

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-019
ANTHONY DUDLEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000612.

Judgment: Affirmed.

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

Paul R. LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Anthony Dudley, appeals from the judgment entered by the Lake County Court of Common Pleas sentencing him to four years in prison. For the reasons set forth in this opinion, we affirm.

{¶2} The charges in this matter arose from a controlled-buy of crack cocaine arranged through the Lake County Narcotics Agency (LCNA). On September 30, 2008,

a confidential informant (CI) spoke with appellant, via telephone, in order to purchase \$1,400 worth of crack cocaine. Upon appellant's arrival at the pre-set location, the CI approached and handed appellant \$1,400 in pre-marked money from LCNA funds. Appellant accepted the money and, in exchange, gave the CI 5.53 grams of crack cocaine. Immediately after the deal, officers moved in and placed appellant under arrest. The \$1,400, a cell phone, and \$142 in cash were seized from appellant.

{¶3} On November 14, 2008, appellant was indicted by the Lake County Grand Jury on one count of trafficking in cocaine, a felony of the third degree, in violation of R.C. 2925.03(A)(1), with two accompanying forfeiture specifications pursuant to R.C. 2941.1417 and R.C. 2981.04; and one count of possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24. Appellant later entered a plea of “not guilty” to all charges.

{¶4} Appellant ultimately withdrew his plea of “not guilty” and entered a plea of “guilty” to the felony-three trafficking charge with the forfeiture specifications. The trial court entered a nolle prosequi on the remaining count. The matter was then deferred to the Lake County Adult Probation Department for a presentence investigation report.

{¶5} On January 20, 2009, a sentencing hearing took place at which appellant was sentenced to a term of 4 years imprisonment. Appellant filed a timely notice of appeal of the trial court's sentence and now assigns two errors for our review.

{¶6} Appellant's first assignment of error reads:

{¶7} “The trial court erred by sentencing the defendant-appellant to a four-year term of incarceration.”

{¶8} Under his first assignment of error, appellant contends the trial court committed reversible error because its findings were not supported by R.C. 2929.12 and it failed to give sufficient consideration to all relevant statutory factors.

{¶9} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio concluded that “[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.” *Id.* at paragraph seven of the syllabus.

{¶10} However, the Court also held that two statutory sections, R.C. 2929.11 and R.C. 2929.12, still “apply as a general guide for every sentencing.” *Foster*, *supra*, at 12-13. In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A) a trial court must be guided by the overriding purposes of felony sentencing, which are “to protect the public from future crime by the offender and others and to punish the offender.” To achieve these two purposes, the court must consider the need for incapacitating the offender, deterring him from future crime, rehabilitating the offender, and making restitution to the victim. *Id.* R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A) and commensurate with and not demeaning to the seriousness of the crime and its impact on the victim. The court must also consider the seriousness and recidivism factors under R.C. 2929.12. By expressly stating that it considered the factors in R.C. 2929.11 and R.C. 2929.12, the court satisfies its duty under those statutes. *State v. Clay*, 7th Dist. No. 08 MA 2, 2009-Ohio-1204, at ¶174. By implication, post-*Foster*, an express articulation of the statutory considerations is

unnecessary to the imposition of a felony sentence. *State v. Wilder*, 6th Dist. No. L-06-1321, 2007-Ohio-4186, at ¶39.

{¶11} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Court provided some guidance regarding *Foster's* application vis-à-vis the procedure for reviewing felony sentences. The Court held that “appellate courts must apply a two-step approach [in reviewing a felony sentence]. First, they must 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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.” *Kalish*, supra, at ¶4.

{¶12} 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. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122.

{¶13} Here, appellant does not allege his sentence is contrary to law; rather, he argues the trial court failed to give “careful and substantial deliberation to the relevant statutory considerations.” *Kalish*, supra, at ¶20. We disagree.

{¶14} At the sentencing hearing, the trial court stated it specifically considered the overriding purposes and principles of felony sentencing set forth in R.C. 2929.11; to wit “to punish this Defendant as well as to protect the public from future crimes committed by this Defendant ***.” Towards the end of complying with those purposes

and principles, the court stated it had considered all relevant statutory factors, “including but not limited to those set forth in [R.C] 2929.12 ***.” The court additionally stated that it had considered the complete record, including the PSI, the statements made by counsel as well as those made by appellant during the hearing. Because a prison term was mandatory in this case, the court also pointed out that a prison term is “consistent with the purposes and principles set forth in 2929.11 of the code.”

{¶15} Prior to announcing its sentence, the trial court made the following particular observations relating to the R.C. 2929.12 factors:

{¶16} “The Court has considered specifically the fact that this Defendant has been sentenced to prison on seven prior occasions. Some of those sentences being run concurrent with each other, and there have been four separate trips to prison where numbers were assigned. It appears that the Defendant was released on December 7th of 2007, from his most recent prison term, and the crime that brings us here today was committed just nine months later in September of 2008. It also appears from the record, and I think I’m being generous in my math, but it appears this Defendant has spent about seven years of his nine years of adult life behind bars in prison because of the crimes that he has, in fact, committed. The Court also notes and has considered that the Defendant was on post release control at the time this crime was committed following his release from prison in December of 2007.

{¶17} “And the Court also notes that the Defendant did act in conjunction with another, a co-defendant, and that makes this crime part of organized criminal activity as well.

{¶18} “The Court has also considered the Defendant’s prior history of juvenile delinquency adjudications, adjudications for burglary and vandalism in ’97; drug possession in ’97; theft in ’97; two separate adjudications for drug possession in ’99; unruly due to truancy and disorderly conduct also in 1999.

{¶19} “As an adult the Defendant did not miss a beat being involved in criminal activity in that his first conviction as an adult was for a felony, that being in the year 2000, attempted receiving stolen property. There were also convictions for attempted possession of drugs in 2000; possession of drugs as a felony in 2000; and preparation of drugs for sale as a felony in 2000. There’s a felony conviction for receiving stolen property in 2001; felony possession of drugs in 2001; drug abuse and disorderly conduct in 02; trafficking in drugs as a felony in 2003, and felonious assault with a firearm, also a felony in 2004. Clearly this Defendant has not responded favorably to sanctions that have previously been imposed. There are PRC violations in 2003; there’s a failure to appear in Court for a hearing in 2002. There’s obviously a violation of his post release control by the commission of this crime while under PRC as a result of that release from prison in ’07.”

{¶20} The court further acknowledged appellant’s history of alcohol and drug abuse. The court observed that although appellant completed one program relating to treatment for his addictions, he had not received any “extensive treatment” at the time of the hearing.

{¶21} Based upon the court’s considerations, appellant was sentenced to four years imprisonment.

{¶22} Appellant asserts the trial court erred in failing to give sufficient weight to appellant's overt expression of remorse during the hearing. Specifically, appellant, on record, apologized to the court, community, and his family. Appellant further indicated his actions were a result of his dire financial situation and his pre-existing addictions. Notwithstanding appellant's representations, we have previously held that a reviewing court must defer to the trial court as to whether a defendant's remarks are indicative of genuine remorse because it is in the best position to make that determination. *State v. Stewart*, 11th Dist. No. 2008-L-112, 2009-Ohio-921, at ¶30; see, also, *State v. Eckliffe*, 11th Dist. No. 2001-L-105, 2002-Ohio-7136, at ¶32, citing *State v. Nutter* (Aug. 24, 2001), 3d Dist. No. 16-01-06, 2001-Ohio-2253, 2001 Ohio App. LEXIS 3752, *5. The trial court indicated it considered appellant's statements; however, the court concluded appellant's significant criminal history outweighed appellant's apologies, justifications, and/or excuses in light of his significant criminal history. We do not believe the trial court's determination was either arbitrary or unreasonable.

{¶23} Appellant next asserts the trial court failed to give appropriate consideration to the amount of cocaine involved in the instant case. Appellant contends that the weight of crack he sold was on the low end of a felony-three charge; specifically, had the seized contraband been a mere half-gram less, his charge would have been a felony-four rather than a felony-three. Appellant maintains the trial court did not give this detail enough weight in calculating his sentence.

{¶24} Once again, the trial court stated it considered the entirety of the record in fashioning a sentence that complied with the purposes and principles of Ohio's felony sentencing code. Simply because the amount appellant sold was approximately a half-

gram away from a lesser charge does not imply the trial court's sentence was unreasonable, especially in light of appellant's lengthy criminal history. The trial court could have sentenced appellant to a maximum five year term; however, after considering *all* the circumstances, the court concluded a four-year term was sufficient. Such a conclusion is not an abuse of discretion.

{¶25} Appellant's first assignment of error is overruled.

{¶26} Appellant's second assignment of error asserts:

{¶27} "The trial court violated the defendant-appellant's rights to equal protection and due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and under Sections 2, 10 and 16, Article I of the Ohio Constitution when it sentenced him contrary to R.C. 2929.11(B)."

{¶28} Appellant argues the trial court erred by imposing a sentence that is inconsistent with the sentences of other similarly situated criminals who committed similarly situated crimes. We disagree.

{¶29} As discussed above, while a trial court is vested with full discretion to impose a sentence within the statutory range, its discretion is guided by R.C. 2929.11 and 2929.12. See *Foster*, *supra*, generally, It is the former statute to which appellant's argument applies.

{¶30} 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.

{¶31} Appellant seizes upon the statutory language and cites various cases in which a defendant was sentenced to less than four years for a similar felony-three conviction. However, the cases appellant cites in support of his argument only include a case caption and a trial court case number. Even utilizing this limited information, we are unable to electronically locate these cases. Under such circumstances, an appealing party is required to attach copies of such cases for the court's review. See Loc.R.16(B)(4)(a). Appellant has failed to comply with this rule and therefore the cited cases are unavailable for our review.

{¶32} This problem aside, appellant's argument is facially flawed in that it assumes a defendant who has been found guilty of a "similar offense" is, by implication, a "similar offender." Such a presumption is unwarranted. For instance, the length of a sentence may vary within the proper statutory range depending upon many things, not the least of which is the criminal history of the offender. If an offender's first offense is a felony-three trafficking conviction, he or she may receive the benefit of a sentence which is lighter than one whose seventh offense is a felony-three trafficking conviction. Even though they may have committed similar crimes, the offenders in the foregoing hypothetical cannot logically be deemed similarly situated; both the circumstances surrounding the crime and the criminal himself will invariably influence the court during its statutory sentencing exercise.

{¶33} Irrespective of this point, appellant's position suffers from a more fundamental problem: past precedent. This court has repeatedly held that the "consistency" requirement of R.C. 2929.11(B) is not met by comparing the case under consideration with prior sentences imposed upon similar offenders who have committed

similar offenses. *State v. Delmanzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, at ¶32; see, also, *State v. DeMarco*, 11th Dist. No. 2007-L-130, 2008-Ohio-3511, at ¶25; *State v. Dudas*, 11th Dist. Nos. 2006-L-267 and 2006-L-268, 2007-Ohio-6739, at ¶110; *State v. Spellman*, 160 Ohio App.3d 718, 722, 2005-Ohio-2065. Rather, consistency in sentencing is achieved via a trial court's proper application of the statutory sentencing guidelines. *Delmanzo*, supra; see, also, *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.

{¶34} Here, the court followed the proper statutory procedure in arriving at its sentence. As the court met its statutory obligations, appellant's rights to due process and equal protection under the law were not violated. As this court has previously held, the mere fact that an "**** appellant's sentence was not identical to sentences in other cases does not imply that his sentence was inconsistent with sentences of other similarly situated offenders." *Delmanzo*, supra, at ¶33.

{¶35} Appellant's second assignment of error is overruled.

{¶36} For the reasons discussed in this opinion, appellant's two assignments of error are overruled and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.

