

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 91
v.	:	T.C. NO. 08 CR 434
TRACY D. MELSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 6th day of November, 2009.

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Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} Tracy D. Melson appeals from a judgment of the Clark County Court of Common Pleas, which imposed a maximum sentence after Melson pled guilty to operating a vehicle under the influence of alcohol (“OVI”).

{¶ 2} On May 4, 2008, Melson was stopped for speeding on Interstate 70 in Clark County. When the state trooper who made the stop approached the vehicle, he detected a strong odor of alcohol and observed that Melson's eyes were bloodshot and glassy. Melson was subsequently arrested and submitted to a breathalyzer test, which indicated that his blood alcohol content was .217.

{¶ 3} On May 27, 2008, Melson was indicted for OVI, in violation of R.C. 4511.19(A)(1), a felony of the fourth degree. The indictment included the specification that Melson had been convicted of five or more prior OVI offenses in the prior twenty years, including two within the past two years. On August 15, 2008, Melson pled guilty to the charged offense pursuant to a plea agreement, whereby a presentence investigation would be completed and the State would not make a recommendation as to sentencing.

{¶ 4} Melson was sentenced on September 5, 2008. At the sentencing hearing, the trial court noted that, in addition to his five prior OVI offenses, Melson had an additional OVI offense pending at the time of the hearing, and that he had eleven prior offenses for driving under suspension or without a driver's license. The court stated:

{¶ 5} "I'm in complete shock to hear that the defendant has never been in county jail. OVI number four, August 24, 2006, probation; OVI number five, February 15, 2007, probation; driving under suspension number ten, March 10, 2008, probation. Driving under suspension, number eleven, March 26, 2008, probation. Your luck has run out Mr. Melson.

{¶ 6} "I don't think you have learned from these crimes. I don't think you're ever going to learn. I think the only way the court can protect the community is to have you off the roads for as long as possible."

{¶ 7} The court then sentenced Melson to the maximum term of thirty months in prison, a \$10,000 fine, and a lifetime driver's license suspension, plus court costs.

{¶ 8} Melson appeals from his conviction, raising one assignment of error:

{¶ 9} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM POSSIBLE PENALTIES FOR THE OFFENSE FOR WHICH HE WAS CONVICTED."

{¶ 10} Melson claims that his five prior convictions for OVI "should not serve as an aggravating factor in sentencing to elevate the offense to one deserving the maximum possible punishment" because these convictions were already taken into account by the legislature in making a sixth OVI offense a felony of the fourth degree. He also claims that the trial court's finding that he could not be rehabilitated, without any evidence to support that conclusion, violates the spirit of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶ 11} 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.

{¶ 12} Since *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court has discretion to impose a sentence within the statutory range, and the court is no longer required to make findings or give its reasons for imposing a maximum sentence. *Id.* at ¶100; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶35. 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.

{¶ 13} 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).

{¶ 14} 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 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. See, also, *State v. Arnold*, Clark App. No. 2008 CA 25, 2009-Ohio-3510, at ¶5-9.

{¶ 15} It is undisputed that Melson had a lengthy history of driving under the influence and that he had not responded favorably to previous sanctions, as

demonstrated by his repeated offenses. Melson's attorney stated at the sentencing hearing that, during his incarceration, Melson "has learned *** that although people might want to think that DUI is a victimless offense, he and his family have become victims because of his behavior." This remark may have suggested to the judge a lack of appreciation by Melson of the dangerousness to the public of the offense. The trial court expressed legitimate concern for the public safety based on Melson's recidivism and the high blood alcohol content in the current offense. The sentence was within the statutory range established by the legislature and reflected the seriousness of Melson's conduct. Moreover, the trial court's belief that Melson could not be rehabilitated did not violate the spirit of *Foster*. Under *Foster*, a trial court has broad discretion and may consider all relevant and lawful factors in imposing sentence; *Foster* does not prohibit a trial court from explaining the bases for the sentence imposed.

{¶ 16} The trial court's decision to impose the maximum sentence was not contrary to law or an abuse of discretion.

{¶ 17} The assignment of error is overruled.

{¶ 18} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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