

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-10-073
 :
 - vs - : OPINION
 : 8/6/2012
 :
 THEODORE W. OLDIGES, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 11-CR-00680

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

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Theodore W. Oldiges, appeals from his sentence in the Clermont County Court of Common Pleas following his guilty plea to two counts of trafficking in heroin. For the reasons set forth below, we affirm appellant's sentence.

{¶ 2} On August 3, 2011, the Clermont County Grand Jury indicted appellant on three counts of trafficking in heroin in violation of R.C. 2925.03(A)(1). Appellant initially pleaded

not guilty to the charges. Pursuant to a plea agreement, appellant later entered a guilty plea to counts two and three, and the state dismissed count one. According to the facts the state presented during the plea hearing, appellant knowingly sold heroin to a confidential informant on May 27, 2011, and again on June 13, 2011.

{¶ 3} The trial court sentenced appellant to serve a prison term of 12 months as to each count, to be served consecutively, for a total prison term of 24 months. Appellant appeals raising three assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT ERRED IN FINDING PRISON TO BE CONSISTENT WITH THE PURPOSES AND PRINCIPLES OF SENTENCING.

{¶ 6} Assignment of Error No. 2:

{¶ 7} THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT ON TWO COUNTS OF TRAFFICKING IN HEROIN.

{¶ 8} Assignment of Error No. 3:

{¶ 9} THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS AS THE RECORD DOES NOT SUPPORT SUCH A SENTENCE.

{¶ 10} As all three of appellant's assignments of error challenge his sentence and raise interrelated issues, we address the arguments together.

{¶ 11} In reviewing felony sentences, appellate courts must apply a two-step test. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, the appellate court 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." *State v. Wiggins*, 12th Dist. No. CA2009-09-119, 2010-Ohio-5959, ¶ 7, citing *Kalish* at ¶ 4. A

sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *State v. Elliott*, 12th Dist. No. CA2009-03-020, 2009-Ohio-5926, ¶ 10, citing *Kalish* at ¶ 18. If the sentence satisfies the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Haddix*, 12th Dist. No. CA2011-07-075, 2012-Ohio-2687, ¶ 64, quoting *Kalish* at ¶ 4.

{¶ 12} "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* 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. *State v. Bishop*, 12th Dist. No. CA2010-08-054, 2011-Ohio-3429, ¶ 15, citing *Kalish* at ¶ 20.

{¶ 13} Appellant argues that his sentence was contrary to law because the court failed to comply with R.C. 2929.13(B). Specifically, appellant contends that before sentencing him to prison, the court was required to find under R.C. 2929.13(B): (1) that he previously served a prison term; (2) that a prison sentence is consistent with the purposes and principles of sentencing, and (3) state whether he was amenable to any available community control sanctions. However, contrary to appellant's assertions, R.C. 2929.13(C) controls appellant's sentence, not R.C. 2929.13(B).

{¶ 14} As appellant was convicted of trafficking in heroin, R.C. 2925.03(C)(6)(a) provides that R.C. 2929.13(C) applies to determine whether to impose a prison term. Under R.C. 2929.13(C), in determining whether to impose a prison term, the trial court must simply comply with the purposes and principles of sentencing under R.C. 2929.11 and R.C. 2929.12. There are no further limitations on the trial court's decision to impose a prison term on an offender, such as appellant, who has been convicted of a felony drug offense. Rather,

the trial court "has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *State v. Bishop*, 2011-Ohio-3429, at ¶ 15, quoting *Kalish* at ¶ 17. Accordingly, the trial court was not required to comply with R.C. 2929.13(B), and after a review of the record, we find the trial court properly complied with R.C. 2929.13(C). The trial court explicitly stated in the judgment entry of sentence that it found prison to be consistent with the purposes of R.C. 2929.11.

{¶ 15} Furthermore, the sentencing transcript and the judgment entry of sentence clearly indicate that the trial court considered the principles and purpose of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. Also, appellant was sentenced within the applicable statutory range. Appellant was convicted of violating R.C. 2925.03(A)(1) for trafficking in heroin, a felony in the fifth degree. R.C. 2925.03(C)(6)(a). The available prison term for such an offense ranges from six months to 12 months. R.C. 2929.14(A)(5). Although appellant received the maximum sentence allowed on both counts, it still fell within the applicable statutory range according to R.C. 2929.14. The trial court also advised appellant of the applicable postrelease control issues. Based on the foregoing, appellant's sentence was not contrary to law as the trial court complied with all applicable statutes and rules.

{¶ 16} As the first prong of the *Kalish* test is met, we must determine whether the trial court abused its discretion in sentencing appellant to 24 months in prison. In arguing the trial court abused its discretion, appellant takes issue with the court's weighing of the statutory factors listed in R.C. 2929.12 and the imposition of maximum and consecutive sentences.

{¶ 17} Appellant contends that a review of the factors listed in R.C. 2929.12 indicates that a community control sanction "was more in line with the purposes and principles of sentencing." Appellant argues that most of the factors contained in R.C. 2929.12 do not apply to him based upon the facts of this case. However, 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. *State v. Paul*, 12th Dist. No. CA2011-10-026, 2012-Ohio-3205, ¶ 29; *State v. Kirchoff*, 12th Dist. Nos. CA2010-12-104 and CA2010-12-105, 2011-Ohio-4718, ¶ 13. Moreover, 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. *Kirchoff* at ¶ 13. As noted above, the trial court made it clear in the sentencing entry and during the hearing that it considered the principles and purposes of sentencing and balanced the seriousness and recidivism factors of R.C. 2929.12 in imposing appellant's sentence. In considering these statutory factors, the court found that prison was consistent with the purposes of the Ohio sentencing structure.

{¶ 18} Appellant also argues that the trial court abused its discretion in imposing the maximum term of imprisonment and consecutive sentences. He asserts his sentence was not "more serious" to warrant maximum or consecutive sentences. However, "trial court's 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." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100.¹ The record demonstrates that the trial court gave careful and substantial deliberation to the circumstances and relevant statutory considerations of this case.

1. The Supreme Court of Ohio recently reiterated that the required judicial fact-finding under R.C. 2929.14(C)(4) prior to imposing consecutive sentences remained unconstitutional even in light of the United States Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711 (2009). *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶ 39. As a result, the court found that trial judges were not required to engage in any such fact-finding prior to imposing consecutive sentences unless the General Assembly enacted new legislation requiring such findings be made. The General Assembly recently amended former R.C. 2929.14(E)(4), renumbered R.C. 2929.14(C), requiring fact-finding for consecutive sentences. Am.Sub.H.B. No. 86. This legislation, however, is inapplicable to appellant because he was sentenced on September 27, 2011, prior to the September 30, 2011 effective date of the legislation. See *State v. Haddix*, 12th Dist. No. CA2011-07-075, 2012-Ohio-2687, ¶ 63.

{¶ 19} At the sentencing hearing, the trial court noted that it had considered the record in this case, including appellant's presentence investigation report. The record indicates that Appellant had an extensive criminal record, including three felony convictions and a history of violence, which resulted in substantial prison terms. In reviewing appellant's presentence investigation report, the court also noted that appellant scored high on ORAS, Ohio Risk Assessment System, a scoring system designed to determine recidivism. The court also found that recidivism is more likely in this case based upon appellant's criminal record and his history of repeat offenses. Further, the court noted appellant's "serious substance abuse" problem. At the sentencing hearing, appellant requested the court order him to a drug treatment program rather than send him to prison. However, the court stated that substance abuse programs had been available to appellant in the past, but he failed to take advantage of such programs. Finally, the court found that a single sentence was insufficient and would demean the nature of these charges as the charges represented two separate sales of heroin. Accordingly, we cannot say that the trial court abused its discretion in sentencing appellant.

{¶ 20} Appellant's first, second, and third assignments of error are overruled.

{¶ 21} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.