

[Cite as *State v. Argyle*, 2010-Ohio-273.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

LEE A. ARGYLE

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CAA 09 0076

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 09 CR I 01 0049A

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 27, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Defendant-Appellant Lee A. Argyle appeals his sentence entered in the Delaware County Court of Common Pleas following a plea of guilty to nineteen counts of theft.

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

{¶3} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶4} “(E) Determination and judgment on appeal. The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶5} This appeal shall be considered in accordance with the aforementioned rule.

STATEMENT OF THE FACTS AND CASE

{¶6} The relevant facts are as follows:

{¶7} Defendant-Appellant Lee Argyle and two co-defendants were indicted following a string of nineteen residential burglaries which occurred between October, 2008, and December, 2008.

{¶8} The indictment charged Appellant and co-defendants with 52 counts including burglary, theft and receiving stolen property.

{¶9} Appellant entered a plea of guilty to nineteen (19) counts of theft ranging from first degree misdemeanors to third degree felonies. In exchange for his guilty plea,

the State of Ohio dismissed the burglary counts and the receiving stolen property counts.

{¶10} Following a pre-sentence investigation, the trial court sentenced Appellant to minimum terms of one year on each of the third degree felonies and the minimum terms of six (6) months on each of the fourth and fifth degree felonies. The trial court sentenced Appellant to maximum six (6) month terms of the remaining misdemeanor counts. The trial court ordered that each of the sentences were to run concurrent, with the exception of the misdemeanor counts and one of the fourth degree felonies, for a total sentence of ten (10) years.

{¶11} Appellant now raises the following assignments of error on appeal:

ASSIGNMENTS OF ERROR

{¶12} “I. THE TRIAL COURT VIOLATED DUE PROCESS AND R.C. 2929.14(E)(4) BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS.

{¶13} “II. THE TRIAL COURT VIOLATED DUE PROCESS AND ABUSED ITS DISCRETION IN IMPOSING CONSECUTIVE SENTENCES.”

I., II.

{¶14} We shall address Appellant’s assignments of error simultaneously as each assigns error to the trial court’s imposition of consecutive sentences.

{¶15} Appellant argues that it was error for the trial court to order his sentences to be served consecutive to one another.

{¶16} In *State v. Foster*, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held “[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 the minimum sentences.” 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus.

{¶17} Recently 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 *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶18} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme 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.

{¶19} “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.

{¶20} 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; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶21} 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.

{¶22} Appellant further 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 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.

{¶23} In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the Ohio Supreme Court recently 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*, as neither party in *Elmore* had briefed the issue prior to oral argument.

{¶24} 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.

{¶25} At this juncture, we find that *Ice* represents a refusal to extend the impact of the *Apprendi* and *Blakely* line of cases, rather than an overruling of them as

suggested by Appellant. We will thus herein 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. *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.

{¶26} Here, Appellant entered a plea of guilty to nineteen counts of theft. The trial court sentenced Appellant within the permissible statutory range for the offenses. See, R.C. § 2929.14(A). We therefore find that such sentences were not contrary to law.

{¶27} At the July 31, 2009, sentencing hearing, the trial court stated that it reviewed the pre-sentence report, the victim impact statements and the principles and purposes of the felony sentencing statutes. The trial court also stated that it considered the serious economic harm caused in these cases and the fact that Appellant was in possession of a firearm. Additionally, in support of ordering consecutive sentences, the trial court stated that each one of the burglaries committed was serious in and of itself and that Appellant deserved to be punished on each of those burglaries.

{¶28} In its Judgment Entry of Sentence, the trial court reiterated its consideration of the record, oral statements, victim impact statements, pre-sentence report and the principles and purposes of sentences, as well as the seriousness and recidivism factors under R.C. §2929.11 and R.C. §2929.12

{¶29} Based on the foregoing, we do not find the trial court abused its discretion in rendering its sentence.

{¶30} Appellant's first and second assignments of error are overruled.

{¶31} For the foregoing reasons, Appellant's sentence in the Court of Common Pleas, Delaware County, Ohio, is affirmed

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES

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