[Cite as *State v. Lawson*, 2010-Ohio-4270.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1296

Appellee — Trial Court No. CR0200902707

v.

Earl Lawson — **DECISION AND JUDGMENT**

Appellant — Decided: September 10, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Earl Lawson, appeals from a judgment of the Lucas County Common Pleas Court, following his guilty plea to the offense of operating a vehicle

while under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(h), a felony of the third degree.

{¶2} Appellant argues in this appeal that the trial court abused its discretion in imposing the maximum sentence and that the five-year sentence was cruel and unusual and therefore, contrary to law. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶3} Appellant was indicted on September 3, 2009, on two counts of operating a vehicle while under the influence of alcohol or drugs. Count 1, a violation of R.C. 4511.19(A)(1)(a) and (G)(1)(e), with a specification that appellant has previously been convicted of or pled guilty to a prior felony offense of driving while intoxicated, is a felony of the third degree with a maximum prison sentence of five years. Count 2, a violation of R.C. 4511.19(A)(1)(h) and (G)(1)(e), with a specification that appellant has previously been convicted of or pled guilty to a prior felony offense of driving while intoxicated, is a felony of the third degree with a maximum prison sentence of five years.

{¶4} The state dismissed Count 1 in exchange for appellant's guilty plea to Count 2. At sentencing on October 21, 2009, the trial court imposed the maximum sentence of five years of incarceration.

II. MAXIMUM SENTENCE

{¶5} In his first assignment of error, appellant maintains:

{¶6} "The trial court abused its discretion by imposing the maximum sentence and should have either imposed a much shorter period of imprisonment or community control."

{¶7} Appellant complains that the trial court was clearly biased against him and that this bias was evidenced by the trial court's characterization that this case "screamed" for a maximum sentence and its imposition of that maximum five-year sentence. Appellant contends that the sentence was excessive and contrary to law.

{¶8} We disagree.

{¶9} Appellant pled guilty and was sentenced after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. According to *Foster*, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus.

{¶10} In reviewing a felony sentence, appellate courts employ a two-step analysis set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. Appellate courts 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." Id. at ¶ 26. The applicable statutes to be

applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes, but rather "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." Id. at ¶ 17.

{¶11} Although "a record after *Foster* may be silent as to the judicial findings that appellate courts were to review under R.C. 2953.08(G)(2)," the trial court must nevertheless consider R.C. 2929.11 and 2929.12. Id. ¶ 12. "In addition, the sentencing court must be guided by statutes that are specific to the case itself." Id. at ¶ 13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. Even if there is no specific mention of these statutes in the record, "it is presumed that the trial court gave proper consideration to those statutes." *Kalish* at fn. 4.

{¶12} R.C. 2929.11(A) states that:

{¶13} "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶14} R.C. 2929.12 sets forth a non-exhaustive list of factors that the trial court is required to consider when determining whether the defendant's conduct is more or less

serious than conduct normally constituting the offense. In addition, the trial court must consider the likelihood that the offender will commit future crimes.

{¶15} In this case, before pronouncing its sentence, the trial court reviewed appellant's three prior felony convictions (including a prior felony DUI), appellant's 19 misdemeanor convictions, and the presentence report. The trial court noted that appellant reported experimenting with marijuana and powdered cocaine and described his consumption of alcohol as 18 beers a day - if he could get it. In addition, the trial court stated that it had considered "all the matters under Sentencing Bill 2 that remain constitutional and other statutes and rules which I must consider."

{¶16} The sentencing entry states that the trial court considered "the record, oral statements, any victim impact statements and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12." See, e.g., *State v. Hatfield*, 2d Dist. No. 2006 CA 16, 2006-Ohio-7090, ¶ 9, citing *Schenley v. Kauth* (1953), 160 Ohio St. 109, 111.

{¶17} Applying the first prong of the *Kalish* analysis, we do not find the trial court's sentence to be clearly and convincingly contrary to law. We are satisfied that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶18} The second prong of the *Kalish* analysis requires that we determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Kalish* at ¶ 17. *Foster* accords the trial court full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. The court in *Kalish* held:

{¶19} "R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." Id.

{¶20} Here, the trial court imposed the maximum sentence. Appellant's individual prison term is within the range authorized by the General Assembly. It is not an abuse of discretion to impose a prison sentence within the statutory range for the offense. *Foster*, 2006-Ohio-856, paragraph seven of the syllabus. 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.

{¶21} We are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and authorized consecutive sentences for multiple offenses. *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 373-374.

{¶22} In *State v. Harmon*, 6th Dist. No. L-05-1078, 2006-Ohio-4642, ¶ 16, this court noted that "[a] trial court's discretion to impose a sentence within the statutory guidelines is very broad and an appellate court cannot hold that a trial court abused its discretion by imposing a severe sentence that is within the limits authorized by the applicable statute." See *Harris v. U.S.* (2002), 536 U.S. 545, 565, 122, S.Ct. 2406, 153 L.Ed.2d 524.

{¶23} In this case, the trial court considered that, at the time of the offense in this case, appellant had previously been convicted of, and imprisoned for, a felony DUI. As a result, appellant's driving privileges had been suspended; he had no driving privileges when he committed the crime in this case. Appellant admitted that he should not have been driving. The trial court also noted that appellant had a number of felony and misdemeanor convictions, and that appellant had made the decision to drink and drive.

{¶24} Because the individual sentence imposed by the court in this case is within the range of penalties authorized by the legislature, it is not grossly disproportionate or shocking to a reasonable person or to the community's sense of justice and does not constitute cruel and unusual punishment. The trial court clearly considered R.C. 2929.12 and concluded that appellant was likely to commit further offenses, particularly offenses involving alcohol and determined that a maximum prison sentence was necessary to protect the public.

{¶25} Nothing in the record suggests that the court's imposition of a maximum sentence was unreasonable, arbitrary, or unconscionable, and therefore we find no abuse of discretion. Accordingly, appellant's first assignment of error is not well-taken.

III. CRUEL AND UNUSUAL PUNISHMENT

{¶26} In his second assignment of error, appellant contends that:

{¶27} "The 5-year sentence is cruel and unusual punishment in violation of Lawson's rights pursuant to the 8th amendment of the U.S. Constitution and Art. I, Sec. 9 of the Ohio Constitution."

{¶28} In support of his Eighth Amendment argument, appellant complains that the length of his commitment is excessive because the trial court failed to consider the fact that there was no accident and appellant was "fully cooperative, accepted responsibility and acknowledged his alcoholism." Appellant implies that the trial court refused to take into consideration the fact that appellant cannot afford medication that enables him to control his consumption of alcohol and maintain employment.

{¶29} We disagree.

{¶30} In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370-371, the Supreme Court of Ohio recognized:

{¶31} "The Eighth Amendment to the Constitution of the United States provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted.'" Similarly, Section 9, Article I of the Ohio Constitution sets forth the same restriction: "* * * nor cruel and unusual punishments inflicted."

{¶32} "* * * Historically, the Eighth Amendment has been invoked in extremely rare cases, where it has been necessary to protect individuals from inhumane punishment such as torture or other barbarous acts. *Robinson v. California* (1962), 370 U.S. 660, 676, 82 S.Ct. 1417, 1425, 8 L.Ed.2d 758, 768. Over the years, it has also been used to prohibit punishments that were found to be disproportionate to the crimes committed. In *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 30 O.O.2d 38, 203 N.E.2d 334, this court stressed that Eighth Amendment violations are rare. We stated that '[c]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' Id. at 70, 30 O.O.2d at 39, 203 N.E.2d at 336. * * *" *Weitbrecht*, 86 Ohio St.3d at 370-371.

{¶33} Moreover, the *Weitbrecht* court stated that for an Eighth Amendment Cruel and Unusual Punishment violation to occur:

{¶34} "* * * '[T]he penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.' Id. See, also, *State v. Chaffin* (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46, paragraph three of the syllabus." *Weitbrecht* at 371.

{¶35} The *Weitbrecht* court used a tripartite analysis to assess whether the penalty imposed is disproportionate to the offense committed:

{¶36} "First, we look to the gravity of the offense and the harshness of the penalty * * *. Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. * * * Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." * * * *Weitbrecht* at 371, quoting *Solem v. Helm* (1983), 463 U.S. 277, 290-291, 103 S.Ct. 3001, 77 L.Ed.2d 637.

{¶37} A reviewing court need not reach the second and third prongs of the tripartite test except in the rare case when a threshold comparison of the crime committed and the sentence imposed lead to an inference that the two are grossly disproportionate. *Weitbrecht* at 373, fn. 4, citing *Harmelin v. Michigan* (1991), 501 U.S. 957, 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (Kennedy, J., concurring); *State v. Keller* (June 1, 2001), 2d Dist. No. 18411.

{¶38} For the following reasons, we conclude that appellant's prison sentence is not "'shocking to any reasonable person.'" *Weitbrecht* at 371, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70. Similarly, we conclude that appellant's prison sentences are not grossly disproportionate to appellant's offenses. *Weitbrecht* at 373, fn. 4. Thus, we need not perform the second and third elements of the tripartite test in our

Eighth Amendment analysis. Id. Therefore, we conclude that the trial court did not commit constitutional error, under the Eighth Amendment Cruel and Unusual Punishment Clause when it imposed five years of imprisonment for appellant's offense.

{¶39} The trial court reviewed appellant's long criminal history and determined that appellant was not amenable to an available community control sanction. The trial court also clearly considered the circumstances of this case, appellant's description of his actions that day, and appellant's continued abuse of alcohol, including the fact that one of appellant's felony convictions was for driving under the influence. The trial court also considered the fact that the prior DUI conviction and lack of driving privileges had not deterred appellant from drinking and driving. The court reasonably concluded that based upon appellant's record and past conduct that he would likely re-offend and was not likely to comply with the court's orders not to drive. The only way to protect the public was to impose a prison sentence.

{¶40} Appellant complains that he is being punished because of his alcoholism. While alcoholism is not a crime, voluntary intoxication is not a defense to any crime. See *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. Appellant was not punished for being an alcoholic; he was punished for his behavior while intoxicated. Appellant's alcoholism does not justify driving under the influence. Appellant's criminal record reflects the extent of his problems with alcohol and makes clear that the trial court was entirely justified in imposing the maximum sentence in order to protect the public.

{¶41} Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶42} We find appellant's two assignments of error not supported by the record. The trial court did not abuse its discretion in imposing a maximum sentence and the sentence is not cruel and unusual. Thus, appellant's first and second assignments of error are not well-taken.

{¶43} Wherefore, based upon the foregoing, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE