

[Cite as *State v. Lappin*, 2009-Ohio-2578.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91068

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DONALD LAPPIN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-496371, CR-502312, and CR-504058

BEFORE: Kilbane, J., Gallagher, P.J., and Rocco, J.

RELEASED: June 4, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Donald Lappin, appeals the sentence he received from the Cuyahoga County Common Pleas Court. After reviewing the law and pertinent facts, we affirm.

{¶ 2} On May 21, 2007, in CR-496371, a grand jury indicted appellant on two counts. Count One charged identity fraud, in violation of R.C. 2913.49, a first degree misdemeanor. Count Two charged aggravated theft, in violation of R.C. 2913.02, a fifth degree felony. The charges in CR-496371 stemmed from appellant's failure to pay his electric bill, which he had fraudulently put in his stepfather's name.

{¶ 3} On October 22, 2007, in CR-502312, a grand jury indicted appellant on four counts. Counts One and Two charged forgery, in violation of R.C. 2913.31, third degree felonies. Count Three charged attempted theft, in violation of R.C. 2913.02, a fourth degree felony. Count Four charged possession of criminal tools, in violation of R.C. 2923.24, a fifth degree felony. In CR-502312, the charges stemmed from appellant's tendering a counterfeit check to the Ohio Title Corporation in order to purchase a house.

{¶ 4} On November 29, 2007, in CR-504058, a grand jury indicted appellant on two counts. Count One charged receiving stolen property, in violation of R.C. 2913.51, a third degree felony. Count Two charged falsification, in violation of R.C. 2921.13, also a third degree felony. In CR-504058, the charges

stemmed from appellant taking jewelry valued at approximately \$300,000 from the home of his fiancée's parents.

{¶ 5} On December 19, 2007, appellant pleaded guilty to various counts in the three cases. In CR-496371, appellant pleaded guilty to one count of identity fraud and one count of theft. In CR-502312, appellant pleaded guilty to one count of forgery. In CR-504058, appellant pleaded guilty to one count of receiving stolen property and one count of falsification.

{¶ 6} On January 16, 2008, the trial court sentenced appellant. In CR-496371, appellant received six months on each count, with the sentences to run concurrently to each other and concurrently to the sentences in the other two cases. In CR-502312, appellant received one year, with the sentence to run concurrently to the other cases. In CR-504058, appellant received five years on both counts, with the sentences to run consecutively to each other but concurrently to the other cases. Appellant received a total of ten years in prison.

{¶ 7} Appellant brings this appeal, asserting one assignment of error.

ASSIGNMENT OF ERROR NUMBER ONE

“THE SENTENCE IMPOSED BY THE COURT IS INCONSISTENT WITH THE PRINCIPLES AND PURPOSES OF SENTENCING UNDER THE OHIO REVISED CODE AND THEREFORE IS CONTRARY TO LAW.”

{¶ 8} Appellant argues that the trial court's sentence is contrary to law. More specifically, he alleges that the trial court erred when it sentenced him to two

maximum, consecutive sentences in CR-504058 without making findings. We find this argument to be without merit.

{¶ 9} “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.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus.

{¶ 10} We review sentences pursuant to a two-prong standard set forth by the Supreme Court of Ohio in a split decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.¹ In *Kalish*, the court held that “[i]n applying *Foster* 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.” *Kalish* at ¶4.

Contrary to Law

{¶ 11} Appellant's sentence is not contrary to law because it was within the permissible range. Under R.C. 2929.14(A)(3), the punishment for a third degree felony is one, two, three, four, or five years. In CR-504058, appellant was convicted

¹ We recognize that *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court of Ohio split over whether we review sentences under an abuse of discretion standard in some instances.

of two third degree felonies and sentenced to five years on each count. Five years on each count is the maximum sentence, but is not contrary to law.

{¶ 12} Also, the trial court appropriately considered the applicable statutes in felony cases, including R.C. 2929.11,² which indicates the purposes of sentencing, and R.C. 2929.12,³ which lists factors the trial court should consider relating to the seriousness of the offense.

{¶ 13} Here, the trial court's judgment entries state "the court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11."

{¶ 14} While the trial judge did not specifically mention R.C. 2929.12, she did consider several of its factors. The trial judge noted that appellant's relationship with one of the victim's facilitated the offense. See R.C. 2929.12(B)(6). Earlier at the sentencing hearing, appellant had informed the court that the victims in CR-504058 had taken him into their home "as their future son-in-law." (Tr. 25.) The trial judge

² Under R.C. 2929.11(A), "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender, *** rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

³Under R.C. 2929.12(A), "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 and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing."

replied, “they took you into their home and you stole about \$300,000 worth of jewelry from them in exchange for their kindness.” (Tr. 25.) The trial court told appellant that he stole “the property of Maureen Afnan and Jalal Afnan, who you’re indicating welcomed you into their home only to be victimized.” (Tr. 31.)

{¶ 15} The trial court also found that appellant has a history of criminal convictions. See R.C. 2929.12(D)(2). The judge orally reviewed appellant’s criminal history, which began as a juvenile and included crimes such as forgery, passing bad checks, and theft. (Tr. 28-30.)

{¶ 16} Finally, the trial court considered appellant’s remorsefulness. See R.C. 2929.12(E)(5). The judge allowed appellant to speak, and appellant indicated that he wanted to apologize and felt remorseful.

{¶ 17} Appellant also contends that his sentence is not consistent with crimes committed by similar offenders.⁴ First, we note that “R.C. 2929.11(B) does not require the trial court to engage in an analysis on the record to determine whether defendants who have committed similar crimes have received similar punishments.” *State v. Hunt*, Cuyahoga App. No. 81305, 2003-Ohio-175, ¶26.

{¶ 18} Appellant did not raise the issue of consistency in the trial court. Consistency “must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis

⁴ Under R.C. 2929.11(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

and to preserve the issue for appeal.” *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700, ¶53. Therefore, he has waived the argument.

{¶ 19} A review of the transcript and record shows that the trial court clearly considered R.C. 2929.11 and 2929.12, and that the ten-year sentence is within the permissible range. Accordingly, the sentence is not contrary to law.

Abuse of Discretion

{¶ 20} Having found that appellant’s sentence is not contrary to law, we must now determine whether the trial court abused its discretion. A trial court abuses its discretion when its attitude is “unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 21} In reviewing the transcript, we find that the trial court did not abuse its discretion in sentencing appellant. As discussed above, the judge considered all of the statutes. Also, in addition to considering that appellant had an extensive criminal history and that his relationship with one of the victim’s facilitated the offense, the judge also noted that appellant had stolen a large amount of money from the victims in the cases at bar, and that he “had so many opportunities to turn your life around, [and] you’ve not taken advantage of any of them.” (Tr. 30.)

{¶ 22} Finally, the trial court allowed appellant to speak on his own behalf, allowed appellant’s mother to speak on his behalf, and considered appellant’s presentence investigation. We find nothing in the record to support appellant’s

imposed for similar crimes committed by similar offenders.”

contention that the trial court's sentence was unreasonable, arbitrary, or unconscionable. Accordingly, appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
KENNETH A. ROCCO, J., CONCUR