

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-05-144
 :
 - vs - : OPINION
 : 1/11/2010
 :
 TRACEY L. KESSEL, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-01-001

Robin N. Piper, Butler County Prosecuting Attorney, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45012-0515, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Tracey Kessel, appeals a decision of the Butler County Court of Common Pleas sentencing him to five years in prison after he was convicted of operating a motor vehicle while under the influence of alcohol. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On January 28, 2009, appellant was indicted on one count of operating a motor vehicle while under the influence of alcohol ("OVI") in violation of R.C. 4511.19(A)(1)(a), a

third-degree felony due to the fact that appellant had previously been convicted of a felony OVI offense. The charge was accompanied by a specification that appellant, within 20 years of committing the current OVI offense, had been convicted of or pleaded guilty to five or more equivalent offenses. R.C. 2941.1413. Pursuant to a plea agreement, appellant entered a guilty plea to the charge and the specification was merged. Following a hearing, appellant was sentenced to five years in prison. Appellant timely appeals, raising one assignment of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT IMPOSED A MAXIMUM SENTENCE OF INCARCERATION."

{¶5} Appellant argues that the trial court abused its discretion in imposing the maximum prison term, insisting that the record is devoid of an adequate explanation for the sentence. According to appellant, the trial court mechanically imposed the maximum term in accordance with an established "sentencing pattern" in OVI cases rather than considering the applicable statutory sentencing factors and the facts and circumstances of his case.

{¶6} In reviewing a felony sentence, an appellate court conducts the two-part analysis outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, we must ensure that the trial court adhered to all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *Id.* at ¶4. If this first prong is satisfied, the trial court's decision is then reviewed for an abuse of discretion. *Id.*

{¶7} Appellant emphasizes certain statements made by the trial court at his plea hearing to argue that his sentence was mechanically determined prior to the sentencing

hearing. The trial court informed appellant of the possible sentences during the plea colloquy, stating "you understand that at a minimum this Court is required to sentence you to a term of imprisonment of 120 days, as a practical matter, you're looking at either five years or very close to it" and re-iterating "you are likely to receive * * * a lengthy prison sentence close to five years." The court also opined that it was highly unlikely that appellant would receive community control, stating "[y]ou will receive a prison sentence, do you understand that?" After the court was informed it had previously sentenced appellant for felony OVI, the court reflected, "[s]o you have an appreciation for the Court's sentencing pattern on DUI." Appellant responded in the affirmative.

{¶8} Although appellant urges that these statements show the trial court's "cookie cutter" approach to sentencing in OVI cases, his focus is improper and detracts from the proper mode of inquiry. That is, despite these statements, appellant's sentence withstands scrutiny under *Kalish*.

{¶9} First, we find that the trial court's sentence is not contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the overriding purposes and principles of felony sentencing as outlined in R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences the defendant to a term within the permissible range. *Kalish* at ¶18. The trial court expressly stated in its judgment entry of conviction that it considered the purposes and principles of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. In addition, the court properly applied postrelease control and sentenced appellant to a term within the permissible range for the offense. Accordingly, the sentence is not clearly and convincingly contrary to law.

{¶10} Second, we find that the trial court did not abuse its discretion in ordering appellant to serve the maximum sentence of five years for OVI with a prior felony OVI

conviction. A trial court does not abuse its discretion in rendering a sentence so long as it gives "careful and substantial deliberation to the relevant statutory considerations." *Kalish* at ¶20. The court considered the presentence investigation report, which revealed appellant's extensive criminal history involving multiple license violations and alcohol-related offenses. The court permitted appellant the opportunity to voice his remorse, but balanced this against the fact that appellant continued to flout the law, expressed a disingenuous acceptance of his alcohol problem, and posed a risk to the public. In view of these considerations, we conclude that the trial court's decision was not unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. A trial court should refrain from inferring that it will impose a particular type of sentence before it has considered all of the relevant sentencing factors and guidelines set out by law. This would avoid the appearance of indiscretion. Appellant's single assignment of error is overruled. Judgment affirmed.

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

[Cite as *State v. Kessel*, 2010-Ohio-46.]