[Cite as *State v. Pankey*, 2011-Ohio-6461.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-378
v.	:	(C.P.C. No. 10CR-05-2704)
Cheryl L. Pankey,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Vorys, Sater, Seymour and Pease, and *Nathan S. Kott*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Cheryl L. Pankey, from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas following appellant's entry of a guilty plea to one count of robbery.

{¶2} On May 4, 2010, appellant was indicted on one count of aggravated burglary, one count of aggravated robbery, one count of robbery, two counts of kidnapping, one count of receiving stolen property, and one count of having a weapon while under disability.

{¶3} The matter was scheduled for trial on January 24, 2011. On that date, the state informed the court that a plea offer had been made to appellant; specifically, a plea to one count of robbery, a felony of the second degree, with a recommendation of a four-year sentence. Appellant, however, informed the court: "I * * * want to go to trial." (Tr. Vol. 3 at 8.) The next day, the prosecutor indicated to the court that, "after numerous conversations and numerous meetings" with defense counsel, appellant "wishes to change her plea to guilty to count three, an F-2 robbery, * * * a felony of the second degree." (Tr. Vol. 5 at 2.) The prosecutor further stated: "There would be a joint recommendation of a presentence investigation." (Tr. Vol. 5 at 2.) With respect to a sentence recommendation, the prosecutor represented to the court: "I think that is sort of a wait-and-see at this point between now and the presentence investigation." (Tr. Vol. 5 at 3.)

{¶4} On January 25, 2011, appellant entered a guilty plea to one count of robbery, a felony of the second degree. During the plea hearing, the prosecutor gave the following recitation of facts:

> Back on August 30, 2009, at about 2:45 a.m., a young man named Preston Lee was at his apartment [located on] Summit Street * * *. There was a knock on his door. He looked outside and saw the defendant, an unknown person to him, who asked if she could come inside to use the phone to call a cab company. He declined to let her in, but he went outside with his phone, and they together called the cab company. She gave the name Sharon and that she was going to an address down on Summit Street.
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> While they were waiting, he did get her a glass of lemonade and a cigarette. She discarded those on the lawn. But while they were there, two other individuals came up and forced him and her back into his apartment at gunpoint, where they ransacked his place, took his flat screen TV, took his Wii, took

> his credit cards, cell phone, and cut what they thought was the phone line, but it was actually the computer power cord. As a result, he was left inside the bathroom and told to wait for ten minutes. I note that he was baby-sitting for a friend, a ten-year-old boy * * * who was also inside the house at the time and hid under a blanket all while that was going on. He was left inside the bathroom and told to wait ten minutes and then come out. He did call the police. * * * He was, obviously, very traumatized by this. The police responded, collected a cigarette butt and the cup. As a result, it was put into the COTA system. As a result, it did come back to a hit on the defendant, Cheryl Pankey. * * *
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> I would note * * * that the detectives did respond, they talked to Mr. Lee, they told him to call the police if they found any activity upon his credit cards. They did find that within two hours of this event at 4:31 at the Morse Road Walmart the defendant is seen on video using his credit card and buying about a $155 worth of grocery products.

(Tr. Vol. 5 at 9-11.)

{¶5} The trial court conducted a sentencing hearing on March 10, 2011. By entry filed on March 11, 2011, the court sentenced appellant to six years incarceration, and imposed a fine.

{¶6} The record indicates that appellant filed a notice of appeal which was time-stamped on April 15, 2011. On September 2, 2011, appellant filed a "motion to accept late filed appeal." On September 14, 2011, the state filed a response indicating it "does not object to appellant's motion" to the extent it is construed as a motion for delayed appeal.

{¶7} On appeal, appellant sets forth the following two assignments of error for this court's review:

> I. The trial court failed to substantially comply with Crim.R. 11(C)(2)(a), when it accepted Ms. Pankey's plea of guilty to robbery as a principal offender where the state indicated, by

> its factual basis, that she was pleading to complicity to robbery.
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> II. The trial court erred and abused its discretion in imposing a six year sentence on Ms. Pankey when she was substantially less culpable than the average offender, she had previously been offered a four year sentence, and had complied with all the requirements of the original offer, but nonetheless received a sentence at the upper end of the range and higher than the original plea offer.

{¶8} We initially address appellant's motion for leave to file a delayed appeal. Pursuant to App.R. 5(A), delayed appeals may be taken with leave of court in criminal proceedings. App.R. 5(A)(2) states in part: "A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right."

{¶9} In support of her motion, appellant submitted a letter representing that she had mailed her notice of appeal on March 24, 2011, but that the clerk of courts had not filed stamped the notice of appeal until April 15, 2011. As noted under the facts, the state has not objected to the motion. Pursuant to App.R. 5, we find appellant's motion for leave to appeal to be well-taken, and we therefore grant the motion.

{¶10} Under the first assignment of error, appellant asserts that the trial court erred in accepting her guilty plea as a principal offender where the factual basis submitted by the state alleged that appellant was complicit in the offense. Specifically, appellant argues that the prosecution alleged that appellant's co-offenders had deadly weapons on or about their persons and threatened to inflict physical harm on the victim; appellant maintains, however, the state did not allege that she personally engaged in conduct that actually encompassed either element.

{¶11} Pursuant to Crim.R. 11(C)(2), a trial court "must follow a certain procedure for accepting guilty pleas in felony cases," and if a plea "is not knowing and voluntary, it has been obtained in violation of due process and is void." *State v. Lewis*, 7th Dist. No. 10-MA-103, 2011-Ohio-1457, ¶9, citing *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, ¶11. In general, "[a] determination of whether a plea was knowing, intelligent, and voluntary is based upon a review of the record." *State v. Vinson,* 10th Dist. No. 08AP-903, 2009-Ohio-3240, ¶7. Crim.R. 11(C)(2)(a) requires the trial court to determine whether a defendant is "making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved." This court has previously held that "it is not always necessary for a trial court to advise the defendant of the elements of the charge * * * so long as the totality of the circumstances demonstrate that the defendant understood the charge." *State v. Horton,* 10th Dist. No. 09AP-245, 2009-Ohio-5117, ¶8, citing *State v. Rainey* (1982), 3 Ohio App.3d 441, paragraph one of the syllabus.

{¶12} According to appellant, the prosecutor's statement that the victim and appellant were forced back into the apartment by the other two individuals implied to appellant that she was merely offering a plea to complicity to commit robbery, rather than robbery. Appellant contends that the trial court erroneously accepted her guilty plea without advising her that she was pleading guilty to being a principal offender, in contravention of the requirement under Crim.R. 11(C) that the offender be apprised of the nature of the charges. We disagree.

{¶13} Ohio's complicity statute, R.C. 2923.03(A)(2), states in part: "No person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." Pursuant to R.C. 2923.03(F), "[w]hoever

violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶14} Thus, "[t]he defendant is on notice by virtue of this statute [R.C. 2923.03(F)] that evidence may be presented that he is either a principal offender or an accomplice." *State v. Polson* (Feb. 25, 1994), 2d Dist. No. 13974 (trial counsel was not ineffective for failing to move to withdraw guilty plea where prosecution represented in its presentation of facts underlying the charge that appellant was an aider and abettor in the crimes charged). See also *Cooper v. Hudsman* (N.D.Ohio, May 5, 2008), Case No. 3:07 CV 610 ("there is no meaningful difference between pleading guilty to aiding and abetting an offense, or committing the offense itself"; to say that the defendant's guilty plea was knowing, intelligent, and voluntarily entered as to the aiding and abetting offenses, but not as to the principal offenses, "would be illogical given the statutory relationship between a complicity offense and the principal offense"); *State v. Anderson,* 9th Dist. No. 22845, 2006-Ohio-5048, ¶28 ("[a] defendant may be convicted of the principal offense if it is established that the defendant acted in complicity with another").

{¶15} In light of the above authority, we agree with the state that appellant, by virtue of R.C. 2923.03, was on notice that she could be charged, prosecuted, and sentenced as a principal offender. We note that appellant does not dispute that the trial court, in accepting the plea, questioned her to determine that she understood the constitutional rights she would be giving up if she pleaded guilty. The court also questioned appellant about whether she had discussed the charges and the guilty plea form with counsel. A review of the plea colloquy reflects that appellant acknowledged she

had spoken with defense counsel about the charges, and that she had reviewed the plea entry with counsel. Appellant also acknowledged that she signed the entry indicating she was pleading guilty to robbery without specification, a felony of the second degree. The court discussed the maximum penalty for a felony of the second degree, and asked appellant whether she understood that "the law establishes a presumption in favor of a prison term for robbery, a felony of the second degree." (Tr. Vol. 5 at 7.) Following the prosecutor's recitation of the facts, defense counsel waived any further reading of the facts. Upon review, the record reflects that the trial court's explanation of the charge and the prosecutor's recital of the factual basis were sufficient to apprise appellant of the nature of the charges she was facing, and appellant has failed to demonstrate that the guilty plea was not knowing, intelligent, and voluntary.

