

[Cite as *State v. Hardy*, 2015-Ohio-2206.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 14 MA 30
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JOSEPH HARDY,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 13 CR 1277.

JUDGMENT: Affirmed.

APPEARANCES:
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 4, 2015

[Cite as *State v. Hardy*, 2015-Ohio-2206.]
DeGENARO, J.,

{¶1} Defendant-Appellant Joseph Hardy appeals the March 14, 2014 judgment of the Mahoning County Court of Common Pleas convicting him of one count of forgery and sentencing him accordingly. On appeal, Hardy contends his sentence was erroneous. Upon review, Hardy's assignment of error is meritless. Currently there is a split within the state and within this appellate district regarding the standard of review to apply to sentencing appeals post H.B. 86, and there is a case pending before the Ohio Supreme Court to resolve the issue. However, regardless of which standard of review is applied—the *Hill* contrary to law/abuse of discretion two-prong analysis, or the *Wellington* R.C. 2953.08(G) contrary to law analysis—Hardy's sentence was proper. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On December 5, 2013, the grand jury indicted Hardy on one count of forgery, R.C. 2913.31(A)(1) and (C)(1), a fifth-degree felony. Hardy was accused of altering an auto insurance card and presenting it to the Ohio Bureau of Motor Vehicles in an attempt to avoid a license suspension. Hardy was arraigned, pled not guilty and retained counsel. He was released on bond, and later executed a speedy trial waiver on January 6, 2014.

{¶3} Hardy ultimately entered into a Crim.R. 11 agreement with the State. Pursuant to the agreement, Hardy agreed to plead guilty to the indicted charge. In exchange, the State agreed to recommend a community control sanction. A plea hearing was held during which the trial court engaged in a colloquy with Hardy concerning the rights he would give up by pleading guilty. The trial court accepted Hardy's plea as knowingly, voluntarily and intelligently made and continued sentencing so that a presentence investigation could be prepared.

{¶4} A sentencing hearing was held on March 14, 2014. The State kept its promise to recommend community control. Defense counsel also advocated for community control. After being asked by the trial court, Hardy gave a statement in mitigation of punishment. After considering the information presented at the hearing and in the PSI, along with R.C. 2929.11, 2929.12, 2929.13 and 2929.14, the trial court sentenced Hardy to six months in prison, with jail-time credit of one day and a

discretionary term of up to three years of post-release control. The court imposed no fine.

Sentencing

{¶5} In his sole assignment of error, Hardy asserts:

{¶6} "Appellant's sentence is contrary to law because the trial court did not conduct a proper analysis of the seriousness of Appellant's conduct and the likelihood of recidivism."

{¶7} This court is currently split as to the standard of review to apply in felony sentencing cases. See *State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919 (Vukovich, J., Donofrio, J., majority with DeGenaro, J., concurring in judgment only with concurring in judgment only opinion); *State v. Wellington*, 7th Dist. No. 14 MA 115, 2015-Ohio-1359 (Robb, J., DeGenaro, J., majority with Donofrio, J. concurring in judgment only with concurring in judgment only opinion).

{¶8} One approach, as adopted in *Hill* is to apply the test set forth in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26. Under the *Kalish* test, we must first examine the sentence to determine if it is "clearly and convincingly contrary to law." *Id.* (O'Connor, J., plurality opinion). A trial court's sentence would be contrary to law if, for example, it were outside the statutory range, in contravention to a statute, or decided pursuant to an unconstitutional statute. *Id.* at ¶ 15 (O'Connor, J., plurality opinion.) In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶13-14 (O'Connor, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. *Id.* at ¶17 (O'Connor, J., plurality opinion). Thus, we also apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶17 (O'Connor, J., plurality opinion).

{¶9} The other approach, as adopted in *Wellington*, is to strictly follow R.C. 2953.08(G), which provides that appellate courts are only to review felony sentences

to determine if they are contrary to law. R.C. 2953.08(G) does not contain an abuse of discretion component.

{¶10} The issue of which felony sentencing standard of review to apply is currently pending before the Ohio Supreme Court. The Court has accepted the certified question: “[D]oes the test outlined by the [c]ourt in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)?” *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453.

{¶11} As will be seen in this case, regardless of which test we apply here, appellant’s sentence must be upheld.

