

[Cite as *State v. Clementson*, 2010-Ohio-3424.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94230

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EMMETT CLEMENTSON, IV

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526381

BEFORE: Sweeney, J., Rocco, P.J., and Celebrezze, J.

RELEASED: July 22, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

George W. MacDonald
848 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Gregory Mussman
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1.

{¶ 2} Defendant-appellant, Emmett Clementson, IV (“defendant”), appeals his 16 ½- year prison sentence for attempted murder, aggravated burglary, felonious assault, and domestic violence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 3} On September 14, 2009, defendant pled guilty to attempted murder, a first degree felony; aggravated burglary, a first degree felony; felonious assault,

a second degree felony; and domestic violence with a previous conviction specification, a fourth degree felony. On October 14, 2009, the court sentenced defendant to ten years each on the first degree felonies, to run concurrently; five years on the assault, to run consecutively to the ten years; and 18 months on the domestic violence conviction, to run consecutively to the 15 years, for an aggregate sentence of 16 years and six months in prison.

{¶ 4} Defendant appeals and raises two assignments of error, which we review together.

{¶ 5} “I. The trial court erred in imposing maximum sentences upon appellant and in imposing sentences which exceeded the minimum.

{¶ 6} “II. The trial court erred in imposing consecutive sentences upon appellant.”

{¶ 7} The Ohio Supreme Court set forth the standard for reviewing felony sentencing decisions in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Kalish*, in a plurality decision, holds that appellate courts must apply a two-step approach when analyzing alleged error in a trial court’s sentencing. “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.* at ¶4.

{¶ 8} In determining whether defendant's sentence is contrary to law, we look to R.C. 2929.14(A)(1), which states that courts shall impose a prison term of between three and ten years for first degree felony offenses; between two and

{¶ 9} eight years for second degree felony offenses; and between six and 18 months for fourth degree felony offenses.

{¶ 10} In the instant case, defendant's sentencing range was from three years to 29 ½ years in prison. The court sentenced defendant to ten years in prison for each first degree felony, to run concurrently; five years for the second degree felony; and 18 months for the fourth degree felony. Defendant's aggregate prison sentence of 16 ½ years is within the statutory range.

{¶ 11} We also find that the court properly included postrelease control as part of defendant's sentence, stating that, at the conclusion of defendant's prison term, he will be subject to a mandatory five years of postrelease control. See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.

{¶ 12} Next, we must determine whether the trial court considered the purpose and principles found in R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12 when sentencing defendant. While the court in the instant case did not expressly mention the sentencing statutes on the record, it made findings in accordance with the guidelines, showing that proper consideration was given. See *State v. Barnette*, Mahoning App. No. 06-MA-135, 2007-Ohio-7209 (holding that when "the court placed on the record a range of pronouncements and findings that coincide with various statutory factors[,]” it

could be concluded on appeal that “the sentencing court has sufficiently fulfilled its duty under these statutes”).

{¶ 13} Accordingly, under the first prong of the *Kalish* test we conclude that the court “clearly and convincingly complied with the pertinent laws.” Id. at ¶18. The details of the court’s findings will be analyzed below under the second prong of *Kalish*.

{¶ 14} We now review the trial court’s decision for an abuse of discretion. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 15} In the instant case, the court took the following into consideration on the record: defendant has a history of domestic violence issues; at the time of the offense, defendant was under a restraining order to have no contact with the victim; defendant’s probation officer requested that defendant be sentenced to the maximum time in prison because he is “one of the most dangerous types of persons”; one of the factors to weigh in sentencing an offender is to protect the community and individuals from future crimes; the victim, who is defendant’s wife, had severe wounds from defendant beating her with a metal baseball bat and stabbing her multiple times with a knife; and this case was the worst form of an attempted murder.

{¶ 16} In addition to determining the length of a prison sentence for each conviction, courts have the discretion to determine whether prison sentences are

to be served consecutively or concurrently. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328. The United States Supreme Court addressed a trial court's authority to impose consecutive sentences in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517. *Ice* held that statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. *Id.* at 714.

{¶ 17} However, the effect *Ice* may have on Ohio's post- *Foster* sentencing scheme has not been fully addressed by the Ohio Supreme Court¹; thus, we continue to follow *Kalish* and *Foster* when reviewing felony sentencing issues. See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶ 29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"). See, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, (acknowledging the *Ice* decision and holding that "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore").

{¶ 18} Accordingly, it was within the court's discretion to run a portion of defendant's prison sentence consecutively. After reviewing the sentencing hearing transcript, we conclude that there is nothing in the record suggesting that

¹Review of this issue is pending before the Ohio Supreme Court. See *State v. Hodge*, Ohio Supreme Court Case No. 2009-1997.

defendant's sentence is unreasonable, arbitrary, or unconscionable. We find that the court did not abuse its discretion by sentencing defendant to 16 ½ years in prison. Defendant's two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR