

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-081
MARK L. ARKENBURG,	:	2010-L-132,
Defendant-Appellant.	:	and 2010-L-133

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000254, 09 CR 000426, and 09 CR 000788.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P. O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Matthew C. Bangert, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Mark D. Arkenburg, appeals his sentences following his guilty pleas in three separate cases before the Lake County Court of Common Pleas. Mr. Arkenburg pleaded guilty to two counts of Illegal Processing of Drug Documents, one count of Receiving Stolen Property, one count of Operating a Vehicle Under the Influence of Alcohol, and one count of Failure to Comply with Order or Signal of a Police Officer. The trial court sentenced him to a combined total period of incarceration of

seven years. Mr. Arkenburg now appeals the sentence, arguing that the trial court abused its discretion in not giving more weight to his expression of remorse. For the following reasons, we affirm the judgments and sentences of the trial court.

{¶2} **Statement of Facts and Procedural History**

{¶3} On January 20, 2010, Mr. Arkenburg attended a combined sentencing hearing before the Lake County Court of Common Pleas, for case numbers 09 CR 000788, 09 CR 000426 and 09 CR 000254. The cases arose from three separate incidents in March, May and September of 2009. Mr. Arkenburg pleaded guilty at this hearing to the following: two counts of Illegal Processing of Drug Documents, in contravention of R.C. 2925.23; one count of Receiving Stolen Property, in contravention of R.C. 4511.19; one count of Operating a Vehicle Under the Influence of Alcohol, a Drug of Abuse, or a Combination of Them, in contravention of R.C. 4511.19(A)(1)(a), which was merged with the Receiving Stolen Property count for sentencing purposes; and one count of Failure to Comply with an Order or Signal of a Police Officer, in contravention of R.C. 2921.331. In total, Mr. Arkenburg was sentenced to a period of incarceration of seven years, ordered to pay restitution in the amount of \$530, and stripped of his driver's license for life on one felony of the third degree and three felonies of the fourth degree.

{¶4} Mr. Arkenburg filed a timely notice of appeal and now brings one assignment of error:

{¶5} “The trial court erred by sentencing the defendant-appellant to a term of imprisonment where its findings were not supported by the record.”

{¶6} **Standard of Review**

{¶7} Pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, appellate courts, post *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, must apply a two-step approach in reviewing a sentence. First, the courts 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. The first prong of the analysis instructs that “the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.*

{¶8} The *Kalish* court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact finding statutes like R.C. 2929.14. *Id.* at ¶17. Therefore, as part of its analysis of whether the sentence is “clearly and convincingly contrary to law,” an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶9} If the first prong is satisfied, that is, the sentence is not “clearly and convincingly contrary to law,” the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* An abuse of discretion is the trial court's “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004).

{¶10} Mr. Arkenburg does not argue that his sentence is contrary to law, merely that that the trial court abused its discretion in selecting a sentence within the permissible range. Therefore, we will refrain from engaging in the first prong of the analysis and we will presume Mr. Arkenburg's sentence is not contrary to law.

{¶11} **Abuse of Discretion**

{¶12} R.C. 2909.12 states "a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing." Under subsection (E), a trial court is obliged to consider a number of factors mitigating against recidivism. One such factor is an offender's demonstration of sincere remorse. Mr. Arkenburg argues that the trial court abused its discretion in failing to give more weight to his expression of "sincere remorse and desire to correct his behavior," pursuant to R.C. 2929.12(E)(5).

{¶13} Although Mr. Arkenburg's sentence exceeds the term jointly recommended by the parties of four years, the trial court was not required to impose a jointly recommended sentence. See *State v. Zenner*, 11th Dist. No. 2004-L-008, 2005-Ohio-6070, ¶26. Furthermore, a review of the record demonstrates that the trial court gave due consideration to a number of factors when meting out Mr. Arkenburg's

sentence. While Mr. Arkenburg did express remorse for his actions before the court, the trial court acknowledged aggravating factors which counterbalanced such repentance. The trial court noted Mr. Arkenburg's substantial criminal history, including his presence before the same judge five years earlier -- at which time he was sentenced to 57 months of incarceration. The trial judge inquired as to how long after being released from that sentence Mr. Arkenburg re-offended, and he indicated only four months.

{¶14} In sentencing Mr. Arkenburg, the trial court expressly stated that it had "reasonably calculated this sentence to achieve the 2 overriding purposes of felony sentencing an[d] to be commensurate with and not demeaning to the seriousness of this offender's conduct. * * * In using my discretion to determine the most effective way to comply with the purposes and principles of sentencing I've considered all relevant factors including the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in division (D) and (E) of Revised Code 2929.12." Therefore, we see no abuse of discretion by the trial court and Mr. Arkenburg's first and only assignment of error is without merit.

{¶15} The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.