[Cite as *State v. Ringler*, 2009-Ohio-6280.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: Sheila G. Farmer, P.J.
	:	Hon: W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 09-COA-008
GINA L. RINGLER	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Ashland County Court of Common Pleas, Case No. 08-CRI-112
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 4, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RAMONA FRANCESCONI ROGERS PAUL T. LANGE 307 Orange Street Ashland, OH 44805	REBECCA CLARK Box 1144 Brunswick, OH 44212

Gwin, P.J.

{¶1} Appellant Gina L. Ringler appeals the sentence rendered by the Ashland County Court of Common Pleas. The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 2, 2008, Appellant and her fiancé were traveling home from the Ashland Public Library on an electric scooter. Upon coming to a stop at the intersection of Quarry Road and Claremont Avenue, another motorist began revving the engine of his vehicle. Appellant and the other motorist engaged in a verbal altercation. Initially, the Appellant began to dismount the scooter in order to confront the motorist; however, she changed her mind and walked the scooter across the street to a nearby fast food restaurant.

{¶3} The other motorist proceeded to call the Ashland Police Department and file a complaint stating that the Appellant and her fiancé were visibly intoxicated; that Appellant had slammed into the back of his vehicle while he was waiting for the red light; and that Appellant had nearly fallen off her scooter due to her intoxication during their altercation. There were no other witnesses to this incident.

{¶4} The police entered the fast food restaurant and found Appellant and her fiancé. Upon inquiring about the accident, Appellant stated that there had been no such accident, but did admit to engaging in a verbal argument with the other driver. Appellant also indicated that she had only driven the scooter on the "alley" in front of the library and had walked it across the intersection to avoid driving on the road.

{¶5} The police inquired as to what Appellant had to drink that day. Appellant admitted to having consumed five beers that morning. The officer asked the Appellant to

perform a series of physical field sobriety tests. Appellant declined due to the poor condition of her knees. Appellant did submit to a horizontal gaze nystagmus test. Appellant was taken into custody under suspicion of operating a motor vehicle under the influence of alcohol and/or drugs. An investigatory search of the Appellant's backpack produced two unopened bottles of alcohol and a third empty bottle.

{¶6} Appellant was indicted on three felonies (1) Operating a Vehicle under the influence of alcohol or drugs - OVI, a violation of R.C. 4511.19(A)(1)(A), a felony of the third degree; (2) a specification regarding Appellant's prior felony conviction of Operating a Vehicle Under the Influence of Alcohol in Richland County, a violation of R.C. 4511.19(A)1(A), a felony of the fourth degree and (3) Possession of Criminal Tools, a violation of R.C. 2923.24(A), a felony of the fifth degree.

{¶7} On October 2, 2008, Appellant appeared with counsel for arraignment on the three charges. On that date, Appellant submitted to a breathalyzer test and the results were positive at .26. The Court revoked the Appellant's bond and set a date for an evidentiary hearing regarding the bond revocation. This hearing was later cancelled upon the request of the Appellant.

{¶8} On December 15, 2008, Appellant entered a plea of guilty to count one of the indictment, Operating a Motor Vehicle Under the Influence of Alcohol and/or Drugs; the State dismissed Counts Two and Three. The Court deferred sentencing and ordered a presentence investigation report be prepared.

{¶9} On February 2, 2009, Appellant was sentenced to three years incarceration. In addition, Appellant's operator's license was suspended for the remainder of her lifetime.

{¶10} Appellant has timely appealed raising the following two assignment of error:

{¶11} "I. THE PUNISHMENT IMPOSED IS BOTH EXCESSIVE AND NOT IN PROPORTION TO THE CRIME COMMITTED WHICH IS A VIOLATION OF THE APPELLANT'S EIGHTH AMENDMENT RIGHTS.

{¶12} "I. [SIC.] THE IMPOSITION OF A PERIOD OF INCARCERATION GREATER THAN THE MANDATORY MINIMUM WAS NOT GUIDED BY THE FACTORS OF O.R.C. 2929.12 AND IS THEREFORE CONTRARY TO THE LAW AND AN ABUSE OF DISCRETION."

I. & II.

{¶13} In her first assignment of error, Appellant argues the trial court erred in sentencing her to a three-year prison term and a lifetime driver license suspension instead of a lesser term. She argues that this sentence is prohibited by the Eight Amendment's ban on "cruel and unusual punishment. In her second assignment of error, she argues that the trial court did not consider the factors set forth in R.C. 2929.11 and 2929.12 when imposing sentence. As Appellant states the assignments of error are contrary to law for the same reasons, we will consider them together[1].

{¶14} The Eighth Amendment to the United States Constitution prohibits "[e]xcessive" sanctions. It provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[1] We note that the assignments of error identified at page four of appellant's brief do not match the assignments of error argued in the body of her brief. Further, both of appellant's assignments of error are listed as "I." See, page 10; 13.

{¶15} Section 9, Article I of the Ohio Constitution sets forth the same restriction: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

{¶16} "It is well established that sentences do not violate these constitutional provisions against cruel and unusual punishment unless the sentences are so grossly disproportionate to the offenses as to shock the sense of justice in the community. *State v. Chaffin* (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46; *State v. Jarrells* (1991), 72 Ohio App.3d 730, 596 N.E.2d 477." *State v. Hamann* (1993), 90 Ohio App.3d 654, 672, 630 N.E.2d 384, 395; *State v. McDowell*, Licking App. No. 2008-CA-0110, 2009-Ohio-1193 at ¶15.

{¶17} In *State v. Hairston* the Court reiterated, " '[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' "118 Ohio St.3d 289, 293, 888 N.E.2d 1073, 1077, 2008-Ohio-2338 at ¶ 21. [Quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69, 203 N.E.2d 334]. In the case at bar, appellant's sentences are all within statutorily authorized ranges.

{¶18} We further note there is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S.Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi,* Licking App. No.2006-CA-41, 2006-Ohio-5823. An individual has no substantive right to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205, 51 L.Ed.2d 393; *State v. Goggans,* Delaware App. No.2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28.

In other words “[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction ... It is not the duration or severity of this sentence that renders it constitutionally invalid ....“ *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690.

{¶19} In a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The first step is to "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." *Kalish* at ¶ 4. If this first step "is satisfied," the second step requires the trial court's decision be "reviewed under an abuse-of-discretion standard." Id.

{¶20} As a plurality opinion, *Kalish* is of limited precedential value. See *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (characterizing prior case as "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law"). *See, State v. Franklin* (2009), 182 Ohio App.3d 410, 912 N.E.2d 1197, 2009-Ohio-2664 at ¶ 8. "Whether Kalish actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v. Ross,* 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2; *State v. Welch*, Washington App. No. 08CA29, 2009-Ohio-2655 at ¶ 6.

{¶21} Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing.

State v. Welch, supra; *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264 at FN 2.

{¶22} In the first step of our analysis, we review whether the sentence is contrary to law. In the case at bar, appellant was convicted of Operating a Vehicle While Under the Influence of Alcohol and/or Drugs, a felony of the third degree. For a violation of a felony of the third degree, the potential sentence that a court can impose is one, two, three, four or five years. Appellant was sentenced to a term of three years.

{¶23} Upon review, we find that the trial court's sentencing on the charge complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Furthermore, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code and advised appellant regarding post release control. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶24} Having determined that the sentence is not contrary to law we must now review the sentence pursuant to an abuse of discretion standard. *Kalish* at ¶ 4; *State v. Firouzmandi,* supra at ¶ 40. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶25} In this case, the trial court noted Appellant’s lengthy criminal history. Appellant committed her first OVI offense in 1981. At the time of her sentencing in this case, Appellant had previously been convicted of eight (8) prior OVI offenses. Additionally, Appellant violated the trial court’s bond order when she arrived for a court hearing under the influence of alcohol.

{¶26} Appellant had been on probation, community control, and post release control in the past. Appellant had received multiple forms of substance abuse counseling prior to her commission of the offense in this case. Despite her prior involvement in the court system, years of probation, years of substance abuse treatment, appellant continued to abuse alcohol and put the public in danger by driving while intoxicated. All of these factors demonstrate the high likelihood that appellant will reoffend. Based upon appellant's extensive prior history, there was almost nothing before the trial court that indicated that appellant was amenable to community control.

{¶27} Accordingly, there is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of Appellant's case to suggest that her sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. *State v. Firouzmandi,* supra at ¶ 43.

{¶28} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of felony sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11.

{¶29} Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under the Ohio and United States Constitutions in its sentencing appellant to the term of three

years incarceration, and a lifetime driver license suspension. Further, the sentence in this case is not so grossly disproportionate to the offense as to shock the sense of justice in the community.

{¶30} Accordingly, appellant's two assignment of error are denied.

{¶31} The judgment of the Ashland County Court of Common Pleas is affirmed.

By Gwin, J.,

Farmer, P.J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS

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[Cite as *State v. Ringler*, 2009-Ohio-6280.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GINA L. RINGLER	:	
Defendant-Appellant	:	CASE NO. 09-COA-008

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS