[Cite as *State v. Allen*, 2010-Ohio-2381.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-09-033

Appellee — Trial Court No. 08 CR 1182

v.

John D. Allen — **DECISION AND JUDGMENT**

Appellant — Decided: May 28, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Andrew R. Bucher, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, John Allen, appeals a judgment of conviction for burglary and theft following a resentencing hearing to correct the mandatory notice of postrelease control. Appellant was sentenced by the Sandusky County Court of Common Pleas to

the aggregate of six years of incarceration. He raises three assignments of error. For the reasons that follow, we affirm the judgment of the trial court.

I. PROCEDURAL BACKGROUND

{¶2} On April 16, 2009, appellant appealed his judgment of conviction for burglary and theft. *State v. Allen*, 6th Dist. No. S-09-004, 2009-Ohio-3799. Because appellant was improperly advised of the potential duration of his postrelease control - five years, when it should have been three years - this court held, "[t]he remedy for this error is to remand the matter to the trial court for resentencing pursuant to R.C. 2929.191(C)." Id. at ¶ 32. This court also held that appellant's plea was made knowingly, intelligently, and voluntarily and that the prison sentences were in the statutory range.

{¶3} On September 24, 2009, appellant appealed for the second time, asserting that the trial court erred during the resentencing hearing when it left undisturbed the consecutive sentences for burglary and theft. Appellant also argues that the trial court should have conducted a de novo sentencing rather than merely adopting its prior findings, and that the trial court should have made the statutorily required findings as prescribed under R.C. 2929.11 and 2929.12.

II. RES JUDICATA

{¶4} The state argues that because appellant raised, or could have raised, these issues during the first appeal, any attack on the imposition of consecutive sentences is barred by res judicata. The doctrine, which operates to prevent repeated attacks on a final

judgment, applies to any proceeding initiated after a final judgment of conviction and direct appeal, *State v. Gaston*, 8th Dist. No. 82628, 2003-Ohio-5825, ¶ 8, and to all issues that were or might have been previously litigated. *State v. Brown*, 8th Dist. No. 84322, 2004-Ohio-6421, ¶ 7. Further, res judicata precludes a criminal defendant from raising on subsequent appeal from a resentencing order issues that could have been raised in his direct appeal. *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, ¶ 12, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 16-19.

{¶5} To apply the doctrine, we must determine whether the issues now raised by appellant could have been raised on direct appeal from the original judgment of conviction and sentence. Our analysis is guided by the well-established principle that all issues which do not require evidence outside of the record must be raised on direct appeal. *State v. Thomson*, 6th Dist. No. L-05-1213, 2006-Ohio-1224, ¶ 27-29.

{¶6} Although the assignments of error set forth in appellant's first and second appeal differ slightly, the fact remains that appellant should have raised all of these issues in his first appeal. Accordingly, we find that res judicata bars this appeal.

III. SENTENCING STATUTE

{¶7} In his first assignment of error, appellant complains that:

{¶8} "The consecutive sentences imposed upon Defendant Appellant were not imposed with the required findings as directed by Revised Code § 2929.14(E)(4)(a)-(c)."

{¶9} Appellant clarifies his assignment of error, stating: "the Trial Court erred in not making the statutorily required findings to impose consecutive sentences which

have been upheld to be constitutional by the United States Supreme Court in *Oregon v. Ice*."

{¶10} Even if we were to assume that res judicata does not bar consideration of the merits of appellant's first assignment of error, it, nonetheless, fails on the merits.

{¶11} In *Oregon v. Ice* (2009), 129 S.Ct. 711, 172 L.Ed.2d 57, the United States Supreme Court upheld an Oregon sentencing statute which provided judges with discretion in determining whether a defendant's sentences for distinct offenses should run concurrently or consecutively and which also required judges to make certain predicate findings of fact before imposing consecutive sentences. *Ice* held that the Oregon statute was not unfaithful to the goals of the Sixth Amendment and the right to a jury trial. However, in upholding an Oregon sentencing statute, the United States Supreme Court was not reversing Ohio sentencing statutes or decisions of the Ohio Supreme Court.

{¶12} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio struck down parts of Ohio's sentencing scheme. The 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. at paragraph seven of the syllabus. Prior to *Foster*, R.C. 2929.14(E) had required judicial fact-finding for an imposition of consecutive sentences.

{¶13} Although appellant asks that we disregard *Foster*, we decline to do so. This court held recently in *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶ 18,

"[w]hile *Oregon v. Ice* may necessitate a re-examination of Ohio's current sentencing statutes, as well as some of those which immediately preceded the decision in *Foster*, such a re-examination can only be taken by the Supreme Court of Ohio. As it stands now, we are bound to follow the law and decisions of the Supreme Court of Ohio, unless or until they are reversed or overruled."

{¶14} Accordingly, we find appellant's first assignment of error not well-taken.

IV. RESENTENCING HEARING

{¶15} In his second assignment of error, appellant complains that:

{¶16} "The sentencing hearing conducted on September 16, 2009 was not a de novo sentencing hearing and the court merly [sic] relied upon the previous void sentencing hearing."

{¶17} We disagree.

{¶18} Even if we were to assume that res judicata does not bar consideration of the merits of appellant's second assignment of error, appellant's argument also fails on the merits.

{¶19} R.C. 2929.191(C) provides that: "On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. * * *." It also allows that "[a]t the hearing, the offender and the prosecuting attorney may

make a statement as to whether the court should issue a correction to the judgment of conviction." Id.

{¶20} R.C. 2929.191 affords a mechanism for trial courts to use in correcting sentences that lack proper imposition of postrelease control. Here, the trial court properly conducted a limited resentencing hearing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus. It was not required to conduct a de novo hearing. Thus, appellant's second assignment of error is not well-taken.

V. SENTENCING STATUTE

{¶21} In his third assignment of error, appellant complains that:

{¶22} "The trial court erred and committed an abuse of discretion in not taking into consideration any of the factors or purposes established by R.C. §§ 2929.11 & 2929.12 which clearly remain undisturbed by *Foster*."

{¶23} We disagree.

{¶24} Even if we were to assume that res judicata does not bar consideration of the merits of appellant's third assignment of error, appellant's argument also fails on the merits.

{¶25} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraphs two and four of the syllabus, the Supreme Court of Ohio severed and excised R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentence, respectively. Trial courts have full discretion to impose a prison sentence within the statutory range. *Foster* at paragraph seven of the syllabus.

{¶26} Although *Foster* invalidated parts of the sentencing statute requiring judicial fact-finding for an imposition of maximum and consecutive sentences, we are required to engage in a two-step analysis set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 17. The applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Kalish* at ¶ 17. Appellate courts are now required to "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." *Kalish* at ¶ 26.

{¶27} If a reviewing court is satisfied that the sentence is not clearly and convincingly contrary to law under the first prong, the court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Kalish* at ¶ 17. "R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for trial judge to consider in fashioning an appropriate sentence." Id. *Foster* accords the trial court full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure - "R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." Id.

{¶28} In appellant's first appeal, this court applied the analysis set forth in *Kalish* and reviewed the trial court's original sentence. This court held that the sentence was not clearly and convincingly contrary to law under the first prong. This court also held that under the second prong, the trial court did not abuse its discretion in selecting a sentence within the permissible statutory range.

{¶29} At the resentencing hearing, the trial court expressly stated that the hearing was for the purpose of correcting the "admonition regarding post release control and clarify that the Defendant shall be subject to post release control for a period of 3-years, not 5-years." The trial court permitted counsel for the appellant and the appellant to address the court in mitigation of sentence. The trial court determined that appellant was not amenable to community control, stressing that it had put a lot of thought into the original sentence and believed it was still appropriate. Nevertheless, under R.C. 2929.191, the trial court was not required to address the remainder of appellant's sentence at the resentencing hearing.

{¶30} Applying the first and second prong of the *Kalish* analysis, we do not find the trial court's sentence to be contrary to law and we are satisfied that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶31} Nothing in the record suggests that the court's imposition of maximum and consecutive sentences was unreasonable, arbitrary, or unconscionable. There was no abuse of discretion. Appellant's third assignment of error is not well-taken.

VI. CONCLUSION

{¶32} We find that appellant's assignments of error could have been raised on direct appeal and res judicata applies. Appellant's aggregate sentence of six years was not an abuse of discretion. It was not disproportionate to the offenses committed. The trial court properly considered the sentencing factors. The trial court was not required to conduct a de novo resentencing hearing. The prison sentence is not clearly or convincingly contrary to law. The sentences are in the statutory range. Nothing in the record demonstrated that the trial court's decision was unreasonable, arbitrary, or unconscionable.

{¶33} Wherefore, based upon the foregoing, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Court of Common Pleas, Sandusky County, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

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JUDGE