

[Cite as *State v. Castellon*, 2010-Ohio-360.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 92733**

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**OMAR CASTELLON**

DEFENDANT-APPELLANT

---

**JUDGMENT:**  
**AFFIRMED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-514910

**BEFORE:** Blackmon, P.J., Dyke, J., and Cooney, J.

**RELEASED:** February 4, 2010

**JOURNALIZED:**

**ATTORNEY FOR APPELLANT**

Brian R. McGraw  
1370 Ontario Street  
Suite 2000  
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

Brian Radigan  
Assistant Prosecuting Attorney  
The Justice Center, 9<sup>th</sup> Floor  
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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Omar Castellon appeals his sentence. Castellon assigns the following error for our review:

**“I. Under the facts and circumstances known to the Court, a sentence of six years was an abuse of discretion.”**

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

{¶ 3} On August 26, 2008, the Cuyahoga County Grand Jury indicted Castellon on two counts of drug trafficking, one count of drug possession, and one count of possession of criminal tools. On August 28, 2008, Castellon pleaded not guilty at his arraignment.

{¶ 4} On October 7, 2008, under a plea agreement with the state of Ohio, Castellon pled guilty to one count of drug trafficking and agreed to the forfeiture of \$81, a cell phone, and a Ford Taurus automobile. The State dismissed the remaining charges pursuant to the plea agreement.

{¶ 5} On that same date, the trial court conducted the sentencing hearing. At the hearing, the State informed the Court that this matter arose from a controlled drug buy that was arranged by Cleveland police through a confidential reliable informant (“CRI”). Furthermore, the State indicated that Castellon arranged to meet the CRI in a Burger King restaurant in Berea, Ohio and exchange 180 unit doses of heroin for a pre-determined sum of money.

{¶ 6} The State further indicated that Castellon and the CRI met as agreed, Castellon delivered the heroin, and the CRI delivered the money. After

the controlled drug buy was completed, the police stopped Castellon’s vehicle, searched him, and recovered the buy-money, which had been given to the CRI to effect the transaction.

{¶ 7} At the hearing, Castellon’s defense counsel indicated that Castellon had arrived from Mexico three months prior to the incident, had been living in Columbus, Ohio, and had a wife and two children living in Mexico. Defense counsel also indicated that Castellon had no prior convictions, had been working in the construction industry to support his family, but unfortunately began associating with the “wrong” people.

{¶ 8} Castellon, who did not speak English, stated through an interpreter that he was sorry.

{¶ 9} The trial court sentenced Castellon to six years in prison, imposed a \$7,500 fine, and three years of postrelease control. Castellon now appeals.

### **Nonminimum Sentence**

{¶ 10} In the sole assigned error, Castellon argues the trial court abused its discretion in imposing a six-year sentence.

{¶ 11} In *State v. Foster*,<sup>1</sup> the Ohio Supreme Court held that statutes requiring judicial findings prior to imposition of maximum, nonminimum, or consecutive sentences violated the Sixth Amendment.<sup>2</sup> The *Foster* court found

---

<sup>1</sup>109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E. 2d 470.

<sup>2</sup>*Id.* at paragraph one of the syllabus.

R.C. 2929.14(B) and (C), 2929.14(E)(4), 2929.19(B)(2), and 2929.41(A) unconstitutional and as a remedy, excised those statutes.<sup>3</sup>

{¶ 12} As a result, after *Foster*, “[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.”<sup>4</sup>

{¶ 13} Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range.<sup>5</sup>

{¶ 14} An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.<sup>6</sup> When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.<sup>7</sup>

{¶ 15} In *Foster*,<sup>8</sup> the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Ohio Supreme Court

---

<sup>3</sup>Id. at paragraphs one, two, three, and four of the syllabus.

<sup>4</sup>Id. at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E. 2d 1, at paragraph three of the syllabus.

<sup>5</sup>*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E. 2d 124. See, also, *State v. Lindsay*, 5<sup>th</sup> Dist. No. 06CA0057, 2007-Ohio-2211; *State v. Parish*, 6<sup>th</sup> Dist. No. OT-07-049, 2008-Ohio-5036; *State v. Bunch*, 9<sup>th</sup> Dist. No. 06 MA 106, 2007-Ohio-7211; and, *State v. Haney*, 11th Dist. No. 2006-L-253, 2007-Ohio-3712.

<sup>6</sup>*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E. 2d 1140.

<sup>7</sup>*State v. Murray*, 11<sup>th</sup> Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E. 2d 748.

