

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA29
	:	
vs.	:	Released: September 24, 2009
	:	
CECIL RUSSELL,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Michael D. Miller, Athens, Ohio, for Defendant-Appellant.

C. David Warren, Athens County Prosecuting Attorney, and George Reitmeier, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Cecil Russell, appeals the decision of the Athens County Court of Common Pleas, convicting him of felonious assault and sentencing him to eight years of incarceration. Appellant asserts there was error below in that: 1) the verdict was not supported by sufficient evidence; 2) the verdict was against the manifest weight of the evidence; 3) the State created prejudice by alluding to the fact that he didn't testify; 4) he had ineffective assistance of counsel; and 5) the trial court illegally imposed the maximum sentence and made it run consecutively with a prior sentence.

{¶2} Because the State presented the jury with evidence which was legally sufficient and competent and credible, Appellant's first two assignments of error have no merit. Because we cannot conclude the alleged reference to Appellant's failure to testify was manifestly intended or that the jury would naturally and necessarily take it to be a comment on the failure to testify, Appellant's third assignment of error is also overruled. His fourth assignment of error fails because Appellant is unable to show that any of the alleged instances of ineffective assistance of counsel were prejudicial. Finally, because his sentence was neither clearly and convincingly contrary to law nor an abuse of discretion, his final assignment of error also fails. Accordingly, we overrule each of Appellant's five assignments of error and affirm the decision of the trial court.

I. Facts

{¶3} The incident leading to Appellant's arrest originated with a verbal altercation between Appellant's brother, Paul Russell, and the victim, Mike Malcolm, at Malcolm's residence. As a result of this dispute, Paul Russell left the scene on his four-wheeler, telling Malcolm that he would be back. Paul then went to Appellant's residence to enlist his help and the two men returned to the scene: Paul still driving the four-wheeler and Appellant following in his pickup truck.

{¶4} Malcolm saw Appellant and Paul Russell approaching in their vehicles and attempted to alert his cousin, Jason Mesaros, who lived next door. After failing to immediately rouse Mesaros, Malcolm approached the road Appellant and Paul Russell were driving upon, which abutted Mesaros' property. Appellant and his brother had turned their vehicles around at this point and were now traveling down the road in the direction from which they had come, Paul Russell still leading on the four-wheeler and Appellant trailing in his pickup. As Paul Russell drove his four-wheeler past Malcolm's position, Malcolm threw a can of beer at him. Appellant, traveling behind the four-wheeler in his truck, then struck Malcolm and continued down the road.

{¶5} As a result of the impact, Malcolm suffered serious injuries requiring a nine-day hospital stay. He suffered two fractured disks in his neck, a lower back injury, and had to undergo reconstructive surgery on his knee, arm and ankle.

{¶6} Appellant was subsequently arrested and indicted for felonious assault. After a jury trial, Appellant was found guilty and sentenced to eight years of incarceration, the maximum penalty for the offense. The trial court further ordered the sentence to run consecutively to

a prior sentence for drug-trafficking which Appellant was already serving.

Following sentencing, Appellant timely filed the current appeal.

II. Assignments of Error

- I. THE VERDICT AGAINST APPELLANT WAS SUPPORTED BY INSUFFICIENT EVIDENCE.
- II. THE GUILTY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
- III. THE STATE MADE IMPROPER STATEMENTS DURING HER CLOSING ARGUMENT WHICH PREJUDICED APPELLANT AND DENIED RIGHT [sic] TO REMAIN SILENT UNDER THE FIFTH AMENDMENT.
- IV. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE [sic] OF COUNSEL AS GAURANTEED [sic] BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND THE OHIO CONSTITUTION.
- V. THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE WHEN IT SENTENCED APPELLANT TO THE MAXIMUM SENTENCE AND IMPOSED THE SENTENCES CONSECUTIVE TO A PREVIOUSLY IMPOSED SENTENCE.

III. First Assignment of Error

{¶7} In his first assignment of error, Appellant alleges there was insufficient evidence to support his conviction for felonious assault. When reviewing the sufficiency of the evidence, an appellate court examines the evidence admitted at trial to determine whether that evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The test is one of legal adequacy, not rational

persuasiveness. The relevant question is, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

{¶8} This test raises a question of law and does not allow us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Rather, the test “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson* at 319. The issues of the weight given to the evidence and the credibility of witnesses are for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶9} At trial, both parties agreed that the only element of felonious assault in question was whether Appellant intentionally struck the victim, Malcolm, with his truck. Appellant did not testify during trial and his version of events came largely from a statement he had given to investigators after the incident occurred. According to Appellant, Malcolm ran across Mesaros’ property and out onto the roadway, where he was

unavoidably and inadvertently struck. Appellant claimed that in no way did he intentionally strike Malcolm with the truck. He also claimed that he drove straight down the road the entire time, that the truck was in the middle of the roadway immediately prior to striking Malcolm, and that at no time did the truck leave the roadway. Further, although he knew he had struck Malcolm, he claimed he did not stop because he thought he had only “bumped” him. The State’s evidence, including eye-witness testimony, presented the jury with a much different scenario.

{¶10} The State called three eye-witnesses to the event: Malcolm’s cousin and neighbor, Jason Mesaros, another neighbor, Cyrus Craig, and Malcolm himself. The testimony of each was in almost complete agreement. Each stated that Malcolm was not in the road, but was still on Mesaros’ property, when Appellant struck him: Malcolm testified that he was stationary and standing between four and six feet from the road; Craig testified that “there is no way he was on the road”; and Mesaros estimated that Malcolm was three or four feet off the roadway.

{¶11} The witness testimony went much further in rebutting Appellant’s version of the incident and indicating that Appellant’s actions were intentional. Craig, from the vantage of his front porch, approximately thirty to forty yards from the scene, witnessed the entire sequence of events.

He testified that he saw Malcolm, standing off the side of the road, throw a beer can at Paul Russell as he drove past on the four-wheeler. He further testified that Appellant then crossed from the right side of the road to the left side, drove off the road into the grass, struck and completely ran over top of Malcolm with the truck, then, without stopping, continued down the roadway.

{¶12} Mesaros, who witnessed the events from his property, approximately twenty to thirty feet from the road, testified similarly. He stated that after Malcolm threw the beer at Paul Russell, Appellant, trailing the four-wheeler down the right side of the roadway, accelerated toward Malcolm, swerved off the left side of the road and into Mesaros' yard, ran over Malcolm, struck a mailbox post, then continued down the road without stopping and left the scene.

{¶13} In addition to the eye-witnesses, the State also presented testimony from the investigating officers. Contradicting Appellant's version of events that his truck never left the road, Trooper Daugherty testified that fresh tire tracks at the scene indicated a vehicle had left the roadway then returned approximately forty feet later. The tracks were approximately five feet off the road and were free-rolling, indicating that the vehicle's breaks had not been applied. Further, the officer testified that the mailbox post

which had been struck was approximately four feet off the road, and that damage to Appellant's truck was consistent with striking the post. The trooper further testified that the tire marks and physical evidence was "consistent with everything that [Mesaros and Craig] told me at the scene." The trooper also testified that the severity of Malcolm's injuries indicated that he had been run over and not simply "bumped" as described by Appellant. Finally, he stated he found no evidence at the scene contradicting Craig, Mesaros, and Malcolm's testimony.

{¶14} In light of such evidence, and after viewing the evidence in a light most favorable to the prosecution, it was clearly reasonable for the jury to find that Appellant acted intentionally and that the essential elements of felonious assault were proven beyond a reasonable doubt. As such, the jury's verdict was supported by sufficient evidence and Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶15} In his second assignment of error, Appellant contends the jury's verdict was against the manifest weight of the evidence. "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Sufficiency tests the

adequacy of the evidence, while weight tests “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other[.]” *State v. Sudderth*, 4th Dist. No. 07CA38, 2008-Ohio-5115, at ¶27, quoting *Thompkins* at 387.

{¶16} “Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence.” *State v. Smith*, 4th Dist. No. 06CA7, 2007-Ohio-502 at ¶41. When determining whether a criminal conviction is against the manifest weight of the evidence, we “will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus. See, also, *Smith* at ¶41. We “must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted.” *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814; *State v. Martin*

(1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. However, “[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶17} Because of the abundance of evidence presented by the State, as discussed in the first assignment of error, we also find the verdict was not against the manifest weight of the evidence. Keeping in mind that the credibility of witnesses and the weight of evidence are issues for the trier of fact, the testimony of investigating officers regarding the physical evidence coupled with the eye-witness testimony, which was contradicted only by Appellant’s self-severing statement, amounted to substantial evidence upon which the jury could have reasonably concluded that all the elements of felonious assault were proven beyond a reasonable doubt. As such, Appellant’s second assignment of error is overruled.

V. Third Assignment of Error

{¶18} In his third assignment of error, Appellant argues the State created prejudice, and violated his Fifth Amendment right to remain silent, by impermissibly referring to the fact that Appellant did not testify. The entirety of the allegedly prejudicial statement is the following, made during the State’s closing argument:

{¶19} “All three of those people [Malcolm, Mesaros and Craig] were in good view points in which they could have the opportunity to see what happened. And they are the only three that you actually got to hear testimony from. Two were at advantage [sic] point from the top of the hill where they were able to look down and one was actually the person that was struck.”

{¶20} As Appellant notes, it is clearly improper for a prosecutor to comment upon a defendant’s failure to testify. *State v. Beebe*, 172 Ohio App.3d 512, 875 N.E.2d 985, 2007-Ohio-3746, at ¶11; *State v. Gapen*, 104 Ohio St.3d 358, 819 N.E.2d 1047, 2004-Ohio-6548, at ¶103. In determining whether a defendant’s Fifth Amendment rights were violated in this regard, courts must consider “whether the language used was *manifestly* intended or was of such character that the jury would naturally and *necessarily* take it to be a comment on the failure of the accused to testify.” *State v. Webb* (1994), 70 Ohio St.3d 325, 328, 638 N.E.2d 1023, quoting *Knowles v. United States* (C.A.10, 1955), 224 F.2d 168.

{¶21} Under this standard, we find the words “they are the only three that you actually got to hear testimony from” did not violate Appellant’s Fifth Amendment rights. In the context of the State’s full statement, the plain, direct meaning was simply that the testimony of the

three eye-witnesses was in complete agreement, that there was no testimony which contradicted the witnesses, and that each witness was in a position to fully view the events in question. The statement obviously made no direct reference to Appellant and, while it is possible to argue that, by implication, the statement alludes to the fact that Appellant did not testify, we cannot conclude it was manifestly intended to do so or that the jury would necessarily take it as such. Accordingly, we overrule Appellant's third assignment of error.

VI. Fourth Assignment of Error

{¶22} As his fourth assignment of error, Appellant states he had ineffective assistance of counsel in that his trial counsel: 1) failed to call a witness who “had a conversation with the alleged victim that the alleged victim was so intoxicated that he did not see the truck driven by Appellant, but that he would get Appellant locked up anyways”; 2) failed to question investigating officers “regarding statements made by them to Appellant that they did not believe, at the crime scene, that the events played out the way the alleged victim and his witnesses claimed they did”; 3) failed to object regarding a lost recording of a conversation between Appellant and an officer at the crime scene; 4) failed to cross-examine witnesses regarding possible bias toward Appellant; 5) failed to object when the State allegedly

referred to Appellant's failure to testify; and 6) refused to allow Appellant to testify.

{¶23} In order to establish ineffective assistance of counsel, an appellant must show that counsel's representation was both deficient and prejudicial. *In re Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101, at ¶77; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Deficient representation means counsel's performance was below an objective standard of reasonableness. *Id.* To show prejudice, an appellant must show it is reasonably probable that, except for the errors of his counsel, the proceeding's outcome would have been different. *Id.*

{¶24} We have stated that "[a] reviewing court when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action." *State v. Wright*, 4th Dist. No. 00CA39, 2001-Ohio-2473, at *22. Instead, reviewing courts must be highly deferential. *Id.* Further, "a reviewing court: 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, citing *Strickland*.

{¶25} Initially, we note that Appellant makes no citations to the record regarding the alleged incidences of ineffective assistance. Specifically, Appellant states that a witness could have been called who would have refuted Malcolm’s version of events, that, at the crime scene, officers made statements to the effect that they had doubts about the sequence of events, that there was a lost recording of a conversation between Appellant and the investigating officer, and that Malcolm threatened Appellant while being treated by the paramedics. However, no evidence of these allegations are contained in the record below.

{¶26} On direct appeal, we are restricted to facts that are apparent in the record. *State v. Davis*, 4th Dist. No. 06CA21, 2007-Ohio-3944, at ¶19. “Where an appellant's claim of ineffective assistance of counsel is based upon facts not in the record, the appropriate remedy is a petition for postconviction relief, not direct appeal.” *State v. Brodbeck*, 10 Dist. No. 08AP-134, at ¶64, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452. As such, in this appeal we are unable to consider those alleged instances of ineffective assistance of counsel which rely on facts outside the record.

{¶27} As to Appellant's contention that counsel was ineffective in failing to cross-examine witnesses and in failing to allow him to testify, we

must be highly deferential toward such decisions. “The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.” *State v. Leonard*, 104 Ohio St.3d 54, 818 N.E.2d 229, 2004-Ohio-6235, at ¶146. Appellant's argument, that cross-examination regarding possible bias toward him would have aided his case, is mere speculation. Trial counsel may have concluded such cross-examination would be ineffective and only serve to reinforce the credibility of the eye-witness testimony. Similarly, the decision to keep Appellant off the stand may have been sound trial strategy. Counsel may have legitimately determined that opening Appellant to cross-examination would only serve to emphasize the inconsistency of Appellant’s version of events with the multiple eye-witness testimony and the physical evidence.

{¶28} In any event, none of the alleged instances of ineffective assistance, either individually or collectively, were prejudicial. To maintain his ineffective assistance of counsel argument, Appellant must demonstrate it was reasonably probable that, but for his trial counsel’s errors, the jury’s verdict would have been otherwise. Here, the testimony of Malcolm, Mesaros and Craig, the tire marks, the testimony of the investigating officers that the physical evidence was consistent with the eye-witness testimony,

and the extensive injuries suffered by Malcolm, despite Appellant's claim that he had only "bumped" him, weigh very heavily against Appellant. In light of such evidence, Appellant has not shown that, but for his trial counsel's alleged errors, it was reasonably probably that the jury would have found him not guilty. As such, the assignment of error is overruled.

VII. Fifth Assignment of Error

{¶29} In his final assignment of error, Appellant states the trial court's decision to impose the maximum sentence and make it run consecutively with a prior sentence was illegal. We begin our analysis with the appropriate standard of review.

{¶30} In the wake of *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, there has been considerable confusion regarding the proper standard of review of felony sentences. The Supreme Court of Ohio addressed the issue in *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. "Whether Kalish actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2. Nevertheless, unless the Supreme Court of Ohio provides further guidance

on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing.¹

{¶31} Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. “First, they 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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.” *Kalish* at ¶4. “As to the first step, the *Kalish* court did not clearly specify what ‘pertinent laws’ we are to consider to ensure that the sentence ‘clearly and convincingly’ adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *.” *Ross* at ¶10.

{¶32} In the case sub judice, the court imposed an eight year term. As felonious assault is a second degree felony, eight years is the maximum term available under statute, but it is within the sentencing range. The court stated it had considered the record, the oral statements, the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and

¹ As the *Kalish* decision is a plurality, not a majority opinion, the Eighth and Tenth Districts have announced they will continue to apply the standards used prior to *Kalish*. *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, at ¶99, fn. 1; *State v. Franklin*, --- N.E. 2d ---, 2009-Ohio-2664, at ¶8. Conversely, though the Ninth District has recognized the questionable precedential value of *Kalish*, it has applied the new standard regardless. *State v. Jenkins*, 9th Dist. No. 24166, 2008-Ohio-6620, at ¶10, fn. 1. We will do the same.

recidivism factors under R.C. 2929.12, and also considered the felony sentence guidance provided by R.C. 2919.13. The court also found Appellant was not amenable to community control due to a prior violent offense.

{¶33} Accordingly, we find the trial court complied with all applicable rules and statutes in imposing Appellant's sentence. As the first prong of the *Kalish* test is satisfied, we now turn to the second prong, whether the trial court abused its discretion.

{¶34} “An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *State v. Horner*, 4th Dist. No. 02CA5, 2003-Ohio-126, at ¶8, citing *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940; *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331; *State v. Adams* (1980), 60 Ohio St.2d 151, 157, 404 N.E.2d 144. When an appellate court applies this standard, it cannot substitute its judgment for that of the trial court. *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, at ¶12.

{¶35} Post-*Foster*, trial courts have full discretion to impose sentences within the statutory range and to determine whether a sentence satisfies the overriding purposes of Ohio's sentencing statutes. No longer are

courts required to give reasons for imposing maximum, consecutive or more than the minimum sentences. Nothing in the record below indicates the trial court abused its discretion in sentencing Appellant. As such, there is no basis for asserting that the trial court's sentence was unreasonable, arbitrary or unconscionable. Because we find the trial court's imposition of an eight year sentence for felonious assault, made to run consecutively with a prior conviction, was neither clearly and convincingly contrary to law nor an abuse of discretion, Appellant's final assignment of error is overruled.

VIII. Conclusion

{¶36} For the foregoing reasons, we overrule each of Appellant's assignments of error and affirm the decision of the trial court. Appellant's sufficiency of the evidence and manifest weight arguments fail because of the abundance of evidence adduced by the State, including eye-witness testimony and testimony regarding the physical evidence. In his third assignment of error, Appellant fails to show the State manifestly intended to refer to his decision not to testify or that the jury would necessarily understand it as such. His fourth assignment of error is unwarranted because of a failure to establish that, but for the alleged ineffective assistance of counsel, the jury's verdict would have been otherwise. Finally, because his sentence comports with *Kalish*, and was neither contrary to law nor an abuse

of discretion, it also is meritless. Accordingly, we affirm the decision and judgment of the court below in full.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.