

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92050

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT ROBINSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510707

BEFORE: Blackmon, J., Cooney, A.J., and Sweeney, J.

RELEASED: July 9, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

By: Robert M. Ingersoll
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Ralph A. Kolasinski
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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).
PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Robert L. Robinson appeals his sentence and assigns the following errors for our review:

“I. Robinson has been deprived of his liberty without due process of law by the sentences imposed on him as said sentences do not comport with Ohio’s sentencing structure.”

“II. Robert Robinson was deprived of his liberty without due process of law, when the trial court failed to merge the sentences for the three firearm specification convictions.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Robinson’s sentences. The apposite facts follow.

{¶ 3} After a plea agreement with the State, and the dismissal of certain other charges by the State, Robinson pled guilty to two counts of felonious assault with three-year firearm specifications. He also pled guilty to aggravated burglary, domestic violence, having a weapon while under disability, and an amended charge of robbery with a one-year firearm specification. In return for the above pleas, the State dismissed the remaining charges.

{¶ 4} Thereafter, the trial court sentenced Robinson to two years on each felonious assault count with a three-year firearm specification attached to each count. The trial court also sentenced Robinson to two years for robbery with a one-year firearm specification attached. The trial court ordered the foregoing sentences to be served consecutively to each other for a total prison term of thirteen years.

{¶ 5} Additionally, the trial court sentenced Robinson to three years in prison for aggravated burglary, six months for domestic violence, and one year for having a

weapon while under disability. The trial court ordered Robinson to serve these sentences concurrently, but consecutively to the sentences imposed for the felonious assault and robbery charges. In total, the trial court sentenced Robinson to sixteen years in prison.

Sentencing

{¶ 6} In the first assigned error, Robinson argues that his sentence does not comport with Ohio’s sentencing structure.

{¶ 7} In *State v. Foster*,¹ the Ohio Supreme Court held that judicial fact-finding to overcome a maximum sentence is unconstitutional in light of *Blakely v. Washington*.² The *Foster* court severed and excised, among other statutory provisions, R.C. 2929.14(C), because imposing maximum sentences requires judicial fact-finding.³

{¶ 8} “After the severance, judicial fact-finding is not required before a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant.”⁴ As a result, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to

¹109 Ohio St.3d 1, 2006-Ohio-856.

²(2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

³*Id.*, applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, *Blakely*, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

⁴*Id.* at ¶99.

make findings and give reasons for imposing maximum, consecutive, or more than the minimum sentence.”⁵

{¶ 9} Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range.⁶

{¶ 10} An abuse of discretion is more than an error in judgment or law; it implies attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.⁷ Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.⁸

{¶ 11} In *Foster*,⁹ the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Ohio Supreme Court held that R.C. 2929.11 does not mandate judicial fact-finding; rather, the trial court is merely to “consider” the statutory factors set forth in this section prior to sentencing.¹⁰

⁵*Foster* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus.

⁶*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See, also, *State v. Lindsay*, 5th Dist. No. 06CA0057, 2007-Ohio-2211; *State v. Parish*, 6th Dist. No. OT-07-049, 2008-Ohio-5036; *State v. Bunch*, 9th Dist. No. 06 MA 106, 2007-Ohio-7211; and, *State v. Haney*, 11th Dist. No. 2006-L-253, 2007-Ohio-3712.

⁷*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

⁸*State v. Murray*, 11th Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122.

⁹109 Ohio St.3d 1, 2006-Ohio-856.

¹⁰*Id.*

{¶ 12} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the “overriding purposes of felony sentencing.”¹¹ Those purposes are “to protect the public from future crime by the offender and others and to punish the offender.”¹² R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.¹³

{¶ 13} We have previously held that judicial fact-finding is not required under R.C. 2929.11.¹⁴ Thus, trial court must merely “consider” the statutory factors before imposing sentence.¹⁵ Further, a comparison of similar cases was not mandated under R.C. 2929.11(B), noting that “[e]ach case is necessarily, by its nature, different from every other case just as every person is, by nature, not the same.”¹⁶

{¶ 14} The record reveals that Robinson pled guilty to one first degree felony, punishable by terms of three, four, five, six, seven, eight, nine, or ten years, and the

¹¹ *State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322.

¹² *Id.*

¹³ *Id.*

¹⁴ See *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341.

¹⁵ See *Foster*.

¹⁶ *State v. Wheeler*, 6th Dist. No. L-06-1125, 2007-Ohio-6375. See, also, *State v.*

trial court sentenced him to serve three years in prison. Robinson also pled guilty to three second degree felonies, punishable by prison terms of two, three, four, five, six, seven, or eight years, and the trial court sentenced him to two years for each count, plus three years for the firearm specifications.

{¶ 15} In addition, Robinson pled guilty to a third degree felony, punishable by a mandatory period of incarceration of one, two, three, four, or five years, and the trial court sentenced him to serve one year in prison. Further, Robinson pled guilty to a first degree misdemeanor, punishable by a period of incarceration not to exceed 180 days, and the trial court sentenced him to 180 days.

{¶ 16} Here, all the foregoing sentences were within the statutory permissible range. Thus, since all the sentences the trial court imposed were within the statutory range for the respective offenses, Robinson's sentences are not contrary to law. Consequently, we find no abuse of discretion.

{¶ 17} Moreover, the record indicates that the trial court considered the overriding purposes of felony sentencing. At the sentencing hearing, Robinson's attorney indicated that the conduct leading to the convictions stemmed from Robinson's abuse of PCP. Robinson's attorney specifically stated:

"Mr. Drucker: *** Your Honor, in regard to the specific facts of this particular case, it is not pretty. We would be the first to acknowledge this. This all happened very quickly, your Honor, within a five, ten-minute time period. My client was

with his mother in a van. His child was also in the car. They were returning the child to the victim, one of the victim's house, the baby's mother.

In the car my client became angry, got into it with his mother. They drove to the scene. When he got there, he was still angry, left the car. He admits at that point he shot the baby's mother. He left the scene. He came back, went in the house and ultimately shot the baby's mother's sister in the leg.

He left the house, and there was a car that he owned that was being driven by a friend of his, and he took that car by gunpoint from his friend, but this all happened very quickly. Again your Honor, he was intoxicated."¹⁷

{¶ 18} In addition Robinson's mother addressed the court and explained that on the day in question, as a result of abusing PCP, Robinson was out of control, did not know who she was, and threatened to shoot her. Robinson's mother indicated that her son was abusing PCP, while taking the prescription medication Zoloft.

{¶ 19} After hearing from the above individuals and from Robinson, the trial court reviewed Robinson's criminal history, which revealed that most of his prior offenses were drug-related. The trial court also acknowledged that this was the first time that Robinson had resorted to violence. However, the trial court stated that Robinson's conduct could not be excused because of his abuse of PCP.

{¶ 20} The trial court indicated that it was taking into consideration that there were three separate victims of Robinson's attack, and that Robinson shot two of the

¹⁷Tr. 9.

victims. The trial court specifically stated that it had considered the purposes and principles of felony sentencing and felt obligated to impose an appropriate sentence that would protect the public and not demean the seriousness of the offense.

{¶ 21} Our review of the record indicates that the trial court considered the overriding purposes of felony sentencing. Since the sentences imposed are within the statutory range for Robinson’s convictions, the trial court followed the statutory process for felony sentencing, and the record is devoid of any evidence of inconsistency or disproportionality, we find that his sentence is supported by the record and not contrary to law. Accordingly, we overrule the first assigned error.

Merging Firearm Specifications

{¶ 22} In the second assigned error, Robinson argues the trial court erred in failing to merge the sentences for the three firearm specifications because the underlying felonies were committed as part of the same act or transaction. We disagree.

{¶ 23} In *State v. Wills*,¹⁸ the Supreme Court of Ohio defined “transaction” as “a series of continuous acts bound together by time, space and purpose, and directed toward a single objective.” Pursuant to R.C. 2929.14(D)(1)(b), when the underlying felonies are committed as part of one transaction, the trial court is limited

¹⁸69 Ohio St.3d 690, 691, 1994-Ohio-417.

to sentencing the defendant to one three-year prison term for a single firearm specification.¹⁹

{¶ 24} In *State v. Hill*,²⁰ we held that the trial court properly sentenced defendant to consecutive sentences for firearm specifications when he shot one victim and continued to shoot another victim after the first victim fell to the ground.²¹ Finding two separate objectives for the shootings, we opined that “[h]ad Hill intended to shoot only Polk, he would not have continued shooting White after Polk fell to the ground.”²²

{¶ 25} Here, the record indicates that Robinson traveled to his baby’s mother’s residence, shot her, and then left. Robinson returned about five minutes later and shot his baby’s mother’s sister. As Robinson left the residence for the second time, he used his firearm to hijack a car from the third victim. The time and space between the two shootings and the hijacking, while relatively close, cannot be deemed one continuous act when Robinson went to the residence, left, returned, and then hijacked a car after leaving the residence the second time.

{¶ 26} Like *Hill*, had Robinson intended to shoot only his baby’s mother, he would not have returned to shoot her sister, and then hijack the car for the third

¹⁹*State v. Santana*, Cuyahoga App. No. 87170, 2005-Ohio-3843, ¶15.

²⁰160 Ohio App.3d 324, 2005-Ohio-1501, ¶64.

²¹*State v. McCrimon*, Cuyahoga App. No. 87617, 2006-Ohio-5722.

²²*Id.*

victim as he fled from the residence. Because the two shootings and the hijacking are not the same transaction for the purposes of R.C. 2929.14(D)(1)(b), the trial court properly sentenced Robinson to consecutive sentences for the firearm specifications for the underlying convictions. Accordingly, we overrule the second assigned error.

{¶ 27} After oral argument, Robinson filed a notice of intention to cite *Oregon v. Ice*²³ as additional authority, and the State filed a motion to strike that authority. We accepted Robinson's request to cite the additional authority and denied the State's motion to strike.

{¶ 28} Robinson argues that *Oregon v. Ice* abrogates *State v. Foster*'s decision that declared the consecutive sentencing section of Senate Bill 2 unconstitutional. *Oregon v. Ice* acknowledges that trial judges historically have decided when to impose consecutive sentences; consequently, it upheld Oregon's law on consecutive sentencing.

{¶ 29} The implication of Robinson's argument is that Senate Bill 2 on consecutive sentences is constitutional, and thus the trial court must make findings before it can impose a consecutive sentence. Recently, in *State v. Reed*,²⁴ we responded to *Oregon v. Ice* and concluded that we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise.

²³(2009), ___ U.S. ___, 129 S.Ct. 711, 716, 172 L.Ed.2d 517

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, A.J., and
JAMES J. SWEENEY, J., CONCUR