

[Cite as *State v. Taylor*, 2016-Ohio-1065.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 15 MA 0078
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
CHRISTOPHER TAYLOR,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 15 CR 165 A
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman St., 6 th Floor Youngstown, Ohio 44503
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For Defendant-Appellant:	Atty. Wesley Johnson 1714 Boardman-Poland Road, Suite 9 Youngstown, Ohio 44514
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JUDGES:

Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 1, 2016

{¶1} Defendant-Appellant Christopher Taylor appeals from the sentence entered by Mahoning County Common Pleas Court for his first-degree aggravated robbery conviction. Appellant argues the trial court failed to consider the seriousness factors in R.C. 2929.12(B) and (C) when it imposed the five year sentence. He contends the sentence must be vacated and the matter remanded for resentencing. His argument has no merit, and the sentence imposed by the trial court is affirmed.

Statement of the Case

{¶2} Appellant was indicted by the Mahoning County Grand Jury for aggravated robbery, a violation of R.C. 2911.01(A)(1)(C), a first-degree felony; and robbery, a violation of R.C. 2911.02(A)(2), a second-degree felony. Attendant firearm specifications accompanied each charge. 3/12/15 Indictment.

{¶3} Appellant originally pled not guilty to the charges in the indictment. 3/24/15 Plea. Following discovery, the parties reached a plea agreement. The state agreed to dismiss the second-degree felony robbery charge, both firearm specifications and recommended a four year prison term on the aggravated robbery. Appellant agreed to plead guilty to the first-degree felony aggravated robbery charge.

{¶4} The trial court accepted the state's motion to dismiss the second-degree felony robbery charge and the firearm specifications. 4/13/15 Plea Tr. 3-4. Following a plea colloquy, the trial court accepted Appellant's guilty plea to the first-degree felony robbery charge. 4/16/15 Plea Agreement; 4/13/15 Plea Tr. 12. The trial court ordered a presentence investigation and set sentencing for a later date.

{¶5} A sentencing hearing was held on May 20, 2015. The state recommended four years. 5/20/15 Sentencing Tr. 2-3. Appellant, through counsel, requested the trial court impose the minimum three year prison term. 5/20/15 Sentencing Tr. 3-5. Appellant declined to say anything prior to sentencing. 5/20/15 Sentencing Tr. 5-6. The trial court imposed a five year sentence. 5/20/15 Sentencing Tr. 8; 6/11/15 J.E.

{¶6} Appellant timely appealed the sentence.

Assignment of Error

The trial court erred because it did not follow the statutory framework before it imposed sentence, as court failed to consider the seriousness or recidivism factors under R.C. 2929.12.

{¶7} This court is currently split on the standard of review to apply in felony sentencing cases. See *State v. Hill*, 7th Dist. No. 13 MA 1, 2014–Ohio–919 (Vukovich, J., Donofrio, J., majority with DeGenaro, J., concurring in judgment only with concurring in judgment only opinion); *State v. Wellington*, 7th Dist. No. 14 MA 115, 2015–Ohio–1359 (Robb, J., DeGenaro, J., majority with Donofrio, J. concurring in judgment only with concurring in judgment only opinion).

{¶8} One approach is to apply the test set forth in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, ¶ 26. *Hill* at ¶ 7–20. Under the *Kalish* test, we must first examine the sentence to determine if it is “clearly and convincingly contrary to law.” *Kalish* at ¶ 26 (O'Connor, J., plurality opinion). Next, if the sentence is clearly and convincingly not contrary to law, the appellate court reviews the sentence to determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶ 17 (O'Connor, J., plurality opinion).

{¶9} The other approach is to strictly follow R.C. 2953.08(G), which provides appellate courts are only to review felony sentences to determine if they are clearly and convincingly contrary to law. R.C. 2953.08(G) does not contain an abuse of discretion component. *Wellington* at ¶ 9–14.

{¶10} The issue regarding which felony sentencing standard of review is applicable is currently before the Ohio Supreme Court. *State v. Marcum*, 141 Ohio St.3d 1453, 2015–Ohio–239, 23 N.E.3d 1453. The certified question the Court has accepted is, “[D]oes the test outlined by the [c]ourt in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)?” *Id.*

{¶11} Regardless of what standard is employed, the result in this case is the same; the sentence is affirmed.

{¶12} Appellant argues that neither the sentencing transcript nor the sentencing judgment entry contain references to R.C. 2929.12(B) and (C), the

seriousness factors. He asserts the record does not reflect that the trial court considered those factors.

{¶13} The state counters by citing us to multiple cases from this court indicating the sentencing court does not need to make findings regarding the seriousness or recidivism factors in R.C. 2929.12. Moreover, we and many other districts have explained that trial courts are not required to state on the record it considered the factors as long as the record provides the reviewing court with evidence of the proper considerations.

{¶14} The state's position is correct. Sentencing courts must consider the principles and purposes of sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12 in determining the appropriate sentence. *State v. Parsons*, 7th Dist. No. 12 BE 11, 2013-Ohio-1281, ¶ 12, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. However, neither R.C. 2929.11 nor R.C. 2929.12 requires the sentencing court to make specific findings regarding the purposes and principles of sentencing, or seriousness and recidivism factors at the sentencing hearing or in the sentencing judgment entry. *State v. Henry*, 7th Dist. No. 14 BE 40, 2015-Ohio-4145, ¶ 22, citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31 and *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶15} We have explained that a silent record raises a rebuttable presumption that the sentencing court considered the proper statutory items within R.C. 2929.11 and R.C. 2929.12. *Henry* at ¶ 23, citing *State v. Grillon*, 7th Dist. No. 10CO30, 2012-Ohio-893, ¶ 131; *State v. James*, 7th Dist. No. 07CO47, 2009-Ohio-4392, ¶ 38-51. Even in the case of a completely silent record, where there is no mention of the factors in the judgment entry or at the hearing, it is presumed the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so. *State v. Hardy*, 7th Dist. No. 14 MA 30, 2015-Ohio-2206, ¶ 13; *State v. Pyles*, 7th Dist. No. 13 BE 11, 2014-Ohio-4146, ¶ 6 (Trial court is not required to discuss the R.C. 2929.12 factors on the record or to state that the factors were considered, so long as the record allows the reviewing court to determine that the proper consideration occurred.).

{¶16} Other appellate districts within Ohio agree with the above law. *State v. Bohannon*, 1st Dist. No. C-130014, 2013-Ohio-5101, ¶ 7; *State v. Rutherford*, 2d Dist. No. 08CA11, 2009–Ohio–2071, ¶ 34; *State v. Jackson*, 3d Dist. No. 1-06-26, 2006-Ohio-5146, ¶ 5; *State v. Picklesimer*, 4th Dist. No. 11CA9, 2012-Ohio-1282, ¶ 30; *State v. Hannah*, 5th Dist. No. 15-CA-1, 2015-Ohio-4438, ¶ 13; *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 11 (6th Dist.); *State v. Sutton*, 8th Dist. No. 102300, 2015-Ohio-4074, ¶ 72; *State v. Cobb*, 9th Dist. No. 13CA0087-M, 2014-Ohio-3530, ¶ 12; *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶64; *State v. Dickerson*, 11th Dist. No. 2013-A-0046, 2015-Ohio-938, ¶ 66. The Eighth Appellate District has even stated, “a trial court's statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill a trial court's obligations under R.C. 2929.11 and 2929.12.” *Sutton* at ¶ 72.

{¶17} The record in this case is not completely silent. In the judgment entry, the sentencing court stated, “The Court considered the record, oral statements and principles and purposes of sentencing under Ohio Revised Code § 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code § 2929.12.” 6/11/15 J.E. During the sentencing hearing the trial court also stated:

So upon considerations of the oral statements of defendant, the assistant prosecutor, presentence investigation report, and all the circumstances of this case, as well as the principles and purposes of sentencing under Revised Code Section 2929.11, and having considered the seriousness and recidivism factors under 2929.12 for the offense of aggravated robbery * * *, the defendant is sentenced to serve a term of five years in prison.

5/20/15 Sentencing Tr. 8.

{¶18} During sentencing, the trial court mentioned factors enumerated under R.C. 2929.12(D) indicating recidivism was more likely. Specifically, the sentencing court referenced Appellant's prior record; he was on probation from Boardman, Youngstown, and Girard when the instant offense was committed; in the past he has failed to respond favorably to community control; and he showed no remorse.

5/20/15 Sentencing Tr. 7. These references indicate the sentencing court considered R.C. 2929.12. Accordingly, we find the record is not silent on recidivism factors and without more, it is presumed the sentencing court fulfilled its obligation under R.C. 2929.12 concerning the likelihood of recidivism.

{¶19} However, there is no reference to the seriousness factors listed in R.C. 2929.12(B) and (C). The record could be considered silent as to that factor. Given the case law, a silent record raises a rebuttable presumption that the sentencing court did consider the appropriate statutory factors for the seriousness of the offense. Thus, the burden is on Appellant to demonstrate the sentencing court did not consider the statutory seriousness factors in R.C. 2929.12. Appellant did not meet that burden. The fact there is evidence in the record demonstrating the trial court considered the recidivism factors in R.C. 2929.12 is an indication the trial court considered all of the factors in R.C. 2929.12, including seriousness factors. Furthermore, Appellant does not explain to this court which seriousness factors are applicable to him. It may be that none of the seriousness factors are relevant in this case, and thus, the sentencing court's silence on the matter is an indication that none of them were applicable or relevant. Silence, in that instance, would not be deemed an indication that it failed to consider those factors. Therefore, without more reasoning from Appellant, it cannot be concluded, even if we deemed the record to be silent, Appellant overcame the rebuttable presumption that the trial court considered all factors in R.C. 2929.12.

{¶20} Consequently, for these reasons the sole assignment of error is meritless and the five year sentence is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.