

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-P-0044
GREGORY A. HAMILTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0262.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Gregory A. Hamilton, appeals from a judgment of the Portage County Court of Common Pleas, sentencing him for aggravated trafficking in drugs.

{¶2} Appellant was indicted on three counts of aggravated trafficking in drugs, felonies of the third degree, in violation of R.C. 2925.03(A) and (C)(1)(b); two counts of complicity to aggravated trafficking in drugs, felonies of the third degree, in violation of R.C. 2923.03 and 2925.03(A) and (C)(1)(b); and one count of possessing criminal tools,

a felony of the fifth degree, in violation of R.C. 2923.24(A) and (C). Appellant, who was represented by counsel, entered a not guilty plea.

{¶3} Thereafter, appellant withdrew his not guilty plea and entered an oral and written guilty plea to three counts of aggravated trafficking in drugs, felonies of the third degree, in violation of R.C. 2925.03(A) and (C)(1)(b). At the plea hearing and in his written guilty plea, the court informed appellant of the penalties involved, including that he may be sentenced up to five years in prison on each count, consecutively, and also notified appellant of the discretionary three-year postrelease control period. Appellant acknowledged at the hearing and in his written guilty plea that he understood the possible sentence and postrelease control sanctions. The court accepted appellant's guilty plea, dismissed the remaining counts of the indictment, and ordered a presentence investigation report.

{¶4} The court sentenced appellant to three years on each of the three counts, to be served consecutively. The court suspended appellant's driver's license for five years, and ordered him to pay a \$5,000 mandatory drug fine, \$120 in restitution, and court costs. The court also notified appellant of the discretionary three-year postrelease control period. Appellant filed a timely appeal, asserting the following assignment of error:

{¶5} "The trial court erred in sentencing the appellant by imposing more than the minimum sentence and by imposing an improper sentence."

{¶6} In his sole assignment of error, appellant argues that the trial court erred by imposing an improper, more than the minimum sentence. He also contends that it

was contrary to law for the court to run his sentences consecutively. Appellant further alleges that the court failed to properly notify him regarding postrelease control.

{¶7} Regarding more than the minimum sentences for each particular count, R.C. 2929.11 and 2929.12 still “apply as a general judicial guide for every sentencing.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶36. In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are “to protect the public from future crime by the offender * * * and to punish the offender.” *Id.* R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed on similarly-situated offenders. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.

{¶8} The *Foster* Court further held that R.C. 2929.11 and 2929.12 do not mandate judicial fact-finding. Rather, “[t]he court is merely to ‘consider’ the statutory factors.” *Id.* at ¶42. Therefore, “in exercising its discretion, a court is merely required to ‘consider’ the purposes of sentencing in R.C. 2929.11 and the statutory * * * factors set forth in R.C. 2929.12.” *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶44.

{¶9} Further, in *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, this court held that a silent record raises a presumption that the trial court considered the purposes of felony sentencing. *Id.* at ¶26, citing *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988), paragraph three of the syllabus. Moreover, in *State v. Cyrus*,

63 Ohio St.3d 164, 586 N.E.2d 94 (1992), the Ohio Supreme Court held the burden is on the defendant to present evidence to rebut the presumption that the court considered the sentencing criteria. *Id.* at 166.

{¶10} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court established a two-step analysis for an appellate court reviewing a felony sentence. *Id.* at ¶26. The court held:

{¶11} “First, [appellate courts] 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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.* An abuse of discretion is the trial court’s ““failure to exercise sound, reasonable, and legal decision-making.”” *State v. Sawyer*, 11th Dist. No. 2011-P-0003, 2011-Ohio-6098, at ¶72, quoting *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶12} The *Kalish* court affirmed the sentence of the trial court as not being contrary to law, since the trial court considered the R.C. 2929.11 and 2929.12 factors, postrelease control was properly applied, and the sentence was within the statutory range. *Kalish* at ¶18.

{¶13} Turning to the first step of the *Kalish* test, appellant pleaded guilty to three counts of aggravated trafficking in drugs, felonies of the third degree, in violation of R.C. 2925.03(A) and (C)(1)(b). The statute in effect at the time this case was decided included a prison term range between one and five years for all third degree felonies. R.C. 2929.14(A)(3). Appellant was sentenced on May 18, 2011, to three years in prison

on each of the three counts. Thus, appellant's sentence was within the statutory range for each offense.

