

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA009719

Appellee

v.

KEITH ALLEN HARVILLE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR075757

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 9, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Keith Harville appeals from his sentence in the Lorain County Court of Common Pleas. For reasons set forth below, we affirm.

BACKGROUND

{¶2} On April 24, 2008, Harville was indicted on one count for failure to register as a sexually oriented offender in violation of R.C. 2950.04(E), a felony of the third degree. Harville's registration requirement arose from a 2006 conviction for sexual battery. Harville pled guilty to the 2008 indictment and was sentenced to four years in prison. Harville appealed to this Court; however, this Court vacated Harville's sentence concluding the entry was void due to an error in the portion of the trial court's entry addressing post-release control. *State v. Harville*, 9th Dist. No. 08CA009501, 2009-Ohio-5420, at ¶¶7-8.

{¶3} The trial court held a resentencing hearing in November 2009, again sentencing Harville to four years in prison. Subsequently, pursuant to R.C. 2929.191, the trial court held a

hearing and issued a nunc pro tunc sentencing entry to correct any errors in post-release control notification.

{¶4} Harville now appeals from the November 2009 sentencing entry, raising one assignment of error for our review.

HARVILLE’S SENTENCE

{¶5} Harville argues in his sole assignment of error that the trial court erred in failing to adequately consider the factors set forth in R.C. 2929.11 and R.C. 2929.12. We disagree.

{¶6} The State contends that we are without jurisdiction to address Harville’s assignment of error as “[R.C.] 2953.08 does not support appellate review as of right regarding [Harville’s] sentence.” However, this contention does not persuade us as the State has not provided us with any controlling precedent on this point to convince us of our lack of jurisdiction. Thus, we turn to addressing the merits of Harville’s appeal. See R.C. 2953.08(A)(4).

{¶7} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio determined that Ohio’s sentencing scheme was unconstitutional to the extent that it required judicial fact-finding. *Id.* at paragraphs one through seven of the syllabus. The Supreme Court concluded that “[t]rial 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 paragraph seven of the syllabus.

{¶8} Following *Foster*, a plurality of the Supreme Court of Ohio declared that appellate courts should implement a two-step test when reviewing sentencing. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court stated:

“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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.*

{¶9} In determining whether a sentence is contrary to law, “we examine whether the trial court complied with applicable rules and statutes.” *State v. Coryell*, 9th Dist. No. 24338, 2009-Ohio-1984, at ¶12, citing *Kalish* at ¶26. Harville pled guilty to a felony of the third degree. Pursuant to R.C. 2929.14(A)(3), the trial court could have sentenced Harville to one, two, three, four, or five years in prison. Thus, Harville’s sentence of four years in prison is within the statutory range. Moreover, the trial court’s entry and the transcript from the November 2009 hearing expressly indicate that the trial court considered the principles and purposes of sentencing contained in R.C. 2929.11 and the factors contained in R.C. 2929.12. We cannot say that Harville’s sentence is contrary to law. See *State v. Banks*, 9th Dist. No. 24259, 2008-Ohio-6432, at ¶8; *Kalish* at ¶18.

{¶10} Next, we examine whether the trial court abused its discretion in imposing the sentence. An abuse of discretion “implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} Harville’s main argument is that in imposing Harville’s four-year sentence, the trial court failed to “adequately consider” the factors listed in R.C. 2929.12 and the sentence was inconsistent with the principles and purposes of sentencing as contained in R.C. 2929.11.

{¶12} The Supreme Court has concluded that “[t]wo statutory sections apply as a general judicial guide for every sentencing[:]” R.C. 2929.11 and R.C. 2929.12. *Foster* at ¶36. The Court further stated that “[i]t is important to note that there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors.” *Id.* at ¶42.

{¶13} R.C. 2929.11 provides that:

“(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The 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 and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

“(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 imposed for similar crimes committed by similar offenders.

“(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.”

{¶14} R.C. 2929.12(A) states that:

“[u]nless otherwise required by section 2929.13 or 2929.14 of the Revised Code, 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.”

“These statutory sections provide a nonexclusive list for the court to consider.” *Foster* at ¶37.

{¶15} In the case at bar, both the trial court's journal entry and the transcript of the November 16, 2009 sentencing hearing evidence that the trial court considered the appropriate statutory factors. The trial court in its entry stated:

“The Court finds that a prison sanction is appropriate in order to comply with the principles and purposes of sentencing. The Court finds that under [R.C.] 2929.12, the factors indicating that recidivism is more likely outweigh those factors indicating that recidivism is less likely and the factors increasing seriousness outweigh those decreasing seriousness.”

The trial court stated as much at the sentencing hearing and then concluded “[u]pon consideration of all matters set forth by law, it is the judgment of law and sentence of the Court that the defendant be sentenced as follows: to a prison term of four years at the Lorain Correctional Institution on Count 1.”

{¶16} In general, Harville’s arguments in his brief focus on statements and discussions that occurred at prior sentencing hearings. Harville contends that at the sentencing hearing the trial court was “principally concerned about Mr. Harville’s housing status.” Additionally, Harville asserts that “[w]hile the court discussed [Harville’s] prior record and other factors, it imposed a prison sentence based solely on his homelessness.” This contention is without merit. We note that while Harville’s homelessness was discussed at sentencing hearings prior to Harville’s November 16, 2009 resentencing hearing, his homelessness was not discussed at all in the transcript of the November 16th hearing. The sentence that is before us on appeal is based upon Harville’s de novo sentencing hearing that took place November 16, 2009.

{¶17} Moreover, a review of the prior sentencing hearings provides no support to the assertion that Harville’s sentence was based *solely* upon his homelessness. While it is discussed at the prior hearings, and perhaps sometimes inappropriately so, Harville’s prior convictions and his presentence investigation report, which is not a part of the record on appeal, are also discussed. The record establishes that the trial court considered both R.C. 2929.11 and R.C. 2929.12 when imposing Harville’s sentence. Harville has not established that the trial court abused its discretion in imposing the four-year sentence.

CONCLUSION

{¶18} In light of the foregoing, the judgment of the Lorain County Court of Common

Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶19} The sentence the trial court imposed on Mr. Harville complies with all applicable rules and statutes and is not an abuse of discretion. Accordingly, I concur in the majority's judgment.

APPEARANCES:

PAUL A. GRIFFIN, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.