<sup>8</sup>109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E. 2d 470.

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.<sup>9</sup>

{¶ 16} 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.”<sup>10</sup> Those purposes are “to protect the public from future crimes by the offender and others and to punish the offender.”<sup>11</sup> 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.<sup>12</sup>

{¶ 17} Our review of the record shows that the trial court sentenced Castellon within the statutory range, provided by R.C. 2929.14 for the respective offense. Castellon pled guilty to one count of drug trafficking, a felony of the second degree. By pleading guilty to the indictment as amended, Castellon admitted to committing the offense as charged.<sup>13</sup> The trial court could have sentenced Castellon to up to eight years in prison on the charge, but chose to

---

<sup>9</sup>Id.

<sup>10</sup>*State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322.

<sup>11</sup>Id.

<sup>12</sup>Id.

<sup>13</sup>*State v. Phillips*, Cuyahoga App. No. 92560, 2009-Ohio-5564.

impose six years. Thus, Castellon's sentence was within the statutory range for the offense to which he pled guilty.

{¶ 18} Prior to sentencing, the trial court heard from the State regarding the facts of the instant offense and also heard in mitigation from Castellon's counsel, who entreated the trial court to impose a minimum sentence. We conclude, in light of the information presented at the sentencing hearing, the trial court considered the overriding purposes of felony sentencing, although it did not specifically state that on the record. We have found, that where the record is silent, an appellate court may presume that the trial court considered the statutory factors when imposing a sentence.<sup>14</sup>

{¶ 19} Since the trial court sentenced Castellon within the statutory range for the instant offense and properly considered the purposes of felony sentencing as outlined in R.C. 2929.11, we conclude the trial court did not abuse its discretion when sentencing Casetellon. Accordingly, we overrule the sole assigned error.

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,

---

<sup>14</sup>*State v. Dargon*, Cuyahoga App. No. 82918, 2003-Ohio-5826, citing *State v. Tucker* (Oct. 28, 1999), Cuyahoga App. No. 74950.

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, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., CONCURS;  
ANN DYKE, J., CONCURS (SEE ATTACHED CONCURRING  
OPINION)

ANN DYKE, J., CONCURRING:

{¶ 20} I concur with the judgment rendered this day but I write separately to address the issue of the failure of the court to obtain a presentence report before imposing sentence in this matter.

{¶ 21} I acknowledge that, pursuant to R.C. 2951.03, and Crim.R. 32.2, the trial court is not required to obtain a presentence report if it does not impose a community control sanction for a felony violation. However, the “presentence investigation report or presentence report (PSR) is considered to be the most important document in the sentencing and correctional processes involving criminal defendants.” Carman, Fairness at the Time of Sentencing: The



Accuracy of the Presentence Report (2004), 78 St. John's Law Review 1. As explained by Judge Carman:

{¶ 22} “Its ‘primary purpose \* \* \* is to assist the court in determining [the] appropriate sentence’ for the defendant after a conviction or a guilty plea. [Citation omitted]. The PSR is particularly important when there is a guilty plea because there has been no trial; thus, the PSR serves as the main source of information about the defendant.”

{¶ 23} Pursuant to R.C. 2951.03, the presentence report contains information regarding “the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2.”

{¶ 24} Crim.R. 32.2 requires that the report shall state, “the defendant’s prior criminal record, the circumstances of the offense, and such information about defendant’s social history, employment record, financial ability and means, personal characteristics, family situation, and present physical and mental condition, as may be helpful in imposing or modifying sentences or providing rehabilitative or correctional treatment[.]”

{¶ 25} Though not specifically required in all cases, the presentence report helps ensure that the punishment fits the crime and the defendant. *United States v. Rosciano* (C.A. 7, 1974), 499 F.2d 173. As stated in that case:

{¶ 26} “It is \* \* \* imperative that sentencing procedures be fair and that they appear to be fair - to the defendant, to those who are deeply interested in his future, and to the public at large. It is that imperative that led the court to hold that normally there must be disclosure of those portions of the presentence report which affect the trial judge's determination. It is of comparable importance to have such a report prepared in the first instance, or to have the record plainly disclose why there is no need for a report in a particular case.”

{¶ 27} In this matter, the sentence imposed was within the statutory guidelines and within the law. Nonetheless, the sentence was imposed immediately after the guilty plea and without a presentence report. I would encourage the judge to obtain presentence reports in future matters to help ensure that lawful and fair sentences are imposed.