[Cite as *State v. Johnson*, 2009-Ohio-2959.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-MA-118
	)	
LEE JOHNSON, JR.	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio
Case No. 05CR1118

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 17, 2009

[Cite as *State v. Johnson*, 2009-Ohio-2959.]
DONOFRIO, J.

{¶1} Defendant-appellant, Lee Johnson, Jr., appeals his ten-year prison sentence in the Mahoning County Common Pleas Court for involuntary manslaughter, following his guilty plea.

{¶2} On December 2, 2005, a Mahoning County grand jury indicted Johnson for murder in violation of R.C. 2903.02(A)(D), a felony-life offense, involving the death of Regina Miller. Johnson initially pleaded not guilty and was appointed counsel. The case proceeded to discovery and other pretrial matters.

{¶3} On September 19, 2006, Johnson entered into a felony plea agreement with plaintiff-appellee, State of Ohio. Instead of proceeding to trial for murder, Johnson pleaded guilty to involuntary manslaughter in violation of R.C. 2903.04(A)(C), a first-degree felony. After his guilty plea, Johnson sent three letters to the trial court indicating that he wanted to withdraw his plea, the first of which arrived just seven days after his plea. Later, Johnson's counsel formally moved to withdraw the plea and, after a hearing, the trial court denied the motion and proceeded to sentencing. The court noted that the victim suffered the most serious harm (i.e., death), detailed Johnson's extensive criminal history, and noted that he demonstrated no remorse. The court then sentenced Johnson to the maximum, ten-year term of imprisonment.

{¶4} Johnson appealed those decisions to this court. We found that the trial court complied with Crim.R. 11's plea colloquy requirements. However, we reversed the trial court's decision denying Johnson's motion to withdraw the plea and remanded for further proceedings. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008-Ohio-1065. This court noted the policy that presentence motions to withdraw should be liberally granted and that, in this case, Johnson's desire was brought to the trial court's attention only seven days after the plea and that the state would not have been prejudiced by the withdrawal.

{¶5} Upon remand, the case again proceeded to discovery and other pretrial matters. On May 9, 2008, Johnson and the state again entered into a Crim.R. 11 felony plea agreement. In exchange for Johnson's guilty plea, the state agreed to

amend the indictment from murder to involuntary manslaughter and recommend a ten-year prison term. The trial court accepted Johnson's plea and proceeded to sentencing. Concerning the death of Regina Miller, Johnson's counsel indicated that Johnson did not intend for her to die, and that she and Johnson had an argument that "got out of control." (Tr 25). His counsel also related that Johnson and his father attempted to revive Miller, and that Johnson has mental health issues and has tried to make better decisions since the incident. (Tr. 25). Johnson himself expressed remorse and explained how he had returned to religion. (Tr. 26-27). At one point, Johnson seemed to acknowledge his own criminal history and how the trial court judge, in an earlier case, had told him of the need to care for his eight children. (Tr. 27). The court then sentenced him again to the maximum, ten-year term of imprisonment. This appeal followed.

{¶6} Johnson raises three assignments of error; each addressed to the trial court's sentencing decision. Johnson's first assignment of error states:

{¶7} "THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE ON DEFENDANT/APPELLANT."

{¶8} Despite the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, Johnson maintains that the legislative policy remains that the maximum sentence should be reserved for those offenders who commit the worst form of the offense or those offenders who are most likely to reoffend. Even though specific findings for the maximum sentence are no longer required, Johnson still argues that the trial court's reasons for imposing the maximum sentence should be clear from the record in order to allow an appropriate appellate review. In this case, Johnson argues that the trial court failed to construct a sufficient record that would allow this court to properly review whether the maximum prison term imposed was consistent with legislative policy.

{¶9} Regardless of the "policy" arguments advanced by Johnson, this court is left only with what remains of Ohio's felony sentencing law and is bound by the Ohio Supreme Court's decisions in that regard. Prior to the Ohio Supreme Court's

decision in *Foster*, the trial court was required to make certain findings in order to sentence an offender to a non-minimum, maximum term. R.C. 2929.14(B) and (C). However, in *Foster*, the Court found those provisions unconstitutional because they statutorily required "judicial fact-finding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant." Id. at paragraph one of the syllabus. As a remedy, *Foster* severed those provisions in their entirety from the statute. Id. at paragraph two of the syllabus. Now, a sentencing court has "full discretion" to sentence an offender within the statutory range and is no longer required to make findings or give its reasons for imposing non-minimum, maximum, or consecutive sentences. Id. at paragraph seven of the syllabus. A sentencing court need only consider "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 the offender." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38.

{¶10} Now, appellate review of felony sentences is a very limited, two-fold approach, as outlined by the recent plurality opinion of the Ohio State Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶26. The first step requires appellate courts 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. (O'Connor, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. Id. at ¶13-14 (O'Connor, J., plurality opinion). If the sentence is not clearly and convincingly contrary to law, the sentencing court's exercise of discretion "in selecting a sentence within the permissible statutory range is subject to review for any abuse of discretion." Id. at ¶17 (O'Connor, J., plurality opinion). Thus, an abuse of discretion is used to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. Id. at ¶17 (O'Connor, J., plurality opinion).

{¶11} In this case, the trial court stated at the sentencing hearing that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors outlined in R.C. 2929.12. Moreover, in the judgment entry of sentence, the court stated that it considered the principles and purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. As for Johnson's argument that the trial court failed to construct a sufficient record for appellate review, the three-Justice *Kalish* plurality decision noted that "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Kalish* at ¶18, fn. 4 (O'Connor, J., plurality opinion), citing *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.

{¶12} In sum, Johnson's sentence fell within the statutory range and was not clearly and convincingly contrary to law. Nor did the trial court's application of R.C. 2929.11 and R.C. 2929.12 to Johnson's sentence constitute an abuse of discretion.

{¶13} Accordingly, Johnson's first assignment of error is without merit.

{¶14} Johnson's second assignment of error states:

{¶15} "DEFENDANT/APPELLANT'S SENTENCE IS CONTRARY TO LAW AS IT DOES NOT SERVE THE OVERRIDING PURPOSES AND PRINCIPLES OF SENTENCING AS EXPRESSED IN ORC 2929.11"

{¶16} R.C. 2929.11 sets forth the overriding purposes of felony sentencing:

{¶17} "(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.

{¶18} "(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.

{¶19} "(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."

{¶20} In addition to R.C. 2929.11 mentioned above, R.C. 2929.12(A) provides that a sentencing court has discretion to determine the most effective way to comply with the purposes and principles of sentencing as set forth in R.C. 2929.11. In exercising that discretion, the court is to consider factors relating to the seriousness of the conduct and factors relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing. Also, "it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing" under R.C. 2929.11 when sentencing an offender for a first-degree felony. R.C. 2929.13(D)(1).

{¶21} Johnson argues that his maximum sentence was not consistent with the purposes of felony sentencing set forth in R.C. 2929.11(A) to adequately protect the public and punish the offender. Likewise, Johnson argues that the maximum sentence was not commensurate with the seriousness of the offender's conduct. Without further explanation, Johnson states that "[t]hese conclusions are true at least based upon the lack of the record before this Court." (Johnson's Brief, p. 7).

{¶22} For the same reasons mentioned under Johnson's first assignment of error, Johnson's second assignment of error is without merit.

{¶23} Johnson's third assignment of error states:

{¶24} "THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM SENTENCE IN THE PRESENT CASE IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A)."

{¶25} Again without explanation, Johnson argues that the maximum sentence imposes an unnecessary burden on state or local government resources, citing R.C. 2929.13(A).

{¶26} R.C. 2929.13(A) provides that a felony "sentence shall not impose an unnecessary burden on state or local government resources."

{¶27} "Just what constitutes a 'burden' on state resources is undefined by the statute, but the plain language suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration. Some have argued that in cases where the multiple life tails might be involved, incarceration of aged offenders who require the kind of nursing care needed by elderly people might place a burden on the state's resources. Of course this is true, but it is only one type of cost associated with incarceration. The court must also consider the benefit to society in assuring that an offender will not be free to reoffend. Many people sleep better at night knowing that certain offenders are incarcerated. They would no doubt consider a lengthy incarceration worth the cost of housing those offenders." *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, 797 N.E.2d 580, at ¶5.

{¶28} Johnson has provided no explanation or evidence that the sentence the trial court imposed would create an unnecessary burden on state or local government resources. Given Johnson's extensive criminal history and the beating death of the victim, it cannot be said that the public, and primarily its safety, would not benefit from having Johnson incarcerated for ten years.

{¶29} Accordingly, Johnson's third assignment of error is without merit.

{¶30} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.