[Cite as *State v. Banks*, 2011-Ohio-4252.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-69
v.	:	(C.P.C. No. 09CR07-3948)
Guy L. Banks,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 25, 2011

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

Saia & Piatt, Inc., and *Jessica G. Fallon*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Guy L. Banks, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

Factual and Procedural Background

{¶2} On July 2, 2009, a Franklin County Grand Jury indicted appellant with one count of felonious assault in violation of R.C. 2903.11 and one count of having a weapon while under disability in violation of R.C. 2923.13. The felonious assault charge included

a firearm specification pursuant to R.C. 2941.145, a drive-by specification pursuant to R.C. 2941.146, and a body armor specification pursuant to R.C. 2941.1411. Appellant initially entered a not guilty plea to the charges.

{¶3} Appellant withdrew his not guilty plea and entered a guilty plea to one count of felonious assault and the three attendant specifications. The trial court accepted appellant's guilty plea and found him guilty. The trial court sentenced appellant to a four-year prison term for the felonious assault conviction and also imposed a five-year prison term for the drive-by specification, a three-year prison term for the firearm specification, and a two-year prison term for the body armor specification. The trial court ordered all of the prison terms to be served consecutively for a total sentence of 14 years.

{¶4} Appellant appeals and assigns the following error:

> THE TRIAL COURT ERRED IN FINDING THAT A PLEA OF GUILTY TO THE BODY ARMOR SPECIFICATION SET FORTH IN THE INDICTMENT REQUIRES A MANDATORY AND CONSECUTIVE TWO-YEAR SENTENCE AT THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS.

Assignment of Error – Body Armor Specification Sentencing

{¶5} R.C. 2941.1411 provides for a two-year prison term if a defendant's indictment alleges that the defendant wore or carried body armor while committing an offense of violence that is a felony. Appellant was indicted and ultimately pled guilty to this body armor specification. At sentencing, appellant's trial counsel argued that the trial court had discretion whether or not to impose the two-year body armor specification sentence consecutively or concurrently to his other sentences. The trial court concluded that it did not have that discretion and, accordingly, ordered the sentence for the body armor specification to be served consecutively to the other sentences appellant received.

{¶6} Appellant now argues that the trial court had discretion whether or not to impose the two-year prison term for the body armor specification.[1] We disagree.

{¶7} We first address our standard of review in this case. The Supreme Court of Ohio has set forth a two-step process for review of a felony sentence: the appellate court first looks to whether the sentence is clearly and convincingly contrary to law, i.e., whether the sentencing court has complied with all applicable sentencing statutes; if so, the appellate court considers whether the sentencing court abused its discretion in the sentence it imposed. *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912. However, because *Kalish* was a plurality opinion, it is of limited precedential effect. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8; *State v. DeJoy*, 10th Dist. No. 10AP-919, 2011-Ohio-2745, ¶36. In fact, since *Kalish,* we have applied this court's prior precedent in which we have limited our review to whether the sentence was clearly and convincingly contrary to law. Id. (citing *State v. Allen,* 10th Dist. No. 10AP-487, 2011-Ohio-1757).

{¶8} However, appellant did not argue below that the two-year prison term was discretionary. Therefore, appellant has waived all but plain error in this regard. Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Even if an error satisfies these

[1] Appellant concedes that if a trial court imposes sentence for a body armor specification, that sentence must be served consecutively to the other sentences. R.C. 2929.14(E)(1)(b).

prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id; *State v. Litreal,* 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim .R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* (quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus).

{¶9} With these standards in mind, we consider appellant's assignment of error.

{¶10} Sentencing for an offender found guilty of the body armor specification described in R.C. 2929.1411 is addressed by R.C. 2929.14(D)(1)(d), which provides:

> If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

{¶11} Appellant pled guilty to a felony offense of violence and a body armor specification. In that situation, pursuant to R.C. 2929.14(D)(1)(d), "the court shall impose on the offender a prison term of two years." Thus, the trial court was required to impose a two-year prison term.

{¶12} However, appellant points to a later sentence in R.C. 2929.14(D)(1)(d), which states that "[i]f a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term

under division (D)(1)(d) of this section." Here, the trial court imposed additional prison terms under both R.C. 2929.14(D)(1)(a), which relates to firearm specifications, and R.C. 2929.14(D)(1)(c), which relates to drive-by specifications. In that circumstance, appellant argues that the phrase, "is not precluded from imposing," grants the trial court the discretion to impose or not to impose a prison term for the body armor specification conviction. We disagree.

{¶13} Our resolution of this issue centers around the interpretation of R.C. 2929.14(D)(1)(d). The interpretation of a statute is a question of law that we review de novo. *State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148, ¶11. The primary goal in statutory interpretation is to give effect to the intent of the legislature. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶11; *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶61. A court best determines that intent from the words used by the legislature. Id.; *Hairston* at ¶12. Thus, when interpreting a statute, a court must first examine the statutory language. " 'Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.' " *State v. Palmer*, 10th Dist. No. 09AP-956, 2010-Ohio-2421, ¶20 (quoting *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus).

{¶14} By its clear language, R.C. 2929.14(D)(1)(d) makes a two-year prison term mandatory for an offender found guilty of a body armor specification described in R.C. 2941.1411. Id. ("the court shall impose on the offender a prison term of two years"). While arguably unnecessary, the "not precluded" language in the statute reinforces the mandatory nature of the two-year prison term, even when a trial court also imposes

sentences for other specifications, by instructing the trial court that the other sentences do not effect the body armor specification sentence. That language does not convert the mandatory two-year prison term into a discretionary sentence. When read in context, the statutory language is clear and unambiguous. *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, ¶34 (quoting *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997-Ohio-35) (" '[A] court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.' ").

{¶15} Appellant argues that the rule of lenity requires that we interpret this provision in his favor. We disagree. Because we conclude that R.C. 2929.14(D)(1)(d) is not ambiguous, the rule of lenity does not apply. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶40; *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶7.

{¶16} Because the trial court was required to sentence appellant to a two-year prison term for his body armor specification conviction, his sentence was not contrary to law and, therefore, not plain error. Accordingly, we overrule appellant's assignment of error.

{¶17} Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.