

[Cite as *State v. Gabel*, 2009-Ohio-3735.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91788

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KERMIT GABEL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510594

BEFORE: Gallagher, P.J., Sweeney, J., and Jones, J.

RELEASED: July 30, 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). SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Kermit Gabel, appeals the sentence entered by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} On November 23, 2007, Gabel was charged under a multi-count indictment. On May 27, 2008, Gabel entered guilty pleas to the following charges: burglary with forfeiture specification, theft with forfeiture specification, attempted burglary with forfeiture specification, and possessing criminal tools with forfeiture specification. The case proceeded to sentencing on June 20, 2008.

{¶ 3} At sentencing, the prosecutor outlined Gabel's lengthy criminal history, dating back to 1956.¹ With respect to the incident in this matter, Gabel attempted to commit a burglary at one home and, after an alarm went off, he proceeded to another home where he successfully broke in and stole a number of items. The prosecutor requested the maximum penalty, arguing that Gabel had led a lifetime of crime, that he had not responded favorably to parole, and that despite the gap in his criminal history, he had committed another crime.

{¶ 4} Defense counsel acknowledged Gabel's criminal history, but argued that Gabel had not committed a crime in 15 years. Defense counsel pointed out that Gabel was on life parole from a Texas sentence imposed in 1980. At the time of sentencing, Gabel was 81 years old, he was an honorably discharged veteran of the United States Air Force from World War II, and he was in failing health with a

¹ Gabel's juvenile record dated back to 1947.

degenerative bone disease. Defense counsel indicated that placement in a halfway house had been arranged with the goal of having Gabel transferred into a veterans' home in Sandusky. Defense counsel argued for a sentence conducive to this arrangement.

{¶ 5} Gabel made a statement to the court, arguing that his criminal record was all more than 15 years ago, and that he was an elderly, disabled veteran who desired to finish his life in the veterans' home.

{¶ 6} The trial court reviewed the presentence investigation report, the defendant's criminal history, the nature of the instant offenses, and the fact that Gabel was under court supervision at the time of the instant offenses. The court commended Gabel's military service, but recognized that Gabel made a choice to engage in criminal behavior throughout his life and to reinvolve himself in crime at the age of 81. The court considered the purposes and principles of felony sentencing in accordance with R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. The court sentenced Gabel to the following prison terms: burglary, eight years; theft, eighteen months; attempted burglary, two years; possessing criminal tools, twelve months. The court ordered counts two, three, and four to run consecutively to each other, but consecutive with count one, for a total aggregate prison term of ten years.

{¶ 7} Gabel timely filed this appeal. Through his brief filed by counsel and his pro se supplemental brief, Gabel raises two assignments of error for our review. His first assignment of error provides as follows: "The trial judge violated appellant's

right to due process when it sentenced the appellant to maximum prison terms and erred by failing to conduct a proportionality review in determining consecutive sentences to be appropriate.”

{¶ 8} Gabel argues that the presumption that the trial court considered the sentencing criteria has been rebutted in this matter. He also claims the trial court failed to consider mitigating factors, including his advanced age, his failing health and degenerative bone disease, his honorable discharge from the military, that he had not committed a crime in fifteen years, and that the charged offenses did not result in physical injury to another. He states that he was essentially given a life sentence. Gabel further argues that the trial court failed to engage in a proportionality review.

{¶ 9} Pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, we apply a two-step approach in reviewing the trial court’s sentencing decision. First, we “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.” *Id.* at 23. “If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.” *Id.*

{¶ 10} Here, the trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. It is presumed that the trial court gave proper consideration to those statutes, and the court had no obligation to state in detail what factors it considered when deciding the sentence. *Kalish*, 120 Ohio St.3d at 26, fn.4.

{¶ 11} The trial court reviewed the presentence investigation report and heard the arguments of counsel, including the mitigating factors presented by defense counsel and Gabel. The court specifically recognized Gabel's military service and advanced age. However, the court could not ignore Gabel's extensive history of criminal activity and the fact that Gabel chose to again involve himself in criminal activity at his present age. Further, even though his parole dated back to 1980, the trial court properly considered that Gabel was in fact on parole at the time of these offenses. The sentence imposed upon Gabel for each offense fell within the applicable statutory range.

{¶ 12} Insofar as Gabel argues that the trial court failed to conduct a proportionality review, the trial court was not required to make specific findings on the record. *State v. Cartulla*, Lake App. No. 2008-L-133, 2009-Ohio-2794. Also, this court has held that when a defendant fails to raise the issue of proportionality before the trial court, he fails to preserve the issue for appeal. See *State v. Logan*, Cuyahoga App. No. 91323, 2009-Ohio-1685; *State v. Burke*, Cuyahoga App. No. 91081, 2009-Ohio-118.

{¶ 13} In reviewing the record, we find that the trial court made the relevant statutory considerations and we do not find that Gabel's sentence is clearly and convincingly contrary to law. Further, there is nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable.

{¶ 14} Gabel's first assignment of error is overruled.

{¶ 15} Gabel's second assignment of error provides as follows: "Appellant's constitutional right to be represented by effective counsel was violated by the acts of defense counsel that amounted to be ineffective assistance of counsel."

{¶ 16} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 1995-Ohio-104. Further, "trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance." *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 1998-Ohio-343, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10.

{¶ 17} Gabel argues that defense counsel was ineffective for failing to raise the disproportionate sentence issue on the record and preserve the issue for appeal. It has been recognized that "a proper and circumspect application of the sentencing guidelines acts to ensure proportionality and consistency under R.C. 2929.11(B). Therefore, to the extent the trial court considered and applied the necessary statutory provisions, a sentence shall be deemed consistent and proportionate to

those imposed for similar crimes.” (Internal citations omitted.) *State v. Marker*, Portage App. No. 2006-P-0014, 2007-Ohio-3379.

{¶ 18} We have already determined that the trial court followed the necessary statutory guidelines in arriving at Gabel’s sentence. Moreover, our review reflects that Gabel’s sentence is clearly and convincingly supported by the record, and that the sentence for each count was within the permissible statutory range. Because Gabel cannot demonstrate that he suffered prejudice from counsel’s failure to object regarding the issue of proportionality, he has failed to establish that his counsel was ineffective. See *id.*

{¶ 19} Gabel’s second 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. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR