

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SCOTT D. THOMAS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Craig R. Baldwin, J.

Case No. 14 CAA 08 0047,
14 CAA 08 0048

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case Nos.
14 CR-I-02-0075A and 14 CR-I-06-0240

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 13, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Scott D. Thomas appeals his sentence entered by the Delaware County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE¹

{¶2} On February 27, 2014, an indictment was returned against Appellant and two co-defendants by the Delaware County Grand Jury charging seven counts relating to three robberies occurring in Delaware and Franklin counties. The charges included one count of robbery, two counts of aggravated robbery, theft of a motor vehicle, receiving stolen property, assault on a police officer by means of a deadly weapon, and failure to comply with the order or signal of a police officer.

{¶3} On June 9, 2014, a Bill of Information was filed relative to Appellant's commission of a fourth robbery near the same time as the three set forth in the indictment.

{¶4} On June 10, 2014, Appellant entered a plea of guilty to the charges relating to the four robberies. A presentence investigation report was ordered and sentencing was scheduled for July 14, 2014.

{¶5} At the July 14, 2014 sentencing hearing on both of Appellant's cases relating to the February 27, 2014 Indictment and the June 9, 2014 Bill of Information, Appellant was sentenced to 30 months on Count One, Robbery, in violation of R.C. 2911.02(A)(3); five years on Count Two, Robbery, in violation of R.C. 2911.02(A)(2); and five years on Count Three, Robbery, in violation of R.C.2911.02(A)(2), all to be served consecutively. Appellant was then sentenced to five years on the sole count

¹ A full rendition of the underlying facts is unnecessary for our disposition of this appeal.

contained within the Bill of Information, Robbery, in violation of R.C. 2911.02(A)(2), to be served consecutive to the counts imposed under the February 27, 2014 Indictment. The trial court further imposed a twelve month prison term as Appellant was on post-release control at the time he committed the offenses to which he plead guilty. The trial court ordered all sentences to be served consecutively. The trial court journalized the sentences via entries in both cases on July 18, 2014.

{¶6} Appellant appeals, assigning as error:

{¶7} "I. CONTRARY TO OHIO SENTENCING LAW, THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT THE SENTENCING HEARING WHEN IT IMPOSED CONSECUTIVE, NON-MINIMUM PRISON SENTENCES - WITHOUT FIRST MAKING ALL OF THE REQUIRED JUDICIAL FACT-FINDINGS UNDER R.C. §2929.14(C)(4).

{¶8} "II. THE RECORD DOES NOT SUPPORT THE FINDINGS THAT ARE REQUIRED FOR THE IMPOSITION OF CONSECUTIVE PRISON SENTENCES AND REVEALS THAT THE TRIAL COURT FAILED TO ENGAGE IN A MEANINGFUL PROPORTIONALITY ANALYSIS PRIOR TO IMPOSING 18.5 YEARS FOR FOUR NONVIOLENT, ROBBERY CONVICTIONS; THUS, THE SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO OHIO SENTENCING LAW."

I.

{¶9} 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*, 5th Dist. No.2008–CA–25, 2080–Ohio–6709, 2008 WL 5265826.

{¶10} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding “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*, ¶¶ 1 and 11, 896 N.E.2d 124, 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*, 5th Dist. No.2006–CA–41, 2006–Ohio–5823, 2006 WL 3185175.

{¶11} “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 intact 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.

{¶12} Thus, despite the fact 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 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).

{¶13} *Kalish* at ¶ 14.

{¶14} Therefore, *Kalish* holds, 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.

{¶15} R.C. 2929.14(C) states,

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶16} The Ohio Supreme Court in the recent decision of *State v. Bonnell* 140 Ohio St.3d 209, 2-014-Ohio-3177, held in order to sentence a defendant to consecutive terms of imprisonment, a trial court must make the findings required by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its entry. The Court held the sentencing court has no obligation to state its reasons in support of its findings. *Bonnell* held,

When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel. See Crim.R. 32(A)(4). And because a court speaks through its journal, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 47, the court should also incorporate its statutory findings into the sentencing entry. However, a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record

contains evidence to support the findings, consecutive sentences should be upheld.

{¶17} At the sentencing hearing herein, the trial court stated:

THE COURT: Going through all of the sentencing factors, Mr. Thomas, the Court finds no factors that would or no facts that would overcome the presumption of prison. Court feels that a prison sentence on each count is appropriate.

Let's talk first about the Post Release Control violation. Under 2929.141, you have 310 days still on the shelf in the case out of Franklin County.

Under the statute, the court can or shall, doesn't say can, shall, if it imposes a sentence under 2929.141, it shall be the greater of 12 months or the period remaining on Post Release Control.

Court is gonna impose 12 months. That 12-month sentence will be served first, it will be served consecutive to any other prison sentence I give you as to any of the other counts.

As to Count 1 in Case No. 14-CR-I 02-0075 A, Robbery, in violation of 2911.02(A)(3), felony of the third degree, it shall be the sentence of this Court that you shall serve 30 months in CRC and pay the costs of prosecution for which execution is awarded.

As to Counts 2 and 3, under that same Indictment, Robbery, violation of 2911.02(A)(2) each being a felony of the second degree, shall be the sentence, then, as to each of those counts you shall serve five

years at CRC and pay the costs of prosecution for which execution is awarded.

Those sentences will be served consecutive to the sentence the Court has imposed on Count 1.

Court is of the opinion that seriousness of your offenses, it's necessary for a consecutive sentence and if is not disproportionate to the conduct that you're being punished for so the sentences will be served consecutive.

As to 14-CR-I-06-0240, Bill of Information for Robbery in violation of 2911.02(A)(2), felony of the second degree, it will be the sentence of this Court that you shall serve five years CRC and pay the costs of prosecution for which execution is awarded.

You can be seated, sir. That sentence will be consecutive to the other sentences. Again, the court is of the opinion that consecutive sentences are necessary to protect the public and that they are not disproportionate to the seriousness of the misconduct.

Mr. Hoague, Mr. Thomas, is correct the most disturbing thing in this whole case is that he had graduated from Buckeye Valley. You were a good student, you were an athlete. We rarely see these type of offenses committed by someone who has attended one of the county schools.

It comes a a shock, quite frankly, that you did what you did in high school and you fell through completely as you fell through, you understand?

I have given you a sentence, I must give you advice under State versus Hernandez. You know what Post Release Control is because I just sentenced you on Post Release Control to 12 months. Again, I must go through it with you.

Tr. at 14-17

{¶18} The trial court's July 18, 2014 Judgment Entry on Sentence reads,

The Court further finds that a stated prison term is consistent with the purposes and principles of Sentencing and the Defendant is not amenable to Community Control Sanctions and that a consecutive sentence should be imposed because of the findings set forth above and consecutive sentences are necessary to protect the public from future crime and to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Further, the Court finds the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶19} After reviewing the record, we find the trial court's sentence is not clearly and convincingly contrary to law. The trial court very clearly stated it had considered the purposes and principles of sentencing according to R.C. 2929.11, and balanced the seriousness and recidivism factors within R.C. 2929.12.

{¶20} We find Appellant's sentence was not based on the consideration of improper factors and not unreasonable, arbitrary or unconscionable. We further hold

said sentence is not contrary to law. The trial court found Appellant violated the terms of post-release control, consecutive sentences were necessary to protect the public from future crime and to punish the offender, consecutive sentences are not disproportionate to the seriousness of the offenders conduct and to the danger the offender poses to the public, and the offender's history of criminal conduct demonstrates consecutive sentences are necessary to protect the public. At the sentencing hearing, the trial court also noted Appellant's history of criminal conduct. Therefore, the trial court set forth its findings at the sentencing hearing and in the July 18, 2014 Judgment Entry stating the findings necessary to support consecutive sentences under Ohio law.

{¶21} The first assignment of error is overruled.

II

{¶22} Appellant asserts his sentences are disproportionate to the seriousness of the crimes. We disagree.

{¶23} Here, Appellant relapsed while in a halfway house. While on a three day binge of cocaine and drugs, he left the halfway house, stole a car, and proceeded to rob a bank. He wrote a note to the cashier, demanding cash. He used the money to buy more drugs. Later the same evening, he went into a CVS drugstore, wrote a note, again demanding cash. The note at the bank stated, "Give me all the cash, I don't want to shoot," which note implied Appellant had a weapon, when in fact he did not actually have a weapon. Appellant argues it was not believed he had a weapon, and he was not taken serious. However, Appellant admitted at the change of plea hearing, the victims of the crimes thought he had a weapon. In light of the facts as presented, we find Appellant's argument unpersuasive.

{¶24} Upon review, we do not find Appellant's sentence disproportionate to the seriousness of the offenses charged. The second assignment of error is overruled.

{¶25} Appellant's sentence in the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur