

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CLAYTON NEWBERRY

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. 2009 AP 06 0028

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County  
Common Pleas Court, Case No.  
2009 CR 0052

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 14, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

PATRICK J. WILLIAMS  
Assistant County Prosecutor  
for Tuscarawas County  
125 East High Avenue  
New Philadelphia, Ohio 44663

GERALD A. LATANICH  
Tuscarawas County Public Defender Office  
153 North Broadway  
New Philadelphia, Ohio 44663

*Hoffman, J.*

{¶1} Defendant-appellant Clayton C. Newberry appeals his sentence entered by the Tuscarawas County Court of Common Pleas, on one count of kidnapping, in violation of R.C. 2905.01, a felony of the first degree; one count of abduction, in violation of R.C. 2905.02, a felony of the third degree; one count of aggravated burglary, in violation of R.C. 2911.11, a felony of the first degree; one count of burglary, in violation of R.C. 2911.12, a felony of the second degree; one count of menacing by stalking, in violation of R.C. 2903.211, a misdemeanor of the first degree; and one count of possession of criminal tools, in violation of R.C. 2923.24, after the trial court found Appellant guilty upon his entering a plea of no contest to the charges. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE CASE AND FACTS

{¶2} On February 3, 2009, the Tuscarawas Grand Jury indicted Appellant on the aforementioned charges in addition to gun specifications on the first four counts. The parties appeared before the trial court on April 13, 2009, at which time the State moved to dismiss the four gun specifications. Appellant withdrew his former plea of not guilty and entered a plea of no contest to the amended indictment. The trial court found Appellant guilty, ordered a presentence investigation, and scheduled the matter for sentencing on May 27, 2009.

{¶3} The trial court sentenced Appellant to a term of imprisonment of ten years on the kidnapping count; ten years on the aggravated burglary count; ten months on the possession of criminal tools count; and 121 days on the menacing count. The abduction count and the burglary count were found to be allied offenses of the

kidnapping and the aggravated burglary counts, respectively, and were merged for sentencing purposes. The trial court ordered the counts of kidnapping, aggravated burglary, and possession of criminal tools be served concurrently. The trial court credited Appellant with 121 days of jail time.

{¶4} The facts underlying the case are as follows. On January 18, 2009, Appellant proceeded to the home of Nancy Herrington, his former girlfriend. Appellant wished to speak to Herrington about why she ended their relationship. Appellant packed his van with items he might need if he had to break into the house. Additionally, approximately one hour prior to arriving at Herrington's house, Appellant purchased fifty rounds of .380 caliber ammunition at a local Wal-Mart. Appellant was in possession of two .380 caliber pistols, one of which he left in his van, and the other which he carried into Herrington's residence. While confronting Herrington, Appellant advised her if she did not tell him why she ended the relationship they could both end up in body bags.

{¶5} Herrington was ultimately able to disarm Appellant. Only after a series of telephone calls between Appellant and his children did Appellant leave the residence. Appellant was at Herrington's residence for at least 45 minutes. After leaving Herrington's residence, Appellant drove to the home of his son, Christopher Newberry. Appellant was subsequently admitted to Barberton Hospital. At some point, Christopher Newberry discovered Appellant had a second handgun on his person, which was surrendered to the Akron Police Department. After being discharged from the hospital, Appellant was arrested and charged.

{¶6} Appellant now appeals his sentence, raising as his sole assignment of error:

{¶17} “I. THE SENTENCE IMPOSED WAS CONTRARY TO LAW. THE COURTS [SIC] SENTENCE VIOLATED THE PURPOSES AND PRINCIPLES OF SENTENCING, AND THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A TEN YEAR SENTENCE.”

{¶18} 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, and discussed the affect of the *Foster* decision on felony sentencing. The *Kalish* Court explained, having severed the judicial fact-finding portions of R.C. 2929.14 in *Foster*, “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.

{¶19} “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.

{¶10} In reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, 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 .” *Id.* at paragraph 4.

{¶11} The *Kalish* Court ultimately found 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 the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and there was “nothing in the record to suggest that the court’s decision was unreasonable, arbitrary, or unconscionable”. *Id.* at paragraph 20.

{¶12} We find Appellant’s sentence is not contrary to law. The trial court expressly stated in its June 5, 2008 Judgment Entry on Sentence it considered the two overriding purposes of felony sentencing set forth in R.C. 2929.11 and considered the

seriousness and recidivism factors set forth in 2929.12. Furthermore, Appellant's sentences are within the permissible statutory ranges.

{¶13} Having satisfied step one, we next consider whether the trial court abused its discretion. *Kalish*, at ¶ 4, 19, 896 N.E.2d 124. An abuse of discretion is “more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶14} We find the trial court did not abuse its discretion. The trial court considered the statutory factors under R.C. 2929.11 and 2929.12. The trial court also considered the factual background of the case; Appellant's sentencing memorandum; the pre-sentence investigation report; Appellant's psychological evaluation; and a report from the Chrysalis Counseling Center. The trial court also heard statements from the victim, the victim's son, a detective, and a counselor from Chrysalis, as well as Appellant and witnesses on behalf of Appellant.

{¶15} Based upon the foregoing, Appellant's sole assignment of error is overruled.

{¶16} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Farmer, J. concur

s/ William B. Hoffman  
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HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards  
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HON. JULIE A. EDWARDS

s/ Sheila G. Farmer  
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HON. SHEILA G. FARMER

