

[Cite as *State v. Johnson*, 2010-Ohio-1986.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93605**

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**KEVIN JOHNSON**

DEFENDANT-APPELLEE

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**JUDGMENT:**  
REVERSED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-517595

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

**RELEASED:** May 6, 2010

**JOURNALIZED:**

## **ATTORNEYS FOR APPELLANT**

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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).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The state of Ohio appeals the sentence imposed upon defendant-appellee, Kevin Johnson (“appellee”). Based on our review of the facts and pertinent case law, we reverse and remand.

{¶ 2} On November 10, 2008, appellee was indicted in a 12-count indictment on three counts of felonious assault of a peace officer, each with one-, three-, and seven-year firearm specifications; two counts of felonious assault of a peace officer with one- and three-year firearm specifications; two counts of having a weapon while under disability; one count of failure to comply with the order or signal of a police officer with a furthermore specification that appellant caused a substantial risk of serious physical harm to persons or property; one count of possession of criminal tools; and three counts of attempted murder with one-, three-, and seven-year firearm specifications.<sup>1</sup>

{¶ 3} As part of a plea agreement, appellee pled guilty to two counts of felonious assault of a peace officer with three-year firearm and forfeiture specifications, first degree felonies; one count of having a weapon while under disability with a forfeiture specification, a third degree felony; and one count of failure to comply with the order or signal of a police officer with the

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<sup>1</sup>All charges carried a forfeiture specification with the exception of the charge of failure to comply with the order or signal of a police officer.

furthermore specification delineated above, a third degree felony. The remaining charges were dismissed.

{¶ 4} Appellee was sentenced to three years on each count of felonious assault to run concurrent to one another but consecutive to three years imposed for the firearm specifications, which merged for sentencing. He was also sentenced to three years for having a weapon while under disability and three years for failure to comply with the order or signal of a police officer. Each of these three-year terms was to run concurrent to the three-year term imposed for felonious assault. Appellee received an aggregate sentence of six years. This appeal followed.

{¶ 5} The state presents one assignment of error for our review wherein it argues that “[t]he trial court erred when it imposed a sentence contrary to law.” The state specifically argues that pursuant to R.C. 2921.331(D), the court was obligated to impose a consecutive sentence for the charge of failure to comply with the order or signal of a police officer. We agree.

### **Law and Analysis**

{¶ 6} In 2006, the Ohio Supreme Court released its opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, wherein it severed and excised portions of the state sentencing statutes. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶18. In the post-*Foster* legal arena, appellate courts are to apply a two-step analysis in determining

the validity of a sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4. “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.” *Id.*

{¶ 7} Appellee pled guilty to failure to comply with the order or signal of a police officer in violation of R.C. 2921.331(B). This charge contained a furthermore specification that he caused a substantial risk of serious physical harm to persons or property in violation of R.C. 2921.331(C)(5)(a)(ii), which elevated the crime to a third-degree felony. R.C. 2921.331 mandates that an offender who violates section (B) of the statute and is sentenced pursuant to division (C)(5), as appellee was in this matter, “shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.” R.C. 2921.331(D). This requirement is reiterated in R.C. 2929.14(E)(3), which states: “If a prison term is imposed for a violation of \* \* \* division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.” As such, the trial court was required to impose a consecutive sentence for appellee’s conviction for failure to comply with the order or signal of a police officer. See, also, *State v. Whittsette*, Cuyahoga App. No. 85478, 2005-Ohio-4824, ¶10 (“Under R.C.

2929.14(E)(3), however, a trial court has no discretion in the decision to impose a consecutive sentence for a violation of R.C. 2921.331(B).”).

{¶ 8} Appellee has conceded that the trial court was obligated to impose a consecutive sentence for his violation of R.C. 2921.331(B), but argues that it is within the trial court’s discretion whether to impose a six- or nine-year sentence on remand. The state, however, argues that the trial court is required to impose a three-year sentence for the firearm specification and must run that specification prior and consecutive to any sentence imposed for the underlying offense. The state then argues that the trial court is also obligated to run the term imposed for appellee’s violation of R.C. 2921.331(B) consecutive to any other prison term, and thus he must receive, at a minimum, a nine-year sentence.

{¶ 9} Appellee pled guilty to two counts of felonious assault with furthermore specifications that the victim was a peace officer, thus elevating the crimes to first degree felonies. R.C. 2903.11(D)(1)(a). A first degree felony carries a minimum sentence of three years. R.C. 2929.14(A)(1). These felonious assault counts each carried a three-year firearm specification, which must be served prior and consecutive to any term imposed for the underlying felony. R.C. 2929.14(E)(1)(a) (“Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender’s person or under the offender’s control while committing a felony \* \* \* the offender shall serve any mandatory prison term \* \* \* consecutively to and prior to any prison term imposed for the underlying felony”).

{¶ 10} The sentences imposed for each count of felonious assault may be served concurrently to one another, and the firearm specifications should merge for sentencing because they arose out of the same transaction or occurrence, but this does not vitiate the fact that appellee must serve a minimum of six years for his felonious assault convictions and firearm specifications.

{¶ 11} The only other count at issue is appellee's conviction for failure to comply with the signal or order of a police officer.<sup>2</sup> Pursuant to our analysis above, any sentence imposed upon appellee for this charge must run consecutive to any other prison term imposed upon him. R.C. 2929.14(E)(3); R.C. 2921.331(D). This charge, however, was a third-degree felony, which carries a minimum prison term of one year. R.C. 2929.14(A)(3).

{¶ 12} Based on our analysis above, appellee must receive a minimum of three years for his felonious assault convictions, three years for the firearm specifications, and one year for failure to comply with the order or signal of a police officer. This means that the minimum sentence he faces is seven years. We recognize, however, that appellee is entitled to a de novo resentencing, and the exact term to impose is within the discretion of the trial judge. Regardless, his sentence in this case is contrary to law, and the state's sole assignment of error must be sustained.

## **Conclusion**

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<sup>2</sup>As previously indicated, appellee also pled guilty to one count of having a weapon while under disability. While the trial judge is required to address this count at resentencing, it is within her discretion what sentence to impose and whether that sentence should run concurrent or consecutive to the other counts.

{¶ 13} The trial court erred when it failed to run appellee's sentence for failure to comply with the order or signal of a police officer consecutive to the terms imposed for his felonious assault convictions and firearm specifications. As such, his sentence is contrary to law, the state's sole assignment of error is sustained, and this matter is remanded for resentencing.

{¶ 14} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

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

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and  
CHRISTINE T. McMONAGLE, J., CONCUR