

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA36
 :
 vs. : **Released: June 11, 2010**
 :
 DAKOTA D. HINES, : DECISION AND JUDGMENT
 : ENTRY
 Defendant-Appellant. :

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Appellant.

James Schneider, Washington County Prosecuting Attorney, Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

McFarland, P.J.:

{¶1} This is an appeal from a Washington County Common Pleas Court conviction and sentence, issued after Appellant, Dakota Hines, pled guilty to one count of burglary, in violation of R.C. 2911.12(A)(4), a felony of the fourth degree, as well as a bill of information charging him with unauthorized use of a motor vehicle, in violation of R.C. 2913.03(A), a first degree misdemeanor. As a result of his pleas, Appellant was sentenced to the maximum term of imprisonment for the burglary conviction, eighteen months. On appeal, Appellant asserts that the trial court erred in sentencing

him to the maximum available prison term. Because we find that the sentence imposed by the trial court was not contrary to law and was not an abuse of discretion, we overrule Appellant's sole assignment of error. Accordingly, we affirm the judgment and sentence of the trial court.

FACTS

{¶2} On April 9, 2009, a complaint was filed in the Marietta Municipal Court charging Appellant one count of burglary, in violation of R.C. 2911.12(A)(1), a felony of the second degree. While out on bond for that pending charge, Appellant was arrested and charged with felony grand theft of a motor vehicle. Appellant was later indicted on the second degree burglary charge and a bill of information was issued charging Appellant with misdemeanor unauthorized use of a motor vehicle¹. After entering into plea negotiations with the State, Appellant pled guilty to one count of burglary, in violation of R.C. 2911.12(A)(4), as well as the bill of information charging him with unauthorized use of a motor vehicle, in violation of R.C. 2913.03(A), a first degree misdemeanor.² A review of the record indicates that Appellant pled guilty to these reduced charges in exchange for the State's agreement not to oppose a community control sanction at sentencing,

¹ This was a reduction of the original charge of grand theft of a motor vehicle.

² Although the record references Appellant's plea of guilt to this bill of information, it appears that this charge had a separate case number, 09-CR-136. Thus, the actual bill of information is not contained in the record before us.

as long as that sanction included a requirement that Appellant enroll in and successfully complete the SEPTA center program.

{¶3} The record further includes the pre-sentence report which was ordered by the court prior to sentencing. The report details Appellant's extensive juvenile record, as well as the events giving rise to the unauthorized use of a motor vehicle charge while Appellant was out on bond on the pending burglary charge.

{¶4} Ultimately, the trial court sentenced Appellant to the maximum available term of imprisonment on the burglary charge, which was eighteen months. After sentencing, Appellant timely filed the current appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THE MAXIMUM AVAILABLE PRISON, WHERE APPELLANT WAS AN EIGHTEEN YEAR OLD, WITH NO PRIOR ADULT RECORD."

LEGAL ANALYSIS

{¶5} In his first assignment of error, Appellant argues the trial court erred and abused its discretion in sentencing him to the maximum term of imprisonment for his offense, considering that he was only eighteen years old and had no prior adult record. Appellant further contends that the sentence was not supported by the record. Specifically, Appellant argues

that the trial court erroneously found that Appellant demonstrated a pattern of drug or alcohol abuse related to the offense and refuses to acknowledge the pattern or refuses treatment. Appellant also argues that the trial court erred in sentencing him to the maximum prison term available because the record does not contain evidence that Appellant committed the worst form of the offense or posed the greatest likelihood of committing future crimes.

{¶6} We begin our analysis with the appropriate standard of review. As we noted in *State v. Babcock*, Washington App. No. 09CA14, 2009-Ohio-6600, “[i]n the wake of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, there has been considerable and continuing confusion over the proper standard of review in felony sentencing.” As set forth in *Babcock*, the Supreme Court of Ohio recently addressed the issue in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.³

{¶7} Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. “First, they must examine the sentencing court's compliance with all applicable rules and statutes in

³ In *State v. Fisher*, Washington App. No. 08CA37, 2009-Ohio-2915, at FN1 we recently noted that “ [w]hether *Kalish* actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented. As a result, our colleagues on the Cuyahoga County Court of Appeals have announced they simply will not follow the plurality and will continue to apply the standard the Eighth District has used all along. (Internal citation omitted.) The same problem has been recognized in the Ninth District, but our colleagues on the Summit County Court of Appeals have applied the two-step *Kalish* analysis regardless. (Internal citation omitted.) We will do the same.” Quoting, *State v. Ross*, Adams App. No. 08CA872, 2009-Ohio-877, at FN 2.

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.” *Kalish* at ¶ 4. “As to the first step, the *Kalish* court did not clearly specify what ‘pertinent laws’ we are to consider to ensure that the sentence ‘clearly and convincingly’ adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *.” *State v. Ross*, Adams App. No. 08CA872, 2009-Ohio-877, at ¶ 10; *State v. Fisher*, Washington App. No. 08CA37, 2009-Ohio-2915, at ¶6.

{¶8} In the case sub judice, Appellant contends that one of the findings in the trial court's sentencing entry was not supported by the record. Appellant acknowledges that, post- *Foster*, trial courts are no longer required to make findings or state reasons for imposing maximum or more than the minimum sentences. However, Appellant argues that the trial court erred and abused its discretion in imposing maximum sentences when some of the findings that it did make were not supported by the record. Additionally, as set forth above, Appellant also contends that the trial court erred and abused its discretion in imposing a maximum sentence, arguing that Appellant did not commit the worst form of the offense and did not pose the greatest likelihood of committing future crimes.

{¶9} The sentencing entry in question reads, in pertinent part:

“Whereupon the Court has considered the record of this case, the oral statements made this day, and the pre-sentence report, as well as the principles and purposes of sentencing pursuant to Ohio Revised Code Sections 2929.11 through 2929.19, and the Court then made the following determinations:

[A] The Court FINDS the following prison factors to be present:

(1) The defendant committed the offense while on probation through Washington County Juvenile Court.

[B] The Court FINDS there are no factors present that make this crime more serious than the norm.

[C] The Court FINDS there are no factors present that make this crime less serious than the norm.

[D] The Court FINDS the following factors present which make the Defendant more likely to recidivate:

(1) The defendant committed the offense while on probation through Washington County Juvenile Court;

(2) The defendant has prior juvenile criminal convictions: [list omitted]

(3) The defendant demonstrated a pattern of drug or alcohol abuse related to the offense and refuses to acknowledge the pattern or refuses treatment.

(4) The defendant failed to respond to past community control sanctions.

[E] The Court FINDS that the following factor is present that makes this defendant less likely to recidivate:

(1) The defendant has no prior adult convictions.

[F] The Court has weighed the seriousness and recidivism factors and has considered the over-riding purposes of felony sentencing to protect the public from future crime by this offender and others, and the purpose to punish this offender, and has considered the need for incapacitating this offender and deterring the offender and others from future crime, and for rehabilitating the offender. Thereupon the Court FINDS that the sentence it is about to impose is reasonably calculated to achieve these purposes, and is commensurate with, and does not demean the seriousness of the offender's conduct, and its impact upon the victim, and is consistent with sentences imposed for similar crimes committed by similar offenders.

[G] The Court further FINDS that the Defendant is not amenable to community control sanctions.”

{¶10} We first note that the trial court sentenced Appellant to eighteen months imprisonment for one fourth degree felony count of burglary. Though this sentence constitutes the maximum sentence for the crime committed, it is within the statutory range. Further, the trial court

specifically stated that it had weighed the applicable seriousness and recidivism factors, considered the principles and purposes of felony sentencing pursuant to R.C. 2929.11 through 2929.19, and it stated the sentence was calculated to achieve those purposes. Accordingly, we find the trial court complied with all applicable rules and statutes in imposing Appellant's sentence and that the sentence was not clearly and convincingly contrary to law. As such, the first prong of the *Kalish* test has been satisfied.

{¶11} We now turn to the second prong, whether or not the trial court abused its discretion in imposing the sentence. In this prong, we look at the specific factual finding of the trial court which is contested by Appellant. Appellant challenges the trial court's finding that Appellant demonstrated a pattern of drug or alcohol abuse related to the offense and refuses to acknowledge the pattern or refuses treatment. Contrary to Appellant's argument, there is sufficient evidence in the record to support the finding of the trial court.

{¶12} For instance, Appellant's history of drug and alcohol abuse is detailed in the pre-sentence investigation (PSI) report and indicates that Appellant's usage during his teenage years increased from weekly to daily and expanded from marijuana usage to Vicodin and Percocet. An assessment performed prior to sentencing indicates that Appellant was

diagnosed with Alcohol, Cannabis and Opioid Dependence. Further, the PSI report states that Appellant had received substance abuse treatment on two different occasions in the past during previous incarcerations as a juvenile. The PSI report further indicates that Appellant and his accomplice were seeking money when they burglarized a residence. We conclude that the trial court could have inferred, based upon these facts, that the crime committed was drug related.

{¶13} Accordingly, the trial court did not abuse its discretion in sentencing Appellant based upon this finding. Further, although it was no longer obligated to find, and, in fact, did not find, that Appellant's conduct constituted the worst form of the offense for purposes of imposing a maximum sentence, the record reflects that Appellant was originally charged with second degree burglary and that only through plea negotiations was Appellant permitted to plead guilty to second degree burglary. Thus, such a finding would have been supported by the record in this case. Further, with respect to Appellant's argument that he did not pose the greatest likelihood of committing future crimes, Appellant's past history of juvenile convictions indicates otherwise. Appellant argues that the fact that he had no prior adult convictions should mitigate in his favor; however, the record indicates that Appellant had only been eighteen for approximately three months when

committed his first felony offense. Further, while out on bond, Appellant committed another offense. Thus, Appellant's argument is without merit.

{¶14} Because the findings by the trial court are supported by the information contained in the record and the pre-sentence report, we cannot conclude that the trial court abused its discretion in making these findings or in relying upon these findings in imposing the maximum sentence upon Appellant. Thus, Appellant's sole assignment of error is overruled. Accordingly, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED** and that the 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 Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.