[Cite as *State v. Konstantinov*, 2010-Ohio-3703.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KATHY KONSTANTINOV

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CAA 09 0085

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 09 CR I 06 0304 B
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 10, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Kathy Konstantinov appeals her conviction, in the Delaware County Common Pleas Court, on three counts of receiving stolen property (R.C. 2913.51(A)), following pleas of guilty. The relevant facts leading to this appeal are as follows.

{¶2} On June 5, 2009, the Delaware County Grand Jury indicted appellant, along with her mother, father, and two adult sisters, on charges of engaging in a pattern of corrupt activity (R.C. 2923.32(A)(1)), complicity to robbery (R.C. 2911.02(A)(3) and R.C. 2923.03(A)(2)), 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)), stemming from incidents at three Polaris Mall stores.

{¶3} Additionally, 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. As noted above, appellant, her mother and her sisters were charged with aiding and abetting the robbery.

{¶4} Appellant subsequently entered pleas of guilty to the three counts of receiving stolen property (Counts Five, Six, and Seven), all fifth degree felonies. The State thereupon dismissed the remaining counts against her.

{¶5} At the sentencing hearing, the court incorporated evidence from a companion case, including a security video which showed appellant, her mother and her sisters entering the mall together, walking around the mall, and entering and exiting certain stores.

{¶6} The trial court concluded, similarly to its prior decision in appellant's mother's case, that there was a separate animus as to each receiving stolen property count because the property was received from separate businesses. The court proceeded to sentence appellant to the maximum term of 12 months on each of the three receiving stolen property counts, to be served consecutively.

{¶7} On September 22, 2009, appellant filed a notice of appeal. She herein raises the following three Assignments of Error:

{¶8} "I. THE TRIAL COURT VIOLATED DUE PROCESS AND R.C. 2828.12(E) (SIC) BY IMPOSING CONSECUTIVE SENTENCES THAT WERE DISPROPOTIONATE (SIC) 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. 2942.25 (SIC) BY IMPOSING MULTIPLE SENTENCES WHERE APPELLANT WAS CONVICTED OF THREE COUNTS OF RECEIVING STOLEN PROPERTY THAT WERE COMMITTED SIMULTANEOUSLY WITH A SINGLR (SIC) ANIMUS."

I.

{¶11} In her First Assignment of Error, appellant argues that the trial court erred in failing to make findings of fact under R.C. 2929.14(E)(4) before imposing consecutive sentences. We disagree.

{¶12} Appellant essentially 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, the trial court was required to comply with the fact-finding requirements of R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) in imposing consecutive sentences in this matter. In other words, appellant urges that *Ice* has effectively "invalidated the portion of *Foster*[1] that severed the fact-finding requirements for consecutive sentences." Appellant's Brief at 6.

{¶13} However, in *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296, we cited *State v. Mickens,* Franklin App.No. 08AP-743, 2009-Ohio-2554, ¶ 25, for the proposition that an alteration of the *Foster* holding under *Ice* must await further review, if any, 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.' " We have thus elected to continue to adhere 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. *Williams* at ¶ 19, citing *State v. Hanning,* Licking App.No. 2007CA00004, 2007-Ohio-5547, ¶ 9. See, also, *State v. Lynn*, Muskingum App.No. CT2009-0041, 2010-Ohio-3042.

{¶14} Accordingly, we herein reject appellant's claim that the trial court was required to make pre-*Foster* findings in sentencing appellant to consecutive sentences. Furthermore, in the sentencing entry in this case, the trial court stated that it had considered the record and the principles and purposes of sentencing, as well as the seriousness and recidivism factors, under R.C. 2929.11 and R.C. 2929.12. Based on

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[1] *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856.

our review of the record, pursuant to the standards set forth in *State v. Kalish,* 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912, we do not find the trial court abused its discretion in rendering its consecutive sentences.

{¶15} Appellant's First Assignment of Error is overruled.

II.

{¶16} In her Second Assignment of Error, appellant argues the imposition of maximum prison sentences in this case constituted an abuse of the trial court's discretion. We disagree.

{¶17} As noted above, this Court has 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. *Hanning*, supra. Thus, trial courts have full discretion to impose a prison sentence within the statutory ranges, although post-*Foster* trial courts must "consider" the general guidance factors contained in R.C. 2929.11 and R.C. 2929.12. See *State v. Duff,* Licking App. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282. 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.

{¶18} Appellant does not dispute that the trial court sentenced her within the permissible statutory ranges for the offenses (see R.C. 2929.14(A)), albeit the maximum on each count. Accordingly, we initially find that such sentences were not contrary to law. Appellant nonetheless maintains her conduct was, at worst, "participating in

shoplifting," and thus the court's sentence constituted an abuse of discretion. Appellant's Brief at 8.

{¶19} In the case sub judice, the trial court also reviewed, inter alia, a pre-sentence investigation report which indicated that appellant and her family had been involved in a long string of shoplifting and theft-related offenses in various states, including Ohio, Illinois, New York, Maryland, and Florida. In the sentencing entry, the trial court stated that it had considered the record and the principles and purposes of sentencing, as well as the seriousness and recidivism factors, under R.C. 2929.11 and R.C. 2929.12, and concluded that appellant stole "for a living" and demonstrated no remorse for her actions. Based on our review of the record, we do not find the trial court abused its discretion in rendering its sentence.

{¶20} Appellant's Second Assignment of Error is overruled.

III.

{¶21} In her Third Assignment of Error, appellant argues that the court erred and violated her constitutional rights in imposing multiple sentences on her three convictions for receiving stolen property. We disagree.

{¶22} R.C. 2941.25(B) reads in pertinent part as follows: "Where the defendant's 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."

{¶23} Based on the aforesaid statutory guidance, it is not necessary in the present case that we engage in a full "allied offense" analysis pursuant to *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999-Ohio-291 and *State v. Cabrales*,

118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625. Instead, our analysis proceeds directly to whether the three receiving stolen property offenses were committed separately or with a separate animus.

{¶24} Ohio law recognizes that theft offenses from different owners at different times may constitute separate offenses. See *State v. Reese,* Clark App. No. 2001-CA-48, 2002-Ohio-937. Furthermore, "[a]n appellate court may not disturb a trial court's sentencing determination absent clear and convincing evidence that either the record does not support the sentence, or the sentence is contrary to law." *State v. Wilmore*, Cuyahoga App.No. 89960, 2008-Ohio-3148, ¶ 65. At the sentencing hearing in the case sub judice, the State incorporated its arguments from the companion cases that all four 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 seeks to persuade us that the security videos utilized during the sentencing hearing do not clearly show the details of appellant's involvement in the various store thefts. However, a review of the original indictments in the trial court file reveal that Count Five addressed the items from the Strasburg Children's Store, Count Six from Williams Sonoma, and Count Seven from Accent on Image. Appellant entered guilty pleas to these counts, and we herein find appellant's present challenge to the sentencing court's finding of separate animus to be without merit.

{¶25} Appellant's Third Assignment of Error is overruled.

{¶26} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed.

By: Wise, J.

Farmer,P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 715

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KATHY KONSTANTINOV	:	
Defendant-Appellant	:	Case No. 09 CAA 09 0085

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES