

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NO. 2006-L-213
- vs -	:	
SYNTHIA L. RADY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000432.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Gregory J. Mussman*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Richard P. Morrison, 30601 Euclid Avenue, Wickliffe, OH 44092 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Synthia L. Rady, appeals from the September 5, 2006 judgment entry of the Lake County Court of Common Pleas, in which she was resentenced for theft from an elderly person, theft, and forgery.

{¶2} On October 25, 2005, appellee, the state of Ohio, charged appellant by way of information with three counts: count one, theft from an elderly person, a felony of the second degree, in violation of R.C. 2913.02(A)(1); count two, theft, a felony of the

fifth degree, in violation of R.C. 2913.02(A)(1); and count three, forgery, a felony of the fifth degree, in violation of R.C. 2913.31(A)(3). Appellant entered a written plea of guilty to the charges on November 21, 2005. In an entry dated November 21, 2005, the trial court accepted appellant's guilty plea and deferred sentencing to a later date.

{¶3} A sentencing hearing was held on December 22, 2005. Pursuant to its December 30, 2005 judgment entry, the trial court sentenced appellant to serve a prison term of four years on count one, ten months on count two, and ten months on count three. The trial court ordered that the sentences were to be served concurrently to one another. Appellant was given one day of credit for time already served. She filed a timely notice of appeal with this court, Case No. 2006-L-012, in which she asserted four assignments of error, all concerning her sentence.

{¶4} On June 30, 2006, in *State v. Rady*, 11th Dist. No. 2006-L-012, 2006-Ohio-3434, this court vacated appellant's sentence, and reversed and remanded the matter to the trial court for appellant to be resentenced pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶5} Pursuant to this court's remand, a resentencing hearing was held on August 31, 2006. In its September 5, 2006 judgment entry, the trial court sentenced appellant to serve a prison term of four years on count one, ten months on count two, and ten months on count three. The trial court ordered that the sentences were to be served concurrently to one another. Appellant was given one day of credit for time already served. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignments of error:

{¶6} “[1.] The trial court erred when it sentenced [appellant] to more-than-the-minimum prison terms in violation of the due process and ex post facto clauses of the Ohio and United States Constitutions.

{¶7} “[2.] The trial court erred when it sentenced [appellant] to more-than-the-minimum prison terms in violation of [appellant’s] right to due process.

{¶8} “[3.] The trial court erred when it sentenced [appellant] to more-than-the-minimum prison terms based on the Ohio Supreme Court’s severance of the offending provisions under *Foster*, which was an act in violation of the principle of separation of powers.

{¶9} “[4.] The trial court erred when it sentenced [appellant] to more-than-the-minimum prison terms contrary to the rule of lenity.

{¶10} “[5.] The trial court erred when it sentenced [appellant] to more-than-the-minimum prison terms contrary to the intent of the Ohio legislators.

{¶11} “[6.] The trial court erred to the prejudice of [appellant] when it sentenced her to prison which sentence is contrary to law.”

{¶12} Initially, we note that the issues contained in appellant’s first through fifth assignments of error have recently been addressed by this court in *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011.

{¶13} In her first assignment of error, appellant argues that the trial court erred by sentencing her to more than the minimum prison terms in violation of the due process and ex post facto clauses of the Ohio and United States Constitutions. She alleges that the sentences imposed were not available to the trial court at the time the offenses were committed.

{¶14} In her second assignment of error, appellant contends that the trial court erred by sentencing her to more than the minimum prison terms in violation of her right to due process. She asserts two issues. In her first issue, appellant maintains that the trial court erred by sentencing her to more than the minimum prison terms when no additional factual findings were made by the jury. In her second issue, she alleges that she had neither actual nor constructive notice that the sentences were possible punishments for the offenses.

{¶15} Appellant's first and second assignments of error are interrelated since they both are premised on alleged violations of ex post facto principles embedded in the notion of due process. Thus, we will address them in a consolidated fashion.

{¶16} Having been issues of first impression in *Elswick*, we concluded that *Foster* did not violate the due process and ex post facto clauses of the Ohio and United States Constitutions, because defendants face the same potential sentence as they did before *Foster*. See *Elswick*, supra, at ¶16-30 (for a complete and thorough analysis). See, also, *State v. Smith*, 2d Dist. No. 21004, 2006-Ohio-4405; *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082; and *State v. McGhee*, 3d Dist. No. 17-06-05, 2006-Ohio- 5162.

{¶17} Prior to *Foster*, individuals who decided to commit crimes were aware of what the potential sentences could be for the offenses committed. R.C. 2929.14(A). Here, appellant pleaded guilty to one count of theft from an elderly person, a felony of the second degree, in violation of R.C. 2913.02(A)(1); one count of theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1); and one count of forgery, a felony of the fifth degree, in violation of R.C. 2913.31(A)(3). Appellant was charged with the

foregoing counts by way of information, which alleged that she committed the offenses on or between April 19, 2005 to May 28, 2005. Thus, appellant's offenses were committed before *Foster*, but after *Apprendi v. New Jersey* (2000), 530 U.S. 466, *Blakely v. Washington* (2004), 542 U.S. 296, and *United States v. Booker* (2005), 543 U.S. 220.

{¶18} The range of sentences available for second and fifth degree felonies remains unchanged post-*Foster*. R.C. 2929.14(A) provided fair warning to appellant that she could receive anywhere from two to eight years for her second degree felony offense, and six to twelve months for her fifth degree felony offenses. Appellant understood and signed her plea agreement, which she entered into on November 21, 2005. Her plea agreement specified the code provisions and the range of possible prison terms. Again, these provisions have not changed or been enlarged in any manner after *Foster*. She was originally sentenced on December 22, 2005, approximately two months prior to *Foster*. However, pursuant to this court's remand, appellant was resentenced on August 31, 2006, according to *Foster*.

{¶19} *Foster* does not violate Section 28, Article II of the Ohio Constitution, or Article I, Section 10 of the United States Constitution.

{¶20} Appellant's first and second assignments of error are without merit.

{¶21} In her third assignment of error, appellant maintains that the trial court erred by sentencing her to more than the minimum prison terms based on the Supreme Court of Ohio's severance of the offending provisions under *Foster*, which was an act in violation of the principle of separation of powers.

{¶22} In *Elswick*, supra, at ¶¶37-38, we stated:

{¶23} “R.C. 1.50 deals with severability of code section provisions and provides: ‘[i]f any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.’

{¶24} “In the case sub judice, we do not agree with appellant that the Supreme Court of Ohio violated the separation of powers doctrine. We note that severance is a specific remedy that the judicial branch may use when interpreting a statute’s constitutionality. Pursuant to R.C. 1.50, if a statute is determined to be unconstitutional, the judicial branch is vested with the power to sever the provision found to be invalid. The Supreme Court in *Foster* did not exceed its power by severing the statutes it found incompatible with the Ohio and United States Constitution. Rather, it employed the same remedy used by the United States Supreme Court in *Booker*, supra, in order to bring Ohio’s sentencing scheme in line with constitutional mandates.”

{¶25} Further, we note that the inferior tribunals of this state are strictly bound by the constitutional mandates and statutory constructions made by the Supreme Court of Ohio. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 475, (constitutional mandates); *State v. Sides*, 11th Dist. No. 2005-L-175, 2006-Ohio-2778, at ¶13 (statutory constructions). Neither the trial court, nor this court, can alter the remedies prescribed by the Supreme Court in curing a constitutionally-infirm statute.

{¶26} Appellant’s third assignment of error is without merit.

{¶27} In her fourth assignment of error, appellant argues that the trial court erred by sentencing her to more than the minimum prison terms contrary to the rule of lenity. She alleges that the rule of lenity dictated a lesser penalty.

{¶28} R.C. 2901.04(A) states: “*** sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”

{¶29} “The “rule of lenity” is a principle of statutory construction which states that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant where the intended scope of the statute is ambiguous.’ *State v. Brown* (May 2, 1997), 2d Dist. No. 96 CA 92, 1997 Ohio App. LEXIS 1747, at 10, citing *Moskal v. United States* (1990), 498 U.S. 103, 107-108 ***. The rule of lenity ‘provides that ambiguity in criminal statutes is construed strictly so as to only apply to conduct that is clearly prescribed.’ *State v. Goist*, 11th Dist. No. 2002-T-0136, 2003-Ohio-3549, at ¶23, citing *United States v. Lanier* (1997), 520 U.S. 259, 266 ***.” *Elswick*, supra, at ¶42. (Parallel citations omitted.)

{¶30} In the instant case, appellant was resentenced after *Foster*, and, thus, the trial court was bound to apply the law announced by the Supreme Court of Ohio. Because R.C. 2929.14(B) is not ambiguous, the rule of lenity does not apply. See *Goist*, supra, at ¶23, citing *United States v. Johnson* (2000), 529 U.S. 53, 59 (holding “[a]bsent ambiguity, the rule of lenity is not applicable to guide statutory interpretation.”)

{¶31} Appellant’s fourth assignment of error is without merit.

{¶32} In her fifth assignment of error, appellant contends that the trial court erred when it sentenced her to more than the minimum prison terms contrary to the intent of the Ohio legislators.

{¶33} *Elswick* contains an extensive discussion of the foregoing issue, fully applicable to this matter. *Id.* at ¶45-54. All we would add here is that this court is without power to review the Ohio Supreme Court's decisions regarding legislative intent. *Sheward*, *supra*, at 475; *Sides*, *supra*, at ¶13.

{¶34} Appellant's fifth assignment of error is without merit.

{¶35} In her sixth assignment of error, appellant contends that the trial court erred when it sentenced her to prison, which sentence is contrary to law. She presents two issues. In her first issue, appellant stresses that the trial court erred by sentencing her to prison rather than community control. In her second issue, appellant maintains that the trial court erred by imposing a sentence that was not consistent with and proportionate to sentences imposed upon similarly situated offenders committing similar offenses.

{¶36} Because her issues are interrelated, we will address them together.

{¶37} In examining a felony sentence, an appellate court conducts a *de novo* review. R.C. 2953.08(G). However, "[a] reviewing court will not disturb a defendant's sentence absent a finding, by clear and convincing evidence, that the record does not support the sentence or that the sentence is contrary to law." *State v. Bush*, 11th Dist. No. 2005-P-0004, 2006-Ohio-4038, at ¶49, quoting *State v. Lloyd*, 11th Dist. No. 2002-L-069, 2003- Ohio-6417, at ¶6.

{¶38} R.C. 2929.11 provides in part:

{¶39} “(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.

{¶40} “(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.”

{¶41} This court stated in *State v. Adams*, 11th Dist. No. 2003-L-110, 2005-Ohio-1107, at ¶57:

{¶42} “although ‘a trial court is required to engage in the analysis set forth by R.C. 2929.11(B) to ensure the consistency of sentences,’ a court is not required ‘to make specific findings on the record’ in this regard. *State v. Newman*, 11th Dist. No. 2002-A-0007, 2003-Ohio-2916, at ¶10. The trial court possesses ‘broad discretion to determine the most effective way to comply with the purposes and principles of sentencing within the statutory guidelines.’ *State v. Smith* (June 11, 1999), 11th Dist. No. 98-P-0018, 1999 Ohio App. LEXIS 2632, at 8.”

{¶43} In *State v. Spicuzza*, 11th Dist. No. 2005-L-078, 2006-Ohio-2379, at ¶14-15, this court indicated that the Supreme Court of Ohio in *Foster*, supra, at ¶37, stated the following with respect to R.C. 2929.12:

{¶44} “(**) R.C. 2929.12, grants the sentencing judge discretion “to determine the most effective way to comply with the purposes and principles of sentencing.” R.C. 2929.12(A) directs that in exercising that discretion, the court shall consider, along with any other “relevant” factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider.’ (Footnote omitted.) The Supreme Court made it clear, however, that ‘there is no mandate for judicial factfinding in the general guidance statutes(,)’ and as such, do not violate *Blakely*. Id at ¶42. “The court is merely to “consider” the statutory factors.’ Id.”

{¶45} We additionally stated in *Spicuzza* at ¶16:

{¶46} “[t]his court has held that, “although the trial court is required ‘to consider the seriousness and recidivism factors,’ the court does not need to ‘make specific findings on the record in order to evince the requisite consideration of all applicable seriousness and recidivism factors.’” *State v. Blake*, 11th Dist. No. 2003-L-196, 2005-Ohio-686, at ¶16, quoting *State v. Matthews*, 11th Dist. No. 2003-L-043, 2004-Ohio-1849, at ¶15.”

{¶47} R.C. 2929.12, which serves as a “general judicial guide for every sentencing[,]” remains valid after *Foster*. *Foster*, supra, at ¶36. Although there is no mandate for judicial factfinding in the general guidance statutes, there is no violation if

the trial court makes findings with respect to R.C. 2929.12. *State v. Mosier*, 11th Dist. No. 2005-P-0100, 2006-Ohio-4187, at ¶11.

{¶48} R.C. 2929.13(D)(1) provides in part: “*** for a felony of the *** second degree *** it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. ***”

{¶49} R.C. 2929.13(D)(2) states in part: “*** the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the *** second degree *** if it makes both of the following findings:

{¶50} “(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

{¶51} “(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender’s conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender’s conduct was more serious than conduct normally constituting the offense.”

{¶52} In the instant matter, the trial court applied and considered the requisite statutory sentencing factors under R.C. 2929.11 and R.C. 2929.12 before issuing appellant’s sentence. Specifically, the trial court emphasized the need to impose a

consistent sentence and that it had balanced the seriousness and recidivism factors. Appellant's sentence is clearly within the basic range authorized by R.C. 2929.14(A).

{¶53} After considering the record, oral statements, pre-sentence report and drug and alcohol evaluation, as well as the principles and purposes of sentencing in R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, the trial court found that a prison term was consistent with R.C. 2929.11 and that appellant was not amenable to community control sanctions. The trial court did not make the findings necessary to impose community control instead of the presumed prison term.

{¶54} Based on our review of the record, the trial court did not err when it sentenced appellant to prison rather than community control.

{¶55} Appellant's sixth assignment of error is without merit.

{¶56} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.

