[Cite as *State v. Plummer*, 2010-Ohio-849.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-06-148 CA2009-06-151
	:	CA2009-06-152
- vs -		CA2009-06-153
	:	CA2009-06-154
JEREMY J. PLUMMER,	:	O P I N I O N 3/8/2010
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case Nos. CR2008-09-1575, CR2008-10-1793, CR2008-12-2094,
CR2009-01-116 and CR2009-02-179

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YOUNG, P.J.

{¶1} Defendant-appellant, Jeremy Plummer, appeals his sentence in the Butler County Court of Common Pleas following his guilty pleas to 13 felony offenses.

{¶2} Between October 2008 and March 2009, appellant was indicted in five separate cases. As a result of the five indictments, he was charged with forgery, theft, grand theft, receiving stolen property, breaking and entering, and possessing criminal tools (for a total of 19 felony offenses), and petty theft (two misdemeanor offenses).

The charges stemmed from a course of conduct between March and December 2008 during which appellant (1) broke into the Children's Home in Hamilton, Ohio and the Hamilton City Garage and stole copper pipes and rolls of copper wire; (2) stole his father's $1,273 IRS refund check and cashed it; (3) stole three checks from his father, forged his father's signature, and cashed the checks for $150, $125, and $150 respectively; (4) stole two blank checks from an acquaintance, forged the acquaintance's signature, and cashed the checks for $350 and $175 respectively; and (5) used a metal pipe to break into a convenient store where he was caught by police taking lottery tickets, cigarettes, and money.

{¶3} On April 4, 2009, appellant entered five guilty pleas. As a result of plea agreements, appellant pled guilty to one count of grand theft (a fourth-degree felony), five counts of forgery, three counts of theft, two counts of breaking and entering, one count of possessing criminal tools, and one count of receiving stolen property (all fifth-degree felonies); he also pled guilty to one count of petty theft (a first-degree misdemeanor). In May 2009, following a sentencing hearing and its review of a presentence investigation report (PSI), the trial court sentenced appellant to 30 months in prison and ordered him to pay court costs and $8,560 in restitution. The trial court sentenced appellant to the minimum prison term for each of the 13 felony offenses (six months) and ordered some of the sentences to be served consecutively. The trial court did not impose fines.

{¶4} Appellant appeals, raising two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE

PREJUDICE OF APPELLANT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT REFUSED TO CONSIDER A COMMUNITY CONTROL OPTION AT SENTENCING AND IMPOSED CONSECUTIVE TERMS OF INCARCERATION."

{¶7} Appellant argues the trial court abused its discretion by sentencing him to prison instead of putting him on community control, and by imposing consecutive sentences. Appellant argues that given (1) the fact he has never been in prison; (2) he has no prior felony conviction; (3) his acknowledgement he has a drug problem and his desire to participate in a substance abuse program; (4) the trial court's disregard of R.C. 2929.11, R.C. 2929.12, and R.C. 2929.14(E)(4); and (5) the trial court's clear opposition to rehabilitation as a sentencing factor and its personal bias as evidenced by some of its statements during the sentencing hearing, the trial court abused its discretion when it sentenced him to 30 months in prison.

{¶8} In *State v. Foster*, 109 Ohio St. 1, 2006-Ohio-856, the Ohio Supreme Court severed unconstitutional provisions of Ohio's felony sentencing statutes and held that "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." Id. at ¶100. Included in the severed unconstitutional provisions was R.C. 2929.14(E)(4), which required judicial fact-finding before imposition of consecutive sentences. In light of *Foster*, the trial court did not err in failing to consider R.C. 2929.14(E)(4) before imposing consecutive sentences.

{¶9} Following *Foster*, appellate review of felony sentencing is controlled by the

two-step procedure outlined by the supreme court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, we 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 ¶4. If this first prong is satisfied, the trial court's decision is then reviewed for an abuse of discretion. Id. An abuse of discretion is more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶10} Community control is the default sentence for felonies of the fourth and fifth degree, except for those identified as mandatory prison offenses. *Foster*, 2006-Ohio-856 at ¶69. R.C. 2929.13(B) governs the sentencing of an offender who, like appellant, is convicted of a fourth or fifth degree felony. The statute does not create a presumption in favor of community control. Id.; *State v. Sanders*, Butler App. No. CA2003-12-311, 2004-Ohio-6320. If no findings are made under R.C. 2929.13(B)(1)(a) through (i), a trial court must find that a community control sanction meets the principles of sentencing under R.C. 2929.11 before it must impose community control. *Foster* at ¶69. A trial court that does not make one of the findings under R.C. 2929.13(B)(1) and does not find that community control is a sufficient sanction retains broad discretion to impose a prison term. Id.

