

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-12-104
	:	CA2010-12-105
- vs -	:	<u>OPINION</u>
	:	9/19/2011
MARK G. KIRCHOFF,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case Nos. 2010CR0778 and 2010CR0940

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

Michael A. Kennedy, 70 North Riverside Drive, Batavia, Ohio 45103, for defendant-appellant

HENDRICKSON, P.J.

{¶1} Defendant-appellant, Mark G. Kirchoff, appeals the sentence imposed by the Clermont County Court of Common Pleas following his guilty plea to nine counts of theft from an elderly person, one count of securities prohibitions, three counts of grand theft, and one count of passing bad checks.

{¶2} On September 22, 2010, the grand jury indicted appellant on 21 counts, including ten counts of theft from an elderly person (Counts 1–10), ten counts of securities

prohibitions (Counts 11-20), and one count of engaging in a pattern of corrupt activities (Count 21). Count 10 was later amended to grand theft. The record indicates that these charges arose from a fraudulent investment scheme appellant engaged in from March 2008 through September 2010. During this time, appellant misspent funds received by several of his clients in his position as a financial advisor. Many of his victims were elderly and one was legally blind. The money appellant took from many of these victims represented life savings or retirement funds. According to the evidence presented at sentencing, appellant used these funds to maintain his extravagant lifestyle. Specifically, the money was used to pay his own personal bills, debts and to make payments to his ex-wife to keep her from reporting his forgery of her signature on a second mortgage of their home. Based on the record, appellant received over \$200,000 from these individuals.

{¶3} Initially, appellant pled not guilty to all charges, but later entered guilty pleas to Counts 1 through 11 of the indictment in exchange for dismissal of the remaining counts. On November 22, 2010, the trial court held a sentencing hearing and sentenced appellant to one-year terms for Counts 1, 3, 4, 5, 6, and 8 for theft from an elderly person involving between \$5,000 and \$25,000, in violation of R.C. 2913.02(A)(3); three-year terms as to Counts 2, 7, and 9 for theft from an elderly person involving between \$25,000 and \$100,000, in violation of R.C. 2913.02(A)(3); three years as to Count 11 for securities prohibitions, in violation of R.C. 1707.44(G), and a six-month term for Count 10 for grand theft, in violation of R.C. 2913.02(A)(3). The trial court ordered that the sentences for Counts 1 through 9 be served consecutive to one another, but concurrently with Counts 10 and 11, for an aggregate sentence of 15 years.

{¶4} On November 29, 2010, the prosecutor charged appellant by information with three additional counts, two counts of grand theft and one count of passing bad checks.

These charges were based upon the same fraudulent investment scheme by appellant, but the victims were not identified until after the grand jury returned the initial indictment. Appellant entered his guilty plea the next day and was sentenced to 12 months for each grand theft count and 180 days for the passing bad checks count. The trial court ordered these terms be served concurrently with the sentence imposed on November 24, 2010.

{¶15} Appellant appealed both cases, and this court ordered the appeals consolidated. Appellant now appeals his sentence in its entirety, advancing one assignment of error for review.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO NINE CONSECUTIVE TERMS OF IMPRISONMENT FOR A TOTAL OF 15 YEARS."

{¶18} Appellant argues that the trial court erred in imposing consecutive sentences for a total of 15 years because he is a first time offender for nonviolent crimes involving property. Appellant argues that the consecutive prison term should be reversed as the trial court abused its discretion in its consideration of R.C. 2929.11 and R.C. 2929.12.

{¶19} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio 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 minimum sentences." *Foster* at ¶100. Accordingly, in applying *Foster*, appellate courts must apply a two-step procedure when reviewing felony sentences. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. "[T]his 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, if the first prong is satisfied, (2) review the sentencing

court's decision for an abuse of discretion." *State v. Wiggins*, Warren App. No. CA2009-09-119, 2010-Ohio-5959, ¶7, citing *Kalish* at ¶4. Although appellant's assignment of error relates to prong two of the *Kalish* test, this court will briefly review the sentence's compliance with the applicable rules and statutes in this case.

{¶10} Appellant pled guilty to a total of three second-degree felonies, seven third-degree felonies, three fourth-degree felonies, and one first-degree misdemeanor. The sentence for each was within the statutory range for the respective degree of felony or misdemeanor. Also, the trial court made clear in its judgment entries that it considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12. *Kalish* at ¶18; *State v. Bishop*, Clermont App. No. CA2010-08-054, 2011-Ohio-3429, ¶15. Accordingly, the sentence is not clearly and convincingly contrary to law. As the first prong of the *Kalish* test is satisfied, we now turn to the second prong, whether the trial court abused its discretion in imposing the sentence.¹

{¶11} "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." *Kalish*, 2008-Ohio-4912 at ¶19. As to sentencing, a trial court does not abuse its discretion as long as careful and substantial deliberation is given to the relevant statutory considerations. *Bishop*, 2011-Ohio-3429 at ¶15.

{¶12} Appellant argues that the trial court abused its discretion in its consideration of

1. The state points out that appellant did not object to his prison sentence, and therefore, a plain error review should apply. *State v. Woodrey*, Clermont App. No. CA2010-01-008, 2010-Ohio-4079, ¶21, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15. However, because *Payne* was decided before *Kalish* and the Supreme Court more recently clarified that the standard of review for sentences is abuse of discretion under *Kalish*, we analyzed appellant's assignment of error under *Kalish*. *State v. Bishop*, Clermont App. No. CA2010-08-054, 2011-Ohio-3429, fn. 1; *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, fn. 3; *State v. Burk*, Bulter App. No. CA2009-03-019, 2009-Ohio-5643, fn. 1; *State v. Elliott*, Clermont App. No. CA2009-03-020, 2009-Ohio-5926, fn. 1; and *State v. Gray*, Clermont App. Nos. CA2010-01-006, CA2010-04-024, 2010-Ohio4949, fn. 3.

the purposes and principles of sentencing under R.C. 2929.11 when sentencing him. Specifically, appellant argues that the trial court abused its discretion because it did not specify the facts that would support a finding that the sentence protects the public in compliance R.C. 2929.11. Appellant also claims that the trial court failed to properly weigh the seriousness and recidivism factors contained in R.C. 2929.12. We find that the trial court did not abuse its discretion in ordering appellant to serve nine consecutive sentences for a total of 15 years.

{¶13} First, R.C. 2929.11 and R.C. 2929.12 only "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at ¶17. The trial court is not required to consider each factor in the statutes, but rather to exercise its discretion in determining whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. *Id.* The fact that the trial court chose to weigh the various sentencing factors differently than how appellant would weigh them is not sufficient to establish an abuse of discretion. As noted above, the trial court made it clear in both sentencing entries that it considered the principles and purposes of sentencing and balanced the seriousness and recidivism factors of the relevant statutes.

{¶14} Additionally, the record demonstrates that the trial court gave careful and substantial deliberation to the circumstances and factors of the case. The trial court withheld sentencing in the initial case until a presentence investigation could be completed. The court then considered this presentence report along with "the record, oral statements, any victim impact statement" prior to imposing the sentence. This presentence report indicated that appellant's actions were not a result of an addiction, such as to drugs or gambling, but rather to maintain an extravagant lifestyle. It further revealed that appellant had no genuine remorse for his actions and never had any intention of repaying any of his victims. Appellant

preyed on the elderly and disabled and as the state argued, took their life savings simply out of greed. Thus, the court found that appellant's crime was so serious that "no single prison sentence for any of the offenses committed as part of the course of conduct adequately reflects the seriousness of the offender's conduct, and that his conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶15} As to appellant's argument that 15 years is too great a punishment for an offender who has otherwise been a law-abiding citizen, we note that the trial court specifically addressed this argument during the second sentencing hearing. The court stated, "I thought under the circumstances you deserved some consideration for the fact that you have been a law-abiding person for the vast majority of your life, and that for whatever reason you had some problems. You reacted improperly. So I imposed a sentence that I thought was right and fair under the circumstances, and I still think it's right and fair."

{¶16} This court agrees and finds that appellant's 15-year sentence was not unreasonable, arbitrary or unconscionable, and therefore not an abuse of discretion.

{¶17} Accordingly, appellant's sole assignment of error is overruled.

{¶18} Judgment affirmed.

PIPER and HUTZEL, JJ., concur