

[Cite as *State v. Jaffal*, 2010-Ohio-4999.]

[Vacated opinion. Please see 2011-Ohio-419.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93142

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NABIL N. JAFFAL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-369065

BEFORE: Jones, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: October 14, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Nabil Jaffal (“Jaffal”), appeals the trial court’s imposition of consecutive sentences. Finding no merit to the appeal, we affirm.

{¶ 2} In 1998, Jaffal was charged with aggravated burglary, vandalism, failure to comply with the order of a police officer, and two counts of felonious assault. The aggravated burglary and felonious assault charges were accompanied by repeat violent offender (“RVO”) specifications. The matter proceeded to a trial by jury and the jury convicted Jaffal of aggravated burglary

with the RVO specification, vandalism, failure to comply with the order of a police officer, and one count of felonious assault with the RVO specification. In April 1999, the trial court sentenced Jaffal to a total of sixteen years in prison. Jaffal appealed and we affirmed his conviction on appeal. *State v. Jaffal* (July 21, 2000), Cuyahoga App. No. 76473, appeal not allowed by 90 Ohio St.3d 1468, 738 N.E.2d 381.

{¶ 3} In 2008, Jaffal filed a pro se motion to correct a void sentence, claiming that because the trial court failed to properly advise him of postrelease control at his 1999 sentencing, his sentence was void. In 2009, the trial court resentenced Jaffal to a total of sixteen years in prison and advised him of postrelease control.

{¶ 4} Jaffal now appeals, raising the following five assignments of error for our review:

“I. The trial court erred by sentencing appellant to serve consecutive sentences without submitting reasons in support pursuant to R.C. 2929.14(E).

“II. The trial court erred in sentencing the appellant to consecutive repeat violent offender specifications as the two specifications merged.

“III. The failure to specifically request a merger finding of the repeat violent offender sentencing enhancements deprived the appellant his right to effective assistance of counsel.

“IV. Ohio's former Repeat Violent Offender penalty enhancement in former R.C. 2929.14(D)(2)(b) violates the Sixth Amendment.

“V. Whether the original attempted 1999 sentence is void for failure to adhere to statutory requirements, the trial court lost jurisdiction to impose [a]

new sentence due to the inexcusable 10[-] year delay between Appellant's 1999 conviction and his March 2009 sentencing hearing.”¹

Consecutive Sentences

{¶ 5} In the first assignment of error, Jaffal claims the trial court erred by sentencing him to consecutive sentences without making the appropriate factual findings.

{¶ 6} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court, in a plurality decision, addressed the standard for reviewing felony sentencing. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellate courts must apply the following two-step approach: “First, they 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.” *Kalish* at ¶26.

{¶ 7} Thus, in the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G). As the *Kalish* court noted, post-*Foster*, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence.” *Id.* at ¶11; *Foster*, paragraph seven of the syllabus. The *Kalish* court declared that

¹ The fifth assignment of error was filed pro se.

although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. *Id.*, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38.

{¶ 8} R.C. 2929.11(A) provides that:

{¶ 9} “[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing[,] * * * to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.”

{¶ 10} R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶ 11} The *Kalish* court also noted that R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14. *Kalish* at ¶17. Rather, they “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Id.* Thus, “[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio’s sentencing structure.” *Id.*

{¶ 12} In this case, and based on our disposition of the second assignment of error, we find that Jaffal's sentence was not contrary to law as it was within the permissible statutory range for his crimes.

{¶ 13} Having satisfied the first step, we next consider whether the trial court abused its discretion. *Kalish* at ¶4 and 19. We find no evidence that the trial court abused its discretion. The trial court imposed the same sentence upon Jaffal that it had originally imposed in 1999.

{¶ 14} Within this assignment of error, Jaffal argues that the trial court erred by imposing consecutive sentences because the trial court was required to make findings under R.C. 2929.14(E)(4). In *Foster*, the Ohio Supreme Court held, in relevant part, "that R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial fact-finding is not required before imposition of consecutive prison terms." *Id.* at ¶99. Jaffal maintains, however, that a recent decision by the United States Supreme Court "reinstated the Ohio statutory sentencing requirements," which were excised by *Foster*. See *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 15} In addition to determining the length of a prison sentence for each conviction, courts have the discretion to determine whether prison sentences are to be served consecutively or concurrently. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328. In *Ice*, the United States Supreme Court addressed the court's authority to impose consecutive sentences. The *Ice* court held that Oregon statutes requiring judicial fact-finding before imposing

consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. *Id.* at 714.

{¶ 16} The effect, if any, that *Ice* may have on Ohio's post-*Foster* sentencing scheme has not been fully addressed by the Ohio Supreme Court; thus, we continue to follow *Kalish* and *Foster* when reviewing felony sentencing issues.² See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"); *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582 (acknowledging the *Ice* decision and holding that "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so").

{¶ 17} In sum, the trial court's imposition of a sixteen-year sentence is supported by the record and was not an abuse of discretion. Moreover, it was within the court's discretion to run a portion of Jaffal's prison sentence consecutively.

{¶ 18} The first assignment of error is overruled.

Repeat Violent Offender Specification

{¶ 19} In the second assignment of error, Jaffal argues that the trial court should have merged his two sentences for the RVO specifications. The court

² Review of this issue is pending before the Ohio Supreme Court. See *State v. Hodge*, Ohio Supreme Court Case No. 2009-1997.

originally sentenced Jaffal in 1999. The court conducted a de novo resentencing hearing in 2009; thus, we look to the law at the time of the resentencing.

{¶ 20} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court reviewed the former RVO statutes, R.C. 2929.14(D)(2)(a) and R.C. 2929.14(D)(2)(b), and found that portions of the statute violated *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The *Foster* court determined that subsection (D)(2)(b) violated *Blakely* because it required the trial court to make findings of fact before imposing the additional penalty. Id. at ¶73-78; see former R.C. 2929.14(D)(2)(b)(i),(ii), and (iii).

{¶ 21} Although *Foster* excised judicial fact-finding from former R.C. 2929.14(D)(2), it did not eliminate the repeat violent offender specification. *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, cert. denied by *Hunter v. Ohio* (2010), 130 S.Ct. 1888, 176 L.Ed.2d 372.

{¶ 22} A review of the record shows that Jaffal can be classified a RVO pursuant to R.C. 2929.14(D)(2) and the trial court used its discretion to resentence him to the RVO specifications. See *Foster* at ¶71 (“[u]nlike all other penalty-enhancing specifications, the court, not the jury, makes the necessary factual findings for convicting the offender of being a repeat violent offender”). Although the trial court did not make any specific factual findings, *Foster* excised the requirement that a trial court make findings of fact before imposing penalty enhancements for repeat violent offenders. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1. Thus, a trial court may impose an additional

prison term pursuant to a RVO specification without conducting any judicial fact-finding. See *State v. Hill*, Cuyahoga App. No. 93379, 2010-Ohio-1670.

{¶ 23} As to Jaffal's argument that his RVO sentences may not run consecutive, the Eleventh District was faced with the issue in *State v. Krug*, Lake App. No. 2008-L-085, 2009-Ohio-3815, appeal not allowed by 126 Ohio St.3d 1517, 2010-Ohio-3331, 930 N.E.2d 333. The *Krug* court held that "[o]ur reading of the statute indicates that while it is correct that the statute only authorizes a single prison term for each RVO specification, nothing in the statute limits the number of specifications when, as in the instant case, the offender is charged with multiple counts of underlying offenses. Regarding the consecutive nature of the two additional prison terms for the RVO specifications, the trial court is vested with full discretion pursuant to *Foster* to impose consecutive sentences. That discretion extends to RVO." (Internal citations omitted). Id. at ¶174-175.

{¶ 24} We agree that post-*Foster*, the trial court is vested with full discretion to impose consecutive sentences on RVO specifications.

{¶ 25} Therefore, the second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 26} In the third assignment of error, Jaffal claims that his counsel at his 2009 resentencing hearing was ineffective for failing to object to the consecutive nature of the RVO specifications.

{¶ 27} In order for this court to reverse a conviction on the grounds of ineffective assistance of counsel, we must find that (1) counsel's performance was

deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 28} Because we have rejected the claim of error that is the basis for Jaffal's claim that his trial counsel was ineffective, we likewise reject the assertion of ineffective assistance of counsel that is premised upon that error. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237.

{¶ 29} The third assignment of error is overruled.

Constitutionality of Former RVO Statute

{¶ 30} Next, Jaffal argues that Ohio's former RVO statute was unconstitutional. But Jaffal was sentenced under the current RVO statute; therefore, he has no standing to challenge the former statute on appeal from his resentencing. Second, the doctrine of res judicata may be applied to bar the further litigation of issues that were previously raised or could have been raised through a direct appeal. See *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. If Jaffal wanted to challenge the constitutionality of the former RVO statute, he is required to have challenged the issue on direct appeal.

{¶ 31} Therefore, the fourth assignment of error is overruled.

Delay Between Sentencing and Resentencing

{¶ 32} In the final assignment of error, Jaffal challenges the time lapse between his original sentencing in 1999 and his resentencing in 2009.

{¶ 33} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, the Ohio Supreme Court held that: “[i]n cases in which a defendant * * * pleads guilty to [] an offense for which postrelease control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” *Id.* at the syllabus.

{¶ 34} In *State v. Graves*, Cuyahoga App. No. 90080, 2008-Ohio-3037, we found that the trial court did not err by imposing postrelease control on the defendant at a new sentencing hearing while the defendant was still in prison. We held that the trial court was required to hold a de novo “hearing in order to notify felony offenders about postrelease control.” *Id.* at ¶7. Merely issuing a nunc pro tunc entry will not suffice. *Id.*

{¶ 35} “Ohio courts have consistently held that when a trial court fails to sentence an offender to postrelease control, the sentence for that offense is void and the offender must be resentenced.” *Graves*, at ¶12, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. This “resentencing does not violate finality or double jeopardy restraints because jeopardy does not attach to a void sentence.” *Id.* at ¶13, citing *Simpkins*.

{¶ 36} A trial court is “‘authorized to correct the invalid sentence to include the appropriate, mandatory postrelease-control term’ where the defendant’s sentence has not yet been completed.” *Id.* at ¶17 citing *Simpkins*; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263; *Bezak*.

{¶ 37} To support his position, Jaffal cites to our decision in *State v. Mack*, Cuyahoga App. No. 92606, 2009-Ohio-6460, appeal not allowed by 124 Ohio St.3d 1540, 2010-Ohio-1557, 924 N.E.2d 844, but *Mack* is not applicable to this case. In *Mack*, we held that the trial court lost jurisdiction to impose sentence when a two-year delay existed between a finding of guilt and pronouncement of sentence. In this case, there was not a long delay between the finding of guilty and the pronouncement of sentence. Jaffal was found guilty in March 1999 and sentenced one month later. He moved for resentencing in February 2008 and was resentenced in March 2009.

{¶ 38} We note that Jaffal does not challenge the 13-month delay between the filing of his pro se motion to correct his void sentence and the time the court resentenced him. But even if he had, we would not find the delay unduly excessive. See *State v. Jackson*, Summit App. No. 24142, 2008-Ohio-6938 (holding that appellant's right to challenge the two-year delay between remand and resentencing was waived by appellant's appearance at resentencing hearing and failure to object or raise any challenge to the trial court's authority to sentence him).³

{¶ 39} The fifth assignment of error is overruled.

³ This court is cognizant of the deluge of motions defendants have filed to correct void sentences following the issuance of the *Bezak* decision. Although it is expected that a trial court will expedite these motions, we will not hold the trial court to a strict timeline to resentence defendants. Of course, if Jaffal had already been released from prison, the court would have been without jurisdiction to resentence him. But Jaffal was still incarcerated at the time of resentencing.

{¶ 40} Accordingly, judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR