

[Cite as *State v. Grant*, 2010-Ohio-5241.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94101

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCENT GRANT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518679

BEFORE: Jones, J., McMonagle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 28, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Vincent Grant (“Grant”), appeals his conviction for sexual battery. Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, Grant was charged with rape, kidnapping, and two counts of felonious assault. On the day trial was supposed to begin, Grant and his attorney both requested that new counsel be appointed to represent him. Grant’s counsel informed the trial court that he and his client did not get along

and had had heated arguments. The trial court stated that “the issue here is he [Grant] is an intimidator.” Counsel responded that Grant had told him “f*** you, you white son of a b****.” The court then appointed new counsel to represent Grant.

{¶ 3} Grant filed a pro se motion requesting the judge be dismissed from the case alleging she was biased against him. He also filed a complaint with the Ohio State Bar Association.

{¶ 4} Two months later, Grant pled guilty to sexual battery. The issue of Grant’s motion to remove the judge from his case was not mentioned during the plea colloquy. The trial court ordered a presentence investigation report and subsequently sentenced Grant to five years in prison. The court also classified Grant as a Tier III sex offender.

{¶ 5} Grant now appeals, raising the following three assignments of error for our review:

“I. The appellant was denied his constitutional right of due process based upon ineffective assistance of counsel.

“II. The trial court abused its discretion in sentencing appellant to the maximum penalty without consideration of the overriding purposes of felony sentencing or the mandatory sentencing factors.

“III. The trial court abused its discretion in sentencing appellant to the maximum period of incarceration without articulating judicially reviewable reasons for imposition of the sentence.”

Ineffective Assistance of Trial Counsel

{¶ 6} In the first assignment of error, Grant argues that his trial counsel was ineffective for failing to comply with the proper procedure to have the trial court judge removed from his case.

{¶ 7} 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, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 8} R.C. 2701.03 governs disqualification of common pleas court judges and provides that "[i]f a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court * * *." R.C. 2701.03(A).

{¶ 9} In this case, Grant filed a pro se motion with the county clerk of courts and a complaint with the Ohio State Bar Association, but did not follow the procedure as set forth in R.C. 2701.03. Grant maintains that his newly appointed counsel was ineffective for failing to follow through and file a motion for disqualification with the Ohio Supreme Court.

{¶ 10} First, we note that “a claim for ineffective assistance of counsel is waived by a guilty plea, unless the ineffective assistance caused the guilty plea to be involuntary.” *State v. Bishop*, Cuyahoga App. No. 91885, 2009-Ohio-1797, ¶10, quoting *State v. Hicks*, Cuyahoga App. No. 90804, 2008-Ohio-6284, ¶24. Grant does not argue that his plea was rendered involuntary by counsel’s performance. Therefore, any argument he has as to counsel’s performance is waived.

{¶ 11} Notwithstanding the waiver, we find that trial counsel’s decision not to proceed with a formal motion for disqualification could be deemed a trial tactic, one that this court will not second-guess. And Grant himself stated he was “very much” satisfied with his counsel. Therefore, even if he had not waived the issue for appeal, we would not find that counsel was ineffective.

{¶ 12} The first assignment of error is overruled.

Sentencing

{¶ 13} In the second and third assignments of error, Grant challenges his sentence.

{¶ 14} We review felony sentences using the *Kalish* framework. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The *Kalish* court declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts “must apply a two-step approach.” *Kalish* at ¶4.

{¶ 15} Appellate courts must first “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 ¶4, 14, and 18. If this first prong is satisfied, then we review the trial court’s decision under an abuse-of-discretion standard. *Id.* at ¶4 and 19.

{¶ 16} In the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G).

{¶ 17} As the *Kalish* court noted, post-*Foster*, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence.” *Id.* at ¶11; *Foster*, paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. *Id.*, citing *Mathis* at ¶38.

{¶ 18} R.C. 2929.11(A) provides that:

{¶ 19} “[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing[,] * * * 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 and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.”

{¶ 20} R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶ 21} R.C. 2929.11 and 2929.12 are not fact-finding statutes. Rather, they “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Kalish* at ¶17. Thus, “[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio’s sentencing structure.” *Id.*

{¶ 22} In the case at bar, we do not find Grant’s sentence contrary to law as it is within the permissible statutory range for sexual battery set forth in R.C. 2907.02(A)(3), as a third-degree felony. In the sentencing journal entry, the trial court acknowledged that it had considered all factors of law and found that prison was consistent with the purposes of R.C. 2929.11. See *State v. El-Berri*, Cuyahoga App. No. 92388, 2010-Ohio-146. And it is axiomatic that a court

speaks through its journal entries. *Id.*, citing *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶47.

{¶ 23} We next consider whether the trial court abused its discretion. *Kalish* at ¶4 and 19. An abuse of discretion is “more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Id.* at ¶19, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 24} Grant argues that the trial court abused its discretion because it did not articulate any reasons for imposing the maximum sentence. Grant concedes that post-*Foster* a trial court does not have to state its reasons on the record, but maintains that the trial court must at least give an explanation so that decision may be reviewed by our court.

{¶ 25} In this case, the trial court considered the presentence investigation report, Grant's criminal history, and the fact that Grant scored high on his risk assessment. The trial court also heard from the victim in this case, who asked that Grant be given the maximum sentence, before rendering its sentence.

{¶ 26} Therefore, we find that the trial court did not abuse its discretion in sentencing Grant to five years in prison.

{¶ 27} The second and third assignments of error are overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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. 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.

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR