

[Cite as *State v. Davis*, 2011-Ohio-1377.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95722

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONALD DAVIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED; REMANDED FOR
CORRECTION OF SENTENCING ENTRY**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-536840

BEFORE: Boyle, P.J., Jones, J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: March 24, 2011
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MARY J. BOYLE, P.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Ronald Davis, appeals his sentence. He claims that the trial court erred when it sentenced him without a presentence investigation report and when it imposed a maximum sentence. Finding no merit to his appeal, we affirm. But as set forth in this opinion, we remand for correction of a clerical error in the sentencing entry.

Procedural History and Factual Background

{¶ 3} In May 2010, the grand jury indicted Davis on three counts: one count of robbery, in violation of R.C. 2911.02(A)(2), with notice of prior conviction and repeat violent offender specifications; one count of robbery, in violation of R.C. 2911.02(A)(3); and one count of resisting arrest, in violation of R.C. 2921.33(A).

{¶ 4} Davis originally pleaded not guilty to the charges, but later withdrew his original plea and pleaded guilty to an amended count of second-degree robbery in violation of R.C. 2911.02(A)(2) without the specifications. The remaining two counts were nolle. The trial court sentenced Davis to eight years in prison and imposed three years of mandatory postrelease control.

Standard of Review

{¶ 5} Appellate courts must apply a two-step approach when reviewing a defendant's sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14. "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." *Id.*

Presentence Investigation Report

{¶ 6} Davis first contends that the trial court erred when it sentenced him without waiting for the presentence investigation report. We disagree.

{¶ 7} At Davis’s plea hearing, the state indicated that Davis’s plea was conditioned on his testimony against his codefendant, and further that his testimony must “be consistent with the oral and written statements previously given to the police.”

{¶ 8} After the court accepted Davis’s plea, it set sentencing for September 14, 2010, and ordered that a presentence investigation report be completed prior to sentencing. But on August 31, 2010, the trial court decided “the presentence investigation report [was] unnecessary” and therefore, it would go forward with sentencing without it.

{¶ 9} Crim.R. 32.2 states, “In felony cases the court shall * * * order a presentence investigation and report before * * * granting probation.” This rule requires a presentence investigation only as a prerequisite to granting probation, and not as a prerequisite to imposing a prison term. “If probation or community control sanctions are not at issue, the rule does not apply.” *State v. Bowman*, 7th Dist. No. 03-BE-40, 2004-Ohio-6372, ¶24, citing *State v. Cyrus* (1992), 63 Ohio St.3d 164, 166, 586 N.E.2d 94.

{¶ 10} The trial court here sentenced Davis to the maximum sentence of eight years for his robbery conviction. Therefore, the trial court did not have to wait for the presentence investigation to be completed before sentencing him.

{¶ 11} Davis’s first assignment of error is overruled.

Maximum Sentence

{¶ 12} Davis argues in his second assignment of error that the trial court erred when it sentenced him to the maximum prison term. Davis contends that “[t]he record does not appear to show clear and convincing proof that an enhanced sentence was necessary.” We disagree.

{¶ 13} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that 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.” Id. at ¶100.

{¶ 14} The Supreme Court explained in *Kalish*, supra, that “[a]lthough *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes.” Id. at ¶ 13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶138.

{¶ 15} R.C. 2929.11(A) provides that when a trial court sentences an offender for a felony conviction it must be guided by the “overriding purposes of felony sentencing.” Those purposes are “to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11(B) states that a felony sentence “must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with

sentences imposed for similar crimes committed by similar offenders.” And R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors.

{¶ 16} R.C. 2929.11 and 2929.12 “are not fact-finding statutes.” *Kalish* at ¶17. “Instead, they serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. Moreover, R.C. 2929.12 explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing.” *Id.* “Therefore, assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster*.” *Id.*

{¶ 17} In *Kalish*, the Supreme Court also made clear that even after *Foster*, “where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.” *Id.* at fn. 4, citing *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.

{¶ 18} After reviewing the record in this case, we find that it supports the inference that the trial court properly considered the factors in R.C. 2929.12 and adhered to the purposes and principles of sentencing set forth in R.C. 2929.11.

{¶ 19} After hearing statements from Davis’s counsel and Davis, the following colloquy occurred between the trial court and Davis.

{¶ 20} “THE COURT: Mr. Davis, I just heard you testify. I just heard you mention something about white powdery substance in the victim’s purse. Where did that little bit of information come from?

{¶ 21} “DEFENDANT: That’s what it looked like.

{¶ 22} “THE COURT: And you just threw that out there on your own in the middle of the state’s case about the victim, huh?

{¶ 23} “DEFENDANT: It wasn’t the only one — it looked like it might have been talcum powder, but it looked like powder.

{¶ 24} “THE COURT: Well, you would know powder. Well, Mr. Davis, I have considered the seriousness and recidivism factors and the purposes and principles of Senate Bill 2.”

{¶ 25} The trial court then began a review of Davis’s extensive criminal history, going back to 1985, including an aggravated robbery conviction, several robbery convictions, and drug convictions.

{¶ 26} The trial court then stated:

{¶ 27} “I have considered all of the factors I am required to. You have a very high risk of recidivism. It’s clear that you will commit another robbery if given the chance.

{¶ 28} “Further, I find your testimony to be less than truthful and cooperative while on the stand. Your statements to police, including the statement about knowing the victim for three years, partying with her, getting high, are not part — well, they clearly didn’t help your truthfulness with this court, so given the fact that you have already committed so many robberies, the state cut you a deal by dropping the repeat violent offender specification which saved you ten years. Society is at risk with you walking around free.”

{¶ 29} The trial court then sentenced Davis to the maximum term of eight years and imposed a period of three years of mandatory postrelease control. We find no error or abuse of discretion in this sentence.

{¶ 30} We note, however, that although the trial court correctly informed Davis at his sentencing hearing that he would be subject to three years of mandatory postrelease control, it incorrectly stated in the sentencing entry that postrelease control was part of Davis’s sentence for a period of “up to three years.” We find this to be a clerical error and remand for correction of the sentencing entry.

Judgment affirmed. Sentence affirmed but case remanded for correction of clerical error in sentencing entry.

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.

MARY J. BOYLE, PRESIDING JUDGE

LARRY A. JONES, J., and
EILEEN A. GALLAGHER, J., CONCUR