

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

WRAHSAAN BARRINGER

Appellant.

Case No. 08-0624

On Appeal From the Portage
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2007-P-0002

**APPELLEE'S RESPONSE IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

VICTOR V. VIGLUICCI (0012579)
Portage County Prosecuting Attorney

PAMELA J. HOLDER (0072427)
Assistant Prosecuting Attorney
Counsel of Record
466 South Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850
(330) 297-4594 (fax)
prosvvv@neo.rr.com

ATTORNEYS FOR APPELLEE

WRAHSAAN BARRINGER
Inmate No. 462-428
Trumbull Correctional Institution
P.O. Box 901
5701 Burnett Road
Leavittsburg, Ohio 44430

PRO SE APPELLANT

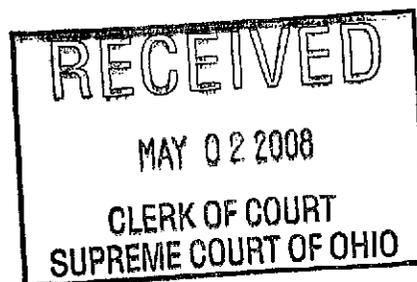
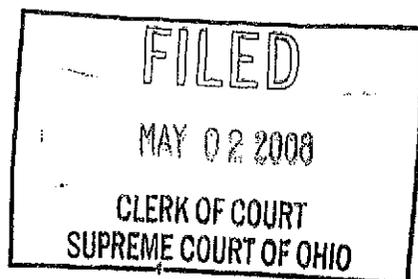


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND WHY IT DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS	1-4
ARGUMENT OPPOSING JURISDICTION	4
<u>Response to Petitioner’s Possible Proposition of Law Regarding Application of Foster Remedy</u>	5
<u>Response to Petitioner’s Possible Proposition of Law The Trial Court’s Discretion in Sentencing.</u>	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10

APPENDIX

<u>Appx.</u>	<u>Page</u>
Opinion of the Portage County Court of Appeals (Feb. 25, 2008).....	1
Judgment Entry of the Portage County Court of Appeals (Feb. 25, 2008).....	10

THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS COURT

This is not a case of public or great general interest. The Eleventh District Court of Appeals recently affirmed the Appellant's sentence finding the "Foster-remedy" constitutional. *State v. Barringer* (Feb. 25, 2008), Portage App. No. 2007-P-0002, 2008-Ohio-729, at ¶35.

Although this case raises the issue of the remedy created by this Court in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, this case does not involve a substantial constitutional question. Rather, this case involves an attempt to use an application of the Ex Post Facto Clause for the purpose of being sentenced under a law declared unconstitutional by this Court in *Foster*. Basically, the Appellant is asking this Court to remand his case to the trial court with instructions to violate the Constitution in re-sentencing him.

The Appellant has not presented any error with the decision of the Eleventh District Court of Appeals or any issue warranting jurisdiction from this Court.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF FACTS

On January 24, 2004, Karen Sanders and her large extended family of children, aunts, uncles and cousins gathered at the Ravenna Men's Civic Club to celebrate Karen's birthday. At one point in the evening, security responded to a fight on the dance floor between two female patrons. As some of the Civic Club members were moving the dance floor crowd toward the exit, Lashaun Sanders fired a single bullet into the air from his 9 millimeter semiautomatic pistol. (Transcript of

June 29, 2004 Trial Proceedings hereinafter "Trial Vol. I, II, III, or IV T.p." Trial Vol. I T.p. 193, Vol. II T.p. 111, Vol. III T.p. 168). The crowd dispersed. Moments later, the Appellant entered the bar, paused near a video machine and then with his .45 caliber semiautomatic pistol began shooting randomly into the crowd of men, women and children. (Trial Vol. I T.p. 193, Vol. II T.p. 113, Vol. III T.p. 169).

A bullet passed straight through Deborah Kelly's right arm leaving both an entrance and exit wound while another bullet hit and wounded Jonathon Caples. (Trial Vol. I T.p. 170, Vol. III T.p. 150). As bullets whizzed by some guests, other guests like Clemmie Perry and Rodney Mack were hit and injured during the Appellant's shooting spree. Lashaun Sanders and the Appellant came to the party together and left together after the shootings.

