

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

: JUDGES:

Plaintiff-Appellee

: Hon. John W. Wise, P.J.
: Hon. Patricia A. Delaney, J.
: Hon. Craig R. Baldwin, J.

-VS-

: Case No. 14-COA-020

DALTON L. GRAFFICE

Defendant-Appellant

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court
of Common Pleas, Case No. 13-CRI-
123

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

May 6, 2015

APPEARANCES:

For Plaintiff-Appellee:

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant Dalton L. Graffice appeals the August 20, 2014 sentencing entry of the Ashland County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} On July 11, 2013, Defendant-Appellant Dalton L. Graffice and Jimmy Graffice were at a bar located in downtown Ashland, Ohio. Dalton and Jimmy Graffice played a game of pool against Kent Comstock and Gerald Kieft. Comstock won the pool game. Jimmy Graffice made a threatening remark to Comstock, but there was no evidence that Comstock responded to Jimmy Graffice. Comstock and Kieft left the bar.

{¶3} Dalton and Jimmy Graffice also left the bar and followed Kieft to his truck. Dalton Graffice made numerous threats towards Kieft, but Kieft got into his truck and drove away. Jimmy Graffice then began assaulting a man named Russell Huffman. At this time, Comstock was standing with his dog on the Ashland Main Street sidewalk. While Jimmy Graffice was assaulting Huffman, Comstock tried to verbally intervene by telling Jimmy Graffice that Huffman had had enough. Dalton Graffice approached Comstock from behind and punched him on the face, knocking him to the ground. Comstock did not see the attack coming and did nothing to protect himself.

{¶4} When Comstock fell, his head struck the pavement. A witness reported that Dalton Graffice hit Comstock with significant force. The Ashland Police Department were dispatched to the scene and found Comstock unconscious on the sidewalk. He was unresponsive and bleeding from his head. Comstock was taken to the local hospital and later transported to Cleveland Metro Hospital. He was diagnosed with a brain injury.

Comstock was admitted to the intensive care unit for 27 days. He was transferred to a nursing home, but had to be readmitted to the hospital after developing fluid on his brain, which caused seizures.

{¶5} During the investigation, Dalton Graffice admitted that he struck Comstock. Dalton Graffice was originally charged in the Ashland County Court of Common Pleas, Juvenile Division because he was 17 years old at the time of the offense. The case was transferred to the Ashland County Court of Common Pleas, General Division on October 28, 2013. On December 5, 2013, Dalton Graffice was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree.

{¶6} Dalton Graffice pleaded guilty to the single count of the indictment on June 17, 2014. At the sentencing hearing, Comstock's daughter testified that he suffered a significant brain injury and currently resided in a nursing home, and would most likely be required to do so for the rest of his life. The trial court considered the pre-sentence investigation report and Graffice's lengthy record in the juvenile court system.

{¶7} On August 20, 2014, the trial court sentenced Dalton Graffice to seven years in prison and ordered that he pay restitution to the victim in the amount of \$46,329.00.

{¶8} It is from this decision Dalton Graffice now appeals.

ASSIGNMENTS OF ERROR

{¶9} Graffice raises two Assignments of Error:

{¶10} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED APPELLANT TO SEVEN (7) YEARS IN PRISON.

{¶11} "II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT IMPOSED RESTITUTION IN THE AMOUNT OF \$46,329.00."

{¶12} At oral argument on March 17, 2015, counsel for Graffice voluntarily dismissed the second Assignment of Error.

ANALYSIS

{¶13} Graffice argues in his remaining Assignment of Error that the trial court abused its discretion when it sentenced him to seven years in prison for felonious assault. We disagree.

{¶14} In *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, ¶ 4, the Supreme Court of Ohio set forth the following two-step approach in reviewing a sentence:

In applying *Foster* [*State v.*, 109 Ohio St.3d 1, 2006–Ohio–856] to the existing statutes, appellate courts must apply 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 shall be reviewed under an abuse-of-discretion standard.

{¶15} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶16} This court reaffirmed our reliance on the *Kalish* standard of review in *State v. Bailey*, 5th Dist. Ashland No. 14-COA-008, 2014-Ohio-5129, ¶ 18–24.

{¶17} In determining a sentence, R.C. 2929.11 and 2929.12 require trial courts to consider the purposes and principles of felony sentencing, as well as the factors of seriousness and recidivism. See *State v. Mathis*, 109 Ohio St.3d 54, 2006–Ohio–855, 846 N.E.2d 1.

{¶18} The trial court found Graffice guilty of felonious assault in violation of R.C. 2903.11(A)(1). The statute states, “[n]o person shall knowingly * * * [c]ause serious physical harm to another * * *. Felonious assault is a felony of the second degree. R.C. 2903.11(D)(1)(a). For a felony of the second degree, the trial court shall impose a definite prison term of two to eight years. R.C. 2929.14(A)(2).

{¶19} Graffice concedes in his appellate brief that the first prong of *Kalish* has been met. His sentence is not clearly and convincingly contrary to law. Graffice states the trial court did consider the purposes and principles of felony sentencing at the sentencing hearing. The trial court sentenced Graffice to seven years in prison. The sentence is within the statutory range for second-degree felonies.

{¶20} Graffice argues that under the second prong of *Kalish*, the trial court abused its discretion when it sentenced him to seven years in prison. This court explained the abuse of discretion standard of review in *State v. Robinson*, 5th Dist. Muskingum No. CT2012-0005, 2013-Ohio-2893, ¶ 19-20:

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. 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.

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*, 57 Ohio App.2d 153, 385 N.E.2d 1342 (1st Dist.1978). 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*, 478 F.2d 139, 147 (8th Cir.1973). 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*.

State v. Minor, 5th Dist. Muskingum No. CT2014-0027, 2014-Ohio-4660, ¶ 8.

{¶21} R.C. 2929.11 governs overriding purposes of felony sentences and states as follows in pertinent part:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶22} The trial court stated it reviewed the pre-sentence investigation report.

While discussing Graffice's prison term, the trial court stated:

Now, you committed this offense as a juvenile this is your first felony offense, and you have done very poorly in the Juvenile system, and I am sitting here thinking about whether eight years is an appropriate sentence. The sentencing statutes for vehicular homicide, I think that we had one in this Court that he received five years for killing someone while

he was under the influence, the thing there though is that individual is operating impaired.

You are not impaired from my understanding, I think something more than five years is certainly appropriate, because of your age and because of my desire to make sure that you pay restitution, I am probably not going to impose the maximum, and that would be the one consideration that I gave you based on your age and the hopes that you can learn from this incident, and Mr. Comstock's one contribution to your life is that you get your act together, but it's going to be the sentence of the Court that you serve seven years in prison * * *.

(Tr. 21-22).

{¶23} Graffice argues that impairment during the commission of an offense should increase the sentence length. Graffice argues that because he was not impaired when he assaulted Comstock and because he did not kill Comstock, his sentence should be less than five years.

{¶24} At the sentencing hearing, the State discussed Graffice's lengthy juvenile record and his repeated failures to comply with the terms of his juvenile probation. When Graffice committed the offense of felonious assault, Graffice was on juvenile probation.

{¶25} The injuries suffered by Comstock were very serious and life altering. Before the assault, Comstock was an independent and contributing member of the Ashland community. Comstock's daughter stated at the sentencing hearing that her

father suffered a serious brain injury and would likely reside in a nursing home for the rest of his life.

{¶26} There is nothing in the record to suggest that the trial court's decision to sentence Graffice to seven years in prison for felonious assault was unreasonable, arbitrary, or unconscionable.

{¶27} Graffice's sole Assignment of Error is overruled.

CONCLUSION

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

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.