

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0041
CURTIS L. ONEIL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0177.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Michael E. Grueschow, 409 South Prospect Street, P.O. Box 447, Ravenna, OH 44266 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Curtis L. ONeil,¹ appeals his sentence following a jury trial in the Portage County Court of Common Pleas in which he was found guilty of rape, aggravated robbery, aggravated burglary, kidnapping, and intimidation during a home invasion. This is appellant's second appeal of his sentence. The instant appeal follows our remand for re-sentencing due to the trial court's failure to properly impose post-

1. Although the indictment states appellant's name as "Curtis L. ONeil," we note that the proper spelling of appellant's name is "Curtis D. O'Neil."

release control. At issue is whether appellant's sentence was unlawful. For the reasons that follow, we affirm.

{¶2} Appellant was indicted for rape, in violation of R.C. 2907.02(A)(2); aggravated robbery, in violation of R.C. 2911.01(A)(1) and (C); aggravated burglary, in violation of R.C. 2911.01(A)(2)(B); kidnapping, in violation of R.C. 2905.01(A)(2)(4) and (C), each being a felony of the first degree; and intimidation, in violation of R.C. 2921.04(B) and (D), a felony of the third degree. Each offense included a firearm specification. The case went to trial in July 2008. After the jury was unable to reach a verdict, the court declared a mistrial and reset the case for a second jury trial in August 2008.

{¶3} The evidence demonstrated that on March 1, 2008, at about 1:30 a.m., appellant and an accomplice, each with guns drawn, forced their way into Brock BeBee's apartment in Kent, Ohio, and, while aiming their guns at him, yelled that this was a robbery.

{¶4} At that time, Brock's girlfriend and his friend Tank were visiting him. When appellant broke into the apartment, Brock and Tank were in the living room and Brock's girlfriend was in Brock's bedroom in his bed watching television.

{¶5} Appellant's accomplice took Brock into the kitchen, while appellant stayed with Tank in the living room. While holding Brock at gunpoint in the kitchen, the accomplice took cash from his wallet. Meanwhile, appellant stole cash from Tank in the living room.

{¶6} Appellant was aware that Brock's roommate held card games in their apartment involving large amounts of money. Appellant asked Brock where the money

was. Appellant started going through the closet in the living room, but did not find anything. He and his accomplice then took Brock and Tank down the hallway and into the back bedroom and forced them to search the closet. When they did not find any money, appellant became angry and said that if they did not find the money, he was going to shoot someone.

{¶7} Appellant's attention was then drawn to Brock's bedroom, in which his girlfriend was watching television in bed. This was 15 minutes after appellant had broken into the apartment. Appellant went into Brock's room, while his accomplice stayed with the others in the kitchen. Appellant pointed his gun at Brock's girlfriend. He then slammed the door shut and she started screaming and crying.

{¶8} Appellant looked through Brock's closet and said, "where's the money?" Brock's girlfriend said she did not know. Appellant then told her to get out of bed and he looked for money under the bed. Then, when she was about to get back in bed, appellant pulled his pants down and, while he was holding his gun on her, forced her to give him oral sex. He then got up and locked the bedroom door. Thereafter, he laid on the bed and told her to get on top of him. Appellant forced her to submit to vaginal intercourse while pointing his gun at her side.

{¶9} Sometime later, appellant's accomplice started banging on the door, yelling, "come on, we gotta get out of here." Some minutes later, appellant got up, opened the bedroom door, and went into the living room. The rape victim remained in the bedroom crying hysterically. As appellant and his accomplice left the apartment, they said to Brock and Tank, "if you call the police ***, we will be back."

{¶10} Following the trial, the jury returned a verdict finding appellant guilty of each offense and firearm specification as charged in the indictment.

{¶11} The court conducted a sentencing hearing. The court considered appellant's lengthy criminal history, including his prior conviction of robbery for which he was sentenced to two years in prison. The trial court sentenced appellant to nine years in prison for rape, eight years for aggravated robbery, eight years for aggravated burglary, five years for kidnapping, and four years for intimidation. The court also sentenced him to three years for each of the five firearm specifications. The sentences for all offenses and firearm specifications were ordered to be served consecutively to each other for a total sentence of 49 years in prison. The court noted that appellant's sentence was necessary "to protect society."

{¶12} Appellant appealed his conviction and sentence. At oral argument, the prosecutor indicated for the first time that the trial court had not properly imposed post-release control and asked us to reverse and remand the matter for re-sentencing. In *State v. O'Neil*, 11th Dist. No. 2008-P-0090, 2009-Ohio-7000, we affirmed appellant's conviction, but remanded the case for re-sentencing pursuant to *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. Because we vacated the sentence, we did not address the other sentencing issues raised as we found them to be moot. We note that, pursuant to the Supreme Court of Ohio's recent holding in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the trial court's error could have been corrected via the remedial procedure provided for at R.C. 2929.191.

{¶13} The trial court re-sentenced appellant on May 7, 2010. The court noted that, based on the evidence presented at trial, each crime committed by appellant was

committed with a separate animus. The court also noted that “what [appellant] did here was horrendous.” The court then imposed the same sentence it had previously imposed. The court also correctly imposed five years mandatory post-release control.

{¶14} Appellant now appeals his re-sentence and asserts two assignments of error. For his first assigned error, he alleges:

{¶15} “The trial court erred in sentencing appellant to consecutive sentences for multiple offenses, and including five (5) consecutive firearm specifications, totaling forty-nine (49) years, which for practical purposes constitutes life imprisonment without parole, which is contrary to law, including Ohio’s statutory sentencing law[,] guidelines and requirements.”

{¶16} First, appellant argues the sentencing scheme regarding consecutive sentencing severed by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, has been revived by the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160. He therefore argues the trial court should have stated its reasons under R.C. 2929.14(E)(4) before imposing consecutive sentences. He also argues the trial court should have made findings of fact when considering the sentencing criteria in R.C. 2929.11 and R.C. 2929.12. He argues that because the trial court did not do so, his sentence was contrary to law. We do not agree.

{¶17} In *Foster*, supra, the court held that because R.C. 2929.14(E)(4) and R.C. 2929.41(A) require judicial fact-finding before a court can impose consecutive sentences, they are unconstitutional and ordered them to be severed. *Id.*, paragraph three of the syllabus. In striking down these and other parts of Ohio’s sentencing scheme, the court held that “[t]rial courts have full discretion to impose a prison

sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Id.*, paragraph seven of the syllabus.

{¶18} The court in *Foster* also held that R.C. 2929.11 and R.C. 2929.12 still “apply as a general guide for every sentencing.” *Id.* at 12-13. In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are “to protect the public from future crime by the offender *** and to punish the offender.” *Id.* R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed on similarly-situated offenders. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.

{¶19} The court in *Foster* held that R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. Rather, “[t]he court is merely to ‘consider’ the statutory factors.” *Id.* at 14. Thus, “in exercising its discretion, a court is merely required to ‘consider’ the purposes and principles of sentencing in R.C. 2929.11 and the statutory *** factors set forth in R.C. 2929.12.” *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶44.

{¶20} Further, in *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, this court held that a trial court’s failure to state on the record that it considered the factors in R.C. 2929.11 and R.C. 2929.12 raises a presumption that the trial court considered them. *Id.* at ¶26, citing *State v. Adams* (1988), 37 Ohio St.3d 295,

paragraph three of the syllabus. Moreover, in *State v. Cyrus* (1992), 63 Ohio St.3d 164, the Supreme Court of Ohio held the burden is on the defendant to present evidence to rebut the presumption that the court considered the sentencing criteria. *Id.* at 166.

{¶21} However, the United States Supreme Court in *Ice*, *supra*, recently held that the right to jury trial under the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. *Id.* at 719.

{¶22} Thereafter, in *State v. Hodge*, 128 Ohio St. 311, 2010-Ohio-6320, paragraph one of the syllabus, the Supreme Court of Ohio adopted the foregoing ruling of the United States Supreme Court in *Ice*, *supra*. However, the court in *Hodge*, paragraph two of the syllabus, held that *Ice* does *not* revive Ohio's former consecutive-sentencing statutes. As a result, the court in *Hodge* held that 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 such findings be made. *Id.*, paragraph three of the syllabus.

{¶23} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. In the first step, we consider whether the trial court “adhered to all applicable rules and statutes in imposing the sentence.” *Id.* at 25. “As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.*

{¶24} Next, if the first step is satisfied, we consider whether the trial court abused its discretion. *Id.* at 27. This court has stated that the term “abuse of discretion”

is one of art, connoting judgment exercised by a court that does not comport with reason or the record. *State v. DelManzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶23, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶25} Addressing the first step of the *Kalish* test, appellant was found guilty by a jury of rape, aggravated robbery, aggravated burglary, and kidnapping, each of which is a felony of the first degree. He was therefore subject to a prison term for each of these offenses of three, four, five, six, seven, eight, nine, or ten years. R.C. 2929.14(A)(1). He was also found guilty of intimidation, a felony of the third degree, for which he was subject to a prison term of one, two, three, four, or five years. R.C. 2929.14(A)(3). He was also convicted of firearm specifications with respect to each of these offenses, providing for additional terms of incarceration of three years for each specification. The maximum sentence that the court could have imposed was 60 years. Appellant's sentence of 49 years was therefore within the statutory range for these offenses.

{¶26} Further, although the trial court did not state on the record that it had considered the purposes of felony sentencing in R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12, it is presumed that it did so. *Greitzer*, supra. Moreover, the record reveals that the trial court considered these factors. At the first sentencing, the court stated that appellant's sentence was necessary to protect society. At the re-sentencing, the court noted that appellant's crimes were "horrendous." The trial court's consideration of these points demonstrated its consideration of the overriding purposes of felony sentencing as noted in R.C. 2929.11: "to protect the public from future crime by the offender *** and to punish the offender." Further, the trial

court's consideration of appellant's prior convictions, including his conviction for robbery, demonstrated its consideration of the factors in R.C. 2929.12.

{¶27} Because the sentence imposed was within the statutory range of sentences for appellant's crimes and the court considered the purposes and factors of felony sentencing, appellant's sentence complied with all applicable statutes and therefore was not clearly and convincingly contrary to law. His sentence therefore complied with the first step of the *Kalish* test.

{¶28} We next address the second step of the test, which is to determine whether the trial court abused its discretion. Appellant presents four arguments in support of his position that the trial court abused its discretion. First, he argues the trial court's sentence of 49 years was disproportionate because such sentence is the equivalent of life in prison, and, as a result, "would probably violate" R.C. 2929.13(A). That section provides that a "sentence shall not impose an unnecessary burden on state or local governmental resources." He argues that "most individuals cease committing serious crimes" in their forties, fifties, or sixties, and that young offenders would normally not be expected to still present a risk of recidivism once they reach those ages. He therefore argues that, before sentencing him, the trial court was required to find that he posed a life-long threat to society. This argument fails for several reasons.

{¶29} First, although appellant chooses to characterize his sentence as a life term, he was not sentenced to life in prison. Next, the life expectancy table attached to appellant's appendix in support of his argument is not in the trial court record and, therefore, cannot be considered on appeal. *State v. Dudas*, 11th Dist. No. 2007-L-074,

2007-Ohio-6731, at ¶15. Further, appellant's argument is not supported by *Foster*, supra, or other pertinent authority. Finally, appellant fails to reference the record in support of his argument that defendants cease committing crimes in their forties, fifties, or sixties, or in support of his argument that his sentence will impose an unnecessary burden on governmental resources, in violation of App.R. 16(A)(7).

{¶30} Second, appellant argues that his sentence was not consistent with sentences imposed on other offenders who have committed similar crimes, in violation of R.C. 2929.11(B). Appellant supports his argument by referencing unauthenticated internet articles, court dockets, and entries he presented at his re-sentencing concerning different sentences imposed on similarly-situated offenders.

{¶31} R.C. 2929.11(B), which provides that a felony sentence must be consistent with sentences imposed on similarly-situated offenders, requires consistency when applying Ohio's sentencing guidelines. However, this court has repeatedly held that sentencing consistency is not derived from the trial court's numerical comparison of the sentence at issue to prior sentences imposed on similarly-situated offenders. See, e.g., *State v. Spellman*, 160 Ohio App.3d 718, 722, 2005-Ohio-2065. Rather, it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency. *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory purposes and factors of felony sentencing.

{¶32} Based on the precedent established by this court, appellant's position that consistency in sentencing is determined by a numerical comparison of sentences lacks merit. Simply because appellant's sentence was not identical to sentences imposed in

other cases does not imply that his sentence was inconsistent with sentences of similarly-situated offenders.

{¶33} As noted above, the trial court considered the purposes and factors of felony sentencing in R.C. 2929.11 and R.C. 2929.12 before imposing appellant's sentence. The court's sentencing thus met the consistency requirement of R.C. 2929.11(B).

{¶34} Third, appellant argues that his sentence was disproportionate to sentences imposed on other sex offenders. In support, he cites *State v. Wilson* (May 26, 2000), 11th Dist. No. 98-L-267, 2000 Ohio App. LEXIS 2275. In *Wilson*, decided before *Foster*, the trial court sentenced the defendant to 45 years to life for the rape of several children under 13 after identifying the presence of certain factors under R.C. 2929.12. Appellant argues that because he was essentially sentenced to life in prison, the trial court was required to find that such factors were present here. However, appellant's argument is flawed because, under *Foster*, trial courts are not required to make findings of fact under the seriousness and recidivism factors in R.C. 2929.12. They are merely required to consider these factors, which, as discussed above, the trial court did.

{¶35} Fourth, as agreed to during oral argument by the parties and the judges, appellant filed a supplemental brief in which he argues that, pursuant to the Supreme Court of Ohio's recent decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, his aggravated robbery was an allied offense to his aggravated burglary and, further, his kidnapping and intimidation were allied offenses to his rape. He therefore

argues that, pursuant to R.C. 2941.25, he should only have been sentenced for aggravated burglary and rape. We do not agree.

{¶36} In 1972, the General Assembly enacted R.C. 2941.25 as a guide for trial courts in determining whether offenses were subject to merger. That section provides:

{¶37} “(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment *** may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶38} “(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 *** may contain counts for all such offenses, and the defendant may be convicted of all of them.” (Emphasis added.)

{¶39} In 1979, the Supreme Court of Ohio in *State v. Logan* (1979), 60 Ohio St.2d 126, adopted a two-step analysis in applying R.C. 2941.25. Under the first step, the trial court determines if the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other. If they do, they are allied offenses of similar import and the court must proceed to the next step. Under the second step, the court considers the defendant’s conduct in determining whether he may be convicted of both offenses. If the court finds that the crimes were committed separately or with a separate animus for each crime, he may be convicted of both offenses. *Id.* at 129.

{¶40} Subsequently, in 1999, the court in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, overruled this approach. The court in *Rance* held that offenses are

allied offenses of similar import if the elements of the offenses correspond to such a degree that the commission of one offense will result in the commission of the other. *Id.* at 636. To determine whether two offenses met this test, the court held that the statutory elements of the offenses should be objectively compared in the abstract. *Id.* If the elements of the crimes so correspond that the offenses are of similar import, the defendant may be convicted of both if the offenses were committed separately or with a separate animus. *Id.* at 638-639.

{¶41} Recently, in *Johnson*, *supra*, the court overruled *Rance*'s requirement that trial courts compare the statutory elements of the offenses in the abstract. The court in *Johnson* held:

{¶42} "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 ***. If the offenses correspond to such a degree that the conduct of the defendant constituting the commission of one offense constitutes [the] commission of the other, then the offenses are of similar import.

{¶43} "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.' ***

{¶44} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶45} "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 [a] separate animus for each offense, then,

according to R.C. 2941.25(B), the offenses will not merge.” (Internal citations omitted and emphasis sic.) *Johnson*, supra, at ¶48-51.

{¶46} The *Johnson* test reflects the approach followed by the Supreme Court of Ohio prior to its decision in *Rance*. *Johnson*, supra, at ¶41-42. Thus, the court’s decisions prior to *Rance* have renewed relevance. Two examples are illuminating. In *State v. Frazier* (1979), 58 Ohio St.2d 253, the defendant and an accomplice pushed their way into the victims’ home, knocking the wife to the floor. Once inside, the assailants severely beat her and threw the husband down a flight of stairs. The court stated:

{¶47} “The robbery and the burglary were committed separately. When the defendant forced the victims’ door open with intent to assault Mrs. Dorr and take the victims’ property, *** the burglary was completed. Whether an intended felony was committed is irrelevant to the burglary charge. *** But where the intended felony is actually committed, a new crime arises for which the defendant may be convicted. The subsequent injuries inflicted upon Mrs. Dorr, in furtherance of *** the taking of the Dorr’s property, constituted a separate offense, robbery. We do not agree with the Court of Appeals that it is impossible to separate these two offenses with reference to the time committed. The forced entry into the victims’ home preceded the beating and was alone sufficient to accomplish the burglary. The *** entry itself could not have given rise to a charge of aggravated robbery since the physical harm was caused not by Mrs. Dorr’s fall as the door was forced open, but by the subsequent beating. The fall gave the defendant access to the victims and their house. The subsequent beating facilitated

the theft of the victims' property. The fall and beating were accordingly distinct in time and in the functions they served." *Id.* at 256.

{¶48} Further, in *State v. Slagle* (1992), 65 Ohio St.3d 597, the defendant broke into the female victim's home through a window with the intent to steal money. His search of her house was "systematic and by stealth." He then entered her bedroom and ordered her to get on her stomach. He got on top of her and proceeded to stab her to death. The court held: "Aggravated robbery and aggravated burglary are not allied offenses of similar import where, as here, the offenses are committed separately ***." *Id.* at 611.

{¶49} Turning our attention to the instant case, appellant committed each of his crimes separately and with a separate animus. Appellant and his accomplice, while armed with guns, forced their way into Brock's apartment with the intent to commit a crime (aggravated burglary). After the burglary was completed, the accomplice forced Brock into the kitchen and, while holding him at gunpoint, stole cash from his wallet. At the same time, appellant stole cash from Tank in the living room. Later, appellant and his accomplice took Brock and Tank down the hallway into the back bedroom and forced them to search for money, threatening to shoot one of the victims if they did not find it. Fifteen minutes after the assailants broke into the apartment, appellant, while holding his gun on Brock's girlfriend, demanded that she tell him where the money was. Appellant thus robbed three victims in several different areas of the apartment during an extended period of time (aggravated robbery).

{¶50} Appellant concedes that when he later raped Brock's girlfriend in his bedroom, the rape was committed with a separate animus (rape). Upon entry into the

bedroom, appellant pointed his gun at Brock's girlfriend and slammed the door shut. While holding his gun on her, he forced her to give him oral sex. Afterwards, he got up, locked the bedroom door, and, while still holding his gun on her, raped her vaginally. Appellant's restraint of the rape victim was prolonged and subjected her to a substantial increase in the risk of harm separate from the rapes. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶40-41 (kidnapping).

{¶51} Finally, after committing these crimes, appellant left the rape victim alone in the bedroom and came out into the living room. There, while leaving the apartment, he told Brock and Tank that if they called the police, they would return (intimidation). The foregoing crimes were not committed at the same time, in the same location, or with the same criminal objective. *State v. Blackman*, 6th Dist. No. L-01-1349, 2003-Ohio-2216, appeal not allowed at 99 Ohio St.3d 1546, 2003-Ohio-4671. Consequently, appellant committed the offenses separately and with a separate animus as to each.

{¶52} Fifth, appellant argues the trial court abused its discretion in sentencing him to "too many three (3) year firearm specifications." He argues that because he only committed two separate acts or transactions, i.e., burglary and rape, pursuant to R.C. 2929.14(D)(1)(b), he should only have been sentenced to six years for two firearm specifications. However, appellant ignores the exception in that section, which gave the trial court discretion to sentence him for each of the five firearm specifications of which he was convicted. R.C. 2929.14(D) provides in pertinent part:

{¶53} "(D)(1)(a) *** [I]f an offender who is convicted of *** a felony also is convicted of *** a specification of the type described in section *** 2941.145 *** of the Revised Code [a firearm specification], the court shall impose on the offender ***:

{¶54} “***

{¶55} “(ii) A prison term of three years if the specification is of the type described in section 2941.145 *** of the Revised Code [a firearm specification] ***;

{¶56} “***

{¶57} “(b) *** *Except as provided in division (D)(1)(g) of this section*, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

{¶58} “***

{¶59} “(g) If an offender is convicted of *** two or more felonies, *if one or more of those felonies is *** aggravated robbery *** or rape*, and if the offender is convicted of *** a specification *** in connection with two or more of the felonies, the sentencing court *shall* impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted *** and, *in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.*” (Emphasis added.)

{¶60} Thus, pursuant to R.C. 2929.14(D)(1)(g), because appellant was convicted of rape and aggravated robbery, the trial court had the discretion to impose three-year sentences with respect to each of the firearm specifications of which he was convicted.

{¶61} As noted above, appellant committed the offenses of which he was charged separately and with a separate animus as to each. As a result, the court’s

sentence on the firearm specifications was based on reason and the record and was, by definition, within the court's discretion. *DelManzo*, supra.

{¶62} In summary, the trial court's sentence was within the applicable felony range. Further, the record indicates that the court considered the purposes and factors of felony sentencing. Moreover, there is nothing in the record indicating that the court abused its discretion. We therefore hold that the trial court complied with the test set forth in *Kalish*, supra, in imposing appellant's sentence.

{¶63} Appellant's first assignment of error is overruled.

{¶64} For his second assigned error, appellant alleges:

{¶65} "The Ohio sentencing law, including that a trial judge may with full discretion, without a jury verdict or admission by offender, impose consecutive sentences for multiple sentences exceeding the statutory maximum for the most serious conviction, determined by the jury, is unconstitutional based on the separation of powers principle embodied in due process of law and by deriving [sic] appellant of his right to jury trial."

{¶66} Appellant's argument is identical to the argument rejected in numerous prior decisions of this court. See, e.g., *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, discretionary appeal not allowed at 113 Ohio St.3d 1513, 2007-Ohio-2208. Appellant's argument has essentially been rejected by the Supreme Court of Ohio as a result of the court's refusal to exercise jurisdiction in *Elswick*, supra.

{¶67} Appellant's second assignment of error is overruled.

{¶68} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.