

[Cite as *State v. Reeves*, 2010-Ohio-4018.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-493
 : (C.P.C. No. 08CR-05-3379)
 Eric W. Reeves, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on August 26, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for
appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Eric W. Reeves ("appellant"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas following appellant's pleas of guilty to theft, possession of criminal tools, and failure to appear on a recognizance bond. For the reasons that follow, we affirm that judgment.

{¶2} Appellant was indicted in case No. 07CR-8559 on November 28, 2007, for theft and possession of criminal tools. He was subsequently released on a recognizance bond after signing the agreement. While having been released on the recognizance bond in that case, appellant failed to appear for his scheduled trial date on or about April 10,

2008. On April 17, 2008, the trial court issued a bond forfeiture and *capias*. On May 5, 2008, appellant was indicted in case No. 08CR-3379 on one count of failure to appear on a recognizance bond. Some time later, the Franklin County Sheriff's Office and the Franklin County Prosecutor's Office were notified that appellant was incarcerated in a correctional facility in Thornton, Pennsylvania. He was eventually extradited to the state of Ohio.

{¶3} On April 16, 2009, appellant entered pleas of guilty to the theft and possession of criminal tools offenses charged in case No. 07CR-8559 and to the failure to appear on a recognizance bond offense charged in case No. 08CR-3379. Appellant informed the trial court that his grandmother¹ had died on April 6, 2008, and that he returned to the state of Pennsylvania in order to be with his family and attend her funeral which was held on April 12, 2008. Following the funeral, he was arrested on an outstanding warrant in the state of Pennsylvania, and thus was unable to immediately return to Ohio to address the charges in case No. 07CR-8559.

{¶4} During the plea regarding case No. 07CR-8559, the State of Ohio informed the trial court there was a joint recommendation to consider the time appellant had already served as the sanction in that case. Regarding case No. 08CR-3379, the State of Ohio advised the trial court there was no joint recommendation with respect to sentencing in that matter.

{¶5} Appellant was sentenced immediately following the plea. Appellant's counsel asked the trial court to follow the joint recommendation in case No. 07CR-8859.

¹ There is a discrepancy in the record as to whether it was appellant's grandmother or mother who died just prior to his court date. Because the references to his grandmother are more numerous, we shall refer to the funeral as his grandmother's funeral.

In following the joint recommendation in case No. 07CR-8559, the trial court sentenced appellant to community control with a local sanction of 141 days in the Franklin County jail. The trial court gave appellant 141 days of jail-time credit and then terminated his community control. With respect to case No. 08CR-3379, the trial court sentenced appellant to eight months of incarceration and noted zero days of jail-time credit. The trial court did not impose a fine or costs.

{¶6} On May 19, 2009, appellant filed a pro se motion for correction of jail-time credit, arguing he was entitled to an additional credit of 96 days. On that same date, appellant also filed a notice of appeal asserting the following assignments of error for our review:

FIRST ASSIGNMENT OF ERROR

The trial court erred in imposing an overly harsh and disproportionate sentence in violation of the requirements set forth in R.C. 2929.11(B) and R.C. 2929.[12].²

SECOND ASSIGNMENT OF ERROR

The trial court erred in failing to give Appellant jail time credit against his sentence in violation of R.C. 2967.191 and the Equal Protection Clauses of the state and federal Constitutions.

{¶7} In his first assignment of error, appellant asserts the trial court erred in sentencing him to an eight-month period of incarceration, arguing that the mitigating factors warranted either community control or a minimum six-month sentence. Appellant contends he received an overly harsh and disproportionate sentence, in violation of R.C. 2929.11(B) and R.C. 2929.12.

² Although appellant's brief cites to R.C. 2929.14, it is apparent from his application and analysis of certain statutory language and factors that he is actually referring to the factors in R.C. 2929.12.

{¶8} R.C. 2929.11(B) requires trial courts to impose punishment and sentencing that is consistent with that imposed for similar crimes committed by similar offenders. Specifically, R.C. 2929.11(B) provides:

A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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.

{¶9} Under R.C. 2929.12, a court imposing a sentence upon a felony offender has the discretion to determine the most effective way to comply with the purposes and principles of sentencing. See R.C. 2929.12(A). Consequently, the court must consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors. R.C. 2929.12(A).

{¶10} Appellant argues his eight month sentence violates the proportionality requirement set forth above. Appellant also submits that none of the "aggravating" or seriousness and recidivism factors set forth in R.C. 2929.12 are present here. He contends the offense of failure to appear is a victimless crime and that no one was harmed. In addition, appellant points out the personal loss he suffered, along with his belief that he had fulfilled his responsibilities by informing the clerk of courts he would be attending an out-of-state funeral on or around the trial date. Furthermore, he argues that only a couple of his alleged convictions could be verified, the circumstances were unlikely to repeat themselves, he did not display a pattern of substance abuse, and he expressed remorse for his actions. Based upon this, appellant submits his sentence was not proportional to the nature of the crime using the factors set forth in R.C. 2929.12.

{¶11} We begin our analysis by discussing the applicable standard of review. Under R.C. 2953.08(G), an appellate court may modify a sentence or remand a case for resentencing if the court clearly and convincingly determines the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660; *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420. In post-*Foster*³ cases, we have held that R.C. 2953.08(G) requires us to continue to review felony sentences under the clearly and convincingly contrary to law standard. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19; *Vaughn* at ¶12. "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.'" *Burton* at ¶19, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶12} Following *Burton*, the Supreme Court of Ohio issued a plurality decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, finding appellate courts must apply a two-step approach when reviewing felony sentences. First, 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. If this is satisfied, then the appellate court reviews the decision to impose a term of imprisonment under the abuse of discretion standard. *Id.* at ¶26; *Vaughn* at ¶13; *Russell* at ¶13.

{¶13} Under the plurality opinion set forth in *Kalish*, once an appellate court has determined the sentence is not contrary to law, it then must consider the sentencing

³ *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

court's post-*Foster* application of R.C. 2929.11 and 2929.12. *Vaughn* at ¶14; *Russell* at ¶13. R.C. 2929.11 and 2929.12 are not factfinding statutes. They serve as an "overarching guide" for a trial judge to consider in imposing an appropriate sentence. *Kalish* at ¶17. Consequently, *Foster* provided trial courts with "full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *Kalish* at ¶17. Furthermore, because R.C. 2929.12 allows the trial court to "exercise its discretion in considering whether its sentence complies with the purposes of sentencing[.]" the *Kalish* court concluded an appellate court's review of the actual term of incarceration should be under an abuse of discretion standard.⁴ *Kalish* at ¶17.

{¶14} Whether we apply the two-step analysis set forth in *Kalish* or simply the contrary to law standard used in *Burton*, we find the trial court did not err in sentencing appellant to an eight-month period of imprisonment.

{¶15} In applying the contrary to law standard, we must determine whether the trial court properly considered and applied the appropriate statutory guidelines and whether the sentence is otherwise contrary to law. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶10. A consistent sentence is derived from the trial court's proper application of the statutory sentencing guidelines, rather than from a case-by-case comparison. *State v. Martin*, 11th Dist. No. 2006-T-0111, 2007-Ohio-6722, ¶34; *State v. Madrigal*, 6th Dist. No. L-07-1417, 2008-Ohio-6394, ¶9; *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶19. In order to demonstrate inconsistency, the appellant must point to facts and circumstances within the record which demonstrate the

⁴ Three justices joined the plurality opinion, while a fourth justice concurred in judgment only and wrote a separate opinion stating he would apply a contrary to law standard in determining whether the trial court considered the R.C. 2929.11 and 2929.12 factors, but would apply an abuse of discretion standard as to its consideration of the factors under R.C. 2929.12(B) through (D), because they are discretionary. *Russell* at ¶13.

sentencing court's failure to properly consider the relevant factors. *Franklin* at ¶9, citing *State v. Todd*, 10th Dist. No. 06AP-1208, 2007-Ohio-4307, ¶15.

{¶16} Here, the sentencing judgment entry states in relevant part as follows:

The Court has 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 the decision of the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

(R. 28, April 20, 2009 Judgment Entry.) We have previously held that such language in the trial court's judgment entry defeats a claim that the trial court failed to consider the purposes and principles of felony sentencing as set forth in R.C. 2929.11 and 2929.12. See *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. Thus, this statement satisfies the consistency requirement under R.C. 2929.11(B). See *Franklin* at ¶14. Consequently, appellant's sentence is not clearly and convincingly contrary to law under either *Kalish* or *Burton*.

{¶17} In addition, based upon the facts and circumstances at issue in this case, the trial court's sentence, which was only two months more than the minimum sentence of imprisonment, was not an abuse of discretion. It clearly falls within the applicable range of sentences for this type of violation. Furthermore, the trial court explained its reasoning during the hearing in imposing its sentence. The trial court informed appellant that although he may have been "delayed" in returning for his court date, the delay was the result of appellant's own misconduct involving another case in Pennsylvania and that it was his responsibility to return for trial. (Tr. 21.) Immediately before imposing sentence, the trial court informed appellant:

THE COURT: All right. You seem to be a very bright person, and, you know, you have had some difficulties in the past.

You have some difficulties here today, but that doesn't mean when you are done with that that you can't make something of yourself and do the right thing. You have some family back there that is willing to support you, which I think is a good thing, and get a job. You can't change the past but you can sure change the future. * * *

(Tr. 22.)

{¶18} Appellant argues that the circumstances surrounding his offense were "not so egregious as to justify a period of incarceration." (Appellant's brief, at 7.) While the circumstances may not be considered "egregious," the record and the hearing transcript clearly established that appellant was 37 years old and had been convicted and sentenced on at least two other offenses prior to the sentencing hearing. Appellant informed the court he was convicted out of a retail theft incident that had previously occurred in Pennsylvania and also had to serve some time for a probation case, presumably because he violated the terms and conditions of his probation. Appellant and his attorney indicated he served that time from May 2008 until his release in December 2008, meaning he was incarcerated for approximately seven months prior to his return to Ohio for the case sub judice. These facts support the conclusion that he has not been amenable to previous sanctions.

{¶19} Additionally, although it appears obvious, it is worth noting that the offense of failure to appear on a recognizance bond was committed while appellant was out on bond on the original charges of theft and possession of criminal tools. Furthermore, there was also sufficient evidence to establish that, although he may or may not have been convicted, he had been arrested numerous times for offenses such as theft, receiving stolen property, and burglary. These circumstances support a sentence imposing a short-term period of incarceration.

{¶20} Therefore, we overrule appellant's first assignment of error.

{¶21} In his second assignment of error, appellant asserts the trial court violated R.C. 2967.191 and the precedent set forth in *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, by failing to award him any jail-time credit in case No. 08CR-3379. Appellant argues that because his sentences in the two cases amounted to concurrent terms, the jail-time credit must be awarded in both cases as he was held on both cases while awaiting trial.

{¶22} In *Fugate*, the defendant was given concurrent prison terms on his burglary and theft convictions and on his community control violation. The Supreme Court of Ohio determined *Fugate* had been held in custody on the burglary and theft charges, as well as for the violation of community control and, as a result, he was entitled to jail-time credit as to each concurrent prison term.

{¶23} The equal protection clause requires that all time spent in jail prior to trial and prior to commitment must be credited to the prisoner's sentence. *Id.* at ¶7. This principal is codified in R.C. 2967.191. *Id.* at ¶8.

{¶24} "[W]hen concurrent prison terms are imposed, courts do not have the discretion to select only one term from those that are run concurrently against which to apply jail-time credit. R.C. 2967.191 requires that jail-time credit be applied to all prison terms imposed for charges on which the offender has been held." *Id.* at ¶12. "So long as an offender is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit for that sentence; a court cannot choose one of several concurrent terms against which to apply the credit." *Id.* at ¶12.

{¶25} Consecutive sentences, on the other hand, are treated differently, although the overall objective is the same, which is to comply with the requirements of the equal

protection clause by reducing the total amount of time offenders spend in prison after sentencing by an amount of time which is equal to the amount of time they were previously held before sentencing. *Id.* at ¶11. When a defendant is sentenced to consecutive terms, the periods of incarceration are stacked, or served one after another. In that situation, jail-time credit that is applied to just one term gives the full amount of credit due, since it reduces the entire length of the prison sentence. *Id.* at ¶22.

{¶26} We find the instant case to be distinguishable from *Fugate* in that we find appellant was not sentenced to concurrent terms. Instead, we find the trial court simply treated the two cases separately. We further find the instant case to be more in-line with *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166.

{¶27} In *Smith*, the defendant was indicted on two counts of aggravated robbery, four counts of robbery, one count of assault on a peace officer, and one count of having a weapon under disability under one case number, and was re-indicted on the robbery counts (in order to conform with *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624) under a second case number. The trial court joined the two indictments for trial. The robbery counts in the second case were eventually dismissed, but Smith was found guilty of all other charges. A statement of violations had also been filed against Smith in a third case alleging he had violated the terms of his community control. At the sentencing and revocation hearing, the parties agreed Smith had 577 days of jail-time credit. The court then applied all of that credit to the sentence imposed for Smith's community control violation and terminated that case. Smith then received an aggregate sentence of 22 years and six months on the case involving the aggravated robberies, assault, and weapon under disability convictions.

{¶28} On appeal, Smith argued that he effectively had concurrent sentences and that the trial court should have given him 577 days of credit in both cases. However, we disagreed, finding that the trial court had not imposed the sentence on the community control violation concurrent with the other sentence because "[t]he way that the trial court crafted the community control sentence resulted in appellant having already served that sentence by the time of the sentencing hearing." *Smith* at ¶49. We found it was the trial court's express intention to apply all of the jail-time credit to the community control violation as the full sentence for that violation. Consequently, we overruled Smith's assignment of error.

{¶29} The circumstances in the instant case closely mirror those found in *Smith*. Although the present case does not involve a community control violation, it does involve two separate cases where the court terminated one of the cases at the sentencing hearing and essentially imposed a "time served" sentence, while imposing incarceration on the remaining case. Here, the court acknowledged there was a joint recommendation with respect to case No. 07CR-8559 which recommended that the court give appellant credit for the time he had already served and terminate the case for time served. The trial court followed that joint recommendation. The trial court made the following statement:

All right. So local sanction of one-hundred-forty-one days on the first case, on both of the F-5s, and give you credit for one-hundred-forty-one days, terminating your community control for time served. So this case is gone. All right.

(Tr. 23.)

{¶30} The trial court then imposed an eight-month sentence on case No. 08CR-3379. The following exchange took place.

THE COURT: * * * I'm going to give you eight months because I think that is sufficient in this matter. I believe you're

sincere. I believe that any more time than that is not going to serve any purpose.

Eight months ODRC, and I take it there's no jail credit on this one; is that correct?

[PROSECUTOR]: There will not be.

THE COURT: There will not be. So that's the order of the court.

There will be no fine and no costs. That's it.

(Tr. 23-24.)

{¶31} Appellant's attorney did not object to the allocation of jail-time credit at the sentencing hearing. In fact, appellant's trial counsel asked the judge to accept the joint recommendation. Because appellant failed to raise this issue during the sentencing hearing when the trial court could have corrected any error, he has forfeited all but plain error for the purposes of appeal. See *State v. Goings*, 10th Dist. No. 07AP-644, 2008-Ohio-949, ¶7 (because no objections were raised at the sentencing hearing regarding defendant's jail-time credit appellant waived all but plain error); *State v. Hunter*, 10th Dist. No. 08AP-183, 2008-Ohio-6962, ¶16 (failure to raise error regarding jail-time credit requires plain error in order to reverse); *State v. Miller*, 4th Dist. No. 07CA2, 2007-Ohio-5931, ¶14 (defendant did not raise his jail-time credit argument in the trial court and therefore has forfeited all but plain error).

{¶32} In addition, we note the sentencing judgment entry in case No. 08CR-3379 states as follows: "The Court finds and all parties agree that the Defendant has 0 days of jail credit and hereby certifies the time to the Ohio Department of Corrections." (R. 28-31, April 20, 2009 Judgment Entry.)

{¶33} After reviewing the evidence available in the record, we find no error, plain or otherwise. It is appellant's duty to show an error in the jail-time credit calculation, and if he has failed to demonstrate error and there is no miscalculation in the jail-time credit that is apparent from the record, any claimed error must be overruled. *Hunter* at ¶17, citing *State v. Evans*, 2d Dist. No. 21751, 2007-Ohio-4892, ¶13.

{¶34} Accordingly, we overrule appellant's second assignment of error.

{¶35} Having overruled appellant's first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.
