[Cite as *State v. Jones*, 2011-Ohio-453.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94408

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCE JONES

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED; SENTENCES VACATED; AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-525681 and CR-526447

BEFORE: Cooney, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 3, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Vince Jones ("Jones"), appeals his convictions for identity fraud, forgery, theft, and tampering with records. Finding some merit to the appeal, we affirm his convictions, vacate his sentences, and remand for resentencing consistent with this opinion.

{¶ 2} In July 2009, Jones was indicted in two separate cases, Case No. CR-525681 and Case No. CR-526447. He was charged with a total of 20 counts. Jones entered into a plea agreement with the State in which he pled guilty to six counts. In Case No. CR-525681,

he pled guilty to one count of identity fraud, one count of forgery, and one count of aggravated theft, and agreed to pay restitution in the amount of $12,700. In Case No. CR-526447, Jones pled guilty to one count of identity fraud, one count of forgery, and one count of tampering with records, and agreed to pay restitution in the amount of $4,837.52. All additional charges were nolled.

{¶ 3} Jones was sentenced to a total of four years in prison in Case No. CR-525681, and a total of four years in prison in Case No. CR-526447. The sentences were ordered to run consecutively, for a total of 8 years in prison.

{¶ 4} Jones now appeals, raising five assignments of error.

Restitution

{¶ 5} In his first assignment of error, Jones argues that the trial court violated Crim.R. 43 by imposing restitution outside his presence.

{¶ 6} Jones is correct that the trial judge failed to mention restitution during the sentencing hearing. However, both sentencing entries contain orders of restitution, in the amount of $12,700 (CR-525681) and $4,837.52 (CR-526447), as was part of the plea agreement.

{¶ 7} The State argues that Jones entered into a contractual agreement with the State when he accepted the plea agreement. Relying on *State v. Miller*, Cuyahoga App. No. 91543, 2009-Ohio-3307, ("*Miller I*"), the State argues that because an agreement to pay

restitution was included in the plea agreement, the trial court was not required to specifically mention it during the sentencing hearing but could merely include it in the sentencing entry.

{¶ 8} Jones argues that because the trial court failed to mention restitution during the sentencing, the orders for restitution contained in the sentencing entries must be vacated. We agree.

{¶ 9} Since the State filed its brief, the Ohio Supreme Court reversed this court's decision in *Miller I.* See *State v. Miller* ("*Miller II*"), Slip Opinion No. 2010-Ohio-5705. In *Miller I*, this court relied on *State v. Middleton*, Preble App. No. CA2004-01-003, 2005-Ohio-681, which held that:

> "Crim.R. 36 states that 'errors * * * arising from oversight or omission, may be corrected by the court at any time.' In this case, the common pleas court corrected an error it had made when it initially sentenced appellant for a third-degree felony instead of the second-degree felony of which appellant was convicted. The court's mistake was due to a clerical error in the pre-sentence investigation report. Appellant was fully aware that he had pled guilty to and was convicted of a second-degree felony. In a written waiver, appellant had previously acknowledged that the maximum penalty for the burglary charge, a second-degree felony, was eight years. We find no error by the common pleas court in immediately correcting a mistake arising from an oversight that occurred at the sentencing hearing." Id. at ¶10.

{¶ 10} This court held that despite the fact that the trial court did not mention restitution during sentencing and failed to order restitution in its original sentencing entry, an order for restitution could be contained in a nunc pro tunc journal entry.

{¶ 11} However, the Ohio Supreme Court found that *Middleton* was not dispositive, because *Miller I* was "wholly distinguishable * * *. It is not the original journal entry that is at issue here, but rather, a substantially altered one." *Miller II* at ¶13. The supreme court reversed our decision, holding that "[a] court may not use a nunc pro tunc entry to impose a sanction that the court did not impose as part of the sentence." Id. at syllabus.

{¶ 12} Regardless, we find *Miller I* distinguishable from the instant case. Unlike *Miller I*, the original sentencing entries contain orders for restitution — a condition stated as part of the plea agreement between the State and Jones. Moreover, it is axiomatic that a court speaks through its journal entries. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶47, citing *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 2000-Ohio-381, 727 N.E.2d 907. See, also, *Miller II* at ¶12.

{¶ 13} However, Crim.R. 43 states in pertinent part: "[t]he defendant shall be present at * * * every stage of trial, including * * * the imposition of sentence." As was stated by this court *In re: R.W.*, Cuyahoga App. No. 80631, 2003-Ohio-401:

{¶ 14} "The courts have consistently held that an adult must be present at a hearing when any modification to a sentence is made. 'A trial court may change the terms of a sentence at anytime before the sentence is journalized, provided the court conducts a hearing in defendant's presence as contemplated by Crim.R. 43(A).' *State v. Jones*, Franklin App. No. 98-AP-1248, 1999-Ohio-1248, at *5.

{¶ 15} "When, however, 'the trial court modifies in defendant's absence a sentence articulated in open court before journalizing the sentence, a judgment entry reflecting the modification is invalid. * * * Thus, a variance between the sentence pronounced in open court and the sentence imposed by a court's judgment entry requires a remand for sentencing, but not necessarily the sentence originally stated in open court.' Id. at *5-6. Citations omitted. See also, *State v. Skaggs*, Cuyahoga App. No. 56714, 2000-Ohio-4947; *State v. Ranieri* (1992), 84 Ohio App.3d 432, 616 N.E.2d 1191; *State v. Hess*, Jefferson App. No. 00-JE-40, 2001-Ohio-1850; *Columbus v. Rowland* (1981), 2 Ohio App.3d 144, 440 N.E.2d 1365 ('Crim.R. 43(A) specifically requires that the defendant be present at every stage of the proceedings, including the imposition of a sentence, and this applies to where one sentence is vacated and a new sentence imposed.')" *In re: R.W.*, at ¶24-25.

{¶ 16} Thus, we find that the trial court erred when it ordered restitution through its journal entry without verbalizing the order in Jones's presence during his sentencing hearing.

{¶ 17} Accordingly, Jones's first assignment of error is sustained and requires a remand for resentencing to order restitution in Jones's presence consistent with his plea agreement.

Court Costs

{¶ 18} In his second assignment of error, Jones argues that the trial court failed to impose court costs in his presence at the sentencing hearing. Jones argues that the order for court costs included in the journal entry must, therefore, be vacated. We agree.

{¶ 19} Relying on *State v. Luna*, Cuyahoga App. No. 91271, 2009-Ohio-2715, the State argues that unless the transcript of the hearing suggests that a defendant was denied the ability to raise the issue of court costs, the trial court is required to impose them. However, *Luna* was reversed on appeal by the Ohio Supreme Court, the court stating:

{¶ 20} "The judgment of the court of appeals is reversed to the extent that the court of appeals held that the trial court could impose court costs in the sentencing entry when the defendant had not been informed at the sentencing hearing that those costs would be imposed as part of his sentence on the authority of *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, and the cause is remanded to the trial court for further proceedings consistent with *State v. Joseph*." *State v. Luna*, 126 Ohio St.3d 53, 2010-Ohio-2694, 930 N.E.2d 311.

{¶ 21} In *Joseph*, the Ohio Supreme Court held that a failure to notify a defendant about court costs and the consequences of failing to pay them, is not harmless error. The court, however, did not require that Joseph's sentence be vacated in its entirety. The court held that Joseph's sentence was not void and he was not entitled to a complete resentencing. He was entitled to proper notification from the trial court and the opportunity to seek a waiver of court costs.

{¶ 22} In the instant case, we are remanding to resentence in light of the court's failure to include restitution. Therefore, the court should also include court costs when resentencing.

{¶ 23} Accordingly, Jones's second assignment of error is sustained.

Sentence for Identity Fraud

{¶ 24} In his third assignment of error, Jones argues that the court erred in sentencing him to four years on Count 1 for identity fraud, in Case No. CR-526447.

{¶ 25} In Case No. CR-526447, Jones pled guilty to Count 1, identity fraud, Count 2, forgery, and Count 10, tampering with records.

{¶ 26} Identity fraud, involving a value of $500 to $5,000, is a felony of the fourth degree, and carries a maximum sentence of 18 months in prison. R.C. 2913.49(B)(2) and 2929.14. Forgery is a felony of the fifth degree, with a maximum sentence of 12 months in prison. R.C. 2913.31(A)(1) and 2929.14. Tampering with records is a felony of the third degree, with a maximum sentence of five years. R.C. 2913.42(A)(2) and 2929.14.

{¶ 27} The transcript indicates that there was some confusion during the sentencing hearing, the court stating:

{¶ 28} "I hope I'm wrong, but I don't see you changing. For the identity fraud, the Court is going to send you for an additional four years. For the tampering, and you have one year each on the additional counts to run concurrent with the four years. Now, the four years

on the felony 3, in docket 526447, and the four years in docket 525681 will run consecutive to one another. You have eight years to serve."

{¶ 29} It would appear from the way the court reporter transcribed the hearing that the trial judge erred in saying "[f]or the identity fraud," but quickly corrected himself when he said "[f]or the tampering," despite the court reporter's placement of punctuation. The judge further clarified his intention by stating "four years on the felony 3." The tampering charge was the only third degree felony contained in Case No. CR-526447, punishable by such a lengthy sentence. We are confident that the trial judge corrected himself and properly sentenced Jones to four years on Count 10 tampering with records, the only third degree felony to which he pled guilty.

{¶ 30} However, the sentencing entry further confuses the issue with an obvious clerical error. The journal entry states:

> "On a former day of court the Defendant plead guilty to identity fraud, Affirmative defenses 2013.49B(2) [sic] F4 as charged in count(s) 1 of the indictment.
>
> "On a former day of court the Defendant plead guilty to forgery, forging identification cards 2913.31A(1) F5 as charged in count(s) 2 of the indictment.
>
> "On a former day of court the Defendant plead guilty to tampering with records 2913.42A(2) F3 as charged in count(s) 10 of the indictment.
>
> "Count(s) 3, 4, 5, 6, 7, 8, 9, 11 was/were nolled.
>
> * *

{¶ 31} "Defendant sentenced to 4 years as to Count 1; 1 year as to counts 2 and 3, * * *."

{¶ 32} The clerical error is contained in the last line of the journal entry designating the specific number of each count. This line should read "[d]efendant sentenced to 4 years as to *Count 10*; 1 year as to *Counts 1 and 2*." This correction would reflect the truth of what the court stated at sentencing.

{¶ 33} Jones argues that this error requires that his sentence be reversed. In light of the errors made by the court regarding restitution and court costs, we agree that resentencing is appropriate in this unusual case.

{¶ 34} Although a trial court's failure to properly journalize the defendant's sentence after it has been stated in open court on the record and transcribed, does not constitute a denial of a defendant's constitutional rights, we are remanding for correction of the errors outlined above.

Voluntariness of Plea

{¶ 35} In his fourth assignment of error, Jones argues that the trial court erred by accepting his guilty plea that was not made voluntarily and knowingly.

{¶ 36} In order for a plea to be made knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *State v. Irizarry*,

Cuyahoga App. No. 93352, 2010-Ohio-3868, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶ 37} A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163; Crim.R. 52(A). The test of prejudicial effect is whether the plea would have been otherwise made. Id. at 108.

{¶ 38} Jones argues that because he was not informed of the possibility of consecutive sentences, his plea was not voluntarily and knowingly made. Relying on *State v. Johnson* (1988), 40 Ohio St.3d 130, 532 N.E.2d 1295, the State argues that a defendant must only be informed of consecutive sentences when the sentences are mandated by law to run consecutively. We agree.

{¶ 39} In *Johnson*, the Ohio Supreme Court held that "[f]ailure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary." Id. at syllabus. The *Johnson* court noted that the text of Crim.R. 11(C) refers to a "single and individual criminal charge." Id. at ¶133. The court concluded that the maximum-penalty language in Crim.R. 11(C)(2)(a) referred to a single crime, rather than the total of all sentences. Id.

{¶ 40} When the choice to impose consecutive sentences is at the discretion of the trial court, Crim.R. 11 does not require that the defendant be informed of the maximum consecutive sentence, only of the maximum sentence for individual counts. Id. As was the case in *Johnson*, Jones's sentences were not mandated to run consecutively and, in turn, the trial court was not obligated to inform him of that possibility. Jones has failed to show that this distinction had a prejudicial effect on his plea. Moreover, Jones pled guilty in two separate cases so he should not be surprised by receiving two sentences.

{¶ 41} We find that the trial court did not err when it accepted Jones's plea. Accordingly, the fourth assignment of error is overruled.

Length of Sentence

{¶ 42} In his fifth assignment of error, Jones argues that the trial court abused its discretion when it sentenced him to eight years in prison.

{¶ 43} We review felony sentences using the *Kalish* framework. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The *Kalish* court, in a split decision, declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts "must apply a two-step approach." *Kalish* at ¶4.[1]

[1] We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse-of-discretion standard in some instances.

{¶ 44} Appellate courts must first "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." Id. at ¶4, 14, 18. If this first prong is satisfied, then we review the trial court's decision under an abuse-of-discretion standard. Id. at ¶4, 19.

{¶ 45} In the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G).

{¶ 46} 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* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three 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 *Mathis* at ¶38.

{¶ 47} R.C. 2929.11(A) provides that:

{¶ 48} "[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."

{¶ 49} 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.

{¶ 50} The *Kalish* court also noted that R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14.[2] *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.

{¶ 51} In the instant case, we do not find Jones's sentence contrary to law. The sentence is within the permissible statutory range for the counts to which he pled guilty in two separate cases. In the sentencing journal entry, the trial court acknowledged that it had

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[2] In *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320, the Ohio Supreme Court recently addressed *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, holding 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 *Foster*. 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." *Hodge* at paragraphs two and three of the syllabus.

considered all factors of law and found that prison was consistent with the purposes of R.C. 2929.11. On these facts, we cannot conclude that his sentence is contrary to law.

{¶ 52} Having satisfied the first step, we next consider whether the trial court abused its discretion. *Kalish* at ¶4, 19. An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" Id. at ¶19, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 53} The transcript shows that the trial court addressed Jones prior to sentencing. The trial court questioned Jones about his prior convictions. In addition, the trial court gave Jones the opportunity to advocate for a lighter sentence.

{¶ 54} Jones concedes in his brief that his crimes deserved incarceration, but he argues that the trial court acted as "the prosecutor and not the judge," harboring ill-will for Jones after he lied in court regarding his criminal motives. We agree that his crimes necessitate incarceration, and find nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary, or unconscionable.

{¶ 55} We find no abuse of discretion in imposing eight years imprisonment under the circumstances presented in the instant case. Accordingly, the fifth assignment of error is overruled.

Conclusion

{¶ 56} This case has several sentencing errors that must be corrected. First, the court failed to mention restitution for both cases during the sentencing hearing but ordered restitution in the journal entry. Secondly, the court failed to order court costs for both cases as part of the sentence. Third, the court confused which charge carried the four-year sentence in Case No. CR-526447. On remand, the trial court must resentence Jones to correct these errors so that the journal entry directly corresponds to the sentence stated in the presence of Jones at his sentencing hearing.

{¶ 57} Convictions affirmed. Sentences vacated, and case remanded for resentencing consistent with this opinion.

It is ordered that appellant and appellee share the 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.

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

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COLLEEN CONWAY COONEY, JUDGE

MELODY J. STEWART, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR