

[Cite as *State v. Fleming*, 2015-Ohio-2236.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ANTHONY FLEMING

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 2014 CA 00174

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 2014 CR 00072

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 8, 2015

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Anthony Fleming appeals his sentence entered in the Stark County Court of Common Pleas on one count of domestic violence following a guilty plea.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On December 14, 2013, Appellant Anthony Fleming struck his live-in girlfriend in the nose with his head, causing her to suffer a non-displaced nasal bone fracture, Bill of Particulars March 28, 2014.

{¶4} On February 25, 2014, Appellant Anthony Fleming was indicted on one count of Felonious Assault, in violation of R.C. §2903.11, a felony of the second degree, and one count of Domestic Violence, in violation of R.C. §2919.25, a felony of the fourth degree.

{¶5} At his arraignment, Appellant entered a plea of not guilty.

{¶6} On June 30, 2014, Fleming appeared before the trial court and changed his plea from not guilty to guilty to the charge of domestic violence, a felony of the fourth degree. The charge of felonious assault was dismissed by the state.

{¶7} Upon accepting his plea, the trial court informed Appellant that the court could sentence Appellant to a number of alternatives including community control for a period of up to five years, a prison term, jail, a community based correction facility, a halfway house or judicial release.

{¶8} The trial court further advised Appellant: “One of the things I am going to look to is how you deal with probation, whether you arrive on time, answer their

questions fully and honestly, have a good attitude, no use of controlled substances or alcohol, no criminal or traffic citation.” (T. Plea, PSI, June 30, 2014 at 8).

{¶9} The trial court ordered Appellant to return for a sentencing hearing on August 4, 2014.

{¶10} At the time he entered his plea, he was on probation for a felony in Portage County.

{¶11} On August 4, 2014, Appellant failed to appear for the sentencing hearing and a *capias* was issued for his arrest.

{¶12} On August 11, 2014, Appellant appeared before the trial court for sentencing. The trial court sentenced Appellant to eighteen (18) months in prison. Appellant was instructed that he could apply for judicial release after a period of six (6) months.

{¶13} Appellant now appeals, raising the following assignment of error for review:

ASSIGNMENT OF ERROR

{¶14} “I. APPELLANT'S SENTENCE WAS CONTRARY TO LAW.”

I.

{¶15} Appellant, in his sole Assignment of Error, argues the trial court erred in imposing the maximum prison term. We disagree.

{¶16} In *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, ¶ 4, the Supreme Court of Ohio set forth the following two-step approach in reviewing a sentence: “First, they 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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.”

{¶17} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶18} As this Court explained in *State v. Robinson*, 5th Dist. Muskingum No. CT2012–0005, 2013–Ohio–2893, ¶ 19–20:

Where the record lacks sufficient data to justify the sentence, the court may well abuse its discretion by imposing that sentence without a suitable explanation. Where the record adequately justifies the sentence imposed, the court need not recite its reasons. In other words, an appellate court may review the record to determine whether the trial court failed to consider the appropriate sentencing factors. *State v. Firouzmandi*, 5th Dist. No. 2006–CA41, 2006–Ohio–5823 at ¶ 52.

{¶19} Accordingly, appellate courts can find an “abuse of discretion” where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Cincinnati v. Clardy*, 57 Ohio App.2d 153, 385 N.E.2d 1342 (1st Dist.1978). An “abuse of discretion” has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States*, 478 F.2d 139, 147 (8th Cir.1973).

{¶20} In the case at bar, Appellant pled guilty to one count of Domestic Violence, in violation of R.C. §2929.25(A), a fourth degree felony.

{¶21} Pursuant to R.C. §2929.14(A), a felony of the fourth degree is punishable as follows:

{¶22} “(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.”

{¶23} The trial court herein sentenced Appellant to eighteen (18) months, the maximum sentence for a fourth degree felony.

{¶24} 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 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.

{¶25} Further, the trial court noted the injuries sustained by the victim, which included a broken nose, the number of protection orders filed against Appellant in the past, statements made by Appellant about women as contained in his Pre-Sentence Investigation report, the fact that Appellant was on probation at the time of this offense, and Appellant's initial failure to show for sentencing. (T. at 3-5). The trial court also made note of Appellant's driving record which listed over twenty (20) license suspensions. (T. at 4).

{¶26} The August 20, 2014, Judgment Entry in this matter also states:

{¶27} “The Court has considered the record, oral statements, any victim impact statement and pre-sentence report prepared, as well as the principles and purposes of

sentencing under Ohio Revised Code Section 2929.11 and has balanced the seriousness and recidivism factors [sic] Ohio Revised Code Section 2929.13.”

{¶28} Based on the foregoing, we find that the trial court did not err in imposing the maximum sentence and that said sentence is not contrary to law.

{¶29} Appellant’s sole Assignment of Error is overruled.

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

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/d 0518

