[Cite as *State v. Burk*, 2009-Ohio-5643.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : CASE NO. CA2009-03-019

: O P I N I O N
- vs - 10/26/2009
:

SHANNON BURK, :

Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008CR00741

Donald W. White, Clermont County Prosecuting Attorney, David Henry Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Shannon J. Burk, appeals his sentence for his resisting arrest, breaking and entering, and theft convictions in the Clermont County Court of Common Pleas. We affirm the trial court's decision.

{¶2} On August 5, 2008, appellant and a co-conspirator entered a Clermont County home, which was under construction, and caused damage and stole tools worth more than $500. On August 13, 2008, a police officer was injured when he attempted to arrest

appellant on an outstanding warrant, and appellant fled. Appellant pled guilty to breaking and entering in violation of R.C. 2911.13(A), a fifth-degree felony; theft in violation of R.C. 2913.(A)(1), a fifth-degree felony; and resisting arrest in violation of R.C. 2921.33(B)(1), a first-degree misdemeanor. The trial court sentenced appellant to 12 months for breaking and entering and 12 months for theft, to be served consecutively. The trial court also sentenced appellant to 180 days for resisting arrest, to be served concurrent to the other terms, and ordered appellant to pay court costs and restitution to the homeowner and contractor. Appellant filed a timely appeal raising two assignments of error.

{¶3} Because appellant's first and second assignments of error relate to sentencing issues, and are subject to the same standard of review, we have elected to address them together.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT."

{¶6} Assignment of Error No. 2:

{¶7} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS AS THE RECORD DOES NOT SUPPORT SUCH A SENTENCE."

{¶8} In his first assignment of error, appellant maintains that the maximum sentence imposed by the court is excessive and fails to achieve the overriding purposes of felony sentencing. In his second assignment of error, appellant argues that the imposition of consecutive sentences is not supported by the record and is contrary to law.[1] We find no

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1. The state argues that in failing to object to the imposition of consecutive sentences, appellant has forfeited any claimed error. Recently, in *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, we addressed an identical argument by the state. Id. at fn. 3. Citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, we stated that in such a situation we are permitted to notice only "'plain errors or defects affecting substantial rights.'" *Simms* at fn.3 quoting *Payne* at ¶15 and Crim.R. 52(B). After reviewing the record in the

merit to appellant's arguments.

{¶9} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. "In applying *Foster* * * * 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." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4.

{¶10} A sentence is not clearly and convincingly contrary to law, where the trial court "consider[s] the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, * * * properly applie[s] postrelease control, and * * * sentence[s] [appellant] * * * within the permissible range." Id. at ¶18. In addition, so long as the trial court gives "careful and substantial deliberation to the relevant statutory considerations" the court's sentencing decision is not an abuse of discretion. Id. at ¶20.

{¶11} Applying this analysis to the first assignment of error, we find that the trial court's sentence is not clearly and convincingly contrary to law. In its judgment entry, the trial court expressly stated that it "considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12." Furthermore, the trial court

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instant case, we do not find that there was an "obvious deviation from a legal rule that affected appellant's substantial rights, or otherwise influenced the outcome of the proceedings." *Simms* at fn. 3, citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. Thus, under a *Payne* analysis, we find no plain error. However, because *Payne* was decided prior to *Kalish*, "we believe it is necessary to analyze appellant's claimed error under *Kalish* as it is the most recent guidance the Supreme Court has offered to review sentencing issues." *Simms* at fn. 3.

informed appellant that he could be subject to three years of postrelease control, and sentenced appellant to 12 months for breaking and entering and 12 months for theft, which are both within the permissible range for the offenses.

{¶12} We also find that the trial court did not abuse its discretion in ordering appellant to serve the maximum sentence of 12 months for breaking and entering and 12 months for theft. It is evident from the record that the trial court gave careful and substantial deliberation to the relevant statutory considerations. The trial court considered that appellant had been released from prison less than six months when he committed the two felonies; that he had committed previous theft and burglary offenses; and that appellant had served three prison terms because of community control and/or probation violations. The trial court also took into account the seriousness of the crime, including that the homeowners were traumatized by the break in, as they had previously been victims of a similar crime; that appellant and his accomplice emptied the contents of a bucket of drywall mud and water on the floors of the home, which the homeowners had to clean up; and that the drywall contractor's tools, which were given to him by his father, were taken from him and are now irretrievable. Lastly, the trial court considered appellant's remorse, his stated intention to improve, and his past drug and alcohol abuse. We find there is nothing in the record to indicate that the trial court's decision to sentence appellant to the maximum sentences for breaking and entering and theft was unreasonable, arbitrary, or unconscionable.

{¶13} Applying this same analysis to the second assignment of error, we find the trial court's decision to run appellant's sentences concurrently is not clearly and convincingly contrary to law. As noted above, the trial court's entry stated that it complied with R.C. 2929.11 and 2929.12 in rendering its decision. We also find no abuse of discretion in the trial court's decision to require the two felony sentences to run consecutive to one other. In addition to the facts considered above, the trial court noted that appellant had numerous

opportunities to receive treatment for his addictions in the past and recidivism, in light of his criminal history, was "highly likely" and "almost certain." We cannot say the trial court's decision to run appellant's felony sentences consecutively was unreasonable, arbitrary, or unconscionable. Therefore, appellant's first and second assignments of error are overruled.

{¶14} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.