

[Cite as *State v. Spicer*, 2010-Ohio-61.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92384 and 92385

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES SPICER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-511869 and CR-503090

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

RELEASED: January 14, 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), is filed within ten (10) 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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Charles Spicer (“Spicer”), appeals his sentence. Finding no merit to the appeal, we affirm.

{¶ 2} In 2007, Spicer was charged with failure to comply with the order or signal of a police officer and receiving stolen property. In 2008, he was charged with two counts of felonious assault with one- and three-year firearm specifications.

He initially pled not guilty in both cases. After plea negotiations with the state, Spicer agreed to plead guilty to failure to comply with the order or signal of a police officer in the first case and one count of felonious assault with firearm specifications in the second case. The trial court ordered a presentence investigation report.

{¶ 3} At the sentencing hearing, the trial court sentenced Spicer to two years for failure to comply and four years for felonious assault with an additional three years for the firearm specifications. The trial court further ordered that the sentences for the two cases be served consecutively, for a total sentence of nine years in prison.

{¶ 4} Spicer appeals his sentence in both cases, and we have consolidated the appeals for purposes of review and disposition. In his appeal, Spicer raises two assignments of error, which will be combined for review.

{¶ 5} In his first assignment of error, Spicer argues that he was denied due process when the trial court failed to follow statutory guidelines in imposing his

sentence for failure to comply. In the second assignment of error, Spicer argues that he was denied due process when the trial court imposed consecutive sentences.

{¶ 6} We review felony sentences as the Ohio Supreme Court declared in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The *Kalish* court, in a split decision, declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts “must apply a two-step approach.” *Kalish* at ¶4.

{¶ 7} Appellate courts must first “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.” *Id.* at ¶4, 14, 18. If this first prong is satisfied, then we review the trial court’s decision under an abuse-of-discretion standard. *Id.* at ¶4, 19.

{¶ 8} Thus, in the first step of our analysis, we review whether the sentence is contrary to law.

{¶ 9} As the *Kalish* court noted, post-*Foster*, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence.” *Id.* at ¶11; *Foster*, paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. See, also, *State v. Redding*, Cuyahoga App. No. 90864, 2008-Ohio-5739; *State v. Ali*, Cuyahoga App. No. 90301, 2008-Ohio-4449; *State*

v. McCarroll, Cuyahoga App. No. 89280, 2007-Ohio-6322; *State v. Sharp*, Cuyahoga App. No. 89295, 2007-Ohio-6324. The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. *Id.*, citing *Mathis* at ¶38.

{¶ 10} R.C. 2929.11(A) provides that:

{¶ 11} “[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing[,] * * * to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.”

{¶ 12} R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶ 13} The *Kalish* court further noted that R.C. 2929.11 and R.C. 2929.12 are not fact-finding statutes like R.C. 2929.14. *Kalish* at ¶17. Rather, they “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Id.* Thus, “[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio’s sentencing structure.” *Id.*

{¶ 14} In the instant case, the trial court noted in its journal entry that it considered the purposes of R.C. 2929.11 and all factors required by law. Furthermore, Spicer's sentences are within the permissible statutory ranges. Thus, we find that his sentences are not contrary to law.

{¶ 15} Having satisfied step one, we next consider whether the trial court abused its discretion. *Kalish*, at ¶4, 19. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* at ¶19, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d.

{¶ 16} Spicer argues that he was denied due process when the trial court imposed consecutive sentences for two unrelated cases. He also contends that his sentences are inconsistent with sentences imposed upon similar offenders in violation of R.C. 2929.11(B). First, we note that this court has previously held that in order to support a contention that a "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. Edwards*, Cuyahoga App. No. 89191, 2007-Ohio-6068. Because Spicer did not raise the proportionality issue in the trial court, he has not preserved the issue for appeal. Thus, we decline to address this argument for the first time on appeal. See *Redding*, *supra* at fn. 7.

{¶ 17} Next, we address Spicer’s argument that the trial court incorrectly suggested at the plea hearing that any prison term imposed for failure to comply was required, pursuant to R.C. 2921.33(D), to run consecutive to any other prison term or mandatory prison term imposed.

{¶ 18} R.C. 2921.331(D) states that “[i]f an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.”

{¶ 19} Although the statute does not specifically state whether it was meant to apply to instances where a defendant is being sentenced on two or more separate cases, we find that, pursuant to R.C. 2921.331(D), a term of imprisonment for failure to comply must run consecutive to that of any other term of imprisonment, no matter if the sentence is being imposed in the same or different case. See *State v. Velasquez*, Cuyahoga App. Nos. 85135 and 85136, 2005-Ohio-3021, at ¶2, rev’d on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 847 N.E.2d 1174, 2006-Ohio-2109.

{¶ 20} With regard to Spicer’s argument that the trial court denied him due process by imposing consecutive sentences in two unrelated cases, a review of the record reveals that the trial court did not abuse its discretion. The trial court imposed consecutive sentences in accordance with R.C. 2921.331(D), and also considered the statutory factors pursuant to R.C. 2929.11 and R.C. 2929.12. The

trial court acknowledged that it reviewed Spicer's presentence investigation report, received letters of support from Spicer's family and friends, and also heard from Spicer and his mother during sentencing. The trial court also notified Spicer that he was subject to three years of postrelease control. See R.C. 2967.28 (B)(2).

{¶ 21} The trial court further noted that the victim in the felonious assault case suffered three gunshot wounds and both the victim's former girlfriend and his child were in the car when Spicer shot into it. We find nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary, or unconscionable. Accordingly, the trial court did not abuse its discretion in imposing consecutive sentences in separate cases.

{¶ 22} Therefore, we overrule Spicer's first and second assignments of error.

{¶ 23} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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.

LARRY A. JONES, JUDGE

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

