[Cite as *State v. Porosky*, 2011-Ohio-330.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94705

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER S. POROSKY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530730

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

RELEASED AND JOURNALIZED: January 27, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Christopher Porosky ("Porosky"), appeals his sentence, arguing that his convictions for felonious assault and child endangering should merge as allied offenses of similar import. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, Porosky was charged with attempted murder, felonious assault, child endangering, and domestic violence involving his 17-day-old son. The state alleged that Porosky was caring for his son when he became upset that the baby was crying and somehow injured him. Porosky admitted to "dropping"

his son, but stated it was an accident. The baby suffered severe injuries, including a brain injury, bilateral retinal hemorrhaging, petechial hemorrhaging, strokes, and seizures.

{¶ 3} Porosky entered into a plea agreement with the state, in which he agreed to plead guilty to felonious assault, child endangering, and domestic violence. At his sentencing hearing, Porosky argued that his convictions for felonious assault and child endangering should merge as allied offenses. The trial court disagreed and refused to merge the offenses. The court sentenced Porosky to 13 years in prison. At the time of sentencing, it was unknown if the baby would ever fully recover from his injuries.

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

> "I. The trial court erred when it failed to conduct a hearing to determine whether convicting Mr. Porosky for both felonious assault and child endangering would be in violation of R.C. 2941.25 (allied offenses) and a denial of Mr. Porosky's rights to protection from double jeopardy guaranteed by Art. I, Section 10 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.
>
> "II. The trial court erred by ordering consecutive sentences when it failed to make all of the necessary findings, with supporting reasons, that are required by R.C. 2929.14(E)(4)."

Hearing on Allied Offenses

{¶ 5} Porosky first claims that the trial court erred in failing to hold a hearing to determine whether his convictions for felonious assault and child endangering were allied offenses of similar import.

{¶ 6} Allied offenses of similar import are governed by R.C. 2941.25, which provides:

> "(A) Where the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 7} Porosky relies on this court's holding in *State v. Kent* (1980), 68 Ohio App.2d 151, 428 N.E.2d 453, where it was held that a trial court is required to hold a hearing to determine if any of the counts in the plea agreement were allied offenses of similar import. Porosky claims that no such hearing was held in this case. We disagree. Defense counsel raised the issue of allied offenses and the trial court considered defense counsel's argument on the record that felonious assault and child endangering are allied offenses of similar import. The trial court dismissed defense counsel's claim, finding that based on the facts of this case, the two offenses were not allied because they were committed with a separate animus. We find no requirement under the law that the hearing had to be more involved than it was in this case.

{¶ 8} As to whether the offenses of felonious assault and child endangering are in fact allied offenses, in *State v. Potter*, Cuyahoga App. No. 81037, 2003-Ohio-1338, this court held that the two offenses are not allied offenses of similar import. Other districts have held the same. See *State v. Overton*, Franklin App. No. 09AP-858, 2010-Ohio-5256; *State v. Journey*, Scioto App. No. 09CA3270, 2010-Ohio-2555; *State v. Smith*, Hamilton App. No. C-080126, 2009-Ohio-3727, appeal not allowed by 123 Ohio St.3d 1510, 2009-Ohio-6210, 917 N.E.2d 812.

{¶ 9} Recently, however, the Ohio Supreme Court overruled its decision in *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, and held that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, at the syllabus. The court determined that a different analysis should be employed to evaluate whether two or more offenses are allied offenses of similar import:

> "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
>
> "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

> "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' * * *
>
> "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.
>
> "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Internal citations omitted). Id. at ¶46-51.

{¶ 10} In *Johnson*, the court found that the offense of felony murder, with the predicate felony being child endangering, and the offense of child endangering are allied offenses and, based upon the conduct of the defendant, the crimes were committed with the same animus. On the same day the Ohio Supreme Court released its opinion in *Johnson*, the court reversed the Twelfth District Court of Appeals decision in *State v. Craycraft*, Clermont App. No. CA2009-02-013, CA2009-02-014, 2010-Ohio-596. *State v. Craycraft*, Slip Opinion No. 2010-Ohio-6332. In *Craycraft*, the appellate court found that child endangering, felonious assault, and domestic violence were not allied offenses of similar import. Since the offenses were not allied, there was no need to consider whether the crimes were committed with the same animus. The Ohio Supreme Court reversed, remanding the case back to the appellate court with instructions to apply its holding in *Johnson*.

{¶ 11} In this case, the facts that can be gleaned from the plea and sentencing hearings show that Porosky first harmed his son (felonious assault) and then endangered him by failing to seek medical attention for the baby for

approximately 12 hours, even though he knew the child was injured. Thus, even if child endangering and felonious assault could be considered allied offenses under the *Johnson* framework, in this case the offenses do not merge since Porosky committed them with separate animus. Therefore, the trial court correctly decided not to merge the two offenses.

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

{¶ 13} In the second assignment of error, Porosky argues the trial court erred in imposing consecutive sentences without first making findings required by R.C. 2929.14(E)(4). In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court 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.

{¶ 14} Thus, we first 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 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.

{¶ 15} R.C. 2929.11(A) provides that:

> "[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."

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} In this case, we find that Porosky's sentence was not contrary to law as it was within the permissible statutory range for his crimes and the trial court stated in its journal entry that it was considering all factors required by law.

{¶ 19} 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. Although Porosky 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.

{¶ 20} Porosky 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. 160, 129 S.Ct. 711, 172 L.Ed.2d 517. The Ohio Supreme Court recently decided that *Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*. *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320. Because the statutory provisions are not revived, 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 findings be made. Id. at ¶39.

{¶ 21} Therefore, we find that Porosky's sentence was not contrary to law and the trial court did not err in sentencing him to consecutive sentences. The second assignment of error is overruled.

{¶ 22} 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. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR