

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00111
SHAWN ERIC WHITE	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2008-CR-1140

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 7, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JOHN D. FERRERO
BY: RENEE M. WATSON
Stark County Prosecutor's Office
110 Central Plaza S., Ste. 510
Canton, OH 44702

GEORGE URBAN
111 Second Street N.W.
Suite 302
Canton, OH 44702

Gwin, J.,

{¶1} Defendant-appellant, Shawn E. White, appeals the revocation of his community control and imposition of a five-year prison sentence following an evidentiary hearing in the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In May 2008 appellant choked and struck the mother of his child in the face and head causing visible injury. As a result, the Stark County Grand Jury indicted appellant on one count of domestic violence. Because appellant had previously pleaded guilty to, or had been convicted of domestic violence on two or more previous occasions, domestic violence in this instance is a felony of the third degree.

{¶3} In August 2008, appellant pleaded guilty as charged. Following a pre-sentence investigation, appellant was granted three years community control. Conditions of community control included that appellant abstain from the use of alcohol and that he have no contact with the victim Jamie Sanders. The court reserved a five-year prison sentence in the event appellant failed to comply with any of the terms and conditions of his community control.

{¶4} Appellant was placed on intensive supervision with probation officer Arlune Culler. Appellant was first ordered to complete the program at SRCCC¹. Culler met with appellant at SRCCC in December 2008, and reviewed the rules and conditions of probation with him. Appellant signed the rules and conditions. Culler again reviewed

¹ Stark Regional Community Correction Center is a community based adult correctional facility

appellant's rules and conditions with the appellant upon appellant's release from SRCCC on March 6, 2009.

{¶5} Thirteen days later, Culler received a call from Jamie Sanders. Sanders was upset because appellant was contacting her by phone. Culler went to Sanders home and was present when appellant called and threatened Sanders with physical harm. Appellant's whereabouts at the time were unknown. As a safety precaution, Culler had Sanders accompany him to the probation office while he attempted to locate appellant.

{¶6} Appellant continued to call Sanders's cell phone while she was in Culler's office. Sanders put the phone in speakerphone mode so that Culler could also hear the conversation, and Culler recognized the voice as appellant's.

{¶7} With the help of the Canton Police Department, Culler located appellant at a Dartmouth Street home. When Culler took appellant into custody, he noted that appellant smelled of alcohol, had slurred speech, was staggering, and had bloodshot eyes. Appellant was so impaired that he required assistance to walk to Culler's vehicle. Appellant admitted to Culler that he had been drinking and that he had contacted Sanders. Appellant was subsequently incarcerated, but continued to contact Sanders from the Stark County Jail.

{¶8} As a result of these events, Culler filed a motion to revoke or modify appellant's community control. After hearing the above outlined evidence, and listening to the tape of appellant's phone calls from the jail, the court found appellant violated his community control and imposed the previously reserved five-year sentence.

{¶9} Appellant now challenges the revocation of his community control sanctions, assigning the following two errors for review:

{¶10} “I. THE FINDING OF THE TRIAL COURT THAT APPELLANT VIOLATED THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE.

{¶11} “II. THE IMPOSITION OF A FIVE (5) YEAR PRISON TERM UPON APPELLANT FOR VIOLATING THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS CONTRARY TO LAW.”

I.

{¶12} In his first assignment of error, appellant asserts there was insufficient evidence presented to support the trial court's revocation of his community control. We disagree.

{¶13} A community control revocation hearing is not a criminal trial. The State therefore need not establish a community control violation by proof beyond a reasonable doubt. *State v. Ritenour*, Tuscarawas App. No. 2006AP010002, 2006-Ohio-4744 at ¶ 36; *State v. Spencer*, Perry App. No. 2005-CA-15, 2006-Ohio-5543 at ¶ 12; *State v. Henry*, Richland App. No. 2007-CA-0047, 2008-Ohio-2474. As this Court noted in *Ritenour*, “Rather, the prosecution must present substantial proof that a defendant violated the terms of his or her probation...Accordingly, in order to determine whether a defendant's probation revocation is supported by the evidence, a reviewing court should apply the ‘some competent, credible evidence’ standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578...This highly deferential

standard is akin to a preponderance of evidence burden of proof..." *State v. Ritenour*, supra at ¶36. (Citations omitted).

{¶14} Once a court finds a defendant violated the terms of probation, the decision whether to revoke probation lies within the court's sound discretion...." *State v. Ritenour*, supra at ¶ 37. (Citations omitted). Thus, a reviewing court will not reverse a trial court's decision absent an abuse of discretion. *State v. Sheets* (1996), 112 Ohio App.3d 1, 677 N.E.2d 818; *State v. Ritenour*, supra at ¶ 37. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Maurer* (1984), 15 Ohio St.3d 239, 253, 473 N.E.2d 768.

{¶15} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183. Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St.3d 71, 523 N.E.2d 846.

{¶16} We find that the record contains sufficient evidence to support a finding that appellant did violate the conditions of his community control sanctions by consuming alcohol and contacting the victim Jamie Sanders.

{¶17} Appellant reviewed the rules and conditions of probation and signed them while he was at SRCCC. He again reviewed the rules and conditions upon his release from SRCCC on March 6, 2009. Conditions of community control included that appellant

abstain from the use of alcohol and that he have no contact with the victim Jamie Sanders.

{¶18} Appellant telephoned Ms. Sanders while she was in the office of appellant's probation officer, Arlune Culler. Culler listened-in on the conversation and recognized appellant's voice. (T. at 13-14). When Culler took appellant into custody, he noted that appellant smelled of alcohol, had slurred speech, was staggering, and had bloodshot eyes. (T. at 12-13). Appellant was so impaired that he required assistance to walk to Culler's vehicle. (Id.). Appellant admitted to Culler that he had been drinking and that he had contacted Sanders. (T. at 21; 29-30). The tape-recorded conversations between appellant and Ms. Sanders was played for the trial court. (T. at 31).

{¶19} As an appellate court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758. Accordingly, a judgment supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶20} Based upon the above, we find there was sufficient evidence appellant violated the terms of his community control, and the trial court did not abuse its discretion in its decision to revoke appellant's community control sanction.

{¶21} Appellant's first assignment of error is overruled.

II.

{¶22} In his second assignment of error, appellant argues that his five year prison term is extreme considering the nature and seriousness of his violation and is therefore contrary to law. We disagree.

{¶23} 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.*

{¶24} 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, also, *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; *State v. Ringler* (Nov. 4, 2009), Ashland App. No. 09-COA-008. 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 FN2; *State v. Ringler*, supra.

{¶25} The Supreme Court held, in *Kalish*, that the trial court's sentencing decision was not contrary to law. "The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law." *Kalish* at ¶ 18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and that there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable." *Kalish* at ¶ 20; *State v. Wolfe*, Stark App. No. 2008-CA-00064, 2009-Ohio-830 at ¶ 25.

{¶26} The relevant sentencing law is now controlled by the Ohio Supreme Court's decision in *State v. Foster*, i.e. " * * * 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." 109 Ohio St.3d 1, 30, 2006-Ohio-856 at ¶ 100, 845 N.E.2d 470, 498.

{¶27} Accordingly, if appellant violates his community control sanctions, the trial court must conduct a second sentencing hearing following the community-control violation and at that time comply with the decision in *Foster*. Thus, at the time of the second sentencing hearing, appellant could be sentenced to a term of incarceration either less than, but not more than, the five year term that the court advised at the original sentencing hearing on September 8, 2008. The trial court has full discretion to

impose a prison sentence within the statutory range and is no longer required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences. *State v. Hines*, Ashland App. No. 2005-COA-046, 2006-Ohio-4053 at ¶ 9; *State v. Wolfe*, supra.

{¶28} In the case at bar, at the original sentencing hearing in this case, the trial court notified appellant that the prison term to be imposed upon revocation of his community control sanction would be five years. (See, Judgment Entry, filed September 16, 2008). When the trial court subsequently revoked appellant's community control, it imposed that very sentence. Upon review, we find that the trial court's sentencing on the charge of domestic violence, a felony of the third degree, 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.

{¶29} 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*, Licking App. No. 2006-CA-41, 2006-Ohio-5823 at ¶ 40. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶30} In the case at bar, the trial court conducted an evidentiary hearing upon the motion to revoke appellant's community control sanctions. Further, the record in the

case at bar indicates that this is appellant's third conviction for domestic violence. Further, the trial court had the benefit of a pre-sentence investigation report at the original sentencing hearing. (See, Judgment Entry, filed August 22, 2008).

{¶31} Prior to the violation in the case at bar, appellant had completed the residential program at SRCCC and was placed on intensive supervision probation. In spite of the resources provided by the court to assist appellant, appellant refused to comply with the trial court's orders that he refrain from using alcohol and that he refrain from contacting Ms. Sanders. "What then could the court do but order appellant incarcerated? It is regrettable that appellant's needs could not be met, but once the community resources have been exhausted, the court's alternatives to incarceration are gone." *State v. Hardy*, Guernsey App. No. 01 CA15, 2002-Ohio-899. [Gwin, J. dissenting]

{¶32} 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 his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. *State v. Firouzmandi*, supra at ¶ 43.

{¶33} Based on the record, 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 five years incarceration, further, the sentence in this case is not

so grossly disproportionate to the offense as to shock the sense of justice in the community.

{¶34} Accordingly, appellant's second assignment of error is denied.

{¶35} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

WSG:clw 1130

