

[Cite as *State v. McConnell*, 2009-Ohio-5998.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RUSSELL G. MCCONNELL

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 12

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 08 CR 38

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 12, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Defendant-Appellant Russell G. McConnell appeals a judgment of the Coshocton County Common Pleas Court which convicted and sentenced him for one count of manslaughter.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On March 2, 2008, Appellant Russell McConnell was involved in a fight with Samuel Rivera outside of a bar, Throttles and Bottles tavern, in Coshocton County, Ohio. Samuel Rivera died from the injuries he sustained during such altercation.

{¶4} On March 3, 2008, Appellant was charged in the Coshocton Municipal Court with one count of Murder, upon warrant, and scheduled for a preliminary hearing.

{¶5} On March 10, 2008, the State moved to continue the hearing due to the unavailability of a forensic pathologist. Prior to the preliminary hearing, the State presented the case to the Grand Jury, and dismissed the case pending in the Municipal Court.

{¶6} On April 7, 2008, Appellant was arraigned in Coshocton County Common Pleas Court upon an Indictment charging one count of Murder in violation of R.C. §2903.02, an unclassified felony. He was determined to be indigent and appointed counsel.

{¶7} On May 2, 2008, Appellant filed a waiver of speedy trial time.

{¶8} On July 7, 2008, Appellant was arraigned on an Amended Indictment charging one count of Murder, in violation of R.C. §2903.02(B), an unclassified felony; one count of Involuntary Manslaughter, in violation of R.C. §2903.04(B), a felony of the

third degree; and one count of Theft, in violation of R.C. §2913.02(A)(1), a misdemeanor of the first degree.

{¶9} On November 21, 2008, Appellant moved to continue his trial, which was scheduled for December 16, 2008, for the reason that he had employed an expert pathologist to review the evidence and submit a report, and the expert required additional time.

{¶10} Prior to the trial in this matter, the State and Appellant reached an agreement whereby the State would dismiss Count One (Murder) and Count Three, (Theft) and Appellant would enter a plea of guilty to Count Two (Manslaughter). The State agreed not to oppose a pre-sentence investigation, and not to object to a continuation of bond. The State also notified Appellant it intended to recommend the maximum sentence of five years at sentencing.

{¶11} Appellant entered his guilty plea on February 17, 2009.

{¶12} On March 23, 2009, the matter came before the court for Disposition. Appellant filed a sentencing memorandum in advance of the hearing. The State argued orally at the hearing and called to testify eight relatives of the victim to give their impact statements under oath.

{¶13} At the conclusion of the sentencing hearing, the trial court executed the maximum sentence of five years incarceration.

{¶14} Appellant now appeals, assigning the following errors for review:

ASSIGNMENT OF ERROR

{¶15} "I. THE COURT ABUSED ITS DISCRETION IN APPLYING THE MAXIMUM SENTENCE TO DEFENDANT."

I.

{¶16} In his sole Assignment of Error, Appellant contends the trial court abused its discretion in ordering the maximum sentence. We disagree.

{¶17} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found certain provisions of Ohio's sentencing statute unconstitutional, in light of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, because said provisions required judicial fact finding to exceed the sentence allowed simply as a result of a conviction or plea. The Court therein concluded “ * * * 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.” Id. at ¶100.

{¶18} Appellant in the case sub judice was sentenced in the post-*Foster* era. In *State v. Firouzmandi*, Licking App.No. 2006-CA-41, 2006-Ohio-5823, this Court 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. This Court concluded that post-*Foster*, an appellate court reviews the imposition of maximum and/or consecutive sentences under an abuse of discretion standard. Id. at ¶ 40. 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. Additionally, post-*Foster*, 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.

{¶19} In the case sub judice, Appellant pled guilty to and was convicted of one count of manslaughter, in violation of R.C. §2903.04, a third degree felony. A third degree felony is punishable by one, two, three, four or five years in prison. It was within the trial court's discretion to consider any penalty within the foregoing range as long as the penalty was considered in light of the factors of R.C. §2929.11 and §2929.12.

{¶20} The facts of this case establish that the victim in this case lost his life as a result of the violent behavior engaged in by Appellant. (T. at 25). The trial court also considered a pre-sentence investigation report in addition to Appellant's criminal history and previous probation violations. (T. at 25-26). The trial court also reviewed the sentencing factors, stating:

{¶21} "I have reviewed those factors that are available and done so with the background of that information, with those facts that are available at this point - Having done that sentencing exercise, I am convinced that there is only one appropriate sentence in this case, that being the maximum sentence of five years in a state penitentiary. I find and so order." (T. at 28).

{¶22} Upon review of the sentencing hearing transcript and the subsequent judgment entry in this matter, this Court is not persuaded that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court otherwise abused its discretion in ordering Appellant to serve the maximum sentence.

{¶23} Appellant's sole Assignment of Error is overruled.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas, Coshocton County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 1027

