

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-11-008

Appellee

Trial Court No. 2010CR0402

v.

James Hyde, Jr.

DECISION AND JUDGMENT

Appellant

Decided: August 10, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather M. Baker and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant James Hyde, Jr. appeals a judgment of the Wood County Court of Common Pleas, convicting him of a single count of rape in violation of R.C. 2907.02(A)(1)(c), and sentencing him to nine years in prison. We affirm, in part, and reverse, in part.

I. Facts and Procedural History

{¶ 2} On September 2, 2010, the Wood County Grand Jury indicted appellant on two first-degree felony counts of rape, one in violation of R.C. 2907.02(A)(2), and the other in violation of R.C. 2907.02(A)(1)(c). Hyde initially pleaded not guilty to both charges. Subsequently, pursuant to an agreement with the state, Hyde changed his plea to guilty to the single count of rape in violation of R.C. 2907.02(A)(1)(c), a felony of the first degree. The remaining charge was dismissed.

{¶ 3} At the sentencing hearing, appellant, his counsel, the victim, each of the victim's parents, and counsel for the state made statements pursuant to R.C. 2929.19(A). Following this, and after announcing the factors used in consideration of sentencing, the court imposed a mandatory prison term of nine years.

{¶ 4} Appellant has timely appealed, raising four assignments of error:

I. The trial court abused its discretion and erred to the prejudice of Appellant at sentencing by imposing a prison term in excess of the minimum in violation of Appellant's right to Due Process under the Sixth and Fourteenth Amendments of the United States Constitution.

II. The trial court abused its discretion and erred to the prejudice of Appellant by improperly considering statements offered at sentencing hearing.

III. The trial court erred to the prejudice of Appellant by imposing court costs in its written judgment entry after failing to order financial sanctions at Appellant's sentencing hearing.

IV. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Constitution of the State of Ohio.

II. Analysis

{¶ 5} For ease of discussion, Assignments of Error Nos. I and II will be addressed together. Further, Assignments of Error Nos. III and IV will be discussed in reverse order.

A. Appellant's Sentence Satisfies the Test Set Forth in *State v. Kalish*

{¶ 6} In his first and second assignments of error, appellant challenges his prison sentence. In reviewing a felony sentence, we apply the two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4: "First, [we] 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." Abuse of discretion "implies that the court's

attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

1. Appellant’s Sentence Was Not Clearly and Convincingly Contrary to Law

{¶ 7} Under the first prong, appellant argues in his first assignment of error that the trial court violated his due process rights by imposing a non-minimum sentence. Appellant’s argument, however, is flawed from its inception. In his brief, appellant states, “prior to the Ohio Supreme Court’s ruling in *State v. Foster* 109 Ohio St.3d 1, the Sixth and Fourteenth Amendments of the United States Constitution prohibited the imposition of a sentence in excess of the statutory *minimum* absent additional findings of fact proven at jury trial or admitted to by Defendant/Appellant.” (Emphasis added.) This is incorrect. In support of this proposition, appellant cites to *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). However, the rule announced in *Apprendi*, and followed in *Blakely* and *Booker*, is “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (Emphasis added.) *Apprendi* at 490. The relevant statutory maximum for *Apprendi* purposes “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (Emphasis omitted.) *Blakely* at 303.

{¶ 8} In *State v. Foster*, the Ohio Supreme Court applied the rules from *Apprendi* and *Blakely*, to Ohio’s sentencing scheme. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. As it relates to former R.C. 2929.14(B), which required judicial findings before imposing a non-minimum sentence, the court held the statute violated *Blakely* principles because “a jury verdict alone does not determine the sentence.” *Id.* at ¶ 61. Finding that R.C. 2929.14(B) was unconstitutional, the Ohio Supreme Court excised that statute. *Id.* at ¶ 97. As a result of that statute being excised—along with other statutes, including R.C. 2929.14(E)(4) and 2929.41(A), which dealt with consecutive sentences—the court pronounced, “[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 ¶ 100.

