

[Cite as *State v. Allen*, 2011-Ohio-1757.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-487
v.	:	(C.P.C. No. 09CR-08-5263)
	:	
Dwann T. Allen,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 12, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Dwann T. Allen ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas convicting him on two counts of aggravated robbery. For the following reasons, we affirm.

{¶2} On February 9, 2009, plaintiff-appellee, the state of Ohio ("appellee"), charged appellant in juvenile court with four counts of aggravated robbery and one

count of kidnapping. The charges stemmed from appellant's involvement in a robbery at a restaurant. The robbery occurred on April 13, 2008, and appellant was 17 years old at the time. Appellant was arrested on the charges, but he was subsequently released and placed on electronic monitoring.

{¶3} Thereafter, appellee amended the complaint to indicate that each charge would have been a first degree felony if committed by an adult. Appellee also requested that appellant be bound over for prosecution as an adult in the trial court. On May 15, 2009, the juvenile court held a hearing, as part of the bindover proceedings, to determine whether there was probable cause for the aggravated robbery and kidnapping charges. At the hearing, appellant stipulated to the following facts. Appellant worked at the restaurant that was robbed on April 13, 2008. He had propped open a door of the restaurant so that his codefendants could enter after business hours. When the armed codefendants entered, they took money from the cash registers and safe while holding the restaurant employees "against their will." (May 15, 2009 Tr. 5.) Appellant confessed to being involved in the incident.

{¶4} Appellant stipulated that there was probable cause for the aggravated robbery and kidnapping charges, and the juvenile court accepted the stipulation. The court continued the case for the second phase of the bindover proceedings, which was to determine whether appellant was amenable to care or rehabilitation within the juvenile system and whether the safety of the community required that appellant be subject to adult sanctions. The court also continued appellant's placement on electronic monitoring, notwithstanding his admission to violating the conditions of the release.

{¶5} Meanwhile, on July 22, 2009, appellant killed his girlfriend's 21-month-old daughter, Zy'niah Braswell, apparently by beating her. Appellant was no longer a juvenile, and he was indicted for murder, felonious assault, and child endangerment in Franklin County Court of Common Pleas case number 09CR-4597.

{¶6} On July 31, 2009, the juvenile court convened for the amenability hearing on the aggravated robbery and kidnapping charges. Defense counsel moved for a continuance in order for appellant to undergo a second mental examination because the previous one occurred before the baby's death. Defense counsel also said that more time was needed to prepare for the hearing given the juvenile court's recent indication that it was inclined to bind appellant over to be prosecuted as an adult, in contrast with its previous indication otherwise. The juvenile court denied that it "pre-judged this case." (July 31, 2009 Tr. 7.) Defense counsel responded, "I think you were very clear. At least both the prosecution and the defense were of the opinion that you had decided not to bind [appellant] over." (July 31, 2009 Tr. 8.) And, the prosecutor confirmed, "I was under the impression that you were not going to send [appellant] to Adult Court." (July 31, 2009 Tr. 8.) The court asked if the defense wanted it to recuse from the case, and defense counsel said no, but reiterated the need for a continuance. The juvenile court granted the defense's requests for a continuance and second mental examination.

{¶7} The amenability hearing was continued to August 28, 2009. During the hearing, the juvenile court admitted into evidence a bindover report, which indicated that appellant was previously adjudicated a delinquent for committing a theft offense, that he was placed on probation for the offense, and that he violated his probation three times.

Appellant also withdrew his request for a second mental examination, and the juvenile court placed into evidence the report of the original mental examination. In the report, Dr. Michael Wagner, a psychologist, said that appellant was upset that the aggravated robbery charges would " 'ruin' " his life. (Bindover evaluation, at 19.) Dr. Wagner also indicated that appellant suffers from "Conduct Disorder, Adolescent Type" and "Adjustment Disorder with Depressed Mood." (Bindover evaluation, at 31.) Dr. Wagner stated, however, that appellant does not suffer from any serious mental illness. The psychologist also concluded that appellant was amenable to rehabilitation in the juvenile system, noting that he had undergone prior behavioral counseling as a juvenile and that, at the time of the evaluation, which occurred before the baby's death, he appeared to have a low risk of future violent behavior.

{¶8} Despite Dr. Wagner's opinion, both parties stipulated that appellant was not amenable to rehabilitation in the juvenile system. As part of the stipulation, the parties agreed that the following factors favored binding appellant over to be prosecuted as an adult: (1) the victims of the April 2008 incident at the restaurant suffered psychological harm; (2) appellant's association with the restaurant facilitated the incident; (3) appellant's three accomplices used firearms; (4) there is insufficient time to rehabilitate appellant within the juvenile system; and (5) appellant was on probation when the incident occurred, and he had violated probation three times. The parties stipulated that the only mitigating factor in favor of the juvenile court retaining jurisdiction is that the victims of the robbery suffered no physical harm.

{¶9} The juvenile court recognized the parties' stipulations, noting in particular the psychological harm to the victims and that "most compelling is the issue of whether or not there's sufficient time for him to be rehabilitated." (Aug. 28, 2009 Tr. 10.) The court concluded that the factors favoring a bindover outweighed the one supporting retention of the case. In an entry journalizing the bindover order, the court stated that appellant "is not amenable to the care and rehabilitation" in the juvenile system and that "[t]he safety of the community may require that [appellant] be incarcerated for a period extending beyond his majority." (Sept. 3, 2009 Entry.)

{¶10} After being bound over to the trial court, appellant pleaded guilty to two counts of aggravated robbery for the April 2008 incident. He also pleaded guilty to murdering the baby. He filed a sentencing memorandum, which highlighted that he was an eagle scout on track to attend college or a military academy upon graduation from high school. He also claimed that he was coerced into participating in the robbery and that he was remorseful when police questioned him. Additionally, he included a report from Dr. David Tennenbaum, a forensic psychologist. Dr. Tennenbaum opined that appellant killed the baby in a release of rage generated from his being neglected and abused as a child and from his anxiety about the consequences of the robbery at the restaurant.

{¶11} During the sentencing hearing, appellant asked the trial court to impose a minimum, concurrent sentence of three years imprisonment for the aggravated robbery offenses. He claimed his participation was not as extensive as his codefendants, whose sentences ranged between six years imprisonment for the driver of the getaway

car, to seven and eight years imprisonment for the other armed perpetrators. Lastly, appellant asked to serve the aggravated robbery sentence concurrently with the murder sentence.

{¶12} The prosecutor argued that appellant should serve the aggravated robbery sentence consecutive to the murder sentence. The prosecutor asserted that appellant had manipulated the justice system by violating the conditions of his being released on electronic monitoring and that he committed murder while on release. The prosecutor also noted that the sentences of appellant's codefendants in the robbery reflect their agreement to testify against each other, and he said that, unlike appellant, two of the codefendants had no criminal record.

{¶13} The trial court sentenced appellant to the mandatory 15 years to life imprisonment for the murder conviction. It ordered appellant to serve that sentence consecutive to two 10-year concurrent prison terms for the aggravated robbery offenses. In imposing the maximum prison term for each aggravated robbery offense, the court said that appellant understood the "seriousness" of his participation in the crime. (Apr. 6, 2010 Tr. 44.) Additionally, the court indicated that appellant was only remorseful because he was caught, and it told appellant, "I've heard everything about your background, your youth, your intelligence, your perseverance; and I have also heard enough about your manipulation and, you know, poor decision making, selfishness." (Apr. 6, 2010 Tr. 47-48.) Lastly, the court noted that it considered the robbery and murder offenses separately.

{¶14} In the sentencing entry for the aggravated robbery offenses, the court stated that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." And the court said that it "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14."

{¶15} Appellant has filed an appeal from the aggravated robbery convictions.

He asserts the following assignments of error:

[I.] THE JUVENILE COURT ERRED IN RELINQUISHING JURISDICTION TO THE GENERAL DIVISION, AND VIOLATED THE APPELLANT'S RIGHTS TO DUE PROCESS OF LAW UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

[II.] APPELLANT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION.

[III.] CONTRARY TO LAW, THE TRIAL COURT ERRED BY FOLLOWING *STATE v. FOSTER*, IN CONTRAVENTION OF RECENT U.S. SUPREME COURT PRECEDENT, *OREGON v. ICE*, AND BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. §§ 2929.14(E)(4), 2929.41(A).

[IV.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶16} In his first assignment of error, appellant argues that the juvenile court erred by binding him over to the trial court for prosecution as an adult. A juvenile court has discretion to order a bindover upon finding that a juvenile is not "amenable to care

or rehabilitation within the juvenile system" and that the "safety of the community may require that the child be subject to adult sanctions." R.C. 2152.12(B)(3). In exercising that discretion, the court must determine whether factors favoring a bindover in R.C. 2152.12(D) outweigh factors against a bindover in R.C. 2152.12(E). See R.C. 2152.12(B)(3).

{¶17} Here, appellant, through defense counsel, stipulated to facts in favor of his being bound over to the trial court for prosecution as an adult. Specifically, he stipulated that he was not amenable to rehabilitation in the juvenile system, and he agreed that more factors in R.C. 2152.12 favored a bindover than against. "It is well settled that a stipulation binds its parties to 'all matters of fact and law concerned in the stipulation.'" *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, ¶10 (citations omitted). Given these stipulations, we cannot conclude that the juvenile court erred by ordering the bindover. Therefore, we overrule appellant's first assignment of error.

{¶18} In his second assignment of error, appellant argues that the trial court erred by imposing the maximum prison term for each aggravated robbery offense and by ordering him to serve his aggravated robbery sentence consecutive to his murder sentence. We disagree.

{¶19} As an initial matter, we must determine the standard of review to apply. In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19, this court held that, pursuant to R.C. 2953.08(G), we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶19.

{¶20} After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "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." *Kalish* at ¶4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶21} As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8. Additionally, since *Kalish*, this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100. In any event, appellant's challenge to his sentence fails whether we adhere to *Burton*, and only apply a contrary-to-law standard of review, or we apply the two-step analysis of *Kalish*.

{¶22} A trial court must consider the "overriding purposes" of sentencing, which, under R.C. 2929.11(A), "are to protect the public from future crime by the offender and others and to punish the offender." And, the court must apply R.C. 2929.12, which requires a court to consider the seriousness of the offense and whether the offender is a recidivist. Appellant argues that the trial court did not apply those statutes. In the

sentencing entry, however, the court stated that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." That language in a judgment entry belies a defendant's claim that the trial court failed to consider the purposes and principles in sentencing, pursuant to R.C. 2929.11(A), and the R.C. 2929.12 factors regarding recidivism and the seriousness of the offense. *State v. Small*, 10th Dist. No. 09AP-1175, 2010-Ohio-5324, ¶16.

{¶23} Additionally, appellant asserts that when the trial court sentenced him for the aggravated robbery offenses to a prison term greater than that of his codefendants, it violated R.C. 2929.11(B), which requires that sentences be consistent with those "imposed for similar crimes committed by similar offenders." There is no requirement that codefendants receive equal sentences, however. *Franklin* at ¶12. Differences between defendants allow trial courts to impose different sentences upon individuals convicted of similar crimes. *Id.*

{¶24} Here, the record supports the trial court's decision to impose a sentence on appellant that differed from the sentences of his codefendants. Specifically, the sentences of appellant's codefendants reflect their agreement to testify against each other, and, unlike appellant, two of the codefendants had no criminal record.

{¶25} Furthermore, the trial court stated the following in its sentencing entry: "The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14."

This statement establishes that the trial court satisfied the consistency requirement in R.C. 2929.11(B). *Franklin* at ¶14.

{¶26} Next, appellant argues that the trial court imposed a lengthy sentence for the aggravated robbery offenses because of his committing murder, a completely different crime. The trial court said, however, that it considered those crimes separately.

{¶27} Lastly, appellant contends that the record does not support the trial court's decision to impose a maximum prison term for his aggravated robbery offenses and to order appellant to serve the aggravated robbery sentence consecutive to the murder sentence. For instance, appellant claims that he should have received a less severe sentence because he committed the robbery under strong provocation, a mitigating factor under R.C. 2929.12(C)(2). The trial court rejected this factor, concluding instead that appellant still understood the seriousness of his participating in the crime, and it was within the province of the court to make that determination. See *State v. Vance*, 10th Dist. No. 06AP-1016, 2007-Ohio-4407, ¶84 (recognizing that a court has significant discretion in determining what weight, if any, it assigns to the factors under R.C. 2929.12).

{¶28} Appellant also asserts that the trial court failed to consider his troubled upbringing, scouting accomplishments, and being on track for college or a military academy. The court acknowledged appellant's background and achievements, but, as was within its province, concluded that they carried little weight as mitigating factors.

{¶29} Next, appellant says he showed remorse while talking to police about the robbery. But the trial court concluded that instead of showing true remorse for the consequences of his actions, appellant was expressing sorrow out of self-pity for being caught. This was a reasonable conclusion, given Dr. Wagner's statement that appellant was upset about how the robbery charges would ruin his life. Appellant's lack of remorse is a factor in support of his lengthy sentence because it demonstrates that he is likely to reoffend. See R.C. 2929.12(D)(5).

{¶30} Also demonstrating appellant's likelihood of reoffending is that he was previously adjudicated a delinquent child for a theft offense and that he has not been satisfactorily rehabilitated after that adjudication, given that he violated his probation for the theft offense three times and was still on probation when he participated in the April 2008 robbery. See R.C. 2929.12(D)(2) and (D)(3). And appellant's lengthy sentence is supported by factors in R.C. 2929.12(B) indicating that the robbery was "more serious than conduct normally constituting the offense." Specifically, appellant's relationship with the victims facilitated the robbery, and the incident occurred as part of organized criminal activity. See R.C. 2929.12(B)(6) and (B)(7).

{¶31} For all these reasons, we conclude that appellant's sentence is neither contrary to law nor an abuse of discretion by the trial court. Thus, we need not disturb the sentence under either the *Kalish* or *Burton* standard of review, and we overrule appellant's second assignment of error.

{¶32} In his third assignment of error, appellant claims that the trial court was required to make findings under R.C. 2929.14(E)(4) and 2929.41(A) before imposing

consecutive sentences. Appellant acknowledges that the Supreme Court of Ohio severed those statutes from the felony sentencing law upon concluding that they were unconstitutional. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶99. He argues, however, that *Foster* is wrong, pursuant to *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, where the United States Supreme Court upheld the constitutionality of another state's statutory sentencing scheme allowing a court to impose consecutive sentences based on judicial factfinding.

{¶33} Appellee responds that appellant forfeited his argument by failing to raise it at sentencing. Nevertheless, appellant's argument fails because the Supreme Court of Ohio has held that "*Ice* does not revive the disputed statutory provisions [severed in *Foster*] and that defendants who were sentenced by trial judges who did not apply those provisions are not entitled to resentencing." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶5. Consequently, we overrule appellant's third assignment of error.

{¶34} In his fourth assignment of error, appellant argues that his defense counsel rendered ineffective assistance. We disagree.

{¶35} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Id.* A defendant establishes prejudice if "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶36} Appellant first challenges his defense counsel's failure to raise the issue of *Ice* at sentencing. But appellant cannot establish ineffective assistance of counsel from that challenge, given *Hodge*.

{¶37} Next, appellant challenges defense counsel's stipulation to facts in favor of his being bound over to the trial court for prosecution as an adult on the aggravated robbery offenses. But, even without the stipulations, the record supports the juvenile court's decision to order the bindover because the factors in favor of the bindover outweigh mitigating factors against it and, therefore, establish that appellant was not "amenable to care or rehabilitation within the juvenile system" and that the "safety of the community may require that the child be subject to adult sanctions." See R.C. 2152.12(B)(3).

{¶38} Those factors favoring a bindover are that appellant's relationship with the victims facilitated the robbery, the robbery occurred as a part of organized criminal activity, and appellant was on juvenile probation at the time of the incident. See R.C. 2152.12(D)(3), (D)(4) and (D)(6). And, under R.C. 2152.12(D)(1), it was appropriate for the juvenile court to recognize the psychological harm to the robbery victims, who were held at gunpoint by appellant's accomplices and "told they would be killed if they did not remain" on the ground "for at least five minutes after" the accomplices left. (Aug. 28, 2009 Tr. 8.)

{¶39} To be sure, Dr. Wagner stated in his psychological examination that appellant was amenable to rehabilitation in the juvenile system. The opinion, premised on the belief that appellant had a low risk of violent behavior, was rendered obsolete when appellant subsequently committed murder, however. And, appellant's commission of murder while the aggravated robbery case was pending constitutes "any other relevant factors" favoring a bindover pursuant to R.C. 2152.12(D).

{¶40} Appellant contends that he was not mentally fit for the bindover, a mitigating factor under R.C. 2152.12(E)(6) and (E)(7), based on Dr. Wagner diagnosing him with psychological disorders. Despite this diagnosis, the record demonstrates appellant's emotional, physical, and psychological maturity, which is a factor in favor of a bindover. See R.C. 2152.12(D)(8). Specifically, appellant did not suffer a serious mental illness, according to Dr. Wagner, and he was accomplished in scouting and on track to attend college or a military academy.

{¶41} Appellant also argues that there would have been sufficient time to rehabilitate him in the juvenile system before his twenty-first birthday, which, pursuant to R.C. 2152.02(C)(6), was when the juvenile court would no longer have jurisdiction over him. Given the serious nature of the aggravated robbery offenses, however, which were prosecuted as first degree felonies in the trial court, appellant required "more time for rehabilitation than one whose offenses are less serious." See *State v. Watson* (1989), 47 Ohio St.3d 93, 96. Consequently, because appellant was already 17 years old when he committed the serious offenses, and 18 years old when bound over for adult prosecution, it was reasonable for the juvenile court to conclude that there was

insufficient time to rehabilitate him in the juvenile system before his twenty-first birthday. See R.C. 2152.12(D)(9). See also *Watson* at 96 (recognizing how, due to the age of a juvenile who committed a major felony, there "may not be sufficient time remaining for rehabilitation to take place before the twenty-first birthday"). In fact, appellant's multiple juvenile probation violations indicated that rehabilitation would not occur in the juvenile system at all. See R.C. 2152.12(D)(7).

{¶42} Appellant additionally asserts that he was pressured into participating in the robbery and that the victims were not hurt during the incident. Although these are mitigating factors under R.C. 2152.12(E)(2), (E)(3) and (E)(4), they do not outweigh the greater number of factors supporting the bindover. Because the record supports the juvenile court's decision to bind appellant over for prosecution as an adult, defense counsel was not ineffective for stipulating to facts in favor of the bindover.

{¶43} Next, appellant claims that defense counsel should have presented Dr. Tennenbaum's psychological report during the amenability hearing. Appellant notes that the parties' July 31, 2009 discussion before the juvenile court revealed that the court was considering the murder as a factor in its decision on the bindover matter. According to appellant, the juvenile court would have accorded no weight to the murder charge after considering Dr. Tennenbaum's report about the incident. By portraying appellant as someone with uncontrolled rage, even to the point of killing another, the report demonstrated the need for appellant to be subject to adult sanctions for the protection of the community, however. Stated another way, the report would have bolstered the juvenile court's decision to bind appellant over for prosecution as an adult.

Accordingly, defense counsel was not ineffective for not presenting Dr. Tennenbaum's report during the amenability hearing.

{¶44} Lastly, appellant asserts that defense counsel should have sought the juvenile court judge's recusal because he became biased and predisposed to ordering the bindover upon learning about the murder charge. "The term 'bias or prejudice' 'implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge.' " *In re Disqualification of O'Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, ¶14, quoting *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 469. Here, the judge denied prejudging appellant's case. And, aside from the fact that appellant's murder charge was a relevant factor for consideration on the bindover matter, the judge mentioned other factors, beyond the murder charge, when ordering the bindover. In any event, appellant has not demonstrated that the outcome of the bindover proceedings would have been different with another judge, given our conclusion that the record supports the decision to bind appellant over to the trial court.

{¶45} For all these reasons, we conclude that appellant's defense counsel did not render ineffective assistance. We overrule appellant's fourth assignment of error.

{¶46} In summary, we overrule appellant's four assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and CONNOR, J., concur.
