

[Cite as *State v. Hody*, 2010-Ohio-6020.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 94328**

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**KEVIN HODY**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
AFFIRMED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-521866

**BEFORE:** Vukovich, J.,\* Gallagher, A.J., and Jones, J.

**RELEASED AND JOURNALIZED:** December 9, 2010

**ATTORNEY FOR APPELLANT**

Britta M. Barthol, Esq.  
P.O. Box 218  
Northfield, Ohio 44067

**ATTORNEYS FOR APPELLEE**

William D. Mason, Esq.  
Cuyahoga County Prosecutor  
By: James D. May, Esq.  
Assistant County Prosecutor  
1200 Ontario Street  
Cleveland, Ohio 44113

JOSEPH J. VUKOVICH, J.:\*

{¶ 1} Defendant Kevin Hody appeals from the sentence imposed in following his guilty plea to attempted engaging in a pattern of corrupt activities with a forfeiture specification and tampering with evidence. For the reasons set forth below, we affirm.

{¶ 2} On March 12, 2009, defendant and seven other individuals or entities were indicted in connection with a 2008 and 2009 theft of trailer trucks of merchandise. The indictment charged defendant with engaging in a pattern of corrupt activity, with a forfeiture specification; two counts of theft; four counts of receiving stolen property; possession of criminal tools; and tampering with

evidence. Defendant eventually pled guilty to one count of attempted engaging in a pattern of corrupt activity with a forfeiture specification, and tampering with evidence.

{¶ 3} Following a hearing, the trial court determined, after considering “all required factors of the law,” that prison was consistent with the purposes of R.C. 2929.11. The court sentenced defendant to a total of six years of imprisonment, plus three years of postrelease control. The trial court also ordered that defendant pay restitution to Parma Express in the amount of \$131,808. Defendant now appeals and assigns two errors for our review.

{¶ 4} For his first assignment of error, defendant asserts that his sentence is contrary to law because the trial court did not consider the purposes and principles of felony sentencing as set forth in R.C. 2929.11 and did not consider the seriousness and recidivism factors set forth in R.C. 2929.12.

{¶ 5} As an initial matter, we note that pursuant to the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the trial court was not required to make any findings on the record in order to support the imposition of the sentence. Post *Foster*, trial courts have full discretion to impose any sentence within the statutory range and are no longer required to make findings or give their reasons for imposing more than the minimum sentences. *Id.*

{¶ 6} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, a plurality of the Ohio Supreme Court established a two-step procedure for

reviewing felony sentences. The *Kalish* Court held:

{¶ 7} “In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, [appellate courts] 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.”  
Id.

{¶ 8} 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] \* \* \* 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.

{¶ 9} R.C. 2929.11(B) provides:

{¶ 10} “A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶ 11} Under R.C. 2929.12, a court imposing a sentence upon a felony

offender has the discretion to determine the most effective way to comply with the purposes and principles of sentencing. See R.C. 2929.12(A). The court must, therefore, consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors. R.C. 2929.12(A).

{¶ 12} Further, as explained in *State v. Dudley*, Lake App. No. 2009-L-019, 2009-Ohio-5064,

{¶ 13} “By expressly stating that it considered the factors in R.C. 2929.11 and R.C. 2929.12, the court satisfies its duty under those statutes. *State v. Clay*, 7th Dist. No. 08 MA 2, 2009-Ohio-1204, at ¶174. By implication, post-*Foster*, an express articulation of the statutory considerations is unnecessary to the imposition of a felony sentence. *State v. Wilder*, 6th Dist. No. L-06-1321, 2007-Ohio-4186, at ¶39.”

{¶ 14} Thus, a sentencing court is not required to use specific language regarding its consideration of the seriousness and recidivism factors. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215, 724 N.E.2d 793; *State v. McAdams*, 162 Ohio App.3d 318, 2005-Ohio-3895, 833 N.E.2d 373; *State v. Patterson*, Cuyahoga App. No. 84803, 2005-Ohio-2003. Further, there is no requirement in R.C. 2929.12 that the trial court state on the record that it has considered the statutory criteria or even discussed them. *State v. Polick* (1995), 101 Ohio App.3d 428, 431, 655 N.E.2d 820.

{¶ 15} In this matter, defendant pled guilty to attempted engaging in a pattern of corrupt activity, a felony of the second degree. R.C. 2923.32(B)(1); R.C. 2923.02. Pursuant to R.C. 2929.14, the trial court was authorized to impose a term of imprisonment of “two, three, four, five, six, seven, or eight years” for this offense. Pursuant to R.C. 2929.14, the trial court was authorized to impose a term of imprisonment of “one, two, three, four, or five years” for the offense of tampering with evidence, a violation of R.C. 2921.12(B) and a felony of the third degree.

{¶ 16} Here, defendant acknowledges that the trial court complied with the applicable rules and statutes in imposing the sentence, as required under the first part of *Kalish*. He claims, however, that because five of the co-defendants received one-year prison terms for their conduct in this matter, the trial court abused its discretion under the second part of the *Kalish* test.

{¶ 17} An abuse of discretion is more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 18} In *State v. Marriott*, Clark App. No. 2008 CA 48, 2009-Ohio-2323, the court noted that there is no requirement that co-defendants receive equal sentences. *Id.*, citing to *State v. Hall*, Franklin App. No. 08AP-167, 2008-Ohio-6228, *State v. Templeton*, Richland App. No. 2006-CA-33, 2007-Ohio-1148; and *State v. Brewer*, Ashtabula App. No. 2008-A-0005,

2008-Ohio-3894.

{¶ 19} In this matter, the record plainly demonstrates that defendant has a lengthy record that includes a variety of offenses and the offenses here could not have been completed without defendant's assistance.

{¶ 20} Defendant also complains that the trial court abused its discretion by failing to take into account that he is suffering from cancer. The record indicates, however, that defendant was incarcerated in a federal facility for an offense that occurred after this alleged diagnosis.

{¶ 21} The trial court did not abuse its discretion in imposing a sentence that was less than the possible maximum term.

{¶ 22} The first assignment of error is without merit.

{¶ 23} For his second assignment of error, defendant complains that the trial court erred in ordering restitution because the amount was not established to a reasonable degree of certainty.

{¶ 24} R.C. 2929.18(A)(1) permits a trial court, as part of a sentence, to order restitution to the victim of the offender's crime in an amount based on the victim's economic loss. *State v. Stamper*, Butler App. No. CA2009-04-115, 2010-Ohio-1939. In fashioning such an order, the trial court must consider the offender's present and future ability to pay the sanction. R.C. 2929.19(B)(6). The court must also determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent, credible evidence. *State v. Warner* (1990), 55 Ohio St.3d 31, 69, 564 N.E.2d 18.

{¶ 25} In this matter, the state and defense entered into a stipulation as to the amount of restitution. The parties' stipulation to the amount of restitution served as sufficient basis to support the trial court's order and precludes defendant from complaining about it now on appeal. *State v. Sancho*, Cuyahoga

{¶ 26} App. No. 91903, 2009-Ohio-5478, citing *State v. Silbaugh*, Portage App. No. 2008-P-0059, 2009-Ohio-1489; *State v. Stewart*, Wyandot App. No. 16-08-11, 2008-Ohio-5823; *State v. Champion*, Franklin App. No. 05AP-1276, 2006-Ohio-4228; *State v. Brewer*, Clermont App. No. CA2002-03-025, 2003-Ohio-1064.

{¶ 27} The second assignment of error is without merit.

Affirmed.

It is ordered that appellee recover from 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JOSEPH J. VUKOVICH, JUDGE\*



SEAN C. GALLAGHER, A.J., and  
LARRY A. JONES, J., CONCUR

\*(Sitting by Assignment: Judge Joseph J. Vukovich of the Seventh District  
Court of Appeals)