

[Cite as *State v. Small*, 2010-Ohio-5324.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-1175
v.	:	(C.P.C. No. 09CR-01-0112)
	:	
Sara J. Small,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on November 2, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Sarah W. Creedon*,  
for appellee.

*Max Sutton*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Sara J. Small ("appellant"), appeals from her prison sentence issued by the Franklin County Court of Common Pleas. For the following reasons, we affirm.

{¶2} Appellant was indicted for aggravated vehicular homicide, failure to stop after an accident, and tampering with evidence. They are third-degree felonies and

stem from appellant (1) causing the death of Domingo A. Hernandez, by hitting him in a car accident, (2) failing to stop after the accident, and (3) washing evidence from her car afterward. Appellant pleaded guilty to the failure to stop and tampering with evidence charges and an amended charge of aggravated vehicular homicide as a fourth-degree felony.

{¶3} At the guilty plea hearing, the prosecution provided the following statement of facts. Appellant hit Hernandez while she was driving on July 27, 2008, around 3:30 a.m. Appellant did not stop and left Hernandez lying unconscious off the side of the road. Police responded to the scene after they were contacted around 5:00 a.m., and Hernandez died two days later.

{¶4} Appellant reported herself to police after they publicized that the person responsible for the accident was driving a car that matched the description of the one she owned. She admitted to police that she was involved in the accident, but she claimed she did not know she hit another person. Police found blood embedded in the broken glass of her car, however.

{¶5} Defense counsel had no objections to the prosecution's statement of facts, and the court accepted appellant's guilty plea. The court ordered a presentence investigation report ("PSI"), which reiterated the facts that the prosecution provided and added the following.

{¶6} Hernandez died of blunt force trauma after the accident. Appellant told police that the accident occurred while she was driving home after drinking at two bars. She said that, at the time of the accident, she was looking at her cell phone, which was

ringing, and her cell phone records indicate that she had been sending text messages at that time. Appellant thought that it was just a rock that hit her windshield, but when she cleaned her car afterward, she removed hair and blood from the car.

{¶7} Appellant provided a written statement for the PSI: "I feel very remorseful, sadden, upset, confused because I don't know why this tragic event had to happen to me of all people. I am a good person, and never thought something like this would ever happen to me." Lastly, according to the PSI, appellant has eight prior traffic violations, including one for speeding 88 m.p.h. in a 65 m.p.h. zone less than one month after the fatal accident.

{¶8} At the sentencing hearing, Worthington Police Lieutenant Michael Dougherty said that appellant did not show remorse during her interviews with police, and he believed the only reason she reported herself to police was that she knew she would get caught because she had no garage to hide her car. The court agreed that appellant has not shown "real remorse" and is only "sorry for what happened because something bad happened to her." (Tr. 18.) The court also noted about appellant: "You're driving down the road in the middle of the night after you've been to two bars and you're texting. \* \* \* [N]either your eyes nor your mind were on the street. \* \* \* It was just a tragedy waiting to happen." (Tr. 18.) The court also rejected appellant's claim that she did not know she hit another person during the accident: "You said later you didn't know what you hit, maybe it was a rock. The guy bounced off your windshield as far as the evidence indicates. You left debris all over the street from your car. \* \* \* [Y]ou wash it, \* \* \* cleaning up blood and hair. I just don't see how you can justify any of

that." (Tr. 18.) And the court recognized that Hernandez was still alive when appellant fled.

{¶9} The trial court sentenced appellant to the maximum sentence of 18 months imprisonment for the amended fourth-degree felony aggravated vehicular homicide offense and two years imprisonment each for the failure to stop and tampering with evidence offenses. The court ordered appellant to serve the prison terms consecutively for a total of five and one-half years of incarceration. In the sentencing entry, the court stated that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the facts set forth in R.C. 2929.12." In addition, the court said it "has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." And the court found that "prison is consistent with the purposes and principles of sentencing."

{¶10} Appellant appealed, raising the following assignments of error:

ASSIGNMENT OF ERROR #1

THE TRIAL COURT ERRED WHEN IT DID NOT COMPLY WITH CRIM.R. 11 BY FAILING TO PROPERLY ASCERTAIN THAT THE APPELLANT UNDERSTOOD THE NATURE AND ELEMENTS OF THE CHARGE AGAINST HER, AND BY FAILING TO INFORM THE APPELLANT ABOUT COMMUNITY CONTROL, AND THE POSSIBILITY OF OTHER CONSEQUENCES OF HER GUILTY PLEA.

ASSIGNMENT OF ERROR #2

THE APPELLANT'S GUILTY PLEA WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED INTO IN VIOLATION OF CRIM.R. 11 AND THE DUE PROCESS CLAUSES OF OHIO AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR #3

APPELLANT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION.

ASSIGNMENT OF ERROR #4

THE TRIAL COURT'S SENTENCE OF MORE THAN THE MINIMUM SENTENCE AND THE MAXIMUM SENTENCE WAS CONTRARY TO LAW BECAUSE THE TRIAL COURT FAILED TO CONSIDER THE REQUIRED STATUTORY CRITERIA AND PRINCIPLES PURSUANT TO OHIO REV. CODE 2929.11 AND 2929.12 AND THE SENTENCE IS NOT SUPPORTED BY THE RECORD AND IS INCONSISTENT WITH SIMILARLY SITUATED DEFENDANTS.

ASSIGNMENT OF ERROR #5

THE COURT'S MAXIMUM AND CONSECUTIVE SENTENCE EXCEEDED THE MAXIMUM PRISON TERM FOR THE MOST SERIOUS OFFENSE FOR WHICH APPELLANT WAS CONVICTED. APPELLANT'S SENTENCE WAS NOT SUPPORTED BY THE RECORD AND WAS CONTRARY TO LAW. THE TRIAL COURT'S ADHERENCE TO STATE V. FOSTER VIOLATED NEW SUPREME COURT PRECEDENT.

ASSIGNMENT OF ERROR #6

THE COURT COMMITTED PLAIN ERROR WHEN IT CONVICTED AND SENTENCED APPELLANT FOR A FOURTH DEGREE FELONY AGGRAVATED VEHICULAR HOMICIDE PURSUANT TO R.C. 2903.06, AN OFFENSE WHICH IS NOT A COGNIZABLE CRIME IN OHIO'S STATUTORY SCHEME.

{¶11} Appellant now moves to dismiss the first, second, and sixth assignments of error. Because appellant no longer wants to pursue the issues raised in those assignments of error, we grant her motion to dismiss and limit our review to her third,

fourth, and fifth assignments of error. We address the assignments of error together, where, having dropped her claim that a fourth-degree felony vehicular homicide offense is not cognizable under the law, appellant contends that the maximum prison sentence on that conviction is unjustified and that the trial court improperly imposed consecutive prison terms for all the offenses. We disagree.

{¶12} As an initial matter, we must determine the standard of review to apply. In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19, this court held that, pursuant to R.C. 2953.08(G), we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to properly apply the appropriate statutory guidelines. *Burton* at ¶19.

{¶13} After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "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 ¶4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶14} As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8. Additionally, since *Kalish*, this

court has continued to rely on *Burton*, and, therefore, only applied the contrary-to-law standard of review. *Franklin* at ¶8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100. In any event, appellant's challenge to her sentence fails whether we adhere to *Burton*, and only apply a contrary-to-law standard of review, or we apply the two-step analysis of *Kalish*. We now address the merits of that challenge.

{¶15} Appellant claims that the trial court improperly relied on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶99, where the Supreme Court of Ohio severed statutes requiring trial courts to make certain findings before imposing maximum and consecutive sentences. Appellant contends that the severed statutes are similar to those from other states approved by the United States Supreme Court in *Cunningham v. California* (2007), 549 U.S. 270, 294, 127 S.Ct. 856, 871. And, she relies on *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, where the United States Supreme Court upheld the constitutionality of another state's statutory sentencing scheme allowing a court to impose consecutive sentences based on judicial factfinding. This court has declined to apply *Cunningham* and *Ice* to depart from *Foster*, however. See *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶48-49, and *State v. Busby*, 10th Dist. No. 09AP-1119, 2010-Ohio-4516, ¶15.

{¶16} Although a trial court's discretion to impose maximum and consecutive sentences is no longer limited by statutes severed by *Foster*, a court must still consider the "overriding purposes" of sentencing, which, under R.C. 2929.11(A), "are to protect

the public from future crime by the offender and others and to punish the offender." And, the court must apply R.C. 2929.12, which requires a court to consider the seriousness of the offense and whether the offender is a recidivist. Appellant argues that the trial court did not apply these statutes. In the sentencing entry, however, the court stated that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the facts set forth in R.C. 2929.12." As this court has repeatedly held, that language in a judgment entry belies a defendant's claim that the trial court failed to consider the purposes and principles of sentencing, pursuant to R.C. 2929.11(A), and the R.C. 2929.12 factors regarding recidivism and the seriousness of the offense. *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970, ¶21.

{¶17} Appellant also argues that the trial court violated R.C. 2929.11(B) by imposing a sentence that is not "consistent with sentences imposed for similar crimes committed by similar offenders." In support, she cites different cases where defendants have received less severe sentences for similar offenses.

{¶18} "'Consistency, however, does not necessarily mean uniformity. \* \* \* Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. \* \* \* Although offenses may be similar, distinguishing factors may justify dissimilar sentences.'" *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶24, quoting *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶23.

{¶19} Therefore, a trial court's proper application of the statutory sentencing guidelines, not a case-by-case comparison, ensures consistency in sentencing.

*O'Keefe* at ¶41. In order to demonstrate that a sentence is inconsistent, a defendant must show that the trial court did not properly consider applicable sentencing criteria. *Id.* Again, here, the trial court stated in its sentencing entry that it considered R.C. 2929.11 and 2929.12. The court also "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." And the court found that "prison is consistent with the purposes and principles of sentencing." These statements establish that the trial court satisfied the consistency requirement in R.C. 2929.11(B). *O'Keefe* at ¶42.

{¶20} Lastly, appellant argues that the record does not support maximum and consecutive prison terms. For instance, she contends that the trial court could not properly consider the applicable sentencing factors without any sworn testimony. But R.C. 2929.19(B)(1) indicates that, before imposing sentence, the trial court need only consider the record in front of it, information presented at the sentencing hearing, the PSI, and the victim impact statement. The trial court considered those items here.

{¶21} Appellant also asserts that the offenses were committed under circumstances not likely to recur, a mitigating factor pursuant to R.C. 2929.12(E)(4). The record demonstrates otherwise; appellant's irresponsible driving caused the accident, and she continued to drive irresponsibly after the accident, speeding 88 m.p.h. in a 65 m.p.h. zone less than one month later.

{¶22} Next, although appellant has an extensive history of traffic violations, she asserts that those violations are not criminal convictions and, therefore, do not satisfy the R.C. 2929.12(D)(2) recidivism factor, which pertains to a defendant having a

criminal history. Regardless, we conclude that her numerous traffic violations demonstrate her disregard for the law and, therefore, constitute "any other relevant" factor, pursuant to R.C. 2929.12(D), indicating that she is likely to reoffend.

{¶23} Appellant also claims that she demonstrated remorse by reporting herself to police. It was reasonable for the court to conclude, as Dougherty proposed, that appellant reported herself to police because she could not hide her car and, therefore, was eventually going to get caught. And, the record establishes that instead of showing true remorse for the consequences of her actions, she has been engrossed in self-pity, complaining that she did not "know why this tragic event had to happen to me" and that she "never thought something like this would ever happen to me." Also negating appellant's claim of remorse is that, despite the record indicating that Hernandez bounced off her windshield, she minimizes her culpability by saying she did not know she hit anyone. Under R.C. 2929.12(D)(5), appellant's lack of remorse is another factor establishing that she is likely to reoffend.

{¶24} Finally, also supporting appellant's sentence is the seriousness of her conduct. See R.C. 2929.12(B). In particular, after she struck Hernandez, she left him lying unconscious on the side of the road, depriving him of immediate assistance for his grave injuries.

{¶25} Accordingly, we conclude that appellant's sentence is neither contrary to law nor an abuse of discretion by the trial court. Thus, we need not disturb the sentence under either the *Kalish* or *Burton* standard of review, and we overrule her third, fourth, and fifth assignments of error.

{¶26} To conclude, we overrule appellant's third, fourth, and fifth assignments of error, and we grant her motion to dismiss the first, second, and sixth assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

*Motion to dismiss assignments of  
error one, two, and six granted.  
Judgment affirmed.*

BROWN and DELANEY, JJ., concur.

DELANEY, J., of the Fifth Appellate District, sitting by  
assignment in the Tenth Appellate District.

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