[Cite as *State v. Hoolihan*, 2012-Ohio-5837.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-T-0023**
- vs -	:	
DANIEL P. HOOLIHAN, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 11 CR 424.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Daniel P. Hoolihan, appeals from the judgment of the Trumbull County Court of Common Pleas sentencing him on two counts of robbery, felonies of the second degree in violation of R.C. 2911.01(A)(2) & (B); one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2) & (C); and one count of grand theft, a felony of the third degree in violation of R.C. 2913.02(A)(1) & (B)(4). Appellant seeks reversal of the trial court's decision sentencing him to non-minimum,

consecutive terms of imprisonment. Specifically, appellant argues that his sentence was based upon improper considerations and was not supported by the record.

{¶2} The underlying charges stem from four separate incidents. With respect to count one, robbery, on May 4, 2011, appellant robbed a Dunkin' Donuts store in Howland Township, Trumbull County, Ohio with a simulated firearm and accosted one of the employees. Regarding count two, robbery, on July 7, 2011, appellant robbed an individual of personal property in the parking lot of a Giant Eagle grocery store in Niles, Ohio. Under count three, burglary, on June 24, 2011, appellant and a cohort broke into an occupied home, assaulted the residents with a pistol, and stole certain personal property. On July 7, 2011, appellant stole a firearm from a Warren, Ohio resident, resulting in the fourth count, grand theft.

{¶3} Appellant was indicted by a grand jury on all four counts. Following a hearing, appellant entered an oral and written plea of guilty to all four counts. The trial court accepted appellant's guilty plea and deferred sentencing pending completion of a presentence investigation report ("PSI"). The trial court sentenced appellant to a term of seven years on count one, three years on count two, three years on count three, and thirty-six months on count four. Counts one and two were ordered to run consecutively. Counts three and four were ordered to run concurrently, as well as concurrently with counts one and two, for a total of ten years. Appellant timely appealed from that judgment and advances a single assignment of error for our review:

{¶4} "The trial court erred and abused its discretion by sentencing the appellant to non-minimum, consecutive terms of incarceration."

{¶5} The sole issue before us concerns the sentences imposed upon appellant. Regarding sentencing, the Supreme Court of Ohio held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, that trial 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." *Id*. at paragraph seven of the syllabus. The Court in *Foster* also held that R.C. 2929.11 and R.C. 2929.12 still "apply as a general judicial guide for every sentencing." *Id*. at ¶36.

{¶6} In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by "the overriding purposes of felony sentencing, which are 'to protect the public from future crime by the offender * * * and to punish the offender.'" *Id*. "R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed on similarly-situated offenders." *State v. Alsina*, 11th Dist. No. 2011-A-0016, 2011-Ohio-6692, ¶10.

{¶7} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶13, the Supreme Court established a two-step procedure for appellate review of a felony sentence. Under the first step, 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." *Id*. at ¶4. "If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id*.

{¶8} Turning to the first prong of the *Kalish* test, appellant concedes that the sentences imposed were within the statutory range provided for felonies within their respective degrees, and that there is a presumption of prison for the second degree felony offenses. Thus, appellant does not contend that his sentence is contrary to law. Instead, appellant submits that trial court abused its discretion under the second prong of *Kalish* by imposing both non-minimum and consecutive terms on counts one and two.

{¶9} Appellant argues that despite being within the statutory sentencing range, the court's sentence was an abuse of discretion because it failed to account for the fact that he had no prior felony record, had never received a prison sentence in the past, and that he committed the underlying crimes due to his drug addiction. Appellant further maintains that the trial court's consideration of pending felony charges in another case rises to the crest of imposition of punishment for a case in which he has not yet been convicted and which may never result in a conviction. In sum, appellant argues that an aggregate sentence of ten years is not supported by anything in the record. For the reasons that follow, appellant's arguments are without merit.

{¶10} At the sentencing hearing, the trial court heard from two of the victims of appellant's crimes. Following their statements, the state spoke on its behalf and requested that appellant receive no less than ten years of imprisonment in order to adequately punish him and serve as a deterrent to others who are similarly situated. In addition to outlining the details of the underlying charges, the state informed the trial court that appellant had a prior felony pending when he committed these offenses, as well as a prior conviction for aggravated possession of drugs. Without additional

statements or objection by either party, and prior to imposing sentence, the court stated as follows:

{¶11} "Mr. Hoolihan, that's the way I read the PSI also. You obviously were involved in some of the most severe criminal acts that a person can do. Home invasion, you accosted someone in the parking lot and held somebody up at gunpoint, and you busted into a Duncan (sic) Donuts. * * * You are a danger to society at this time. Everybody blames it on drugs. Everybody blames it on all these problems. You made an intent. You made a plan. * * * [W]hen you say three different incidents like this where they were choreographed, people knew what they were doing, obviously a plan was put together and you were in charge of that plan and you're going to end up, as a result, paying the price." The trial court proceeded to sentence appellant to consecutive terms of seven and three years respectively on counts one and two.

{¶12} Following sentencing on counts one and two and directly prior to imposing sentence on counts three and four, the trial court further stated:

{¶13} "The Court finds that this harm is so great or unusual that a single term does not adequately reflect the seriousness of the conduct and that your criminal history shows consecutive terms are necessary and other than consecutive sentences would demean the seriousness of these offenses and not adequately protect the public. Again, the Court noting that there were other pending charges at this time. The Court will sentence you to an additional three years as to count 3, to be served concurrent with count 1 and 2, and an additional 36 months as to count 4 that will be concurrent with counts 1 and 2."

{¶14} First, with respect to appellant's contentions that the trial court based his

sentencing on improper considerations, appellant failed to preserve any objection on that issue at the trial court. "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams,* 51 Ohio St.2d 112, paragraph one of the syllabus (1977).

{¶15} However, "'[U]nder Crim.R. 52(B) * * * this court has the power to recognize plain error or defects involving substantial rights even if they are not brought to the attention of the trial court. *State v. Haines*, 11th Dist. No. 2003–L–035, 2005–Ohio–1692, at ¶30. "In the context of a criminal case, a court of review should invoke the plain error doctrine with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.'" *State v. Oliver*, 11th Dist. No. 2010-P-0017, 2012-Ohio-122, ¶35-36.

{¶16} We conclude there is no "manifest miscarriage of justice." We acknowledge that the trial judge was aware of appellant's pending felony charge because that fact was argued by the state in favor of the maximum sentence, was included in the PSI, and was later mentioned by the court after it sentenced appellant on the two counts of robbery. However, appellant has failed to demonstrate that the pending felony charge was the essential underpinning of the trial court's sentencing decision. In fact, based on the trial court's recitation, noted above, the trial court was clearly primarily focused on the nature and severity of appellant's crimes, his criminal intent, the danger he posed to the public, and insuring that he received punishment commensurate with his crimes. Contrary to appellant's assertion, there is nothing

showing the trial court treated appellant's pending felony charge as a prior conviction for sentencing purposes. Furthermore, any consideration by the trial court of appellant's pending felony charge at sentencing was appropriate because this information is required to be provided in a PSI. R.C. 2951.03(A)(1).

{¶17} This court notes that, consistent with appellant's argument, it would certainly be improper for the trial court to elevate appellant's pending felony charge to the status of a conviction for sentencing purposes when he had not actually been convicted of the pending charge. However, appellant's pending felony charge is a relevant consideration. Pursuant to R.C. 2929.12(D)(1): "[t]he sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes: (1) at the time of committing the offense, the offender was under release from confinement before trial * * *." As there was a proper purpose for considering the pending charge for the purposes of sentencing, there was no objection to its consideration, and there is no demonstration that the trial court elevated the pending charge to a conviction, the record does not demonstrates plain error.

{¶18} Finally, in its sentencing entry, the trial judge stated that he considered the record, oral statements, PSI report, the victim impact statements as well as the R.C. 2929.11 and 2929.12 guidelines and factors. Accordingly, we find nothing in this record to demonstrate that the trial court failed to follow the appropriate statutory procedure or abused its discretion in determining appellant's sentence.

{¶19} Based on the foregoing, this court holds that the trial court did not err in sentencing appellant to non-minimum consecutive terms. Appellant's assignment of

error is wholly frivolous and without merit. Appellant's request to vacate his sentence is not well-taken.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.