

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-VS-	:	
	:	Case No. 10-COA-003
HAROLD G. WEBER	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Ashland County Court of Common Pleas, Case No. 09-CRI-099
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	August 24, 2010
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APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Appellant Harold G. Weber 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 October 30, 2009, appellant pled guilty to a Bill of Information charging him with one count of Rape, a felony of the first degree involving his five-year-old grandson.

{¶3} On December 18, 2009, the Court held a sentencing hearing. Counsel for appellant addressed appellant's service to his country in Korea, his age (seventy years old), his lack of a criminal record, and his genuine remorse for his actions and the harm caused to the victim. Appellant then addressed the Court, saying that he was sorry for his actions and accepted responsibility for them, stating, "I'm guilty as charged." The State recommended appellant be imprisoned as opposed to a community control sanction. The Court then reviewed the seriousness of the offense and likelihood of recidivism and found the maximum sentence was appropriate and sentenced appellant to ten years imprisonment.

{¶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 ten-year prison sentence results in an unnecessary burden on state resources. We disagree.

{¶7} At the outset, we note there is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S. Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi*, 5th Dist No. 2006-CA-41, 2006-Ohio-5823. An individual has no substantive right to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205; *State v. Goggans*, Delaware App. No. 2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28. In other words “[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction...It is not the duration or severity of this sentence that renders it constitutionally invalid....” *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255.

{¶8} In a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The first step is to "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." *Kalish* at ¶ 4. If this first step "is satisfied," the second step requires the trial court's decision be "reviewed under an abuse-of-discretion standard." *Id.*

{¶9} As a plurality opinion, *Kalish* is of limited precedential value. See *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (characterizing prior case as "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute

controlling law"). See, *State v. Franklin* (2009), 182 Ohio App.3d 410, 912 N.E.2d 1197, 2009-Ohio-2664 at ¶ 8. "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; *State v. Welch*, Washington App. No. 08CA29, 2009-Ohio-2655 at ¶ 6. Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing. *State v. Welch*, supra; *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264 at n. 2; *State v. Ringler*, Ashland App. No. 09-COA-008, 2009-Ohio-6280 at ¶ 20.

{¶10} In the first step of our analysis, we review whether the sentence is contrary to law. In the case at bar, appellant was convicted of rape a felony of the first degree. For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years. R.C. 2929.14(A)(1).

{¶11} Upon review, we find that the trial court's sentencing on the charges complies with applicable rules and sentencing statutes. The sentences were 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.

{¶12} 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.

{¶13} Under Ohio law, judicial fact-finding is no longer required before a court imposes consecutive or maximum prison terms. See *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856; *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855. Instead, the trial court is vested with discretion to impose a prison term within the statutory range. See *Mathis*, at ¶ 36. In exercising its discretion, the trial court must “carefully consider the statutes that apply to every felony case [including] R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender [and] statutes that are specific to the case itself.” *Id.* at ¶ 37. Thus, post-*Foster*, “there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors.” *Foster* at ¶ 42. *State v. Rutter*, 5th Dist. No. 2006-CA-0025, 2006-Ohio-4061; *State v. DeLong*, 4th Dist. No. 05CA815, 2006-Ohio-2753 at ¶ 7-8. Therefore, post-*Foster*, trial courts are still required to consider the general guidance factors in their sentencing decisions.

{¶14} There is no requirement in R.C. 2929.12 that the trial court states on the record that it has considered the statutory criteria concerning seriousness and recidivism or even discussed them. *State v. Polick* (1995), 101 Ohio App.3d 428, 431; *State v. Gant*, Mahoning App. No. 04 MA 252, 2006-Ohio-1469, at ¶ 60 (nothing in R.C. 2929.12 or the decisions of the Ohio Supreme Court imposes any duty on the trial court to set forth its findings), citing *State v. Cyrus* (1992), 63 Ohio St.3d 164, 166; *State v. Hughes*, Wood App. No. WD-05-024, 2005-Ohio-6405, at ¶10 (trial court was not

required to address each R.C. 2929.12 factor individually and make a finding as to whether it was applicable in this case), *State v. Woods*, 5th Dist. No. 05 CA 46, 2006-Ohio-1342 at ¶19 (“... R.C. 2929.12 does not require specific language or specific findings on the record in order to show that the trial court considered the applicable seriousness and recidivism factors”). (Citations omitted).

{¶15} Where the record lacks sufficient data to justify the sentence, the court may well abuse its discretion by imposing that sentence without a suitable explanation. Where the record adequately justifies the sentence imposed, the court need not recite its reasons. *State v. Middleton* (Jan. 15, 1987), 8th Dist. No. 51545. In other words, an appellate court may review the record to determine whether the trial court failed to consider the appropriate sentencing factors. *State v. Firouzmandi*, 5th Dist No. 2006-CA41, 2006-Ohio-5823 at ¶ 52.

{¶16} Accordingly, appellate courts can find an “abuse of discretion” where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Cincinnati v. Clardy* (1978), 57 Ohio App.2d 153, 385 N.E.2d 1342. An “abuse of discretion” has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. The imposition by a trial judge of a sentence on a mechanical, predetermined or policy basis is subject to review. *Woosley*, supra at 143-145. Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's can reverse the sentence. *Woosley*,

supra at 147. This by no means is an exhaustive or exclusive list of the circumstances under which an appellate court may find that the trial court abused its discretion in the imposition of sentence in a particular case. *State v. Firouzmandi*, supra.

{¶17} 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 her sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.

{¶18} In the case at bar, the trial court conducted a sentencing hearing in open court. Despite appellant's lack of a significant criminal history, this was an extremely serious offense. The trial court noted that this offense was more serious because of the fact that appellant is the victim's own grandfather; appellant was suppose to be babysitting the victim at the time of the offense; further, the victim was only five years old at the time of the offense; and the victim has suffered psychological harm as a result of this offense. (T. at 8-9).

{¶19} Further, appellant has not shown genuine remorse. Appellant did not come forward and report this offense to law enforcement. It was reported by the victim's Mother. Further, when law enforcement interviewed appellant, he stated that he was putting his finger up his five-year-old grandson's anus because his grandson had talked him into it. Even after he pled guilty, appellant told the Adult Parole Authority that he only did this because the victim had talked him into it. During the sentencing hearing, the trial court took particular note of the fact that appellant continued to allege

that the primary reason this Rape occurred was that his five year old grandson begged for it. (T. at 8).

{¶20} 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.

{¶21} Based on the record, 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. Further, the sentence in this case is not so grossly disproportionate to the offense as to shock the sense of justice in the community.

{¶22} In his assignment of error, appellant 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 beyond the minimum sentence creates an unnecessary burden on state and local resources.

{¶23} 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."

{¶24} 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.

{¶25} 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.

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

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

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

HAROLD G. WEBER

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 10-COA-003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER