[Cite as *State v. Kozel*, 2011-Ohio-4306.]

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-044**
- vs -	:	
MATTHEW KOZEL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 000724.

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).

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

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Matthew Kozel, appeals from the judgment of sentence entered by the Lake County Court of Common Pleas. We affirm.

{¶2} On March 10, 2011, appellant entered a plea of "guilty" to one count of theft from an elderly person, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1). After holding a sentencing hearing, appellant was ordered to serve a 12-month term of imprisonment consecutive to a prison term imposed for a probation

violation. He was further ordered to pay $90 in restitution to the victim. Appellant now appeals and alleges the following assignment of error:

{¶3} "The trial court erred by sentencing the defendant-appellant to a maximum and consecutive term of imprisonment."

{¶4} 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.

{¶5} 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. Consequently, 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. Id., citing *Kalish*, supra, at ¶15; see, also, *State v. Gooden*, 9th Dist. No. 24896, 2010-Ohio-1961, at ¶48. 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.

{¶6} Under his sole assignment of error, appellant contends the trial court failed to give proper consideration to all relevant statutory factors under R.C. 2929.12. In

particular, appellant points out that the crime was a result of a severe drug habit that compromised his judgment. Appellant maintains he is now prepared to overcome his addiction and start his life anew. In light of his interest in sobriety, appellant asserts the offense occurred under circumstances not likely to happen again. Appellant also underscores that he did not physically harm or threaten the victim in the course of committing the crime. Given these points, appellant asserts the trial court clearly failed to give due weight to the factors set forth under R.C. 2929.12(C) and (E). Thus, he concludes the court abused its discretion in imposing the maximum term of imprisonment and requiring him to serve the term consecutive to a term he was serving at the time of the sentencing hearing.

{¶7} It is well-established that a trial court is required to consider R.C. 2929.11 and R.C. 2929.12 in rendering a felony sentence. See, e.g., *State v. Foster*, 109 Ohio St.3d 1, 14, 2006-Ohio-856. In considering these provisions, 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'Neill*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, at ¶34.

{¶8} We initially point out that the trial court, in its judgment entry of sentence, explicitly stated it had considered and balanced the seriousness and recidivism factors under R.C. 2929.12 in crafting appellant's sentence. Because the sentence is within the relevant felony range and there is nothing to otherwise indicate the trial court acted unreasonably in imposing sentence, the sentence is legally sufficient under *Kalish*, supra.

{¶9} Still, in an effort to support the sentence it selected, the trial court did, in fact, set forth a variety of factors it weighed in fashioning appellant's sentence. From the bench, the trial court stated:

{¶10} "I've reasonably calculated this sentence to achieve the two overriding purposes of felony sentencing, and to be commensurate with [and] not demeaning to the seriousness this offender's conduct and its impact on the victim and on society, and to be consistent with sentences imposed for similar crimes committed by similar offenders. In using my discretion to determine the most effective way to comply with the purposes and principles of sentencing I have considered all relevant factors including the seriousness and the recidivism factors set forth in 2929.12. There are a number of features that make this crime more serious. There are two factors that actually elevate it to a felony of the fifth degree. The credit card alone could make it a felony of the fifth degree. The elderly victim alone can make it a felony of the fifth degree. Both are present. The victim suffered serious psychological harm. It was perpetrated, the crime was perpetrated in a place like the home where one would feel absolutely safe from being victimized by crime. Praying in a church, in a pew, no one would expect that a perpetrator would come there supposedly for a similar purpose and steal. This was committed while on probation. I gave you breaks before. I offered you treatment on probation. You violated the terms of your community control sanctions. I didn't max you out the last time. I have to this time."

{¶11} The foregoing statement demonstrates the trial court considered factors it found specifically germane to appellant's case. The sentence was statutorily permissible and, given the court's discussion on record, it is clear the sentence the court selected was based upon the overriding purposes of Ohio's felony sentencing structure.

{¶12} With respect to appellant's specific arguments, we recognize the crime was purportedly committed to finance appellant's drug habit. Addiction, however, while a factor in considering appellant's motivations for acting as he did, is neither an excuse

nor a justification. Further, the court stated it had recently given appellant the opportunity to treat his addiction in a previous case; the record, however, indicates appellant failed to take advantage of the opportunity. The court did not abuse its discretion by declining to find appellant's drug habit somehow lessened the severity of the crime.

{¶13} Moreover, the record demonstrates that, shortly after the court had placed appellant on probation for a previous theft offense (in which he stole items to feed his drug addiction), appellant committed the underlying offense. We recognize appellant expressed remorse for his crime and aspires to live a sober lifestyle. Nevertheless, the trial court could reasonably infer from appellant's conduct that he posed a high risk of recidivating. Reviewing the circumstances as a whole, the trial court properly considered the relevant statutory criteria and did not err in imposing the sentence it chose. We reject appellant's arguments and hold the trial court's sentence meets the requirements of *Kalish*.

{¶14} Appellant's sole assignment of error is overruled and the judgment of the Lake County Court of Common Pleas is therefore affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.