

[Cite as *State v. Morris*, 2009-Ohio-6643.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92898

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER MORRIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499651

BEFORE: Kilbane, P.J., Dyke, J., and Celebrezze, J.

RELEASED: December 17, 2009

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. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Christopher Morris (“Morris”), appeals the denial of his motion to withdraw his guilty plea and the trial court’s imposition of consecutive sentences. After a review of the pertinent law and the record, we affirm.

{¶ 2} On August 9, 2007, a seven-count indictment was issued against Morris and his codefendant, Christopher Cooper (“Cooper”). Counts 1 and 4 charged both Morris and Cooper with attempted murder in violation of R.C. 2923.02. Counts 2, 3, 5, 6, and 7 charged both defendants with felonious assault in violation of R.C. 2903.11. All seven counts contained both one- and three-year firearm specifications. The indictment was the result of events that occurred on July 6, 2007, at 1900 Lee Road and 13157 Cedar Road, both located in Cleveland Heights, Ohio.

{¶ 3} Morris waived his right to a speedy trial several times and requested continuances of pretrials and the trial date. Ultimately, on November 13, 2008, the State amended Counts 2, 5, and 7, removing the one-year firearm specifications. The remaining counts were nolle.¹ (Tr.

¹Morris also had a second criminal case pending at this time, CR-504473, which is not at issue in this appeal. A resolution to both cases was reached at the same time at a hearing held on November 13, 2008. In CR-504473, Morris pled guilty to the following: Count 1, which charged him with aggravated robbery with a one-year firearm specification; Counts 6 and 10, which charged him with robbery; Count 9, which charged him with grand theft motor vehicle; Count 12, which charged him with receiving stolen property, Count 13, which charged him with

4-5.) The same day, Morris pled guilty to the three counts of felonious assault, each with a three-year firearm specification. On January 12, 2009, the trial court held a sentencing hearing at which time Morris made an oral motion to withdraw his guilty pleas pursuant to Crim.R. 11. (Tr. 48, 56.) The trial court heard arguments from Morris, denied the motion, and ultimately continued the sentencing hearing for further investigation of the facts surrounding Cooper's sentencing. On February 3, 2009, at the second sentencing hearing, Morris again made an oral motion to withdraw his guilty pleas. After hearing arguments from counsel and Morris, the trial court denied the motion and proceeded to sentencing. On Counts 2, 5, and 7, Morris was sentenced to two years of imprisonment on each count, to be served consecutively, and the mandatory three years on each firearm specification. The six-year term of imprisonment for the underlying felonious assault convictions was discretionary; however, pursuant to R.C. 2929.14(D), the nine years imposed for the three firearm specifications was mandatory and must be served, "consecutively to and prior to the prison term imposed for the underlying offense," resulting in an aggregate sentence of 15 years of imprisonment.

{¶ 4} Morris appealed, asserting four assignments of error.

domestic violence; and Count 14, which charged him with assault on a peace officer. The remaining counts were nolle. The charges in CR-504473 were alleged to have occurred between December 2007 and February 2008.

ASSIGNMENT OF ERROR NUMBER ONE

**“DEFENDANT WAS DENIED DUE PROCESS OF LAW
WHEN THE COURT REFUSED TO GRANT DEFENDANT’S
MOTION TO VACATE HIS PLEA.”**

{¶ 5} Morris argues that the trial court erred in denying his motion to withdraw his guilty pleas. Morris maintains that he believed the trial court would order the sentences to be served concurrently, for a total of five years of imprisonment, instead of 15 years of imprisonment, and that this mistaken belief entitled him to withdraw his guilty pleas. We disagree.

{¶ 6} Defendants are permitted, pursuant to Crim.R. 32.1, to file a motion to withdraw their plea prior to sentencing. While the general rule is that a motion to withdraw a guilty plea made prior to sentencing should be liberally granted, a defendant does not have an absolute right to withdraw his plea. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. The trial court must hold a hearing to determine if the defendant has a legitimate reason for withdrawing his plea. *Id.* at 527. “The good faith, credibility and weight of the movant’s assertions are matters to be resolved by the trial court.” *State v. Triplett*, Cuyahoga App. No. 91807, 2009-Ohio-2571, at ¶16, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324. A trial court’s decision on whether to grant a motion to withdraw a plea will not be reversed absent an abuse of discretion. *Smith*, *supra*. In order to find that

the trial court abused its discretion, we must conclude that the trial court's decision was not merely an error of law or judgment, but rather, that it was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 7} On January 12, 2009, the trial court attempted to hold a sentencing hearing at which Morris orally moved to withdraw his guilty plea. Morris stated, "I don't feel like I did it. I shouldn't be right here facing all this time." (Tr. 17.) The trial court stated that, based merely upon those statements, the motion was denied.

{¶ 8} Due to issues surrounding the sentencing of Morris's codefendant, Cooper, the trial court rescheduled Morris's sentencing hearing to February 3, 2009. At the second hearing, Morris again made an oral motion to withdraw his guilty plea. The trial court held a hearing at which Morris argued that when he entered his plea, he believed the sentences on the firearm specifications would be run concurrently. However, this was in direct contradiction to R.C. 2929.14(D), which requires firearm specifications be served "consecutively to and prior to any prison term imposed for the underlying offense," and the trial court's instruction at the change of plea hearing when it specifically stated, "the various firearm specifications of one and three years variously as they apply would be served consecutively[.]" (Tr. 10.) At the plea hearing, Morris responded that he understood that the

firearm specifications would be served consecutively. The trial court further inquired as to whether the defendant had been promised anything in return for his change of plea, to which Morris responded that he had not. (Tr. 11.)

{¶ 9} Morris maintains that he was informed by his counsel prior to changing his plea that the firearm specifications could run concurrently, making him eligible for a minimum sentence of five years. Morris contends that he should have been allowed to withdraw his guilty pleas based on the erroneous advice of his counsel. However, the Ohio Supreme Court concluded in *Xie*, supra, that a trial court does not abuse its discretion in denying a motion to withdraw a plea where the sole reason is the erroneous advice of defense counsel. *Xie* at 525.

{¶ 10} While this court has consistently held that a defendant entering a guilty plea must be aware of the maximum penalty he faces, Morris cites no authority that requires that a defendant be advised of the possible minimum sentence. *State v. Szakacs*, Cuyahoga App. No. 92230, 2009-Ohio-5480, at ¶5; *State v. Johnson* (1988), 40 Ohio St.3d 130, 133, 532 N.E.2d 1295.

{¶ 11} To determine whether the court abused its discretion, we consider (1) whether the accused is represented by highly competent counsel, (2) whether the accused was afforded a full hearing, pursuant to Crim.R. 11, before entering the plea, (3) the nature of the court's hearing on the motion,

and (4) the actual consideration given to the plea withdrawal request. *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863.

{¶ 12} The trial court specifically noted the fact that Morris was represented by competent counsel when the trial court stated, “you have received a very thorough representation on each of these cases.” (Tr. 9.) The trial court also conducted a full hearing pursuant to Crim.R. 11, during which the trial court explained each of the constitutional rights Morris was giving up by changing his plea to guilty and the possible penalties associated with each of the charged offenses. Morris responded that he understood these rights and the possible penalties. (Tr. 9-11.) On January 12, 2009, at the initial sentencing hearing, Morris argued that he should be allowed to withdraw his plea because he felt he was facing too much time in prison. (Tr. 17.) The trial court denied the motion as it had explained to Morris at the change of plea hearing the possible penalties associated with each of the charged offenses. On February 3, 2009, at the second sentencing hearing, Morris’s counsel was given the opportunity to fully explain that Morris pled guilty because he believed he would be eligible for a five-year sentence. (Tr. 48-56.) The trial court considered these arguments and denied the motion.

