

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-031
- vs -	:	<u>OPINION</u> 1/11/2010
THERESANN FOWLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. CV2005-07-2229

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Denise S. Barone, 385 North Street, Batavia, Ohio 45103-3005, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Theresann Fowler, appeals her conviction and sentence for forgery and receiving stolen property. We affirm.

{¶2} On December 17, 2008, appellant was indicted for forgery in violation of R.C. 2913.31(A)(1) and receiving stolen property in violation of R.C. 2913.51(A), both felonies of the fifth degree. According to the bill of particulars, appellant obtained a stolen credit card which she used to obtain \$1,200.57 of automotive parts from a car dealership. A plea

agreement was reached between appellant and the prosecution. Specifically, appellant agreed to enter guilty pleas to both counts. The prosecution agreed to recommend concurrent six-month sentences if appellant paid restitution by the sentencing deadline, which would also be served concurrent to a sentence she was serving in Hamilton County. If appellant failed to provide the restitution, the prosecution would recommend consecutive six-month sentences. Appellant entered the guilty pleas, which were accepted by the trial court. At the plea hearing, the trial court also ordered a presentence investigation.

{13} Although appellant had not paid the requested restitution by the sentencing hearing, the prosecution did not request consecutive sentences. The trial court then sentenced appellant to 12 months in prison on each count, to be served consecutively and consecutive to the Hamilton County sentence. Appellant timely appeals, raising two assignments of error.

{14} Assignment of Error No. 1:

{15} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN APPOINTING COUNSEL, AS COUNSEL WAS INEFFECTIVE."

{16} In her first assignment of error, appellant argues that her counsel was ineffective. Appellant's full argument in this assignment of error provides, "Theresa Ann Fowler believes that her defense counsel did not adequately protect her, nor inform her of the very real possibility that the court would punish her unduly at sentencing. Had she known, she would not have entered into the guilty plea."

{17} To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's actions were outside the wide range of professionally competent assistance, and that he was prejudiced by reason of counsel's actions. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. Trial counsel's performance will not be deemed ineffective unless the defendant shows that "counsel's representation fell

below an objective standard of reasonableness," *id.* at 688, 104 S.Ct. at 2064, and that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156. In addition, any questions regarding the effectiveness of counsel must be viewed in light of the evidence against the defendant, *Bradley* at 142, with a "strong presumption that counsel's conduct falls within the wide range of professional assistance." *Strickland* at 689, 104 S.Ct. at 2065.

{¶8} In determining a claim of ineffective assistance of counsel, our review is limited to the record before this court. It is impossible for a reviewing court to determine on direct appeal whether ineffective assistance of counsel occurred where the allegations of ineffectiveness are based upon evidence outside of the record. *State v. Fowler*, Clermont App. No. CA2001-03-041, 2002-Ohio-1912, ¶81, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228.

{¶9} The trial court in this case instructed appellant that, by entering a plea of guilty, the court could impose a sentence up to 24 months in prison. See *State v. Coats*, Mercer App. Nos. 10-09-04,10-09-05, 2009-Ohio-3534, ¶21. Further, Appellant executed a written plea agreement acknowledging, "I understand the MAXIMUM penalty COULD be: a maximum basic prison term of 24 months, of which 0 is mandatory." There is nothing in the record to support appellant's contention that her trial counsel failed to adequately inform her of the possibility of a sentence longer than 6 months or that she would have not entered the guilty plea. Rather, at the plea hearing, appellant stated that she read and understood the entire plea agreement and that she went over the entire agreement with her trial counsel.

{¶10} Appellant's first assignment of error is overruled.

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT."

{¶13} In her second assignment of error, appellant challenges the maximum sentences. Appellant argues that the prosecution had no intention of aggressively punishing appellant and the trial court "went completely against his prior inclinations and imposed the most onerous sentence available." Appellant submits that she was merely guilty of "two low-level felonies," "there is a statutory presumption in favor of community control sanctions," and the court was given "clear signals from the state, that it did not envision justice being served if Theresa Ann Fowler were sentenced to the maximum penalty."

{¶14} Appellate review of felony sentencing is controlled by the two-step procedure recently outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Under *Kalish*, this court must (1) 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, and (2) review the sentencing court's decision for an abuse of discretion. *Id.* at ¶4.

{¶15} Trial 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." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. "In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38. There is no presumption in favor of community control for felonies of the fourth and fifth degree. *Foster* at ¶68-70. In reviewing whether a sentence is clearly and convincingly contrary to law, "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." *Kalish* at ¶15.

{¶16} The decision whether to accept or reject a plea bargain rests within the sound

discretion of the trial court and the court has no obligation to sentence appellant pursuant to the state's recommended sentence. *State v. Asberry*, 173 Ohio App.3d 443, 2007-Ohio-5436, ¶40, citing *In re Disqualification of Mitrovich* (1990), 74 Ohio St.3d 1219. The trial court made no indication or promises regarding the length of sentence he planned to impose at the plea hearing. As described above, appellant was informed both in the written plea agreement and orally by the trial court prior to entering her plea that the court was not bound to follow the state's recommendation. *State v. Wickham*, Muskingum App. No. CT2006-0084, 2007-Ohio-1754, ¶33.

{¶17} The trial court ordered and reviewed a presentence investigation and found that appellant was not amenable to community control, noting that she had 11 previous felony and 15 previous misdemeanor convictions. Furthermore, the trial court expressly stated that it considered the principles and purposes of sentencing under R.C. 2929.11. Since the record indicates that the trial court followed all of the applicable rules and statutes, appellant's sentence is not clearly and convincingly contrary to law. *Kalish* at ¶18.

{¶18} In reviewing the trial court's imposition of sentence for an abuse of discretion, we find that the court gave careful consideration to the relevant statutory considerations. *Id.* at ¶20. The court considered appellant's criminal history and nothing in the record indicates that the trial court abused its discretion by acting unreasonably, arbitrarily, or unconscionably in sentencing appellant. *Id.*

{¶19} Appellant's second assignment of error is overruled.

{¶20} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.

[Cite as *State v. Fowler*, 2010-Ohio-49.]