to life on Count Ten to be served consecutively for a total minimum prison sentence of 48 years. At the time of sentencing, appellant was 36 years old.

{¶7} Appellant appeals his sentence raising one Assignment of Error:

{¶8} "I. THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES TOTALING FORTY-EIGHT YEARS TO LIFE IS CONTRARY TO LAW.

I.

{¶9} In his sole assignment of error, appellant contends that his prison sentence is contrary to law. He presents two issues for review. First, appellant argues that the 48 year sentence was not reasonably calculated to achieve the overriding purposes of felony sentencing. Next, he contends that the sentence was contrary to law and was not consistent with similar crimes by similar offenders.

{¶10} Appellant was sentenced in the post- *Foster* era. See *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. In *State v. Firouzmandi,* Licking App. No.2006-CA-41, 2006-Ohio-5823, we recognized that the *Foster* court's removal of R.C.

2953.08(G)(2) from the statutory sentencing scheme eliminated the clear and convincing standard and left a void concerning the applicable standard of review in sentencing matters. *Id.* at ¶ 37, citing *State v. Windham,* Wayne App. No. 05CA0033, 2006-Ohio-1544 at ¶ 11. Therefore, the rule in the post-*Foster* era is to review felony sentences under an abuse of discretion standard contrary to appellant's assertion that this Court should apply a clear and convincing standard. See *State v. Pressley,* Muskingum App. No. CT2006-0033, 2007-Ohio-2171, ¶ 17, citing *State v. Coleman,* Lorain App. No. 06CA008877, 2006-Ohio-6329. An abuse of discretion implies the court's attitude is "unreasonable, arbitrary or unconscionable." See *State v. Adams* (1980) 62 Ohio St.2d. 151, 157. Furthermore, judicial fact-finding is no longer required before a court imposes maximum prison terms. *State v. Mooney,* Stark App. No.2005-CA-00304, 2006-Ohio-6014, ¶ 58, citing *State v. Mathis,* 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855. But trial courts are still required to "consider" the general guidance factors contained in R.C. 2929.11 and R.C. 2929.12 in their sentencing decisions. See *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282, ¶ 8.

{¶11} The sentencing range on each of the rape counts was 3, 4, 5, 6, 7, 8, 9, or 10 years, with an additional one to ten years for felonious sexual penetration of a victim under 13 years old. The trial court sentenced appellant on Counts One and Two to nine years on each count. The trial court sentenced appellant to fifteen years on Counts Nine and Ten. These sentences were within the statutory range.

{¶12} Our review of the record further indicates the trial court considered the purposes of felony sentencing under R.C. 2929.11 and R.C. 2929.12 in the Judgment

Entry on Sentence dated October 1, 2007. The trial court also considered the Pre-sentence Investigation. See, Sentencing Entry date October 1. 2007.

{¶13} The trial court stated that the appellant lacked remorse and was still blaming his child victims at the time of his allocution and that appellant claimed his victims were "sexually aggressive." Tr. at 12. The only mitigating factor the trial court cited was the fact that appellant pleaded guilty which prevented his victims from having to testify. Tr. at 12. The trial court then stated:

{¶14} "[B]ased upon the facts of this case, considering the ages of the girls, considering your allocution that you made, you are one of those individuals that, quite frankly, if you spend the rest of your life in prison, society's probably better off." Tr. at 13.

{¶15} Appellant next claims his sentence violates the consistency mandate found in R.C. 2929.11(B). This section states: "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶16} As we stated in *State v. King,* Muskingum App. No. CT06-0020, 2006-Ohio-6566, our role as an appellate court evaluating a sentence challenged for consistency is to determine "whether the sentence is so unusual as to be outside the mainstream of local judicial practice" citing *State v. Quine,* Summit App. No. 20968, 2002-Ohio-6987. In *King,* we declined "to compare a particular defendant's sentences with similar crimes in this or other jurisdictions unless there is an inference of gross

disproportionality." Id., citing *State v. Vlahopoulos,* Cuyahoga App. No. 80427, 2002-Ohio-3244.

{¶17} Our review of the record indicates that the trial court did not fail to consider the purposes and principles of R.C. 2929.11 et seq. Our review centers around the particular facts and circumstances of the case to determine whether the trial court considered the proper factors and imposed a sentence that is not grossly inconsistent with those received by substantially similar offenders.

{¶18} As stated earlier, appellant's sentence is within the statutory range and it is within the trial court's discretion to consider the factors presented to it in determining the appropriate length of sentence and imposition of consecutive sentences.

{¶19} Based on our independent review of the record, we find that the trial court's 48 year sentence was not unreasonable, arbitrary or unconscionable. Accordingly, appellant's sole assignment of error is overruled.

{¶20} The decision of the Delaware County Common Pleas Court is affirmed.

By: Delaney, J.

Farmer, P.J. and

Edwards, J. concur.

S/L Patricia A. Delaney

S/L Sheila G. Farmer

S/L Julie A. Edwards

JUDGES

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| Defendant-Appellant | : | Case No. 07CAA100050 |
| | : | |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to appellant.

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S/L Patricia A. Delaney

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S/L Sheila G. Farmer

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S/L Julie A. Edwards

JUDGES