{¶ 13} We cannot conclude that the trial court abused its discretion in denying Morris’s motion to withdraw his guilty plea. Defense counsel expressed to the trial court that Morris was only interested in withdrawing his

guilty plea if he was not eligible for a five-year sentence. A defendant should not be allowed to freely withdraw his plea after testing the sentence of the trial court. *Peterseim*, supra. Therefore, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE DEFENDANT WAS SEPARATELY SENTENCED FOR THE FIREARM SPECIFICATIONS.”

{¶ 14} Morris pled guilty to three counts of felonious assault. Each of the three counts pertained to a different victim, and each count contained a three-year firearm specification. The trial court determined that the firearm specifications should not merge and sentenced Morris to three years on each of the firearm specifications, to run consecutively to one another. Morris argues that the firearm specifications should have merged for sentencing. After a review of the record and applicable law, we disagree.

{¶ 15} The sentencing guidelines for firearm specifications are outlined in R.C. 2929.14(D)(1)(b), which states that a trial court shall not impose more than one term of imprisonment for offenses committed in a single transaction.

The Ohio Supreme Court has defined transaction as “a series of continuous acts bound together by time, space and purpose, and directed toward a single objective.” *State v. Wills*, 69 Ohio St.3d 690, 1994-Ohio-417, 635 N.E.2d 370.

{¶ 16} In light of Morris’s guilty plea, there are few facts in the record regarding the circumstances surrounding the charged offenses. However, each of the three charges against Morris name a different victim, and two distinct addresses are listed as the locations for the charged offenses. This court has previously held that even where the charged offenses occur during the same course of conduct, when each charge specifies a different victim, a separate animus exists for each of the charged offenses. *State v. Williams*, Cuyahoga App. No. 89566, 2008-Ohio-1095, ¶32.

{¶ 17} Prior to sentencing Morris, the trial court stated, “[t]he court believes the evidence in this case shows a separate animus having been expressed on the Cedar/Lee incident, a separate animus expressed on the shooting of Curtis Gay, and yet again, a separate animus having been expressed in the separate shooting of Larry Eddy, and as such, the Court believes that consecutive sentences are required * * *.” (Tr. 56.)

{¶ 18} Further, the trial court was present during the trial of Morris’s codefendant, Cooper, at which Morris testified on behalf of the State. Therefore, the trial court had ample facts to determine that a separate animus was present for each of the charged offenses.

{¶ 19} This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

“DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT RULED THAT THE FIREARM SPECIFICATIONS AND THE UNDERLYING OFFENSES OF FELONIOUS ASSAULT HAD TO BE SERVED CONSECUTIVELY.”

{¶ 20} Morris argues that the trial court sentenced him to serve all of his sentences consecutively because it believed it was required to do so. We disagree.

{¶ 21} At the sentencing hearing, defense counsel specifically asked the trial court, “Is it the court’s position you cannot run the underlying offenses concurrent?” The trial court did not respond by stating that he believed the law required him to impose consecutive sentences. Rather the trial court stated, “It’s the court’s belief that the conduct involved in this case, in its own independent analysis, requires such a sentence be imposed,” indicating that although he was not required to sentence Morris consecutively, he felt such a sentence was warranted in this case. (Tr. 61.)

{¶ 22} This court has consistently held that trial courts are no longer required to make specific findings when imposing consecutive sentences. *State v. Lancaster*, Cuyahoga App. Nos. 92463 and 92842, 2009-Ohio-5373, at ¶26, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The sentence imposed on the three counts of felonious assault, felonies of the second degree, was two years of imprisonment on each count, to be served

consecutively. The sentence was within the statutory range, and therefore, there is no basis for reversal.

{¶ 23} Morris's third assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

“DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN THE COURT ENGAGED IN JUDICIAL FACTFINDING [AND] THEN IMPOSED CONSECUTIVE SENTENCES FOR THE FIREARM SPECIFICATIONS AND FELONIOUS ASSAULT.”

