[Cite as *State v. Lazlov*, 2009-Ohio-3734.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91736

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAWRENCE ZASLOV

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
VACATED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-496495 and CR-507362

BEFORE: Blackmon, J., Cooney, A.J., and McMonagle, J.

RELEASED: July 30, 2009

JOURNALIZED:

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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), is filed within ten (10) 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. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Lawrence Zaslov appeals his sentence and assigns the following errors for our review:

> **"I. The defendant's sentence was incorrect as a matter of law."**
>
> **"II. A trial court is without authority to impose conditions of post-release control."**
>
> **"III. The trial court failed to properly consider the factors in R.C. 2929.11 and 2929.12 and imposed a disproportionately severe sentence."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision in part, vacate in part, and remand for resentencing. The apposite facts follow.

Facts

{¶ 3} Zaslov was indicted in two different cases arising out of his conduct where he befriended elderly people only to rob them of their savings. In CR-496495, the Cuyahoga County Grand Jury indicted Zaslov for one count of theft in excess of $500,000; four counts of forgery; and three counts for complicity to commit falsification and/or false notarization. All of the counts, except the complicity counts, had an elderly person specification attached.

{¶ 4} In CR-507362, Zaslov was indicted for one count of theft in excess of $5,000 but less than $100,000, with an elderly person specification attached; one count of tampering with evidence; and one count of theft of Medicaid in an amount of more than $5,000 but less than $100,000.

{¶ 5} Zaslov entered a no contest plea to both indictments. The trial court accepted the pleas and made a finding of guilt on all counts. The trial court sentenced Zaslov to six concurrent years in prison in CR-496495 and three concurrent years in prison in CR-507362. The sentence in CR-507362 was ordered to be served consecutively to the sentence imposed in CR-496495. The trial court also imposed postrelease control and ordered Zaslov to pay restitution in the amount of $396,191 to the first victim's estate, $90,000 to the second victim's estate, and $232,000 to Medicaid.

Sentencing Error as to Degree of Felony

{¶ 6} We will address Zaslov's first and third assigned errors together because they both concern allegations that the court erred in sentencing him.

{¶ 7} In *State v. Kalish*,[1] the Supreme Court of Ohio articulated a two-step approach in reviewing felony sentences. The Court stated:

> **"In applying *Foster* [109 Ohio St.3d 1, 2006-Ohio-856] to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's**

[1]120 Ohio St.3d 23, 2008-Ohio-4912.

> **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."**[2]

{¶ 8} In determining whether the trial court imposed its sentence in accordance with law, we are mindful that the trial court has full discretion to sentence an offender within the allowable statutory range permitted for a particular degree of offense.

1) Sentencing Error as to Degree of Felony

{¶ 9} Zaslov argues that the trial court erred when it sentenced him on Count 3 in both cases. We agree. In CR-496495, Zaslov was charged in Count 3 with forgery, a fifth-degree felony with a maximum prison term of one year. The trial court, however, both at the sentencing hearing and in the journal entry, sentenced him as if Count 3 was a second-degree felony, imposing a six-year sentence. Likewise, in CR-507362, Zaslov was charged in Count 3 with theft, a fourth-degree felony with a maximum prison term of 18 months. However, at the sentencing hearing and in the journal entry, the trial court sentenced him as if Count 3 was a third-degree felony and imposed a three-year prison term.[3]

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[2]Id. at ¶4. We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court is split over whether we review sentences under an abuse-of-discretion standard in some instances.

[3]Zaslov also pled to the incorrect felony degree for both counts at his plea

{¶ 10} The State concedes the trial court erred in sentencing Zaslov on these two counts, but contends the error is harmless because Zaslov was sentenced to concurrent prison terms. However, when a trial court has imposed a sentence that is contrary to the indictment and statute, the sentence imposed is contrary to law.[4] Thus, the first prong in *Kalish* has not been met as to Counts 3 in both cases. When an invalid sentence is imposed, the sentence must be vacated.[5]

2) <u>Sentence Disproportionate</u>

{¶ 11} In his third assigned error, Zaslov argues the trial court failed to consider the factors set forth in R.C. 2929.11 and 2929.12 when determining his sentence and claims his sentence is disproportionate to sentences in similar cases. We disagree.

{¶ 12} The *Kalish* court noted that, post-*Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum,

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hearing. However, he did not file an appeal from the plea. It would be difficult to argue he was prejudiced by pleading to felonies carrying a higher sentence than in the charged offenses. See *State v. Nawash*, Cuyahoga App. No. 82911, 2003-Ohio-6040.

[4]*Kalish*, supra; *State v. Zelinko*, 6th Dist. No. L-05-1345, 2006-Ohio-5106; *State v. Haynes* (Mar. 5, 1999), 1st Dist. No. C-960794.

[5]*Kalish*, supra at ¶15; *Zelinko*, supra; *Haynes*, supra.

consecutive or more than the minimum sentence."[6] The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact.[7] As a result, the trial court still has to at least consider these statutes when imposing a sentence.[8]

{¶ 13} In the instant case, the record demonstrates that the trial court considered R.C. 2929.11 and 2929.12. Both sentencing journal entries read in part: "The court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." Therefore, the trial court properly considered R.C. 2929.11 and 2929.12.[9]

{¶ 14} Further, our review of the record shows that the trial court considered the fact that Zaslov abused the elderly victims' trust, the economic harm he inflicted affected many lives, and that his theft consisted of destroying the victims' life savings. In addition, the court considered Zaslov's presentence investigation report, psychiatric discharge reports, and the victims' and Zaslov's

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[6]Id. at ¶11; see, also, *State v. Foster*, supra at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph three of the syllabus.

[7]*Kalish*, supra, at ¶13.

[8]Id., citing *Mathis*, supra, at ¶38.

[9]Cf. *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873 at ¶103; *State v. Snyder*, Cuyahoga App. No. 90869, 2008-Ohio-5586; *State v. Nolan*, Cuyahoga App. No. 90646, 2008-Ohio-5595. (Court complied with R.C. 2929.11 and 2929.12 because journal entry stated court considered all required sentencing factors and testimony was considered at sentencing hearing.)

statements. Thus, based on the court's considerations, we conclude the trial court did not abuse its discretion by sentencing Zaslov to a total sentence of nine years in prison.

{¶ 15} We also find no merit to Zaslov's contention his case was disproportionate to sentences in similar cases. Zaslov did not present this argument at his sentencing hearing; therefore, he has waived this argument on appeal.[10] This court has also struck the cases Zaslov submitted for review because they were not presented to the trial court; therefore, they are not part of the appellate record. Accordingly, Zaslov's first assigned error is sustained, and his third assigned error is overruled.

Restitution as Condition of Postrelease Control

{¶ 16} In his second assigned error, Zaslov contends the trial court erred by ordering restitution as a condition of postrelease control. We disagree.

{¶ 17} It is well established that a court speaks only through its journal entries.[11] Although the sentencing transcript shows the trial court improperly

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[10] *State v. Edwards*, Cuyahoga App. No. 89181, 2007-Ohio-6068; *State v. Nettles*, Cuyahoga App. No. 85637, 2005-Ohio-4990; *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700; *State v. Mercado*, Cuyahoga App. No. 84559, 2005-Ohio-3429; *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510; *State v. Austin*, Cuyahoga App. No. 84142, 2004-Ohio-5736.

[11] *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, at ¶20; *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 2000- Ohio-

advised Zaslov that his failure to pay restitution would result in a violation of his postrelease control, the trial court correctly stated the law in the journal entries. The journal entry in CR-496495 states: "[p]ost release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28 ***. Restitution ordered in the amount of ***." Likewise, the journal entry in CR-507362 states: "post release control is part of this prison sentence for 3 years for the above felony(s) under R.C. 2967.28 ***. Restitution same as CR-496495." Thus, in the journal entries, the trial court properly imposed restitution separate from the postrelease control.

{¶ 18} Zaslov does not raise as an error the amount of the restitution; however, our review of the restitution orders indicates the trial court exceeded the restitution amount it could order payable to Medicaid. We raise this issue sua sponte and will consider it under the standard of plain error. In order to find plain error under Crim.R. 52(B) the error must be an "obvious" defect in the trial proceedings, and the error must have affected "substantial rights."[12] We conclude the excessive restitution amount ordered payable to Medicaid constitutes plain error.

381; *State v. King*, 70 Ohio St.3d 158, 162, 1994-Ohio-412.

[12]*State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68.

{¶ 19} Zaslov was indicted in CR-507362 for one count of Medicaid theft in an amount more than $5,000, but less than $100,000. In the journal entry, the court ordered restitution to Medicaid in the amount of $232,000, which exceeds the amount of the loss stated in the indictment. "[R]estitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced."[13] As this court held in a similar case, "a trial court abuses its discretion when it orders restitution in an amount which has not been determined to bear a reasonable relationship to the actual loss suffered as a result of a defendant's offense for which he was convicted."[14]

{¶ 20} In addition, our review of the sentencing transcript indicates the court ordered restitution in the amount of $82,287.79 to Medicaid; this was the restitution amount the State argued was due Medicaid. However, at the hearing, the court failed to order an amount to one of the victim's (Shook) estate. The court stated as follows:

> **"Conditions of post-release control will be that you pay $396,000 - - $396,191 to the Lebovits, the various Lebovits' estates and that you pay $82,287.79 to the Shook - - to Medicaid."**[15]

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[13] *State v. Hooks* (2000), 135 Ohio App.3d 746, 748.

[14] *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648, at ¶12.

[15] Tr. 55.

{¶ 21} Thus, it appears the trial court was confused at the hearing as to the restitution amount to be allocated to the Shook estate and Medicaid. Thus, at the resentencing hearing, the trial court must adjust the restitution amount awarded to Medicaid and also resolve the issue of whether the Shook estate receives restitution or whether the restitution related to the Shook estate is solely the reimbursement to Medicaid.

Judgment is affirmed in part, vacated in part, and remanded for resentencing.

It is ordered that appellee and appellant share the 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 Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR