[Cite as *State v. Farnese*, 2015-Ohio-3533.]

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

STATE OF OHIO,	:	Case No. 15CA11
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DARREN C. FARNESE,	:	
Defendant-Appellant.	:	**RELEASED: 08/11/2015**

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.

Kevin Rings, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} Darren C. Farnese was indicted on two counts of unlawful sexual conduct with a minor, both fourth degree felonies. After negotiations he entered a guilty plea to count one in return for the state's dismissal of count two. The trial court sentenced Farnese to the maximum 18 months in prison, a mandatory postrelease control of five years, and found him to be a Tier II sexual offender. The court also ordered Farnese to pay court costs.

{¶2} Farnese raises two assignments of error. He argues that the maximum sentence is "inappropriate" because the statutory principles and purposes of felony sentencing, and seriousness and recidivism factors do not support the trial court's imposition of the maximum 18-month sentence. However, the trial court's sentence is not contrary to law. The court stated at the sentencing hearing and in the entry that it considered the purposes and principles under R.C. 2929.11 and it balanced the factors

in R.C. 2929.12 concerning the seriousness of the offense and the likelihood of recidivism. And, the sentence imposed was within the statutory range. Moreover, the record clearly and convincingly supports the findings the court used in imposing a maximum sentence. Because the court followed the proper procedure and applied all relevant statutory factors, we overrule Farnese's first assignment of error.

{¶3} Farnese also argues he was provided constitutionally ineffective assistance of counsel because his attorney failed to request a waiver of court costs at the sentencing hearing. Even assuming trial counsel's performance was deficient, Farnese cannot show that he was prejudiced because under amended R.C. 2947.23(C) a motion for waiver of court costs can be filed at anytime. Thus, we overrule Farnese's second assignment of error and affirm the trial court's judgment.

I. ASSIGNMENTS OF ERROR

{¶4} Farnese makes the following assignments of error:

I. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT-APPELLANT TO THE MAXIMUM SENTENCE ALLOWED BY LAW.

II. TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE BY FAILING TO MOVE AT SENTENCING FOR A WAIVER OF THE IMPOSITION OF COURT COSTS.

II. LAW AND ANALYSIS

A. Standard of Review

{¶5} The trial court sentenced Farnese to the maximum prison term allowed for his one fourth degree offense under R.C. 2929.14(A)(4). Thus, under R.C. 2953.08(A)(1)(a), Farnese is entitled to appeal his sentence as a matter of right because he pleaded guilty to a felony, he received a nonmandatory maximum prison term, and he was sentenced for one offense. Under R.C. 2953.08(G)(2), an appellate

court may increase, reduce or modify a sentence or may vacate the sentence and remand the matter to the sentencing court if it clearly and convincingly finds either:

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

Maximum sentences do not require specific findings referenced in R.C. 2953.08(G)(2)(a), thus our focus is on subpart (b) of that section. *See State v. Lister,* 4th Dist. Pickaway App. No. 13CA15, 2014-Ohio-1405, ¶ 10.

{¶6} We have held that even though the "clearly and convincingly" standard of review in R.C. 2953.08(G)(2) replaces the "abuse of discretion" standard of review previously established in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the first part of the analysis established in *Kalish* is still useful. *See State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317 (4th Dist.):

> Although the plurality opinion in *Kalish* no longer controls our standard of review of felony sentences, "it may still be utilized in the course of determining whether a sentence is clearly and convincingly contrary to law." *Tammerine,* 2014-Ohio-425, 2014 WL 505471, at ¶ 15. Consequently, a sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied postrelease control, and imposed a sentence within the statutory range. *Id.,* citing *Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 18. The sentence must also comply with any specific statutory requirements that apply, e.g. a mandatory term for a firearm specification, certain driver's license suspensions, etc.

Id. at ¶38.

B. Maximum Sentence

{¶7} Farnese argues that we should vacate the sentence and remand the matter to the sentencing court because his sentence is "inappropriate," which we

construe to mean "contrary to law." He admits that the trial court considered the purposes and principles of felony sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. But he contends that the record showed only one recidivism factor under R.C. 2929.12(D), one nonviolent factor in that he did not have a firearm on his person when he committed the offense, no violence factors, and there were no factors showing that his conduct was either more serious or less serious than conduct normally constituting the offense under R.C. 2929.12(B) or (C). Based upon the balance of factors, Farnese argues his maximum sentence of 18 months "is inappropriate" and his case should be remanded to the trial court for resentencing. Farnese "contends the maximum sentence is inappropriate where the record shows only one recidivism factor plus one nonviolent factor but shows, no more serious factors and no less serious factor, no violence factors and one nonviolent factor" but cites no statutory or case law authority to support this proposition. In fact, the sentencing statutes and our standard of review in R.C. 29053.08(G)(2) provide for the contrary.

{¶8} The state argues that the standard is not whether the sentence was "inappropriate" but whether the sentence is clearly and convincingly contrary to law. Because the record shows that the trial court considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12, the state argues that the trial court's sentence is not contrary to law; moreover, the court had discretion to impose any term of imprisonment within the statutory range. We agree, see R.C. 2929.13(A), which provides the trial court with discretion on how much weight to give the various factors and what ultimate sentence to impose in most

circumstances. *See State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶30.

{¶9} The 18-month prison sentence for Farnese's fourth-degree felony conviction for unlawful sexual conduct with a minor was within the statutory range of six to 18 months. R.C. 2929.14(A)(4). Therefore, Farnese's maximum 18 month sentence is not clearly and convincingly contrary to law.

{¶10} And to the extent his argument about the "appropriateness" of the sentence is intended to assert that the court's findings under the purposes and principles and the seriousness and recidivism factors is not supported by clear and convincing evidence, the record clearly refutes that contention. The record shows that the trial court considered the principles and purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. The recidivism factor was specifically addressed at the sentencing hearing. The trial court recited Farnese's lengthy juvenile and criminal record at the hearing and in the sentencing entry, which included breaking and entering and theft as a juvenile, and probation violations, theft, receiving stolen property, and the illegal conveyance or possession of a deadly weapon in a school zone as an adult. This last conviction involved menacing behavior towards a 14-year old girl. The court stated, "Mr. Farnese, for a person of age 20, has managed to obtain a lengthy criminal record. His juvenile record is longer than many adult records, actually." His history of prior juvenile and adult convictions led the court to conclude that Farnese has "failed to respond favorable in the past to sanctions imposed upon him." The court also found that Farnese was not amenable to community control sanctions because there was an active warrant for him

in Wood County, West Virginia for breaking and entering and grand larceny. We find no merit in Farnese's first assignment of error and overrule it.

C. Ineffective Assistance of Counsel

{¶11} For his second assignment of error Farnese argues that trial counsel provided constitutionally ineffective assistance when he failed to move for a waiver of the imposition of court costs at the sentencing hearing. To prevail on a claim of ineffective assistance of counsel an appellant must establish that (1) counsel's performance was deficient, that is, it fell below an objective standard of reasonable representation, and (2) counsel's deficient performance resulted in prejudice, meaning that there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mundt*, 115 Ohio St.3d 22, 2007–Ohio–4836, 873 N.E.2d 828, ¶ 62; *State v. Sowards*, 4th Dist. Gallia No. 06CA13, 2013–Ohio–3265, ¶ 11. In employing this standard we apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," with the "benchmark" being "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 689, 686; *State v. Williams*, 99 Ohio St.3d 493, 2003–Ohio–4396, 794 N.E.2d 27, ¶ 159.

{¶12} In all criminal cases the judge must include in the sentence the costs of prosecution and render a judgment against the defendant for such costs, even if the defendant is indigent. R.C. 2947.23(A)(1)(a); *State v. White,* 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. However, the trial court retains jurisdiction to waive,

suspend, or modify the payment of the costs "at the time of sentencing or at any time thereafter." R.C. 2947.23(C).[1] The trial court may waive court costs – but is not required – if the defendant is indigent. *State v. Hawkins*, 4th Dist. Gallia 13CA3, 2014-Ohio-1224, ¶ 18; *State v. Walker*, 8th Dist. Cuyahoga App. No. 101213, 2014-Ohio-4841, ¶ 9 (the discretion to waive court costs includes the discretion not to waive them).

{¶13} Here the court found Farnese indigent and did not impose fines because of it. However, the court acknowledged that it was required to issue a judgment against him for court costs and explained that Farnese could set up a payment plan or apply to the court to perform community service. The court explained that Farnese could find community service work and the court could order that payment of his court costs be made through the value of his work and time performed in community service. At the conclusion of the sentencing hearing, the court remarked, "So, you've got - - you've got yourself behind the eight ball in a big way. You really have, legally."

{¶14} Even if we assume counsel's failure fell below an objective level of reasonable representation we cannot conclude the failure to move for a waiver of court costs resulted in prejudice. There is not a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. The trial court imposed the maximum sentence on Farnese after reciting nearly his entire juvenile and adult criminal records, explained ways for Farnese to pay court costs through community service, and summarized Farnese's legal status as "behind the eight ball in a big way."

{¶15} The statutory provision in R.C. 2947.23(C) adds another facet to our ineffective assistance of counsel analysis because a defendant is no longer required to

[1] This provision was added effective March 22, 2013 and was in effect at the time Farnese was convicted and assessed costs.

move for a waiver of court costs at the sentencing hearing or waive it – strategic timing may now play a role in trial counsel's decision – and prejudice resulting from a failure to move at the sentencing hearing is harder, if not impossible, to discern.

{¶16} Trial counsel may have decided as a matter of strategy not to seek a waiver or modification of court costs until some later time when the trial court had time to either reflect upon its sanctions or the vividness of the impact of Farnese's conduct had faded. The Third District Court of Appeals recently addressed a defendant's ineffective assistance of counsel claim arising from trial counsel's failure to request a waiver of court costs at the sentencing hearing under R.C. 2947.23(C) and held that any error in failing to move to waive court costs at the sentencing hearing is not prejudicial:

> The new version of the statute [R.C. 2947.23] went into effect on March 22, 2013, and is cited above. This version, unlike the one in *Weimert*, provides the trial court with ongoing jurisdiction to waive, suspend or modify costs at sentencing or at any time after sentencing. Thus, even if counsel should have objected to the imposition of costs, the error is not prejudicial.

State v. Williams, 3rd Dist. Auglaize App. No. 2-13-31, 2014-Ohio-4425, ¶ 17. Because Farnese cannot show he was prejudiced by counsel's failure to move for a waiver of costs, we overrule Farnese's second assignment of error.

III. CONCLUSION

{¶17} The court's findings that support Farnese's 18-month maximum sentence are clearly and convincingly supported by the record. And the sentence is not clearly and convincingly contrary to law. The trial court considered the sentencing principles and purposes in R.C. 2929.11, balanced the seriousness and recidivism factors in R.C. 2929.12, and imposed a sentence within the statutory range for a fourth degree felony under R.C. 2929.14(A)(4).

{¶18} And even if we assume that trial counsel's failure to move for a waiver of court costs at the sentencing hearing was deficient, Farnese failed so show that he was prejudiced because he can still move for suspension of court costs.

{¶19} Therefore, we overrule Farnese's assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

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 Court of Common Pleas 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.: Concurs in Judgment and Opinion.
McFarland, A.J.: Concurs in Judgment Only.

For the Court

BY: _____
William H. Harsha, 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.