

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
Plaintiff-Appellee	:	William B. Hoffman, J.
	:	Sheila G. Farmer, J.
-vs-	:	
	:	Case No. 09 CA 23
	:	
RICHARD HODGE	:	<u>OPINION</u>
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Guernsey County Court of Common Pleas Case No. 09 CR 01
--------------------------	--

JUDGMENT:	Affirmed
-----------	----------

DATE OF JUDGMENT ENTRY:	June 11, 2010
-------------------------	---------------

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

DANIEL G. PADDEN
Guernsey County Prosecuting Attorney
139 West 8th Street
P.O. Box 640
Cambridge, Ohio 43725

CHARLES E. McKNIGHT
121 West 8th Street
Cambridge, Ohio 43725

Edwards, P.J.

{¶1} Appellant, Richard Hodge, appeals a judgment of the Guernsey County Common Pleas Court convicting him of two counts of discharge of a firearm at or near a prohibited premises (R.C. 2923.162(A)(3)) and one count of improperly handling a firearm in a motor vehicle (R.C. 2923.16(A)) with a firearm specification (R.C. 2941.145) upon pleas of guilty. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE¹

{¶2} On September 17, 2008, appellant was present in a motor vehicle owned and operated Tabatha Drown. Nakia Gravely and appellant's co-defendant, Londale Campbell, were also in the vehicle. The occupants of the vehicle possessed two loaded handguns.

{¶3} Drown drove from her residence to the 400 block of Foster Avenue in Cambridge, Ohio. While traveling in the moving vehicle through the 400 block of Foster Avenue, appellant and another individual in the car discharged multiple rounds from the handguns. Two homes were struck by bullets and sustained damage. Two vehicles also sustained bullet damage.

{¶4} Appellant was a juvenile at the time of the shooting incident. On September 30, 2008, appellant was charged in the Guernsey County Common Pleas Court, Juvenile Division, with two counts of improperly discharging a firearm at or into a habitation in violation of R.C. 2923.16(A), each with a specification that the firearm was discharged from a motor vehicle in violation of R.C. 2941.146, and improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16(A), with a firearm specification

¹ Because the plea hearing was not transcribed as part of the record on appeal, the facts underlying the guilty pleas are taken from the bill of particulars.

(R.C. 2941.145). On January 15, 2009, appellant was bound over to the general division of the common pleas court for trial as an adult.

{¶5} Appellant was indicted by the Guernsey County Grand Jury on identical charges to those filed in the juvenile court. Appellant and his co-defendant Campbell entered into a negotiated plea with the State. On May 21, 2009, appellant pleaded guilty to a bill of information filed by the state on May 15, 2009, charging him with two counts of discharge of a firearm at or near a prohibited premises in violation of R.C. 2923.162(A)(3) and one count of improperly handling a firearm in a motor vehicle (R.C. 2923.16(A)) with a firearm specification (R.C. 2941.145). The judgment setting forth the terms of the negotiated plea stated that the State would recommend four years incarceration on Counts 1 and 2, to be served concurrently with each other; one year incarceration on Count 3, to be served concurrently with the sentences on Counts 1 and 2, and three years mandatory incarceration on the gun specification. The agreement stated that appellant and his co-defendant reserved the right to argue for a lesser sentence at the sentencing hearing. The negotiated plea agreement included both appellant's case and Campbell's case in the same document, setting forth the same terms as to each.

{¶6} The case proceeded to a joint sentencing hearing for appellant and Campbell. After the hearing, the court sentenced appellant in accordance with the state's recommendation in the negotiated plea to seven years total incarceration. He assigns a single error on appeal:

{¶7} “THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO FOUR YEARS FOR BOTH OF THE VIOLATIONS OF R.C. 2923.16(A)(3).”

{¶8} Appellant argues that the trial court did not comply with R.C. 2929.11(B), R.C. 2929.11(C), and R.C. 2929.14 in sentencing him to four years incarceration on each conviction of improperly discharging a firearm at or near a prohibited premises.

{¶9} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶10} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding 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 the minimum sentences.” *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.²

² “[P]ursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are “to protect the public from future crime by the offender and others and to punish the offender. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.” *State v. Murray*, Lake App. No. 2007-L-098, 2007-Ohio-6733, paragraph 18, citing R.C. 2929.11(A).

{¶11} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant’s sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Kalish* at paragraph 14.

{¶12} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. “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 shall be reviewed under an abuse of discretion standard.” *Kalish* at paragraph 4, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶13} The Supreme Court held, in *Kalish*, that the trial court’s sentencing decision was not contrary to law. “The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law.” *Kalish* at paragraph 18. The Court further held that the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and that there was

“nothing in the record to suggest that the court’s decision was unreasonable, arbitrary, or unconscionable”. *Kalish* at paragraph 20.

{¶14} R.C. 2929.11(B) provides that a sentence for a felony shall be “consistent with sentences imposed for similar crimes committed by similar offenders.” Appellant argues that the record clearly demonstrates that he did not receive a sentence consistent with Russell Rose, a juvenile who was not sentenced as an adult, and another case where the discharge of a firearm into a habitation was treated as a misdemeanor.

{¶15} We first note that while appellant presented the court with a certified copy of the sentence in the misdemeanor case and an uncertified copy of Russell Rose’s sentence, neither document was formally admitted at the hearing and these entries have not been preserved as part of the record before this court on appeal. The transcript reflects that the municipal court case involved a May 22, 2003, incident of shooting into a house, and the judgment presented to the court was from the Cambridge Municipal Court. Tr. 13. The transcript reflects that the Municipal Court case involved a shot fired into a house while the victims were sleeping, narrowly missing a woman.

{¶16} The trial court incorrectly stated that it could take judicial notice of the court’s record in *State v. Rose*, a 2004 case from Guernsey County Common Pleas Court. A trial court can take judicial notice of the court’s docket. *State v. Washington* (August 27, 1987), Cuyahoga App. Nos. 52676, 52677, 52678 at 15. However, a court does not have the authority to take judicial notice of the proceedings in another case, including its own judgment entries. Eg., *State v. LaFever*, Belmont App. No. 02 BE 71, 2003-Ohio-6545, ¶ 27; *State v. Blaine*, Highland App. No. 03CA9, 2004-Ohio-1241, ¶

17; *Diversified Mortgage Investors, Inc. v. Athens Cty. Bd. of Revision* (1982), 7 Ohio App.3d 157, 454 N.E.2d 1330; *NorthPoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, ¶ 16. The rationale for this holding is that if a trial court takes notice of a prior proceeding, the appellate court cannot review whether the trial court correctly interpreted the prior case because the record of the prior case is not before the appellate court. Eg. *Blaine*, supra, ¶ 17; *LaFever*, supra, ¶ 27; *Buoscio*, supra, ¶ 34. The transcript of appellant's sentencing hearing reflects that Russell Rose was tried as a juvenile and received a sentence of three years incarceration for felonious assault and three years for a firearm specification, to be served consecutively. Tr. 16.

{¶17} In considering a claim that a trial court violated R.C. 2929.12(B), this Court has previously held:

{¶18} “Simply pointing out an individual or series of cases with different results will not necessarily establish a record of inconsistency. *State v. Gorgakopoulos*, [8th Dist. No. 81934, 2003-Ohio-4341] at ¶ 23. * * * “[i]t is not the trial court's responsibility to research prior sentences from undefined, and largely unavailable, databases before reaching its sentencing decision. The legislature did not intend to place such a burden on the trial court when it enacted 2929.11(B). The legislature's purpose for inserting the consistency language contained in R.C. 2929.11(B) is to make consistency rather than uniformity the aim of the sentencing structure. See Griffin and Katz, *Ohio Felony Sentencing Law* (2001), 59. Uniformity is produced by a sentencing grid, where all persons convicted of the same offense with the same number of prior convictions receive identical sentences. *Id.* Consistency, on the other hand, requires a trial court to weigh the same factors for each defendant, which will ultimately result in an outcome

that is rational and predictable. Under this meaning of 'consistency,' two defendants convicted of the same offense with a similar or identical history of recidivism could properly be sentenced to different terms of imprisonment. * * *." *State v. Zwelling*, Muskingum App. No. CT2006-0055, CT2006-0051, 2007-Ohio-3691, ¶43-44.

{¶19} In the instant case, appellant presented two prior cases where a gun was fired into a habitation. One was charged as a misdemeanor and the other involved a juvenile offender. Appellant has not challenged the appropriateness of the bindover and pleaded guilty to felony offenses. To the extent he argues that he was not charged appropriately, he has waived any error. Neither the misdemeanor case nor the juvenile case presents an example of a sentence given for the same offenses to which appellant pleaded guilty. Appellant's co-defendant Campbell was initially bound over from juvenile court, entered a negotiated plea to the same offenses which appellant pleaded guilty to, and was sentenced to the identical sentence appellant received. Appellant has not demonstrated that the sentence is inconsistent under R.C. 2929.11(B).

{¶20} Appellant next argues that the court failed to comply with R.C. 2929.11(C), which mandates that felony sentences not be based on the race, ethnic background, gender or religion of the offender. Appellant argues that his co-defendant Tabatha Drown received a sentence of three years, five months.

{¶21} The record does not demonstrate what sentence Drown received. Appellant reserved the right at his sentencing hearing to present further argument and evidence after Drown was sentenced. Tr. 6. The record does not reflect that appellant chose to do so. Nothing in the record demonstrates that appellant was sentenced based on his race, ethnic background, gender or religion.

{¶22} Finally, appellant argues that the court erred in not imposing the minimum term of incarceration because he had no prior prison record and the record does not demonstrate that the shortest term would demean the seriousness of the offense.

{¶23} R.C. 2929.14(B) provides:

{¶24} “(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in section 2907.02, 2907.05, or 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

{¶25} “(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

{¶26} “(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender’s conduct or will not adequately protect the public from future crime by the offender or others.”

{¶27} The judicial fact-finding portions of R.C. 2929.14(B) were found unconstitutional and excised from the statute by *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. As discussed earlier, in *Kalish*,^{supra} the Ohio Supreme Court discussed the effect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding 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 the minimum sentences.” *Kalish* at

paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶28} The record reflects that the court considered the statutory sentencing factors found in R.C. 2929.11 and 2929.12. The court stated that recidivism was likely because appellant demonstrated a pattern of drug and alcohol abuse at the time of the offense for which he was not in treatment. Tr. 27. Appellant showed genuine remorse and had no prior criminal convictions; however, the court placed less weight on appellant’s lack of a prior record because he had just turned eighteen. The court weighed the seriousness and the impact the crime had on the victim:

{¶29} “And here Richard as I have stated to the Assistant Prosecuting Attorney I believe the hand of God weighed heavily on your shoulders and on the shoulders of the young girl sitting back because she could have very easily been shot, and if she had been shot, and killed your sentence would have been different. You are very fortunate the homes had bullet holes in them. No one, no person was injured. The homes were injured. They have holes. No person had a hole, and I have to weigh that. I have to also weigh properly your age eighteen, and I have to weigh the impact on the victim and the victim statement we heard those in Court, and having weighed all of those things I

find that now is the time to punish. The time for rehabilitation and mercy that has been sought by your Attorney very eloquently here is going to wait.” Tr. 27-28.

{¶30} Appellant has not demonstrated that the sentence of four years was contrary to law or an abuse of discretion. The assignment of error is overruled.

{¶31} The judgment of the Guernsey County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

JAE/r0323

