

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA37
	:	
vs.	:	Released: June 17, 2009
	:	
RONALD W. FISHER,	:	<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 W. Fisher, appeals from the decision of the Washington County Court of Common Pleas, sentencing him to five years of incarceration. Appellant asserts that 1) the trial court erred in sentencing him to the maximum prison term on each of his convictions; and 2) he had ineffective assistance of counsel. Because we find the trial court abused its discretion in determining that Appellant's crimes resulted in serious physical harm to numerous victims, we sustain Appellant's first assignment of error and remand the case for resentencing. As to Appellant's

second assignment of error, we find Appellant has failed to prove his trial counsel's representation was either deficient or prejudicial.

I. Facts

{¶2} Appellant was originally indicted on six felony counts: 1) trafficking in drugs, a fifth degree felony; 2) trafficking in drugs, a third degree felony; 3) possession of drugs, a fourth degree felony; 4) trafficking in drugs, a fourth degree felony; 5) possession of drugs, a fifth degree felony; and 6) illegal conveyance of weapons or prohibited items onto the grounds of a detention facility or institution, a third degree felony. Appellant originally pleaded not guilty to all six counts. At the time, Appellant was already incarcerated for a prior trafficking conviction.

{¶3} As a result of a plea agreement, Appellant pleaded guilty to the first two counts and the state dismissed the remaining counts. The trial court imposed a sentence of one year on count one, the maximum sentence, and five years on count two, also the maximum sentence. The court ordered the sentences to run concurrently and concurrently with the one-year sentence Appellant was already serving for his prior trafficking conviction. After sentencing, Appellant timely filed the current appeal.

II. Assignments of Error

- I. THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM AVAILABLE PRISON TERMS ON EACH COUNT IN THIS CASE.

II. APPELLANT’S TRIAL COUNSEL WAS INEFFECTIVE IN ADVISING APPELLANT TO PLEAD GUILTY AND IN ADVISING APPELLANT THAT HE WOULD RECEIVE A LOWER THAN MAXIMUM SENTENCE.

III. First Assignment of Error

{¶4} In his first assignment of error, Appellant argues the trial court abused its discretion in sentencing him to the maximum term for each of his offenses. Appellant contends the trial court made several findings to substantiate the maximum sentences, but that those findings are not supported by the record.

{¶5} We begin our analysis 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 and continuing confusion over the proper standard of review in felony sentencing. 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-4912.¹

{¶6} 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

¹ “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. As a result, our colleagues on the Cuyahoga County Court of Appeals have announced they simply will not follow the plurality and will continue to apply the standard the Eighth District has used all along. (Internal citation omitted.) The same problem has been recognized in the Ninth District, but our colleagues on the Summit County Court of Appeals have applied the two-step *Kalish* analysis regardless. (Internal citation omitted.) We will do the same.” *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2

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 convincingly’ adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *.” *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at ¶10.

{¶7} In the case sub judice, Appellant contends that a number of findings in the trial court’s sentencing entry are inaccurate or unsupported by the record. Appellant acknowledges that, post-*Foster*, trial courts are no longer required to make findings or state reasons for imposing maximum or more than the minimum sentences. However, Appellant argues that, because the trial court did state specific findings in the sentencing entry, and because some of those findings are not supported by the record, the trial court abused its discretion in imposing maximum sentences.

{¶8} The sentencing entry in question reads, in pertinent part:

{¶9} “Whereupon the Court has considered the record of this case, the oral statements made this day, and the pre-sentence report which was received by the Court on August 18, 2008, as well as the principles and

purposes of sentencing pursuant to Ohio Revised Code Sections 2929.11 through 2929.19, with specific reference to Ohio Revised Code section 2929.13(F)(5) and the Court then made the following determinations:

[A] The Court FINDS the following prison factors to be present:

(1) The original offense was committed for hire or as part of an organized criminal activity.

(2) The defendant has served a prior prison term.

[B] The court FINDS that the following factors are present that make this crime more serious than the norm:

(1) The defendant caused serious physical harm – there were numerous victims.

(2) The original crime was committed for hire or as part of an organized criminal activity.

[C] The Court FINDS that there are no factors present that make this crime less serious than the norm.

[D] The Court FINDS the following factors present which make this Defendant more likely to recidivate:

(1) The defendant has prior juvenile and adult criminal convictions:

As a Juvenile: 1992 Theft

As an Adult: 1994 Possession of Marijuana
 1995 Negligent Assault

1996 Breach of Recognizance
1996 Disorderly Conduct
2001 Driving Under Suspension
2002 Driving Under Suspension
2003 Driving Under Suspension
2007 Failure to Reinstate License
2008 Trafficking in Drugs
2008 Domestic Violence

(2) The defendant demonstrated a pattern of drug or alcohol abuse related to the offense and refuses to acknowledge the pattern or refuses treatment.

[E] The Court FINDS that there are no factors present that make this defendant less likely to recidivate.

[F] The Court has weighed the seriousness and recidivism factors and has considered the over-riding purposes of felony sentencing to protect the public from future crime by this offender and others, and the purpose to punish this offender, and has considered the need for incapacitating this offender and deterring the offender and others from future crime, and for rehabilitating the offender. Thereupon the Court FINDS that the sentence it is about to impose is reasonably calculated to achieve these purposes, and is commensurate with, and does not demean the seriousness of the offender's conduct, and its impact upon the victim, and is consistent with sentences imposed for similar crimes committed by similar offenders.

[G] The Court further FINDS that the Defendant is not amenable to community control sanctions.”

{¶10} We first note that the trial court sentenced Appellant to one year for the fifth degree trafficking conviction and five years for the third degree trafficking conviction. Though both of the sentences are maximum sentences for the crimes committed, they are within the statutory range. Further, the trial court specifically stated that it had weighed the applicable seriousness and recidivism factors, considered the principles and purposes of felony sentencing pursuant to R.C. 2929.11 through 2929.19, and it stated 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 and that the sentence was not clearly and convincingly contrary to law. As such, the first prong of the *Kalish* test has been satisfied and we now turn to the second prong, whether or not the trial court abused its discretion in imposing the sentence.

{¶11} In this prong, we look at the specific factual findings of the trial court which are contested by Appellant. These findings are: 1) that the offense was committed for hire, or as part of an organized criminal activity; 2) that Appellant had served a prior prison term; 3) that Appellant demonstrated a pattern of drug or alcohol abuse related to the offense and

refuses to acknowledge the pattern or refuses treatment; and 4) that Appellant's crime caused serious physical harm and there were numerous victims.

{¶12} There is sufficient evidence in the record to support the first two contested findings of the trial court. The record shows Appellant had committed numerous drug trafficking offenses within a narrow window of time which could be construed as a pattern of organized criminal activity. As to the trial court's finding that he had served a prior prison term, Appellant was already serving a prison term for another trafficking offense at the time of the sentencing in question. Additionally, he had been jailed numerous times in the past for prior offenses. While we find that there is ample evidence for both of the first two findings of the trial court contested by Appellant, the third and fourth contested findings are a different matter.

{¶13} The pre-sentence investigation report states the following: "The defendant indicated that he would seriously like help to say [sic] off drugs and get his life together. He would like to go to SEPTA and have drug and alcohol counseling." In light of that statement, it could be argued that the trial court's third contested finding, that Appellant demonstrated a pattern of drug or alcohol abuse and refuses to acknowledge the pattern or seek treatment, is inaccurate. However, such finding does not rise to the level of

abuse of discretion. The trial court may have concluded that Appellant's longstanding drug abuse and continuing drug-related crimes constituted a refusal to acknowledge a continuing pattern. Accordingly, we turn to the trial court's fourth contested finding.

{¶14} Specifically, the court's sentencing journal entry reads “(1) The defendant caused serious physical harm – there were numerous victims.” While, it can certainly be argued that trafficking in drugs often causes serious physical harm to numerous victims, the specific circumstances of Appellant's case does not indicate that this is such an instance. As Appellant points out, regarding the first trafficking count, it was a police informant who bought the drugs from Appellant. The drugs were then given directly to the Sheriff's Department. As such, the first trafficking charge resulted in no serious physical harm to any victims. Regarding the second trafficking charge, the drugs being transported for sale were, again, collected by the authorities. As already stated, in the abstract, drug trafficking can certainly be seen as a crime which causes serious physical harm to numerous people. However, as to the specific trafficking convictions for which Appellant was sentenced, nowhere in the record is there an indication that Appellant caused serious physical harm to numerous

victims. Accordingly, we find the trial court abused its discretion in making that finding. As such, Appellant's first assignment of error is sustained.

{¶15} We stress that our decision does not necessarily require that Appellant receive a lighter sentence upon remand. Upon remand, the trial court may very well again impose the maximum sentence for each of Appellant's convictions. After *Foster*, trial courts have full discretion to determine whether sentences satisfy the overriding purposes of Ohio's sentencing statutes. In the case sub judice, the trial court may determine that, taken together, the myriad pertinent sentencing factors still require that Appellant receive maximum sentences for his crimes. Our decision simply mandates that, in determining Appellant's sentence, the trial court may not rely upon the finding that Appellant's crimes resulted in serious physical harm to numerous victims.

IV. Second Assignment of Error

{¶16} In his second assignment of error, Appellant argues that his trial counsel was ineffective in advising him to plead guilty. Appellant states that he entered his guilty plea based on his counsel's representation that he would receive a sentence of between two and four years and that, if not for that representation, Appellant would not have pleaded guilty.

{¶17} In order to establish ineffective assistance of counsel, an appellant must show that counsel's representation was deficient as well as

prejudicial. *In re Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101, at ¶77.

Deficient representation means counsel's performance was below an objective standard of reasonableness. *Id.* To show prejudice, an appellant must show it is reasonably probable that, except for the errors of his counsel, the proceeding's outcome would have been different. *Id.* "To show that a defendant has been prejudiced when the defendant has pled guilty, the proponent must prove that there is a reasonable probability that, were it not for counsel's errors, the defendant would not have pled guilty." *State v. Parker* (Jan. 6, 1998), 4th Dist. No. 96CA35, at *2. See, also, *State v. Martin*, 4th Dist. No. 06CA3110, 2007-Ohio-4258, at ¶21.

{¶18} "A reviewing court when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action." *State v. Wright*, 4th Dist. No. 00CA39, 2001-Ohio-2473, at *22. Instead, reviewing courts must be highly deferential. *Id.* Further, "a reviewing court: 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, citing *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052.

{¶19} Appellant fails to show that his counsel's representation was either deficient or prejudicial. The entire basis of Appellant's argument is that he would not have pleaded guilty had he known he could receive more than a two to four year prison term. However, during sentencing, the trial court explicitly told him that, despite the plea bargain and any sentencing recommendations from the State, Appellant could receive the maximum sentences for his crimes. Appellant indicated that he understood the trial court's warning. Further, Appellant's counsel was able to negotiate a plea bargain that reduced a six count indictment with a potential 15 year sentence into a two count conviction with a potential maximum of six years. Accordingly, Appellant has failed to show his counsel's representation was below an objective standard of reasonableness and has failed to show that, but for his counsel's errors, he would not have pleaded guilty. Appellant's second assignment of error is overruled.

V. Conclusion

{¶20} Because there is no evidence in the record below that the two crimes for which Appellant was convicted resulted in serious physical harm to numerous victims, the trial court abused its discretion in finding such during sentencing. Accordingly, to the extent the trial court relied upon that finding in imposing sentence, there was error. As such, we sustain Appellant's first assignment of error and remand the matter for resentencing.

Because Appellant's trial counsel's representation was neither deficient nor prejudicial, we overrule his second assignment of error.

**JUDGMENT REVERSED
AND CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND THE CAUSE REMANDED and that the Appellant recover of Appellee 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.

Kline, P.J. and Abele, J.: Concur in Judgment and Opinion.

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.