[Cite as *State v. Williams*, 2010-Ohio-4630.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DEVAN A. WILLIAMS, SR. Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 2009CA00196 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2008CR1702
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO, PROSECUTING ATTORNEY, STARK COUNTY, OHIO By: RENEE M. WATSON Assistant Prosecuting Attorney Appellate Section 110 Central Plaza South, Suite 510 Canton, Ohio 44702-1413	RODNEY A. BACA Schnars, Baca & Infantino, LLC 610 Market Avenue North Canton, Ohio 44702

Hoffman, P.J.

{¶1} Defendant-appellant Devan A. Williams, Sr. appeals his conviction and sentence entered by the Stark County Court of Common Pleas, on one count of possession of cocaine, and one count of possession of marijuana, following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On October 28, 2008, the Stark County Grand Jury indicted Appellant on one count of possession of cocaine, in violation of R.C. 2925.11(A)(C)(4)(b), a felony of the fifth degree, and one count of possession of marijuana, in violation of R.C. 2925.11(A)(C)(3)(a), a minor misdemeanor. Appellant appeared before the trial court for arraignment on November 21, 2008, and entered a plea of not guilty to the charges. Appellant filed a motion to suppress, arguing all of the evidence obtained by the State in connection with the matter should be suppressed as the arresting officers did not have reasonable, articulable suspicion which warranted the stop of Appellant, and Appellant did not freely, voluntarily or knowingly give officers permission to search his person. The trial court conducted a hearing on the motion on May 4, 2009, and thereafter, overruled such via Judgment Entry filed May 15, 2009. The matter proceeded to jury trial on June 24, 2009.

{¶3} The following evidence was adduced at trial. Canton Police Officer Kevin Sedares testified, at approximately 12:20 am on September 22, 2009, he and his partner, Officer Mike Volpe, were on routine patrol in the South Canton area. As Officer Sedares drove his cruiser through the intersection of Ninth Street and High Avenue he observed an individual, who was subsequently identified as Appellant, riding a bicycle.

As the officers drove by, Officer Volpe informed Officer Sedares Appellant had turned off the bicycle headlight. Officer Sedares turned around the cruiser and followed Appellant. Appellant began to rapidly pedal the bicycle. As Appellant drove the bicycle into an alley, Officer Volpe observed him throw something. The officers stopped Appellant, who immediately identified himself. Officer Volpe asked Appellant if he would consent to being searched, and Appellant stated he had marijuana on his person. The officers arrested Appellant and placed him in the rear of the cruiser. Officer Volpe returned to the area where he had seen Appellant discarding something, and located a baggie containing what was determined to be crack cocaine. In addition to the marijuana, the officers also found on Appellant's person $770.00 in denominations of twenties and fives, which subsequently tested positive for traces of cocaine.

{¶4} After hearing all the evidence and deliberating, the jury found Appellant guilty as charged. The trial court conducted a sentencing hearing on June 29, 2009, and imposed an aggregate prison term of eighteen months.

{¶5} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

{¶6} "I. THE ARREST OF THE APPELLANT IS IN VIOLATION OF OHIO REVISED CODE 2935.26 CONSTITUTES AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION XIV OF THE OHIO CONSTITUTION THEREBY REQUIRING SUPPRESSION IN ACCORDANCE WITH THE EXCLUSIONARY RULE OF EVIDENCE SEIZED AS CONSEQUENCE OF THE VIOLATION OF THAT STATUTE.

{¶7} "II. THE TRIAL COURT ERRED WHEN IT ABUSED ITS DISCRETION IN SENTENCING THE APPELLANT TO THE MAXIMUM PRISON TERM.

{¶8} "III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

I

{¶9} In his first assignment of error, Appellant challenges the trial court's denial of his motion to suppress. Appellant submits his arrest constituted an unreasonable seizure under the Fourth Amendment of the United States and Ohio Constitutions, and the evidence obtained as a result thereof should have been suppressed. Appellant contends the only evidence of his committing criminal activity was riding a bicycle without a headlight and possession of marijuana, both of which are minor misdemeanors for which he could not lawfully be arrested.

{¶10} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 2003-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate the credibility of witnesses. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra. [Citing *State v. McNamara* (1997), 124 Ohio

App.3d 706, 707 N.E.2d 539]; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas,* supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas,* supra at 698, 116 S.Ct. at 1663.

{¶11} Appellant correctly notes, pursuant to R.C. 2935.26(A), a police officer is not permitted to arrest an individual for a minor misdemeanor, but instead must issue a citation unless one of four exceptions is met. However, this statute is inapplicable to the instant action. Officers Sedares and Volpe placed Appellant under arrest for possession of marijuana. Possession of marijuana is a minor misdemeanor under the Ohio Revised Code. R.C. 2925.11(A)(C)(3)(a). However, possession of marijuana is a first degree misdemeanor under Canton Codified Ordinance 513.03. The Ohio Supreme Court has found such city ordinances to be constitutional, despite the differences in the degree of misdemeanor. *City of Niles v. Howard* (1984), 12 Ohio St.3d 162. At the time of his arrest, the Canton Police Officers had the authority to arrest Appellant under the Canton Codified Ordinance.

{¶12} Accordingly, we find Appellant's first assignment of error to be without merit and overrule the same.

II

{¶13} In his second assignment of error, Appellant contends the trial court erred and abused its discretion in sentencing him to the maximum prison term.

{¶14} 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, and discussed the affect of the *Foster* decision on felony sentencing. The *Kalish* Court explained, having severed the judicial fact-finding portions of R.C. 2929.14 in *Foster,* "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 paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. "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 paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13. See also, *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶15} "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 paragraph 14.

{¶16} In reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, 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.” *Id.* at paragraph 4.

{¶17} The *Kalish* Court ultimately found 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 paragraph 18. The Court further held the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and there was “nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable”. *Id.* at paragraph 20.

{¶18} We find Appellant's sentence is not contrary to law. The trial court expressly stated in its July 8, 2009 Judgment Entry/Prison Sentence Imposed, it considered the overriding purposes of felony sentencing set forth in R.C. 2929.11 and considered the seriousness and recidivism factors set forth in 2929.12. Furthermore, Appellant's sentences are within the permissible statutory ranges.

{¶19} Having satisfied step one, we next consider whether the trial court abused its discretion. *Kalish,* at ¶ 4, 19, 896 N.E.2d 124. An abuse of discretion is “more than

an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶20} We find the trial court did not abuse its discretion. The trial court considered the statutory factors under R.C. 2929.11 and 2929.12. The trial court also considered the factual background of the case; and Appellant's lengthy criminal history, including two prior prison terms and nine prior felony convictions.

{¶21} Based upon the foregoing, Appellant's second assignment of error is overruled.

III

{¶22} In his final assignment of error, Appellant challenges his conviction as against the manifest weight of the evidence and based upon insufficient evidence.

{¶23} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

State v. Martin (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶24} Appellant was convicted of R.C. 2925.11(A)(C)(4)(b), which provides:

{¶25} "(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶26} "* * *

{¶27} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶28} "* * *

{¶29} "(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

{¶30} "* * *

{¶31} "(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense."

{¶32} Appellant asserts the evidence presented at trial would not convince the average mind of his guilt beyond a reasonable doubt. Appellant submits the area in which he was stopped was dimly lit, Officer Volpe did not know for sure if the baggie he

found was the baggie Appellant had allegedly thrown, and the neighborhood in which he was arrested is a high drug area and residents had previously found drug paraphernalia as well as drugs strewn openly around the area.

{¶33} Upon review of the trial transcript, we find Appellant's conviction was neither against the manifest weight nor based upon insufficient evidence. The officers testified their suspicion of Appellant was raised after he appeared to extinguish the headlight on his bicycle, and began to rapidly pedal away from the officers. Officer Volpe observed Appellant throw something as he rode the bicycle into an alley. Officer Volpe testified Appellant was approximately seventy-five feet away from him when he (Appellant) threw the item, and the area was well lit by moonlight, streetlight, and some porch lights. Volpe subsequently located a baggie, which contained crack cocaine, in the area where he had seen Appellant discard something.

{¶34} The jury was free to accept or reject any or all of the testimony of the witnesses. The jury was free to conclude the object Appellant threw was, in fact, the baggie of cocaine found by Volpe. The jury obviously chose to find the Officers' rendition of the events of the evening of September 22, 2008 to be credible.

{¶35} Appellant's third assignment of error is overruled.

{¶36} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DEVAN A. WILLIAMS, SR.	:	
	:	
Defendant-Appellant	:	Case No. 2009CA00196

For the reasons stated in our accompanying Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY