[Cite as *State v. Talley*, 2015-Ohio-2816.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2014-T-0098**
DARIUS EUGENE TALLEY, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CR 105.

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).

Andrew R. Zellers, 3810 Starrs Centre Drive, Canfield, OH 44406. (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Darius Eugene Tally, Jr., contests the imposition of a one-year prison term for possession of marijuana. For the following reasons, we affirm.

{¶2} Appellant was indicted for marijuana possession, a fifth-degree felony under R.C. 2925.11(A), and failure to comply with an order or signal of a police officer, a third-degree felony under R.C. 2921.331(B). The first count asserts that appellant

knowingly had control over marijuana, a Schedule I controlled substance, in an amount between 200 and 1,000 grams and includes a forfeiture specification for $408 that appellant possessed when arrested.

{¶3} Appellant ultimately pled guilty to the marijuana count and the forfeiture specification. In return, the "failure to comply" count was dismissed. Sentencing was deferred pending a presentencing investigation.

{¶4} At sentencing, appellant's counsel asked the trial court not to impose a prison term because his client was experiencing significant health problems and wanted to continue to see his local medical providers. The trial court nevertheless imposed a one-year sentence because appellant had a substantial criminal record. As part of a colloquy with the court, appellant admitted that he had previously been to prison four times and had numerous other convictions. Thus, the trial court imposed the maximum one-year term for a fifth-degree felony.

{¶5} After the trial court issued its final sentencing judgment, appellant brought this appeal and was appointed new counsel. Upon reviewing the trial record, appellate counsel filed an "Anders" brief in which he contended that the trial court did not commit any prejudicial error in disposing of the underlying action. Despite this contention, the brief also sets forth one potential assignment of error for review.

{¶6} "In *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.493 (1967), the United States Supreme Court outlined the proper steps to be followed in this situation: (1) counsel should act in the role of active advocate for his client; (2) counsel should support his client to the best of his ability; (3) if counsel finds his client's case to be wholly frivolous, counsel should advise the court and request permission to

withdraw; (4) the request to withdraw must be accompanied by a brief referring to anything in the record that might arguably support the appeal; (5) counsel should furnish the indigent client with a copy of counsel's brief, and time must be allowed for the client to raise any points he chooses; (6) the court, not counsel, proceeds and decides whether the case is frivolous after full examination of all the proceedings. *Id.* at 744." *State v. Spears*, 11th Dist. Ashtabula No. 2013-A-0027, 2014-Ohio-2695, ¶5.

{¶7} In this case, within one month of submitting the "Anders" brief, appellate counsel moved to withdraw. As part of that motion, appellate counsel indicated that a copy of the "Anders" brief was sent to appellant. Accordingly, this court issued a judgment affording appellant twenty days to assert additional arguments in a supplemental brief. Appellant has not filed additional arguments for review.

{¶8} Thus, this appeal proceeds upon the sole potential assignment of error, as set forth in the "Anders" brief:

{¶9} "The trial court erred when it sentenced appellant to a maximum sentence of twelve (12) months for possession of marijuana in violation of R.C. 2925.11, a felony [of] the fifth degree."

{¶10} In a recent series of opinions, this court has altered the standard we apply in reviewing the propriety of felony sentences. *See, e.g., State v. Dickerson*, 11th Dist. Ashtabula No. 2013-A-0046, 2015-Ohio-938, ¶49; *State v. Chesler*, 11th Dist. Geauga No. 2014-G-3181, 2015-Ohio-711, ¶24-29. Prior to the issuance of our new precedent, this court strictly followed the two-step analysis delineated in the lead opinion of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶26. However, in light of the enactment of H.B. 86, we now apply the standard contained in R.C. 2953.08(G)(2). *Chesler*, at ¶25,

citing *State v. Cornelison*, 11th Dist. Lake No. 2013-L-064, 2014-Ohio-2884, ¶35. R.C. 2953.08(G)(2) states:

{¶11} "The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶12} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶13} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶14} "(b) That the sentence is otherwise contrary to law."

{¶15} Like the *Kalish* standard, R.C. 2953.08(G)(2) provides a two-step analysis for reviewing the imposition of a felony sentence. Specifically, an appellate court must affirm the felony sentence unless: (1) the trial court's findings on applicable mandatory requirements are not supported by the record; or (2) the sentence is not consistent with other relevant aspects of the law. *State v. Robinson*, 1st Dist. Hamilton No. C-140043, 2015-Ohio-773, ¶38. Under the second step of this standard, "a maximum sentence is not contrary to law when it is within the statutory range and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and

recidivism factors." *State v. Martin*, 2nd Dist. Clark No. 2014-CA-69, 2015-Ohio-697, ¶8.

{¶16} Appellant was sentenced for a fifth degree felony and is therefore subject to imprisonment for six, seven, eight, nine, ten, eleven or twelve months. R.C. 2925.11(C)(3)(c) and R.C. 2929.14(A)(5).

{¶17} In addition to stating the degree of appellant's felony offense, R.C. 2925.11(C)(3)(c) further requires application of R.C. 2929.13(B) in determining whether to impose a prison term at all as opposed to community control. As previously noted, R.C. 2929.13(B) is one of the referenced provisions in R.C. 2953.08(G)(2)(a) that sets forth the first step of the "felony sentence" standard. Accordingly, it must be determined whether the record supports the trial court's decision to impose a prison term rather than community control.

{¶18} R.C. 2929.13(B) delineates criteria for determining what type of penalty a trial court should impose for a felony of the fourth of fifth degree. Division (B)(1)(a) provides that a community control sanction must be imposed if each of three listed criteria are satisfied. One of the three criteria is that the defendant's prior criminal record does not include a felony conviction. In contrast, division (B)(1)(b) states that the trial court has the discretion to impose a prison term if any of eleven possible criteria are met. One of the possible factors is whether the defendant previously served a prison term.

{¶19} In this case, the presentencing report demonstrated that appellant had at least five prior felony convictions. Moreover, appellant admitted that he previously served at least four prison terms. Hence, the record readily supports the imposition of a

prison term. R.C. 2929.13(B)(1)(b).

{¶20} Of the statutory provisions listed in R.C. 2953.08(G)(2)(a), only R.C. 2929.13(B) is applicable to appellant's sentence. Thus, the first prong is satisfied.

{¶21} Regarding the "contrary to law" prong, although the trial court imposed the longest prison term possible, the sentence falls within the statutory range for a fifth-degree felony under R.C. 2929.14(A)(5). Moreover, during the sentencing hearing and as part of its sentencing judgment, the trial court specifically stated that, in imposing the twelve-month term, it considered the principles and purposes of felony sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12. Therefore, appellant's sentence is not contrary to law. *Martin*, 2015-Ohio-697, at ¶8.

{¶22} Given that the trial court complied with all applicable sentencing statutes, the sentence is affirmed. Accordingly, appellate counsel's single assignment of error is without merit.

{¶23} Moreover, having independently reviewed the entire record, there are no other potential issues for consideration. The judgment of the Trumbull County Court of Common Pleas is therefore affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶24} I respectfully dissent based on my dissenting opinions in similar matters involving *Anders. State v. Christian*, 11th Dist. Trumbull No. 2013-T-0055, 2014-Ohio-4882, ¶21-34 ("This writer believes that *Anders*, and the majority's application, essentially creates a conundrum as no good solution evolves from such situation. On the one hand, if appellant is successful in bringing an appeal, the panel has become biased because they have already prejudged the case ex parte. Thus, the panel should not sit on and determine the matter. On the other hand, if appellant is unsuccessful in bringing an appeal, he is denied his rights to counsel and to an appeal, as a matter of right."); *State v. Spears*, 11th Dist. Ashtabula No. 2013-A-0027, 2014-Ohio-2695, ¶14-19; *State v. Burnett*, 11th Dist. Lake No. 2013-L-053, 2014-Ohio-1358, ¶29-34; *State v. Gibbs*, 11th Dist. Geauga No. 2012-G-3123, 2014-Ohio-1341, ¶37-42.

{¶25} Accordingly, I respectfully dissent.