

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009-CAA-05-0050
	:	
	:	
CHRISTOPHER A. FOUT	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Delaware County Court of Common Pleas Case No. 2007-CRI-08-0456
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	January 14, 2010
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Edwards, J.

{¶1} Appellant, Christopher Fout, appeals a judgment of the Delaware County Common Pleas Court sentencing him to one year incarceration for a conviction of possession of cocaine (R.C. 2925.11(A)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On August 24, 2007, appellant was indicted by the Delaware County Grand Jury with one count of possession of cocaine. On March 25, 2008, he was granted intervention in lieu of conviction.

{¶3} The state filed a motion to terminate appellant's intervention in lieu of conviction and to accept his guilty plea and impose sentence. The motion alleged that appellant violated his community control sanctions by failing to report to his probation officer, testing positive for cocaine and opiates on June 21, 2008 and on August 21, 2008, failing to provide documentation of attendance at AA meetings as ordered, being unsuccessfully terminated from a therapy program due to poor attendance, failing to make any payments toward his court fees, and lying about his consumption of illegal substances.

{¶4} The court held a hearing on the motion to terminate intervention in lieu of conviction on October 22, 2008. Appellant admitted to the alleged violations. Tr. 4. The court terminated appellant's intervention in lieu of conviction and made a finding of guilt based upon the guilty plea appellant entered on March 24, 2008. The state recommended that appellant be ordered to a term of community control sanctions, one of those sanctions being that he complete a program at West Central Community Based Correctional Facility (CBCF) for his addiction problem.

{¶5} Counsel for appellant stated that his drug relapse was precipitated by his girlfriend having a miscarriage, his grandfather's death, and his own dental problems. Counsel indicated that appellant would like to continue working with treatment in lieu of conviction but that he did not want to participate in a CBCF. Appellant then stated that he did not feel he had relapsed. The court replied:

{¶6} "THE COURT: You did not relapse? Further your background, your involvement and your knowledge of this case where some young man was killed over drugs, I cannot believe that you have not learned your lesson. You know what I'm talking about.

{¶7} "THE DEFENDANT: Yes." Tr. 7.

{¶8} The court sentenced him to 12 months incarceration. After informing appellant of the possibility of post-release control, the court stated:

{¶9} "Specifically, I make certain findings Mr. Fout, that the court has been more than lenient with you, you have basically violated every condition of intervention in lieu. As the court mentioned earlier, you were fully aware of a young man that was murdered because of drugs, if nothing else it would bring you sober, that should have brought you sober, but it hasn't. So, as far as this Court is concerned I have given you the maximum number in sentence." Tr. 8-9.

{¶10} Appellant assigns a single error on appeal:

{¶11} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ARBITRARILY SENTENCED DEFENDANT TO THE MAXIMUM SENTENCE."

{¶12} Appellant specifically argues that the reasons given by the judge from the bench for the maximum sentence, namely that appellant should have complied with the

terms of treatment in lieu of conviction and that appellant was aware of a young man being murdered as a result of drugs, are not permissible considerations for sentencing purposes under R.C. 2929.12(B), (C), (D), and (E).

{¶13} 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.

{¶14} 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 1.¹

{¶15} “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

¹ “[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).

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.

{¶16} 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.

{¶17} 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.

{¶18} Appellant has not met the first prong of *Kalish* as he has not established that the sentence was contrary to law. The sentence was within the statutory range for a felony of the fifth degree. R.C. 2929.14(A)(5). The trial court stated that it weighed the statutory seriousness and recidivism factors. Contrary to appellant's argument, the court is not limited to the specific factors named in the statute. R.C. 2929.12(A) provides in pertinent part:

{¶19} "(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. 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* (emphasis added)."

{¶20} Similarly, subsections (B), (C), (D), and (E) of R.C. 2929.12 each allow the court to consider any other relevant factors. Thus the court was not limited to the factors in the statute.

{¶21} Appellant has not demonstrated that the court abused its discretion in considering appellant's knowledge of the death of another young man from drugs and appellant's failure in the treatment in lieu of conviction program. Appellant attempted to blame his failure in the program on his girlfriend's miscarriage, his grandfather's death, and his own dental problems. Tr. 6. The court did not abuse its discretion in pointing

out to appellant his knowledge of the potentially fatal consequences of his drug addiction, yet appellant “basically violated every condition of intervention in lieu.” Tr. 8-9.

{¶22} The assignment of error is overruled.

{¶23} The judgment of the Delaware County Common Pleas Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/r0807

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CHRISTOPHER A. FOUT	:	
	:	
Defendant-Appellant	:	CASE NO. 2009-CAA-05-0050

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES