

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0072
HERBERT M. SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2010 CR 0312.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal, submitted on the record and briefs of the parties, emanates from the judgment entered by the Portage County Court of Common Pleas sentencing appellant, Herbert M. Smith, to an aggregate term of 30 months in prison as a result of his plea of guilty to various felonies and misdemeanors. We affirm.

{¶2} On May 20, 2010, appellant was indicted on one count of operating a vehicle under the influence of alcohol or drugs (“OVI”), in violation of R.C. 4511.19(A)(1)(a), R.C. 4511.19(G)(1)(d), and R.C. 2929.13(G)(2), a felony of the fourth

degree (“Count One”); one count of refusal to submit to chemical tests, in violation of R.C. 4511.19 and R.C. 2929.13, a felony of the fourth degree (“Count Two”); one count of leaving the scene of an accident, in violation of R.C. 4549.02 and R.C. 4549.99(B), a misdemeanor of the first degree (“Count Three”); one count of obstructing official business, in violation of R.C. 2921.31, a misdemeanor of the second degree (“Count Four”); one count of driving under suspension, in violation of R.C. 4510.11(A), a misdemeanor of the first degree (“Count Five”); and one count of assured clear distance, in violation of R.C. 4511.21(A)(1), a minor misdemeanor (“Count Six”). Forfeiture specifications relating to appellant’s vehicle were attached to the OVI count as well as the refusal to submit to chemical tests count.

{¶3} On July 1, 2010, appellant entered a written plea of guilty to Count One, Count Two, Count Three, and Count Five. The trial court accepted appellant’s plea and dismissed Counts Four and Six. The matter was referred to the Adult Probation Department for a presentence investigation report (“PSI”).

{¶4} The matter proceeded to a sentencing hearing at which the trial court sentenced appellant to 20 months imprisonment for Count One; 10 months imprisonment for Count Two, to be served consecutively to the sentence for Count One. The trial court further ordered appellant to serve concurrent terms of 180 days in jail for both Count Three and Count Five. The trial court ordered that the jail time run concurrently with time appellant was serving in prison for the felonies. The court further imposed a mandatory fine of \$1,350; it suspended appellant’s driver’s license for eight years and ordered that appellant’s vehicle be forfeited to the Ohio State Highway Patrol.

{¶5} Appellant now appeals and asserts one assignment of error, which reads:

{¶6} “The trial court erred in sentencing the appellant by imposing more than the minimum sentence and by imposing an improper sentence.”

{¶7} Appellant contends the trial court’s imposition of a total of 30 months imprisonment was contrary to law because the aggregate term was greater than the minimum for the crimes to which appellant pleaded guilty. He further asserts the trial court abused its discretion when it imposed the above sentence because, in doing so, the trial judge failed to carefully and substantially deliberate on the statutory factors it was obligated to consider.

{¶8} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus, the Supreme Court of Ohio held that trial courts have discretion to impose a sentence within the statutory range without the need for findings of fact with respect to maximum sentences, consecutive sentences, or sentences greater than the minimum.

{¶9} Since *Foster*, the Supreme Court has established a two-step analysis for an appellate court reviewing a felony sentence. See *State v. Kalish*, 120 Ohio St.3d 23, 28, 2008-Ohio-4912. 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 under R.C. 2929.11 and R.C. 2929.12, whether the trial court abused its discretion in selecting the defendant’s sentence. *Id.* at 27.

{¶10} Here, appellant first asserts his sentence was contrary to law because it does not fall within the permissible statutory range. In support, appellant makes the following “argument”:

{¶11} “The trial court sentenced the Appellant to twenty months on the operating a vehicle under the influence of alcohol charge and ten months on the refusal to submit to a chemical test charge. The sentences were to be served consecutively, and not concurrently, for a total sentence of thirty months. *** However, the sentences do not fall within the permissible statutory range for these offenses. *** The permissible sentences permitted by statute were one, two, three, four, or five years, since the Appellant also was convicted of or plead guilty to a specification under R.C. Section 2941.1413. Thus, the sentences of twenty months and ten months respectively were contrary to law and not permissible under the law.”

{¶12} Appellant’s construction of the record is erroneous. Had appellant pleaded guilty to a specification under R.C. 2941.1413, he would have been subject to a prison term between one and five years. Appellant’s indictment, however, did not include an R.C. 2941.1413 specification and he certainly did not plead guilty to that specification.¹ Appellant’s initial argument is therefore without merit.

{¶13} Our analysis, however, does not end with this conclusion. In its brief, the state identifies an error in the trial court’s imposition of sentence that appellant failed to raise. According to the state, the trial court committed reversible error by imposing the 30-month sentence without first sentencing appellant to a mandatory 60-day term as required by R.C. 4511.19(G)(1)(d). That statute provides, in relevant part:

1. Even if the record demonstrated appellant had pleaded guilty to an R.C. 2941.1413 specification, the 20-month sentence for the OVI conviction would fall within the permissible one to five year statutory window. Thus, irrespective of his factual misstatements, appellant’s argument is prima facie wrong.

{¶14} “(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses *** is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

{¶15} “(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code *or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type.* If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. *If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months* and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. ****” (Emphasis added.)

{¶16} R.C. 2929.13(G)(2) states that if an offender has not been convicted of and has not pleaded guilty to an R.C. 2941.1413 specification, the trial court “*** shall impose *** a mandatory prison term of sixty days or one hundred twenty days ***” as set forth under R.C. 4511.19(G)(1)(d).

{¶17} In its sentencing entry, the trial court stated:

{¶18} “IT IS THEREFORE ORDERED that the Defendant is sentenced to the Ohio Department of Rehabilitation and Correction, Grafton, Ohio to a definite term of imprisonment of twenty (20) months to be served for the offense of ‘Operating a Vehicle Under the Influence of Alcohol’, [sic] and ten (10) months to be served for the offense of ‘Refusal to Submit to Chemical Test’ of which shall run consecutive to one another, or until such time as he is otherwise legally released.”

{¶19} In its brief, the state asserts the trial court committed reversible error in failing to identify the mandatory 60-day period; the state’s brief, however, suggests that imposing the 60-day term is a necessary condition precedent to imposing further time. As a result, the state maintains the court lacked authority to impose the sentence it chose. We disagree with the manner in which the state frames this issue.

{¶20} With respect to the court’s authority, a court sentencing a defendant to a felony-four OVI possesses *the authority* to impose a prison term not over or under the time allotted in the statute. In this case, therefore, the trial court was authorized to impose a 20-month prison term for appellant’s OVI offense. Nothing in the statute indicates the mandatory 60-day term must necessarily be imposed before a court can announce the aggregate term it has selected under the statute. Rather, the statute states that, in addition to that mandatory term, the trial court possesses the authority to impose additional sanctions, including further incarceration, from six to 30 additional

months. In this case, the trial court chose to impose a 20-month sentence for the OVI offense, a prison term the court was authorized to impose under the “not more than thirty months” provision of R.C. 4511.19(G)(1)(d)(i).

{¶21} That said, however, the trial court’s judgment entry fails to reflect that appellant is *required*, pursuant to that section and R.C. 2929.13(G)(2), to serve a 60-day term irrespective of any remaining definite prison term imposed by the court. By failing to explicitly reference the mandatory nature of the 60 days, the trial court’s judgment suggests that appellant could be subject to judicial release prior to the expiration of the statutorily mandated prison term, in violation of R.C. 2929.20(A). Although the trial court erred in failing to specify the mandatory term, we hold the error is harmless under the circumstances of this case.

{¶22} Appellant was sentenced on August 18, 2010, and, as a result, the 60-day mandatory prison term has passed without appellant being awarded judicial release. Thus, even if the issue was not waived by appellant’s failure to argue the point, the trial court’s failure to memorialize the mandatory nature of the 60-day term is harmless error and, because the time has passed, the issue is now moot. Based upon the foregoing points, we therefore hold the trial court’s imposition of the aggregate 30-month term of imprisonment is not contrary to law.

{¶23} Next, appellant asserts the trial court abused its discretion by failing to give sufficient consideration to the factors set forth under R.C. 2929.11 and R.C. 2929.12. In *Foster*, supra, the Supreme Court of Ohio also held that two statutory sections, R.C. 2929.11 and R.C. 2929.12, “apply as a general guide for every sentencing.” *Foster*, supra, at 12. Pursuant to *Foster*, “[t]he court is merely to ‘consider’ the statutory factors.” *Id.* at 14. Thus, “in exercising its discretion, a court is merely

required to ‘consider’ the purposes of sentencing in R.C. 2929.11 and the statutory guidelines and factors set forth in R.C. 2929.12.” *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶44.

{¶24} The Court in *Kalish*, however, noted that where a sentencing court does not memorialize on the record that it considered the factors set forth in R.C. 2929.11 and R.C. 2929.12, a presumption arises that the factors were properly considered. *Id.* at 27, fn. 4. “By implication, as long as there is some indication that the factors were considered, a reviewing court is bound to uphold the sentence.” *State v. Chapdelaine*, 11th Dist. No. 2009-L-166, 2010-Ohio-2683, at ¶14.

{¶25} In this case, the trial court did not mention the foregoing factors when it imposed appellant’s sentence; the judgment entry is also silent regarding the factors. Nevertheless, the judgment does indicate the court considered the evidence presented at the hearing; the oral statements; the PSI report; as well as appellant’s statement. Given the state of felony sentencing law, we believe the trial court’s brief statement is sufficient to meet the second prong in *Kalish*. We therefore hold the court did not abuse its discretion in sentencing appellant to 30 months imprisonment.

{¶26} Appellant’s assignment of error is overruled.

{¶27} For the reasons discussed above, the judgment of the Portage County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.