{¶11} In challenging his sentence, appellant takes issue with the following findings by the trial court, which appellant claims, show the trial court's personal bias, clear opposition to rehabilitation as a sentencing factor, and complete disregard of R.C. 2929.11 and 2929.12:

{¶12} "I cannot find, Mr. Plummer, that you are amenable to a community control sanction. Your record is lengthy. *** [Y]ou had a lengthy [juvenile] record there and your record since you turned 18 has likewise been lengthy, all kinds of theft offenses, offenses of violence as well, no felonies up to this point, but multiple offenses of violence and multiple offenses of theft.

{¶13} "I don't doubt that a lot of this is drug related. There's one thing that's important to keep in mind is that sentencing - - in our system of justice, we have become more of a sociologically based system or psychologically system of 'justice' but fundamentally justice is not about what a defendant needs.

{¶14} "And we can start looking at things that way, and that's not what I am here for. I don't wear a black robe because I have always wanted to be a social worker. I don't believe that's the way justice should be. We are looking at you as an adult and we're looking at you as a person who is responsible for what he has done.

{¶15} "We are looking at you as someone who has to pay the price. We are looking at punishment. We are looking at protection of the public. That's what justice in the criminal realm is about. That's what sentencing in the criminal realm is about.

{¶16} "We sometimes do lip service to those words and judges see themselves as social workers primarily and think that's fine, and that's where the future lies, and what the truth is about and this is about the defendant, and how we make the defendant better, and all of that. I don't share that view.

{¶17} "I think that our old system of justice is the way that it should be. I think that we should treat 23-year-old people as responsible people, responsible for what they

have done, not that they couldn't help what they did. My view - - but it comports with the law, as I read it as well.

{¶18} "I have considered the record. I have considered the overriding purposes of felony sentencing, which are what I have been talking about, to protect the public from future crime and to punish the offender. I have considered the seriousness and the recidivism factors set forth in the statutes. I have considered the information contained in the [PSI], and any victim impact statement. I have also considered any and all statements made at this hearing.

{¶19} "*** and I would say this, that most - - I do believe in rehab. I believe in people being restored. But it has to start from within, and you just don't do it when you have been caught. You have been caught now, and you are going to have a while, and there are programs inside of the walls of prison. Now, you can - - if you think there is a usefulness there, take advantage of it. You are going to have an opportunity."

{¶20} Later, after imposing the sentences, the trial court told appellant: "We have got five cases, I am giving you the very minimum. It may not sound like much of a minimum here, but it's the very minimum in each of these cases, and the last case, we have six different counts, six felonies. We have multiple felonies in multiple cases. I am giving you the minimum for each case, but I am stacking one case on another on another, so you got five, six-month periods basically, so the whole thing is 30 months. And that's a lot of time, but it's not nearly what it could be."[1]

1. During the plea hearing, the trial court told appellant that based on his guilty plea to 13 felony offenses, he could be sentenced between six months (minimum and concurrent prison terms) and 13 and one-half years (maximum and consecutive prison terms).

{¶21} Upon reviewing the record, we find that notwithstanding some of the unorthodox statements made by the trial court, appellant's sentence withstands scrutiny under *Kalish*.

{¶22} First, we find that the trial court's sentence is not contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the overriding purposes and principles of felony sentencing as outlined in R.C. 2929.11 and theseriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences the defendant to a term within the permissible range. *Kalish*, 2008-Ohio-4912 at ¶18.

{¶23} In each of the five sentencing entries, the trial court expressly stated it considered the purposes and principles of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors under R.C. 2929.12, considered whether community control was appropriate under R.C. 2929.13, and found that appellant was not amenable to community control. Likewise, during the sentencing hearing, the trial court expressly stated it considered the overriding purposes of felony sentencing as well as the seriousness and recidivism factors set forth in R.C. 2929.12. Further, the trial court properly applied postrelease control and sentenced appellant for each offense to a term within the permissible range for the offense. Id.; *State v. Kessel*, Butler App. No. CA2009-05-144, 2010-Ohio-46, ¶9. In fact, as stated earlier, the trial court sentenced appellant to the very minimum prison term available for each of the 13 felony offenses.

{¶24} The record does not support appellant's assertion the trial court disregarded R.C. 2929.11 and 2929.12. A trial court should refrain from expressing its philosophical point of view and personal sentiment about the justice system and other

sentencing courts. Some of the statements made by the trial court were inappropriate. Nonetheless, other statements clearly indicate the trial court considered the overriding purposes of felony sentencing, to wit: to protect the public and punish the offender. Contrary to appellant's assertion, the trial court also considered, albeit briefly, appellant's rehabilitation. Under R.C. 2929.11, a trial court is required to consider the rehabilitation of the offender; it is not required to accede to the offender's request for rehabilitation or his preference as to the terms of his sentence.

{¶25} Accordingly, the sentence is not clearly and convincingly contrary to law.

{¶26} Second, we find that the trial court did not abuse its discretion by sentencing appellant to prison rather than community control, and by sentencing him to 30 months by ordering some of the prison terms to be served consecutively. A trial court does not abuse its discretion in rendering a sentence as long as it gives "careful and substantial deliberation to the relevant statutory considerations." *Kalish*, 2008-Ohio-4912 at ¶20; *Kessel*, 2010-Ohio-46 at ¶10.

{¶27} The trial court considered the PSI which revealed appellant's juvenile criminal record, his lengthy adult criminal record which included similar offenses to the case at bar (theft, petty theft, passing bad checks, receiving stolen property, and criminal damaging), his disregard for community control sanctions (he had several active bench warrants in three different jurisdictions), and his failure to pay court costs and fines. It is undisputed that prior to the case at bar, appellant had never been in prison and had no felony conviction. The trial court acknowledged that appellant's felony offenses were most likely due to his drug addiction. Nonetheless, given (1) appellant's lengthy criminal record; (2) appellant's clear failure to respond favorably to sanctions

previously imposed for his criminal convictions; (3) the fact several of the felony offenses involved an acquaintance and the father of appellant, which facilitated the offenses; and (4) the fact the victims all suffered economic harm, the trial court did not abuse its discretion in sentencing appellant to 30 months in prison for his 13 felony offenses (by means of consecutive minimum prison terms) rather than community control.

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

{¶29} Assignment of Error No. 2:

{¶30} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT WHEN IT IMPOSED RESTITUTION WITHOUT FIRST CONSIDERING WHETHER APPELLANT POSSESSED THE PRESENT AND FUTURE ABILITY TO THAT FINANCIAL SANCTION."

{¶31} Appellant argues there is no evidence in the record showing the trial court considered whether appellant had the present and future ability to pay the $8,560 restitution order.[2] Appellant asserts that to the contrary, "the trial court seemed to make a contrary finding at the sentencing hearing where it [ ] stated that [appellant] would 'be way behind the eight ball when you get out here with all of the court costs and the restitution figures. You've got about almost ten thousand dollars in restitution."

{¶32} R.C. 2929.18(A) authorizes trial courts to impose financial sanctions on felony offenders. This includes ordering the offender to pay restitution to the victim of the offender's crime "in an amount based on the victim's economic loss." R.C. 2929.18(A)(1). However, before a trial court may impose a financial sanction, the court

must consider the offender's present and future ability to pay the financial sanction. R.C. 2929.19(B)(6).

{¶33} "[T]here are no express factors that must be taken into consideration or findings regarding the offender's ability that must be made on the record." *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942; *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, ¶8. However, there must be some evidence in the record to show the trial court acted in accordance with the legislative mandate. *Simms* at id.

{¶34} We have consistently held that compliance with R.C. 2929.19(B)(6) can beshown through the trial court's use of a PSI, which often provides financial and personal information, in order to aid the court in making its determination. Id. at ¶9; *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶21; *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, ¶6.

{¶35} The trial court stated at the sentencing hearing that it had considered the information in the PSI and all statements made at the hearing. Likewise, in each of the three sentencing entries ordering restitution, the trial court stated it had considered the record, oral statements, and the PSI; "[f]urther, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees and the court makes no finding at this time of the defendant's ability to pay attorney fees."

{¶36} While the PSI does not list any of appellant's assets, it did contain information regarding his age, education level, family/marital status, physical and mental

2. We note appellant does not contest the amount of the restitution order, only his ability to pay.

health, his alcohol and drug use, and his previous employment. Appellant who was 23 years old at the time of the sentencing hearing, left school in the 12th grade, is in good health, and has been employed before doing labor work at $9-10 per hour. He will be approximately 26 years old upon his release from prison. There is nothing in the record which would indicate he would be unable to obtain some type of employment upon his release from prison. See *Simms*.

{¶37} In light of the foregoing, we find that the trial court complied with R.C. 2929.19(B)(6) before ordering restitution. As for the "eight ball" statement made by the trial court, we do not construe it as a contrary finding regarding appellant's ability to pay. Upon a review of the trial court's related findings in their entirety, it is evident the statement was made as part of, and based on, the trial court's refusal to impose fines in light of the court costs and restitution appellant will have to pay. Appellant's second assignment of error is overruled.

{¶38} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.