[Cite as *State v. Cave*, 2010-Ohio-1237.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-6
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-684
v.	:	
	:	(Criminal Appeal from
ROBERT CAVE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	
	:	

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O P I N I O N

Rendered on the 26th day of March, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Robert Cave appeals from his five-year sentence imposed following his conviction for Operation of a Motor Vehicle While Under the Influence of Alcohol (OMVI), a felony of the third degree. Cave maintains that the trial court abused its discretion in imposing a maximum sentence, and that the

sentence is contrary to law. We conclude that Cave's sentence is not contrary to law and that the trial court did not abuse its discretion in imposing a maximum sentence. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In the early morning hours, one day in mid-August, 2008, Sergeant Tate of the Springfield Police saw a Chevy Blazer drive past a house on Selma Road, that he had under surveillance for suspected prostitution and drug activity. The Blazer pulled to the curb, then backed up about twenty yards, stopping in front of the suspicious house. As Cave exited the vehicle, Sergeant Tate drove by and ran the license plates. He found that the plates were registered to a Ford and that the owner of the plates, Cave, had a suspended license.

{¶ 3} Sergeant Tate circled the block and saw a man who fit Cave's description get into the driver's seat and drive away. The officer followed the Blazer and activated his lights. Cave did not stop, instead, he glanced at the rear view mirror and then accelerated. He drove another block before he braked hard, stopped the car, and got out. Sergeant Tate approached and repeatedly ordered Cave to get back into the vehicle; Cave eventually complied. Sergeant Tate noticed that Cave's speech was slurred, and he could smell alcohol coming from inside the Blazer. During field sobriety tests, Sergeant Tate could also smell alcohol on Cave's breath. Cave performed poorly on those tests, and he was arrested for OMVI.

{¶ 4} Cave was indicted on two counts of OMVI, pursuant to R.C. 4511.19(A)(1)(a) and 4511.19(A)(2). He pled guilty to the first count, and the second count was dismissed. The trial court ordered a maximum five-year

sentence, imposed a fine and court costs, ordered the Blazer forfeited, and suspended Cave's driving privileges for life. From his sentence, Cave appeals.

II

{¶ 5} Cave's sole assignment of error is as follows:

{¶ 6} "THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE ON APPELLANT BECAUSE IT WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND AN ABUSE OF DISCRETION."

{¶ 7} Cave argues that his five-year sentence is contrary to law because the trial court failed to "expressly indicate that it even considered the purposes and principles of sentencing under R.C. 2929.11 or the seriousness and recidivism factors under R.C. 2929.12." Alternatively, he insists that the trial court abused its discretion in imposing that sentence. We conclude that Cave's sentence is not contrary to law and that the trial court did not abuse its discretion in imposing a maximum sentence.

{¶ 8} When reviewing felony sentences, "an appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G). If on appeal the trial court's sentence is, for example, outside the permissible statutory range, the sentence is clearly and convincingly contrary to law." *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶¶14-15.

{¶ 9} When a trial court imposes a sentence that falls within the applicable statutory range, the court is required to consider the purposes and principles set forth

in R.C. 2929.11 as well as the recidivism factors enumerated in R.C. 2929.12. *State v. Hawkins,* Greene App. No. 06CA79, ¶8, citing *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855. For any defendant convicted of OMVI as a felony of the third degree, the maximum sentence allowed by law is five years. R.C. 2929.14(A)(3). Thus, Cave's sentence falls within the lawful statutory range. Nevertheless, it is Cave's contention that his sentence is contrary to law because the trial court did not consider either R.C. 2929.11 or R.C. 2929.12 before imposing his sentence.

{¶ 10} Although it is true that the trial court did not specifically cite either statute during the sentencing hearing, the court did state in its sentencing entry that: "[t]he court has considered * * * 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." Because a trial court speaks only through its journal entries, we conclude that Cave's sentence is not clearly and convincingly contrary to law merely because the trial court failed to specifically cite either statute during his sentencing hearing. See, e.g., *State v. Hatfield,* Champaign App. No. 2006 CA 16, 2006-Ohio-7090, ¶9, citing *Schenley v. Kauth* (1953), 160 Ohio St.109, 111. Furthermore, even if there is no specific mention of those statutes in the record, "it is presumed that the trial court gave proper consideration to those statutes." *Kalish,* supra, at fn 4.

{¶ 11} A sentence, if not clearly and convincingly contrary to law, must be reviewed under an abuse of discretion standard. *State v. Bowshier,* Clark App. No. 08-CA-58, 2009-Ohio-3429, ¶6, citing *Kalish,* supra.

{¶ 12} Both parties, in addressing the abuse of discretion standard of review,

assert that an abuse of discretion means more than an error of law. Going back at least as far as 1940, many Ohio appellate opinions have stated that an abuse of discretion "means more than an error of law or judgment", which incorrectly implies that a trial court may commit an error of law without abusing its discretion. *State v. Bowles,* Montgomery App. No. 23037, 2010-Ohio-278, ¶15, citation omitted. To the contrary, "[n]o court - not a trial court, not an appellate court, nor even a supreme court - has the authority, within its discretion, to commit an error of law." Id. at ¶26. The abuse of discretion standard is more accurately defined as "'[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.'" Id. at ¶18, quoting Black's Law Dictionary, Eighth Edition (2004), at 11.

{¶ 13} Before imposing Cave's sentence, in addition to R.C. 2929.11 and 2929.12, the trial court considered the facts underlying Cave's conviction, the pre-sentence investigation report, and a statement from defense counsel, with which Cave agreed. Furthermore, the trial court was aware that Cave was still on community control from his most recent OMVI conviction. The trial court offered an extensive explanation at the sentencing hearing for imposing a maximum sentence on Cave.

{¶ 14} The court explained that the "[p]re-sentence investigation report does reveal that this is the Defendant's sixth DUI offense. It's also his sixth driving under suspension and/or no operator's license offense. It's interesting to note that in his last DUI conviction, which was a felony in Cincinnati, that the Judge imposed a lifetime driver's license suspension upon the Defendant and here the Defendant is

driving again.

{¶ 15} "And prosecutor makes a good point. The Defendant stated to the officer that he had just bought the Chevy Blazer. Makes one wonder why a person would buy a Chevy Blazer if that person had a lifetime license suspension. It is probative towards the intent of the Defendant to continue driving and continue violating the Court's order that his license be suspended for lifetime.

{¶ 16} "I listened to the statement the Defendant made – well, actually, his attorney made the statement, but the Defendant adopted it when he said his Attorney's statement pretty much summed up everything. It is interesting to think that the Defendant didn't intend to drive that night, yet he did drive that night. He didn't intend to consume alcohol, but, yet, he consumed alcohol. That he didn't intend to commit a crime, yet he committed a crime. That alcohol shouldn't be around him, when in reality, he shouldn't be around alcohol.

{¶ 17} "That the Defendant could not have been too intoxicated because he just got off work. I don't buy that for several reasons. One, if he wasn't intoxicated, why did he refuse the breath test. And two, I have a report here from the officer indicating that he didn't do so well on several field sobriety tests. And there is nothing to suggest that he wasn't drinking while he was at work.

{¶ 18} "I also find it interesting to note that the Defendant's first statement, in a statement to the probation officer that he loaded up his Chevy Blazer with lettuce to drop off for elderly and needy people. I don't know what that has to do with this case other than maybe he's trying to look good. But it makes me wonder how he was going to drop that lettuce off to people anyway if he was going to have to be

driving.

{¶ 19} "And the Defendant is asking for a program. I don't know, Mr. Cave, maybe after my first DUI I would have considered getting myself into a program. Certainly after my second DUI I would have gotten myself into a program. You had a third and a fourth DUI and I don't know if you got yourself into a program or not. Finally, after your fifth DUI, which was a felony, the Court sentenced you to a program. And here you are two years later drinking and driving again.

{¶ 20} "So I agree with the Prosecutor that the ultimate issue in this case is the safety of the community. I'm not here to help you. It's your responsibility to help yourself. It doesn't appear you've done a very good job of that. The job of the criminal justice system is to protect the community and based upon your record and your past conduct it does seem likely that you'll re-offend. And you'll certainly not follow the Court's orders not to drive.

{¶ 21} "So, basically, you've left this Court with the – or in the situation of knowing that as soon as you're a free man, you'll be out driving. And quite possibly you'll be driving under the influence of alcohol. So I agree with the Prosecutor that the only way to protect the community is to incapacitate you for as long as possible. That way when you kill somebody, which you will do if you continue drinking and driving, whether it be yourself or someone else, it won't be on my watch."

{¶ 22} We agree with the reasons expressed by the trial court, quoted above, for imposing the maximum, five-year sentence. Under the circumstances of this case, we find the five-year sentence to be eminently reasonable and appropriate. Cave's sole assignment of error is overruled.

III

{¶ 23} Cave's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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

Copies mailed to:

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