

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-022
MICHAEL L. BEVER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000674.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Michael L. Bever, appeals the sentence of the Lake County Court of Common Pleas following his guilty plea to attempted felonious assault. At issue is whether the trial court erred in sentencing him for a post-release control violation. For the reasons that follow, we affirm.

{¶2} On September 15, 2009, the victim Ryan Crittle was standing in the backyard of a private residence. He was in the process of moving a truck and was waiting for towing equipment. Suddenly, without any notice, appellant approached Mr. Crittle from behind and punched him in the back of his head. The blow was so severe that Mr. Crittle sustained a brain injury and inter-cranial hemorrhage and was rendered unconscious. Due to the extent of his injuries, he had to be life-flighted to Metro Hospital in Cleveland for treatment.

{¶3} Appellant waived his right to an indictment, and on December 9, 2009, he pled guilty by way of information to attempted felonious assault, a felony of the third degree, in violation of R.C. 2923.02 and 2903.11(A)(1). His written guilty plea included the admonition that upon release from prison, he would be on post-release control for three years.

{¶4} Prior to his sentencing hearing in the present case, appellant filed a sentencing brief in which he argued his previous sentence in 2007 was void because the trial court had not correctly advised him regarding post-release control. He therefore argued the court could not sentence him for a post-release control violation in addition to his new felony.

{¶5} The following procedural history is based on a statement of facts outlined by the trial court at appellant's sentencing hearing in the present case on January 14, 2010. After this recitation, the parties stipulated to its accuracy. On November 29, 2007, appellant pled guilty in two prior cases in the trial court. In Case No. 07 CR 000478, he pled guilty to trafficking in marihuana, a felony of the fifth degree. In Case No. 07 CR 000702, he pled guilty to attempted felonious assault, a felony of the third

degree. Immediately following his guilty plea on November 29, 2007, appellant was sentenced in both cases. In the drug trafficking case, the court sentenced him to six months in prison. In the attempted felonious assault case, the court sentenced appellant to one year in prison. The two terms were to be served consecutively for a total term of imprisonment of 18 months.

{¶6} While sentencing appellant on his 2007 attempted felonious assault case, the trial court informed him that the Ohio Adult Parole Authority had the option to put him on post-release control for up to three years. In the court's sentencing entry for that case, the court repeated "that post-release control is optional in this case up to a maximum of 3 years ***." Appellant did not object to this admonition regarding post-release control. At the same time, the court sentenced appellant in his drug trafficking case. In that case the court also advised him that he was subject to optional post-release control for up to three years. The court's judgment on sentence in that case also stated that post-release control was optional for up to three years. Appellant entered prison on December 28, 2007. After serving his entire sentence, appellant was released on February 19, 2009, and placed on post-release control by the APA.

{¶7} At the sentencing hearing in the present case, the court stated that its advice in 2007 regarding post-release control was accurate for the drug trafficking charge, but not for the attempted felonious assault charge, for which post-release control was mandatory for up to three years. The trial court found that because it had correctly advised appellant regarding post-release control as to the drug trafficking offense, the court's November 29, 2007 sentence was not void. At the time appellant did not object to this admonition regarding post-release control. The court found that

appellant had either waived or invited any error by failing to object to this warning. The court found that since the 2007 sentence was not void, when appellant committed the present crime, he was on post-release control and had violated its terms. The court also found that, due to his warning concerning post-release control, appellant could not have been and was not placed on mandatory post-release control, but rather was on discretionary post-release control.

{¶8} Further, the trial court noted that two months after appellant committed the present crime but before his sentencing hearing, the APA released appellant from post-release control on November 27, 2009. The court essentially found, however, that because appellant was still on post-release control when he committed the present crime, the APA's later release of appellant from post-release control was irrelevant to whether the court had authority to sentence him for a post-release control violation.

{¶9} The court sentenced appellant to five years in prison for attempted felonious assault and one year for the post-release control violation, the two terms to be served consecutively, for a total term in prison of six years. Appellant appeals his sentence, asserting two assignments of error. For his first assigned error, he contends:

{¶10} "The trial court erred when it imposed a consecutive prison sentence for a violation of postrelease [sic] control in violation of the defendant-appellant's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article 1 of the Ohio Constitution."

{¶11} R.C. 2929.19(B)(3), which sets forth the trial court's obligations at a sentencing hearing, provides in pertinent part:

{¶12} “(3) *** [I]f the sentencing court determines at the sentencing hearing, that a prison term is necessary or required, the court shall do all of the following:

{¶13} “***

{¶14} “(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, *** or *for a felony of the third degree *** in the commission of which the offender caused or threatened to cause physical harm to a person.*” (Emphasis added.)

{¶15} R.C. 2967.28(B) provides for the *mandatory* imposition of post-release control for a felony of the third degree resulting in physical harm to the victim, such as appellant’s prior attempted felonious assault case. That section provides in pertinent part: “Each sentence to a prison term for a felony of the *** third degree *** in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment.”

{¶16} Alternatively, R.C. 2967.28(C) provides for the *optional* imposition of post-release control for other crimes, such as appellant’s previous drug trafficking case: “Any sentence to a prison term for a felony of the *** fifth degree *** shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender’s release from imprisonment, if the parole board *** determines that a period of post-release control is necessary for that offender.”

{¶17} In *State v. Biondo*, 11th Dist. No. 2008-P-0028, 2008-Ohio-6560, this court summarized recent Supreme Court of Ohio case law regarding a trial court's failure to advise a defendant regarding post-release control, as follows:

{¶18} "The following conclusions can be drawn from the [Supreme Court of Ohio] authority discussed above. First, a court must advise a defendant that post-release control sanctions will be a part of his or her sentence at the sentencing hearing and journalize a similar notification in its judgment entry on sentence. [*State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085]. The failure to do so renders a defendant's sentence void. [*State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795]; [*State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197]. To the extent a defendant is still incarcerated, the state may move the trial court to resentence the defendant because the trial court retains continuing jurisdiction over a criminal matter for purposes of correcting a void judgment. *Jordan*, supra; [*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126]; *Cruzado*, supra; *Simpkins*, supra. However, where a defendant has served his term of incarceration on the underlying sentence, the parole authority lacks the authority to impose post-release control upon a defendant and there can be no remand for resentencing. *Hernandez*, supra; *Cruzado*, supra. Under such circumstances, the defendant who has served his prison term is entitled to release from post-release control. *Id.*" *Biondo*, supra, at ¶28.

{¶19} Appellant argues that because the trial court incorrectly advised him during his 2007 sentencing that post-release control was optional for up to three years, instead of mandatory, as required by R.C. 2967.28(B)(3) for his conviction of attempted felonious assault, his sentence was void. He therefore argues the trial court did not

have authority to sentence him for a post-release control violation based on his commission of his present felony. He argues that because he has already served his entire sentence for his convictions in 2007, his case cannot be remanded for resentencing, and his sentence on the post-release control violation must be reversed.

{¶20} At the sentencing hearing in the instant case, the trial court found that the APA was authorized to put appellant on discretionary post-release control because, in sentencing him in his 2007 drug trafficking case, the court correctly informed him that post-release control was optional for up to three years. Appellant concedes on appeal that the trial court correctly advised him as to post-release control with respect to his prior drug trafficking offense. The court found: “[A]s far as this Court is concerned, the Defendant was on post release control at the time that this [present offense] occurred. Whether it was mandatory post release control or option[al] post release control is going to be a question of law. I’m taking the position that it was optional post release control, because he couldn’t have been on mandatory post release control.” The court found that because appellant was on optional post-release control when he committed his present felony, it had authority to sentence him for the post-release control violation. The trial court thus found that any error resulting from his failure to correctly advise appellant concerning mandatory post-release control for his prior attempted felonious assault offense was harmless.

{¶21} Appellant challenges this finding, arguing that he was not placed on optional post-release control because his sentence in his prior drug trafficking case was six months and therefore completed before he began serving his sentence on the attempted felonious assault case. However, the record does not reflect the sequence in

which the sentences were served. Appellant may well have served the sentence on his prior attempted felonious assault case prior to the sentence on his trafficking case. In any event, even if appellant had served the six-month trafficking sentence first, R.C. 2967.28(C) provides that “[a]ny sentence to a prison term for a felony of the *** fifth degree [such as appellant’s prior drug trafficking conviction] *** shall include a requirement that the offender be subject to a period of post-release control of up to three years *after the offender’s release from imprisonment*, if the parole board *** determines that a period of post-release control is necessary for that offender.” (Emphasis added.) Thus, even if appellant had served the six-month term first, post-release control could not have been imposed until after he was released from prison on both convictions.

{¶22} Appellant also argues that, due to a letter from the APA to appellant releasing him from post-release control effective November 27, 2009, the trial court had no authority to sentence him for his post-release control violation on January 14, 2010. Appellant argues the APA sent this letter due to its determination that the sentence was flawed due to the trial court’s failure to properly advise appellant concerning post-release control. However, there is nothing in the record showing this was the reason for the APA’s release of appellant from post-release control. Appellant failed to present any evidence concerning the offense for which he was on post-release control at the time he committed the present offense. Appellant’s argument that he was on mandatory rather than discretionary post-release control at the time he committed the present offense would be pure speculation in which this court cannot indulge. We are,

therefore, left to consider the effect, if any, of the APA's release of appellant from post-release control two months after appellant committed the present crime.

{¶23} The issue is resolved by R.C. 2929.141, which provides:

{¶24} “(A) Upon the *** plea of guilty to a felony by *a person on post-release control at the time of the commission of the felony*, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

{¶25} “(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. *** A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

{¶26} “(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.” (Emphasis added.)

{¶27} Thus, under this statute the pivotal consideration is whether appellant was on post-release control at the time he committed the present crime. In *State v. Berry III*, 5th Dist. No. 06-CAA-10-0079, 2007-Ohio-4242, the Fifth District held:

{¶28} “By statute, it is within the trial court’s authority to impose a prison term for a violation of post release control at the same time it sentences for a new felony. Appellant was on post release control at the time of the commission of the new felony and on the date of his guilty plea to that felony. Appellant violated the terms of his post release control and was subject to sentencing for the new felony and the post release control violation.” Id. at ¶16.

{¶29} The concurring opinion in *Berry III* amplified the court’s holding in that case as follows:

{¶30} “I do not find the date Appellant entered his plea as relevant in determining whether *** a post-release control sanction can be imposed following Appellant’s commission of a new felony. I find the sole determinate factor is whether Appellant was on post-release control at the time of the commission of the new felony. If so, the sanction may be imposed upon his *** plea of guilty to the new felony, *even if the post-release control expired before the conviction, plea or sentencing.*” (Emphasis added.) Id. at ¶18.

{¶31} It is undisputed that: (1) appellant was on post-release control at the time he committed the present crime and that (2) the trial court had correctly notified him that he could be placed on post-release control as to his 2007 drug trafficking case for up to three years. Based on the foregoing authority, because the trial court correctly advised appellant concerning post-release control concerning his prior drug trafficking case, his prior sentence was not void. The trial court was thus authorized to sentence appellant for the post-release control violation. It is, therefore, irrelevant that, two months after appellant committed the present crime, the APA released him from post-release control.

{¶32} Next, appellant argues the trial court erred in requiring him to prove prejudice. Appellant's argument would have merit if the court's prior sentencing judgment was void. However, because we hold the judgment was not void, it was incumbent on appellant to object to any alleged error in the entry and to demonstrate prejudice on appeal. Appellant concedes he did not object to the trial court's admonition regarding post-release control in its 2007 sentence. As a result, any error resulting from the court's warning was waived or invited. Moreover, since appellant concedes the trial court correctly advised him about post-release control in his trafficking case, any error resulting from the court's failure to correctly advise him regarding post-release control in the attempted felonious assault case was harmless. Even if we were to review the issue for plain error, the result would be the same. Appellant has failed to argue, let alone demonstrate, that if he had been correctly advised regarding mandatory post-release control for his prior attempted felonious assault case, he would not have pled guilty and instead would have insisted on going to trial.

{¶33} Appellant provides a general survey of the Supreme Court of Ohio's cases regarding the failure of the trial court to advise a defendant concerning post-release control. However, he does not cite any authority suggesting, let alone holding, that a trial court is divested of authority to sentence a defendant for a post-release control violation in the circumstances presented here.

{¶34} We therefore hold that, because the trial court correctly advised appellant concerning post-release control with respect to his prior drug trafficking conviction in both the sentencing hearing and entry, his sentence was not void and the APA had authority to place him on discretionary post-release control upon his release from

prison, as it did here. Further, because appellant was still on post-release control at the time he committed the instant offense, the trial court had the authority to sentence him for the new felony as well as appellant's violation of post-release control. Thus, any error resulting from the court's failure to correctly advise him regarding post-release control regarding his prior attempted felonious assault conviction was harmless.

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

{¶36} For his second assignment of error, appellant alleges:

{¶37} "The trial court erred by sentencing the defendant-appellant to the maximum term of imprisonment."

{¶38} Appellant concedes his sentence was not contrary to law, but instead argues for the first time on appeal that the trial court abused its discretion in imposing the maximum sentence because, he claims, the court did not give "careful and substantial deliberation" to the pertinent seriousness and recidivism factors in R.C. 2929.12.

{¶39} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, 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.* at paragraph seven of the syllabus.

{¶40} Post-*Foster*, "appellate courts must apply a two-step approach [in reviewing a felony sentence]. 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." *State v. Kalish*, 120

Ohio St.3d 23, 2008-Ohio-4912. If this first prong is satisfied, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in R.C. 2929.11 and R.C. 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. See *Id.* at 27. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which 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. The Second Appellate District also recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶41} In *Foster*, the Supreme Court of Ohio also held that two statutory sections, R.C. 2929.11 and R.C. 2929.12, "apply as a general guide for every sentencing." *Foster*, *supra*, at 12. Pursuant to *Foster*, "[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 of sentencing in R.C. 2929.11 and the statutory guidelines and factors set forth in R.C. 2929.12." *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶44.

{¶42} It is well-settled that R.C. 2929.12 does not require a sentencing court to discuss the statutory criteria on the record or even to state on the record that it has considered them. *State v. Chapdelaine*, 11th Dist. No. 2009-L-166, 2010-Ohio-2683, at ¶14. In fact, the Court in *Kalish* noted that where a sentencing court does not

memorialize on the record that it considered the factors, a presumption arises that the factors were properly considered. *Id.* at 27, f.n. 4. “By implication, as long as there is some indication that the factors were considered, a reviewing court is bound to uphold the sentence.” *Chapdelaine*, *supra*.

{¶43} Turning our attention to the instant case, as noted above, appellant concedes on appeal that the trial court’s sentence was not contrary to law. In so conceding, he also agrees that the court complied with all applicable statutes, including R.C. 2929.12, in imposing his sentence. *Kalish*, *supra*, at 23. In support of his argument that the trial court abused its discretion in imposing its sentence, he argues the court failed to sufficiently consider three factors under R.C. 2929.12.

{¶44} First, he argues the court failed to sufficiently consider appellant’s stated remorse. However, the court was also presented with evidence of appellant’s lack of genuine remorse. At the time of appellant’s arrest when the sheriff’s deputies attempted to speak to him about what he had done, when referring to the victim, appellant said, “I don’t care about that kid ***. ”

{¶45} Next, appellant argues the court disregarded appellant’s acknowledgement of his drug and alcohol addiction and his desire to obtain treatment. However, appellant made these points at the hearing, and there is nothing in the record to indicate the court disregarded them.

{¶46} Finally, appellant argues the court failed to sufficiently consider his version of the crime and that he did not intend to harm the victim. While appellant told the court that Mr. Crittle became loud and came toward him in “sort of a menacing type of

manner,” the court noted Mr. Crittle had told police that he “was blind-sided from behind, had no idea it was coming.”

{¶47} While the trial court obviously did not find appellant’s statements credible, he cannot dispute that the court considered the statutory factors. In *Delmanzo*, supra, this court held: “A trial court is not required to give any particular weight or emphasis to a given set of circumstances; it is merely required to consider the statutory factors in exercising its discretion.” Id. at ¶23.

{¶48} Moreover, the court weighed the other, pertinent factors under R.C. 2929.12. The court considered appellant’s lengthy history of criminal convictions. As a juvenile, he was found to be unruly in June 1999. He was found to be truant in August 1999. He had two probation violations in that case. In September 1999, he was found guilty of disorderly conduct. In August 2000, he was found guilty of criminal damaging. He had six probation violations in that case. In May 2003, he was found guilty of domestic violence and aggravated menacing. He had nine probation violations in that case. In October 2003, he was found guilty of criminal damaging. In that same month he was found guilty of felony assault. He had five probation violations in that case. In January 2004, he was found guilty of felony criminal damaging. In October 2004, he was found guilty of assault. In May 2005, he was found guilty of receiving stolen property, theft, possession of drug paraphernalia, and drug abuse. In June 2005, he was found guilty of criminal damaging, theft, two counts of assault, and two counts of drug abuse. In January 2007, he was found guilty of receiving stolen property, criminal mischief, possession of drug paraphernalia, aggravated menacing, disorderly conduct, and criminal mischief. As an adult, in June 2007, he was found guilty of possession of

drug paraphernalia and possession of marijuana. Also in that same month, he pled guilty to attempted trafficking in drugs. In December 2007, he pled guilty to assault. On November 29, 2007, he pled guilty to trafficking in marijuana and attempted felonious assault and on the same day was sentenced to prison for both offenses. It is while appellant was on post-release control after his release from prison for his conviction in those two cases that he committed the present felony.

{¶49} The court also noted appellant's lack of response to the court's previously-imposed sanctions and the serious physical harm suffered by the victim.

{¶50} As this court stated in *Chapdelaine*, supra, "It appears the court concluded appellant's long history of criminal conduct and his inability to respond favorably to previous sanctions outweighed appellant's expressions of remorse. Such a decision is well within the trial court's discretion and cannot be considered arbitrary or unreasonable." *Id.* at ¶24.

{¶51} Likewise, here, in considering the relevant seriousness and recidivism factors, the court obviously found appellant's extensive criminal history and failure to respond to previously-imposed sanctions outweighed his expressions of remorse. We cannot say that in doing so the court abused its discretion.

{¶52} The trial court indicated on the record and in its sentencing entry that it had considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. Moreover, the record indicates that the trial court expressly considered the sentencing guidelines and the pertinent factors in those sections.

{¶53} Appellant pled guilty to attempted felonious assault, a felony of the third degree. He was subject to a prison term of one, two, three, four, or five years. R.C. 2929.14(A)(3). He was also found guilty of having violated post-release control for his previous drug trafficking conviction in 2007, for which he was subject to an additional prison term of up to one year. Appellant's sentence of six years was thus within the statutory range for these offenses. Because the trial court sentenced appellant within the statutory range and considered the statutory purposes and guidelines of felony sentencing and the seriousness and recidivism factors, we hold the trial court's sentence was not clearly and convincingly contrary to law. Further, the trial court did not abuse its discretion in sentencing appellant.

{¶54} We do not agree with appellant's suggestion that the trial court was required to make findings under R.C. 2929.12 that were supported by the record. First, as noted above, the court considered the seriousness and recidivism factors of R.C. 2929.12. Moreover, in *Foster*, the Court held that trial courts are not required to make findings under R.C. 2929.11 and R.C. 2929.12; they are merely required to "consider" the sentencing guidelines and factors set forth in those statutes. *Foster*, supra, at 12-14.

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

{¶56} For the reasons stated in the Opinion of this court, the assignments of error are not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.