

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-11-007

Appellee

Trial Court No. 10-CR-753

v.

Marcus Zimmerman

DECISION AND JUDGMENT

Appellant

Decided: June 22, 2012

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Katie L. Ignasiak, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from an October 7, 2010 judgment of the Sandusky County Court of Common Pleas, where appellant pled guilty to one count of burglary, a felony in the third degree, in exchange for appellee's dismissal of a corresponding felony theft

charge. Appellant was sentenced to four years of incarceration. For the reasons set forth below this court affirms the judgment of the trial court.

{¶ 2} Appellant sets forth the following assignment of error:

1. The trial court erred in sentencing Appellant without an updated pre-sentence investigation.

{¶ 3} On April 30, 2010, appellant entered the home of the victim in Fremont, Ohio. Seven hundred dollars and jewelry was stolen from the premises. Appellant was subsequently charged with one count of burglary, a felony in the third degree, and one count of theft, a felony in the fifth degree.

{¶ 4} Appellant entered into a plea agreement, pleading guilty to burglary in exchange for the dismissal of the other charge. At the plea hearing both parties requested that the court refer the matter to the probation department for a presentence investigation prior to sentencing. On November 29, 2010, appellee filed a motion for revocation of appellant's bond due to his failure to cooperate in the completion of the presentence investigation. The court found the motion well-taken. Appellant was taken into custody. The presentence investigation report was not able to be completed given appellant's lack of cooperation. The case proceeded to sentencing. Appellant was sentenced to a four-year term of incarceration. Appellant filed a notice of appeal on February 9, 2011.

{¶ 5} Appellant argues that the trial court erred in sentencing him without a completed presentence investigation. We find this argument unpersuasive. Under Crim.R. 32.2, a trial court is only required to obtain a presentence investigation report

prior to sentencing if the trial court is imposing community control or granting probation. As such, a presentence investigation report was not required in this case. Appellant was sentenced to a four-year term of incarceration without community control. The Supreme Court of Ohio has clearly held that, “If probation is not at issue, the rule does not apply.” *State v. Cyrus*, 63 Ohio St.3d 164, 166, 586 N.E.2d 94, 95 (1992). Likewise, the Second District Court of Appeals has held that Crim.R. 32.2, “requires a presentence investigation only as a prerequisite to granting probation, and not as a prerequisite to all sentencing proceedings.” *State v. Garrison*, 123 Ohio App.3d 11, 16, 702 N.E.2d 1222, 1225 (1997).

{¶ 6} It is clear from the record that the requisite component of community control was not part of appellant’s sentence, so as to mandate a presentence investigation report prior to sentencing. In addition appellant’s own failure to cooperate in the presentence investigation caused the sentencing to go forward without the completed presentence investigation report. Given these facts and circumstances, it was wholly proper for the court to proceed with sentencing appellant.

{¶ 7} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4, the Supreme Court of Ohio adopted a two-step approach in examining sentences imposed by a trial court:

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.

{¶ 8} After examining the trial court's sentence in this case, we find that the trial court properly followed the principles of sentencing in imposing appellant's sentence.

{¶ 9} The term of incarceration permitted by statute was a minimum of one year and a maximum of five years for appellant's burglary conviction. Appellant was given a sentence of four years. This squarely falls within the permissible range. There is no evidence that the sentence imposed on appellant was inconsistent with the law, the first prong of the test.

{¶ 10} The second prong of *Kalish* is to review the sentence under an abuse of discretion standard of review. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983). We find no evidence that the trial court abused its discretion. On the contrary, the record reflects that the trial court lawfully sentenced appellant. Based on the foregoing, the assignment of error is not well-taken.

{¶ 11} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