{¶ 9} Appellant now argues that *State v. Foster*’s severance of R.C. 2929.14(B) “was unconstitutional in light of recent cases such as *State of Ohio v. Hodge*, 2010-Ohio-6320.” Appellant also cites to *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, and *Oregon v. Ice*, 555 U.S. 160, 163-164, 129 S.Ct. 711, 172 L.Ed.2d 517, as cases that question the constitutionality of the holding in *Foster*. However, appellant’s assertion is wholly unsupported by the cases he references. For example, rather than questioning its constitutionality, *State v. Mathis* actually applied *Foster* to hold that the judicial fact finding required by *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793

N.E.2d 473, at sentencing hearings for consecutive or non-minimum sentences no longer survives. *Mathis* at ¶ 26.

{¶ 10} Appellant does correctly identify, though, that in *State v. Hodge* the Ohio Supreme Court stated that had it had the benefit of *Oregon v. Ice* at the time, it may have decided *State v. Foster* differently. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 758, ¶ 20. As a brief explanation, *Oregon v. Ice* held that statutes that require judicial fact finding before imposing consecutive sentences do not violate the Sixth Amendment or *Apprendi* and *Blakely* principles. *See Ice* at 163-164. The rationale behind this holding is that the choice whether to impose sentences consecutively or concurrently rested exclusively with the judge; the jury historically played no role in the decision. *Id.* at 168-169.¹ Thus, in its discussion of the impact of *Ice* on *Foster*, the Ohio Supreme Court in *Hodge* conceded that it may have needlessly excised the statutes dealing with consecutive sentences. Importantly, however, it does not question *Foster*'s constitutionality. Instead, the court noted that *Foster* was not overruled by *Ice*, and further held that the statutes excised by *Foster* were not automatically revived by *Ice*. *Hodge* at ¶ 18, 39. Therefore, the court concluded, “trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences.” *Id.* at 39.

{¶ 11} In his brief, appellant next attempts to infer from his erroneous argument—that *Foster* unconstitutionally excised the statutes relating to consecutive sentences—the

¹ *Ice* was also based on considerations of state sovereignty in the administration of sentencing regimes. *See Ice* at 170-172.

conclusion that *Foster* also unconstitutionally excised R.C. 2929.14(B), and therefore he should have been sentenced to the minimum sentence absent judicial findings. Again, this is incorrect. Not only is his argument contrary to the settled law of *State v. Hodge* that the excised statutes were not revived, but the analogy itself is fatally flawed. Unlike the decision to impose consecutive or concurrent sentences, which *Oregon v. Ice* recognized as historically not requiring findings by the jury, the facts that increase the prescribed range of penalties to which a criminal defendant is exposed must be determined by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. at 490. Thus, *State v. Foster* correctly determined that R.C. 2929.14(B), which required a judge, not a jury, to find facts before imposing a non-minimum sentence, was unconstitutional. Therefore, appellant's argument in favor of reviving R.C. 2929.14(B) must fail.

{¶ 12} Having determined that the trial court's imposition of a nine-year sentence without additional findings of fact is not contrary to law, we hold that the first prong of *Kalish* is satisfied.

2. The Trial Court's Imposition of a Nine-Year Mandatory Prison Term Was Not an Abuse of Discretion

{¶ 13} We next consider appellant's second assignment of error, in which he argues that the trial court abused its discretion by giving insufficient weight to the fact that appellant had no prior record, and by improperly considering the victim's father's

statements at the sentencing hearing. Further, appellant argues that a number of other rape convictions in Ohio have resulted in less severe sanctions.

{¶ 14} Starting with his last argument, i.e., that his sentence is disproportionate to other sentences for rape convictions, we note that “[c]onsistent sentencing occurs when a trial court properly considers the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 in every case.” *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 17. “Therefore, appellant cannot support an assignment of error of disproportionate sentencing solely based upon references to sentences imposed in other cases where defendants were sentenced for the same offense.” *Id.* Thus, we must determine whether the trial court properly applied R.C. 2929.11 and 2929.12 in this case, which is the subject of his first two arguments.

{¶ 15} In his first two arguments, appellant does not contend that the trial court failed to consider the sentencing factors and guidelines in R.C. 2929.11 and 2929.12, but rather that it gave improper weight to the statements of the victim’s father, and not enough weight to appellant’s lack of a prior criminal record. It is a general rule that a sentencing court has discretion to determine the weight to assign a particular statutory factor. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). However, before deciding whether the trial court abused its discretion in weighing the factors, we must first decide whether giving any amount of weight to the father’s statement was permissible.

{¶ 16} Here, appellant argues that the content of the father’s statements should be limited to informing the court of the victim’s physical, psychological, economic, or other harm. Consequently, he concludes that because the statement went more to the level of punishment that should be levied by the court, the court should not have given any weight to that statement.

{¶ 17} We note that appellant does not provide any support for his declaration that the father’s statement must be limited to the harm suffered by the victim. On the contrary, R.C. 2929.19(A) provides that he “may present information relevant to the imposition of sentence in the case.” Here, the statement is relevant to the imposition of sentence since it speaks to the level of punishment the father feels appellant deserves. Moreover, R.C. 2929.19(B)(1) requires that prior to imposing sentence, the court “shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report * * * and any victim impact statement.” Therefore, in this case the court was not just permitted, but was required, to consider the father’s statement.

{¶ 18} Turning now to whether the trial court abused its discretion in assigning weight to the factors, we note that the transcript indicates that the trial court considered the principles and purposes of sentencing in R.C. 2929.11, the victim impact statement, the presentence investigation report, and the statements made at the sentencing hearing. The court also considered the sentencing factors in R.C. 2929.12(B)-(E). After reviewing all of the above, the court commented, “Normally with a prior record that I have in front

of me the sentence would be at the lower end of the spectrum. However, given what I would consider to be the situation in this particular case * * *.” Clearly, the court felt that the lack of a prior criminal record was outweighed by the serious nature of the crime, which included appellant giving his son permission to give an alcoholic beverage to the 15-year-old victim, then, knowing full well that the victim was substantially impaired because of her intoxication, digitally penetrating her in the living room of his residence, and subsequently, along with his son, carrying her to a spare bedroom where he again engaged in sexual activity including penetration. From this record we find that nothing indicates the court’s decision was unreasonable, arbitrary, or unconscionable. Therefore, we hold that the trial court’s imposition of a mandatory nine-year prison term was not an abuse of discretion, thereby satisfying the second prong of *Kalish*.

{¶ 19} Accordingly, appellant’s first and second assignments of error are not well-taken.

B. Appellant Did Not Receive Ineffective Assistance of Counsel

{¶ 20} In his fourth assignment of error, appellant argues he received ineffective assistance of counsel when his trial counsel failed to object to the victim’s father’s statements at the sentencing hearing.

{¶ 21} To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that

but for counsel's error, the result of the proceedings would have been different.

Strickland at 687-688, 696.

{¶ 22} Here, appellant fails to satisfy the first prong. As we have already discussed, the trial court must consider any statement relevant to the imposition of sentence pursuant to R.C. 2929.19(A) and (B)(1). Therefore, we conclude that counsel's failure to object was not unreasonable.

{¶ 23} Accordingly, appellant's fourth assignment of error is not well-taken.

C. The Trial Court Erred in Its Imposition of the Costs of Prosecution

{¶ 24} Finally, in his third assignment of error, appellant argues that the trial court erred by including an order for the costs of prosecution in the judgment entry without notifying appellant of those costs at the sentencing hearing. The state, for its part, concedes error on this issue.

{¶ 25} Although R.C. 2947.23(A)(1) mandates that, "In all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution," the Ohio Supreme Court held that it was error for the trial court to impose those costs without orally notifying the criminal defendant. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22. The remedy for this error is to remand the cause for the limited purpose of allowing the defendant the opportunity to move the court for a waiver of the payment of those costs. *Id.* at ¶ 23.

{¶ 26} Accordingly, appellant's third assignment of error is well-taken.

III. Conclusion

{¶ 27} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed, in part, and reversed, in part. This cause is remanded for the limited purpose of orally notifying appellant of his obligation to pay the costs of prosecution, thereby affording him an opportunity to move for a waiver of those costs. Pursuant to App.R. 24, costs of this appeal are to be split evenly between the parties.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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