Several guests at the party were not only related to Karen Sanders but also were related to the Appellant. Following the shootings, eyewitnesses Patricia Carter and Vanessa Jackson identified their cousin, the Appellant, as the gunman. (Trial Vol. III T.p. 18, 32).

Lashaun Sanders, the Appellant's cousin, entered a written plea of guilty to carrying a concealed weapon, illegal possession of a firearm in liquor permit premises and a one year firearm specification in connection with the Civic Club shooting. (Trial Vol. III T.p. 154, State Exhibit 19).

PROCEDURAL HISTORY

On April 27, 2004, the Portage County Grand Jury indicted the Appellant on four counts of felonious assault in violation of R.C. 2903.11(A)(2), having a weapon under disability in violation of R.C. 2923.13 and illegal possession of firearm in liquor

permit premises in violation of R.C. 2923.121. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 1). Each felonious assault count also carried a firearm specification pursuant to R.C. 2929.14(D) and 29241.145. (T.d. 1).

The matter proceeded to a jury trial on June 29, 2004. (T.d. 56). The jury returned a verdict of guilty to the felonious assault charges and firearm specification as alleged in Counts One and Two, having a weapon under disability and illegal possession of firearm in liquor permit premises. (T.d. 56). The jury returned a verdict of not guilty to the felonious assault charges alleged in Counts Three and Four. (T.d. 56). The trial court referred the matter to the Adult Probation Department for a presentence investigation report.

Following the jury verdict, the Appellant moved the trial court for a new trial. (T.d. 63). The trial court overruled the Appellant's motion and sentenced the Appellant to consecutive terms of seven years in prison for each felonious assault, a consecutive term of three years for the merged firearm specifications and concurrent terms of eleven month for the remaining counts. (T.d. 67).

The Eleventh District Court of Appeals reversed and remanded Counts 1 and 2 for resentencing pursuant to *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Barringer* (May 26, 2006), Portage App. No. 2004-P-0083, 2006-Ohio-2649, at ¶88. The Appellate Court further held that the consecutive three years sentences for the two firearm specifications as well as the sentences for having a weapon under disability and illegal possession of firearm in liquor permit premises were to remain undisturbed on remand. *Id.*, at ¶84, 86.

On remand, the matter proceeded to a resentencing hearing on Counts 1 and 2. (T.d. 101). The trial court sentenced the Appellant to consecutive terms of seven years in prison for both counts of felonious assault. (T.d. 101). The Appellant appealed the re-sentencing and challenged his consecutive sentences.

On February 25, 2008, the Eleventh District affirmed the Appellant's sentence finding, the *Foster* remedy constitutional. *State v. Barringer* (Feb. 25, 2008), Portage App. No. 2007-P-0002, 2008-Ohio-729, at ¶35. This matter is now before the Supreme Court of Ohio on the Appellant's memorandum in support of jurisdiction.

ARGUMENT OPPOSING JURISDICTION

The State begins by noting that the Appellant's memorandum in support of jurisdiction to this Court was filed pro se. In his explanation of why this Court should accept jurisdiction of his case, the Appellant asserted the following reasons: 1) the State's alleged failure to disclose evidence, 2) the trial court's failure to declare a mistrial, 3) sentencing issues pursuant to *State v. Foster*, and 4) the fact that his jury returned inconsistent verdicts. (Appellant's Memorandum).

With exception of the *Foster* sentencing issues, the other reasons provided by the Appellant were issues that were raised in his original appeal to the Eleventh District Court of Appeals. *State v. Barringer* (May 26, 2006), Portage App. No. 2004-P-0083, 2006-Ohio-2649, at ¶88. The record reflects, the Appellate Court ruled against him on these issues and no discretionary appeal to this Court was sought. Accordingly, the Appellant is barred by the doctrine of res judicata from raising these issues again in this memorandum in support of jurisdiction.

