

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. CT2009-CA-0019
KENNETH L. MILLER	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas Case No. CR2008-0297

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: October 13, 2009

APPEARANCES:

For Plaintiff-Appellee:

D. MICHAEL HADDOX
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Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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Delaney, J.

{¶1} Kenneth L. Miller appeals from his conviction and sentence in the Muskingum County Court of Common Pleas on one count of possessing drug abuse instruments, in violation of R.C. 2925.12(A), a misdemeanor of the second degree; one count of possession of heroin, in violation of R.C. 2925.11(A), a felony of the fifth degree; and one count of theft, in violation of R.C. 2913.02(A)(1), a felony of the fifth degree.

{¶2} Appellant was indicted on October 29, 2008, on these charges. He entered pleas of not guilty to all charges at his arraignment.

{¶3} On January 7, 2009, Appellant withdrew his previously entered not guilty pleas and changed his plea to that of guilty to all charges in the indictment. In exchange for the plea, the State made no sentencing recommendation and deferred to the trial court with respect to sentencing.

{¶4} The trial court ordered a presentence investigation and held a sentencing hearing on February 23, 2009. At that hearing, the court sentenced Appellant to one year in prison for the theft offense, one year in prison for the possession of heroin offense, and ordered that the sentences be served consecutively to each other. The court also ordered Appellant to serve 90 days in jail for the offense of possessing drug abuse instruments, to be served concurrently to the other counts.

{¶5} Appellant raises two Assignments of Error:

{¶6} “I. THE TRIAL COURT ERRED BY FAILING TO MAKE THE REQUISITE FINDINGS OF FACT TO SUPPORT THE IMPOSITION OF A CONSECUTIVE SENTENCE, PURSUANT TO ORC 2929.14(E)(4), AND FAILING TO STATE ITS

REASONING SUPPORTING SUCH STATUTORILY ENUMERATED FINDINGS ON THE RECORD AT THE SENTENCING HEARING, PURSUANT TO ORC 2929.19(B)(2)(c).

{¶7} “II. THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN SENTENCING KENNETH MILLER TO MAXIMUM CONSECUTIVE SENTENCES.”

I & II

{¶8} In his first and second assignments of error, Appellant argues that the trial court erred in sentencing him to maximum, consecutive sentences. We disagree.

{¶9} The statutes governing felony sentencing in Ohio used to require that a trial court make particular findings before sentencing a criminal defendant to maximum and consecutive sentences. However, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, 845 N.E.2d 470, the Ohio Supreme Court found much of Ohio's felony sentencing scheme unconstitutional because that scheme violated a defendant's right to a jury trial. Now, a trial court which is sentencing a felony offender “must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself.” *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-0855, 846 N.E.2d 1, at ¶ 38.

{¶10} After *Foster*, trial courts now 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*, supra, at paragraph seven of the syllabus.

{¶11} Appellant argues the trial court erred when sentencing him to maximum and consecutive sentences because the trial court did not make any of the findings listed in R.C. 2929.14 and did not give the reasons in support of that finding. However, the statute he is relying on was found unconstitutional in *Foster* and severed from the statutory scheme. *Foster*, at paragraphs one and two of the syllabus.

{¶12} The trial court, in sentencing Appellant in the present case, noted that it reviewed the presentence investigation report and that Appellant had between ten and twelve prior felony convictions, as well as a pending felony in another county. The court told Appellant that prison is for punishment as well as protecting society and that “You’re stealing from people. It’s just - - that’s your history. You don’t go very long at all from 1997 to the present without being convicted of theft, some type of theft offense.”

{¶13} Moreover, there were no objections to the sentence imposed by the trial court by either Appellant or his counsel. Additionally, the court, in its judgment entry, indicated that it had considered the purposes and principles of sentencing under R.C. 2929.11 and had balanced the seriousness and recidivism factors in R.C. 2929.12.

{¶14} The court then sentenced Appellant within the statutory scheme on all counts. Accordingly, Appellant’s argument fails.

{¶15} Appellant’s first and second assignments of error are overruled.

{¶16} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KENNETH L. MILLER	:	
	:	
Defendant-Appellant.	:	Case No. CT2009-CA-0019
	:	

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

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE