

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-332
v.	:	(C.P.C. No. 08CR-05-3493)
	:	
Richard E. Flood,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 3, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Richard E. Flood ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas sentencing him to a maximum term of ten years' incarceration as a result of his plea of guilty to attempted murder, a first-degree felony in violation of R.C. 2923.02 as it relates to R.C. 2903.02.

{¶2} On May 9, 2008, a Franklin County Grand Jury indicted appellant in a six-count indictment for attempted murder, kidnapping, felonious assault, aggravated robbery, and two counts of robbery. Five of the counts contained a repeat violent offender ("RVO") specification, which was based on appellant's prior murder conviction.

On October 2, 2008, appellant entered a plea of guilty to attempted murder without specification, and a nolle prosequi was entered as to the specification and the remaining counts.

{¶3} According to the plea proceedings, Kattie Robinson and appellant were at Ms. Robinson's apartment when appellant asked Ms. Robinson for some money. When she indicated she did not have any, appellant pulled out a knife, stabbed Ms. Robinson several times, and then left the scene. Despite receiving multiple lacerations to her neck, torso, and both arms, Ms. Robinson was able to call 911, whereupon she was transported to a hospital for medical attention.

{¶4} After appellant entered his guilty plea to attempted murder, a presentence investigation report ("PSI") was ordered. A sentencing hearing was held on February 26, 2009, and appellant was sentenced to a ten-year term of incarceration.

{¶5} This appeal followed and appellant brings the following assignment of error for our review:

WAS APPELLANT'S SENTENCE CONTRARY TO LAW AND
DID THE TRIAL COURT ABUSE ITS DISCRETION BY
RENDERING A 10 YEAR SENTENCE CONTRA OHIO LAW
AND THE U.S. CONSTITUTION.

{¶6} In his single assignment of error, appellant does not provide any factual or legal argument, nor does he identify error in the record upon which the assignment of error is based. Rather, appellant asks this court to review the record and determine whether his sentence is contrary to law and whether the trial court abused its discretion in sentencing him as it did.

{¶7} Pursuant to R.C. 2953.08(G), an appellate court may modify a sentence or may remand for resentencing if the court clearly and convincingly finds the sentence is contrary to law. *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970, ¶12, citing *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held portions of Ohio's sentencing scheme were unconstitutional and severed the offending portions from Ohio's sentencing code. In doing so, the Supreme Court held "[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." *Id.* paragraph seven of the syllabus.

{¶8} In the wake of *Foster*, this court has held that R.C. 2953.08(G) requires us to continue to review felony sentences under the clear and convincing as contrary to law standard. *Vaughn* at ¶12, citing *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19. "In applying the clear and convincing as contrary to law standard, we would "look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law." ' ' *Vaughn* at ¶12, quoting *Burton* at ¶19, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶9} Recently, however, the Supreme Court of Ohio rendered *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The plurality opinion in *Kalish* stated 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)." *Id.* at ¶14. As we stated in *Vaughn*:

Kalish clarified that once an appellate court has determined the sentence is not contrary to law, the court must consider the trial court's application of R.C. 2929.11 and 2929.12 in light of *Foster*, which gave the trial court "full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." Considering also that R.C. 2929.12 "explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing[.]" *Kalish* concluded that "[i]t naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Id.* The plurality opinion secured a fourth vote, with a separate opinion, that would apply a "contrary to law" standard to determine whether the trial court considered the R.C. 2929.11 and 2929.12 factors, but would apply an abuse of discretion standard to the trial court's consideration of the factors in R.C. 2929.12(B) through (D) since they are discretionary.

Id. at ¶14. (Internal citations omitted.)

{¶10} Nonetheless, whether we apply a contrary to law standard or an abuse of discretion standard, appellant's contentions are unavailing.

{¶11} The overriding purposes of felony sentencing must guide a court that sentences an offender for a felony. R.C. 2929.11(A). Those purposes "are to protect the public from future crime by the offender and others and to punish the offender." *Id.* To carry out 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." *Id.* Thus, a felony sentence "shall be reasonably calculated to achieve the two overriding purposes of felony sentencing" set forth in R.C. 2929.11(A). R.C. 2929.11(B). The sentence must be "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." *Id.*

{¶12} In addition to the factors set forth in R.C. 2929.11, a trial court must consider the seriousness and recidivism factors outlined in R.C. 2929.12 to ensure that a sentence complies with the overriding principles of felony sentencing enunciated in R.C. 2929.11. R.C. 2929.12(A); *State v. Arnett*, 88 Ohio St.3d 208, 213, 2000-Ohio-302. R.C. 2929.12(A) allows the trial court to consider also "any other factors that are relevant" to the principles of felony sentencing.

{¶13} Here, the trial court's sentencing entry expressly states it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12" and "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." (Entry at 2.) As this court has repeatedly held, "such language in a trial court's judgment entry belies a defendant's claim that the trial court failed to consider the purposes of felony sentencing as required in R.C. 2929.11 and 2929.12." *Vaughn* at ¶21; *State v. Morales-Gomez*, 10th Dist. No. 08AP-336, 2008-Ohio-6513, ¶17; *State v. Daniel*, 10th Dist. No. 05AP-564, 2006-Ohio-4627, ¶50; *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶27; *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448, ¶6.

{¶14} Additionally, the trial court heard statements from the victim and considered appellant's prior criminal history as reflected in the PSI. The trial court also considered the fact that this crime occurred while appellant was on parole for a homicide conviction received in 1998 and noted that, based on the facts of the present case, appellant was fortunate to not be facing a second homicide charge. Furthermore, pursuant to R.C.

2929.14(A), the imposed ten-year prison term is within the statutory range for the convicted offense, and the trial court explained its rationale for the imposition of said sentence. Based on the foregoing, we do not find appellant has demonstrated that his sentence is contrary to law, nor do we find an abuse of discretion here.

{¶15} For the foregoing reasons, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
