

[Cite as *State v. Thrasher*, 2015-Ohio-2504.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27547

Appellee

v.

JAMES R. THRASHER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2014 04 1053 (A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 24, 2015

CARR, Presiding Judge.

{¶1} Appellant James Thrasher appeals his sentence imposed by the Summit County Court of Common Pleas. This Court reverses and remands.

I.

{¶2} Thrasher and a co-defendant (Felicia Burkhammer) were each indicted on one count of theft (fifth degree felony) and one count of burglary (second degree felony). Pursuant to plea agreement, Thrasher pleaded guilty to burglary in exchange for the State’s dismissal of the theft charge. The trial court ordered a presentence investigation report. The trial court subsequently sentenced Thrasher to prison for a term of five years. Thrasher appealed and raises one assignment of error for review.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT’S SENTENCE IS CLEARLY AND CONVINCINGLY
CONTRARY TO LAW.

{¶3} Thrasher argues that his sentence is contrary to law and that the trial court abused its discretion by imposing a five-year prison term. This Court agrees.

{¶4} This Court utilizes the test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, when reviewing criminal sentences. See *State v. Roper*, 9th Dist. Summit No. 27025, 2014-Ohio-4786, ¶ 30.

First, [we] 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 is reviewed under the abuse-of-discretion standard.

Kalish at ¶ 26. The Supreme Court of Ohio has held that “[t]rial courts have full discretion to impose a prison sentence within the [applicable] statutory range[.]” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. In exercising that discretion, “[a] court must carefully consider the statutes that apply to every felony case[,] * * * includ[ing] R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender.” *State v. Davison*, 9th Dist. Lorain No. 10CA009803, 2011-Ohio-1528, ¶ 12, quoting *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. “[W]here the trial court does not put on the record its consideration of [Sections] 2929.11 and 2929.12 [of the Ohio Revised Code], it is presumed that the trial court gave proper consideration to those statutes.” (Alterations sic.) *State v. Steidl*, 9th Dist. Medina No. 10CA0025–M, 2011–Ohio–2320, ¶ 13, quoting *Kalish* at ¶ 18, fn. 4. “Unless the record shows that the court failed to consider the factors, or that the sentence is strikingly inconsistent with the factors, the court is presumed to have considered the statutory factors if the sentence is within the statutory range.” (Internal quotations and citations omitted.) *State v. Fernandez*, 9th Dist. Medina No. 13CA0054-M, 2014-Ohio-3651, ¶ 8.

{¶5} “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A). R.C. 2929.12 in turn provides that a sentencing judge has discretion to determine the most effective means of complying with the purposes and principles of sentencing. R.C. 2929.12(B) includes factors that suggest that the offense is more serious. R.C. 2929.12(C) includes factors suggesting the offense is less serious. The recidivism factors—factors indicating an offender is more or less likely to commit future crimes—are set forth in R.C. 2929.12(D) and (E).

{¶6} The trial court sentenced Thrasher to five years in prison for a felony of the second degree, a term which falls within the prescribed statutory range. R.C. 2929.14(A)(2). As the sentence is not contrary to law, the first prong of the *Kalish* test is satisfied; and we move on to consider whether the trial court abused its discretion in imposing the five-year sentence. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶7} Thrasher argues that the trial court abused its discretion in its weight accorded to the seriousness and recidivism factors enumerated in R.C. 2929.12(B), (C), (D), and (E).

{¶8} Factors indicating that an offender’s conduct was more serious than that normally constituting the offense are as follows:

- (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.
- (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2929.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

R.C. 2929.12(B).

{¶9} The following factors indicate that that the offender's conduct was less serious than that normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

R.C. 2929.12(C).

{¶10} Factors indicating that the offender is likely to commit future crimes are as follows:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing; was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code; was under post-release control * * * or had been unfavorably terminated from post-release control * * *; was under transitional control in connection with a prior offense; or had absconded from the offender's approved community placement resulting in the offender's removal from the transitional control program * * *.

(2) The offender previously was adjudicated a delinquent child * * * or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child * * * or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

R.C. 2929.12(D).

{¶11} The following factors indicate that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

R.C. 2929.12(E).

{¶12} The record in this case offers significant insight even in light of Thrasher's entering a guilty plea to the charge. At the change of plea hearing, the State informed the court

that it would later recommend at sentencing that the court impose a two-year prison sentence. Defense counsel requested a presentence investigation report, noted that the State would recommend no more than a two-year sentence, and asserted that Thrasher would be free to argue in support of a lesser sanction. The trial court expressly recognized the agreement that the State would request no greater than a two-year prison sentence.

{¶13} At the sentencing hearing, the State reiterated its request that the trial court sentence Thrasher to two years in prison. Defense counsel discussed two main issues in support of his argument that Thrasher receive community control sanctions.

{¶14} First, defense counsel discussed the facts underlying the burglary offense. The presentence investigation report also gives the factual background relative to the offense. The offense occurred when Thrasher was 18 years old. He had expressed a romantic interest in another teenager and asked her for money on several occasions. Thrasher and Burkhammer went to the teen's home that she shared with her grandmother. After hanging out in the teen's room for a while, Thrasher and Burkhammer left to have a cigarette. When they did not return, the teen went to look for them and saw Thrasher carrying a television out of the house. Thrasher and Burkhammer left the house, having taken several items.

{¶15} Thrasher reported that he did not go to the teen's home with the intent to steal anything. However, he admitted he had significant drug abuse problems and stole the items because he had the urge to get high and he needed money for drugs.

{¶16} Second, defense counsel emphasized Thrasher's tragic history, which was also detailed in the presentence investigation report. Between the ages of 5 and 10, Thrasher was physically abused by his mother's boyfriend, who would frequently hit him with various objects at hand. He was also repeatedly sexually abused by a maternal uncle from the age of 8 until 10.

When Thrasher's father died when he was in 9th grade, he dropped out of school. Children's Services Board became involved with the family at some point. At the final hearing in that case, Thrasher's mother retained custody of another son but relinquished custody of Thrasher because she did not want to raise him. As a result of the systematic abuses he suffered, coupled with his father's death and mother's abandonment, Thrasher attempted to cope by using illegal substances beginning at the age of 12. His substance abuse issues escalated until he was abusing drugs and/or alcohol on a daily basis by the age of 15. Without family, Thrasher took refuge on the streets with a man with gang affiliations. He suffers from mental health issues, feelings of worthlessness, and thoughts of suicide.

{¶17} Thrasher became involved with the juvenile delinquency system at the age of 13. Although he had numerous misdemeanor charges, many were dismissed. The bulk of his juvenile offenses were related to theft and mischief. The instant offense was his first felony offense. Although the presentence investigation report indicates that Thrasher was involved in "Intensive Probation" at one time, there is no information regarding what that entailed or how he performed.

{¶18} Although the presentence investigation report notes that a victim impact statement is attached, it is not. The trial court, however, read portions of the victim-homeowner's letter on the record. The victim wrote that she still felt violated and fearful five months after the incident. She asserted that much of what was taken were things of no monetary value but high sentimental value, like a plastic hospital bracelet from the victim's birth; a small, flat piece of wax with the victim's deceased daughter's fingerprint on it; and some costume jewelry. The victim discussed \$6000 worth of electronic equipment, including a camera which she used to supplement her income. She wrote that the insurance company reimbursed her for all but her \$1000 deductible

and that her insurance policy was then cancelled. The victim inquired in her letter whether Thrasher would pay for a new insurance policy. He informed the court that he would if he could.

{¶19} Thrasher made a statement to the probation officer during the presentence investigation, in which he admitted he took the victim's television to sell for drugs. Thrasher expressed his remorse, saying that he felt very bad and did not really want to take anything, but that the urge to get high compelled him to take something he could exchange for drugs. In court, Thrasher disputed the victim's claims that he had taken merely sentimental items with no monetary value because his purpose in taking the items was to sell them for drugs. He admitted taking items that had monetary value, specifically a television and a laptop. Thrasher stated that the victim did not lose as many items as she claimed, and that she "claimed all kinds of stuff and got everything replaced new." He asserted that he was sorry for what he did. Attempting to explain the impact that his substance abuse problems had had on his life, Thrasher stated that "you have no remorse for anyone else, not even yourself sometimes." He added, "And that's why I'm trying to get something out of this, at least something that can help me change myself." He requested drug rehabilitation, probation, restitution "since [he] did take some things," and community service in an effort to make amends.

{¶20} In imposing a five-year prison sentence, the trial court characterized Thrasher's record as "horrible" and "horrific," although it appeared to speculate as to the details, stating, "With that juvenile record, * * * [h]e was either in youth services or something." The trial court found "repugnant" Thrasher's comment that he did not believe the victim felt too bad because her insurance company replaced everything she claimed with new items. While reading the victim's letter, the trial court inserted its own commentary, noting it was "sickened" by Thrasher's "scam" involving a "young, naïve girl," although Thrasher and the girl had

exchanged electronic communications prior to the incident regarding proposed sexual conduct. The trial court, although acknowledging Thrasher's "bad childhood," referred to him as a "parasite." Moreover, notwithstanding Thrasher's having pleaded guilty along with his expressions of remorse to both the probation officer and in open court, the trial court asserted that it saw "no remorse, no remorse at all on [his] part for what [he had] done to these people."

{¶21} Based on this Court's review of the record, we conclude that the trial court was unreasonable in its weighing of the seriousness and recidivism factors in R.C. 2929.12. Although Thrasher had been sporadically involved with the juvenile justice system from the age of 13 despite some rehabilitative measures, there is nothing in the record to indicate any attempts to mitigate the effects of his abusive childhood. Under the circumstances, it is a stretch to characterize a juvenile record comprised of multiple misdemeanor theft offenses as "horrible" or "horrific." Moreover, evidence of the trauma associated with his childhood indicated "substantial grounds to mitigate [Thrasher's] conduct, although the grounds are not enough to constitute a defense." R.C. 2929.12(C)(4). The evidence was as follows. He was physically and sexually abused for years by adults in his life. He was ultimately rejected by his mother who chose to parent only his brother. His father was deceased. He was permitted to drop out of school, thereby precluding any opportunity to receive guidance and mentorship in his teenage years. As Thrasher admitted, he sought escape in drugs and alcohol, and support and mentorship from the streets and a man with gang affiliations. Thrasher displayed remorse and insight into the circumstances that led him to commit the offense. The State requested a two-year prison term. Instead of according weight to the significance of the substantial grounds to mitigate Thrasher's conduct, e.g., theft premised on the compelling need for drugs which had become the only coping mechanism Thrasher developed after formative years of abuse, neglect, and

abandonment, the trial court imposed a sentence two-and-a-half times longer than that requested by the State. Although the legislature did not mandate the weight to be accorded to any specific mitigating circumstances, the trial court must still be reasonable in its consideration. *See State v. Pitt*, 3d Dist. Wyandot Nos. 16-02-01, 16-02-02, 2002-Ohio-2730, ¶ 12. Under the facts and circumstances of this case, this Court cannot find the trial court's five-year sentence reasonable, as it is strikingly inconsistent with the sentencing factors. *See Fernandez*, 2014-Ohio-3651, at ¶ 8. Accordingly, the trial court abused its discretion in imposing the five-year prison sentence. Thrasher's assignment of error is sustained.

III.

{¶22} Thrasher's sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

GREGORY A. PRICE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.