[Cite as *State v. Wulff*, 2011-Ohio-700.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94087

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALEX WULFF

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518412

BEFORE: Cooney, J., Boyle, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 17, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Alex Wulff ("Wulff"), appeals his sentences for murder, tampering with evidence, and abuse of a corpse. Finding no merit to the appeal, we affirm.

{¶ 2} In November 2008, Wulff was indicted on ten counts. In June 2009, Wulff accepted a plea agreement in which he pled guilty to three counts and the remaining counts were nolled. He pled guilty to murder, tampering with evidence, and abuse of a corpse. The trial court sentenced him to 15 years to life in prison for murder, four years in prison for

tampering with evidence, and one year in prison for abuse of a corpse. All three sentences were ordered to run consecutively, for a total of 20 years to life in prison.

{¶ 3} Wulff filed a delayed appeal, raising two assignments of error.

Consecutive Sentences

{¶ 4} In his first assignment of error, Wulff argues that his consecutive sentences are contrary to law and an abuse of discretion. First, he argues that the court should have made statutory findings pursuant to R.C. 2929.14(E)(4).

{¶ 5} 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]

{¶ 6} 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. If this first prong is satisfied, then we review the trial court's decision under an abuse-of-discretion standard. Id. at ¶4, 19.

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[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.

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

{¶ 8} 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; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. See, also, *State v. Redding*, Cuyahoga App. No. 90864, 2008-Ohio-5739; *State v. Ali*, Cuyahoga App. No. 90301, 2008-Ohio-4449; *State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322; *State v. Sharp*, Cuyahoga App. No. 89295, 2007-Ohio-6324. 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.

{¶ 9} R.C. 2929.11(A) provides that:

{¶ 10} "[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."

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} In the instant case, we do not find Wulff's sentence contrary to law. Wulff's sentence is within the permissible statutory range for murder, set forth in R.C. 2903.02(B), an unclassified felony; tampering with evidence, set forth in R.C. 2921.12(A), a third degree felony; and gross abuse of a corpse, set forth in R.C. 2927.01, a fifth degree felony. In the

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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.

sentencing journal entry, the trial court acknowledged that it had 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.

{¶ 14} 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, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 15} Wulff argues that his sentence constitutes an abuse of discretion because the trial court failed to acknowledge mitigating factors such as Wulff's mental health issues and the break-ins at his home, which occurred in the weeks prior to the murder.

{¶ 16} However, after a thorough review of the record, we find that the trial court did not abuse its discretion in imposing a twenty-year prison sentence. The court began the sentencing hearing by characterizing Wulff's crimes as "heinous and brutal." The record indicates that the trial judge met with both the State and defense counsel prior to sentencing and discussed the matter in detail in her chambers. The judge also read counsels' sentencing memorandum, as well as letters submitted on behalf of Wulff and on behalf of the victim. The trial judge also reviewed the Court Psychiatric Clinic evaluation of Wulff.

{¶ 17} Prior to sentencing, the trial court heard from the victim's family. The trial court also allowed Wulff and his counsel the opportunity to advocate for a lighter sentence. Wulff's counsel spoke of Wulff's time as a Marine and of the break-ins at his home that preceded the murder.

{¶ 18} We find nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary, or unconscionable. Accordingly, the first assignment of error is overruled.

Allied Offenses

{¶ 19} In his second assignment of error, Wulff contends that his convictions for tampering with evidence and gross abuse of a corpse are allied offenses of similar import and should have merged for purposes of sentencing. He claims the record does not identify what "evidence" he tampered with apart from efforts to dispose of the body. The State in its brief and oral argument recites the facts set forth in its supplemental bill of particulars that reflect separate acts of tampering with evidence, unrelated to the burning of the victim's corpse.

{¶ 20} Wulff entered into a plea agreement whereby seven of the ten counts were nolled on the condition he plead guilty to murder, tampering with evidence, and gross abuse of a corpse. Defendant proceeded to voluntarily enter separate guilty pleas on each of the three charges, and seven other charges were nolled.

{¶ 21} In *State v. Antenori*, Cuyahoga App. No. 90580, 2008-Ohio-5987, this court found that "[a] plea of guilty waives all non-jurisdictional defects." Id. at ¶5-6; citing *State v. Watson* (Apr. 8, 1976), Cuyahoga App. No. 34664, citing *Ross v. Court* (1972), 30 Ohio St.2d 323, 324, 285 N.E.2d 25 ("[a] defendant who enters a voluntary plea of guilty while represented by competent counsel waives all non-jurisdictional defects in prior stages of the proceedings."). See, also, *State v. Hooper*, Columbiana App. No. 03 CO 30, 2005-Ohio-7084, ¶7-17 (defendant who enters guilty plea to two distinct offenses waives argument that offenses are, in reality, allied offenses of similar import).

{¶ 22} *Antenori* was initially accepted on appeal by the Ohio Supreme Court and held for a decision in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. However, after the Ohio Supreme Court decided *Underwood*, the *Antenori* appeal was dismissed as improvidently allowed.[3]

{¶ 23} In *Underwood*, the Ohio Supreme Court held that:

{¶ 24} "[w]hen a sentence is imposed for multiple convictions on offenses that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D)(1) does not

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[3] *State v. Antenori*, 124 Ohio St.3d 1219, 2010-Ohio-576, 922 N.E.2d 965. Reconsideration also denied by *State v. Antenori*, 124 Ohio St.3d 1543, 2010-Ohio-1557, 924 N.E.2d 845.

bar appellate review of that sentence even though it was jointly recommended by the parties and imposed by the court." Id. at syllabus.

{¶ 25} We find the instant case analogous to *Antenori* and distinguishable from *Underwood*. Underwood pled no contest to all four counts for which he was indicted. On appeal, the State in *Underwood*, conceded that the convictions were in fact allied offenses of similar import. Whereas, in *Antenori* and the instant case, a plea bargain was entered involving pleas to just some charges and no such concession by the State exists. Moreover, *Underwood* applies to an appellate review of a *jointly recommended sentence*, as opposed to sentences like those in *Antenori* and the instant case, which were imposed by the trial court after the defendant pled guilty to just some of the charges he faced.

{¶ 26} Accordingly, by voluntarily entering two separate guilty pleas, one to tampering with evidence and one to gross abuse of a corpse, as well as allowing himself to be sentenced at the court's discretion, Wulff waived any argument that these charges constituted allied offenses of similar import.

{¶ 27} Moreover, the Ohio Supreme Court recently directed appellate courts to consider the underlying conduct when reviewing possible allied offenses. Pursuant to *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, the State has set forth separate acts of conduct that show Wulff tampered with evidence by washing his truckbed of evidence, and a separate

act of burning the victim's corpse. Therefore, the two offenses do not merge under these circumstances.

{¶ 28} Thus, Wulff's second assignment of error is overruled.

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.

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COLLEEN CONWAY COONEY, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR