[Cite as *State v. Arnold*, 2010-Ohio-3125.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. CT2009-0021
	:	
	:	
JASON M. ARNOLD	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR2009-0062
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 25, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RON WELCH Assistant Prosecuting Attorney 27 North Fifth Street Zanesville, Ohio 43701	VINCENT C. RUSSO 44 South 6th Street P.O. Box 970 Zanesville, Ohio 43702-0970

Edwards, P.J.

{¶1} Appellant, Jason Arnold, appeals a judgment of the Muskingum County Common Pleas Court convicting him of possession of drugs (R.C. 2925.11(A)) as a felony of the second degree, possession of drugs (R.C. 2925.11(A)) as a felony of the fifth degree, having a weapon while under disability (R.C. 2923.13(A)(3)), and carrying a concealed weapon (R.C. 2923.12(A)(2)) upon pleas of guilty. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On March 16, 2009, several police officers went to 725 Bates Street in Zanesville, Ohio, to locate appellant pursuant to an outstanding warrant for his arrest. The officers found appellant in a trailer at the address on the warrant. Appellant attempted to avoid detection and move past the officers through the trailer. When appellant was told he was under arrest, he failed to comply and ultimately he was "tased." During a search incident to the arrest, officers found appellant to be in possession of 3.8 grams of cocaine, 11.8 grams of crack cocaine and a loaded .25 caliber semiautomatic handgun.

{¶3} Appellant was charged by bill of information with possession of drugs (R.C. 2925.11(A)) as a felony of the second degree, possession of drugs (R.C. 2925.11(A)) as a felony of the fifth degree, having a weapon while under disability (R.C. 2923.13(A)(3)), and carrying a concealed weapon (R.C. 2923.12(A)(2)). He entered pleas of guilty to the charges on March 25, 2009. The court sentenced him on April 23, 2009, to four years incarceration for possession of drugs as a second degree felony, one year incarceration for possession of drugs as a fifth degree felony, two years

incarceration for having a weapon under a disability, and one year incarceration for carrying a concealed weapon. The sentences on the two drug counts were to run concurrently to each other, and the sentences on the weapons counts were to run concurrently to each other but consecutively to the sentence for the drug convictions, for a total term of incarceration of six years. Appellant assigns two errors on appeal:

{¶4} "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).

{¶5} "II. THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN SENTENCING JASON M. ARNOLD TO MAXIMUM AND CONSECUTIVE SENTENCES."

I

{¶6} Appellant argues that in light of the decision of the United States Supreme Court in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517, it is necessary that Ohio trial courts return to the statutory felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. In *Foster*, the Ohio Supreme Court declared portions of R.C. 2929.14, R.C. 2929.19 and R.C. 2929.41 unconstitutional under *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. Specifically, because R.C. 2929.14(E)(4) and R.C. 2929.41(A) require judicial finding of

facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional. The remedy provided by the Ohio Supreme Court was that R.C. 2929.14(E)(4) and R.C. 2929.41 be severed and excised from the statute. *Foster* at paragraph 97.

{¶7} In *State v. Elmore,* 122 Ohio St.3d 472, 2009-Ohio-3478, the Ohio Supreme Court summarized *Oregon v. Ice* as "a case that held that a jury determination of facts to impose consecutive rather than concurrent sentences was not necessary if the defendant was convicted of multiple offenses, each involving discrete sentencing prescriptions." *Elmore* at ¶ 34. However, the Ohio Supreme Court did not therein discuss all of the ramifications of *Ice* on its decision in *Foster,* as neither party in *Elmore* had briefed the issue prior to oral argument.

{¶8} In *State v. Mickens,* Franklin App.No. 08AP-743, 2009-Ohio-2554, the Tenth District Court of Appeals indicated that judicial review of some of Ohio's current sentencing statutes might be necessary in light of *Ice. Id.* at ¶ 25. However, the court was unwilling to tamper with the *Foster* holding, concluding that "such a look could only be taken by the Ohio Supreme Court, as we are bound to follow the law and decisions of the Ohio Supreme Court, unless or until they are reversed or overruled." *Id.* Accord *State v. Crosky,* Franklin App.No. 09AP-57, ¶ 7, citing *State v. Robinson,* Cuyahoga App.No. 92050, 2009-Ohio-3379, ¶ 29; *State v. Krug,* Lake App.No.2008-L-085, 2009-Ohio-3815, f.n.1.

{¶9} 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.

{¶10} In *State v. Smith*, Licking App. No. 09-CA-31, 2009-Ohio-6449, this Court recognized that the Ohio General Assembly amended R.C. 2929.14 effective April 7, 2009, and restated the requirement that the trial court make findings when imposing consecutive sentences. Id. at ¶9. However, we concluded that *Foster* controlled because the appellant was sentenced prior to the effective date of the amendment. Id.

{¶11} R.C. 2929.14 was amended subsequent to the *Ice* decision. While appellant in the instant case was sentenced after the effective date of the amendment, we conclude that the amendment does not reinstate, pursuant to *Ice,* the requirement that the court make the statutory findings before imposing consecutive sentences. For purposes of our discussion, it must be kept in mind that whenever any amendment, no matter how small, is made to an Ohio Revised Code section by the legislature, the entire code section is restated. The original bill denotes changes with capital letters and lines through deleted portions.

{¶12} In *Stevens v. Ackman*, 91 Ohio St. 3d 182, 743 N.E.2d 901, 2001-Ohio-249, the code section in question, R.C. 2744.02(C), had previously been declared unconstitutional in its entirety. The legislature later passed legislation restating and purportedly amending R.C. 2744.02. The sole purpose of the amendment was to insert a reference to a statute not previously mentioned in R.C. 2744.02(B)(2), and no other changes were made to R.C. 2744.02 in the amendment. Specifically, no changes were made to R.C. 2744.02(C). However, the appellee in that case argued that the act repealed the version of the statute that the Ohio Supreme Court had found unconstitutional, and replaced it with a new version without the constitutional infirmity. Id. at 192.

{¶13} Where an act is amended, the part that remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions are to be considered as having become the law only at the time of the amendment. Id. at 194. R.C. 1.54 provides that a statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute. Id.

{¶14} The *Stevens* court concluded that for the General Assembly to have successfully reenacted R.C. 2744.02(C), the General Assembly must have intended the act to have that effect. Id. at 193.

{¶15} The court noted that the editor's comment in Baldwin's Ohio Revised Code Annotated to Section 15, Article II of the Ohio Constitution states that while that section of the Constitution requires that an act repeal an amended section, R.C. 101.53 provides devices for showing changes to the printed bill or act: matter to be deleted is

shown struck through, and new matter to be inserted is shown in capital letters. Id. at 194. The court found that the printing format showed no intent to reenact R.C. 2744.02(C), as it appeared in the printed act in regular type, without capitalization which would indicate new material pursuant to R.C. 101.53. Id. Further, Section 15(D), Article II of the Constitution requires that where a law is amended, the new act shall contain the section or sections amended, and the sections so amended shall be repealed. Id. However, the provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amending act. Id., citing *In re Allen* (1915), 91 Ohio St. 315, 320-21, 110 N.E. 535, 537. The court concluded that R.C. 2744.02(C) continued forward as the original enactment previously found unconstitutional by the Ohio Supreme Court, as the General Assembly did not intend to reenact the statute. Id. at 195.

{¶16} H.B. No. 130 amended R.C. 2929.14 effective April 7, 2009. However, there were no changes made to R.C. 2929.14(E)(4), and the only change in R.C. 2929.14 was to R.C. 2929.14(D)(2)(b)(ii). Such amendment served only to substitute subsection (C)(C) for subsection (D)(D) in a reference to R.C. 2929.01(1), to comport with the renumbering of R.C. 2929.01(1) pursuant to an amendment to R.C. 2929.01(1). OH Legis 173(2008). R.C. 2929.14(E)(4) appears in regular type, without any indication pursuant to R.C. 101.53 which would indicate new material.

{¶17} Therefore, the amendment of R.C. 2929.14 effective April 7, 2009, did not operate to reenact those portions of the statute the Ohio Supreme Court severed in its

Foster decision. 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*.

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

II

{¶19} In his second assignment of error, appellant argues that the court abused its discretion in sentencing him to maximum and consecutive sentences. We note at the outset that the only conviction for which appellant received the maximum sentence was Count 2, possession of drugs as a fifth degree felony, for which he received a sentence of one year.

{¶20} The Ohio Supreme Court's *Foster* decision explicitly vests power with the trial court to impose consecutive sentences. "[T]rial 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 minimum sentences." *State v. Foster,* 109 Ohio St.3d at 30, 845 N.E.2d 470.

{¶21} In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *Foster*, as it relates to the remaining sentencing statutes and appellate review of felony sentencing. In *Kalish,* the court discussed the effect of the *Foster* decision on felony sentencing. The *Kalish* court stated that, in *Foster,* the court severed the judicial fact-finding portions of R.C. 2929.14, holding 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." *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100. See also, *State v. Payne,* 114

Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13. See also *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶22} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Kalish* at paragraph 14.

{¶23} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. “First, they must 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. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard.” *Kalish* at paragraph 4; *Foster*, supra.

{¶24} The Supreme Court held, in *Kalish,* that the trial court's sentencing decision was not contrary to law. “The trial court expressly stated that it considered the

purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law." *Kalish* at paragraph 18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable". *Kalish* at paragraph 20.

{¶25} R.C. 2929.11 governs the purposes of felony sentencing, and provides in pertinent part:

{¶26} "A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

{¶27} "(B) 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."

{¶28} R.C. 2929.12 sets forth factors to be considered by the court in sentencing:

{¶29} "(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

{¶30} "(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

{¶31} "(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

{¶32} "(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

{¶33} "(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

{¶34} "(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

{¶35} "(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

{¶36} "(6) The offender's relationship with the victim facilitated the offense.

{¶37} "(7) The offender committed the offense for hire or as a part of an organized criminal activity.

{¶38} "(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

{¶39} "(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

{¶40} "(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

{¶41} "(1) The victim induced or facilitated the offense.

{¶42} "(2) In committing the offense, the offender acted under strong provocation.

{¶43} "(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

{¶44} "(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

{¶45} "(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

{¶46} "(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

{¶47} "(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

{¶48} "(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

{¶49} "(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has

demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

{¶50} "(5) The offender shows no genuine remorse for the offense.

{¶51} "(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

{¶52} "(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

{¶53} "(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

{¶54} "(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

{¶55} "(4) The offense was committed under circumstances not likely to recur.

{¶56} "(5) The offender shows genuine remorse for the offense."

{¶57} Appellant argues that the court abused its discretion in applying the statutory factors because he was found in the possession of the drugs while in a private residence and not in public, and there is no indication in the record that the drugs were intended for anything other than personal use. Similarly, he argues that the weapons were in his possession in a private residence and not in public. He argues that he did not cause any harm to person or property in committing the offenses, had demonstrated remorse before the court, and had recently found out he was the father of a child.

{¶58} Appellant has not demonstrated that the court abused its discretion in the sentences, which were within a lawful range. The record of the sentencing hearing

reflects that appellant had a prior conviction for trafficking in drugs in 2005. He admitted in court that he "worked the program" following his conviction but returned to selling drugs because he couldn't get a job. Tr. 7. He told the court that the only people who give him a chance in life are drug pushers, which is why he continues to go back to that way of life. Tr. 6-7. The court noted that while appellant claimed he couldn't get a job because he was a convicted felon, he also admitted that he didn't have a job prior to his first conviction. Tr. 8. The court further noted that appellant had a loaded weapon at the time of his arrest. Appellant has not demonstrated that given his past failure to turn his life around following an earlier trafficking conviction and his admission that he keeps returning to a drug trafficking lifestyle because he can not find a job, the court abused its discretion in sentencing appellant to consecutive terms and to the maximum on one of the four charges.

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

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

Hoffman, J., concurring

{¶61} I concur in the majority's analysis and disposition of both of Appellant's assignments of error.

{¶62} I write separately only to note my retreat from the decisions I authored for this Court in *State v. Vandriest*, 2010-Ohio-997, and *State v. Smith*, 2009-Ohio-6449, based upon the majority's persuasive analysis concerning the effect of legislative amendments.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

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JUDGES

JAE/r0217

[Cite as *State v. Arnold*, 2010-Ohio-3125.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JASON M. ARNOLD	:	
Defendant-Appellant	:	CASE NO. CT2009-0021

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.

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JUDGES