

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Court of Appeals No. H-10-020

Appellee

Trial Court No. CRI-2009-1199

v.

Edward Eugene Blair

DECISION AND JUDGMENT

Appellant

Decided: March 31, 2011

* * * * *

Thomas H. Freeman, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Edward Eugene Blair, appeals from his sentence imposed by the Huron County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant's counsel has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, asserting that there are no meritorious issues for appeal. In *Anders*, the United States Supreme Court held that where counsel, after a

conscientious examination of a case, determines the case to be wholly frivolous, he or she should so advise the court and request permission to withdraw. *Anders*, 386 U.S. 738, 744. In the instant matter, counsel for appellant has filed with his request to withdraw a brief identifying something in the record that could support the appeal and, also, has furnished his client with a copy of the brief and the request to withdraw as required under *Anders*. *Id.* Appellant has not filed his own brief.

{¶ 3} Appellant's counsel raises the following potential assignments of error:

{¶ 4} I. "The trial court violated the purposes and principles of sentencing by sentencing appellant to the maximum sentence for each of the three (3) offenses."

{¶ 5} II. "The trial court violated the purposes and principles of sentencing by sentencing appellant to consecutive prison terms."

{¶ 6} Appellant was indicted on five counts of drug trafficking on December 23, 2009. Counts one and two charged appellant with trafficking in cocaine, both felonies of the fifth degree. Count three charged appellant with aggravated trafficking in drugs, a felony of the third degree. And counts four and five charged appellant with trafficking in Percoset, both felonies of the fourth degree.

{¶ 7} On June 15, 2010, appellant entered a plea of guilty to counts one and two, involving trafficking in cocaine, and to count four, involving trafficking in Oxycodone (Percoset).

{¶ 8} On August 5, 2010, appellant was sentenced to an aggregate of 30 months in prison. Specifically, on both count one and count two he was sentenced to serve 12

months in prison, with the sentences ordered to be served concurrently, and on count four he was sentenced to serve 18 months in prison, with the sentence ordered to be served consecutively to the sentences for counts one and two. It is from this sentence that appellant appeals.

{¶ 9} Because appellant's two assignments of error involve overlapping issues, we will review them together in this analysis. In order to render Ohio's sentencing scheme compatible with the United States Supreme Court decisions in *Blakely v. Washington* (2004), 542 U.S. 296 and *United States v. Booker* (2005), 543 U.S. 220, the Ohio Supreme Court held that "trial 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 minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. "Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 13.

{¶ 10} In a plurality opinion, the Supreme Court of Ohio set forth a two-step procedure for reviewing a felony sentence. *Kalish*, 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." *Id.* at ¶ 4. "If this first step is satisfied, the second step requires that the trial court's decision be reviewed under an abuse-of-discretion standard." *Id.*

{¶ 11} In *Kalish*, the Supreme Court held that the defendant's sentence was not contrary to law, where the trial court: (1) expressly stated that it had considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12; (2) properly applied postrelease control; and (3) imposed a sentence that was within the permissible range. *Id.* at ¶ 18. The court further held that there was no abuse of discretion, inasmuch as: (1) the trial court had given careful and substantial deliberation to the relevant statutory considerations; and (2) there was nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable. *Id.* at ¶ 20.

{¶ 12} With respect to the first step of the two-step procedure, we note that appellant does not dispute that his sentences were within the permissible ranges for the offenses charged. In addition, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in R.C. 2929.11 and 2929.12, and, further, properly advised appellant regarding postrelease control. Based on the foregoing, we find that the trial court complied with all applicable rules and statutes and, as a result, appellant's sentence is not clearly and convincingly contrary to law.

{¶ 13} Having determined that the first step of the *Kalish* test was satisfied, we move to the second step, pursuant to which we must review appellant's sentence under an abuse of discretion standard. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An appellate court

applying an abuse of discretion standard may not substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621.

{¶ 14} The trial court, in addition to balancing the R.C. 2929.11 and 2929.12 factors, also considered the totality of appellant's criminal record, various oral statements that had been made, and the presentence investigation report. In pronouncing its sentence, the trial court expressly focused on recidivism factors, noting that appellant: (1) has an extensive juvenile history; (2) has an extensive adult criminal history involving 38 offenses, including "prior prison for trafficking, probation violations, and prior PRC violation;" (3) has not responded favorably to sanctions previously imposed; and (4) has shown no genuine remorse.

{¶ 15} Upon our review of the record, we find no evidence that the trial court acted arbitrarily, unreasonably, or unconscionably in crafting appellant's sentence. For all of the foregoing reasons, appellant's first and second assignments of error are found not well-taken.

{¶ 16} In addition, we find no other grounds for a meritorious appeal. Thus appellant's appeal is found to be without merit and is wholly frivolous. The motion to withdraw that was filed by counsel for appellant is well-taken and is hereby granted.

{¶ 17} The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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