[Cite as *State v. Cisternino*, 2011-Ohio-6207.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-008**
- vs -	:	
ANTHONY CISTERNINO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 000555.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Edward M. Heindel, 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Anthony Cisternino, appeals from the judgment entered by the Lake County Court of Common Pleas sentencing him to four years imprisonment to be served consecutively to sentences imposed in a separate case. We affirm.

{¶2} On September 10, 2010, appellant was indicted on one count of aggravated arson, a felony of the second degree, in violation of R.C. 2909.02(A)(2); one count of complicity to aggravated arson, a felony of the second degree, in violation of R.C. 2923.03(A)(1); and one count of complicity to aggravated arson, a felony of the

second degree, in violation of R.C. 2923.03(A)(2). The charges arose out of a fire which occurred in a trailer owned by appellant's mother.

{¶3} After initially pleading "not guilty," appellant entered a plea of "guilty" to a lesser included offense of aggravated arson; to wit, attempted aggravated arson, a felony of the third degree, in violation of R.C. 2923.02(A) and R.C. 2909.02(A)(2). Sentencing was deferred and a presentence investigation report was ordered.

{¶4} After holding a sentencing hearing, the trial court ordered appellant to serve four years in prison. The term was ordered to be served consecutively to sentences imposed in previous Lake County and Cuyahoga County cases.[1] Appellant now appeals his felony sentence. His sole assignment of error alleges:

{¶5} "The trial court erred in sentencing the defendant-appellant to the more-than-the-minimum term of imprisonment." (Sic.)

{¶6} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. In the first step, we consider whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." Id. at 25. "As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. Next, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in Sections 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. See id. at 27.

1. Appellant previously pleaded guilty to F-5 theft in Lake County and pleaded no contest to F-4 carrying concealed weapons and F-3 having weapons under a disability in Cuyahoga County. The record indicates that appellant would be due for release on these convictions on March 8, 2012.

{¶7} With respect to the first prong of *Kalish*, the Supreme Court did not specifically offer guidance as to the "laws and rules" an appellate court must consider to ensure the sentence clearly and convincingly conforms with Ohio law. *State v. Burrell*, 11th Dist. No. 2009-P-0033, 2010-Ohio-6059, at ¶17. Thus, "if the sentence falls within the statutory range for the felony of which a defendant is convicted, it will be upheld as clearly and convincingly consistent with the law." *State v. Kozel*, 11th Dist. No. 2011-L-044, 2011-Ohio-4306, at ¶5. "If the sentence is within the purview of the applicable 'laws and rules,' we then consider whether the trial court acted within its discretion in fashioning the sentence at issue." Id.

{¶8} Under his sole assignment of error, appellant contends the trial court failed to give proper consideration to certain statutory factors under R.C. 2929.12. In particular, appellant asserts the trial court failed to give appropriate consideration to the fact that the offense occurred under circumstances not likely to reoccur. Appellant further contends the trial court simply failed to give any consideration to his "genuine remorse" and other mitigating factors militating in favor of a less severe sentence. The record does not support appellant's contentions.

{¶9} It is well settled that a trial court is required to consider R.C. 2929.11 and R.C. 2929.12 in imposing a felony sentence. See, e.g., *State v. Foster*, 109 Ohio St.3d 1, 14, 2006-Ohio-856. In considering these provisions, however, a trial court "*** is not required to make findings of fact under the seriousness and recidivism factors in R.C. 2929.12." *State v. O'Neil*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, at ¶34.

{¶10} Notwithstanding the foregoing points of law, the trial court, at the sentencing hearing, did articulate the statutory factors it found relevant in ordering the

sentence it imposed. Prior to imposing sentence, the court stated it had considered the facts and circumstances of the case, the nature of the offense, defense counsel's and appellant's statements, the prosecutor's comments and ultimate recommendation, and the information in the presentence investigation report. The court further stated it had considered this information in light of the purposes and principles of felony sentencing pursuant to R.C. 2929.11. The court then made the following comments:

{¶11} "As to the factors in 2929[.]12, factors which would indicate the offense is more or less, there is nothing really present which makes it more or less serious. Obviously an arson offense. There is economic harm. That's typically involved. The economic harm in this case probably isn't as great as what we normally see in arson cases. Nothing that stands out with regard to this offense itself which makes it more serious or less serious than conduct that normally constitutes this offense.

{¶12} "Factors indicating recidivism is more likely, as indicated, many of these factors are present. The Defendant did commit this offense while he was on probation, I think Richland County. He had just been released from prison a couple months earlier. Released from prison July 30, 2009. This offense was then committed on September 27th. So just less than two months after being released, this offense was committed. The Defendant has a lengthy history of criminal convictions. As well as juvenile delinquency adjudications dating back to when he was a minor. He has served multiple prison terms before in the past. Has not responded favorably to previously imposed sanctions.

{¶13} "No factors present which would indicate *** the Defendant is less likely to commit crimes in the future.

{¶14} "***

{¶15} "In weighing these factors, the Court finds that prison is consistent with the purposes and principles of felony sentencing. The Defendant is not amenable to any available community control sanctions. Quite frankly, with what the plea agreement was, that was reached in this case, even the maximum sentence would be pretty, a pretty good result for Mr. Cisternino with the criminal history involved here. The maximum would be five years in prison. With the F-2 that he was facing, that was eight years in prison. Which any judge could have justifiably imposed in this case with the history."

{¶16} Given these points, the trial court imposed a four-year term of imprisonment on the felony-three attempted arson to which appellant pleaded guilty, less than the maximum.[2] This sentence is within the applicable felony range and therefore not contrary to law.

{¶17} Furthermore, the trial court recited the factors that it found most relevant in crafting the sentence and, in doing so, provided this court with an explicit means of reviewing its reasoning process. Considering the information in the record in relation to the trial court's findings, it is clear the trial court acted squarely within its discretion in imposing the underlying sentence. Appellant's sentence is consistent with reason as well as the evidence. We therefore hold the trial court did not abuse its discretion in imposing the four-year prison term for the felony-three offense to which appellant pleaded.

{¶18} Appellant's assignment of error is without merit.

2. It is worth noting that the trial court's judgment entry also reflects the trial court's consideration of all relevant statutory factors.

{¶19} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.