

[Cite as *State v. El-Berri*, 2010-Ohio-146.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92388

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TAMER EL-BERRI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-475596

BEFORE: Cooney, P.J., Blackmon, J., and Jones, J.

RELEASED: January 21, 2010

**JOURNALIZED:
FOR APPELLANT**

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ATTORNEYS FOR APPELLEE

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Tamer El-Berri (“El-Berri”), appeals his sentence for rape. Finding no merit to the appeal, we affirm.

{¶ 2} In January 2006, El-Berri was charged with kidnapping with a sexual motivation specification and rape. A jury found him guilty of both offenses in January 2007. The trial court sentenced him to seven years in prison on each count, to be served concurrently. El-Berri appealed his convictions to this court, which held that the two charges were allied offenses of similar import, merged the kidnapping conviction into the rape conviction, and remanded the case for resentencing. *State v. El-Berri*, Cuyahoga App. No. 89477, 2008-Ohio-3539. In October 2008, the trial court resentenced El-Berri to seven years in prison.

{¶ 3} El-Berri now appeals, raising three assignments of error for our review.

{¶ 4} We address them out of order for ease of discussion. In the third assignment of error, El-Berri claims that he received ineffective assistance of counsel at sentencing because his counsel (1) failed to affirmatively argue that the incident had little impact on the victim four years later, at the time of resentencing, even though the victim refused to participate in the resentencing hearing because she did not want El-Berri to be further

punished, and (2) did not object to the seven-year sentence, which was disproportionate to El-Berri's crime.

{¶ 5} To prevail on this claim, El-Berri must show that his counsel's performance fell below an objective standard of reasonable representation and that his counsel's deficient performance prejudiced him. See *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶98, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. We now consider whether El-Berri can prove that he would have obtained a lesser sentence had his counsel raised the issues of victim impact and proportionality at the resentencing hearing.

{¶ 6} We review felony sentences using the *Kalish* framework. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The *Kalish* court, in a split decision, declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts "must apply a two-step approach." *Kalish* at ¶4.¹

{¶ 7} Appellate courts must first "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to

¹We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse-of-discretion standard in some instances.

determine whether the sentence is clearly and convincingly contrary to law.” Id. at ¶4, 14, 18. If this first prong is satisfied, then we review the trial court’s decision under an abuse-of-discretion standard. Id. at ¶4, 19.

{¶ 8} In the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G).

{¶ 9} As the *Kalish* court noted, post-*Foster*, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence.” Id. at ¶11; *Foster*, paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. See, also, *State v. Redding*, Cuyahoga App. No. 90864, 2008-Ohio-5739; *State v. Ali*, Cuyahoga App. No. 90301, 2008-Ohio-4449; *State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322; *State v. Sharp*, Cuyahoga App. No. 89295, 2007-Ohio-6324. The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. Id., citing *Mathis* at ¶38.

{¶ 10} R.C. 2929.11(A) provides that:

{¶ 11} “[A] court that sentences an offender for a felony shall be 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. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.”

{¶ 12} R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶ 13} The *Kalish* court also noted that R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14.² *Kalish* at ¶17. Rather, they “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Id.* Thus, “[i]n considering these statutes in light of

²The United States Supreme Court recently upheld a judicial fact-finding statute similar to R.C. 2929.14, calling into question the *Foster* court’s abrogation of R.C. 2929.14(B) and (C) and 2929.19(B)(2). *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 714, 172 L.Ed.2d 517. The Court held that laws that require judges “to find certain facts before imposing consecutive, rather than concurrent, sentences” do not violate the Sixth Amendment. *Id.* In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, the Ohio Supreme Court recently acknowledged *Ice* but declined to fully address its ramifications because neither party had briefed the issue. We will continue to review felony sentences consistent with *Foster* until the Ohio Supreme Court addresses the impact of *Ice* on Ohio’s criminal sentencing.

Foster, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio’s sentencing structure.” *Id.*

{¶ 14} In the instant case, we do not find El-Berri’s sentence contrary to law. El-Berri’s sentence is within the permissible statutory range for rape set forth in R.C. 2907.02(A)(2), as a first-degree felony. In the sentencing journal entry, the trial court acknowledged that it had considered all factors of law and found that prison was consistent with the purposes of R.C. 2929.11. And it is axiomatic that a court speaks through its journal entries. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶47, citing *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 2000-Ohio-381, 727 N.E.2d 907. On these facts, we cannot conclude that his sentence is contrary to law.

{¶ 15} Having satisfied the first step, we next consider whether the trial court abused its discretion. *Kalish* at ¶4, 19. 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.” *Id.* at ¶19, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 16} The trial court did not abuse its discretion in imposing a seven-year prison sentence. The trial court allowed El-Berri and his counsel to advocate a lighter sentence. El-Berri’s counsel informed the trial court

that El-Berri served his prison sentence productively, by successfully completing a sexual offender awareness program, working in the law library, and helping other inmates learn to read and to handle their legal issues. His counsel stated that El-Berri was married and operated his own business. Finally, his counsel informed the court that El-Berri was not a U.S. citizen and would agree to permanent deportation to his native country of Egypt once released. El-Berri addressed the court directly via a videoconference, apologizing to the victim and asking for a minimum sentence so that he could restart his life in Egypt. We find nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary, or unconscionable.

{¶ 17} Based on the foregoing, El-Berri cannot prove that he would have obtained a lighter sentence had his counsel raised the issues of victim impact and sentence proportionality. We, therefore, overrule the third assignment of error.

{¶ 18} In the first assignment of error, El-Berri claims that the trial court erred when it resentenced him to the same prison term for one conviction as it had previously done for two convictions. In the second assignment, he claims that the trial court erred in imposing a seven-year sentence on a first offender after failing to consider R.C. 2929.11 and 2929.12.

El-Berri argues that the trial court should have sentenced him to the

minimum three-year prison term because the court did not find facts to support a longer prison term.

{¶ 19} As previously stated, we find no basis to invalidate El-Berri's sentence. Accordingly, the first and second assignments of error are overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
LARRY A. JONES, J., CONCUR