[Cite as *State v. Kirkpatrick*, 2010-Ohio-6578.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0025**
- vs -	:	
JASON W. KIRKPATRICK,	:	
Defendant-Appellant.	:	

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

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and LuWayne Annos, *Assistant Prosecutor*, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

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 his resentencing by the Trumbull County Court of Common Pleas, which, after our remand in *State v. Kirkpatrick*, 11th Dist. No. 2009-T-0007, 2009-Ohio-6519 (*Kirkpatrick* I), resentenced him to a nine-year term of imprisonment. In *Kirkpatrick* I, we determined that Mr. Kirkpatrick's first appeal had merit insofar as his nine-year sentence upon revocation of community control was contrary to law because he was sentenced outside of the range for a second-degree felony.

{¶2} As his sentence is now within the applicable range, it is not contrary to law, nor do we find the trial court abused its discretion in sentencing Mr. Kirkpatrick to what he agreed to serve if he violated the terms of his community control.

{¶3} **Substantive and Procedural History**

{¶4} Mr. Kirkpatrick originally pled guilty to 16 counts of breaking and entering, and one count of engaging in a pattern of corrupt activity that involved 19 businesses throughout Trumbull County over a five-month span.

{¶5} At Mr. Kirkpatrick's first sentencing hearing, the court was initially inclined to sentence Mr. Kirkpatrick to a two-year term of imprisonment. Mr. Kirkpatrick, however, urged the court to consider community control, and, specifically, his participation in the Teen Challenge Program ("Teen Challenge"). After his pastor and the director of the program testified, the court reconsidered and sentenced Mr. Kirkpatrick to five years of community control, provided he complete Teen Challenge.

{¶6} Less than one month later, however, Mr. Kirkpatrick was terminated from Teen Challenge and brought before the court for resentencing. As advised during his original sentencing hearing, the court sentenced Mr. Kirkpatrick to a total term of imprisonment of nine years. This was the sentence Mr. Kirkpatrick agreed to in accepting the community control sanctions over the two-year term of imprisonment the court originally considered. Specifically, however, the court sentenced Mr. Kirkpatrick to serve nine years on the count of corrupt activity, a second degree felony, to be served concurrently to one-year concurrent terms on the remaining sixteen counts of breaking and entering.

{¶7} On appeal, Mr. Kirkpatrick contends his sentence was manifestly unjust and not reasonably calculated to punish him or protect the public from future crimes. Although we found his contention without merit, we reversed and remanded the case because Mr. Kirkpatrick was resentenced outside the applicable range for a second-degree felony, and thus, his sentence was contrary to law.

{¶8} The trial court held a third sentencing hearing upon remand, in which Mr. Kirkpatrick was sentenced anew. The court heard testimony from Mr. Kirkpatrick and arguments of his attorney detailing potentially mitigating factors of Mr. Kirkpatrick's bipolar disorder and the fact that Mr. Kirkpatrick engaged in nonviolent crimes. Mr. Kirkpatrick further argued that he did not construct an electric shot gun, a fact that was noted in the record as the reason why he was expelled from Teen Challenge, but rather a simple hand buzzer.

{¶9} The court reminded Mr. Kirkpatrick of his original agreement to a nine-year sentence if he failed to complete the program and noted that Mr. Kirkpatrick has been in prison three times in the past. The court then sentenced Mr. Kirkpatrick to an eight-year term of imprisonment on the count of engaging in a pattern of corrupt activity, to be served consecutively to one-year concurrent terms for each of the remaining counts of breaking and entering, for a total term of imprisonment of nine years.

{¶10} Mr. Kirkpatrick now appeals, raising four assignments of error for our review:

{¶11} "[1.] The trial court erred 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.

{¶12} "[2.] The trial court erred by imposing a prison sentence upon Mr. Kirkpatrick because the community control sanction violated the Establishment Clause of the United States Constitution.

{¶13} "[3.] The trial court erred by imposing a prison sentence upon Mr. Kirkpatrick because the community control sanction violated the Free Exercise Clause of the United States Constitution and Article One, Section Seven of the Ohio Constitution.

{¶14} "[4.] Mr. Kirkpatrick was denied effective assistance of counsel at the Second Revocation Hearing on January 28, 2010."

{¶15} **Sentencing Standard of Review Post-*Foster***

{¶16} "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." *Kirkpatrick* I at ¶22, quoting *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.

{¶17} "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 ¶23, quoting *Brown* at ¶13, quoting *Stewart* at ¶9.

{¶18} "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 ¶24, quoting *Brown* at ¶14, quoting *Stewart* at ¶10, quoting *Kalish* at ¶4.

{¶19} "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 ¶25, quoting *Brown* at ¶15, quoting *Stewart* at ¶11, citing *Kalish* at ¶14.

{¶20} "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."'" Id. at ¶26, quoting *Brown* at ¶17, quoting *Stewart* at ¶13, citing *Kalish* at ¶18.

{¶21} "Once a reviewing court is satisfied the sentence is not contrary to law, then the court must engage in the 'second prong of the analysis, which requires an

appellate court to determine whether the trial court abused its discretion in selecting a sentence with the permissible range.'" *Brown* at ¶18, quoting *Stewart* at ¶14, citing *Kalish* at ¶17.

{¶22} "In *Kalish*, the Supreme Court of Ohio found no abuse of discretion, noting that the trial court 'gave careful and substantial deliberation to the relevant statutory considerations [of R.C. 2929.11 and R.C. 2929.12],' and that there was nothing in the record to suggest the trial court's decision was unreasonable, arbitrary, or unconscionable." Id. at ¶19, quoting *Stewart* at ¶16, quoting *Kalish* at ¶20.

{¶23} **Review of Mr. Kirkpatrick's Sentence**

{¶24} A review of Mr. Kirkpatrick's sentence reveals his assignments of error are without merit. First, Mr. Kirkpatrick's sentence is neither clearly and convincingly contrary to law, nor an abuse of discretion, as the court considered the purposes of R.C. 2929.11 and R.C. 2929.12, properly applied post-release control, and sentenced Mr. Kirkpatrick within the permissible range. Moreover, the trial court sentenced Mr. Kirkpatrick to the sentence Mr. Kirkpatrick agreed to when he pled guilty to the substantive crimes of 16 counts of breaking and entering and one count of engaging in a pattern of corrupt activity. Mr. Kirkpatrick elected this sentence after urging the court to allow him the opportunity to enroll in Teen Challenge and serve a term of community control.

{¶25} Although Mr. Kirkpatrick originally agreed to the nine-year term of imprisonment, at his second (first revocation) and third (second revocation) hearing, the court allowed Mr. Kirkpatrick and his attorney to present potentially mitigating factors for the court to consider when sentencing him. At the third hearing, the court noted Mr.

Kirkpatrick's lengthy criminal history and that he has served in prison at least three times prior, including a term in a federal prison.

{¶26} It is clear the trial court, which was familiar with Mr. Kirkpatrick's case, considered the relevant factors during sentencing, including those presented in mitigation. Thus, there is nothing in the record to suggest the trial court's decision was unreasonable, arbitrary, or unconscionable. See *Brown* at ¶32, *Stewart* at ¶16. Further, we defer to the trial court in this matter since "the trial court was in a better position than this court to make that determination." *Brown* at ¶32, quoting *Stewart* at ¶30, citing *State v. Eckliffe*, 11th Dist. No. 2001-L-105, 2002-Ohio-7136, ¶32, citing *State v. Nutter* (Aug. 24, 2001), 3d Dist. No. 16-01-06, 2001 Ohio app. LEXIS 3752, 5. "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." *Brown* at ¶32 (citations omitted).

{¶27} Mr. Kirkpatrick's first assignment of error is without merit.

{¶28} **Constitutional Errors**

{¶29} Mr. Kirkpatrick next argues that the religious connotations of Teen Challenge infringed on his constitutional rights. Mr. Kirkpatrick cannot now argue his sentence is unconstitutional because it violates the establishment clause of the United States Constitution and the free exercise clause of the Ohio Constitution, when it was he who advocated the program, with full knowledge of its religious aspects.

{¶30} At the first sentencing hearing, the court was prepared to sentence Mr. Kirkpatrick to a two-year term of imprisonment, but Mr. Kirkpatrick petitioned the court for community sanctions and specifically advocated for Teen Challenge. Mr.

Kirkpatrick's pastor testified on his behalf, and informed the court that Mr. Kirkpatrick would be quite amenable to the program as he had been working with Mr. Kirkpatrick for the past four-and-a-half months.

{¶31} Mr. Kirkpatrick elected the five-year community control sentence with the understanding that, if he failed, a nine-year sentence would be imposed. Mr. Kirkpatrick himself induced the sentence the court made. *State v. Tribble*, 7th Dist. No. 07 MA 205, 2009-Ohio-1311, ¶34, citing *State v. Kniep* (1993), 87 Ohio App.3d 681, 686. See, also, *State v. Thomas*, 12th Dist. No. CA2006-03-041, 2006-Ohio-7029, ¶43.

{¶32} Mr. Kirkpatrick's second and third assignments of error are without merit.

{¶33} **Ineffective Assistance of Counsel**

{¶34} Lastly, Mr. Kirkpatrick argues that his counsel in the third (second revocation) hearing was ineffective in that he failed to object to the trial court's "summary proceeding" in revoking his sentence of community control, and, further, failed to raise the issue of Teen Challenge's religious leanings, which he contends violated the establishment clause of the United States Constitution as well as the free exercise clause of the Ohio Constitution.

{¶35} "'[W]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *** The [Supreme Court of Ohio] recognized that there are '(***) countless ways to provide effective assistance in any given case.'" *State v. Painter*, 11th Dist. No. 2009-A-0016, 2009-Ohio-4929, ¶34, quoting *State v. Sands*, 11th Dist. No. 2007-L-003, 2008-Ohio-6981, ¶35, quoting *State v. Vinson, Jr.*, 11th Dist. No. 2006-L-238, 2007-Ohio-5199, ¶29, citing *State v. Allen* (Sept. 22, 2000),

11th Dist. No. 99-A-0050, 2000 Ohio App. LEXIS 4356, 10, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687-689. "Therefore, the court stated judicial scrutiny of counsel's performance must be highly deferential." *Painter* at ¶34.

{¶36} In addition, "because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at ¶35 (citation omitted). "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." Id. (citation omitted). "Thus, to warrant reversal, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citation omitted).

{¶37} Whether a violation occurred in this case was not at issue as Mr. Kirkpatrick admitted to violating community control at the outset of the hearing. Secondly, the requirements of the revocation hearing were met as Mr. Kirkpatrick was provided with a hearing and represented by counsel.

{¶38} "[T]he requirements of a Crim.R. 11(C)(2) do not apply to a community-control revocation hearing. *** A defendant faced with revocation of probation or parole is not afforded the full panoply of rights given to a defendant in a criminal prosecution. *** So a revocation hearing is an informal one, 'structured to assure that the finding of a

*** violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the defendant's behavior.' ***

{¶39} "Instead, Crim.R. 32.3(A) applies to community-control revocation hearings. Before a trial court imposes a prison term for a violation of the conditions of a community-control sanction, the court must hold a hearing at which the defendant is present and apprised of the grounds for the violation. ***" *State v. Orr*, 11th Dist. No. 2008-G-2861, 2009-Ohio-5515, ¶21-22, quoting *State v. Alexander*, 1st Dist. No. C-070021, 2007-Ohio-5457, ¶7-8.

{¶40} "Crim.R. 11(C) mandates certain requirements with which the trial court must comply prior to accepting a guilty or no contest plea to a felony offense. Crim.R. 32.3 provides the procedural framework that is to occur at a community-control-revocation hearing." *Orr* at ¶23. Crim.R. 32.3 is titled "revocation of community release" and provides, in pertinent part:

{¶41} "(A) Hearing. The court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed. The defendant may be admitted to bail pending hearing.

{¶42} "(B) Counsel. The defendant shall have the right to be represented by retained counsel and shall be so advised.***"

{¶43} Mr. Kirkpatrick's second contention, that his counsel did not raise religious concerns regarding Teen Challenge is not only an invited error as noted above, but also without merit. Mr. Kirkpatrick's counsel did raise the assertion that the program did not live up to Mr. Kirkpatrick's expectations. Although counsel did not state it as a

constitutional challenge, the trial court did consider the religious aspect of the program and Mr. Kirkpatrick's full knowledge of the program at the first hearing.

{¶44} Quite simply, Mr. Kirkpatrick cannot show that but for his counsel's alleged errors, there is a reasonable probability that his sentence would have been different. Mr. Kirkpatrick was offered a two-year term at the outset of the case. Instead, he urged the court for community control in order to complete the Teen Challenge Program. He was also well aware that if he violated his community control he would be facing a nine-year sentence. At his revocation hearing, the trial court erred in sentencing him to a term that was outside of the range for a second-degree felony. Upon remand, the trial court properly sentenced Mr. Kirkpatrick to a nine-year term, effectuating the agreement Mr. Kirkpatrick made when he initially pled guilty.

{¶45} Mr. Kirkpatrick's fourth assignment of error is without merit.

{¶46} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.