

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-06-046
 :
 - vs - : OPINION
 : 1/9/2012
 :
 THOMAS D. NELMS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 10-CR-00987

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

Denise S. Barone, 385 North Street, Batavia, Ohio 45103, for defendant-appellant

PIPER, J.

{¶1} Appellant, Thomas Daniel Nelms, appeals from a sentence imposed by the Clermont County Court of Common Pleas. Appellant pled guilty to theft and was sentenced to one year of incarceration. For the reasons outlined below, we affirm the trial court's judgment.

{¶2} Appellant was indicted on December 8, 2010, on one count of theft in violation of R.C. 2913.02(A)(1), a fifth-degree felony. The charges stemmed from allegations that

appellant stole two Dyson vacuum cleaners from a Home Depot. The aggregate value of the vacuum cleaners exceeded \$500. After the theft, appellant planned to resell one vacuum and return the other for store credit. Appellant is 60 years old and is a heroin addict. He has been convicted of 43 misdemeanors and 14 felonies over his life. Many of these offenses were thefts and were committed so that he could continue to feed his addiction. At the time of sentencing appellant expressed remorse for the offense, was eligible for a reduced rate apartment, and had completed a substance abuse treatment program.

{¶3} On March 16, 2011, appellant pled guilty to the charge. The trial court sentenced appellant to one year of incarceration which is the maximum term of imprisonment for the offense.

{¶4} Appellant now appeals the sentence, raising one assignment of error:

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT ON ONE COUNT OF THEFT."

{¶6} Appellant argues two issues in his assignment of error. In the first issue, he argues his sentence was in error because the record did not support the imposition of the maximum term of imprisonment.

{¶7} "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." *State v. Clay*, Madison App. No CA2011-02-004, 2011-Ohio-5086, ¶8, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. Appellate review of felony sentencing is controlled by the two-step procedure outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, an appellate court is to review the sentence to "determine whether the sentence is clearly and convincingly contrary to law." *Id.* If the sentence is not clearly and convincingly

contrary to law, then "the trial court's decision shall be reviewed under an abuse of discretion standard." *State v. Miller*, Butler App. No. CA2010-12-336, 2011-Ohio-3909, ¶10; *Kalish* at ¶17. An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181.

{¶8} A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences the defendant within the permissible range. *Kalish* at ¶18. In the present case, the trial court considered the purposes and principles of sentencings under R.C. 2929.11,¹ and balanced the seriousness and recidivism factors under R.C. 2929.12. Further, the court properly applied postrelease control and sentenced appellant to a term within the permissible range for the offense. R.C. 2929.14(A)(5). Thus, the sentence is not clearly and convincingly contrary to law.²

{¶9} The next step is to determine whether the trial court abused its discretion in imposing appellant's sentence. A trial court does not abuse its discretion in rendering a sentence so long as its gives careful and substantial deliberation to the relevant statutory considerations. *Kalish* at ¶20. The trial court considered the facts of the offense, appellant's age, and the presentence investigation report. The court also considered appellant's long

1. During sentencing the trial court orally stated that it considered the principles and factors of felony sentencing under R.C. 2911.12 and R.C. 2911.13. Although these statutes were incorrect, the court properly stated the relevant statutes in its judgment entry. A court speaks through its judgment entry. *State v. Workman*, Clermont App. No. CA2009-07-039, 2010-Ohio-1011, ¶12.

2. Appellant mentions in his brief that plain error review should apply when the defendant does not object to his sentence. *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008, ¶8, 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*. E.g., *State v. Kirchoff*, Clermont App. Nos. CA2010-12-104, CA2010-12-105, 2011-Ohio-4718, fn.1.

criminal history. As noted above, appellant has 43 misdemeanor and 14 felony criminal convictions. During sentencing, appellant admitted that he is a heroin addict and that he often steals in order to support his addiction. The trial court also mentioned that appellant planned to exploit his theft by selling one vacuum and returning the other one for credit. Thus in light of the facts of this case, the court did not abuse its discretion in imposing the maximum one-year sentence.

{¶10} In appellant's second issue, he argues that defense counsel was ineffective. Specifically, appellant claims counsel failed to advise him of the possibility of the maximum term of incarceration.

{¶11} To prevail on an ineffective assistance of counsel claim, appellant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *State v. Jones*, 193 Ohio App.3d 400, 2011-Ohio-1717, ¶35, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052. In order to demonstrate prejudice, appellant must establish, but for counsel's errors, a reasonable probability exists that the result of his trial would have been different. *State v. Ritchie*, Butler App. No. CA2008-12-304, 2009-Ohio-5280, ¶21, citing *Strickland* at 694. The failure to make an adequate showing on either prong is fatal to appellant's ineffective assistance of counsel claim. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶77, citing *Strickland* at 697. Judicial scrutiny of counsel's conduct must be highly deferential. *Id.* at 689.

{¶12} Appellant argues that counsel was ineffective because he was not advised that he would be sentenced to one year in prison. However, until appellant exercised his allocution and the trial court actually announced the sentence, no one knew what appellant's sentence would be. Appellant's disappointment with receiving the maximum sentence is not enough for this court to find counsel ineffective. Appellant cannot credibly claim that he was

prejudiced when he knew his own criminal history and he was informed that one year imprisonment was possible. He was aware of the chance of receiving the maximum term because both the trial court and the written plea agreement informed him of this possibility. Moreover, he also admitted to the court that counsel told him that prison was possible. Thus, appellant's counsel was not ineffective.

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

{¶14} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.