{¶14} The record reflects that the court gave due deliberation to the relevant statutory considerations. Before imposing appellant's sentence, the court considered the following at the sentencing hearing: appellant's record, which included prior convictions for criminal trespass, criminal damaging, petty theft, possession of cocaine, and conspiracy to distribute or possess with intent to distribute cocaine, and that he violated federal postrelease control; appellant's struggle with substance abuse throughout his life; the fact that he used his neighbor's pain medication and sold drugs to his neighbor; and appellant's purchase of drugs, which took place in front of his minor daughter. The trial judge found that appellant was not amenable to community control sanctions and that a prison term was warranted. The judge told appellant that if he used his time in prison wisely, she may consider releasing him early. However, the judge stated to appellant that he has to show that he has learned his lesson, i.e., that he "finally [has] gotten it." In addition, the judge told appellant that he was a smart man with the ability to make positive changes but just needs to "turn his mindset around."

{¶15} Furthermore, the trial court stated in its sentencing entry that it had considered the evidence presented, oral statements, any victim impact statement, the presentence investigation report, and/or appellant's statement.

{¶16} The trial court's consideration of the foregoing points demonstrates its consideration of the factors in R.C. 2929.11 and 2929.12. Thus, because the sentence imposed was within the statutory range of sentences for appellant's crimes and the court considered the purposes and factors of felony sentencing, appellant's sentence

complied with all applicable statutes and therefore was not clearly and convincingly contrary to law. Appellant's sentence complied with the first step of the *Kalish* test.

{¶17} Turning to the second step of the *Kalish* test, we must determine whether the sentence imposed by the trial court was an abuse of discretion. The record reflects the trial court gave due deliberation to the relevant statutory considerations. As noted above, the trial court considered the purposes and factors of felony sentencing in R.C. 2929.11 and 2929.12 before imposing appellant's sentence.

{¶18} After reviewing the record, we cannot say the court's decision to impose more than the minimum sentences on each count was unreasonable, arbitrary, or unconscionable, pursuant to *Kalish's* abuse-of-discretion standard of review.

{¶19} Regarding consecutive sentences, in *Foster*, the Ohio Supreme Court held that because R.C. 2929.14(E)(4) and 2929.41(A) require judicial fact-finding before a court can impose consecutive sentences, they are unconstitutional and ordered them to be severed. *Foster, supra*, paragraph three of the syllabus. In striking down these and other parts of Ohio's sentencing scheme, the *Foster* court held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.*, paragraph seven of the syllabus.

{¶20} The United States Supreme Court in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), subsequently held that the right to a jury trial under the Sixth Amendment to the United States Constitution does not preclude states from

requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. *Ice, supra*, at 171-172.

{¶21} Thereafter, in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, the Ohio Supreme Court addressed “whether, as a consequence of the decision in *Ice*, Ohio trial courts imposing consecutive sentences must first make the findings specified in R.C. 2929.14(E)(4) in order to overcome the presumption for concurrent sentences in R.C. 2929.41(A).” *Hodge, supra*, at ¶9. In answering the question in the negative, the court held: (1) the Sixth Amendment right to a jury trial does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences; (2) *Ice* does not revive Ohio’s former consecutive-sentencing statutes held unconstitutional in *Foster*; and (3) trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that such findings be made. *Id.*, paragraphs one, two, and three of the syllabus. Trial judges have “the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.” *Id.* at ¶12, quoting *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶18-19.

{¶22} The *Hodge* court further explained that *Foster* merely took away a trial judge’s duty to make findings before imposing consecutive sentences and that *Ice* did not directly overrule *Foster*. *Hodge, supra*, at ¶17, 37. The court indicated that “although the *Ice* decision holds that it is constitutionally permissible for a judge to engage in judicial fact-finding to impose consecutive sentences, there is no

constitutional requirement that a judge make findings of fact before imposing consecutive sentences.” *Id.* at ¶26.

{¶23} Thus, judges have discretion and inherent authority to impose either concurrent or consecutive sentences without the requirement of specific fact finding. In this case, based upon the previous discussion, the trial judge acted within her discretion and inherent authority in running appellant’s sentences consecutively rather than concurrently. *Hodge, supra*, at ¶12.

{¶24} Regarding postrelease control, appellant contends that the trial court failed to inform him that it was mandatory. However, “[p]ostrelease control is discretionary for third degree felonies that are not felony sex offenses, unless during the commission of the offense, the defendant caused or threatened to cause physical harm to a person.” *State v. Werber*, 8th Dist. No. 90888, 2008-Ohio-6482, at ¶13; R.C. 2967.28(B) and (C). Appellant pleaded guilty to third degree felony drug offenses. There is no evidence of any actual or threatened physical harm during the commission of those offenses. Thus, the trial court’s notification to appellant of the discretionary three-year postrelease control period was proper.

{¶25} For the foregoing reasons, appellant’s sole assignment of error is not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.