[Cite as *State v. Korotkov*, 2010-Ohio-3097.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CAA 08 0073
	:	
	:	
JULIE KOROTKOV	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Delaware County Court of Common Pleas Case No. 09 CR I 06 0304E
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2010

APPEARANCES:

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Edwards, P.J.

{¶1} Appellant, Julie Korotkov, appeals a judgment of the Delaware County Common Pleas Court convicting her of three counts of receiving stolen property (R.C. 2913.51(A)) upon pleas of guilty and sentencing her to an aggregate term of incarceration of three years. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Following an alleged string of thefts from stores in and around the Polaris Mall, appellant, her mother and father, and her two adult sisters were indicted together on a charge of engaging in a pattern of corrupt activity (R.C. 2923.32(A)(1)) involving robbery (R.C. 2911.02(A)(3)), receiving stolen property (R.C. 2913.51(A)), and other related offenses. All five family members were further charged with possession of criminal tools (R.C. 2923.24(A)) and three counts of receiving stolen property valued at $500 or more but less than $5,000 (R.C. 2913.51(A)) from three different Polaris Mall stores.

{¶3} Additionally, when a security guard tried to stop them, appellant's father allegedly tried to run him over with their car. As a result, appellant's father was individually charged with robbery (R.C. 2911.02(A) (3)) and assault with a deadly weapon (R.C. 2903.11(A) (2)), namely a motor vehicle. Appellant, her mother and her sisters were charged with aiding and abetting the robbery (R.C. 2923.03(A) (2)).

{¶4} All of the members of the family accepted plea bargains. Appellant pleaded guilty to the three counts of receiving stolen property, all fifth degree felonies, in exchange for the prosecution dismissing the remaining counts.

{¶5} At the sentencing hearing, the prosecution argued that multiple or consecutive sentences were warranted because all three counts of receiving stolen property had a separate animus as the property was stolen from three different stores-Strasbourg Clothing, Williams Sonoma, and Accent on Image. The parties acknowledged that the court had heard evidence at the sentencing hearing for appellant's mother, Maria Konstantinov, on this issue. This evidence included a security video which showed appellant, her mother and her sisters entering the mall together, walking around the mall, and entering and/or exiting some stores. The prosecution also presented photographs of a "tent" or "luggage" dress that was allegedly used to conceal stolen items and that was found in the family's car at the time of appellant's arrest. The prosecution argued that the evidence showed that all four of the Konstantinov women stole the property together, thereby committing separate acts of receiving stolen property because they were aware that the property came from different stores and different theft incidents. Appellant's trial counsel objected to the admission of this evidence from the prior case, and the court overruled the objection.

{¶6} The court also reviewed a pre-sentence investigation report, which indicated that appellant and her family had been involved in a long string of theft-related, shoplifting type of offenses in various states stretching back over numerous years.

{¶7} The trial court concluded in accordance with its prior decision in Maria Konstantinov's case that there was a separate animus as to each count because the property was received from separate businesses. Based on the evidence, the court sentenced appellant to the maximum term of 12 months on each count, to be served

consecutively, for a total term of incarceration of 36 months. It is from this sentence appellant appeals, raising the following three assignments of error:

{¶8} "I. THE TRIAL COURT VIOLATED DUE PROCESS AND R.C. 2929.12 BY IMPOSING CONSECUTIVE SENTENCES THAT WERE DISPROPORTIONATE TO APPELLANT'S CONDUCT.

{¶9} "II. THE TRIAL COURT VIOLATED DUE PROCESS AND ABUSED ITS DISCRETION IN IMPOSING MAXIMUM CONSECUTIVE SENTENCES THAT WERE NOT COMMENSURATE WITH APPELLANT'S CONDUCT.

{¶10} "III. THE TRIAL COURT VIOLATED DUE PROCESS, THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, AND R.C. 2941.25 BY IMPOSING CONSECUTIVE SENTENCES WHERE APPELLANT WAS CONVICTED OF THREE COUNTS OF RECEIVING STOLEN PROPERTY THAT WERE COMMITTED SIMULTANEOUSLY WITH A SINGLE ANIMUS."

I

{¶11} In her first assignment of error, appellant argues that the trial court was required to make the requisite findings of fact in R.C. 2929.14(E)(4) before imposing consecutive sentences. At the same time, appellant argues the court engaged in impermissible judicial fact-finding in considering the evidence presented by the state in support of its argument that the crimes were committed with a separate animus.