{¶ 24} Morris argues that a statement made by the trial court indicated that the trial court had engaged in judicial factfinding, which was the basis for the imposition of consecutive sentences. Morris maintains that the trial court erred by imposing consecutive sentences on both the firearm specifications and the underlying offenses. We disagree.

{¶ 25} The trial court stated, “the court believes the evidence in this case shows a separate animus having been expressed on the Cedar/Lee incident, a separate animus expressed on the shooting of Curtis Gay, and yet again, a separate animus having been expressed in the separate shooting of Larry Eddy, and as such, the court believes that consecutive sentences are required under the Ohio Supreme Court rulings.” (Tr. 56.)

{¶ 26} In his brief, Morris contends that his Sixth Amendment rights were violated by imposing a sentence greater than that called for by the plea bargain without the finding of additional facts. However, there is no evidence

in the record that there was ever an agreed sentence between the parties. The trial court specifically outlined the possible penalties for each of the charged offenses, and when the trial court asked Morris if he had been promised anything in regard to his guilty pleas, he specifically responded that he had not. (Tr. 7, 10-11.)

{¶ 27} Morris also argues pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, that the trial court may not sentence a defendant to a sentence greater than the statutory maximum without additional facts being found by a jury beyond a reasonable doubt. *Booker* at 244. The statutory maximum 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.” *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, citing *Ring v. Arizona* (2002), 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556.

{¶ 28} Morris pled guilty to three counts of felonious assault, all felonies of the second degree, which carried with them a possible prison sentence of two to eight years. Morris was specifically advised by the trial court as to the possible prison terms for these offenses. (Tr. 10.) There is no evidence in the record to support that there was an agreement that the sentences would be imposed concurrently. *Booker* is clearly inapplicable because Morris was not sentenced beyond the statutory maximum.

{¶ 29} Although trial courts were once required to make specific findings prior to sentencing, in *Foster*, supra, the Supreme Court found statutes that required trial courts to make specific findings prior to sentencing violated the Sixth Amendment. The two-step analysis for reviewing felony sentencing after *Foster* was set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, in a split decision by the Ohio Supreme Court.² First, this court must determine whether the trial court complied with all applicable rules and statutes to determine if the imposed sentence was clearly and convincingly contrary to law. *Id.* at ¶4. If the imposed sentence was within the statutory range, this court will then review the trial court's sentence only for an abuse of discretion. *Blakemore*, supra.

{¶ 30} Although trial courts are no longer required to make specific findings when sentencing a defendant, trial courts are still required to consider the general factors of felony sentencing as outlined in R.C. 2929.11 and R.C. 2929.12, which consider the purposes of felony sentencing. The trial court in the instant case ordered a presentence investigation and report and heard arguments from Morris and his counsel prior to sentencing. The trial court made extensive comments during sentencing indicating that significant thought was placed into imposing an appropriate sentence. While the trial

²We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse of discretion standard in some instances.

court had discretion to sentence Morris on the underlying felonious assault convictions either concurrently or consecutively, pursuant to R.C. 2929.14, the trial court had no discretion but to impose consecutive sentences on the three-year firearm specifications. The trial court was not required to make any findings of facts prior to sentencing, therefore, any comments by the trial court during sentencing were simply superfluous.

{¶ 31} Morris pled guilty to three counts of felonious assault, felonies of the second degree. Each of the three counts contained a three-year firearm specification. The trial court could have sentenced Morris to up to eight years imprisonment on each of the three counts of felonious assault, for a total of 24 years, plus three years each on the three firearm specifications for an additional nine years, for an aggregate sentence of 33 years. However, the trial court sentenced Morris to the minimum of two years imprisonment on each count of felonious assault, and ran them consecutive for a total of six years of imprisonment, plus a total of nine years for the firearm specifications, for an aggregate sentence of fifteen years of imprisonment. As the sentence is clearly within the statutory range, we cannot find that the trial court abused its discretion.

{¶ 32} Therefore, this assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

ANN DYKE, J., CONCURS IN JUDGMENT ONLY

FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY