

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L- 026
MARCUS W. GIBSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000732.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Marcus W. Gibson, appeals the Judgment Entry of Sentence of the Lake County Court of Common Pleas, sentencing him to a five-year prison term for Robbery. For the following reasons, we affirm the decision of the court below.

{¶2} On October 29, 2009, Gibson (age 24) was involved in a shoplifting incident at the Super Kmart at 9200 Mentor Avenue, Mentor, Ohio. Gibson was

observed by a loss prevention officer leaving the store with assorted merchandise without paying for it. According to the loss prevention officer, he approached Gibson in the parking lot and together they walked back to the store vestibule. At this point, Gibson punched the loss prevention officer in the eye and fled the scene. Gibson claimed he was grabbed by an unidentified individual as he was leaving the store and reacted instinctively by punching the individual in the face. Gibson stated that it was his intention, upon entering the Kmart, to shop-lift merchandise to support his drug habit.

{¶3} On December 4, 2009, Gibson was charged, by way of Information in the Lake County Court of Common Pleas, with one count of Robbery, a felony of the third degree in violation of R.C. 2911.02(A)(3).

{¶4} On December 22, 2009, Gibson signed a Written Plea of Guilty to Robbery.

{¶5} The trial court ordered a Presentence Investigation Report and Psychological Evaluation Request.

{¶6} On February 18, 2010, a sentencing hearing was held pursuant to R.C. 2929.19. Counsel for Gibson argued that he had committed one of the “least forms” of the offense of Robbery, “basically a misdemeanor theft with a punch.” Counsel also argued that Gibson would benefit more from anger management and drug and alcohol counseling than from an extended prison sentence.

{¶7} Gibson addressed the court as follows:

{¶8} Your Honor, *** I would just like to say that I apologize for my actions that I displayed on that date. I do have a problem. It revolves around drugs, alcohol, probably even psychiatric problems. But sending me to prison is not helping. It's only probably gonna make me worse, in a sense, and I honestly feel like I need help. *** I've always learned something from being incarcerated. But being incarcerated is not helping me mentally. It's not helping me get the help that I need. *** I just, again, I just

apologize for my negative actions and I hope that you'll take it into consideration that I do need help.

{¶9} The State recommended a prison term of four years.

{¶10} The trial court noted that Gibson had a lengthy juvenile record. The court also noted that Gibson had been sentenced to prison three times as an adult: for Possession of Cocaine in 2005 (Lake County); for Robbery in 2005 (Cuyahoga County); and for Domestic Violence in 2008 (Lake County). Gibson was released from prison on June 29, 2009, and committed the current offense while under post release control. The court cited Gibson's psychological evaluation, which indicated a diagnosis of malingering and anti-social personality disorder. The evaluating psychologist did not recommend treatment and opined that Gibson's "personality structure is chronic and not likely to be changed."

{¶11} At the close of the hearing, the trial court sentenced Gibson to five years in prison for Robbery, the maximum term of imprisonment for a third-degree felony, and to an additional year for the post release control violation, for an aggregate prison term of six years.

{¶12} The trial court journalized Gibson's sentence on February 26, 2010.

{¶13} On March 24, 2010, Gibson filed his Notice of Appeal. On appeal, Gibson raises the following assignment of error:

{¶14} "[1.] The trial court erred by sentencing the defendant-appellant to the maximum term of imprisonment."

{¶15} "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. 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." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26.

{¶16} The overriding purposes of felony sentencing in Ohio "are to protect the public from future crime by the offender *** and to punish the offender." R.C. 2929.11(A). A sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). "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." R.C. 2929.12(A).

{¶17} It is well-established that R.C. 2929.12(A) does not require a sentencing court to make specific findings regarding the seriousness and recidivism factors. *Kalish*, 2008-Ohio-4912, at ¶17 ("R.C. 2929.11 and 2929.12 *** are not fact-finding statutes"). Ohio's felony sentencing law only requires the trial court to "consider" the mitigating circumstances in the exercise of its discretion. *State v. Glenn*, 11th Dist. No. 2003-L-022, 2004-Ohio-2917, at ¶47 ("[a] trial court is only required to *consider* mitigating factors") (emphasis sic). Thus, the Ohio Supreme Court has characterized the mandate of R.C. 2929.12(A) as a "general judicial guide for every sentencing *** grant[ing] the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.'" *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶36-37 (citation omitted). "It is important to note that there is no mandate for

judicial factfinding in the general guidance statutes. The court is merely to ‘consider’ the statutory factors.” *Id.* at ¶42.

{¶18} Gibson does not claim that his sentence was contrary to law. Rather, he argues the trial court failed to give “careful and substantial deliberation to the relevant statutory considerations.” *Kalish*, 2008-Ohio-4912, at ¶20. Specifically, the court failed to give appropriate consideration to the following mitigating factors: Gibson’s expressed remorse for his conduct; his recognition of the role played by substance abuse in the present offense and willingness to seek treatment; his mental health issues; and that the injury caused by his use of force was minimal and unintended.

{¶19} We find no abuse of the discretion in the trial court’s decision to impose the maximum sentence for a third-degree felony. The court noted Gibson’s indications of anti-social personality disorder as well as the conclusion that the condition is chronic. The court further observed that Gibson had been to prison several times and committed the present offense only four months after being released. As was explained to Gibson, the court must sentence him so as to protect the public, not merely to do what might be best for the offender.

{¶20} Moreover, a five-year sentence for Robbery is not inconsistent with the mitigating factors urged by Gibson. The demonstration of remorse, even genuine remorse, and the recognition of substance abuse issues do not mandate a lesser sentence where the judge determines, in the sound exercise of his discretion, that the maximum sentence is necessary to achieve the purposes of felony sentencing, i.e., protecting the public from future crime by the offender and punishing the offender. *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, at ¶34 (“the trial court is not

obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor”) (citations omitted); *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus (“[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”).

{¶21} The sole assignment of error is without merit.

{¶22} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, sentencing Gibson to a five-year prison term for Robbery, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.