

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Shirley Lynette Harthorne

Appellant

Court of Appeals Nos. L-09-1207

L-09-1208

L-09-1209

Trial Court Nos. CR0200901851

CR0200901837

CR0200901797

DECISION AND JUDGMENT

Decided: November 19, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Defendant-appellant, Shirley Harthorne, appeals her sentence in the above-captioned case. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} In April 2009, a grand jury indicted appellant in three separate cases, charging her with a total of nine felony offenses. Appellant was charged in case No. CR0200901797 with three counts of burglary, two of which were felonies of the second degree and one of which was a felony of the third degree. In case No. CR0200901851, she was charged with two counts of burglary, one a felony of the second degree and the other, a felony of the third degree. Finally, in case No. CR0200901837, appellant was charged with one count of theft, a felony of the fifth degree, and three counts of forgery, also felonies of the fifth degree.

{¶ 3} On June 30, 2009, appellant and her co-defendants, Arren Patton and Lanai Moore, all entered pleas of no contest to the indictments in case Nos. CR0200901797 and CR0200901851. Appellant, in addition, entered a plea of no contest to the charge of theft in case No. CR0200901837.¹ (Neither of appellant's co-defendants was charged in that case.)

{¶ 4} On July 10, 2009, the court imposed sentences on appellant and her two co-defendants. Co-defendants Patton and Moore were sentenced to serve a total of four years in prison in case No. CR0200901797, and five years of community control in case No. CR0200901851.

{¶ 5} Appellant, on the other hand, was sentenced to serve a term of five years in prison in case No. CR0200901797, a term of three years in prison in case No.

¹The state entered a nolle prosequi with respect to the three counts of forgery also charged in the indictment in that case.

CR0200901851, and a term of 11 months in prison in case No. CR0200901837. The court ordered appellant's prison term in case No. CR0200901851 to be served consecutively to the prison term in case No. CR0200901797, and ordered that the prison term in case No. CR0200901837 run concurrently with the other two prison terms, for a total of eight years in prison.

{¶ 6} Appellant timely filed an appeal from her sentence, raising the following assignments of error:

{¶ 7} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO A SENTENCE DIFFERENT THAN HER CO-DEFENDANTS.

{¶ 8} "II. THE TRIAL COURT IMPOSED A SENTENCE CONTRARY TO LAW."

{¶ 9} Because appellant's two assignments of error involve overlapping issues, we will review them together in this analysis. In order to render Ohio's sentencing scheme compatible with the United States Supreme Court decisions in *Blakely v. Washington* (2004), 542 U.S. 296 and *United States v. Booker* (2005), 543 U.S. 220, the Ohio Supreme Court held 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 minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. "Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact

R.C. 2929.11 and 2929.12. The trial court must still consider these statutes." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 13.

{¶ 10} Appellant argues in his second assignment of error that the United States Supreme Court's decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, invalidates *Foster*, supra, and that, as a result of the United States Supreme Court's decision, the trial court was required to make factual findings in imposing consecutive sentences. This court has consistently declined to take such action on the grounds that a re-examination of the law set forth in *Foster* can only be undertaken by the Supreme Court of Ohio. See *State v. Ward*, 6th Dist. No. OT-10-005, 2010-Ohio-5164, ¶ 8. Consequently, appellant's second assignment of error is found not well-taken.

{¶ 11} In a plurality opinion, the Supreme Court of Ohio set forth a two-step procedure for reviewing a felony sentence. *Kalish*, 2008-Ohio-4912. 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." *Id.* at ¶ 4. "If this first step is satisfied, the second step requires that the trial court's decision be reviewed under an abuse-of-discretion standard." *Id.*

{¶ 12} In *Kalish*, the Supreme Court held that that the defendant's sentence was not contrary to law, where the trial court: (1) expressly stated that it had considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12; (2) properly applied postrelease control; and (3) imposed a sentence that was within the permissible range. *Id.* at ¶ 18. The court further held that there was no abuse of

discretion, inasmuch as: (1) the trial court had given careful and substantial deliberation to the relevant statutory considerations; and (2) there was nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable. *Id.* at ¶ 20.

{¶ 13} With respect to the first step of the two-step procedure, we note that appellant does not dispute that her sentences were within the permissible ranges for the offenses charged. In addition, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in R.C. 2929.11 and 2929.12, and, further, properly advised appellant regarding postrelease control. Based on the foregoing, we find that the trial court complied with all applicable rules and statutes and, as a result, appellant's sentence is not clearly and convincingly contrary to law.

{¶ 14} Having determined that the first step of the *Kalish* test was satisfied, we move to the second step, pursuant to which we must review appellant's sentence under an abuse of discretion standard. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An appellate court applying an abuse of discretion standard may not substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621.

{¶ 15} In the instant case, appellant argues that the trial court abused its discretion by sentencing her to a prison term that was four years greater than that of her co-defendants. In advancing this argument, appellant relies on paragraph (B) of R.C.

2929.11 for the proposition that a sentence imposed for a felony shall be "consistent with sentences imposed for similar crimes committed by similar offenders."

{¶ 16} As held by this court in *State v. Lathan*, 6th Dist. No. L-03-1188, 2004-Ohio-7074, ¶ 28, reversed, in part, on other grounds, 2005-Ohio-321, it is no longer necessary for this court to do "case comparisons when the issue of 'consistency' is raised." Instead, consistency "is to be statutorily considered as but one of a number of factors." *State v. Donahue*, 6th Dist. No. WD-03-083, 2004-Ohio-7161, ¶ 8.

{¶ 17} Thus, "[w]hen a sentence is objected to and alleged to be inconsistent with other sentences, what is truly being contested is whether the sentence is supported by the record. Therefore, an appellate court's task is to review the sentence to see if by clear and convincing evidence the appellant has shown the sentence was not supported by the record or was contrary to law." *Lathan*, 2004-Ohio-7074, ¶ 27.

{¶ 18} As indicated above, there is no question that the sentence imposed was not contrary to law. Thus, the only matter that remains for our determination is whether the sentence was supported by the record. See *id.*

{¶ 19} The trial court, in addition to balancing the R.C. 2929.11 and 2929.12 factors, also considered the totality of appellant's criminal record, various oral statements that had been made, the victim impact statements, and the presentence report. In pronouncing its sentence, the trial court expressly stated that appellant was punished more severely than her co-defendants because appellant had a much more extensive and serious criminal history than that of either of her co-defendants. Our review of the record

reveals that while the co-defendants had criminal histories involving several misdemeanor convictions and, in one case, a bad driving record, appellant's criminal history involved a long history of convictions, dating back to when she was a juvenile, and which included a robbery conviction for which she was imprisoned.

{¶ 20} Upon our review of the record, we find no evidence that the trial court acted arbitrarily, unreasonably, or unconscionably in crafting appellant's sentence. For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 21} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
