

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

State of Ohio

Court of Appeals No. L-13-1081

Appellee

Trial Court No. CR0201301242

v.

Christina Tammerine

DECISION AND JUDGMENT

Appellant

Decided: February 7, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay D. Navarre and Evy M. Jarrett, Assistant Prosecuting Attorneys,
for appellee.

Patricia Horner, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which found appellant guilty of one count of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second degree. Appellant was sentenced to a term of

incarceration of five years and was given a three-year period of mandatory post release community control. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Christina Tammerine, sets forth the following single assignment of error:

I. THE TRIAL COURT'S SENTENCE WAS AN ABUSE OF DISCRETION.

{¶ 3} The following undisputed facts are relevant to this appeal. On December 22, 2012, appellant was on duty working the closing shift at the Kentucky Fried Chicken restaurant on Alexis Road in Sylvania, Ohio. At 9:00 p.m., the store manager closed the restaurant for the day, locked all exterior entry doors, and then went into his office.

{¶ 4} At this time, in collusion with a former co-worker no longer employed at the restaurant, appellant unlocked one of the exterior restaurant entry doors. Pursuant to a scheme previously arranged between appellant and Travis Welch, the co-defendant and former co-worker, appellant was aware that upon unlocking the entry door from the inside for Welch, he would then enter the restaurant, forcibly rob the manager, and share the proceeds from the robbery with appellant in exchange for her surreptitious participation in the crime.

{¶ 5} The events successfully transpired according to the plan. Appellant covertly unlocked the door after the manager was no longer in sight, Welch then entered the

restaurant wearing a mask and gesturing so as to give the impression that he was carrying a concealed weapon. Welch went into the manager's office and punched him several times in the head. Welch then instructed his accomplice, appellant, to give him the money from the cash register. Appellant, anticipating a share of the proceeds, gave appellant all of the cash from the register.

{¶ 6} In accordance with the plan, Welch subsequently shared some of the proceeds of the robbery with appellant. In the timeframe immediately following the crime, appellant continued her ruse and portrayed herself to others as a fellow victim in the robbery. Appellant falsely conveyed to the victim's mother how she too had been assaulted and intimidated during the robbery. Appellant's actual active role in the execution of the robbery was subsequently discovered.

{¶ 7} On March 21, 2013, appellant pled guilty to one count of robbery, in violation of R.C. 2911.02, a felony of the second degree. An additional charge against appellant was dismissed as part of a plea agreement. Notably, at the time of this offense, appellant was on active probation through both the Sylvania and Maumee Municipal Courts as a result of other recent property and theft related convictions. A presentence investigation was ordered.

{¶ 8} On April 4, 2013, appellant was sentenced to a term of incarceration of five years and was also given a three-year term of mandatory post release control. This appeal ensued.

{¶ 9} In the sole assignment of error, appellant contends that the non-maximum trial court sentence imposed in this case was an abuse of discretion. At the outset, we would note that this court has adhered over recent years in its review of felony sentences to the two-step analysis delineated in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Pursuant to *Kalish*, this court first determined whether the disputed sentence was clearly and convincingly contrary to law. If this first prong was met, we then reviewed the record to determine whether the sentence constituted an abuse of discretion. *State v. Bratton*, 6th Dist. Nos. Lucas L-12-1219, L-12-1220, 2013-Ohio-3293, ¶ 10.

{¶ 10} Given recent legislative action in Ohio, culminating in the passage of a new statute directly addressing appellate court felony sentence review and a growing body of recent appellate cases applying the new statutory parameters, we are no longer utilizing the former *Kalish* approach.

{¶ 11} Specifically, on March 22, 2013, R.C. 2953.08(G)(2) took effect and became law in the state of Ohio. This new statute directly defines and establishes the proper appellate standard of review in felony sentencing cases. In contrast to *Kalish*, it clearly states that, “The appellate court’s standard for review is not whether the sentencing court abused its discretion.” R.C. 2953.08(G)(2) establishes that an appellate court may increase, reduce, modify, or vacate and remand a dispute sentence if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13 (B) or (D), division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

{¶ 12} We note that in the wake of the passage of H.B. 86 and the subsequent enactment of the sentencing review statutory scheme delineated in R.C. 2953.08(G)(2), a quickly expanding plurality of Ohio appellate courts have transitioned from the former *Kalish* abuse of discretion review of felony sentencing to R.C. 2953.08(G)(2) based review of felony sentencing given the statute’s clear statement that, “The appellate court standard for review is not whether the sentencing court abused its discretion.”

{¶ 13} As concisely summarized recently by the First District Court of Appeals in *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 9 (1st Dist.),

We presume that the legislature knew what it was doing when it reenacted the R.C. 2953.08(G)(2) standard of review. And we cannot justify applying an abuse of discretion standard where the legislature has explicitly told us that the standard of review is not an abuse of discretion. Thus, henceforth, we will apply the statutory standard rather than the *Kalish* plurality framework to our review of felony sentences.

{¶ 14} Similarly, the Eight District Court of Appeals recently outlined the impact of R.C. 2953.08(G)(2) on appellate review of felony sentencing in *State v. Carman*, 8th Dist. Cuyahoga No. 99463, 2013-Ohio-4910, ¶ 7:

The post-*Foster* era ended with enactment of H.B. 86 and the revival of statutory findings necessary for imposing consecutive sentences under R.C. 2929.14(C)(4). By reviving the requirement for findings as a predicate for imposing consecutives, the ground offered by *Kalish* for rejecting the standard of review set forth in former R.C. 2953.08 – that it could not stand as a standard of review for a statute that improperly required findings of fact before imposing consecutive sentences – was nullified. With the basis for the decision in *Kalish* no longer valid, and given that *Kalish* had questionable precedential value in any event, we see no viable reasoning for continuing to apply the standard of review used in that case. Henceforth, we review consecutive sentences using the standard of review set forth in R.C. 2953.08.

{¶ 15} We further note that while we find that *Kalish* is no longer controlling in our review of felony sentences, it may still be utilized in the course of determining whether a sentence is clearly and convincingly contrary to law. As held in *White* at ¶ 12, “Although *Kalish* no longer provides the framework for reviewing felony sentences, it does provide * * * guidance for determining whether a sentence is clearly and convincingly contrary to law.” Significantly, *Kalish* determined that a sentence was not

clearly and convincingly contrary to law in a scenario in which it found that the trial court had considered the R.C. 2929.11 purposes and principles of sentencing, had considered the R.C. 2929.12 seriousness and recidivism factors, had properly applied post release control, and had imposed a sentence within the statutory range. *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 at ¶ 18.

{¶ 16} Based upon all of the foregoing, we now likewise apply the statutory standard of review rather than the former *Kalish* approach to our review of felony sentences. However, we may still utilize *Kalish* in the course of determining whether a sentence is clearly and convincingly contrary to law. Accordingly, we now will consider the propriety of the disputed sentence in this case pursuant to the new R.C. 2953.08(G)(2) statutory parameters.

{¶ 17} First, we note that the permissible statutory sentencing range for a felony of the second degree such as the conviction underlying this case is between two and eight years. R.C. 2929.14(A)(2). Thus, we find that the five-year term of incarceration imposed in this case squarely falls within the permissible range. The record also shows that the trial court properly applied post release control and considered both the seriousness and recidivism factors underlying this case. The trial court properly considered appellant's lengthy criminal history, recent criminal history, and the seriousness of the crime in which appellant participated. Accordingly, the record does not show that appellant's sentence is clearly and convincingly contrary to law.

{¶ 18} Next, in connection to consideration of any statutory findings potentially relevant to our review of this case, the record reveals that none of the R.C. 2953.08(G)(2) statutory findings are applicable to the instant case.

{¶ 19} R.C. 2929.13(B) pertains to fourth or fifth degree felony cases. This case entails a second degree felony offense and thus those statutory findings are not relevant to this case. R.C. 2929.13(D) pertains to the necessity to make findings in those cases in which a prison term is not imposed in a second degree felony case. A prison term was imposed in this case and thus those statutory findings are not relevant to this case.

{¶ 20} R.C. 2929.14(B)(2)(e) pertains to the sentencing of offenders who are repeat violent offenders. This case does not involve a repeat violent offender and thus those statutory findings are not relevant to this case. R.C. 2929.14(C)(4) pertains to multiple convictions on multiple offenses. This case did not entail multiple convictions on multiple offenses and thus those statutory findings are not relevant to this case.

{¶ 21} Lastly, R.C. 2929.20(I) pertains to judicial release hearings. As such, it is not relevant to this case. Based upon the foregoing and pursuant to R.C. 2953.08(G)(2), we find that the disputed sentence was not clearly and convincingly based upon relevant statutory findings not supported by the record and was not otherwise clearly and convincingly contrary to law. Wherefore, we find appellant's sole assignment of error not well-taken.

{¶ 22} The judgment of the Lucas County Court of Common Pleas is hereby 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, 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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