[Cite as *State v. Munson*, 2010-Ohio-1982.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93229

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ISRAEL MUNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515352

BEFORE: Gallagher, A.J., McMonagle, J., and Celebrezze, J.

RELEASED: May 6, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Israel Munson appeals his sentence from the Cuyahoga County Court of Common Pleas. For the reasons outlined below, we affirm in part, reverse in part, and remand.

{¶ 2} On September 12, 2008, a Cuyahoga County grand jury indicted Munson and eight codefendants in a 15-count indictment. The charges included three counts of attempted murder, seven counts of felonious assault, and one count of criminal gang activity; the remaining charges did not apply to Munson. All counts that applied to Munson, with the exception of that for criminal gang activity, carried two firearm specifications and a criminal gang activity specification.

{¶ 3} On September 1, 2008, Munson and the eight codefendants, who were allegedly members of the gang "Skulls," confronted several teens who were believed to be members of a rival gang. At least one of the codefendants brandished a gun during the encounter. In the ensuing confrontation, gunshots were fired, one victim was shot, and another victim was pistol-whipped.

{¶ 4} Although the state originally offered a joint plea deal, ultimately the state offered pleas to the individual defendants. On February 23, 2009, Munson pleaded guilty to one count of felonious assault, in violation of

R.C. 2903.11(A)(2), a second-degree felony, and criminal gang activity, in violation of R.C. 2923.42(A), also a second-degree felony. The state incorporated all victims into the felonious assault charge and dismissed the three specifications.

{¶ 5} On March 31, 2009, the trial court held a sentencing hearing, at which it sentenced Munson to five years in prison and a $250 fine for each count, to run consecutive, for a total of ten years and a $500 fine. Munson filed the instant appeal, raising four assignments of error for our review.

{¶ 6} "I. Appellant's consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate the findings and reasons necessary to justify it."

{¶ 7} In his first assignment of error, Munson argues that statutory findings for imposing consecutive sentences are required by implication of the United States Supreme Court's decision in *Oregon v. Ice* (2009), ___U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 8} Our review of the sentencing hearing transcript demonstrates that the trial court did not place its findings on the record before imposing consecutive sentences on Munson. However, "[w]e have found, that where the record is silent, an appellate court may presume that the trial court considered the statutory factors when imposing a sentence." *State v. Castellon*, Cuyahoga App. No. 92733, 2010-Ohio-360. And while some may

believe appellate review would be greatly enhanced if the trial court and counsel were to create a more complete record, this is not the current law in Ohio.

{¶ 9} Munson's argument is that *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, is no longer good law, in light of *Oregon v. Ice*, supra. In *State v. Elmore,* 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, the Ohio Supreme Court acknowledged the *Oregon* decision, yet chose to follow its *Foster* decision, reiterating that trial courts "'are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.'" *Elmore*, supra at 482, quoting *Foster*. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.

{¶ 10} In any event, even under pre-*Foster* law, in a time where many believed a more complete record was created, this did not stop claims or assertions that sentences imposed were disproportionate or unfair. The simple truth is that until the Ohio legislature decides to revisit our sentencing framework, claims of disproportionate sentences will continue unabated regardless of whether the principles of *Oregon v. Ice* are applied or we retain the rule of law in *Foster*.

{¶ 11} Accordingly, Munson's first assignment of error is overruled.

{¶ 12} "II. The sentence imposed is contrary to law and must be vacated because the trial court failed to advise the defendant of postrelease control."

{¶ 13} In his second assignment of error, Munson argues the trial court neglected to advise him at his sentencing hearing that he would be subject to postrelease control. The state concedes this argument.

{¶ 14} The Ohio Supreme Court has held that if a trial court completely fails at the plea hearing to mention a mandatory period of postrelease control, which falls under the category of "maximum penalty involved," the plea must be vacated. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. Additionally, the trial court must properly inform the defendant of postrelease control at the sentencing hearing, even if it has already done so during the plea proceedings. *State v. Bailey*, Clark App. No. 2007 CA 121, 2008-Ohio-5357. The Ohio Supreme Court in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, held that "[b]ecause a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law" and void, and the cause must be remanded for resentencing. Id. at 23, 27.

{¶ 15} *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus, mandates: "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to

properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191."

{¶ 16} Here, the trial court informed Munson at the plea hearing that he could be subject to postrelease control. At the sentencing hearing, however, the trial court failed to mention postrelease control at all.

{¶ 17} Thus, Munson's second assignment of error is sustained; therefore, we remand for the trial court to employ the "sentence-correction mechanism" of R.C. 2929.191. Id.

{¶ 18} "III. Appellant's convictions for felonious assault and criminal gang activity are allied offenses of similar import and the convictions must merge into a single conviction."

{¶ 19} In his third assignment of error, Munson argues that the trial court erred in not merging his conviction for felonious assault with his conviction for criminal gang activity. We disagree.

{¶ 20} R.C. 2941.25(A) provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one of the offenses. R.C. 2941.25(B) provides that where the conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the defendant may be convicted of all the offenses.

{¶ 21} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the Ohio Supreme Court recently instructed as follows: "[C]ourts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.

{¶ 22} Here, Munson was convicted of felonious assault and criminal gang activity. Felonious assault requires: "No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(2). Criminal gang activity requires: "No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as

defined in division (C) of section 2923.41 of the Revised Code." R.C. 2923.42(A).

{¶ 23} Even a cursory review of the two statutes demonstrates the two offenses are not allied. The elements of each crime are separate and distinct, and are not aligned whatsoever. Furthermore, the commission of felonious assault does not necessarily result in the commission of criminal gang activity, nor will the reverse occur.

{¶ 24} We find no Ohio case where an appellate court merged convictions for felonious assault and criminal gang activity under R.C. 2941.25(A). Even Munson does not attempt to align the elements of these two offenses. Instead, Munson contends that because the legislature explicitly allows simultaneous prosecution for felonious assault and criminal gang activity under R.C. 2923.42(D), the legislature implicitly precludes simultaneous convictions by its silence on that point. Munson cites no cases, nor do we find any, that support this argument. Munson's third assignment of error is overruled.

{¶ 25} "IV. Appellant's sentence is contrary to law and violative of due process because the trial court failed to consider whether the sentence was consistent with the sentences imposed for similar crimes committed by similar offenders and because a ten-year sentence for a first-time offender is inconsistent with such sentences."

{¶ 26} In his fourth assignment of error, Munson argues that the trial court failed to consider consistency and proportionality with sentences for similar offenders when it sentenced him. He further argues that similarly situated first-time offenders did not receive sentences as excessive as the one he received.

{¶ 27} R.C. 2929.11(B) reads as follows: "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." R.C. 2929.11(A) provides that the "overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender."

{¶ 28} While R.C. 2929.11 does not require a trial court to make findings on the record, a record must nevertheless adequately demonstrate that the trial court considered the objectives of R.C. 2929.11(B). *State v. Turner*, Cuyahoga App. No. 81449, 2003-Ohio-4933. As we recognized in *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341, "trial courts are given broad but guarded discretion in applying these objectives to their respective evaluations of individual conduct at sentencing."

{¶ 29} The goal of felony sentencing pursuant to R.C. 2929.11(B) is to achieve "consistency" not "uniformity." *State v. Klepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529. The court is not required to make express findings that the sentence is consistent with other similarly situated offenders. *State v. Richards*, Cuyahoga App. No. 83696, 2004-Ohio-4633; *State v. Harris*, Cuyahoga App. No. 83288, 2004-Ohio-2854. This court has also determined that in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700.

{¶ 30} The sentencing entry indicates that the trial court considered all required factors of the law. Furthermore, Munson's failure to raise arguments regarding similarly situated offenders at the time of sentencing precludes him from raising them now. His fourth assignment of error is overruled.

Judgment affirmed in part, reversed in part, and cause remanded. It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings consistent with this opinion.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. MCMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR