

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

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2009-P-0033</b>
MELISSA L. BURRELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0125.

Judgment: Affirmed.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Holly L. Bednarski*, Bednarski & Reece, L.P.A., 159 South Main Street, #300, Akron, OH 44308; *Thomas M. DiCaudo*, Kaffen, Zimmerman, DiCaudo & Yoder, 520 South Main Street, #500, Akron, OH 44311-1077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Melissa L. Burrell, appeals from the judgment of the Portage County Court of Common Pleas sentencing her to an eight year term of imprisonment after entering pleas of guilty to one count of aggravated vehicular homicide and one count of operating a motor vehicle while under the influence of a drug of abuse. At issue is whether the trial court erred in imposing the prison term for the crimes to which she pleaded guilty. For the reasons that follow, we affirm.

{¶2} On August 5, 2007, appellant, driving a 1994 Jeep, struck a stationary Ford Taurus occupied by Sandra Wilk and her eight-year-old niece. The former was killed and the latter injured. Appellant's urine tested positive for methamphetamine at a level of 85,300 nanograms per milliliter, over 170 times the statutory limit for methamphetamine. Appellant's statement, taken immediately after the fatal crash, provided:

{¶3} "I was heading on Old Forge Rd and I had the car pegged at top speed when I hit another vehical [sic] head on."

{¶4} While discussing the crash with the officer who responded to the scene, appellant stated she was trying to commit suicide. The reconstruction report indicated appellant was traveling between 66 mph and 81 mph upon impact.

{¶5} On February 26, 2008, the Portage County Grand Jury indicted appellant on one count of felony murder, in violation of R.C.2903.02(B), an unclassified felony; two counts of aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1) and (2), felonies of the second and third degree, respectively; felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree; and two counts of operating a vehicle under the influence, in violation of R.C. 4511.19, misdemeanors of the first degree.

{¶6} Appellant was released on bond pending further proceedings. In the meantime, defense counsel filed several motions, including a motion to dismiss the felony murder charge; a motion to suppress evidence of bodily fluid test results; and any evidence of appellant's verbal statements to officers after the crash.

{¶7} On May 5, 2008, the court held a suppression hearing at which the parties stipulated (1) to the approximate time of the crash; and (2) that more than three hours had elapsed before appellant's bodily fluids were drawn. The court subsequently suppressed the results of the bodily fluid tests for purposes of proving a per se violation because the draws occurred beyond the three-hour window set by statute. The court determined, however, that its ruling would not preclude the prosecution from using the test results at trial with an expert to establish appellant's condition at the time of the crash.

{¶8} Several days later, appellant entered a written plea of guilty to one count of aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1), a felony of the second degree; and one count of operating a motor vehicle under the influence, in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(G), a misdemeanor of the first degree. The trial court accepted appellant's plea of guilty and nolleed the remaining counts. The matter was then referred to the Adult Probation Department for a presentence investigation report.

{¶9} A sentencing hearing was held on June 13, 2008, at which the court received two oral victim impact statements as well as multiple documents, including several letters submitted on appellant's behalf. After arguing, inter alia, that the facts of the case represent "truly the worse [sic] form of this offense," the state recommended that the court order appellant to serve a term of eight years in prison for the crimes to which she pleaded.

{¶10} In mitigation, defense counsel submitted a report from an independent reconstruction analyst indicating the position of appellant's vehicle at the time of impact

demonstrated she swerved immediately prior to the crash. Defense counsel also underscored various emotional hardships appellant had endured during her life, including a “very bad incident” she had experienced on the night before the crash with people she had “a horrible relationship with.”

{¶11} After considering the information submitted at the hearing, the trial court sentenced appellant to a term of eight years in prison for aggravated vehicular homicide; and a term of 180 days in jail with a lifetime suspension of her driver’s license for operating a vehicle under the influence. The court ordered the jail time to run concurrently with the term of imprisonment.

{¶12} Appellant now appeals and asserts two related assignments of error which we shall address together. They provide:

{¶13} “[1.] The sentenced [sic] imposed by the trial court was not reasonably calculated to achieve the overriding purposes established by O.R.C. [Sec.] 2929.11(A).

{¶14} “[2.] The sentenced [sic] imposed by the trial court was not commensurate with appellant Burrell’s conduct nor was it consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶15} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. In the first step, we consider whether the trial court “adhered to all applicable rules and statutes in imposing the sentence.” *Id.* at 25. “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.* Next, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors

set forth in Sections 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. See *Id.* at 27.

{¶16} Under the first prong of *Kalish*, a reviewing court is required to consider whether the sentence complies with all applicable rules and statutes to ensure the sentence is not clearly and convincingly contrary to law. *Id.* at ¶4. As the Ninth Appellate District recently observed:

{¶17} “*Kalish* did not specifically provide guidance as to the ‘laws and rules’ an appellate court must consider to ensure the sentence clearly and convincingly conforms with Ohio law. The specific mandate of *Kalish* is that the sentence fall within the statutory range for the felony of which a defendant is convicted. *Id.* at ¶15.” *State v. Gooden*, 9th Dist. No. 24896, 2010-Ohio-1961, at ¶48.

{¶18} Appellant's felony sentence for aggravated vehicular homicide was within the statutory range for a second degree felony. Appellant's sentence, therefore, did not go beyond or run afoul of sentencing laws as they existed at the time she was sentenced. As the imposition of appellant's sentence passes the first prong of *Kalish*, we must next determine whether the trial court abused its discretion in selecting its sentence.

{¶19} Appellant asserts several arguments to support her position that the trial court abused its discretion in sentencing her to the maximum term of imprisonment for the second degree felony to which she pleaded. First, appellant contends her eight year sentence does not serve the underlying purposes of felony sentencing; to wit: “\*\*\* to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11(A). Appellant emphasizes that, prior to the underlying incident,

she had been convicted of only two minor traffic violations as well as felony theft and manufacturing of drugs. Moreover, appellant claims each of her non-traffic related criminal convictions stemmed less from a disregard for the law, and more from her struggles with drug abuse and the instability of her mental health. Appellant therefore contends her sentence undermines the purposes of felony sentencing because, with proper treatment and therapy, there is nothing to indicate she would commit crimes in the future. We find this argument unavailing.

{¶20} Although appellant minimizes her criminal history, the fact remains that she has a criminal history. This does provide some foundation for the court to conclude she may recidivate. Moreover, even assuming appellant has struggled with a drug problem and mental illness, she is not entitled to excuse her criminal history on this basis. The record indicates that, at the time of the underlying incident, appellant was 20 years old. In her adult life, appellant had been convicted of three offenses, two of which were felonies. Considering these points, we believe the trial court's sentence was rationally calculated to protect the public from future crimes appellant would commit and punish appellant, i.e., appellant's sentence was reasonably fashioned to achieve the overriding purposes of Ohio's felony sentencing laws. We therefore find no abuse of discretion.

{¶21} Next, appellant argues her sentence was not commensurate with her conduct. We disagree.

{¶22} The record indicates appellant recklessly drove her vehicle at a high rate of speed in order to kill herself. She did so with complete disregard to the safety of the general public and other motorists. In the end, instead of accomplishing her purported

goal, one innocent person was killed and another was injured. The impact of appellant's action on the victims' family was elaborately articulated in a lengthy statement read into the record. Not only did the family lose a beloved member, but the only surviving victim, a young girl, still suffers from severe emotional problems as a result of the incident. Given the circumstances of the crash and the information before the court, we believe the trial court did not impose a sentence incommensurate with appellant's conduct. In this respect, the court acted within its discretion in sentencing appellant.

{¶23} Appellant's final argument alleges that her sentence was not consistent with other sentences imposed on offenders who have committed similar crime. Appellant supports her argument by listing several cases from this district wherein defendants were sentenced to lesser terms of imprisonment after being convicted of aggravated vehicular homicide. This argument is not well-taken.

{¶24} This court has held that a direct comparison of cases does not necessarily demonstrate appellant was treated in a manner inconsistent with other, similarly situated defendants. In other words, a "numerical comparison to other sentences is not dispositive of the issue of consistency" in felony sentencing. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶52. In holding that cases cannot be formulaically compared in the abstract, we are acknowledging that the circumstances and realities of one case will invariably differ from another. Similarly, by designating a range from which a judge can select an appropriate sentence, Ohio's sentencing laws recognize that some situations merit a greater punishment than others, even when different defendants commit the same crime. A felony-two, for example, is punishable between

two and eight years. A sentence for such a crime will always depend upon the unique facts of the case, the defendant's personal and/or criminal history, and any other circumstances a court deems reasonably germane to achieve the important social and punitive goals of sentencing. The fact that appellant received a harsher sentence in this case than others convicted of the same crime is therefore not indicative of inconsistency, but reflective of the circumstances of the crime to which she admitted legal and factual guilt.

{¶25} As discussed supra, the trial court's sentence was within the applicable felony range and congruent with the principles and purposes of felony sentencing. The court further stated on record that it had considered Ohio's sentencing statute in selecting appellant's sentence. We therefore hold, in adhering to the statutory framework, the trial court imposed a sentence consistent with the circumstances of the case. *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶25. (Holding consistency in sentencing is derived from the proper application of Ohio's felony sentencing guidelines.) We find no abuse of discretion.

{¶26} One final point deserves attention. In its response brief, the state concedes the trial court failed to properly notify appellant of postrelease control during the sentencing hearing. This issue was not assigned as error in appellant's brief. Nevertheless, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. Pursuant to R.C. 2929.191, a trial court may, after conducting a hearing described in the statute, "correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender

leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control.” *State v. Singleton*, 124 Ohio St.3d. 173, 179, 2009-Ohio-6434. As these procedures can be initiated at any time while the offender is in prison, the matter need not be reversed and remanded via this opinion and judgment.

{¶27} Appellant’s two assignments of error are therefore overruled.

{¶28} For the reasons discussed in this opinion, the judgment of the Portage County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.