

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-020
- vs -	:	<u>OPINION</u>
	:	11/9/2009
LEE M. ELLIOTT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008CR00895

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, Lee Mont Elliott, appeals his sentence for operating a vehicle under the influence of alcohol or drugs (OVI) conviction in the Clermont County Court of Common Pleas. We affirm the trial court's decision.

{¶2} On October 2, 2008, appellant was arrested for an OVI by a Clermont County deputy sheriff. Appellant also had more than five OVI convictions within the past 20 years and refused a breathalyzer test. The trial court accepted appellant's guilty plea for the OVI in violation of R.C. 4511.19(A)(1)(a), a fourth-degree felony; sentenced

appellant to 30 months; ordered appellant to pay a mandatory \$750 fine and court costs; and suspended appellant's license for his lifetime. In addition, since appellant was on community control for a drug offense at the time of his OVI, he was sentenced to an additional 12 months, running consecutively, for violating the terms of community control. Appellant filed a timely appeal raising two assignments of error.

{¶13} 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.

{¶14} Assignment of Error No. 1:

{¶15} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT OF THIRTY (30) MONTHS FOR FELONY DUI."

{¶16} Assignment of Error No. 2:

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

{¶18} In his first assignment of error, appellant maintains that the 30-month prison 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 merit to appellant's arguments.

1. The state argues that by failing to object to the imposition of consecutive sentences, appellant has forfeited any claimed error. Recently, we addressed identical arguments by the state. *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, fn. 3; *State v. Burk*, Clermont App. No. CA2009-03-019, 2009-Ohio-5643, fn. 1. In *Simms* we stated that in such a situation we are permitted to notice only "plain errors or defects affecting substantial rights." *Id.* at fn.3, quoting *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15 and Crim.R. 52(B). After reviewing the record in this case, we do not find that there was an "obvious deviation from a legal rule that affected appellant's substantial rights, or otherwise

{¶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 reasoning 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 informed appellant that he could be subject to three years of postrelease control; and sentenced appellant to 30 months, which is within the permissible range for the offense.

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 do not find plain error. However, because *Payne* was

{¶12} We also find that the trial court did not abuse its discretion in ordering appellant to serve the maximum sentence of 30 months for his OVI conviction. It is evident from the record that the trial court gave careful and substantial deliberation to the relevant statutory considerations. In particular the trial court considered the fact that appellant had 15 prior OVIs during his lifetime; that appellant had been treated for, and had been offered treatment, for his addiction, but it was "not working;" and that appellant's license had been suspended for many years, yet he continued to operate a motor vehicle after he had been drinking. The trial court specifically noted that incarceration was the best way to protect the public from appellant operating a motor vehicle after consuming alcohol. Finally, the trial court considered appellant's admission of his addiction and his request for treatment. We find there is nothing in the record to indicate that the trial court's decision to sentence appellant to the maximum sentence of 30 months for his OVI conviction was unreasonable, arbitrary, or unconscionable.

{¶13} In applying this same analysis to appellant's second assignment of error, we find that the trial court's decision to run appellant's sentences consecutively 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 reaching its decision. We also find no abuse of discretion in the trial court's decision to run appellant's OVI sentence and community control violation sentence consecutive to one other. In addition to the facts considered above, the trial court observed that appellant's 2008 drug offense which caused appellant to be placed on community control, also resulted in appellant's most recent two-year driver's license suspension. We cannot say that the trial court's decision to impose consecutive sentences was unreasonable, arbitrary, or

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.

unconscionable. Therefore, appellant's first and second assignments of error are overruled.

{¶14} Judgment affirmed.

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