Following his resentencing, the Appellant raised four assignments of error to the Eleventh District Court of Appeals. Two dealt with the *Foster* remedy and two dealt with the trial court's discretion to resentence to consecutive terms of seven years in prison. As only these issues are available to the Appellant as possible grounds to support a memorandum of jurisdiction to this Court, the State will address each separately.

Response to Appellant's Possible Proposition of Law Regarding Application of *Foster* Remedy: As the Appellant sought an application of the Ex Post Facto Clause for the purpose of being sentenced under a law declared unconstitutional by this Court, the Eleventh District Court of Appeals properly affirmed the decision of the Portage County Court of Common Pleas.

The Appellant seeks jurisdiction from this Court because his case became subject to the *Foster* remedy while on appeal to the Eleventh District Court of Appeals. As this Court's severance remedy in *Foster* did not violate the United States Constitution or the Ohio Constitution, the Appellant is not entitled to a discretionary review from this Court. *Barringer*, 2008-Ohio-729, at ¶35.

In Ohio, before this Court decided *Foster*, individuals who committed crimes were aware of what the potential sentences could be for criminal offenses. *State v. Elswick* (Dec. 29, 2006), Lake App. No. 2006-L-075, 2006-Ohio-7011, at ¶23. This Court's decision in *Foster* did not alter the range of sentences available for the various degrees of felonies. The Appellant's case involved second degree felonies. The statute governing sentencing for second degree felonies provided the following prison terms both before and after *Foster*, "[f]or a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years. R.C.

2929.14(A)(2). Accordingly, the Appellant knew the potential sentence for the offenses he committed.

Prior to this Court's decision in *Foster*, an offender's sentence was dependent on the action of the trial judge. *State v. McGhee* (Oct. 2, 2006), Shelby App. No. 17-06-05, 2006-Ohio-5162, at ¶25. Offenders could not expect a specific sentence prior to *Foster* because trial judges could make findings to sentence the Offender anywhere within the range provided by R.C. 2929.14(A). Further, an Offender was not able to predict which facts a trial judge would use in making pre-*Foster* statutory findings pursuant to former R.C. 2929.14(B), (C), and (E)(4). *Id.* As Offenders were not entitled to enforce or protect a specific sentence before *Foster*, it can not be said that the Appellant had a substantive right that was affected by a retroactive application of the *Foster* remedy. Accordingly, *Foster* did not create a substantive remedial law.

In the present case, the Appellant knew the potential sentence for the offenses he committed and had notice that Ohio's sentencing statutes were subject to judicial scrutiny. Furthermore, the remedy he now seeks is an application of the Ex Post Fact Clause for the purpose of being sentenced under a law that this Court declared unconstitutional in *Foster*. The Appellant is asking this Court to remand his case to the trial court with instructions to violate the Constitution in re-sentencing him. Such a result contradicts the general rule that, when the Supreme Court strikes down a law as unconstitutional, "the effect is not that the former was bad law, but that it never was the law." *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 210. Accordingly, the Appellant has not presented any error with the decision of the

Eleventh District Court of Appeals regarding the application of the *Foster* remedy to his case on remand warranting discretionary review from this Court.

Response to Appellant's Possible Proposition of Law Regarding the Trial Court's Discretion in Sentencing: As the record of the Appellant's case supports the trial court's sentence, the trial court did not abuse its discretion in sentencing the Appellant and the Eleventh District Court of Appeals properly affirmed the decision of the Portage County Court of Common Pleas.

On appeal, the Eleventh District Court of Appeals held that the trial court did not abuse its discretion in sentencing the Appellant to consecutive terms of seven years in prison for each count of felonious assault. *Barringer*, Portage App. No. 2007-P-0002, 2008-Ohio-729, at ¶16. The Court found that the Appellant decided to fire a handgun into a crowded nightclub, shooting into the crowd without regard to who he hit. *Id.*, 2008-Ohio-729, at ¶16. Additionally, the Court rejected the Appellant's invitation to compare his case with other felonious assault cases because the cases presented by the Appellant were factually distinguishable and failed to provide any information regarding the offender's criminal history. *Id.*, 2008-Ohio-729, at ¶19.

In *Foster*, this Court stated 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 the minimum sentences." *Foster*, 2006-Ohio-856, at ¶100. Accordingly, the Appellant has failed to demonstrate any error with the trial court's discretion in sentencing him to consecutive terms of seven years in prison for each felonious assault.

Another issue raised by the Appellant on appeal to the eleventh District Court of Appeals was the trial court's alleged failure to consider the statutory factors of

R.C. 2929.11 and 2929.12. The Appellate Court held that a review of the factors provided in R.C. 2929.11 and 2929.12 in relation to the Appellant's case revealed that the trial court considered the statutory factors in its sentencing determination. *Id.*, 2008-Ohio-729, at ¶32. Most important to the Eleventh District Court of Appeals was that the Appellant had a long criminal history, had caused his victims to suffer serious physical harm and was likely to resort to similar acts of violence during future emotionally escalated situations. *Id.*

The two purposes and principles of felony sentencing are "to protect the public from future crimes by the offender and others and to punish the offender." R.C. 2929.11(A). R.C. 2929.11 further provides that the trial court should consider the need to incapacitate the offender, deterrence, rehabilitation and restitution. R.C. 2929.11(A).

Pursuant to R.C. 2929.12, seriousness factors and recidivism factors are two primary categories of factors the trial court must consider in making the sentencing determination. The seriousness factors enumerated in R.C. 2929.12 are factors that make an offense either more or less serious than conduct normally constituting the offense. R.C. 2929.12(B), (C). Similarly, the recidivism factors enumerated in R.C. 2929.12 are separated into two categories that make it more or less likely that the offender will commit future crimes. R.C. 2929.12(D), (E). Additionally, the trial court may consider any other relevant factors relating to seriousness and recidivism to the extent that the additional factors are helpful in achieving the overriding purpose and principles of felony sentencing. R.C. 2929.12(A).

With regards to R.C. 2929.11 and 2929.12, the Supreme Court of Ohio held, “[i]t is important to note that there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors.” *Foster*, 109 Ohio St.3d at 15, 2006-Ohio-856, at ¶42. As the record in this case demonstrated that the trial court considered the statutory factors of the general guidance statutes, the Appellant failed to demonstrate any error with the Eleventh District Court of Appeals decision warranting jurisdiction from this Court.

CONCLUSION

The Appellee, State of Ohio, respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted,

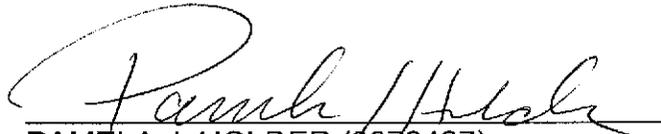
VICTOR V. VIGLIICCI (0012579)
Portage County Prosecuting Attorney



PAMELA J. HOLDER (0072427)
Assistant Prosecuting Attorney
Attorney for Appellee
Counsel of Record
466 South Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850
(330) 297-4594 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent to Wrahsaan Barringer, Inmate No. 462-428 at Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430, this 24th day of April 2008.



PAMELA J. HOLDER (0072427)
Assistant Prosecuting Attorney

FEB 25 2008

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2007-P-0002
WRAHSAAN J. BARRINGER, :
Defendant-Appellant. :

Criminal Appeal from the Court of Common Pleas, Case No. 2004 CR 0165.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Derek Cek, 2725 Abington Road, Suite 102, Fairlawn, OH 44333 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Wrahsaan J. Barringer, appeals the judgment entered by the Portage County Court of Common Pleas. Upon remand from this court, the trial court sentenced Barringer to an aggregate prison term of 17 years for his convictions for felonious assault, with firearm specifications; having a weapon while under disability; and illegal possession of a firearm in a liquor permit premises.

{¶2} In January 2004, a fight occurred during a birthday party at the Men's Civic Club in Ravenna, Ohio. During the fight, several shots were fired into the crowd.

At trial, Barringer was identified as one of the shooters. Several individuals sustained injuries as a result of the shooting.

{¶3} Barringer was indicted on six counts, including four counts of felonious assault, in violation of R.C. 2903.11(A)(2) and second-degree felonies; one count of having a weapon while under disability, in violation of R.C. 2923.13 and a fifth-degree felony; and one count of illegal possession of a firearm in a liquor permit premises, in violation of R.C. 2923.121 and a fifth-degree felony. All of the felonious assault counts contained firearm specifications, pursuant to R.C. 2929.14(D) and 2941.145.

{¶4} Barringer pled not guilty to the charges, and a jury trial was held. The jury found Barringer guilty on two of the felonious assault counts, as well as the firearm specifications in regard to those counts. In addition, the jury found Barringer guilty of the counts of having a weapon while under disability and illegal possession of a firearm in a liquor permit premises. The jury found Barringer not guilty on the remaining two counts of felonious assault.

{¶5} The trial court merged the firearm specifications for purposes of sentencing. The trial court sentenced Barringer to seven-year prison terms for each of his felonious assault convictions, to be served consecutively to each other. The trial court imposed a three-year term for the firearm specification, to be served consecutively to both of the seven-year terms for the felonious assault convictions. Further, the trial court imposed 11-month sentences for Barringer's convictions for having a weapon while under disability and illegal possession of a firearm in a liquor permit premises. The 11-month terms were ordered to be served concurrently to each other and the

sentences for the felonious assault convictions and the firearm specification. Thus, Barringer's aggregate prison term was 17 years.

{¶6} Barringer appealed his convictions and sentence to this court. *State v. Barringer*, 11th Dist. No. 2004-P-0083, 2006-Ohio-2649. This court affirmed his convictions. *Id.* at ¶88. In addition, this court affirmed Barringer's sentences for having a weapon while under disability and illegal possession of a firearm in a liquor permit premises, as well as his sentence for the firearm specification. *Id.* at ¶84-88. However, this court reversed Barringer's sentences for his felonious assault convictions and remanded the matter for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Id.* at ¶88.

{¶7} In July 2006, the trial court conducted a resentencing hearing. The trial court imposed an identical, aggregate 17-year prison sentence. This aggregate prison sentence included seven-year sentences for each of Barringer's felonious assault convictions and a three-year term for the firearm specification, all to be served consecutively to each other.

{¶8} Barringer has appealed the trial court's resentencing judgment entry to this court. Barringer raises four assignments of error. His first and second assignments of error are:

{¶9} "[1.] The trial court erred when it sentenced appellant under the guidelines of *State v. Foster* since *Foster's* severance provisions operate as an ex post fact law.

{¶10} "[2.] The trial court denied appellant due process when it sentenced appellant under the guidelines of *State v. Foster*."

{¶11} In his first and second assignments of error, Barringer asserts his sentence is unconstitutional because he committed his crimes prior to the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, but was sentenced pursuant to the post-*Foster* version of R.C. 2929.14. This court has addressed Barringer's exact arguments in the case of *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011. In *State v. Elswick*, this court found the arguments that are raised in this appeal to be without merit. *Id.* at ¶5-31. See, also, *State v. Marino*, 11th Dist. No. 2006-L-192, 2007-Ohio-2566, at ¶8-14; *State v. Nicholson*, 11th Dist. No. 2006-L-210, 2007-Ohio-2058, at ¶5-11; and *State v. Schaub*, 11th Dist. No. 2006-L-126, 2007-Ohio-2853, at ¶10-17. Additionally, in *State v. Green*, this court found a similar post-*Foster* Ex Post Facto Clause argument to be without merit. *State v. Green*, 11th Dist. Nos. 2005-A-0069 & 2005-A-0070, 2006-Ohio-6695, at ¶15-23. Finally, similar arguments have "been consistently rejected by other Ohio appellate districts and federal courts." *State v. Markiewicz*, 11th Dist. No. 2006-L-249, 2007-Ohio-3974, at ¶12, citing *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899, at ¶15-18; *State v. Moore*, 3d Dist. No. 1-06-51, 2006-Ohio-6860, at ¶7-12; and *United States v. Portillo-Quezada* (C.A.10, 2006), 469 F.3d 1345, 1354-1356.

{¶12} Based upon the prior authority of this and other courts, Barringer's first and second assignments of error are without merit.

{¶13} Barringer's third assignment of error is:

{¶14} "The trial court's sentence of appellant was an abuse of discretion."

{¶15} After the *State v. Foster* decision, "[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.” *State v. Foster*, 2006-Ohio-856, at paragraph seven of the syllabus. Thus, this court has held post-*Foster* felony sentencing is generally reviewed for abuse of discretion. *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, at ¶19: “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶16} In this matter, Barringer contends the trial court abused its discretion by imposition of consecutive, seven-year prison terms for the felonious assault convictions. We disagree. Barringer’s felonious assault convictions resulted from his decision to fire a handgun in a crowded nightclub. As this court noted in its opinion of Barringer’s first appeal, one of the witnesses described Barringer’s actions as follows, “and the next thing I know, (Barringer) just starts shooting. As he’s running, he’s shooting, not knowing who he’s shooting at and don’t care who he hits.” *State v. Barringer*, 11th Dist. No. 2004-P-0083, 2006-Ohio-2649, at ¶18. The jury determined that Barringer’s actions injured two people, to wit: Deborah Kelly and Jonathan Caples, who both received gunshot wounds to their right arms. In determining to impose seven-year, consecutive sentences, the trial court most certainly considered the severity of Barringer’s offenses and the fact that the outcome of his actions could have been much more tragic.

{¶17} Barringer directs our attention to several other cases to support his argument that the trial court abused its discretion in imposing consecutive, seven-year prison terms. For the following reasons, all of these cases are distinguishable from the case sub judice. Barringer cites *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-

2216, at ¶3, in which the defendant was sentenced to an aggregate prison term of 19 years for his rape and kidnapping convictions in a case where the defendant's wife was the victim. Since the underlying crimes in *Worrell* are entirely different from those in the case sub judice, this case is immediately distinguishable. Barringer also cites *State v. Burten*, 8th Dist. No. 88395, 2007-Ohio-2641. In *Burten*, the defendant was sentenced to a term of eight years in prison for his felonious assault convictions. *Id.* at ¶10. However, unlike the instant matter, there was only one shooting victim in *Burten*. *Id.* at ¶4. Finally, Barringer cites *State v. Serrano*, 164 Ohio App.3d 103, 2005-Ohio-5606, at ¶1, where the defendant received a four-year prison term for his felonious assault conviction. It is important to note that the attack in *Serrano* was unsuccessful, as the knife actually hit the victim's cell phone and did not enter his body. *Id.* at ¶2.

{¶18} Moreover, none of the cases cited by Barringer outline the criminal history of the respective defendants. In this case, the trial court indicated it reviewed the presentence investigation ("PSI") report. The PSI report indicates Barringer has a significant criminal history. On appeal, Barringer recognizes this fact. In his brief, he concedes that he has "a history of criminal convictions." A defendant's prior criminal record is a critical fact regarding the offender's recidivism potential and is to be considered when imposing a felony sentence. See R.C. 2929.12(D)(2).

{¶19} Considering all of the cases cited by Barringer are factually distinguishable from the case sub judice, none of those cases expand on the defendants' criminal records, and Barringer's own criminal record, we decline to find that the trial court erred in imposing Barringer's sentence based on the cases cited by Barringer.

{¶20} The trial court did not abuse its discretion by imposing consecutive, seven-year prison sentences for Barringer's felonious assault convictions.

{¶21} Barringer's third assignment of error is without merit.

{¶22} Barringer's fourth assignment of error is:

{¶23} "The trial court's [sic] abused its discretion by failing to consider the statutory factors of Ohio Revised Code Section 2929.12."

{¶24} R.C. 2929.12 is a "general guidance statute," which was not affected by the *Foster* decision. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶36-42. See, also, *State v. Lloyd*, 11th Dist. No. 2005-L-146, 2006-Ohio-6534, at ¶¶17-18. R.C. 2929.12 provides a list of factors that the trial court "shall consider" when imposing a felony sentence.

{¶25} While this court generally reviews post-*Foster* felony sentencing decisions for abuse of discretion, there are certain limited circumstances where the clear and convincing standard of review remains viable. For example, the clear and convincing standard of review will be employed where it is alleged the sentence is contrary to law. *State v. Payne*, 2007-Ohio-6740, at ¶19. See, also, e.g., *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, at ¶19.

{¶26} This court has held that the abuse of discretion standard of review applies to the appellate review of the trial court's consideration of the R.C. 2929.12 factors. *State v. Payne*, 2007-Ohio-6740, at ¶21. We have conducted an abuse of discretion review in our analysis of Barringer's third assignment of error. We concluded that the trial court did not abuse its discretion by imposing consecutive, seven-year prison sentences for Barringer's felonious assault convictions.

{¶27} Barringer asserts the trial court did not consider the R.C. 2929.12 factors. If true, the trial court's actions would be contrary to the clear mandates of the statute. Thus, Barringer essentially argues that his sentence is contrary to law. Accordingly, pursuant to R.C. 2953.08(G)(2)(b), we will employ the "clear and convincing" standard of review for this assignment of error.

{¶28} While the trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors [of R.C. 2929.12.]'" *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215.

{¶29} R.C. 2929.12(B) contains factors that indicate an offender's conduct is "more serious" than normal conduct associated with the offense. Barringer argues that it is questionable as to whether R.C. 2929.12(B)(2) applied. We strongly disagree. This section provides that "[t]he victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." Both victims were shot with a firearm. As such, R.C. 2929.12(B)(2) pertains to this matter.

{¶30} R.C. 2929.12(C) contains factors that indicate an offender's conduct is "less serious" than normal conduct associated with the offense. In his brief, Barringer concedes that none of these factors pertain to his conduct in the instant matter.

{¶31} R.C. 2929.12(D) contains factors that indicate an offender is "likely to commit future crimes." Barringer acknowledges that "some of [these] factors apply." Specifically, he refers to the fact that he has a history of criminal convictions. See R.C. 2929.12(D)(2).

{¶32} R.C. 2929.12(E) contains factors that indicate an offender is “not likely to commit future crimes.” Barringer argues that he had not been adjudicated a delinquent child. See R.C. 2929.12(E)(1). However, we note, and Barringer admits, that he has a history of crimes committed as an adult. R.C. 2929.12(E)(2). Also, Barringer argues that the instant offenses were committed under circumstances not likely to recur. See 2929.12(E)(4). He argues that it is unlikely he will “again become involved in resolving a dispute in a club at a birthday party.” Barringer reads this factor too narrowly. The issue is not whether Barringer will fire a handgun at the exact location, during an identical function. Rather, the issue is whether Barringer will resort to similar acts of violence during another emotionally-escalated situation.

{¶33} Barringer has not demonstrated that the trial court failed to consider the R.C. 2929.12 factors. Thus, upon a review of the record and Barringer’s arguments, we do not clearly and convincingly find that the trial court’s sentence was contrary to law. See R.C. 2953.08(G)(2). Moreover, we hold that the trial court did not abuse its discretion in imposing Barringer’s sentence.

{¶34} Barringer’s fourth assignment of error is without merit.

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

DIANE V. GRENDALL, P.J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.

STATE OF OHIO

IN THE COURT OF APPEALS

COUNTY OF PORTAGE

)
FILED
COURT OF APPEALS

ELEVENTH DISTRICT

FEB 25 2008

STATE OF OHIO,

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

Plaintiff-Appellee,

JUDGMENT ENTRY

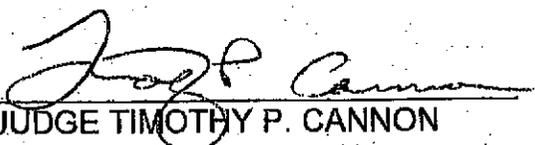
- vs -

CASE NO. 2007-P-0002

WRAHSAAN J. BARRINGER,

Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.


JUDGE TIMOTHY P. CANNON

DIANE V. GRENDELL, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.