

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

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| STATE OF OHIO, | : | O P I N I O N |
| Plaintiff-Appellee, | : | |
| - VS - | : | CASE NO. 2011-G-3044 |
| STEVEN M. ANDERSON, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 10 C 000169.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Edward A. Heffernan, 28787 Ridge Road, Wickliffe, OH 44092 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Steven M. Anderson appeals from judgments of the Geauga County Court of Common Pleas. The court sentenced him to five years of imprisonment for attempted felonious assault and also imposed court costs. We find that the sentence imposed is not clearly and convincingly contrary to law and that the trial court gave careful and substantial consideration to the statutory sentencing factors. While Mr. Anderson claims the trial court erred in refusing to continue his sentencing hearing for

13 days until the effective date of the amendments to Ohio's felony sentencing statute, we find that *even if* R.C. 1.58 applies to an unsentenced defendant such as one in Mr. Anderson's position, the outcome of this appeal would not have been different. And, finally, because we find that the trial court did not abuse its discretion by failing to waive court costs, we affirm the trial court's judgment.

Substantive Facts and Procedural History

{¶2} On December 16, 2010, Mr. Anderson was indicted on five counts of rape, a felony of the first degree in violation of R.C. 2907.02(A)(2), and one count of kidnapping, a felony of the first degree in violation of R.C. 2905.01(A)(4). These incidents stemmed from an incident where he sexually assaulted his girlfriend in the apartment they shared. He pled "not guilty" to all six counts and filed multiple motions to suppress the evidence. After a hearing, the trial court denied the motions.

{¶3} On July 22, 2011, at a plea hearing, Mr. Anderson entered an *Alford* plea to lesser charges pursuant to a plea agreement. He pled guilty to (1) a lesser-included offense of attempted felonious assault, a felony of the third degree in violation of R.C. 2923.02(A) and R.C. 2903.11(A)(1), and (2) a lesser-included offense of domestic violence, a misdemeanor of the first degree in violation of R.C. 2919.25(A). The remaining charges were dismissed. The court accepted the plea and referred the matter for a presentence investigation report. The matter was then scheduled for a sentencing hearing on September 16, 2011.

{¶4} At the sentencing hearing, Mr. Anderson's counsel advised the court that H.B. 86, which amended several sentencing statutes, was to take effect shortly and it requires a trial court to consider minimum sanctions in achieving the felony sentencing purposes of R.C. 2929.11(A). Mr. Anderson's counsel asked the trial court to either

apply the new law or continue the sentencing until the law went into effect on September 30, 2011.

{¶5} The trial court denied the request. It then heard the statement from the state and Mr. Anderson's counsel, as well as Mr. Anderson. Before sentencing, the court stated it had considered the presentence investigation report, statements made by counsel, the plea agreement, and the purposes of R.C. 2929.11 and factors of R.C. 2929.12. It then sentenced him to a prison term of five years on the attempted felonious assault count and six months on the domestic violence count, to run concurrently. Mr. Anderson orally moved the court to waive his court costs. The court took the request under advisement, and subsequently issued an order denying the request.

{¶6} Mr. Anderson now appeals from these judgments, raising three assignments of error for our review:

{¶7} "[1.] The trial court committed prejudicial error and abused its discretion by denying appellant's oral motion for continuance made at the sentencing hearing.

{¶8} "[2.] The trial court committed prejudicial error and abused its discretion in considering the seriousness and recidivism factors set forth at R.C. 2929.12.

{¶9} "[3.] The trial court committed prejudicial error and abused its discretion by failing to waive costs."

{¶10} For ease of discussion, we address the second assignment of error first.

Appellate Review of Felony Sentencing

{¶11} The Supreme Court of Ohio provided a two-step analysis for an appellate court to apply when reviewing felony sentences in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶26. Although *Kalish* is a plurality opinion, we apply *Kalish* to appeals

involving felony sentencing until the court provides further guidance on this matter. See *State v. Slack*, 5th Dist. No. COA 040, 2012-Ohio-2081.

{¶12} First, the reviewing court 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. The applicable statutes include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id.* at ¶17. As part of its analysis of whether the sentence is "clearly and convincing contrary to law," an appellate court must be satisfied that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶13} If the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then 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 within the permissible statutory range. *Id.* at ¶17. The *Kalish* court explained the effect of R.C. 2929.11 and 2929.12 in this connection:

{¶14} "R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Kalish* at ¶17.

{¶15} 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. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. When an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* at ¶67.

Consideration of R.C. 2929.12 Factors

{¶16} The overriding purpose of felony sentencing pursuant to R.C. 2929.11 is to protect the public from future crimes and to punish the offender, and R.C. 2929.12 requires a court to consider seriousness and recidivism factors. The latter statute provides 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 the objectives of felony sentencing.

{¶17} Under the second assignment of error, Mr. Anderson contends the trial court “abused its discretion in considering the seriousness and recidivism factors set forth in R.C. 2929.12.” We analyze the claim under the two-prong analysis.

{¶18} At the sentencing hearing, the trial court stated it had reviewed the presentence investigation report. Before sentencing, it afforded Mr. Anderson an opportunity to speak, and he read a poem to the victim. His counsel also spoke on his behalf, focusing on the victim's lack of credibility and advocating for minimum sentence. The state argued for the maximum term for Mr. Anderson's offense.

{¶19} The court, before imposing the five-year term, which is within the sentencing range for a third-degree felony, stated it had considered (1) the overriding purposes of felony sentencing [to protect the public and to punish the offender] set forth in R.C. 2929.11, (2) the recidivism and seriousness factors set forth in R.C. 2929.12, (3) the plea agreement, (4) the defendant and counsel's statements, and (5) the presentence investigation report.

{¶20} 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)." *Kalish* at ¶14. Based on the record before us, the sentence is not "clearly and convincingly contrary to law."

{¶21} Next, we must decide whether the court abused its discretion in selecting a sentence within the permissible statutory range. The trial court's consideration of the statutory factors is reviewed under this prong. See *Kalish* at ¶19-20 (in reviewing the record, the court found the trial court gave careful and substantial deliberation to the relevant statutory considerations and therefore did not abuse its discretion).

{¶22} Here, in considering the recidivism and seriousness factors, the trial court noted that (1) Mr. Anderson had a prior criminal record, having served a prison term for

a multiple-counts felony conviction in 2006, and violated his parole twice, (2) he had never expressed any remorse until the sentencing hearing, (3) there was some evidence of physical harm, as reported by the sexual assault nurse, suffered by the victim, who was pregnant with Mr. Anderson's child at the time of the incident, and (4) the defendant used the intimate relationship he had with the victim to facilitate his offense, which the victim had done nothing to provoke.

{¶23} While the trial court is required to consider the recidivism and seriousness factors enumerated in R.C. 2929.12, the court does not need to make specific findings on the record in order to evince its consideration of all applicable seriousness and recidivism factors. *State v. Blake*, 11th Dist. No. 2003-L-196, 2005-Ohio-686, ¶16. See also *State v. Hughes*, 6th Dist. WD-05-024, 2005-Ohio-6405 (trial court was not required to address each R.C. 2929.12 factor individually and make a finding as to whether it was applicable); *State v. Lewis*, 11th Dist. No. 2006-L-224, 2007-Ohio-3014, ¶24 ; *State v. Rady*, 11th Dist. No. 2006-L-213, 2007-Ohio-1551, ¶46 .

{¶24} Here, the court, in balancing the recidivism and seriousness factors of 2929.12, noted on the record the most salient factors in its determination of an appropriate sentence for Mr. Anderson's offense, emphasizing his repeated violations of parole conditions, which reflected a high risk of recidivism. The record reflects a careful and substantial consideration of the statutory factors, and therefore, we do not find an abuse by the trial court in its sentencing of Mr. Anderson. The second assignment of error is without merit.

Continuance of Sentencing Hearing

{¶25} Under the first assignment of error, Mr. Anderson claims the trial court abused its discretion in denying his oral motion for a continuance of the sentencing

hearing until September 30, 2011, the effective date of H.B. 86, so that the court could apply the amended version of the statute in sentencing him.

{¶26} We review the trial court’s grant or denial of a continuance for abuse of discretion. *State v. Unger*, 67 Ohio St.2d 65, 67 (1981). In deciding whether to continue a proceeding, a trial court weighs any potential prejudice to a defendant against concerns such as a court’s right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice. *Unger* at 67. More specifically, in considering a motion for a continuance, a court should take into account “the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.” *Id.* at 67-68.

Amendment of R.C. 2929.11

{¶27} Mr. Anderson requested the trial court to continue the sentencing hearing because he believed the General Assembly “substantially altered” the overriding purposes and principles of R.C. 2911 in its amendment of R.C. 2929.11 and the trial court abused its discretion by not postponing his sentence until the effective date of the new law.

{¶28} H.B.86, effective September 30, 2011, amended R.C. 2929.11 by inserting into section (A) of the statute the following phrase: “using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary

burden on state or local government resources.” The statute, as amended, now states as follows:

{¶29} “(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources*. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” (Emphasis added.)

{¶30} Section 4 of H.B.86 contains the specific legislative intent not to make the changes retroactive: “The amendments to * * * division (A) of section 2929.14 of the Revised Code * * * apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58(B) of the Revised Code makes the amendments applicable.” See also *State v. Fields*, 5th Dist. No. CT11-0037, 2011-Ohio-6044, ¶10-12.

{¶31} R.C. 1.58(B), in turn, provides: “If the penalty, forfeiture, or punishment for any offense *is reduced by* a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.” (Emphasis added.)

{¶32} The statutory amendments providing new sentencing guidelines became effective on September 30, 2011. Mr. Anderson committed the offense on December

16, 2010, and his sentencing hearing was scheduled for September 16, 2011, prior to the effective date of the amended statute. The question is then whether R.C. 1.58 makes the amendment applicable to Mr. Anderson.

{¶33} The answer would appear to be no, because, while H.B. 86 reduces the criminal penalties for many offenses, particularly regarding thefts and drugs, its amendment of R.C. 2929.11 does not *in itself* “reduce” the penalty, forfeiture, or punishment. The amendment merely adds another principle for the trial court to consider, which *may or may not* reduce a defendant’s sentence. Thus, it is not clear, on the face of R.C. 1.58, whether R.C. 1.58 makes the amendment applicable to someone in Mr. Anderson’s situation.

{¶34} In any event, as we will explain, the issue in this appeal is not whether Mr. Anderson should be sentenced under the new law, but rather, whether the trial court abused its discretion in not continuing the sentencing hearing.

The “Resources Conservation” Principle

{¶35} We begin with noting that the sentence inserted into R.C. 2929.11(A) embodies the principle referred to as the “resources conservation” principle found in former R.C. 2929.13. R.C. 2929.13 governs sentencing principles for fourth and fifth degree felony, and the former version of the statute contained a similarly-worded provision: “The [defendant’s] sentence shall not impose an unnecessary burden on state or local government resources.” This sentence is now deleted from R.C. 2929.13 by H.B.86, and a similar sentence is inserted into R.C. 2929.11, which governs felony sentencing in general.

{¶36} Ohio courts, in the context of applying R.C. 2929.13, have long determined that while resource and burdens to the government may be a relevant

sentencing criterion, the statute “does not require trial courts to elevate resource conservation above the seriousness and recidivism factors.” *State v. Ober*, 2d Dist. No. 97CA0019, 1997 Ohio App. LEXIS 4544 (Oct. 10, 1997). In *State v. Foster*, 11th Dist. No. 2004-P-0104, 2005-Ohio-5281, this court also observed that although R.C. 2929.13(A) failed to give any guidance as to what constitutes an “unnecessary burden,” Ohio courts have consistently held that the “resource conservation” principle does not override the seriousness and recidivism factors of R.C. 2929.12. *Foster* at ¶66. See also *State v. Leasure*, 5th Dist. No. 2011-COA-031, 2012-Ohio-318; *State v. Parker*, 2nd Dist. No. 03CA0017, 2004-Ohio-1313, ¶49; *State v. Fox*, 3rd Dist. No. 16-2000-17, 2001-Ohio-2116; *State v. Brooks*, 10th Dist. No. 97APA-11-1543, 1998 Ohio App. LEXIS 3803 (Aug. 18, 1998); *State v. Stewart*, 8th Dist. No. 74691, 1999 Ohio App. LEXIS 835 (Mar. 4, 1999).

{¶37} Turning to Mr. Anderson’s case, the transcript reflects that at the September 16, 2011 hearing, prior to sentencing, Mr. Anderson’s counsel advised the court that H.B. 86 would go into effect shortly, on September 30, 2011, which would require the trial court to consider using the minimum sanctions that the court determine would accomplish the felony sentencing purposes without imposing unnecessary burdens on government resources. After so informing the trial court, Mr. Anderson’s counsel then asked the court to either apply the new law or continue the sentencing hearing until the law goes into effect on September 30, 2011. The court, exercising its discretion, denied the request to continue the sentencing hearing.

{¶38} The record shows the trial court was aware that, under the amended statute, it is required to take into account the “resources conversation” principle. The transcript reflects that in sentencing Mr. Anderson to a five-year term, the trial court

placed great weight on his lack of rehabilitation while in prison for a previous conviction, as evidenced by his violation of parole twice, which indicated a high risk to re-offend. In exercising its discretion to deny the request for continuance, the court apparently determined that Mr. Anderson would *not* have received a lesser sentence under the amended statute, and therefore, would be not be prejudiced by the court's denial of continuance.

{¶39} As it is within the trial court's discretion to decide whether resources conversation outweighs recidivism and seriousness factors, the record supports a conclusion that the trial court did not abuse its discretion in not continuing the sentencing proceeding. Thus, *even if* R.C 1.58 applies to an unsentenced defendant, the outcome of Mr. Anderson's appeal would have been the same. The first assignment of error is without merit.

Court Costs

{¶40} Under the third assignment of error, Mr. Anderson claims the trial court abused its discretion in denying his oral motion at the sentencing hearing to waive costs. He argues the trial court should have waived the court costs due to his indigent status.

{¶41} The trial court denied his request to waive court costs in an order after the sentencing hearing, finding that he had been gainfully employed prior to his incarceration, and that he failed to demonstrate he would be unable to pay for the court costs upon his release from prison. Mr. Anderson claims the court's finding regarding his gainful employment prior to his incarnation is erroneous and therefore abused its discretion in not waiving court costs.

{¶42} R.C. 2947.23 requires the trial court to impose costs against all convicted defendants. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶1. Furthermore, a trial court may order a defendant to pay court costs regardless of indigence, and the denial of a motion to waive court costs will not be reversed absent an abuse of discretion. *Threatt* at paragraph four of the syllabus. “Ohio law does not forbid a trial court from imposing court costs on an indigent defendant convicted of a felony.” (Citations omitted.) *State v. Glavic*, 11th Dist. Nos. 001-L-177 and 2001-L-179, 2003-Ohio-6961, ¶52. Therefore, even if Mr. Anderson lacked steady employment prior to his incarceration, and may be impeded in finding future employment upon his release from prison, it does not preclude the trial court from imposing the court costs. We find no abuse of discretion in the trial court’s decision to impose costs. The third assignment of error is without merit.

{¶43} The judgments of the Geauga County Court of Common Pleas are affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.