

[Cite as *State v. Brown*, 2009-Ohio-6107.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92836

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMON BROWN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507259

BEFORE: Jones, J., Cooney, A.J., and Kilbane, J.

RELEASED: November 19, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Damon Brown ("Brown"), appeals his sentence for drug trafficking. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} On February 27, 2008, the grand jury indicted Brown in a three-count, secret indictment. Count 1 charged drug trafficking, in violation of R.C. 2925.03(A)(2), with three forfeiture specifications. Count 2 charged possession of drugs, in violation of R.C. 2925.11(A), with three forfeiture specifications. Count 3 charged possessing criminal tools, in violation of R.C. 2923.24(A), with three forfeiture specifications.

{¶ 3} On January 13, 2009, Brown entered into a plea agreement. In exchange for a plea of guilty to amended Count 1 (the weight of the drugs was amended), and the forfeiture of \$2,278.00 in U.S. currency and an LG phone, the remaining counts were nolle. Following the plea by Brown, the court ordered a presentence investigation report. After reviewing the report, the court, on February 10, 2009, sentenced Brown to Lorain Correctional Institution for a period of three years with credit for time served. Additionally, Brown was fined \$5,000.00.

{¶ 4} Subsequently, Brown timely filed his notice of appeal assigning one assignment of error.

ASSIGNMENT OF ERROR

{¶ 5} “[1.] The trial court erred when it did not follow the requirements of Ohio Revised Code Sections 2929.11 and 2929.12 when sentencing defendant-appellant.”

LEGAL ANALYSIS

{¶ 6} R.C. 2929.11 provides the following:

“(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.

“(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.

“(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.”

{¶ 7} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Ohio Supreme Court set forth the standard for appellate review of felony sentences subsequent to its ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

Post- *Foster*, we must use a two-step process in reviewing sentences. First, we “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.” *Kalish*, supra, at ¶ 4. If this first prong is satisfied, we must then review the trial court’s decision under an abuse-of-discretion standard. *Id.*

{¶ 8} Here, the evidence demonstrates that the lower court acted properly. The journal entry relating to sentencing demonstrates that the trial court allowed Brown to speak on his behalf and complied with all applicable rules and statutes prior to sentencing Brown. “Defendant addresses the court. The court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11.”¹ In addition, the sentencing transcript reflects that the trial court complied with all applicable rules and statutes prior to imposing sentence on appellant. The transcript provides the following:

Judge: “Mr. Brown, you certainly have the right to speak before you’re sentenced. I’m willing to hear anything you have to say.”

* * *

Judge: “In 2002, you were on probation in this court and ordered to complete outpatient treatment. Apparently you didn’t, because you violated in that case. So I disagree when you say that you’ve never—and I’m paraphrasing—when

¹See journal entry of February 11, 2009 and nunc pro tunc journal entry of August 25, 2009.

you say you've never had an opportunity for treatment as part of a sentence."

* * *

Judge: "Mr. Brown it is necessary to impose a prison term to comply with the sentencing laws in the state of Ohio. So I'm going [to] order that you be sentenced to LCI for three years. This sentence also includes what we call three years of post-release control, abbreviated PRC."²

{¶ 9} The trial judge's statements demonstrate that the court allowed appellant the opportunity to speak and bring up whatever questions or concerns he may have had prior to being sentenced. Moreover, the transcript further demonstrates that the trial judge also considered particular facts and evidence, such as prior violations and prior treatment opportunities. The analysis was done so that the court could mentally place appellant in a group of similar offenders in order to issue an appropriate sentence. In addition, the court speaks through its journal entry. *State v. Hlavsa* (Oct. 19, 2000), Cuyahoga App. No. 77199.

{¶ 10} Under Ohio law, judicial fact-finding is no longer required before a court imposes maximum, consecutive, or more than the minimum prison terms. Instead, a trial court is vested with full discretion to impose a prison term within the statutory range. In exercising its discretion, the trial court must carefully consider

²Tr. 5, 9-12.

all applicable rules and statutes that apply to every felony case, including R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of an offender, and statutes that are specific to the case itself. Accordingly, post-*Foster*, trial courts are still required to “consider” the general guidance factors in their sentencing decisions; however, there is no requirement that this be done on the record. *State v. Dismukes*, Cuyahoga App. No. 89169, 2007-Ohio-5847.

{¶ 11} Thorough examination of the evidence, record, sentencing journal entry and transcript clearly show that the trial court complied with all applicable rules and statutes in imposing the sentence. All required factors of the law were considered. We find no abuse of discretion or error on the part of the lower court.

{¶ 12} Accordingly, appellant’s assignment of error is without merit. Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY EILEEN KILBANE, J., CONCUR