

[Cite as *State v. Messina*, 2009-Ohio-5372.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92457

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TABITHA MESSINA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-510541 and CR-499707

BEFORE: Sweeney, J., Kilbane, P.J., and Stewart, J.

RELEASED: October 8, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Tabitha Messina (“defendant”) appeals her sentence of 60 years to life in prison for the murder of her father and his girlfriend. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On September 15, 2008, defendant pled guilty to two counts of aggravated murder and one count of robbery. On October 25, 2008, the court sentenced defendant to life in prison with parole eligibility after 30 years for the murder of Sandra Cover; life in prison with parole eligibility after 25 years for the murder of Richard Messina; and five years in prison for the robbery. The court ordered that the sentences be served consecutively for an aggregate sentence of 60 years to life in prison.

{¶ 3} Defendant appeals and raises one assignment of error for our review:

{¶ 4} I. “The trial court erred by imposing more than the minimum sentence for each conviction and then ordering appellant to serve all sentences consecutively for a total sentence of sixty years to life imprisonment.”

{¶ 5} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 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.

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*, supra, at ¶26.

{¶ 6} In the instant case, pursuant to R.C. 2929.03(A)(1), the minimum sentence that the court could have imposed upon defendant was two concurrent terms of life in prison with parole possibility after serving 20 years for the murder convictions, plus a concurrent term of two years in prison for the robbery. As the capital murder specification was deleted as part of the plea agreement, the maximum sentence that the court could have imposed upon defendant was two consecutive terms of life in prison without the possibility of parole for the murders, plus a consecutive term of eight years in prison for the robbery. In short, defendant faced a sentence ranging from life in prison with parole eligibility after 20 years to life in prison with no possibility of parole.

{¶ 7} Accordingly, defendant’s sentence of life in prison with the possibility of parole after 60 years is within the statutory range.

{¶ 8} Next, we must determine whether the trial court considered the purpose and principles of the felony sentencing statutes as stated in R.C. 2929.11, which are to protect the public and punish the offender, and the seriousness and recidivism factors of R.C. 2929.12 when sentencing defendant.

{¶ 9} In the instant case, the trial court stated the following at defendant’s sentencing hearing:

{¶ 10} “Now, I cannot dispense perfect justice. * * * I can only weigh the factors provided from my experience as a judge and guidance that’s given me by the sentencing statutes.

{¶ 11} “My sentence my must punish the offender and protect the public. My sentence must be commensurate, but not demeaning to the seriousness of this offender’s conduct, and hopefully be consistent with similar crimes.

{¶ 12} “Now, I sympathize with the families of each of the victims for their loss. I empathize with Tabitha for her damaged state attributed to her background. However, I emphasize that while [the defendant does] have this background, it is not a defense to these acts. It does provide a degree of mitigation.”

{¶ 13} Additionally, the trial judge in the instant case was a member of the three-judge panel that presided over the co-defendant’s trial, and took the following into consideration when sentencing defendant:

- The murders of Messina and Cover were “quite simply * * * a tragedy. The two victims of these crimes suffered a senseless and brutal death, each of them”;
- Defendant presented various scenarios of the offenses that “are inconsistent with the evidence”;
- The forensic psychologist’s report indicated that defendant has a “significant * * * potential [for] explosive behavior and * * * anti-social practices”;

- Defendant has been in trouble since she was in first grade and “the history of various kinds of interventions were ineffective”;
- Defendant has been involved with the police since she was in fourth grade, when she lit a fire and attacked another student, grabbing him by the neck and threatening to kill him;
- Defendant is hyperactive, she has trouble conducting herself in social situations, she is aggressive toward her peers, and harmful to herself;
- Defendant was removed from the home in 1999 after “attacking others physically and she engaged in a pattern of behavior in which she would do something anti-social, blame it on someone else and then attempt to get attention by trying to fix it”;
- Defendant has been evaluated and treated for “underlying rage * * * and inappropriate reactions to the violence that occurred in her own life. * * * [Defendant is] scripted for violence and victimization and there was a slow but inexorable accumulation of rage that would exceed her control system”;
- Defendant “does not appreciate how unrealistically bizarrely ridiculous some of the fantasy notions she possesses actually are”;
- Defendant’s ultimate medical diagnosis is “dystemic disorder, which is a depressive disorder that starts in adolescence; drug abuse * * *; post-traumatic stress disorder by history * * *; [and] borderline personality disorders, severe with Narcissistic, dissociative and dependent features *

* * [indicating] an individual who will not change her behavior because [she] always blame[s] other people for any problem.”

{¶ 14} After considering the above, the court found that defendant’s impairment is severe with a significant risk of harming other people. “[W]hen [defendant] is faced with fearful consequences she will rely on what she learned from an early age to try and find a way to deflect this, deflect the situation and lower her chances of either being the object or the cause of the aggression in her home situation.

{¶ 15} “She makes things up as she goes along. She then believes what she says and the new version she feels is necessary to preserve her life. The problem is * * * [she could] easily erupt with suddenness and viciousness unforeseen by anyone, sometimes including the perpetrator.

{¶ 16} “Borderline rage is well known in the literature. And in this individual it accounts for the kind of violence and the lack of appropriate affect that was seen at the scene.”

{¶ 17} Finally, the court stated that the expert psychological report submitted as part of defendant’s pre-sentence investigation explained defendant’s “fabrication, manipulation, and attempt to present herself as a victim. * * * [N]one of this would have occurred, none of it would have occurred but for [defendant]. [D]efendant set it all in motion. Without [defendant], none of this happens.”

{¶ 18} While the court did not expressly mention the felony sentencing statutes on the record, it stated facts and made findings in accordance with the guidelines, showing that proper consideration was given. For example, the court found a significant risk that defendant would harm other people and that she was unlikely to change her behavior. Accordingly, her sentence was designed around the likelihood of recidivism and to protect the public. Additionally, the court found that this incident was “a tragedy,” “senseless,” and “brutal,” thus indicating that the crimes were a serious form of murder for which defendant should be punished.

{¶ 19} Upon review, we find that the court properly considered the purposes of Ohio’s statutory sentencing scheme, as stated in R.C. 2929.11 and 2929.12. See *State v. Pate*, Cuyahoga App. No. 90313, 2008-Ohio-5736, at ¶31 (holding that when “the court placed on the record a range of pronouncements and findings that coincide with various statutory factors,” it could be concluded on appeal that “the sentencing court has sufficiently fulfilled its duty under these statutes”) quoting *State v. Barnette*, Mahoning App. No. 06-MA-135, 2007-Ohio-7209.

{¶ 20} Under the first prong of the *Kalish* test we conclude that the court “clearly and convincingly complied with the pertinent laws.” *Id.* at ¶18.

{¶ 21} We now review the trial court’s decision for an abuse of discretion. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it

implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 22} 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. The United States Supreme Court recently addressed the court's authority to impose consecutive sentences in *Oregon v. Ice* (2009), 129 S.Ct. 711. *Ice* held that statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. *Id.* at 714. However, the effect *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. 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"). See, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478 (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. The trial court thus had authority to impose consecutive sentences on Elmore").

{¶ 23} Therefore, it was within the court's discretion to run defendant's prison sentences consecutively. Additionally, after reviewing the sentencing

hearing transcript – specifically, the factors the court took into consideration as presented earlier in this opinion – we conclude there is nothing in the record suggesting that defendant’s sentence is unreasonable, arbitrary or unconscionable. Given our above reasoning, we find that the court did not abuse its discretion by imposing upon defendant an aggregate prison sentence of 60 years to life. Defendant’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR