

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2012-P-0014
STEVEN L. MILLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0849.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Steven L. Miller appeals from a judgment of the Portage County Court of Common Pleas, which sentenced him to seven years of imprisonment for his conviction for aggravated robbery and three years on a firearm specification. After a review of the record and pertinent law, we affirm the trial court's judgment.

{¶2} On November 17, 2010, Mr. Miller robbed a Circle K clerk in Streetsboro with an automatic weapon. He pled guilty to aggravated robbery with a firearm

specification; the trial court found him guilty and ordered a presentence investigation report.

{¶3} While in jail awaiting sentencing, Mr. Miller assaulted a corrections officer and was charged with the offense of assault of a corrections officer, under a separate trial court number. At a combined proceeding, Mr. Miller pled guilty to the assault charge, and the court sentenced him in both cases. The court imposed seven years of imprisonment for his offense of aggravated robbery and three years for the firearm specification, to be served consecutively. The court also imposed a concurrent one-year term for his offense of assaulting a corrections officer.

{¶4} Mr. Miller now appeals, assigning the following error for our review:

{¶5} “The trial court erred in sentencing the appellant by imposing more than the minimum sentence and by imposing an improper sentence.”

Reviewing Sentences Post *Foster*

{¶6} Post *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 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.

{¶7} 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. Under the first prong of the analysis, “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 ¶14. The *Kalish* court explained that

the applicable statutes to be applied by a trial court 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 convincingly contrary to law,” an appellate court must be satisfied that the trial court considered the purposes and principles of R.C. 2929.11, which are to protect the public from future crimes and to punish the offender, and the seriousness and recidivism factors listed in R.C. 2929.12.

{¶8} 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:

{¶9} “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.

{¶10} In this appeal, Mr. Miller claims the trial court imposed a more-than-minimum term of seven years for his offense of aggravated robbery without *any*

consideration of the purposes and principles of R.C. 2929.11 and the seriousness and recidivism factors given in R.C. 2929.12. This alleged error relates to the first prong of the *Kalish* analysis, and therefore, we review it to determine whether the trial court's sentence was clearly and convincingly contrary to law.

{¶11} At the sentencing hearing, Mr. Miller presented a psychiatrist to testify on his behalf. The psychiatrist testified that her evaluation of Mr. Miller showed he had an IQ score of 63, indicating a mild mental retardation and deficits in communication, living skills, socialization, and work performance.

{¶12} Mr. Miller's counsel also spoke on his behalf, stressing that, because of his intelligence issues, Mr. Miller is easily influenced by others. He committed the robbery because someone told him to, and, furthermore, the gun used in the robbery was not loaded. His counsel also asked for leniency because the robbery was Mr. Miller's first offense.

{¶13} The prosecutor's statements painted a different picture. Mr. Miller had actually approached other individuals about robbing stores, but eventually decided to rob the Circle K clerk by himself. He brandished an automatic weapon at the clerk, demanding all the money. After the clerk complied, he took the victim to the back of the store, and then took the victim's cell phone, to prevent him from calling the police. After the robbery, Mr. Miller bragged about the robbery to several witnesses. The prosecutor argued that Mr. Miller's conduct demonstrated a thought process in carrying out the robbery, despite his intelligence issues, and it also reflected a lack of remorse.

{¶14} The court, having been made aware of Mr. Miller's low intelligence, nonetheless stressed the seriousness of his offense and the need to punish him and deter future crimes. Before sentencing Mr. Miller, the trial court stated the following:

{¶15} "[T]his was a very serious offense, and it is my job to punish you and deter others from trying to commit these same type[s] of offenses. You used a weapon, you scared the clerk to death, and you must be punished for that."

{¶16} Furthermore, contrary to Mr. Miller's assertion on appeal, the trial court stated, in the sentencing entry, that it had "considered the evidence presented by counsel, oral statements, any victim impact statement, the Pre-sentence Report and the defendant's statement."

{¶17} In addition, in the sentencing entry, the court recited the principles and purposes of felony sentencing in R.C. 2929.11, although without specifically referencing the statute. It stated that it had "considered the purpose of felony sentencing which is to protect the public from future crime by the defendant and to punish the defendant using the minimum sanctions that the Court determines to accomplish those purposes without imposing an unnecessary burden on state or local government resources. The court also considered the need for incapacitating the defendant, deterring the defendant and others from future crime[s], rehabilitating the defendant, making restitution to the victim of the offense, the public[,] or both."

{¶18} As to the seriousness and recidivism factors in R.C. 2929.12, the trial was not required to make specific findings on the record in order to evince the requisite consideration of all applicable factors. *State v. Blake*, 11th Dist. No. 2003-L-196, 2005-Ohio-686, ¶16. When the record is silent, it is presumed that the trial court complied

with its duty to consider the factors set forth in R.C. 2929.11 and R.C. 2929.12. *State v. Yount*, 2d Dist. No. 24023, 2011-Ohio-3107, ¶91. See also *State v. Luecke*, 11th Dist. No. 2011-P-0085 and 2011-P-0104, 2012-Ohio-3032. The burden is on the defendant to come forward with evidence to rebut the presumption that the trial court considered the sentencing criteria. *State v. Nenzoski*, 11th Dist. No. 2007-P-0044, 2008-Ohio-3253, ¶63. See also *State v. Bernadine*, 11th Dist. No. 2010-P-0056, 2011-Ohio-4023, ¶36. Mr. Miller makes no effort to rebut the presumption on appeal.

{¶19} Given this record, we are satisfied that the trial court considered the R.C. 2929.11 principles and R.C. 2929.12 factors, as it was required to, before fashioning the appropriate punishment for Mr. Miller's offense. The court's sentence was not "clearly and convincingly contrary to law" pursuant to *Kalish*. The assignment of error is without merit.

{¶20} The judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.