

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NOS. 2009 CA 30,
		2009 CA 31, 2009 CA 44,
v.		2009 CA 70
	:	
RAMON BOYCE	:	T.C. NOS. 05CR1114, 08CR0363,
		08 CR 0612
Defendant-Appellant	:	
		(Criminal appeal from
		Common Pleas Court)
	:	

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**OPINION**

Rendered on the 14<sup>th</sup> day of May, 2010.

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FROELICH, J.

{¶ 1} Between 2007 and 2009, in three separate cases, Ramon Boyce was found guilty in the Clark County Court of Common Pleas of one count of burglary, six counts of receiving stolen property, and one count of tampering with evidence. Boyce appeals, challenging the imposition of consecutive sentences in these

cases. For the reasons discussed below, the judgments of the trial court will be affirmed.

*The Three Cases*

A. Case No. 05 CR 1114

{¶ 2} In December 2005, Boyce was indicted on six counts of burglary, eight counts of receiving stolen property, and one count of tampering with evidence.

Boyce was tried by a jury in June 2006, after the trial court overruled, in part, his pre-trial motion to suppress evidence. Boyce was convicted of one count of burglary, eight counts of receiving stolen property, and one count of tampering with evidence. He was sentenced to an aggregate term of 17 years in prison. Boyce appealed from his conviction, and we reversed, concluding that a warrantless pat-down search had been illegal and that Boyce's detention had been "unreasonably prolonged." *State v. Boyce*, Clark App. No. 06-CA-64, 2007-Ohio-2131. We remanded the matter to the trial court.

{¶ 3} On November 2, 2007, Boyce pled guilty to three counts of receiving stolen property and one count of tampering with evidence. All other counts were dismissed. He was sentenced to an aggregate term of 28 months, with credit for 868 days served, such that Boyce's release was nearly simultaneous with his conviction.

{¶ 4} Boyce's delayed appeal from his conviction in Case No. 05 CR 1114 is Clark App. No. 09 CA 30.

B. Case No. 08 CR 363

{¶ 5} On May 6, 2008, Boyce was indicted on one count of receiving stolen

property, which was alleged to have occurred on February 15, 2008. He was initially released on bail, but he was arrested on other charges (see Case No. 08-CR-612, below) before trial. In September 2008, Boyce was convicted by a jury of one count of receiving stolen property and was sentenced to twelve months in prison. Boyce's delayed appeal from this conviction is Clark App. No. 09 CA 31.

C. Case No. 08 CR 612

{¶ 6} In August 2008, Boyce was indicted on one count of burglary and two counts of receiving stolen property; the offenses were alleged to have occurred in May and June, 2008. Boyce's charges were bifurcated, and he had two trials in 2009. In the first trial, he was convicted of one count of burglary and one count of receiving stolen property. For the burglary, he was sentenced to five years of imprisonment and fined \$10,000; for receiving stolen property, he was sentenced to one year of imprisonment and fined \$2,500. The trial court ordered that the prison sentences run consecutively to one another and to the sentence he was already serving in Case No. 08 CR 363. In the second trial, Boyce was found guilty of one count of receiving stolen property; he was sentenced to one year of imprisonment and fined \$2,500. The court ordered that this sentence also run consecutively to the other sentences Boyce was serving. Boyce's appeal of the conviction resulting from the first trial is Clark App. No. 09 CA 44, and his appeal of the conviction resulting from the second trial is Clark App. No. 09 CA 70.<sup>1</sup>

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<sup>1</sup>The trial court's decision to impose fines in Case No. 08 CR 612 and counsel's failure to object to the fines concern us in light of the facts that Boyce was found to be indigent for the purpose of obtaining appointed counsel and was sentenced to lengthy prison terms. In imposing a fine, the trial court must

{¶ 7} Boyce filed timely notices of appeal in Clark App Nos. 09 CA 44 and 09 CA 70. He filed motions for leave to file delayed appeal in Clark App. Nos. 09 CA 30 and 09 CA 31, which we granted. Boyce filed one appellate brief, which lists all four appellate case numbers. On April 23, 2010, we consolidated his appeals.

{¶ 8} Boyce raises one assignment of error on appeal.

{¶ 9} “THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER CONCURRENT SENTENCES FOR THE DEFENDANT’S OFFENSES.”

{¶ 10} Boyce’s argument is directed to the two sentences that resulted from Case No. 08 CR 612. He contends that “there was no mention in the transcript of the possibility of concurrent sentences, nor was there an analysis of why consecutive sentences were specifically appropriate in this particular case.” He argues that the consecutive sentences were an “injustice” and that this matter should be remanded to the trial court for re-sentencing.

{¶ 11} Boyce’s brief makes no argument related to the convictions in Case Nos. 08 CR 363 and 05 CR 1114. Although we surmise that Boyce has appealed

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consider the offender’s present and future ability to pay. R.C. 2929.19(B)(6); *State v. Ward*, Montgomery App. No. 23365, 2010-Ohio-1794, at ¶27. Moreover, the fine on the count of burglary was a mandatory fine under R.C. 2929.18(B)(1); when faced with such a fine, the defendant may assert that he is unable to pay by filing an affidavit of indigency prior to sentencing. Boyce’s attorney did not file such an affidavit. “The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel if the record shows a reasonable probability that the trial court would have found Defendant indigent and relieved him of the obligation to pay the fine had the affidavit been filed.” *State v. Sheffield*, Montgomery App. No. 20029, 2004-Ohio-3099. However, Boyce has not raised any issue with respect to the imposition of fines on appeal.

from the sentence imposed in Case No. 08 CR 363 because the trial court ran his subsequent sentence in Case No. 08 CR 612 consecutively to it, such an argument does not demonstrate an error in the earlier sentence. Boyce's argument does not seem to relate in any way to the sentence imposed in Case No. 05 CR 1114. Because he has failed to identify any errors in Case Nos. 05 CR 1114 or 08 CR 363 (Clark App Nos. 09 CA 30 and 09 CA 31), we will disregard those portions of his appeal, pursuant to App.R. 12(A)(1)(c). We confine our review to the sentences imposed in Case No. 08 CR 612 (Clark App. Nos. 09 CA 44 and 09 CA 70).

{¶ 12} We review a felony sentence using a two-step procedure. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4. "The first step is 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.'" *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio-5775, at ¶4, quoting *Kalish* at ¶4. "If this step is satisfied, the second step requires that the trial court's decision be 'reviewed under an abuse-of-discretion standard.'" *Id.*

{¶ 13} The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11(A). Unless otherwise required by R.C. 2929.13 and R.C. 2929.14, the trial court has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. R.C. 2929.12(A). The trial court must also consider the seriousness of the offender's conduct, its impact upon the victim, and the sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B). It may consider any other factors that are

relevant to achieving the purposes and principles of sentencing. R.C. 2929.12. See, also, *State v. Arnold*, Clark App. No. 2008 CA 25, 2009-Ohio-3510, at ¶8. Absent an affirmative showing to the contrary, an appellate court will presume that the trial court did consider the statutory factors in imposing consecutive sentences. *State v. Latham*, Champaign App. No. 07-CA-23, 2008-Ohio-4734, at ¶11; *Kalish* at ¶18, n.4.

{¶ 14} In Boyce’s case, the trial court stated in its Judgment Entry of Conviction that it “considered the record, oral statements of counsel, the principles and purposes of sentencing under [R.C.] 2929.11, and \*\*\* balanced the seriousness and recidivism factors under [R.C.] 2929.12.” It did not state any specific reasons for imposing the sentences that it did. However, since *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court has discretion to impose any sentence within the statutory range and is no longer required to make findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *Id.* at ¶100; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶37.<sup>2</sup> Because the trial court stated that it considered the factors set forth in R.C. 2929.11 and R.C. 2929.12 in imposing Boyce’s sentence and imposed a sentence

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<sup>2</sup>The case on which Boyce relies in support of his argument that findings were required, *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, was abrogated by *Foster* and is no longer good law. In fact, since Boyce’s brief was filed in this case, we commented in another case that we were surprised by Boyce’s attorney’s untimely reliance on *Comer* and its progeny for the proposition that a trial court cannot impose consecutive sentences unless it makes certain findings and gives reasons for those findings, noting that the supreme court abrogated *Comer* more than four years ago. *State v. Younts*, Champaign App. No. 2009-CA-6, 2010-Ohio-947, at ¶6.

within the statutory range, Boyce's sentence is not clearly and convincingly contrary to law.

{¶ 15} Having concluded that Boyce's sentence was not contrary to law, we must consider whether the trial court abused its discretion in imposing the sentence that it did. *Stevens*, 179 Ohio App.3d 97 at ¶4; *State v. Watkins*, Clark App. No. 08-CA-122, 2010-Ohio-740, at ¶41. The abuse of discretion standard is an "appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Bowles*, Montgomery App. No. 23037, 2010-Ohio-278, at ¶18, quoting Black's Law Dictionary, Eighth Edition (2004), at 11; *Watkins* at ¶41.

{¶ 16} Boyce had an extensive history of criminal activity. The records of the cases on appeal demonstrate that, less than three months after being released from a 28-month prison term, Boyce committed another offense of receiving stolen property. After he was indicted on that offense, and while he was awaiting trial, he committed another burglary and two counts of receiving stolen property. Additionally, there were numerous allegations of prior burglaries and receiving stolen property of which he had not been convicted. Although the trial court did not expressly rely on these prior offenses in imposing the sentences that it did, the court had reason to believe that a lengthy sentence was required to protect the public from future crime and to punish Boyce for his offenses. Under the facts presented, the trial court did not abuse its discretion in imposing consecutive sentences within Case No. 08 CR 612 or in ordering those sentences to run consecutive to the sentence he was already serving in Case No. 08 CR 363.

{¶ 17} The assignment of error is overruled.

{¶ 18} The judgments of the trial court will be affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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Hon. Douglas M. Rastatter