{¶16} Accordingly, the first assignment of error is without merit and is overruled.

{¶17} Under the second assignment of error, appellant asserts the trial court abused its discretion in imposing a six-year sentence, arguing that it was error for the court to impose a sentence in the upper range. With respect to the standard of review, appellant, citing *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, argues that this court should review a criminal defendant's sentence for an abuse of discretion after determining that a defendant has not demonstrated that the sentence is clearly and convincingly contrary to law.

{¶18} In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶19-21, this court discussed the standard of review in felony sentencing decisions as follows:

> 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.
> 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.
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> 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.

{¶19} Under Ohio's statutory framework, a trial court, in sentencing a criminal defendant, is required to consider the principles and purposes of felony sentencing (R.C. 2929.11), as well as the seriousness and recidivism factors set forth under R.C. 2929.12. With respect to the latter statute, R.C. 2929.12 "identifies a nonexclusive list of factors relating to the seriousness of the offense and recidivism of the offender for the court to consider in imposing a sentence to meet those objectives." *State v. Samuels,* 8th Dist. No. 88610, 2007-Ohio-3904, ¶14.

{¶20} Appellant argues that the trial court abused its discretion by imposing a six-year prison sentence rather than the sentencing recommendation of the prosecutor (four years). Appellant further argues that the trial court failed to consider that appellant

cooperated with authorities regarding the identity of the co-offenders. Appellant also maintains that the court failed to take into consideration the fact she had led a law-abiding life for a significant number of years.

{¶21} The record of the sentencing proceedings indicates that the trial court heard statements from both the robbery victim and appellant. The victim related that appellant's actions had "destroyed my life." (Tr. Vol. 6 at 9.) Appellant offered an apology, stating that she was "very intoxicated" during the events, and that she had made a "bad decision." (Tr. Vol. 6 at 11.) The trial court indicated that appellant's intoxication could not be used "as an excuse for your behavior." (Tr. Vol. 6 at 12.) The court cited the "fear" the victim experienced as a result of appellant's conduct. (Tr. Vol. 6 at 13.) The court also noted its responsibility to protect the public, to punish the offender, and to deter similar crimes, and the court indicated that it had considered the impact on the victim, and appellant's remorse, as well as appellant's prior criminal record. In considering appellant's prior criminal record, and various sentencing factors, the court concluded that none of the relevant factors weighed in her favor. Further, the court considered appellant's mitigation efforts to provide information to police officers about the other co-offenders; the court expressed doubt as to appellant's inability to provide information with respect to the other two co-offenders (in light of appellant having spent an extended period of time with them on the date of the events). The court also cited appellant's conduct in using the victim's credit card shortly after the incident.

{¶22} The trial court's sentencing entry states 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." The court's entry additionally provides that it "weighed the factors as set forth

in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." This court has previously held that such "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." *Allen* at ¶22.

{¶23} In the instant case, this court's review of the record reflects that the trial court considered the relevant statutory guidelines and sentencing factors. Appellant's contention that the trial court erred in failing to impose the four-year sentence originally recommended by the state is not persuasive. As noted by the state, appellant rejected that offer and, under the terms of the plea agreement, the prosecution and defense agreed to a "joint recommendation" for a pre-sentence investigation report ("PSI"). (Tr. Vol. 5 at 2.) Prior to sentencing, the trial court reviewed appellant's PSI, which revealed an extensive criminal record, including prior convictions for obstruction of and possession of stolen mail, burglary, soliciting (multiple convictions), falsification (multiple convictions), possession of drugs (2004), drug paraphernalia (2007), and disorderly conduct (multiple convictions). Further, the record does not support appellant's contention that the trial court had an "implied" erroneous belief regarding appellant's role in the robbery, or that the court sought to "punish" appellant's reluctance to plead guilty. Finally, the term of imprisonment fell within the statutory range set forth under R.C. 2929.14, and therefore the sentence imposed was not contrary to law.

{¶24} Upon review, appellant has failed to demonstrate that the sentence imposed was contrary to law. Moreover, even assuming, as argued by appellant, that this court is required to apply the second step of the *Kalish* analysis, appellant has failed to

demonstrate that the trial court abused its discretion in imposing a six-year sentence. Accordingly, appellant's second assignment of error is not well-taken and is overruled.

{¶25} Based upon the foregoing, appellant's motion for leave to file delayed appeal is granted, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Motion for leave to file delayed appeal granted;
judgment affirmed.

TYACK and DORRIAN, JJ., concur.

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