

COURT OF APPEALS  
ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-COA-029
CLIFFORD E. HILL	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Ashland County Court of Common Pleas, Case No. 09-CRI-037

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 4, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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*Gwin, P.J.*

{¶1} Appellant Clifford E. Hill appeals the sentence rendered by the Ashland County Court of Common Pleas. The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 24, 2009, the Court held a sentencing hearing<sup>1</sup>. Appellant had previously pled guilty to one count of aggravated robbery with a firearm specification, a felony of the first degree; one count of felonious assault, a felony of the second degree; and one count of having weapons while under disability, a felony of the third degree.

{¶3} The Court sentenced Appellant to a term of ten years in prison for the aggravated robbery, with three years for the firearm specification to be served consecutively to the aggravated robbery sentence; eight years for the felonious assault to be served consecutively to the aggravated robbery and firearm specification; and five years for the having weapons while under disability to be served concurrently to the other sentences. The Court also imposed seven hundred eighty-two (782) days for violating post-release control to be served consecutively to the new sentences. The total prison time to be served is over twenty-three years.

{¶4} Appellant has timely appealed raising the following assignment of error

{¶5} "I. THE IMPOSITION OF A PRISON SENTENCE IN THIS CASE IMPOSES AN UNNECESSARY BURDEN ON STATE RESOURCES."

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<sup>1</sup> A Statement of the Facts underlying Appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignment of error shall be contained therein.

## I.

{¶6} Appellant maintains in his sole assignment of error the length of the prison sentences imposed in his case results in an unnecessary burden on state resources. We disagree.

{¶7} At the outset, we note there is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S. Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi*, 5<sup>th</sup> Dist No. 2006-CA-41, 2006-Ohio-5823. An individual has no substantive right to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205; *State v. Goggans*, Delaware App. No. 2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28. In other words “[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction...It is not the duration or severity of this sentence that renders it constitutionally invalid....” *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255.

{¶8} Recently 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. See, *State v. Snyder*, Licking App. No.2008-CA-25, 2008-Ohio-6709.

{¶9} 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 ¶ 1 and 11, 896 N.E.2d 124, citing *Foster* at ¶ 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306; *State v. Firouzmandi*, Licking App. No. 2006-CA-41, 2006-Ohio-5823.

{¶10} "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 ¶ 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 ¶ 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1; *State v. Firouzmandi*, supra at ¶ 29.

{¶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 ¶ 14.

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

{¶13} As a plurality opinion, *Kalish* is of limited precedential value. See *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (characterizing prior case as "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law"). See, *State v. Franklin* (2009), 182 Ohio App.3d 410, 912 N.E.2d 1197, 2009-Ohio-2664 at ¶ 8. "Whether *Kalish* actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2; *State v. Welch*, Washington App. No. 08CA29, 2009-Ohio-2655 at ¶ 6; *State v. Ringler* (Nov. 4, 2009), Ashland App. No. 09-COA-008. Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing *State v. Welch*, *supra*; *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264 at FN2; *State v. Ringler*, *supra*.

{¶14} 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 ¶ 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 ¶ 20.

{¶15} In the first step of our analysis, we review whether the sentence is contrary to law. In the case at bar, appellant was convicted of aggravated robbery, a felony of the first degree, together with a firearm specification, felonious assault, a felony of the second degree and having a weapon while under disability, a felony of the third degree.

{¶16} For a felony of the first degree, the possible prison term is three, four, five, six, seven, eight, nine, or ten years. R.C. 2929.14(A) (1). For a felony of the second degree, the possible prison terms are two, three, four, five, six, seven, or eight years. R.C. 2929.14(A) (2). For a felony of the third degree, the possible prison terms are one, two, three, four, or five years. 2929.14(A) (3). The sentence for a specification for use of a firearm to facilitate an offense is three years. R.C. 2941.145; R.C. 2929.14(D) (1) (a) (ii). For a violation of post release control, the maximum prison term shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. R.C. 2929.141(A).

{¶17} Appellant was sentenced to ten years for the first-degree felony, three years for the firearm specification to be served consecutive to the first-degree felony sentence, eight years for the felony of the second degree, consecutive to the previous sentences, five years for the felony of the third degree, concurrent to the previous sentences. Appellant was also sentenced for violating post-release control to 782 days

consecutive to the previous charges. The aggregate prison term imposed is over 23 years.

{¶18} Upon review, we find that the trial court's sentencing on the charge complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Furthermore, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code and advised appellant regarding post release control. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶19} Having determined that the sentence is not contrary to law we must now review the sentence pursuant to an abuse of discretion standard. *Kalish* at ¶ 4; *State v. Firouzmandi*, supra at ¶ 40. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶20} In the case at bar, the trial court took note that the Appellant's offenses were more serious. First, the victim suffered serious physical harm as a result of the offenses. The victim has a bullet lodged next to his heart that cannot be surgically removed. Further, the victim has extremely limited use of one of his arms. (S. Transcript at 22-24). The Court also found the offenses to be more serious because they involved organized criminal activity that was planned out in advance. (Id. at 24-25). The offenses did not arise out of a random encounter; rather Appellant went to great lengths to obtain a gun and gather information about the victim. (Id.).

{¶21} Further, the trial court was greatly concerned by the likelihood that Appellant will reoffend. (Id at 25-26). Appellant has an extensive criminal history.

Appellant's criminal history includes numerous prior convictions for violent offenses including assault, aggravated robbery, domestic violence, aggravated menacing, and a previous robbery. (Id. at 26).

{¶22} Additionally, Appellant previously served a prison sentence and was on post-release control at the time he committed the crimes in the present case. The pre-sentence investigation report indicates that a previous aggravated robbery conviction involved the Appellant and other individuals viciously beating a man for \$115. Appellant's next conviction for robbery involved Appellant stopping a buggy that contained a Mother and child. The Appellant pointed a gun at the woman demanding that she give him her purse.

{¶23} There is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of appellant's case to suggest that his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. *State v. Firouzmandi*, supra at ¶ 43.

{¶24} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of felony sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11.

{¶25} Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under

the Ohio and United States Constitutions in its sentencing appellant to the aggregate term of approximately 23 years incarceration.

{¶26} In his assignment of error, appellant contends that his sentence violates the General Assembly's intent to minimize the unnecessary burden on state and local government resources. Specifically, appellant argues that because of the high cost of housing prison inmates, the cost of housing him in prison beyond the minimum sentence creates an unnecessary burden on state and local resources.

{¶27} In *State v. Ober* (Oct. 10, 1997), Greene App. No. 97CA0019, the Second District considered this same issue. In rejecting the argument, the court stated “Ober is correct that the ‘sentence shall not impose an unnecessary burden on state or local government resources.’ R.C. 2929.19(A). According to criminal law experts, this resource principle ‘impacts on the application of the presumptions also contained in this section and upon the exercise of discretion.’ Griffin & Katz, *Ohio Felony Sentencing Law* (1996-97), 62. Courts may consider whether a criminal sanction would unduly burden resources when deciding whether a second-degree felony offender has overcome the presumption in favor of imprisonment because the resource principle is consistent with the overriding purposes and principles of felony sentencing set forth in R.C.2929.11. *Id.*”

{¶28} The *Ober* court concluded, “[a]lthough resource burdens may be a relevant sentencing criterion, R.C. 2929.13(D) does not require trial courts to elevate resource conservation above the seriousness and recidivism factors. Imposing a community control sanction on Ober may have saved state and local government funds; however, this factor alone would not usually overcome the presumption in favor of imprisonment.” *Id.*

{¶29} Several other appellate courts, including our own, considering these issues have reached the same conclusion. See, e.g., *State v. Hyland*, Butler App. No. CA2005-05-103, 2006-Ohio-339 at ¶ 32; *State v. Brooks* (Aug. 18, 1998), Franklin App. No. 97APA-11-1543; *State v. Stewart* (Mar. 4, 1999), Cuyahoga App. No. 74691; *State v. Fox* (Mar. 6, 2001), Wyandot App. No. 16-2000-17; *State v. Miller*, Ashland App. No. 04-COA-003, 2004-Ohio-4636. We agree with the reasoning of the *Ober* court and other courts considering this issue and find no merit to appellant's argument.

{¶30} Appellant's sole assignment of error is overruled.

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

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

