

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 13CA42
v.	:	
	:	<u>DECISION AND</u>
STACY Y. LEE,	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	Released: 10/27/2014

APPEARANCES:

Stephen H. Eckstein, Washington Court House, Ohio for Appellant.

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

Hoover, J.:

{¶ 1} Appellant-defendant Stacy Y. Lee appeals her conviction and sentence from the Washington County Court of Common Pleas. Lee pled guilty to one count of Tampering With Drugs, a third degree felony, in violation of R.C. 2925.24(A). Prior to her guilty plea, Lee filed a motion to suppress her statements and property seized or obtained during a police search. The trial court denied the motion. As a result of her plea, the trial court sentenced her to 24 months in prison. On appeal, Lee argues: 1) the trial court erred in denying her motion to suppress and 2) the trial court erred in sentencing her to 24 months. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} On August 3, 2012, the Washington County Sherriff's department executed a search warrant on the residence of Russell Burkhammer. Appellant Lee was present at the residence at the time of the police search. As a result of the search, Burkhammer and Lee were

both indicted on one count each of Tampering with Drugs, a third degree felony, in violation of 2925.24(A)&(E).

{¶ 3} Lee filed a motion to suppress the statements collected during the police search as well as the property seized. During the hearing on the motion to suppress, a digital recording of the conversation between Burkhammer, Lee and Lieutenant Joshua Staats was played. The conversation went as follows:

JS [Lt. Staats]: And spoon.

KH: And a spoon in a bag.

RB[Burkhammer]: I don't know nothing about that, sir. I just got my house back -
-

JS: She ain't been Mirandized yet, either, Brian.

RB: You can check all my arms and my legs. I don't -- I don't like needles.

SL[Lee]: Anything like that belongs to me.

JS: What, needles?

SL: You know --yes, he knows nothing about --

JS: I'm going to read you your rights first, before you start blabbing here, even though you've been through it 25 fucking times.

SL: (Inaudible).

JS: You have the right to remain silent. Anything you say --

(Unintelligible by voice in background.)

JS: -- can and will be used against you in court. You have the right to consult an attorney, have an attorney present during any questioning. If you cannot afford attorney, one can be provided to you before any question at no cost.

Do you understand your rights?

(Pause.)

JS: You. Yes or no?

SL: I'm sorry. I thought you were speaking to him.

JS: You understand your rights?

SL: Yes, I do.

{¶ 4} The trial court denied the motion to suppress. On June 5, 2013, Lee entered a plea of guilty to one count of Tampering with Drugs, a third degree felony, in violation of R.C. 2925.24(A). At sentencing, the trial court found:

Making it less -- recidivism less likely, none of the statutory factors are present.

Seriousness factors, the non-serious, I don't really see any of those.

And violence factors, I think she was under supervision at the time this offense was committed. That's also listed as a violence factor.

And nonviolent, did not have a firearm.

So she has prior felonies, and she's not followed the rules of supervision.

Honestly, this Court does not believe that Ms. Lee is presently amenable to community control and prison is consistent with the purposes of 2929.11. You are sentenced to imprisonment at the Ohio Reformatory for Woman at Marysville, Ohio, for a definite sentence of 24 months. You are to receive a credit for six days

jail you've already served and any time you remain in the county jail, pending transportation to the institution.

The trial court sentenced Lee to 24 months in prison. Lee now presents this timely appeal.

Appellant's First Assignment of Error:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS STATEMENTS

{¶ 5} In her first assignment of error, Lee argues that Lt. Staats should have read the Miranda rights to her again after it was clear she had not been paying attention during the time Lt. Staats read them. Lee contends that the state failed to carry its burden of ensuring she fully understood her Miranda rights before her waiver was accepted.

{¶ 6} However, because Lee entered a guilty plea, she has forfeited her right to appeal the trial court's decision on the motion to suppress. *State v. Jacobson*, 4th Dist. Adams No. 01CA730, 2003-Ohio-1201, ¶ 10; *see also Huber Hts. v. Duty*, 27 Ohio App.3d 244, 500 N.E.2d 339 (2nd Dist.1985); *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus (stating that a guilty plea "waives all appealable errors which may have occurred * * * unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea."). In exchange for Lee entering a guilty plea, the State agreed to recommend a prison sentence of 24 months. The State also agreed not to oppose judicial release after 12 months in exchange for Lee's guilty plea. Lee makes no argument that her plea was not voluntarily entered. Therefore, we must overrule Lee's first assignment of error.

Appellant's Second Assignment of Error:

THE TRIAL COURT ERRED IN IMPOSING A TWENTY-FOUR MONTH SENTENCE

{¶ 7} In her second assignment of error, Lee argues that the trial court erred in sentencing her to 24 months. Specifically, Lee contends that the trial court did not consider two “less serious” factors under 2929.12 that were present in her case. The two factors Lee asserts are (1) the record does not show any propensity to cause physical harm to persons or property and (2) the record shows a long term drug addicted person who was abusing drugs because of her addiction.

{¶ 8} “Generally, when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2).” *State v. Baker*, Athens No. 13CA18, 2014–Ohio–1967, ¶ 25. *See also State v. Brewer*, Meigs No. 14CA1, 2014–Ohio–1903, ¶ 33 (“we join the growing number of appellate districts that have abandoned the *Kalish* plurality’s second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that ‘[t]he appellate court’s standard of review is not whether the sentencing court abused its discretion’ ”). R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that “the record does not support the sentencing court’s findings” under the specified statutory provisions or “the sentence is otherwise contrary to law.”

{¶ 9} Although *Kalish* may not provide the standard of review framework for reviewing felony sentences, it does provide guidance for determining whether a sentence is clearly and convincingly contrary to law. *See State v. Lee*, 12th Dist. Butler No. CA2012-09-182, 2013-Ohio-3404, ¶ 10. According to *Kalish*, a sentence is not clearly and convincingly contrary to law when the trial court considered the purposes and principles set forth in 2929.11, as well as the factors listed in R.C. 2929.12, properly applies post release control, and sentences within the permissible statutory range. *Id.*; *see also Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 at ¶ 18.

R.C. 2929.12(C) states:

(C)The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

- (1) The victim induced or facilitated the offense.
- (2) In committing the offense, the offender acted under strong provocation.
- (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
- (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

Lee asserts that the factors in R.C. 2929.12(C)(3) and (4) should have been considered by the trial court. As cited earlier in this opinion the court found: “Seriousness factors, the non-serious, I don’t really see any of those.”

{¶ 10} Here, it is clear that the trial court considered the factors listed in R.C. 2929.12. The trial court expressed that it considered the factors, as well as the principles and purposes of sentencing set forth in R.C. 2929.11. Even if the trial court did not consider that Lee’s offense did not cause physical harm to any person or property or that Lee was a long term drug addict, it did state other seriousness and recidivism factors justifying the sentence. The trial court cited Lee’s criminal history, her failure to respond to sanctions, and her demonstrated pattern of drug abuse as reasons why she presented a moderate risk for recidivism. The sentence of 24 months is also well within the statutory range for punishment for a third degree felony offense.

{¶ 11} Therefore, we cannot find that Lee's sentence was clearly and convincingly contrary to law. Lee's second assignment of error is overruled.

{¶ 12} Having overruled both of Lee's assignments of error, the judgment of the Washington County Court of Common Pleas is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the 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 the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest 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 the 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](#).

Abele, P.J. & Harsha, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Judge

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.