[Cite as *State v. Kepich*, 2015-Ohio-1920.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TAYLOR KEPICH Appellant	C.A. No. 27520 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013 11 3209

DECISION AND JOURNAL ENTRY

Dated: May 20, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant, Taylor L. Kepich, appeals from his conviction and sentence in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} On November 3, 2013, Officer Frederick Jones of the Munroe Falls Police Department was performing radar of traffic on Munroe Falls Avenue. Around noon, Officer Jones "clocked" a vehicle driving 64 miles per hour in a 35 mile per hour zone. Officer Jones activated the cruiser's overhead lights and effectuated a traffic stop of the speeding vehicle. Upon seeing Officer Jones' cruiser, the vehicle in question abruptly stopped in the middle of the road.

{¶3} Before Officer Jones could even place the cruiser into park and dispatch in the traffic stop, the driver of the stopped vehicle, later identified as Taylor Kepich, had exited his vehicle. Mr. Kepich approached the police cruiser's driver-side window and began yelling

obscenities at Officer Jones. Mr. Kepich's presence and demeanor startled Officer Jones to the point that he drew his service firearm, pointed it at Mr. Kepich, and ordered him to step away from the cruiser. Mr. Kepich complied with the officer's order.

{¶4} Officer Jones then exited his cruiser and called for backup on his portable radio. At this point, Officer Jones reassessed the threat posed by Mr. Kepich and decided to holster his firearm, instead electing to draw his Taser. Officer Jones ordered Mr. Kepich to get on the ground, but Mr. Kepich refused to comply. Mr. Kepich then dared the officer to tase him, and said, "I don't have time for this" before walking back to his vehicle and getting back into it. Officer Jones followed Mr. Kepich and ordered him out of the vehicle. Sergeant Craig MacDonald, a passerby who witnessed the interaction between Officer Jones and Mr. Kepich, testified that as Mr. Kepich was exiting his vehicle, he quickly spun and struck Officer Jones once near the collar bone and again in the face. The impact of the blows caused Officer Jones to fall to the ground, which caused him to sustain injuries from hitting his head on the pavement. Officer Jones, understanding the danger of lying in the middle of the roadway, rolled to the side of the road and quickly stood back up.

{¶5} At this point, Officer Jones noticed Mr. Kepich get back into his vehicle. Officer Jones walked up to the vehicle, pointed his Taser at Mr. Kepich through an open window, and ordered him out of the vehicle. Mr. Kepich again refused to comply. As a result, Officer Jones opened the door and pulled Mr. Kepich from the vehicle onto the ground. Officer Jones was eventually able to place handcuffs on Mr. Kepich. Once backup arrived, Mr. Kepich was placed into the back of a cruiser and transported to the police station for booking and subsequently taken to the county jail.

{¶6} On January 8, 2014, the Summit County Grand Jury indicted Mr. Kepich with one count of assault on a peace officer while in the performance of their official duties in violation of R.C. 2903.13(A), a fourth degree felony. Mr. Kepich pled not guilty and his case was tried to the bench. At the close of evidence, the trial court found Mr. Kepich guilty and sentenced him to the maximum prison term of eighteen months.

{¶7} Mr. Kepich now appeals his conviction and sentence, raising two assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

> THE VERDICT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE SINCE THE STATE OF OHIO FAILED TO PROVE EACH AND EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT.[1]

{¶8} In his first assignment of error, Mr. Kepich argues that his conviction for assaulting a peace officer was against the manifest weight of the evidence because he did not cause or attempt to cause physical harm to Officer Jones. We disagree.

{¶9} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must:

> review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

[1] Although Mr. Kepich's first assignment of error seemingly conflates manifest weight of the evidence with sufficiency of the evidence, his brief argues the manifest weight standard. Therefore, we will limit our review accordingly.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986). In making this determination, this Court is mindful that evaluating evidence and assessing credibility are primarily for the trier of fact. *State v. Velez*, 9th Dist. Lorain No. 13CA010518, 2015-Ohio-642, ¶ 16, citing *State v. Wilson*, 9th Dist. Summit No. 26683, 2014-Ohio-376, ¶ 31. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact[-]finder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). An appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340.

{¶10} Mr. Kepich argues that his conviction is against the manifest weight of the evidence because he denies ever striking Officer Jones, because Officer Jones does not remember being struck, and because Sgt. MacDonald had an obstructed view of the altercation at the beginning of the incident.

{¶11} "This Court has repeatedly held that the trier of fact is in the best position to determine the credibility of witnesses and evaluate their testimony accordingly." *State v. Johnson*, 9th Dist. Summit No. 25161, 2010-Ohio-3296, ¶ 15. Here, the trial court apparently accepted the testimony of Officer Jones. The factfinder "has the right to place considerable weight on the testimony of the victim." *State v. Felder*, 9th Dist. Lorain No. 91CA005230, 1992 WL 181016, *1 (July 29, 1992). Officer Jones' testimony, if believed, supports the conclusion that Mr. Kepich became irate and started yelling obscenities immediately after being pulled over for speeding. Officer Jones also testified that after ordering Mr. Kepich out of his vehicle, Mr. Kepich "all of a sudden out of nowhere * * * spun around and just came at me. And the next thing I knew is I was on the ground." This testimony is supported by Sgt. MacDonald's

testimony that Mr. Kepich struck Officer Jones, first with an open right hand to the collar bone area and next with a closed left fist to the mouth. Sgt. MacDonald further testified that his view of Mr. Kepich striking Officer Jones was unobstructed. Although Mr. Kepich attempted to show at trial that Officer Jones sustained his injuries by falling to the pavement after tripping on some gravel, the trial court was free to disregard that theory.

{¶12} After reviewing the record, we cannot conclude that the trial court lost its way and committed a manifest miscarriage of justice in convicting Mr. Kepich of assaulting a peace officer while in the performance of official duties. Mr. Kepich's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT IMPOSING A MAXIMUM PRISON SENTENCE ON A FIRT [SIC] TIME OFFENDER IS CONTRARY TO LAW AND AN ABUSE OF DISCRETION.

{¶13} In his second assignment of error, Mr. Kepich argues that his maximum sentence is either contrary to law or an abuse of discretion. We disagree.

{¶14} "A plurality of the Supreme Court of Ohio held that appellate courts should implement a two-step process when reviewing a felony sentence." *State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 43, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. "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." *Kalish* at ¶ 26. The standard of review in the first step is de novo. *Id.* If the sentence is not contrary to law, we review the trial court's decision in imposing a term of imprisonment for an abuse of discretion. *Id.* An abuse of discretion implies that the

court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶15} The Supreme Court of Ohio has held 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 * * * sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, paragraph seven of the syllabus.

> [N]evertheless, in exercising its discretion, the [trial] court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender.

State v. Mathis, 109 Ohio St.3d 54, 2006–Ohio–855, ¶ 38. "[W]here the trial court does not put on the record its consideration of [Sections] 2929.11 and 2929.12 [of the Ohio Revised Code], it is presumed that the trial court gave proper consideration to those statutes." (Alterations sic.) *State v. Steidl*, 9th Dist. Medina No. 10CA0025-M, 2011-Ohio-2320, ¶ 13, quoting *Kalish* at ¶ 18, fn. 4. "Unless the record shows that the court failed to consider the factors, or that the sentence is 'strikingly inconsistent' with the factors, the court is presumed to have considered the statutory factors if the sentence is within the statutory range." *State v. Fernandez*, 9th Dist. Media No. 13CA0054-M, 2014-Ohio-3651, ¶ 8, quoting *State v. Boysel*, 2d Dist. Clark No. 2013-CA-78, 2014-Ohio-1272, ¶ 13.

{¶16} "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). R.C. 2929.12 in turn provides that a sentencing judge has discretion to determine the most effective means of complying with the

purposes and principles of sentencing. In exercising its discretion, the sentencing judge "shall consider" seriousness and recidivism factors pertinent to the ultimate achievement of the purposes of felony sentencing articulated in R.C. 2929.11(A). R.C. 2929.12(A). R.C. 2929.12(B) includes factors that suggest that the offense is more serious than conduct normally constituting the offense. R.C. 2929.12(C) includes factors suggesting the offense is less serious than conduct normally constituting the offense. The recidivism factors—factors indicating whether an offender is more or less likely to commit future crimes—are set forth in R.C. 2929.12(D) and (E).

{¶17} At the outset, we note that Mr. Kepich's 18-month prison sentence is within the permissible statutory sentencing range for a fourth degree felony. *See* R.C. 2929.14(A)(4). At the sentencing hearing, the trial court stated the following:

> Your conduct that day was appalling, to say the least. Not only did you put your life at risk, not only did you put [Officer Jones'] life at risk, you put everyone around in that small community at risk.
>
> That police officer testified that after 28 or 30 years, he was concerned that that would be the day that either he would have to defend himself or that he was going to get seriously, seriously injured because of your actions, the decisions that you made.
>
> And my job, unfortunately, as I balance all of the factors, the sentencing factors, you, your history, your actions, the consequences of those, my job is to hold you accountable. I don't think you have fully accepted responsibility.
>
> * * *
>
> With that being said, Mr. Kepich, based upon the facts and circumstances, consideration of the relevant sentencing factors, applying the minimum sanction that I have determined will protect the public and punish you without imposing an unnecessary burden on state or local resources, considering the seriousness factors, recidivism factors, all sentencing factors that I am required to analyze before imposing a sentence, I hereby impose the following sentence:
>
> On Count One, a felony of the fourth degree, I am imposing an 18 month prison term, Mr. Kepich.

Based upon the trial court's statement above and the entirety of the proceedings, we find that the trial court addressed the statutory requirements of R.C. 2929.11 and 2929.12. Further, the trial court indicated its consideration of the entirety of R.C. 2929.11 and 2929.12 in its sentencing entry. Therefore, we determine that the trial court's sentence cannot be considered contrary to law. *See Kalish* at ¶ 18 (determining a sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12).

{¶18} The crux of Mr. Kepich's argument regarding his sentence concerns the amount of weight that the trial court gave to the respective factors enumerated in R.C. 2929.12. Specifically, Mr. Kepich contends that the R.C. 2929.12 factors, when considered in his case, weigh against the imposition of a maximum term of imprisonment. However, having presided over the bench trial, the sentencing judge was familiar with the evidence presented at trial. The trial court noted during the sentencing hearing that Mr. Kepich's behavior on November 3, 2013 was appalling, that his actions caused a 30-year veteran of the police force to fear for his safety, and that his conduct endangered his life, the life of Officer Jones, and the lives of the community. Moreover, the trial court stated its belief that Mr. Kepich had not fully accepted responsibility for his actions. In light of the forgoing, we cannot conclude that the sentence imposed in this case was unreasonable, arbitrary, or unconscionable.

{¶19} Based on Mr. Kepich's argument and our own independent review of the record, we conclude that the trial court complied with all applicable rules and statutes in imposing its sentence such that Mr. Kepich's sentence is not clearly and convincingly contrary to law.

Moreover, we conclude that the trial court did not abuse its discretion in its imposition of a maximum term of imprisonment upon Mr. Kepich.

{¶20} Accordingly, Mr. Kepich's second assignment of error is overruled.

III.

{¶21} Both of Mr. Kepich's assignments or error are overruled, and the judgment of the Summit 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 Summit, 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(C). 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.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

ANGELA M. KILLE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.