

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 12AP-69
	:	(C.P.C. No. 11CR-09-5043)
Andrew K. Foster,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 11, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Law Office of Thomas F. Hayes, LLC, and *Thomas F. Hayes*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Andrew K. Foster ("appellant"), appeals from a judgment entry of conviction entered in the Franklin County Court of Common Pleas following a guilty plea. Appellant pled guilty to one count of possessing criminal tools, a felony of the fifth degree, and was sentenced to a maximum period of 12 months of incarceration. Because the sentence was not contrary to law, and because the trial court did not abuse its discretion, we affirm.

{¶ 2} On September 21, 2011, appellant was indicted by the grand jury on one count of breaking and entering and one count of possessing criminal tools. On December 5, 2011, appellant entered a plea of guilty to the offense of possessing criminal tools. A nolle prosequi was entered for the breaking and entering count. The facts

presented at the plea hearing established that, on September 11, 2011, appellant and a co-defendant pried open the door to a Sunoco gas station located in Columbus at 7700 Kenny Road in Franklin County, Ohio, and attempted to steal an ATM machine using a pry tool. Ultimately, appellant and his co-defendant were not able to steal the ATM machine, but they did steal cigarettes. The trial court ordered a pre-sentence investigation report ("PSI") and scheduled the matter for sentencing.

{¶ 3} At a sentencing hearing on December 29, 2011, the trial court imposed a maximum sentence of 12 months of incarceration. Appellant was awarded 110 days of jail-time credit. The trial court noted that appellant had recently been granted judicial release from prison on a case originating in Licking County, Ohio. The trial court further ordered the sentence to be run concurrently with any time appellant may receive out of cases and/or events arising in Licking County, Ohio and Perry County, Ohio. No fines or costs were imposed.

{¶ 4} Appellant now files a timely appeal in which he asserts a single assignment of error for our review:

The trial court abused its discretion when it imposed a maximum sentence for a felony of the fifth degree.

{¶ 5} Appellant contends the imposition of a maximum sentence of 12 months of incarceration for a non-violent property crime violates R.C. 2929.11 and 2929.12, as well as the Fourteenth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 16. Appellant submits the imposition of such a sentence by the trial court was an abuse of discretion because the trial court failed to reasonably consider the factors in R.C. 2929.11 and 2929.12, which include the purposes and principles of sentencing, such as protecting the public, punishing the offender using the minimum sanctions necessary to accomplish those purposes without imposing an unnecessary burden on government resources, rehabilitating the offender, and proportionality and consistency requirements, as well as the seriousness and recidivism factors.

{¶ 6} Appellant argues that prior to the commission of the instant offense, he was gainfully employed and had been struggling with addiction problems throughout much of his life. Appellant also notes that during his period of local incarceration, he had been

entrusted to be a runner at the Franklin County jail. In essence, appellant submits that the sentence imposed was overly harsh and failed to consider rehabilitation, particularly in light of the circumstances, and therefore, the trial court abused its discretion in imposing a maximum sentence of 12 months.

{¶ 7} The State of Ohio ("the State"), on the other hand, argues that the correct standard to be applied here is not an abuse of discretion, but rather, the clear and convincing standard set forth in R.C. 2953.08(G)(2). The State submits that in order to be successful, appellant must show by clear and convincing evidence that his sentence is contrary to law. The State points out that appellant has expressly stated he is not arguing that his sentence is contrary to law, and he is only arguing that the sentence constitutes an abuse of discretion. As a result, the State argues appellant cannot succeed on this assignment of error.

{¶ 8} We believe it is significant to note that appellant did not raise any argument challenging the imposition of a maximum sentence at the sentencing hearing in the trial court. As a result, we may reverse appellant's sentence only if the sentence imposed rises to the level of plain error. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Plain error is not present unless, but for the error complained of, the outcome would have been different. *Long* at paragraph two of the syllabus; *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶78.

{¶ 9} In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶ 19-21, we recently discussed the standard of review applicable to felony sentencing issues as follows:

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 apply the appropriate statutory guidelines. *Burton* at ¶ 19.

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.

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 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.

Id. See also *State v. Pankey*, 10th Dist. No. 11AP-378, 2011-Ohio-6461, ¶ 18; and *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 83.

{¶ 10} Pursuant to Ohio's sentencing laws, a sentencing court is required to consider the principles and purposes of felony sentencing as set forth in R.C. 2929.11, as well as the seriousness and recidivism factors provided in R.C. 2929.12. *Pankey* at ¶ 19.

{¶ 11} A court sentencing an offender for a felony must be guided by the overriding purposes of felony sentencing. R.C. 2929.11(A). "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). In order to achieve those purposes, the court must consider the need for incapacitating the offender, deterring future crime, rehabilitating the offender, and making restitution. *Id.*

{¶ 12} Besides being reasonably calculated to achieve the two overriding purposes of felony sentencing as set forth above, a sentence imposed for a felony must also be "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." R.C. 2929.11(B).

{¶ 13} In addition, the sentencing court must consider the seriousness and recidivism factors set forth in R.C. 2929.12 in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. *State v. Arnett*, 88 Ohio St.3d 208, 213 (2000). R.C. 2929.12 " 'identifies a nonexclusive list of factors relating to the seriousness of the offense and recidivism of the offender for the court to consider in imposing a sentence to meet those objectives.' " *Pankey* at ¶ 19, quoting *State v. Samuels*, 8th Dist. No. 88610, 2007-Ohio-3904, ¶ 14. R.C. 2929.12(A) also permits the court to consider "any other factors that are relevant to achieving the purposes and principles of sentencing." *Id.*

{¶ 14} In the instant case, appellant has not argued that his sentence is contrary to law. In fact, appellant has expressly acknowledged that he is not making such an argument. We further note that his sentence falls within the applicable range of sentences for felonies of the fifth degree. *See Pankey* at ¶ 23 (the term of imprisonment fell within the statutory range established under R.C. 2929.14, so the sentence imposed was not contrary to law). Additionally, the judgment entry of conviction states as follows:

The court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. 2929.13(F).

(R. 34 at 1.)

{¶ 15} This court has previously held that such language in a judgment entry refutes an offender's claim that the trial court failed to consider the purposes and principles of sentencing as set forth in R.C. 2929.11, and the seriousness and recidivism factors established in R.C. 2929.12. *See State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶ 26; *Allen* at ¶ 22; *Pankey* at ¶ 22.

{¶ 16} Considering all of this, we believe appellant's argument fails under our commonly applied standard of review (clearly and convincingly contrary to law). However, even if we analyze this assignment of error under the two-step procedure set

forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, and therefore go on to the second step to apply the abuse of discretion standard, we find no merit in this assignment of error.

{¶ 17} Appellant's contention that the trial court abused its discretion in imposing a maximum sentence is not persuasive. Based upon comments made by the trial judge during the sentencing hearing, it is apparent that the trial court had reviewed appellant's PSI, which revealed a criminal history. Specifically, the trial court noted that appellant had recently been released from prison on judicial release on a case originating from Licking County. The trial court was also aware of the fact that appellant was on probation in Perry County and that Licking County and/or the adult parole authority had placed a holder on appellant. Although the trial court was aware appellant had asserted he was suffering from addiction and that he had been employed prior to the commission of the offense, the trial court also noted that, given appellant's behavior of committing crimes while he was "on paper" and on judicial release, the court did not have "any reason to feel any optimism on [appellant's] rehabilitation at all." (Tr. 14.)

{¶ 18} Upon review, we find appellant has failed to demonstrate (or even argue) that the sentence imposed was contrary to law. Moreover, even assuming, as argued by appellant, that this court is required to apply the second step of the *Kalish* analysis, appellant has failed to demonstrate that the trial court abused its discretion in imposing a maximum sentence of 12 months. Accordingly, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
