

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-COA-036
STEPHEN J. SHULL	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Ashland County Court of Common Pleas, Case No. 08-CRI-051

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 24, 2009

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Gwin, P.J.

{¶1} Appellant Stephen J. Shull appeals the sentence rendered by the Ashland County Court of Common Pleas on the basis that it imposes an unnecessary burden on the state's resources. The following facts give rise to this appeal.

{¶2} On March 20, 2008, Doug McQuate, appellant's probation officer, observed appellant getting into his car and driving away from a bar. Mr. McQuate was aware of the fact that appellant did not have driving privileges so he followed appellant home. When appellant reached his home, Mr. McQuate approached him and noticed a strong odor of alcohol coming from him. Appellant acknowledged that he had indeed been drinking that day. Appellant then submitted to a Breath Alcohol Content Datamaster test. The results showed appellant had .218 grams of alcohol per 210 liters of breath in his system. The investigation further revealed the fact that appellant had three prior convictions for OVI offenses in the past six years.

{¶3} The Ashland County Grand Jury indicted appellant on two counts of Operating a Vehicle Under the Influence of Alcohol and/or Drugs, both felonies of the fourth degree. Appellant pled guilty to one count of Attempted Operating a Vehicle Under the Influence of Alcohol and/or Drugs, a felony of the fifth degree. As a result of this conviction, the trial court sentenced appellant to serve six months in prison.

{¶4} Appellant has timely appealed raising the following assignment of error:

{¶5} "I. THE IMPOSITION OF A PRISON SENTENCE IN THIS CASE IMPOSES AN UNNECESSARY BURDEN ON STATE RESOURCES."

I.

{¶6} Appellant maintains, in his sole assignment of error, the imposition of a six-month prison sentence results in an unnecessary burden on state resources. We disagree.

{¶7} Recently in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470 as it relates to the remaining sentencing statutes and appellate review of felony sentencing. See, *State v. Snyder*, Licking App. No. 2008-CA-25, 2008-Ohio-6709.

{¶8} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding that “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Kalish* at ¶ 1 and 11, citing *Foster* at ¶100, See also, *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, 873 N.E. 2d 306; *State v. Firouzmandi*, Licking App. No. 2006-CA-41, 2006-Ohio-5823.

{¶9} “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at ¶ 12. However, although *Foster* eliminated mandatory judicial fact-finding, it left in tact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at ¶13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1; *State v. Firouzmandi*, supra at ¶ 29.

{¶10} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when *initially* reviewing a defendant’s sentence. Instead, 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).” *Kalish* at ¶14.

{¶11} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. “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 in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard.” *Kalish* at ¶ 4, *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470.

{¶12} The Supreme Court held, in *Kalish*, that the trial court’s sentencing decision was not contrary to law. “The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law.” *Kalish* at ¶18. The Court further held that the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and that there was

“nothing in the record to suggest that the court’s decision was unreasonable, arbitrary, or unconscionable.” *Kalish* at ¶20.

{¶13} In the case at bar, appellant was convicted of Attempted Operating a Vehicle While Under the Influence of Alcohol and/or Drugs, a felony of the fifth degree. For a violation of a felony of the fifth degree, the potential sentence that a court can impose is six, seven, eight, nine, ten, eleven, or twelve months. Appellant was sentenced to the minimum sentence of six months.

{¶14} Upon review, we find that the trial court's sentencing on the charge complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Furthermore, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code and advised appellant regarding post release control. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶15} Having determined that the sentence is not contrary to law we must now review the sentence pursuant to an abuse of discretion standard. *Kalish* at ¶ 4; *State v. Firouzmandi*, supra at ¶ 40. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶16} In this case, the trial court noted that the appellant’s criminal history goes back to 1978 when he was convicted of his first OVI offense. (Sent. Trans., Oct. 10, 2008 at 8). In 1980, appellant again committed an OVI offense. (*Id.*) Appellant was convicted of OVI offenses in 2002, 2005, and 2007. (*Id.*) Appellant was also convicted of Disorderly Conduct offenses in 2004, 2005, and 2007. (*Id.*) Appellant was on

probation at the time of the offense in this case and had been on probation for the years preceding the instant offense. (Id.) Appellant had received multiple forms of substance abuse counseling prior to his commission of the offense in this case. (Id. at 9). Despite his prior involvement in the court system, years of probation, years of substance abuse treatment, appellant continued to abuse alcohol and put the public in danger by driving while intoxicated. All of these factors demonstrate the high likelihood that appellant will reoffend. Based upon appellant's extensive prior history, there was almost nothing before the trial court that indicated that appellant was amenable to community control.

{¶17} Accordingly, there is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of appellant's case to suggest that his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. *State v. Firouzmandi*, supra at ¶ 43.

{¶18} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of felony sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11.

{¶19} Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under

the Ohio and United States Constitutions in its sentencing appellant to the term of six (6) months incarceration.

{¶20} In his assignment of error, appellant further contends that his sentence violates the general assembly's intent to minimize the unnecessary burden on state and local government resources. Specifically, appellant argues that because of the high cost of housing prison inmates, the cost of housing him in prison instead of a community control sanction creates an unnecessary burden on state and local resources.

{¶21} In *State v. Ober* (Oct. 10, 1997), Greene App. No. 97CA0019, the Second District considered this same issue. In rejecting the argument, the court stated "Ober is correct that the 'sentence shall not impose an unnecessary burden on state or local government resources.' R.C. 2929.19(A). According to criminal law experts, this resource principle 'impacts on the application of the presumptions also contained in this section and upon the exercise of discretion.' Griffin & Katz, *Ohio Felony Sentencing Law* (1996-97), 62. Courts may consider whether a criminal sanction would unduly burden resources when deciding whether a second-degree felony offender has overcome the presumption in favor of imprisonment because the resource principle is consistent with the overriding purposes and principles of felony sentencing set forth in R.C. 2929.11. *Id.*"

{¶22} The *Ober* court concluded, "[a]lthough resource burdens may be a relevant sentencing criterion, R.C. 2929.13(D) does not require trial courts to elevate resource conservation above the seriousness and recidivism factors. Imposing a community control sanction on Ober may have saved state and local government funds;

however, this factor alone would not usually overcome the presumption in favor of imprisonment." *Id.*

{¶23} Several other appellate courts, including our own, considering these issues have reached the same conclusion. See, e.g., *State v. Hyland*, Butler App. No. CA2005-05-103, 2006-Ohio-339 at ¶32; *State v. Brooks* (Aug. 18, 1998), Franklin App. No. 97APA-11-1543; *State v. Stewart* (Mar. 4, 1999), Cuyahoga App. No. 74691; *State v. Fox* (Mar. 6, 2001), Wyandot App. No. 16-2000-17; *State v. Miller*, Ashland App. No. 04-COA-003, 2004-Ohio-4636. We agree with the reasoning of the *Ober* court and other courts considering this issue and find no merit to appellant's argument.

{¶24} Appellant's sole assignment of error is overruled.

{¶25} The judgment of the Ashland County Court of Common Pleas is affirmed.

By Gwin, J.,

Farmer, P.J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

