

**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. 2011-P-0087
BERNARD FOSTER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2011 CR 0119.

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).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Bernard Foster, appeals from the Portage County Court of Common Pleas' judgment of sentence. At issue is whether the trial court imposed an improper sentence for failing to consider felony-sentencing criteria. For the reasons that follow, the judgment is affirmed.

{¶2} Appellant was indicted on charges of aggravated robbery and kidnapping in connection with his involvement in an armed robbery of a Circle K convenience store in Ravenna, Ohio. Appellant entered a plea of guilty to aggravated robbery, a first-

degree felony in violation of R.C. 2911.01(A)(1). The state of Ohio dismissed the kidnapping charge, which stemmed from the allegation that appellant forced the store clerk into a bathroom at knife point. Appellant was sentenced to ten years in prison. He was also ordered to pay restitution to the Circle K convenience store in the amount of \$60.00.

{¶3} Appellant sought leave to file a delayed appeal, which was granted. He now files his appeal and asserts one assignment of error, which states:

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

{¶5} Appellant argues that the trial court, in sentencing him to a period of incarceration greater than the minimum term, was obligated to consider felony-sentencing purposes pursuant to R.C. 2929.11 and weigh seriousness and recidivism factors pursuant to R.C. 2929.12. Appellant contends there is nothing in the record to indicate that the trial court gave consideration to these purposes or factors. Thus, appellant argues the sentence is improper and the matter should be remanded for resentencing.

{¶6} As a preliminary matter, after the *State v. Foster* decision, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus.

{¶7} Felony-sentence review is conducted pursuant to the two-step approach set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-

4912. First, an appellate court must perform a de novo review to assess whether the court “adhered to all applicable rules and statutes in imposing the sentence.” *Id.* at ¶25. Next, a reviewing court must consider whether the trial court abused its discretion in selecting the term of imprisonment within the permissible statutory range. *Id.* 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* 11 (8th Ed.2004).

{¶8} As to the first step of the *Kalish* test, the record indicates the trial court adhered to all applicable rules and statutes in sentencing appellant. A trial court is required to consider the purposes of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; however, it need not expressly indicate on the record that it considered those purposes and factors. *State v. Hamilton*, 11th Dist. No. 2011-P-0044, 2012-Ohio-1457, ¶8; *State v. Burkett*, 11th Dist. No. 2009-P-0069, 2010-Ohio-6250, ¶72, citing *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, ¶10, and *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000).

{¶9} In fact, contrary to appellant’s assertions, a silent record raises a presumption that the trial court considered the felony sentencing purposes and criteria set forth in R.C. 2929.11 and R.C. 2929.12. See *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, ¶26, quoting *State v. Adams*, 37 Ohio St.3d 295 (1988) (“a trial court’s failure to state on the record that it considered the seriousness and recidivism factors in R.C. 2929.11 and 2929.12 ‘raises a presumption that the trial court did, indeed, consider these factors’”). Here, however, appellant has not introduced any evidence to rebut the presumption that the trial court considered the sentencing criteria

in his case. See *Hamilton, supra*, ¶9, citing *State v. Cyrus*, 63 Ohio St.3d 164, 166 (1992).

{¶10} At appellant's sentencing hearing, the trial court noted the severity of the crime and the magnitude of appellant's record. The trial court stated: "[Y]ou have a horrendous record. You've been down before. You used a knife. You scared these people to death." This statement reflects the overriding purpose of felony sentencing, pursuant to the considerations found in R.C. 2929.11, which is "to protect the public from future crime by the offender and others and to punish the offender." Additionally, appellant's sentence of ten years for violation of R.C. 2911.01(A)(1) was within the statutory permissible range pursuant to R.C. 2929.14(A)(1).

{¶11} Thus, the record indicates that the trial court acted in accord with all applicable laws and provisions, including R.C. 2929.11 (purposes of felony sentencing), R.C. 2929.12 (factors in felony sentencing), and R.C. 2929.14(A)(1) (general prison terms). Therefore, the first step of the *Kalish* test has been satisfied.

{¶12} As to the second step of the *Kalish* test, it cannot be concluded that the trial court abused its discretion in sentencing appellant to the permissible statutory term of ten years. The trial court heard from the state as well as counsel for appellant. The court also gave appellant the opportunity to be heard. Ultimately, the trial court specifically found that appellant was "not amenable to community control" and that a prison term was warranted. However, the court noted that judicial release may be a future prospect in the event appellant "shows" the court that he "finally got it" and that he has taken steps to change his life. There is nothing in the record that suggests the trial

court failed to exercise sound, reasonable, and legal decision-making; thus, the second step of the *Kalish* test has been satisfied.

{¶13} Appellant's sole assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.