

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

vs.

SHANE WALSH

Appellant

Case No. C 16 0763

Trial No. B 15 05106

18-0015

ON APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION

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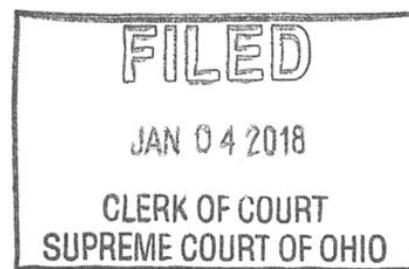
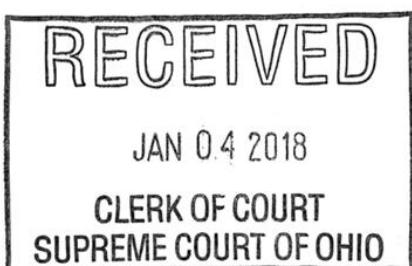


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Walsh timely filed this appeal through appointed counsel.

On September 3, 2015, Shane Walsh was babysitting a child named Lillie Lindsley when he allegedly became angered and physically body slammed Lindsley into the ground causing multiple serious injuries requiring extensive medical care. (T.p. 4-5)

Mr. Walsh had no criminal record at the time of the incident (T.p. 3, September 26, 2016, Sentencing Hearing).

First Proposition of Law: The trial court erred to Walsh's prejudice by not ruling upon his motion to withdraw guilty plea.

Shane Walsh filed a *pro se* motion to withdraw his guilty plea after sentencing but before this notice of appeal was filed on his behalf on October 4, 2016. (TR Notice of Appeal) The trial court did not conduct any hearing, nor issue any ruling either granting or denying his motion.

Second Proposition of Law: The trial court erred to Walsh's prejudice by imposing a prison term not supported by the record.

The seven-year prison sentence imposed by the trial court on Mr. Walsh was clearly and convincingly not supported by the record. As such it should be vacated and remanded for the imposition of either a minimum prison term, or community control. Specifically, the near-maximum seven-year term in prison was unsupported by the record.

This Court reviews sentences under the standard of review set forth in *Ohio Revised Code* §2953.08(G)(2). Under that standard, the Court may modify or vacate Walsh's sentence only if it clearly and convincingly finds that the record does not support the trial court's findings or that the sentence is contrary to law.¹ Specifically, under statutory review, when hearing an appeal of a trial court's felony sentencing decision, "the appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and

¹ *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, (1st Dist. No. C 13 0114; *State v. Ruttle* (September 4, 2013), 1st Dist. Case No. C 13 0067

remand the matter to the sentencing court for resentencing.”² The standard for review is not whether the sentencing court abused its discretion.³ Under *Ohio Revised Code* §2953.08(G)(2), this Court may only modify or vacate a sentence if it “clearly and convincingly find” that either (1) the record does not support the mandatory sentencing findings, or (2) that the sentence is “otherwise contrary to law.”⁴

This Court has held “Although *Kalish* no longer provides the criteria for reviewing felony sentences, it does provide guidance for determining whether a sentence is clearly and convincingly contrary to law.”⁵ *Kalish* requires that the sentence must be within the statutory range, which it is. But under the second prong of *Kalish*, while it is not necessary for the trial court to articulate its consideration of each individual sentencing factor, it must be evident from the record that the principles of sentencing under *Ohio Revised Code* §2929.11 and §2929.12 were considered.⁶ This concern also is a factor under *Ohio Revised Code* §2958.08(G)(2) review, a sentence is clearly and convincingly contrary to law where the trial court did not consider the purposes and principles of *Ohio Revised Code* §2929.11, as well as the factors listed in *Ohio Revised Code* §2929.12. It does not appear that the trial court ever noted that Mr. Walsh had no criminal record prior to the instant case. (T.p. 3)

Thus, the record indicates the court failed to adequately consider the statutory factors, and the sentence is unlawful. The overriding purposes of felony sentencing is to protect the public from future crime by the offender and to others, and to punish the offender using the minimum sanctions.⁷ To achieve these purposes, the sentencing court shall consider the need for incapacitation, rehabilitation, and making restitution.⁸ “A sentence imposed for a felony shall be

² *Ohio Revised Code* §2953.08(G)(2)

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912

⁷ *Ohio Revised Code* §2929.11(A)

⁸ *Id.*

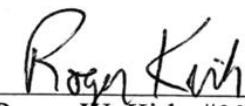
reasonably calculated to achieve the overriding purposes of felony sentencing . . . , commensurate with . . . the seriousness of the offender's conduct and its impact on the victim . . . ”⁹

Applying the referenced statutory scheme, it is apparent that Mr. Walsh had absolutely no prior criminal record, had no felony convictions, no crimes of violence, no prior prison sentence. (T.p. 3) The overriding purposes of felony sentencing, to protect the public . . . and punish the offender, were not met in this case. Sending him to prison for an almost maximum seven years is beyond what is reasonable for the facts surrounding this offense. Mr. Walsh articulated to the court that he was remorseful and apologized to the victim for his actions. (T.p. 3-5) Prison was not warranted in his case, despite serious injuries to the victim. However, the medical reports indicated prognosis for recovery was good, although uncertain. (T.p. 10) The record shows the court did not adequately consider the two principal purposes of sentencing. Based on the statutory considerations considered above, Mr. Walsh's sentence was clearly and convincingly contrary to law and not supported by the record, and as such he should be re-sentenced to either a minimum prison term, or ISP community control.

CONCLUSION

Based on the foregoing, Shane Walsh requests this Court accept jurisdiction of this case.

Respectfully submitted,

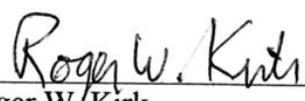


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⁹ Ohio Revised Code §2929.11(B)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was hand-delivered to the office of the Hamilton County Prosecutor on January 2, 2018.



Roger W. Kirk
Attorney for Defendant-Appellant

APPENDIX

Judgment Entry of the First District Court of Appeals

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-160763
		TRIAL NO. B-1505106
Plaintiff-Appellee,	:	
		<i>JUDGMENT ENTRY.</i>
vs.	:	
SHANE WALSH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.*

Following the entry of a guilty plea, defendant-appellant Shane Walsh was convicted of child endangering, a second-degree felony, and sentenced to a seven-year prison term. Walsh now appeals, setting forth two assignments of error. We affirm.

In his first assignment of error, Walsh contends that it was error for the trial court to fail to rule on his postsentence motion to withdraw his guilty plea. We decline to consider this assignment of error because we do not have jurisdiction to do so. An appeals court has jurisdiction to review only the judgment from which the appeal has been taken. *See State v. Gipson*, 1st Dist. Hamilton Nos. C-960867 and C-960881, 1997 WL 598397 (Sept. 26, 1997). Here, the judgment appealed from is the judgment of conviction for child-endangering. Walsh has not appealed from a denial of his motion

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to withdraw his guilty plea because the trial court has not yet rendered a judgment on that motion. Thus, we have no jurisdiction to consider this assignment of error.

In his second assignment of error, Walsh argues that his sentence is contrary to law. We disagree. Although Walsh contends that the trial court failed to consider his lack of a criminal record, the record demonstrates that the trial court, at the sentencing hearing, specifically stated that it had reviewed the presentence investigation report, which noted Walsh's lack of a prior record, and that it had considered "the risk that you will commit another offense, and protecting the public, nature and circumstance of the offense [and] your history" before imposing a nonmaximum prison term.

Because the trial court considered the appropriate factors prior to sentencing Walsh for child endangering, we hold that his sentence is not contrary to law. *See State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). The second assignment of error is overruled.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., CUNNINGHAM and DETERS, JJ.

To the clerk:

Enter upon the journal of the court on November 22, 2017
per order of the court _____.
Presiding Judge