

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2009-T-0007
JASON W. KIRKPATRICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007-CR-00905.

Judgment: Vacated and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Jason W. Kirkpatrick, PID A562-137, Lorain Correctional Institution, 2075 South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

Matthew M. Nee, The Law Office of Matthew M. Nee, 14701 Detroit Avenue, #700, Lakewood, OH 44107 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Jason W. Kirkpatrick appeals from the trial court's judgment, which resentence him to a nine-year term of imprisonment after he violated his original sentence of five years of community control.

{¶2} Mr. Kirkpatrick's sentence followed the court's acceptance of Mr. Kirkpatrick's guilty plea to sixteen counts of breaking and entering, and one count of

engaging in a pattern of corrupt activity involving nineteen businesses throughout Trumbull County over a five-month span.

{¶3} At the original sentencing hearing, the court was initially inclined to sentence Mr. Kirkpatrick to a two-year term of imprisonment. Ultimately, the court sentenced Mr. Kirkpatrick to five years of community control, provided he complete a program known as “Life Challenge.” One month later, however, Mr. Kirkpatrick was terminated from the program and was brought before the court for resentencing. Accordingly, on January 8, 2009, Mr. Kirkpatrick was sentenced to a term of imprisonment of nine years for the count of engaging in a pattern of corrupt activity, to be served concurrently to concurrent one-year terms on the remaining sixteen counts of breaking and entering. This was the sentence Mr. Kirkpatrick agreed to in accepting the community control sanctions over a two-year term of imprisonment if he violated the terms of his original sentence.

{¶4} Mr. Kirkpatrick appeals, contending the trial court erred in resentencing him to a nine-year term of imprisonment for his failure to complete “Life Challenge,” arguing that such a lengthy term is manifestly unjust, and not reasonably calculated to punish him or protect the public from future crimes.

{¶5} Although Mr. Kirkpatrick’s contention is without merit, the court sentenced Mr. Kirkpatrick outside the range of imprisonment for a second degree felony for the count of engaging in a pattern of corrupt activity. Thus, we must vacate his sentence and remand for the trial court to sentence Mr. Kirkpatrick anew because his sentence is clearly and convincingly contrary to law.

{¶6} Substantive and Procedural History

{¶7} On December 26, 2007, Mr. Kirkpatrick was secretly indicted by a grand jury on thirty-four counts; nineteen counts of breaking and entering, fifth degree felonies in violation of R.C. 2911.13(A)&(C); nine counts of grand theft, fourth degree felonies in violation of R.C. 2913.02(A)(1)&(B)(1)(2); five counts of vandalism, fifth degree felonies in violation of R.C. 2909.05(B)(1)(b)&(E); and one count of engaging in a pattern of corrupt activity, a second degree felony in violation of R.C. 2923.32(A)(1)&(B)(1).

{¶8} The indictment alleged that Mr. Kirkpatrick had broken into nineteen separate Trumbull County businesses over a five-month span, from September 14, 2006 to January 26, 2007.

{¶9} Mr. Kirkpatrick reached a plea agreement with the state, which the court accepted, pleading guilty to sixteen of the nineteen counts of breaking and entering, and the one count of engaging in a pattern of corrupt activity. The state entered and the court accepted a nolle prosequi on the remaining counts and the matter was referred for a presentence investigation (“PSI”).

{¶10} The first sentencing hearing was held on September 18, 2008. The court reviewed the factors of R.C. 2929.11 and 2929.12, the report that the PSI “did not go well,” and that Mr. Kirkpatrick had an extensive prison record, having already served a total of nine years for three separate felonies in the past. The state urged the maximum sentence be imposed. Mr. Kirkpatrick’s pastor, who is also in charge of Life Challenge, spoke on Mr. Kirkpatrick’s behalf. Although the court was initially inclined to sentence Mr. Kirkpatrick to a two-year term of imprisonment, the court gave Mr. Kirkpatrick the option to choose the two-year term of imprisonment, or five years of community control sanctions, which included successful completion of the twelve-month Life Challenge

program. Mr. Kirkpatrick agreed that in the case of revocation he would serve nine years in prison.

{¶11} Mr. Kirkpatrick was terminated from the program. Accordingly, he was arrested and a resentencing/probation violation hearing was held on January 8, 2009.

{¶12} At the hearing, Mr. Kirkpatrick testified that Life Challenge failed to provide certain promised services, including vocational training, on-site employment opportunities, and substance abuse counseling. In his experience, no such services were provided, and, in fact, the program actually discouraged participants from discussing prior substance abuse.

{¶13} Ms. Traci Hunt, Mr. Kirkpatrick's probation officer, testified that Mr. Kirkpatrick was discharged from Life Challenge on October 18, 2008. When she arrived at work that day, she had a message from the program stating that they had given Mr. Kirkpatrick the option to stay in the program on a different level, or to leave altogether. Mr. Kirkpatrick made a request to contact either Ms. Hunt or his Michigan probation officer, which was denied. Because he was not given that opportunity, he chose to leave the program. After leaving, he contacted Ms. Hunt, who informed him of his noncompliance, that the court's order was very specific, and that because he was terminated from the program, he had to return to court for a resentencing hearing. One week later he was arrested and incarcerated to await his resentencing.

{¶14} Detective Hoolihan, one of the original officers on the case, testified at the resentencing hearing that the Ohio Organized Crime Task Force was very displeased with Mr. Kirkpatrick's original sentence because Mr. Kirkpatrick was allowed to plead guilty to only sixteen of a thirty-four count indictment, even though he had been

incarcerated three other times, including serving time in a federal prison for similar crimes.

{¶15} The state urged the court to sentence Mr. Kirkpatrick to the original nine-year term of imprisonment the court and Mr. Kirkpatrick had agreed to if he violated his sentence of community control. The state asserted that although Mr. Kirkpatrick testified that he chose to leave Life Challenge because it was not what was initially explained to him, he was, in fact, terminated from the program for attempting to construct an electric shotgun and not getting along with others.

{¶16} The court then reviewed the original sentencing hearing, reiterating that Mr. Kirkpatrick was offered a two-year term of imprisonment or the five-year term of community control sanctions, which included the successful completion of the Life Challenge program, and that he would be sentenced to a nine-year term of imprisonment if he did not. Because Mr. Kirkpatrick failed to do as he agreed, the court imposed the nine-year sentence.

{¶17} Mr. Kirkpatrick now timely appeals, raising the following assignment of error:

{¶18} “The trial court erred at Mr. Kirkpatrick’s revocation hearing by not sentencing Mr. Kirkpatrick anew, and by imposing a nine-year prison sentence that is not reasonably calculated to punish Mr. Kirkpatrick or to protect the public from future crime.”

{¶19} Review of Sentence

{¶20} In his sole assignment of error, Mr. Kirkpatrick contends the trial court erred because it did not hold a de novo sentencing hearing upon his revocation. He

specifically contends the nine-year prison term is manifestly unreasonable, and he should not be imprisoned for his failure to complete the Life Challenge program. Although we determine Mr. Kirkpatrick's argument is without merit, as the state concedes, the trial court erred in sentencing Mr. Kirkpatrick to a term of imprisonment that is clearly and convincingly contrary to law as it is outside the range of a second degree felony. Thus, we vacate and remand for a resentencing within the statutory range.

{¶21} Standard of Review Post-Foster

{¶22} “Regarding maximum and consecutive sentences, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio severed and excised R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentences, respectively. The court held that the trial 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 or consecutive sentences. Consequently, when a trial court imposes such punishment on a defendant, we no longer review the record to determine if the record supports its findings.” *State v. Brown*, 11th Dist. No. 2008-L-152, 2009-Ohio-2189, ¶12, quoting *State v. Stewart*, 11th Dist. No. 2008-L-112, 2009-Ohio-921, ¶8, citing *Foster* at paragraph seven of the syllabus. See, also, *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, ¶28.

{¶23} “Rather, when reviewing a felony sentence post *Foster*, we are now required to engage in a two-step analysis recently set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.” *Id.* at ¶13, quoting *Stewart* at ¶9.

{¶24} “The Supreme Court of Ohio explained that ‘[i]n applying *Foster* to the existing statutes, appellate courts must apply a 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 prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.’” Id. at ¶14, quoting *Stewart* at ¶10, quoting *Kalish* at ¶4.

{¶25} “The first prong of the analysis instructs that ‘the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. 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. at ¶15, quoting *Stewart* at ¶11, citing *Kalish* at ¶14. See, also, *State v. Goodnight*, 11th Dist. No. 2008-L-029, 2009-Ohio-2951.

{¶26} Thus, in *Kalish*, in applying this first-prong of the analysis, the Supreme Court of Ohio concluded that the trial court’s sentence was not clearly and convincingly contrary to law “because (1) the trial court ‘expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors in R.C. 2929.12, (2) it properly applied post-release control, and (3) *the sentence was within the permissible range.*’” (Emphasis added.) Id. at ¶17, quoting *Stewart* at ¶13, citing *Kalish* at ¶18.

{¶27} The court, in explaining when a sentence is clearly and convincingly contrary to law, explicitly stated that “[i]f on appeal the trial court’s sentence is, ***, *outside the permissible statutory range, the sentence is clearly and convincingly*

contrary to law, and the appellate court's review is at an end. The sentence cannot stand." (Emphasis added.) *Kalish* at ¶15.

{¶28} In Mr. Kirkpatrick's case, the court did consider the purposes and principles of R.C. 2929.11, as well as the factors in R.C. 2929.12, and further it properly applied conditions of post-release control. The court erred, however, in sentencing Mr. Kirkpatrick to a nine-year term solely on the one count of engaging in a pattern of corrupt activity, a second degree felony, as well as sixteen one-year concurrent terms for the sixteen counts of breaking and entering.

{¶29} The statutory range for a second degree felony is two to eight years. See R.C. 2929.14. Thus, pursuant to the Supreme Court of Ohio's analysis in *Kalish*, our review is at an end, as the sentence is clearly and convincingly contrary to law, being outside the maximum statutory range for a second degree felony.

{¶30} We note that if the trial court had ordered the one-year concurrent terms of imprisonment for the breaking and entering counts to be served consecutively to the maximum eight-year term for the count of engaging in a pattern of corrupt activity, the sentence would not be clearly and convincingly contrary to law, and we would be able to proceed to the second prong of the analysis -- whether the trial court's sentence was an abuse of discretion.

{¶31} We are not, however, faced with such a situation. As Mr. Kirkpatrick was sentenced outside of the statutory range, it is clearly and convincingly contrary to law. Thus, we must vacate his sentence and remand for a new sentencing hearing.

{¶32} For the reasons stated in the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is vacated, and the matter is remanded for further proceedings.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.