

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

State of Ohio	Court of Appeals Nos. L-12-1337
	L-12-1338
Appellee	L-12-1339
	L-12-1340
v.	
David Ottinger	Trial Court Nos. CR0201201655
	CR0201201081
Appellant	CR0201201097
	CR0201201470

DECISION AND JUDGMENT

Decided: May 23, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

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PIETRYKOWSKI, J.

{¶ 1} These consolidated appeals are before the court from judgments of the Lucas County Court of Common Pleas, which, together, sentenced defendant-appellant, David

Ottinger, to a total of 68 months in prison following his convictions on four counts of breaking and entering and one count of failure to comply. Ottinger now challenges his sentence through the following assignment of error:

The trial court abused its discretion in sentencing appellant to a total prison term of sixty-eight months.

{¶ 2} Appellant was indicted by the Lucas County Grand Jury in four individual cases. On January 18, 2012, he was charged with two counts of breaking and entering for offenses occurring on September 28 and December 17, 2011, and one count of failure to comply, for an offense occurring on December 18, 2011 (Lucas County Common Pleas case No. CR12-1081). On January 20, 2012, appellant was charged with two counts of breaking and entering for offenses occurring on January 3 and 9, 2012 (Lucas County Common Pleas case No. CR12-1097). On March 27, 2012, he was charged with five counts of breaking and entering for offenses occurring on October 19, November 24 (two counts), December 15, and December 30, 2011 (Lucas County Common Pleas case No. CR12-1470). Finally, on April 30, 2012, he was charged with one count of breaking and entering and one count of theft, for offenses occurring on December 30, 2011 (Lucas County Common Pleas case No. CR12-1655). The breaking and entering counts all alleged violations of R.C. 2911.13(A), fifth degree felonies, the failure to comply count alleged a violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a third degree felony, and the theft count alleged a violation of R.C. 2913.02(A)(1) and (B)(2), a fifth degree felony.

{¶ 3} Appellant initially entered pleas of not guilty to all charges. On July 17, 2012, however, following negotiations with the state, appellant withdrew his prior pleas and entered pleas of no contest to four counts of breaking and entering and the one count of failure to comply. The state informed the court that it would seek a dismissal of the remaining seven counts. In accepting the pleas, the court informed appellant that he was facing a maximum period of incarceration of 33 to 84 months. Appellant acknowledged that he understood those sentencing parameters.

{¶ 4} On July 31, 2012, the case proceeded to the sentencing hearing at which the court sentenced appellant to 11 months on each of the breaking and entering counts and 24 months on the failure to comply count. The court further ordered all of the terms to be served consecutively to each other, for a total term of incarceration of 68 months. In imposing sentence, the court reviewed appellant's extensive criminal history, which included convictions for 12 felonies and 25 misdemeanors and numerous terms of incarceration in state and regional facilities. The court acknowledged appellant's drug addiction problem but further noted that he had been given an opportunity to address that problem previously when he was sent to a treatment facility following a previous theft offense. In ordering the terms to be served consecutively, the court found that consecutive terms were necessary to protect the public from future crime and to punish appellant and that consecutive sentences were not disproportionate to the seriousness of appellant's conduct or the danger he poses to the public. The court also found that one or more of the offenses were committed while appellant was on post-release control for a

prior offense, that at least two of the offenses were committed as part of one or more courses of conduct, and that the harm caused by two or more of the multiple offenses was so great or unusual that no single prison term for any of the offenses committed adequately reflected the seriousness of appellant's conduct. Finally, the court found that appellant's history of criminal conduct demonstrated that consecutive sentences were necessary to protect the public from future crime by appellant.

{¶ 5} In his sole assignment of error, appellant asserts that the lower court abused its discretion in imposing sentence as it did. Appellant does not contest the consecutive nature of the sentences, but rather asserts that the total term of 68 months is excessive.

{¶ 6} Initially we are compelled to address the issue of the standard of review applicable to this appeal. In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio articulated a two-step analysis to be employed in reviewing felony sentences on appeal. Under *Kalish*, the appellate courts are first required to "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." *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing sentence under an abuse-of-discretion standard. *Id.* That is the standard of review that we have applied in reviewing felony sentences in recent years. In 2012, however, the General Assembly amended R.C. 2953.08(G) and statutorily defined the standard of review that appellate courts are to apply in reviewing felony sentences. *See State v. Tammerine*, 6th Dist. Lucas No. L-13-

1081, 2014-Ohio-425, for a discussion of the new statutory standard. That amendment took effect on March 22, 2013. Because appellant in the present case was sentenced on August 3, 2012, we will review this case under the prior *Kalish* abuse of discretion standard.

{¶ 7} The sentences imposed by the trial court were clearly within the statutory ranges applicable to third and fifth degree felonies and were not the maximum terms possible for those offenses. R.C. 2929.14(A)(3)(b) and (A)(5). Similarly, in ordering that the terms be served consecutively, the lower court fully complied with R.C. 2929.14(C)(4). We must therefore consider whether the lower court abused its discretion in sentencing appellant as it did.

{¶ 8} R.C. 2929.11(A) provides that “[a] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing” which are “to protect the public from future crime by the offender and others and to punish the offender[.]” R.C. 2929.12 then sets forth a non-exhaustive list of factors that the court is to consider that relate to the seriousness of the defendant’s conduct and the likelihood that the defendant will reoffend. Where the trial court does not expressly state on the record that it considered R.C. 2929.11 and 2929.12, we are to presume that it gave proper consideration to those statutes. *Kalish, supra* at ¶ 18, fn. 4.

{¶ 9} In reviewing the transcript from the sentencing hearing below, it is clear that although the lower court did not expressly state so, it properly considered the principles and purposes of felony sentencing under R.C. 2929.11 and the seriousness and recidivism

factors under R.C. 2929.12. The court reviewed appellant’s lengthy criminal history, including prior terms of incarceration and appellant’s quick return to criminal activity following those terms. The court also recognized that appellant had previously been given an opportunity to address his substance abuse problems through a treatment facility but quickly reoffended. The court then determined that the overriding consideration in imposing sentence in this case was to protect the public from appellant’s conduct. Given appellant’s criminal history, we fail to see how the lower court’s sentence of 68 months was unreasonable, arbitrary or unconscionable.

{¶ 10} The sole assignment of error is not well-taken.

{¶ 11} On consideration whereof, the court finds that substantial justice was done the party complaining and the judgment of the Lucas 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.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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:
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