

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CALVIN D. FRANCE

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. Sheila G. Farmer, J.

Case No. 15CA19

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of  
Common Pleas, Case No. 2014CR0694D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 19, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Hoffman, J.*

{¶1} Defendant-appellant Calvin D. France appeals his sentence entered by the Richland County Court of Common Pleas for assault on a peace officer. Plaintiff-appellee is the state of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On March 16, 2014, Appellant's pregnant girlfriend, S.B., attempted to call 911 to report Appellant had assaulted her minutes earlier. The call was interrupted. However, S.B. did manage to call her grandmother, who then called 911. The Mansfield Police Department responded to the residence.

{¶3} During the incident, S.B. slapped Appellant in the face. Appellant then punched S.B. in the face, threw S.B. to the ground, repeatedly striking S.B. and telling S.B. he hoped S.B.'s pregnancy would end. S.B. then ended the fight by stabbing Appellant in the forehead with a fork.

{¶4} Upon responding to the call, Mansfield Police Officers heard arguing inside the apartment and witnessed S.B.'s grandmother forcing Appellant out of the apartment. Upon witnessing the officers outside, Appellant fled the scene and escaped on foot.

{¶5} On April 11, 2014, shortly before 1:00 a.m., at Appellant's mother's house, Appellant once again assaulted S.B., punching her in the face and throwing her down the basement stairs, preventing her from leaving. S.B. called friends asking them to help her.

{¶6} Mansfield Police Officers arrived at the scene, heard thumping noises and movement inside the residence, forced open the door, and entered the residence.

Upon encountering the Appellant, Appellant fought with the officers, and attempted to punch Officer Dittrich in the face.

{¶7} On October 14, 2014, the Richland County Grand Jury indicted Appellant on one count of assault on a peace officer, in violation of R.C. 2903.13(A), a felony of the fourth degree; one count of obstructing official business, in violation of R.C. 2921.31(A), a felony of the fifth degree; and one count of domestic violence, in violation of R.C. 2919.25(A) and (C)(4), a felony of the third degree.

{¶8} On February 2, 2015, Appellant entered a plea of guilty to Count One, assault on a peace officer, and Count Two, obstructing official business. Pursuant to the plea agreement, Count Three, domestic violence, was dismissed.

{¶9} The presentence investigation report indicated Appellant had a prior criminal history including aggravated assault, two counts of domestic violence and a charge of having weapons under disability.

{¶10} The trial court imposed a sentence of seventeen months on Count One, assault on a peace officer and five years community control on Count Two, obstructing official business. The trial court further ordered Appellant was to have no contact with S.B. while in prison.

{¶11} Appellant appeals his sentence assigning as error,

{¶12} "I. THE COURT'S 17-MONTH SENTENCING OF APPELLANT FOR A FELONY OF THE 4TH DEGREE WAS EXCESSIVE. THE COURT FAILED TO CONSIDER THE FACTORS OUTLINED IN OHIO REVISED CODE, SECTION 2929.12."

## I.

{¶13} Appellant argues the trial court's sentence was excessive and failed to consider the purposes and principles of sentencing. Specifically, Appellant maintains the trial court did not consider the lack of severity of the injury suffered by the victim, Mansfield Police Officer Dietrich.

{¶14} R.C. 2929.12 states,

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

\* \* \*

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

\* \* \*

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

(F) The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.

{¶15} 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.

{¶16} In *Kalish*, the Court discussed the effect 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.

{¶17} 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.

{¶18} A sentencing court has broad discretion to determine the relative weight to assign the factors in R.C. 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). Subsequent to the Ohio Supreme Court’s *Foster* decision, “[t]he decision to impose the maximum sentence is simply part of the trial court’s overall discretion in issuing a felony sentence and is no longer tied to mandatory fact-finding provisions.” *State v. Parsons*, 7th Dist. Belmont No. 12 BE 11, 2013–Ohio–1281, ¶ 14. Accord, *State v. Trammel*, 5th Dist. Stark No.2012CA00237, 2013–Ohio–4354, ¶ 35.

{¶19} At sentencing herein, the trial court stated on the record,

THE COURT: Okay. In this particular case, Mr. France, back on March the 16<sup>th</sup> of last year, which would be about eleven months ago now, you slapped S.B., your pregnant girlfriend who was pregnant with your

twins at the time, you threw her to the floor by her hair. Then you straddled her and beat her in the face. At one point she stabbed you with a fork to make you get off of her, or let go of her hair, to make you stop.

On April the 11<sup>th</sup>, which is almost a month after that, you were again beating the same victim. The police had to force their way into the place where you were living. You fought with the officers, especially Officer Dittrich. You told the victim that the only way she would ever get away was if you killed her.

The PSI writer says you have no remorse. You pled guilty because you said you would lose at trial. You state Officer Dittrich beat you and it wasn't the first time. You said that you didn't beat any of your girlfriends, they are all crazy.

In terms of prior record, as an adult you have three prior domestic violences, weapons under disability, resisting arrest, aggravated assault, disorderly conduct. You've previously been to prison on two occasions. On this time you don't even concede that you did these things, that you only did it because it was expedient for you to avoid a penalty.

MR. O'DONNELL: Your Honor, aren't we here for the obstructing and assault on an officer? The other two cases were dismissed, the domestic violences.

THE COURT: Okay. It's the November - - excuse me, the April 11<sup>th</sup> incident when the officers came there and forced their way in that he got in a fight with the officers.

MR. O'DONNELL: Yes.

THE COURT: So you're right, the domestic violence, the third degree felony, has been set aside. I think they had an uncooperative victim. She wasn't willing to testify. So we are left then with assault on a peace officer and obstructing official business.

I am sentencing you as follows: On Count 1, actually I believe it's count - - yes, Count 1, seventeen months for assault on a police officer. You are to have no contact with S.B. while you are in prison. On Count 2 I sentence you to five years of community control. If you violate that community control you will fact twelve months in prison. Count 2 probation will begin when you are released from prison on Count 1.

Tr. at 3-5.

{¶20} A review of the sentencing entry and the record indicates the trial court considered the factors set forth in R.C. 2929.12. Ohio Courts have continually held uncharged crimes and dismissed charges pursuant to plea agreements may be considered by courts as factors during sentencing. *State v. Watson*, 7th Dist. 09MA62, 2011-Ohio-1178; *State v. Starkey*, 7<sup>th</sup> Dist. No. 06MA110, 2007-Ohio-6702, *State v. Williams*, 2<sup>nd</sup> Dist. 2002-Ohio-2908. Accordingly, the trial court did not err in considering Appellant's conduct with regard to S.B. herein.

{¶21} Appellant entered a plea of guilty to both assault of a peace officer, a fourth degree felony, in violation of R.C. 2903.13(A) and (C)(5); and obstructing official business, a fifth degree felony, in violation of R.C. 2921.31(A) and (B). The trial court dismissed the domestic violence charge pursuant to the plea agreement. A fourth

degree felony carries a maximum penalty of eighteen months incarceration, while a fifth degree felony carries a maximum term of twelve months incarceration. Therefore, had the trial court imposed the maximum prison term on each count and ran the terms consecutively, Appellant would have received a term of thirty months in prison, not the seventeen months he received. Regardless of the dismissed charges against S.B., the trial court noted Appellant's past criminal history, including multiple offenses of violence.

**{¶22}** We find the trial court's sentence in this matter was not based on the consideration of improper factors and was not unreasonable, arbitrary or unconscionable. We further hold said sentence is not contrary to law.

**{¶23}** Accordingly, the sentence of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur