[Cite as *State v. McNaughton*, 2012-Ohio-1271.]

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-083**
- vs -	:	
DALE R. MCNAUGHTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000001.

Judgment: Affirmed.

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

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Dale R. McNaughton appeals from a judgment of Lake County Court of Common Pleas which sentenced him to 16 years in prison for his conviction of eight counts of burglary and also ordered him to pay restitution to the victims. After reviewing the record and pertinent law, we affirm the trial court's judgment.

Substantive Facts and Procedural History

{¶2} Mr. McNaughton, 25, went on a crime spree between February and March of 2010, burglarizing 10 homes in Kirtland, Willoughby Hills, and Mentor. Carrying a spiral notebook, he would approach homes and knock on doors. If the residents were home and came to the door, he would pretend to be soliciting signatures for some cause and ask them if they would sign the petition; if no one answered the door, he would burglarize the home. He stole mostly jewelry, which he pawned to feed his drug addiction.

{¶3} Mr. McNaughton has a lengthy criminal record, which began in 1999 while he was a juvenile. He began his adult criminal career in 2004, committing a variety of crimes including receiving stolen property, breaking and entering, theft, aggregated theft, grand theft, and robbery. His commission of crimes was only temporarily interrupted by the two prison terms he served in 2005 and 2008. After his release from prison in 2008, he was charged with various crimes under several case numbers. In the instant case, he was charged with nine counts of burglary, four of which contained a firearm specification, one count of attempted burglary, and one count of engaging in a pattern of corrupt activity.

{¶4} On May 2, 2011, Mr. McNaughton pled guilty to eight counts of burglary, second degree felonies in violation of R.C. 2911.12(A)(2), four of which contained a firearm specification, and the court ordered a presentence report. He was later sentenced to three years for two of the eight burglary counts, to run consecutively to each other and also consecutively to the concurrent six-year term each for the remaining six counts. The trial court imposed an additional one-year term for each of

the four counts with firearm specifications, for a total of 16 years. The court also imposed $124,104.90 in restitution to be paid to the victims.

{¶5} Mr. McNaughton now appeals, raising two assignments of error:

{¶6} "[1.] The trial court erred by sentencing the defendant-appellant to consecutive sentence of sixteen years in prison.

{¶7} "[2.] The trial court erred to the prejudice of the defendant-appellant when it ordered him to pay $124,104.90 in restitution."

Review of Sentence Post-*Foster*

{¶8} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that in imposing maximum, consecutive sentences, a trial court is not required to make judicial fact-finding as mandated by the legislature in R.C. 2929.14. Subsequently, the Supreme Court of Ohio, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, provided a two-step analysis for an appellate court to apply when reviewing felony sentences.

{¶9} First, the reviewing court 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 appellate court then reviews the trial court's decision under an abuse-of-discretion standard. *Id*. at ¶4.

{¶10} The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. 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*. at ¶14. The *Kalish* court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id*. at ¶17. Therefore, as part of its analysis of whether the sentence is "clearly and convincing contrary to law," an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶11} If the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id*. at ¶17. The court in *Kalish* explained the effect of R.C. 2929.11 and 2929.12 as follows:

{¶12} "R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Kalish* at ¶17.

{¶13} Affirming the trial court's sentence, the court in *Kalish* noted the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and found nothing in the record to suggest the trial court's decision was an abuse of discretion. An abuse of discretion is the trial court's "failure to exercise sound,

reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶14} On appeal, Mr. McNaughton does not assert his sentence is contrary to law. He only claims the trial court failed to give "careful and substantial deliberation" to the relevant statutory considerations regarding R.C. 2929.12 required by *Kalish*.

{¶15} R.C. 2929.12 requires a court to consider the seriousness and recidivism factors. It provides a nonexclusive list of factors relating to the seriousness of the offense and recidivism of the offender for the court to consider in imposing a sentence to meet the objectives of felony sentencing.

{¶16} In this case, the trial court indicated that it had considered the presentence report, Mr. McNaughton's drug and alcohol evaluation, the victim impact statements, letters written on behalf of Mr. McNaughton, and his in-court statement. The court stated it had evaluated the circumstances of this case in light of the purposes and principles of R.C. 2929.11 and the factors set forth in R.C. 2929.12.

{¶17} Before imposing consecutive sentences for his conviction of two of the eight counts of burglary, the trial court explained at great length its consideration of the seriousness and recidivism factors under R.C. 2929.12. It stated that Mr. McNaughton's offenses were more serious than normal. The victims' letters indicated they suffered not only serious economic harm, but also emotional distress. They no longer feel secure and safe in their own home. The court noted the burglaries were committed over and over again, creating wide-spread fear and alarm in entire neighborhoods.

{¶18} Regarding recidivism, the court noted Mr. McNaughton has a very lengthy history of juvenile delinquency adjudications and adult convictions, beginning at age 13. He committed offenses even while on parole on two separate occasions. He served a prison term in 2005, and committed a felony immediately after he was released from prison. He returned to prison, and shortly after his release, began the instant burglary spree. The court noted all his offenses were felonies, and he had several parole violations. After reviewing Mr. McNaughton's record, the court remarked:

{¶19} "Obviously the Defendant has not responded favorably to previously imposed sanctions. * * * I recognize a drug abuse problem which relates to the commission of these offenses[;] I am not disputing that. But the Defendant has not gotten treatment for that. You can blame the courts that they should have sent him, but the Defendant can go get help on his own. Nothing prevent[s] him when he was out to try[] to go get the help. * * *

{¶20} "* * *

{¶21} "* * * As I mentioned, I recognize the serious drug issues that you have, Mr. McNaughton, and that that is what you claim, not disputing it necessarily, is what pushed you to commit these crimes. But you have been doing it over and over and over. There comes a point in time when – one of the main purposes in sentencing is you have got to protect the community, protect the community from future criminal conduct, from these serious, serious offenses. Because your history has shown as soon as you get out, you go right back to this."

{¶22} Despite the record clearly reflecting the trial court's thorough consideration of the statutory factors, Mr. McNaughton complains that the trial court did not give

appropriate consideration and weight to the genuine remorse he expressed, or his acknowledgement of his serious drug addiction problems. He refers us to the apology he made to the victims and his plea for forgiveness at his sentencing hearing.

{¶23} The transcript reflects that the trial court acknowledged Mr. McNaughton's drug issues, but balanced it against the need to protect the communities from his repeated commissions of serious offenses while not incarcerated. Regarding his expression of remorse, in which Mr. McNaughton did show some insight into his disease, this court has repeatedly held that a reviewing court must defer to the trial court as to whether the defendant's remarks are indicative of genuine remorse, because the trial court is in the best position to make that determination. *State v. Dudley*, 11th Dist. No. 2009-L-019, 2009-Ohio-5064, ¶22; *State v. Stewart*, 11th Dist. No. 2008-L-112, 2009-Ohio-921, ¶30; *State v. Eckliffe*, 11th Dist. No. 2001-L-015, 2002-Ohio-7136, ¶32.

{¶24} Thus, we will not second-guess the trial court's finding of a lack of genuine remorse by Mr. McNaughton. "Remorse goes to sleep during a prosperous period and wakes up in adversity." *State v. Brown*, 11th Dist. No. 2008-152, 2009 Ohio 2189, ¶2, quoting Jean-Jacques Rousseau, Confessions II. The trial court refused to give much weight to Mr. McNaughton's expression of remorse under the circumstances of this case, and we defer to the trial court for that assessment.

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

Restitution

{¶26} Under the second assignment of error, Mr. McNaughton contends the trial court erred in finding his ability to pay the restitution.

{¶27} The trial court ordered him to pay restitution to various victims totaling $124,104.90. At the sentencing hearing, the court did not comment on Mr. McNaughton's ability to pay, but stated in its judgment entry that it has determined that "the defendant is able to pay a financial sanction of restitution or is likely in the future to be able to pay a financial sanction or restitution."

{¶28} We review an order of restitution for an abuse of discretion. *State v. Marbury,* 104 Ohio App.3d 179, 181 (8th Dist. 1995); *State v. Cisternino*, 11th Dist. Nos. 2010-L-031, 2011-Ohio-2453; *State v. Rose*, 2d Dist. No. 24196, 2011-Ohio-3616; *State v. Burns*, 8th Dist. No. 95465, 2011-Ohio-4230.

{¶29} R.C. 2929.18 allows a trial court to impose on a defendant financial sanctions, including restitution and reimbursements. R.C. 2929.19(B)(6) requires that, before imposing a financial sanction under R.C. 2929.18, the trial court "shall consider the offender's present and future ability to pay the sanction or fine."

{¶30} "Under R.C. 2929.19(B)(6), a trial court must consider an offender's present and future ability to pay before imposing a financial sanction such as restitution. 'The trial court does not need to hold a hearing on the issue of financial sanctions, and there are no express factors that the court must take into consideration or make on the record.'" *State v. Russell*, 2d Dist. No. 23454, 2010-Ohio-4765, ¶62, citing *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, ¶57 (2d Dist.). *See also State v. Martin*, 140 Ohio App.3d 326, 338 (4th Dist, 2000). A trial court need not even state that it considered an offender's ability to pay, but the record should contain some evidence that the trial court considered the offender's ability to pay. *Russell* at ¶62.

{¶31} Here, the presentence report indicates Mr. McNaughton was 25, and generally in good health. He took advancement placement classes at high school and obtained a GED. Nothing on the record suggests he would be prevented from gainful employment upon release from prison. The trial court expressly stated it determined the defendant is able to pay or likely to be able to pay restitution. This statement, which indicates the court had considered the defendant's ability to pay, satisfies the requirement of R.C. 2929.19(B)(6), and we find no abuse in its ordering restitution.

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

{¶33} Judgment of the Lake County Common Pleas Court is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,