{¶12} Turning to the first prong of the *Kalish* test, Hardy was afforded his allocution rights pursuant to Crim.R. 32(A)(1); after being asked by the trial court, Hardy gave a statement in mitigation of punishment. The trial court properly notified Hardy that upon his release from prison he could be subject to post-release control for up to three years, and explained the ramifications of violating post-release control. R.C. 2967.28(C). And the six-month prison sentence Hardy received is at the bottom of the 6-12 month range for a fifth-degree felony. See R.C. 2929.14(A)(5).

{¶13} Further, in its sentencing entry, the trial court stated it had considered the purposes and principles of felony sentencing and the sentencing factors. See R.C. 2929.11 and R.C. 2929.12. Contrary to Hardy’s contentions, “it is not required that the sentencing court state on the record at the sentencing hearing that it has considered these statutes.” *State v. Bellard*, 7th Dist. No. 12 MA 97, 2013-Ohio-2956, ¶11. “[E]ven in the case of a completely silent record—no mention of the factors in the entry or the hearing—this court has held that ‘it will be presumed that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so unless the sentence is strikingly inconsistent with the applicable factors.’ ” *Id.*, quoting *State v. James*, 7th Dist. No. 07 CO 47, 2009–Ohio–4392, ¶50 (citation omitted). See also *State v. Parsons*, 7th Dist. No. 12 BE 11, 2013–Ohio–1281, ¶12.

{¶14} From the record, it is clear that the trial court took relevant factors into consideration. Hardy had a lengthy prior criminal history including multiple felonies.

Furthermore, Hardy acquired new charges when he was free on bond while the instant forgery charge was pending. And at the time of sentencing, Hardy had criminal cases pending in Campbell, Struthers, and Boardman, involving possession of drugs and illegal conveyance of a weapon and/or drugs. The trial court described Hardy's record as "atrocious," while noting that Hardy was only 31 years old.

{¶15} At sentencing, the trial court also expressly stated it considered the PSI and Hardy's criminal history:

* * * Taking everything into consideration, the pre-sentence investigation, the negotiations that took place with the plea in the matter, and recognizing that unless the prosecutor is told by someone or somehow tries to find out what the past record is of somebody like this, it becomes a problem. And particularly when you got all these pending cases and definitely under a community control sanction at the time this happened.

{¶16} Thus, Hardy's sentence reflects that the trial court did consider R.C. 2929.11 and R.C. 2929.12.

{¶17} Hardy also argues very briefly in passing that a prison sentence was contrary to law pursuant to R.C. 2929.13(B). He claims the trial court failed to consider the factors in that subsection, which pertain to sentencing a fourth or fifth-degree felon to prison as opposed to community control.

{¶18} As an initial matter, however, the sentencing entry indicates the trial court considered R.C. 2929.13.

{¶19} Further, R.C. 2929.13(B)(1)(a) provides in relevant part:

Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense.

{¶20} Here, Hardy was convicted of several prior felonies, thus community control was not mandatory. See also *State v. Esmail*, 7th Dist. No. 11 CO 35, 2013-Ohio-2165, ¶35.

{¶21} R.C. 2929.13(B)(1)(b) goes on to state in relevant part:

The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

* * *

(iii) The offender violated a term of the conditions of bond as set by the court.

* * *

(x) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(xi) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

{¶22} Here, Hardy was on probation when he committed the instant offense, committed a new offense while out on bond on the current charge, and had previously served a prison term, thus it was within the sentencing court's discretion to sentence him to a prison term.

{¶23} If we were to apply the standard of review articulated by R.C. 2953.08(G) and applied in *Wellington*, because Hardy's sentence is not contrary to law we would

end our analysis here and affirm the trial court's sentence.

{¶24} Given the split in this district and pending the Ohio Supreme Court's resolution of the issue in *Marcum* though, we will turn to the second part of the *Kalish* sentencing analysis, and consider whether the sentence chosen by the trial court was or was not an abuse of discretion. Although the crime might not have been the most serious, on balance, the recidivism factors support a prison sentence in this case. Namely, Hardy had a lengthy criminal history including felonies. He was already under a community control sanction at the time the instant forgery offense was committed. He committed a new offense while out on bond in this case. See generally R.C. 2929.12(D)(1)-(3) (the applicable factors indicating that recidivism is more likely).

{¶25} In sum, regardless of which standard of review is applied—the *Hill* contrary to law/abuse of discretion two-prong analysis, or the *Wellington* R.C. 2953.08(G) contrary to law analysis—Hardy's sentence was proper. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.