

[Cite as *State v. Lombardo*, 2010-Ohio-2099.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93390

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES V. LOMBARDO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520240

BEFORE: Gallagher, A.J., McMonagle, J., and Celebrezze, J.
RELEASED: May 13, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Roger M. Bundy
4766 Broadview Road
Cleveland, Ohio 44109

Also listed:

James Lombardo
Inmate Number 564-695
Lorain Correctional Institution
2075 South Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: James Hofelich
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, James Lombardo, appeals his sentence from the Cuyahoga County Court of Common Pleas. For the reasons outlined below, we affirm in part, reverse in part, and remand for further proceedings.

{¶ 2} On February 3, 2009, a Cuyahoga County grand jury indicted Lombardo on three counts of felonious assault. A jury trial commenced on April 29, 2009.

{¶ 3} According to the facts adduced at trial, on the evening of January 11, 2009, several people, including Anthony Smart, Pamela Grady, and Lombardo, were at a house rented by Phil Lewis in Cleveland, Ohio. There was testimony that Lombardo left sometime during the evening. Later that evening, Smart and Grady retired to one of the bedrooms in Lewis's house.

{¶ 4} At approximately 1:30 a.m., Smart and Grady heard people yelling and trying to get into the bedroom where they were sleeping. The people were later identified as Lombardo, Bobbie Meadows, and "Ray." These men were apparently trying to get into the bedroom to retrieve some scrap metal they had placed there earlier that day. Smart and Grady refused Lombardo entry, saying it was not their room and Lombardo should return when Lewis's son was home. The commotion in the hallway prompted Lewis to come into the hall from his room, carrying a bat and yelling for everyone to leave his house.

{¶ 5} Lombardo, Meadows, and Ray left the house, immediately followed by Smart and Grady. According to Smart and Grady, once everyone was outside, Lombardo attacked them with a snow shovel, hitting Grady hard enough to cause bruises on her arm and hitting Smart hard enough to fracture his skull and cause severe blood loss. Grady did not seek medical attention, but Smart was transported to the hospital.

{¶ 6} In the defense's case, Meadows testified that once everyone was outside, Smart attacked Lombardo with the snow shovel, Lombardo then hit Smart once, and no one hit Grady at all. Lombardo testified, and his testimony corroborated Meadow's.

{¶ 7} The jury returned not guilty verdicts on Counts 1 and 3, and a guilty verdict of the lesser-included offense of aggravated assault, in violation of R.C. 2903.12, on Count 2. At sentencing, the state argued that Lombardo should receive the maximum sentence because he had a long criminal past, showed no signs of rehabilitation, and admitted during his direct testimony that he continued to take scrap metal that did not belong to him.

{¶ 8} The court stated that its review of Lombardo's lengthy criminal record and his involvement with drugs compelled it to focus on protecting the public from future crimes, as well as to punish him for the aggravated assault. The court also acknowledged that it would respect the jury's verdict, which validated Lombardo's claim he was provoked by Smart. The court

then sentenced Lombardo to the maximum sentence of 18 months in prison. In its final words, the court stated: “You’ll be subject to three years’ postrelease control following the completion of the prison sentence and you’ll receive credit for time served. Good luck to you.”

{¶ 9} Lombardo filed this appeal, raising two assignments of error.

{¶ 10} “I. Defendant was denied due process of law when the court based his sentence upon alleged criminal activity for which defendant has never been charged or convicted.”

{¶ 11} In his first assignment of error, Lombardo argues the court sentenced him based on information that he was involved with stealing scrap metal, a crime he was not charged with in this case. He contends that the court obviously disagreed with the jury verdict and, therefore, sentenced him to the maximum allowable prison time for a fourth-degree felony. We are not persuaded.

{¶ 12} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that trial courts have full discretion to impose a prison sentence within the statutory range and are not required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. *Id.* at paragraph seven of the syllabus.

{¶ 13} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the supreme court set forth how appellate courts are to review felony

sentences after *Foster*.¹ The supreme court stated: “In applying *Foster* to the existing statutes, appellate courts must apply 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 shall be reviewed under an abuse-of-discretion standard.” *Id.* at ¶ 4.

{¶ 14} The *Kalish* court explained that the applicable statutes a trial court must apply include the felony sentencing statutes R.C. 2929.11 and 2929.12 because, unlike R.C. 2929.14, they are not fact-finding statutes. *Id.* at ¶ 17. Therefore, as part of its analysis of whether the sentence is “clearly and convincingly contrary to law,” an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶ 15} In sentencing Lombardo, the trial court expressly stated that its decision to impose a prison sentence would be based both on what will punish the defendant for his act and what will protect the public from future crimes by the same defendant.² The court then addressed Lombardo’s lengthy

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

² Under R.C. 2929.11(A), “[t]he overriding purposes of felony sentencing are to

criminal record and failure to be rehabilitated. The only time the trial court mentioned Lombardo's testimony about his involvement with scrap metal was during Lombardo's allocution, when Lombardo said, "I was going there to get scrap that was laying around. It wasn't like I was going in houses and breaking and stealing stuff out of it, you know. As far as that goes it was just laying around, your Honor." The court then asked him, "It still didn't belong to you, you understand that?" to which Lombardo responded, "I realize that."

{¶ 16} We find that the trial court's sentence was not "clearly and convincingly contrary to law" because the trial court expressly stated that it must impose a sentence that both punishes Lombardo and protects the public from future crimes he might commit, albeit without mentioning either R.C. 2929.11 or 2929.12 specifically,³ and the trial court's sentence was within the permissible range for a fourth-degree felony. R.C. 2929.14(A)(4) and (5).

protect the public from future crime by the offender and others and to punish the offender. * * *

Under R.C. 2929.12(A), "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. * * *"

³ "A silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.

{¶ 17} Since we have determined the first prong was satisfied, this court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. “R.C. 2929.11 and 2929.12 * * * serve as an overarching guide for the trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. Moreover, R.C. 2929.12 explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion.” *Kalish* at ¶ 17.

{¶ 18} Applying the second prong of the analysis to the underlying case, we find the trial court “gave careful and substantial deliberation to the relevant statutory considerations,” and that “there is nothing in the record to suggest the trial court’s decision was unreasonable, arbitrary, or unconscionable.” See *Kalish*, at ¶ 20. The trial court explained its pertinent considerations under the statutes, including Lombardo’s extensive criminal record, his failure to rehabilitate, his repeated involvement with drugs, and his history of violence, all of which suggest a high likelihood of recidivism. The court concluded that Lombardo was not “amenable to any type of

criminal control sanctions.” We find, therefore, the trial court considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12.

{¶ 19} On this record, the trial court did not abuse its discretion in sentencing him to 18 months in prison. Lombardo’s first assignment of error is overruled.

{¶ 20} “II. The trial court erred in sentencing defendant by failing to advise defendant of the consequences of violating postrelease control as required by R.C. 2929.19(3)(B).”

{¶ 21} In his second assignment of error, Lombardo argues that although the trial court mentioned postrelease control when it sentenced him, the court did not inform him of the consequences of violating its terms. We agree.

{¶ 22} In *State v. Samilton*, Cuyahoga App. No. 92823, 2010-Ohio-439, this court held: “Under R.C. 2929.19(B)(3), the trial court was required to notify [the defendant] at sentencing that if he violated a condition of postrelease control, the parole board may impose a prison term for as much as one-half of the stated prison term originally imposed upon the defendant. See *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 2; *State v. Williams*, Cuyahoga App. No. 92351, 2009-Ohio-6303, ¶ 21. Because the trial court did not advise [the defendant] that he could be subject

to up to two years in prison (one-half of the stated prison term) if he violated postrelease control, we find that the trial court's explanation of the penalties for violating postrelease control was not adequate."

{¶ 23} Here, the trial court informed Lombardo he was subject to three years' postrelease control, but made no mention of the consequences he would face for violating its terms. This error constitutes a failure to properly impose postrelease control. In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus, the court held, "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191."

{¶ 24} Therefore, Lombardo's second assignment of error is sustained, necessitating that we remand for the trial court to employ the "sentence-correction mechanism" of R.C. 2929.191. Id.

Judgment affirmed in part, reversed in part, and cause remanded.

It is ordered that appellant and appellee share 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.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS

CHRISTINE T. MCMONAGLE, J., CONCURS WITH SEPARATE OPINION

CHRISTINE T. MCMONAGLE, J., CONCURRING:

{¶ 25} I concur in all the findings of the majority, but write separately only to address a small issue arising out of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, and addressed most artfully by the Ninth Appellate District in *State v. Trifari*, 9th Dist. No. 08CA0043-M, 2009-Ohio-667. We have all been slavishly citing the first prong of review under *Kalish*, i.e., whether the sentence imposed by the court is “**clearly and convincingly contrary to law.**”

{¶ 26} The Ninth District observed the following:

{¶ 27} “In the Wizard of Oz, after Dorothy’s house fell on the Wicked Witch of the East, the Munchkins called upon the coroner to determine whether the witch who had terrorized them was morally, ethically, spiritually, physically, positively, absolutely, undeniably, and reliably dead. The coroner assured them that he had thoroughly examined her ‘[a]nd she’s not only merely dead, she’s really most sincerely dead.’ She was dead. An assurance that she was ‘most sincerely dead’ added nothing.

{¶ 28} “A determination that the trial court imposed a sentence ‘clearly and convincingly’ contrary to law means nothing different than a determination that the trial court imposed a sentence contrary to the law.” Id. at ¶14-15.

{¶ 29} In short, a sentence is either “according to law” or “contrary to law,” and our first-prong analysis should be limited solely to resolution of that issue. To suggest that there are degrees of “contrary to law” results in unnecessary analysis and is occasionally misleading to resolution of the issue.