

[Cite as *State v. Kimbrough*, 2011-Ohio-89.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94489

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY S. KIMBROUGH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-527417, CR-527546 and CR-528134

BEFORE: Jones, J., Kilbane, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: January 13, 2011

FOR APPELLANT

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Anthony Kimbrough ("Kimbrough"), appeals the judgment of the trial court imposing consecutive sentences. Having reviewed the pertinent law, we hereby affirm the judgment of the trial court.

STATEMENT OF THE CASE AND FACTS

{¶ 2} Kimbrough was indicted in Case Numbers CR-527417, CR-527546, and CR-528134. These cases were consolidated and a joint plea was entered by Kimbrough on November 17, 2009. Kimbrough entered a guilty plea to theft in

CR-527417, a guilty plea to the charges in CR-528134, and a guilty plea to the amended charges in CR-527546.

{¶ 3} On December 10, 2009, the court imposed a total sentence of five-and-one-half years for all three cases. Specifically, the court imposed a sentence of four years in CR-527546, seven months in CR-527417, and 11 months in CR-528134. The sentences in all three cases were to run consecutively. Appellant now appeals.

ASSIGNMENT OF ERROR

{¶ 4} Kimbrough assigns one assignment of error on appeal:

{¶ 5} “[1.] The trial court abused its discretion by imposing consecutive sentences without making findings of fact as required by Ohio Revised Code Section 2929.14(E)(4).”

LEGAL ANALYSIS

{¶ 6} In *State v. Kalish*,¹ the court declared that “[i]n 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. 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 and 19.

¹*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

{¶ 7} Therefore, in the first step of our analysis, we review whether the sentence is contrary to law. 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, quoting *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. 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.

{¶ 8} 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:

“[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 further 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} Here, the trial court noted in its December 10, 2009 journal entry that it considered the purposes of R.C. 2929.11 and all factors required by law. Furthermore, Kimbrough’s sentences are within the permissible statutory ranges. Thus, we find that his sentences are not contrary to law.

{¶ 13} Having satisfied step one, we next consider whether the trial court abused its discretion. *Kalish* at ¶¶4 and 19, 896 N.E.2d 124. “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, 896 N.E.2d 124, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 404.

{¶ 14} In the case at bar, Kimbrough fails to make any specific arguments in his brief beyond the mere assertion that the trial court’s sentence is an abuse of discretion. However, contrary to Kimbrough’s mere assertions, we note that the record reveals that the trial court did not abuse its discretion.

{¶ 15} Review of the journal entry and transcript demonstrates that the trial court judge, “considered all of the purposes and principles of sentencing laws of

the State of Ohio,” pursuant to R.C. 2929.11 and 2929.12, prior to sentencing.² The trial court received comments from defense counsel regarding Kimbrough’s presentence investigation report;³ received information from the prosecution stating that some of the victims would like Kimbrough to serve jail time;⁴ heard from Kimbrough during sentencing; and reviewed all evidence presented. The trial court also notified Kimbrough that he was subject to three years of postrelease control.⁵ See R.C. 2967.28.

{¶ 16} The trial court provided additional rationale when the judge stated the following during sentencing, “*I tend to view these [crimes] as some of the worst crimes that we’ve come across*, except in those that resulted in physical harm or death to another person.”⁶ (Emphasis added.)

{¶ 17} We find nothing in the record to suggest that the trial court’s decision was unreasonable, arbitrary, or unconscionable. Accordingly, the trial court did not abuse its discretion in imposing consecutive sentences in this case.

{¶ 18} Finally, Kimbrough cites *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that *Foster* is no longer good law. In *Ice*, the United States Supreme Court addressed the court’s authority to impose

²See December 10, 2009, sentencing transcript, p. 24.

³Sentencing transcript, p. 30.

⁴Sentencing transcript, p. 24.

⁵Sentencing transcript, p. 31.

⁶Tr. 31.

consecutive sentences. The Court held that Oregon statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial.

{¶ 19} The Ohio Supreme Court has held, however, that *Ice* does not invalidate *Foster*. *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320, paragraph two of the syllabus. Thus, *Foster* is still good law, and under it we find no error.

{¶ 20} Accordingly, Kimbrough's sole assignment of error is overruled.

Judgment 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

MARY EILEEN KILBANE, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR

