

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-A-0016
MIGUEL A. ALSINA, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 18.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Jane Timonere, Timonere Law Offices, L.L.C., 4 Lawyers Row, Jefferson, OH 44047-1099 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Miguel A. Alsina, Jr., appeals from the February 15, 2011 judgment of the Ashtabula County Court of Common Pleas, sentencing him for attempted aggravated murder of a police officer, felonious assault, and having weapons while under disability.

{¶2} A police officer with the Ashtabula City Police Department was patrolling an area known for illegal narcotics. The officer went to the A.M.H.A. housing

development and parked his cruiser next to appellant's parked car. After the officer exited his vehicle, appellant opened the driver's side door of his car, pointed a gun at the officer, and began shooting at him. Appellant subsequently fled the scene.

{¶3} Thereafter, the state filed a bill of information charging appellant with three counts: count one, attempted aggravated murder of a police officer, a felony of the first degree, in violation of R.C. 2903.01(A) and (E)(2) and R.C. 2923.02, with a firearm specification; count two, felonious assault, a felony of the first degree, in violation of R.C. 2903.11(A)(2) and (D)(1)(a), with a firearm specification; and count three, having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(1). Appellant waived his right to proceed by way of a grand jury indictment and bond was set.

{¶4} Following a plea hearing, appellant entered an oral and written plea of guilty to all three counts. The trial court accepted appellant's guilty plea and deferred sentencing pending completion of a presentence investigation and report.

{¶5} The trial court sentenced appellant to 10 years in prison on count one, plus three years on the firearm specification. The court found that count two was an allied offense of similar import and merged it with count one. Appellant was sentenced to serve five years in prison on count three. The court ordered the sentence imposed under count one to be served consecutively to the sentence imposed under count three, and consecutively to the mandatory three year term imposed for the firearm specification. The court further ordered the sentences to be served consecutively to another sentence previously imposed, Case Nos. 09-CR-248, 10-CR-226, and 10-CR-227. The court also notified appellant that five years of postrelease control is

mandatory. It is from that judgment that appellant filed a timely appeal and raises the following assignment of error:

{¶6} “The trial court violated Mr. Alsina’s Sixth Amendment rights, as defined by *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, and committed reversible error with respect to the imposition of consecutive sentences by engaging in judicial fact finding as justification for imposition of the consecutive sentences on Mr. Alsina.”

{¶7} In his sole assignment of error, appellant argues that the trial court erred by engaging in impermissible fact-finding when it imposed consecutive sentences contrary to the Supreme Court of Ohio’s holding in *Foster*.

{¶8} Preliminarily, we note that appellant did not object to any alleged impermissible fact finding at the trial court level. “The general rule is that challenges to constitutional issues must first be raised to the trial court or they are deemed waived for appellate review.” *State v. Perry*, 11th Dist. No. 2006-T-0078, 2007-Ohio-2050, at ¶11, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. With respect to *Foster*, however, this type of error cannot be waived. *Perry* at ¶11-12.

{¶9} In *Foster*, the Supreme Court of Ohio held that because R.C. 2929.14(E)(4) and R.C. 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 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.

{¶10} The Court in *Foster* also held that R.C. 2929.11 and R.C. 2929.12 still “apply as a general judicial guide for every sentencing.” *Id.* 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.

{¶11} The Court in *Foster* further held that R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. Rather, “[t]he court is merely to ‘consider’ the statutory factors.” *Id.* at ¶42. Thus, “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.

{¶12} Subsequently, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶13} “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. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

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

{¶15} The United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160 subsequently held that the right to 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. *Id.* at 171-172.

{¶16} Thereafter, in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, paragraph one of the syllabus, the Supreme Court of Ohio adopted the foregoing ruling of the United States Supreme Court in *Ice*. However, the Court in *Hodge* held that *Ice* does not revive Ohio's former consecutive-sentencing statutes. *Id.*, paragraph two of the syllabus. As a result, the Court in *Hodge* held that 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.*, paragraph three of the syllabus.

{¶17} In the instant matter, appellant alleges that his Sixth Amendment rights were violated and relies on *State v. Buchanan*, 7th Dist. No. 05 MA 60, 2006-Ohio-

5653, for the proposition that his sentence must be vacated. In *Buchanan*, the appellant was sentenced to consecutive sentences before *Foster* was decided. *Id.* at ¶5. On appeal, the Seventh District vacated the appellant's sentence and remanded the case to the trial court for a new sentencing hearing in order for the sentencing to comport with *Foster*. *Id.* at ¶31.

{¶18} In our case, however, appellant was sentenced after *Foster*. At the sentencing hearing, the trial court referenced both *Foster* and *Ice*. Again, following the *Ice* decision, the Supreme Court of Ohio in *Hodge* held that trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences. *Id.*, paragraph three of the syllabus. The Court held that *Foster* merely took away a trial court judge's duty to make findings before imposing consecutive sentences. *Hodge*, *supra*, at ¶17. The Court in *Hodge* held that *Ice* did not directly overrule *Foster*. *Id.* at ¶37. The *Hodge* 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.

{¶19} Turning to the first step of the *Kalish* test, appellant pleaded guilty to counts one and two, both felonies of the first degree with firearm specifications. Appellant also pleaded guilty to count three, a third degree felony. For felonies of the first degree, the prison term is anywhere from three to 11 years. R.C. 2929.14(A)(1). The firearm specifications with respect to the first degree felony offenses provided for additional terms of incarceration of three years. R.C. 2929.14(B)(1)(a)(ii). For felonies

of the third degree, the prison term includes a range between one and five years. R.C. 2929.14(A)(3).

{¶20} Again, the trial court sentenced appellant to 10 years in prison on count one, plus three years on the firearm specification. The court found that count two was an allied offense of similar import and merged it with count one. Appellant was also sentenced to serve five years in prison on count three. Thus, appellant's sentence was within the statutory range for each offense. The trial court also properly applied postrelease control. In addition, the trial court stated on the record and in its sentencing entry that it considered the record, oral statements, any victim impact statement and presentence investigation report as well as the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12. Therefore, because appellant's sentence was not clearly and convincingly contrary to law, it complied with the first step of the *Kalish* test.

{¶21} 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. Before imposing consecutive sentences, the court emphasized appellant's lengthy criminal record and considered the following: that consecutive sentences were necessary to protect the public from future crime committed by appellant and to punish him; that consecutive sentences would not be disproportionate to appellant's conduct and the danger he poses to the public; and that the offenses were committed while appellant was awaiting sentencing on other charges.

{¶22} The foregoing discretionary determinations establish that the trial court did not engage in impermissible fact-finding under any severed portions of the sentencing statute. The decision in *Foster* does not prohibit a trial court from considering sentencing factors found in the portions of the sentencing statute that have been declared unconstitutional. After reviewing the record, we cannot say the court's decision to impose consecutive sentences on appellant was unreasonable, arbitrary, or unconscionable, pursuant to *Kalish's* abuse-of-discretion standard of review.

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

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.