

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA29
	:	
vs.	:	Released: June 5, 2009
	:	
RONALD D. WELCH, JR.,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Defendant-Appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Ronald D. Welch, Jr, appeals the decision of the Washington County Court of Common Pleas sentencing him to three years in prison for burglary. Appellant argues that the trial court erred in: 1) sentencing him to a prison term instead of community control sanctions; 2) sentencing him to a three year term instead of a lesser term; and 3) not informing him that if he failed to pay court costs, he could be ordered to perform community service. Because Appellant fails to prove his sentence was clearly and convincingly contrary to law or that the trial court

abused its discretion, his first two assignments of error are overruled.

Further, because it is not ripe for review, we also overrule his third assignment of error. Accordingly, we overrule each of Appellant's assignments of error and affirm the trial court's decision.

I. Facts

{¶2} In late April 2008, Appellant used a tire iron to forcibly break into an apartment in Marietta, Ohio. Soon after the break-in, police apprehended Appellant and found him in possession of several items from the apartment, including a cell phone, beer, and numerous prescription medications.

{¶3} Through a bill of information, Appellant was subsequently charged with third degree felony burglary. At the plea hearing, the trial court informed Appellant regarding the possibly range of sentences for the offense, including that he could be sent to prison or placed on community control. After being fully informed of his rights, Appellant pleaded guilty to third degree felony burglary in violation of R.C. 2911.12(A)(3) and (C). As a result of the guilty plea, the State agreed to not seek an indictment for a second degree felony burglary charge and a fifth degree felony criminal tools charge. After accepting Appellant's plea, the trial court ordered a pre-sentence investigation report and scheduled sentencing for a later date.

{¶4} After reviewing Appellant's pre-sentence report and SEPTA evaluation, the trial court imposed a sentence of three years in prison.

Following sentencing, Appellant timely filed the current appeal.

II. Assignments of Error

- I. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A THREE YEAR PRISON TERM, RATHER THAN TO COMMUNITY CONTROL SANCTIONS.
- II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A THREE YEAR PRISON TERM, RATHER THAN TO A LOWER AVAILABLE TERM.
- III. THE TRIAL COURT ERRED BY IMPOSING COURT COSTS WITHOUT NOTIFYING APPELLANT THAT FAILURE TO PAY COURT COST [sic] MAY RESULT IN THE COURT ORDERING HIM TO PERFORM COMMUNITY SERVICE.

III. First and Second Assignments of Error

{¶5} In his first assignment of error, Appellant argues the trial court erred in sentencing him to a prison term instead of community control sanctions. In his second assignment of error, he argues the trial court erred in sentencing him to a three-year prison term instead of a lesser term. As Appellant states the assignments of error are contrary to law for the same reasons, we will consider them together.

{¶6} Our analysis begins with the appropriate standard of review. In the wake of *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, there has been considerable confusion regarding the proper

standard of review of felony sentences. The Supreme Court of Ohio recently addressed the issue in *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. “Whether *Kalish* actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented.” *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2. Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing.¹

{¶7} Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. “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 first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.” *Kalish* at ¶4. “As to the first step, the *Kalish* court did not clearly specify what ‘pertinent laws’ we are to consider to ensure that the sentence ‘clearly and

¹ As the *Kalish* decision is a plurality, not a majority opinion, the Eighth District Court of Appeals has announced that it will not follow the decision and will instead continue to apply the same standard the district had used prior to *Kalish*. *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, at ¶99, fn. 1. Conversely, though the Ninth District has recognized the questionable precedential value of *Kalish*, it has applied the new standard regardless. *State v. Jenkins*, 9th Dist. No. 24166, 2008-Ohio-6620, at ¶10, fn. 1. We will do the same.

convincingly’ adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *.” *Ross* at ¶10.

{¶8} We first note the trial court did not impose the maximum sentence available. As the court advised Appellant before his plea, it had the option of placing Appellant on community control or sending him to prison for a term of one to five years. The resulting three-year sentence was, thus, well within the statutory range. Further, the trial court specifically stated that it had weighed the applicable seriousness and recidivism sentencing factors, considered the principles and purposes of felony sentencing pursuant to R.C. 2929.11 through 2929.19, and that the sentence was calculated to achieve those purposes. Accordingly, we find the trial court complied with all applicable rules and statutes in imposing Appellant's sentence. As such, the sentence was not clearly and convincingly contrary to law. As the first prong of the *Kalish* test is satisfied, we now turn to the second prong, whether the trial court abused its discretion in imposing the sentence.

{¶9} “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Wright v. Suzuki Motor Corp.*, 4th Dist. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, at ¶112, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When an

appellate court applies this standard, it “may not substitute [its] judgment for that of the trial court.” *Gordon Proctor Dir. of Trans. v. Cydrus*, 4th Dist. No. 04CA2758, 2004-Ohio-5901, at ¶14, citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181.

{¶10} In the case sub judice, Appellant argues that his prison term is unnecessary to protect the public from harm and that it unnecessarily burdens state resources. For the following reasons, we find Appellant’s argument unpersuasive.

{¶11} Appellant does not challenge the factual validity of any of the trial court’s specific findings, including that: Appellant had served prior prison terms; he caused economic harm; he had an extensive history of criminal convictions, both as a juvenile and as an adult; and that prior sanctions had been unsuccessful. Post-*Foster*, trial courts have full discretion to impose sentences within the statutory range and determine whether a sentence satisfies the overriding purposes of Ohio’s sentencing statutes. Here, the trial court may reasonably have determined that, taken together, the particular circumstances of Appellant’s crime, his extensive history of criminal offenses, his prior failure to successfully complete substance abuse treatment, his previous failures to abide by the terms of non-

prison sanctions, and a host of other factors warranted a prison term instead of community control.

{¶12} The fact that a trial court may chose to weigh the various felony sentencing factors differently than a reviewing court would, is not sufficient to require reversal. Instead, in order for there to be an abuse of discretion, the trial court's decision must be “* * * so palpably and grossly violative of fact or logic that it evidences not the exercise of will, but perversity of will; not the exercise of judgment, but defiance of judgment; and not the exercise of reason, but, instead, passion or bias.” *Nakoff v. Fairview Gen. Hosp.* 75 Ohio St.3d 254, 662 N.E.2d 1, 1996-Ohio-159, at 256. Here, as there was no such abuse of discretion, we overrule Appellant's first and second assignments of error.

IV. Third Assignment of Error

{¶13} As his third assignment of error, Appellant argues that the trial court erred when it did not notify him that failure to pay court costs could result in an order to perform community service. We have addressed similar arguments in recent cases. See, *State v. Ward*, 168 Ohio App.3d 701, 714, 2006-Ohio-4847, 861 N.E.2d 823; *State v. Slonaker*, 4th Dist. No. 08CA21, 2008-Ohio-7009; *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755.

{¶14} At the time of the filing of this appeal, Appellant remained incarcerated. Consistent with our previous rulings, we find Appellant’s third assignment of error is, therefore, not ripe for review. “Here, although we agree with Appellant that R.C. 2947.23 makes it mandatory for the judge to inform a defendant that he could be ordered to perform community service, at this time, Appellant has not suffered any prejudice from the trial court’s failure to inform him that it may, in the future, require him to perform community service to fulfill his obligation to pay costs. Thus, we conclude that the issue is not ripe for adjudication.” *Slonaker* at ¶7. Accordingly, Appellant’s third assignment of error is overruled.

V. Conclusion

{¶15} For the foregoing reasons, we overrule each of Appellant’s assignments of error. The first two assignments of error fail because Appellant has not shown that the trial court’s decision was either clearly and convincingly contrary to law or an abuse of discretion. Because his third assignment of error is not yet ripe for review, it is also overruled. Accordingly, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

Harsha, J., dissenting in part:

{¶16} Consistent with my dissent in *Slonaker* supra, I would hold that Welch cannot be ordered to perform community service if he fails to pay the court costs. Thus, I dissent in part here also.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J.: Concur in Judgment and Opinion.

Harsha, J.: Concur in Judgment and Opinion as to Assignments of Error I and II and Dissents with Opinion as to Assignment of Error III.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.