{¶12} This Court has previously held that *Ice* represents a refusal to extend the impact of the *Apprendi* and *Blakely* line of cases, rather than an overruling of these cases as suggested by appellant. *State v. Argyle,* Delaware App. 09 CAA 09 0076; *State v. Kvintus*, Licking County App. No. 09CA58, 2010-Ohio-427; *State v. Mitchell*,

Muskingum App. No. CT2006-0090, 2009-Ohio-5251; *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296. We have adhered to the Ohio Supreme Court's decision in *Foster,* which holds that judicial fact finding is not required before a court imposes non-minimum, maximum or consecutive prison terms. *State v. Hanning,* Licking App. No. 2007CA00004, 2007-Ohio-5547, ¶ 9. Trial courts have full discretion to impose a prison sentence within the statutory ranges, although *Foster* does require trial courts to "consider" the general guidance factors contained in R.C. § 2929.11, and R.C. § 2929.12. *State v. Duff,* Licking App. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282. Even though R.C. 2929.14 has been reenacted after the U.S. Supreme Court's decision in *Ice*, this Court has held that the reenactment did not remove the constitutional infirmity in the statute as found by the Ohio Supreme Court in *Foster*, supra, and until the Ohio Supreme Court considers the effect of *Ice* on its *Foster* decision, we are bound to follow the law as set forth in *Foster*. *State v. Arnold* (June 25, 2010), Muskingum App. No. CT2009-0021, ¶12.

{¶13} The trial court therefore was not required to make the findings required by R.C. 2929.14(E)(4) before imposing a consecutive sentence, as R.C. 2929.14(E)(4) was found unconstitutional by the Ohio Supreme Court in *Foster*, supra.

{¶14} Further, appellant has not demonstrated error in the court's consideration of the surveillance video and photographs from Polaris at the time of the crime. The court stated that it considered all the evidence submitted, including appellant's allocution, to find a separate animus for each offense. Judgment Entry, August 24, 2009. The photographs do not relate to the issue of separate animus, as they show cell phones belonging to the family members and the style of "tent" or "luggage" apron

dresses used to conceal stolen items. The surveillance video which shows appellant and members of her family leaving several different stores is merely cumulative of appellant's statements at the change of plea hearing. At the change of plea hearing, it was clear from appellant's statements to the court that she understood that the stolen items found in the van came from three distinct stores, selling different types of merchandise, with the items taken from each store exceeding a value of $500.00.

{¶15} The first assignment of error is overruled.

II

{¶16} In her second assignment of error, appellant argues that she engaged in "some shoplifting," and a three year prison term is not commensurate with such minor criminal conduct.

{¶17} The Supreme Court of Ohio has established a two-step procedure for reviewing a felony sentence. *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. 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." *Kalish* at ¶ 4. If this first step "is satisfied," the second step requires the trial court's decision be "reviewed under an abuse-of-discretion standard." Id.

{¶18} Appellant concedes in her brief that the first prong of the test is satisfied in that the sentence is not clearly and convincingly contrary to law. However, she argues that the sentence was an abuse of discretion.

{¶19} In order to find an abuse of discretion, we must find that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. The transcript of the sentencing hearing reflects that appellant's PSI showed nineteen separate instances of criminal charges being filed against appellant. While not all these charges showed verification of conviction, she had been convicted of breaking and entering in Michigan in 1996, attempted burglary in New York City in 2000, and theft in Wisconsin in 2002. She confirmed that she had sixteen different aliases. She dropped out of school in the 6th grade and has a sketchy work history, working on and off doing painting and house cleaning, and working at a car wash. Based on appellant's criminal history involving theft offenses, the record does not demonstrate that the court abused its discretion in the sentence.

{¶20} The second assignment of error is overruled.

III

{¶21} In the third assignment of error, appellant argues that the court erred in not merging all three counts together, as they were not committed with a separate animus.

{¶22} R.C. 2941.25 defines allied offenses of similar import:

{¶23} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶24} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment

or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶25} In *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract, which would produce clear legal lines capable of application in particular cases. Id. at 636. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both only if the offenses were committed separately or with a separate animus. Id. at 638-39.

{¶26} However, in 2008 the court clarified *Rance*, because the test as set forth in *Rance* had produced inconsistent, unreasonable and, at times, absurd results. *State v. Cabrales*, 118 Ohio St.3d 54, 59, 886 N.E.2d 181, 2008-Ohio-1625. In *Cabrales*, the court held that, in determining whether offenses are of similar import pursuant to 2941.25(A), courts are required to compare the elements of the offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Id. at syllabus 1. "Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." Id. The court then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. Id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶27} In the instant case, the three convictions were for violations of the same statute. Therefore, we need only address the issue of whether they were committed separately or with a separate animus.

{¶28} To find appellant guilty of receiving stolen property, the trier of fact would have had to find that appellant received, retained, or disposed of the property of another, knowing or having reasonable cause to believe the property had been obtained through the commission of a theft offense. R.C. 2913.51(A). A theft offense involves knowingly obtaining control over the property of another without that person's consent. R.C. 2913.02(A) (1).

{¶29} The criteria for determining whether a defendant knew or should have known that property has been stolen were set forth in *State v. Davis* (1988), 49 Ohio App.3d 109, 550 N.E.2d 966. The factors include: 1) the defendant's unexplained possession of the merchandise; 2) the nature of the merchandise; 3) the frequency with which such merchandise is stolen; 4) the nature of the defendant's commercial activities; and 5) the relatively limited time between the theft and the recovery of the merchandise. Id. at 112.

{¶30} "Knowledge that property is stolen may be inferred from circumstantial evidence." *State v. Beasley* (Feb. 21, 1991) Cuyahoga App. No. 58054.

{¶31} In *State v. Jones*, the Supreme Court observed:

{¶32} “This court has generally not found the presence or absence of any specific factors to be dispositive on the issue of whether crimes were committed separately or with a separate animus. But, see, *State v. Barnes* (1981), 68 Ohio St.2d 13, 17, 22 O.O.3d 126, 129, 427 N.E.2d 517, 520-521 (Celebrezze, C.J., concurring).

Instead, our approach has been to analyze the particular facts of each case before us to determine whether the acts or animus were separate. See *State v. Nicholas* (1993), 66 Ohio St.3d 431, 435, 613 N.E.2d 225, 229; *State v. Hill* (1992), 64 Ohio St.3d 313, 332, 595 N.E.2d 884, 899-900; *State v. Jells* (1990), 53 Ohio St.3d 22, 33, 559 N.E.2d 464, 475; *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 83-84, 549 N.E.2d 520, 522; *State v. Powell* (1990), 49 Ohio St.3d 255, 262, 552 N.E.2d 191, 199. Thus, we must examine the record to determine whether the two acts…were committed separately or with a separate animus….” 78 Ohio St.3d 12, 14, 676 N.E.2d 80, 81-82, 1997-Ohio-38.

{¶33} In appellant’s mother’s case, this Court found that the three counts of receiving stolen property were committed as three separate acts:

{¶34} “In the case at bar, the trial court conducted a sentencing hearing. The state played for the trial court two DVD copies of the mall’s surveillance tapes showing the group of females going from store to store. The trial court found that the merchandise was recovered from three distinct places of retail and although located in the Polaris Mall, each was located separately and were not adjoining. (Judgment Entry on Sentence, filed August 24, 2009 at 1). Further, the appellant, through her counsel, acknowledged that she knew or should have known that the property was stolen. (Sent. T., Aug. 12, 2009 at 14; 16).

{¶35} “As a result of plea negotiations, appellant entered pleas to three separate counts of receiving stolen property, not simply a single count. The entry of a plea of guilty is a grave decision by an accused to dispense with a trial and allow the state to obtain a conviction without following the otherwise difficult process of proving his guilt beyond a reasonable doubt. See *Machibroda v. United States* (1962), 368 U.S. 487,

82 S. Ct. 510, 7 L. Ed.2d 473. A plea of guilty constitutes a complete admission of guilt. Crim. R. 11 (B) (1). 'By entering a plea of guilty, the accused is not simply stating that he did the discreet acts described in the indictment; he is admitting guilt of a substantive crime.' *United v. Broce* (1989), 488 U.S. 563, 570, 109 S.Ct. 757, 762. Finally, appellant acknowledged on the record during the sentencing hearing that she has been involved in theft related offenses throughout the Unites States on twenty-five previous occasions. (Sent. T. at 22). Accordingly, the trial court could find that appellant was not an innocent, naive participant in the activity of stealing the merchandise from various stores located within the mall.

{¶36} "Based on the foregoing, the record reflects that the state presented evidence at trial demonstrating that appellant committed three separate acts. Accordingly, the state did not rely on the same conduct to prove three offenses. Appellant's convictions did not originate from a single act; therefore, the trial court did not err in sentencing appellant for each offense." *State v. Konstantinov*, Delaware App. No. 09-CAA-090077, 2009-Ohio-6964, ¶32-34.

{¶37} In the instant case, the evidence presented in appellant's mother's case was incorporated into the record, including the surveillance video. Further, at her plea hearing, the record clearly demonstrates that appellant understood she possessed stolen property from three separate stores, each independently valuing over $500.00. Appellant stated on the record that Count 5 represented children's clothing taken from Strasbourg Children's Clothing with a value of over $500.00. Tr. 14-15. As to Count 6, appellant told the court that the items came from Williams-Sonoma, a kitchen store. Tr. 15. She knew the items were stolen, and that their value added up to more than

$500.00. Tr. 16. Count 7 involved two purses stolen from Accent on Image. Tr. 16. She knew the purses had not been paid for, and if you put the two purses together, their value was over $500.00. Tr. 17. The evidence supports a finding that the three counts were committed as three separate acts, and the court did not err in sentencing appellant to consecutive sentences.

{¶38} The third assignment of error is overruled.

{¶39} The judgment of the Delaware County Common Pleas Court is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/r0505

[Cite as *State v. Korotkov*, 2010-Ohio-3097.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JULIE KOROTKOV	:	
Defendant-Appellant	:	CASE NO. 09 CAA 08 0073

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.

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES