

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 25
v.	:	T.C. NO. 07 CR 1144
	:	
VICTOR ARNOLD, JR.	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

**OPINION**

Rendered on the 17<sup>th</sup> day of July, 2009.

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FROELICH, J.

{¶ 1} Victor Arnold, Jr., entered a negotiated plea of guilty to possession of crack cocaine in an amount more than five grams but less than ten grams, in violation of R.C. 2925.11(A), a third degree felony. In exchange for the plea, the State dismissed one count of trafficking in crack cocaine, one count of trafficking in heroin, one count of possession of

heroin, one count of possession of criminal tools, and one count of tampering with evidence. The trial court sentenced Arnold to a mandatory term of five years in prison, which was the maximum sentence, and imposed a fine of \$10,000 and court costs.<sup>1</sup>

{¶ 2} Arnold appeals from his sentence, raising one assignment of error:

{¶ 3} “I. THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO THE MAXIMUM TERM OF INCARCERATION.”

{¶ 4} In his sole assignment of error, Arnold claims that trial court abused its discretion by failing to consider the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12 at the sentencing hearing. Arnold asserts that the trial court imposed the maximum sentence based solely on his criminal record.

{¶ 5} We review a felony sentence using a two-step procedure. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4. “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.’” *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio-5775, at ¶4, quoting *Kalish* at ¶4. “If this step is satisfied, the second step requires that the trial court’s decision be ‘reviewed under an abuse-of-discretion standard.’” *Id.* An abuse of discretion is “‘more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 6} Since *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court has

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<sup>1</sup> At the sentencing hearing, the trial court also ordered a five-year license suspension. That order was not included in the final judgment entry.

discretion to impose any sentence within the statutory range, and the court is no longer required to make findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *Id.* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus. In exercising its discretion, however, the trial court must carefully consider the statutes that apply to every felony offense, including R.C. 2929.11 and 2929.12. *Mathis* at ¶38; *State v. Gabbard*, Clark App. No. 07 CA 133, 2009-Ohio-2739, at ¶6.

{¶ 7} R.C. 2929.11(B) requires that the sentence imposed for a felony “be reasonably calculated to achieve the two overriding purposes of felony sentencing, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11(A).

{¶ 8} Unless otherwise required by R.C. 2929.13 and R.C. 2929.14, the trial court has discretion “to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.” R.C. 2929.12(A). In exercising that discretion, however, the court must consider factors relating to the seriousness of the conduct and to the likelihood of the offender’s recidivism, as set forth in R.C. 2929.12(B)-(E). The trial court may also consider any other factors that are relevant to achieving the purposes and principles of sentencing. R.C. 2929.12(A).

{¶ 9} While it is preferable that the trial court state on the record that it has considered the statutory criteria, the statute does not require the court to do so. Instead, absent an

affirmative showing to the contrary, an appellate court will presume that the trial court did consider the statutory factors. *State v. Latham*, Champaign App. No. 07-CA-23, 2008-Ohio-4734, at ¶11; *Kalish* at ¶18, n.4.

{¶ 10} At the sentencing hearing, Arnold’s counsel told the court that Arnold admitted his offense, acknowledged that he was a drug addict, and had sent counsel and the probation department letters “ask[ing] for help to get off of drugs.” Counsel expressed Arnold’s desire to get back to his fiancée and young child as soon as possible in order to meet his family obligations and be with his child. Counsel asked the court to consider the inequity in sentencing for crack cocaine versus powder cocaine offenses.

{¶ 11} Exercising his right of allocution, Arnold informed the court that he had been using drugs daily for eight or nine months and that he recognized that he had hurt those who love him with his drug use. Arnold stated, “I’m not a bad person. And never robbed, stealed [sic], or killed for my drugs. I just know now what’s more important to me, and that’s my family.”

{¶ 12} In response, the State recommended a maximum sentence, noting Arnold’s past criminal record and that the State had dismissed several other charges as part of the plea agreement, including a second degree felony.

{¶ 13} The trial court imposed the maximum sentence of five years in prison. In doing so, the court indicated that it had reviewed the presentence investigation report. The court cited to Arnold’s “pretty significant” criminal record, which included a juvenile felonious assault, possession of crack cocaine in 2000, and breaking and entering and possession of criminal tools in 2003. Due to these convictions, Arnold had twice served sentences in prison. The court

stated:

{¶ 14} “\*\*\* And instead of getting help after that, you’ve now committed another offense of drug abuse.

{¶ 15} “It’s never too late to get help, Mr. Arnold; but it’s too late to ask the Court to help you. If you want help for your drug problem, you’re going to have to do it on your own time. Court’s job is not to help you. The Court’s job is to punish you.

{¶ 16} “Based on your prior record, it’s the order of the Court that you be sentenced to five years in the Ohio State penitentiary. \*\*\*”

{¶ 17} In its final judgment entry setting forth Arnold’s sentence, the trial court expressly stated that it had “considered the record, oral statements, any victim impact statement and presentence 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 [under] Ohio Revised Code Section 2929.12.”

{¶ 18} Upon review of the record, we find no affirmative showing that the trial court failed to consider the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12 at the sentencing hearing. Although we disagree with the court’s statement that its job is not “to help”, but rather only “to punish,” punishing the offender is one of the two statutory overriding purposes of felony sentencing, and the multiple charges and Arnold’s criminal record was perhaps indicative of the court’s need to protect the public by imposing the maximum sentence. The court did not orally inform Arnold that it had considered the necessary statutory factors, but the judgment entry expressly stated that the court had considered the principles and purposes of sentencing set forth in R.C. 2929.11

and the factors set forth in R.C. 2929.12. Because the trial court complied with all applicable rules and statutes in imposing the sentence, Arnold has not demonstrated that his sentence was contrary to law. Based on Arnold's criminal record and the nature of the plea agreement, we likewise find that his sentence was not an abuse of discretion.

{¶ 19} The assignment of error is overruled.

{¶ 20} The trial court's judgment will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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Hon. Douglas M. Rastatter