[Cite as *State v. Konstantinov*, 2010-Ohio-3099.]

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 09 0079
	:	
	:	
KELLY KONSTANTINOV	:	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-06-0304C
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, Kelly Konstantinov, 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 two 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 incidents of theft. 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. However,

because her criminal history was not as involved as the criminal history of her other family members, the court ordered the sentence on Count 6 of the indictment to run consecutively with the sentence on Count 5, and the sentence on Count 7 to run concurrently to the sentences imposed on Counts 5 and 6, for a total term of incarceration of 24 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 AND BY CONDUCTING IMPERMISSIBLE JUDICIAL FACT FINDING.

{¶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. Appellant requested only the transcript of the sentencing hearing. Appellant did not request the transcript of her plea hearing. We therefore do not know what facts the court had before it at the time the plea was accepted on which to base its decision concerning separate animus for the crimes in question. During appellant's sentencing hearing, the trial court stated to counsel for appellant, "Your client's allocution pretty well established separate animus, did it not?" Tr. 5. Further, in appellant's sentencing entry, the court recites, "Considering all the evidence submitted, including the allocution made by the Defendant, the court finds there to be a separate animus for each offense and that even though the offenses are of the same kind, the separate animus allows the Defendant to be convicted of all three offenses of Receiving Stolen Property and the Defendant may be sentenced consecutively." Judgment Entry, August 24, 2009.

{¶15} When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceeding and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. Because we do not have a transcript of the plea hearing, we cannot determine if the evidence appellant claims was improperly admitted at the sentencing hearing was necessary to the resolution of the issue of separate animus or whether such evidence was merely cumulative of what was presented at the plea hearing regarding the facts and circumstances of the case.

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

II

{¶17} 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.[1]

{¶18} 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.

{¶19} 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.

{¶20} 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 record of the sentencing hearing reflects that the presentence investigation report stated that recidivism was likely because appellant showed no remorse. Tr. 8-9. Her involvement with the law for theft offenses began in 2003, in Lyons, Illinois. The instant offense was her sixth involvement with the law for retail theft and included offenses in Illinois, Virginia and Maryland. Other than babysitting, she had not held a job. Her family traveled around the United States engaging in a pattern of retail theft. Appellant agreed that there is no

[1] Appellant's actual aggregate term of incarceration is 24 months, not three years.

desire on the part of anyone in her family to lawfully work. Tr. 13. Because appellant's criminal history was not as extensive as the remainder of her family, the court ordered two of her 12-month sentences to be served concurrently, for a total term of two years, rather than three years. The record does not demonstrate that the court abused its discretion in the sentence.

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

III

{¶22} 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. As discussed in assignment of error I above, appellant has not provided this court with a transcript of her plea hearing, and the court relied at least in part on statements she made during that hearing in finding separate animus. We must, therefore, presume regularity in the proceedings and affirm. *Knapp*, supra.

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

{¶24} 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. Konstantinov*, 2010-Ohio-3099.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KELLY KONSTANTINOV	:	
Defendant-Appellant	:	CASE NO. 09 CAA 09 0079

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