

[Cite as *State v. White*, 2010-Ohio-1511.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23288
Plaintiff-Appellee	:	Trial Court Case No. 08-CR-3631
v.	:	
	:	
MARK A. WHITE	:	(Criminal
	:	Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

.....

OPINION

Rendered on the 2nd day of April, 2010.

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MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

FRANK A. MALOCU, Atty. Reg. #0055228, 2100 First National Plaza, 130 West Second Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} Mark White has appealed a 10-year prison sentence. He contends

primarily that the trial court failed to follow, or even consider, the purposes and principles of sentencing stated in section 2929.11 of the Revised Code. White secondly contends that trial counsel's assistance was ineffective because counsel failed to object to the sentence. White fails to prove either contention, so we will affirm the sentence.

{¶ 2} Around 12:30 a.m., one morning in July 2008, White walked up to the front door of the home in which his wife and two children lived, and kicked it in.¹ He walked upstairs to his wife's bedroom, walked into the room, and grabbed her by the throat. White then grabbed her by the hair and shook her head. He threw her on the floor. For the next ten minutes, White kicked and hit his wife—repeatedly. White admitted these facts when he took the stand during his trial.

{¶ 3} White was indicted and tried to a jury on three counts: aggravated burglary in violation of R.C. 2911.11(A)(1), a first-degree felony; burglary in violation of R.C. 2911.12(A)(1), a second-degree felony; and domestic violence in violation of R.C. 2919.25(A), a third-degree felony. The domestic-violence charge was in the third degree because White had been convicted of domestic violence three times before. White was found guilty of all three offenses.

{¶ 4} The trial court sentenced White to an aggregate prison term of 10 years. For the domestic-violence offense, from the 1-to-5 year range for a third-degree felony, see R.C. 2929.14(A)(3), the court selected a 3-year term. The court merged the two burglary offenses and, from the 3-to-10 year range for a first-degree felony, see R.C.

¹They had been married for seven-and-a-half years but, at the time at least, did not live together.

2929.14(A)(1), selected a 7-year term, which the court ordered White to serve consecutively to the first. Also, the court found that White violated conditions of a community-control sanction, which were imposed in a prior case, so it added an additional, concurrent sentence of 18 months.

{¶ 5} White assigns two errors for our review.

{¶ 6} The first assignment of error alleges:

{¶ 7} “WHETHER THE TRIAL COURT FAILED TO FOLLOW THE REQUIREMENTS OF O.R.C. 2929.11, APPELLANT’S SENTENCE IS INCONSISTENT WITH SENTENCES OF SIMILAR OFFENDERS AND A LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT Demean THE SERIOUSNESS OF THE OFFENSE AND IMPACT OF THE VICTIM.”

{¶ 8} Trial courts have the discretion to select a prison term from within the statutory range. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus. Courts do not select terms in a mechanical, one-size-fits-all manner. Rather, courts tailor their selections to the offender upon whom the sentence is imposed. To help ensure a proper fit, division (A) of section 2929.11 gives sentencing courts obligatory guidelines. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶17 (“[R.C. 2929.11] serve[s] as an overarching guide for trial judges to consider in fashioning an appropriate sentence.”). It tells courts to be guided by the two overriding purposes of felony sentencing—protection of the public and punishment of the offender. The sentence that the court imposes must be “reasonably calculated to achieve the two overriding purposes.” R.C. 2929.11(B). “To achieve those purposes,” says division (A), “the sentencing court shall consider the

need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” Division (B) of section 2929.11 tells courts that their sentences should reflect certain principles of sentencing: a sentence should be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B).

{¶ 9} Here, the trial court said little about how White's sentence was tailored to him. Before imposing the sentence, the court noted that a prison sentence was presumed—“Now according to the Ohio Revised Code section 2929.13(D) and 2929.11, it is presumed that a prison sentence or a term in prison is necessary to comply with the principles and purposes of sentencing in Ohio Revised Code section 2929.11.” (Tr. 171). The only other tailoring clue came immediately after the court imposed the sentence, when it said to White, “Your children need a chance to grow up outside of the violence. And you don't seem to understand the boundaries, sir, so that's 10 years.” (Tr. 172).

{¶ 10} However, while the court was required to follow the statutory guidelines, it was not required by rule or law to express how doing so led it to the 10-year term. See *Kalish*, at ¶12 (“*Foster* does not require a trial court to provide any reasons in imposing its sentence.”). The better practice, to be sure, is for the court to explain, as this would undoubtedly aid our review of the sentence. But merely by not explaining on the record the court commits no error. We assume that the court followed the law and sought to achieve the purposes and principles of sentencing stated in section

2929.11, unless, of course, affirmative evidence shows otherwise. *State v. Rigsbee*, 174 Ohio App.3d 12, 2007-Ohio-6267, at ¶23 (“[A] silent record raises the presumption that a trial court considered the statutory factors and guidelines.”). White points to no such evidence.

{¶ 11} Generally, appellate review of a felony sentence is two-fold—ensuring that the trial court followed the pertinent sentencing laws and rules, and, if it did, ensuring the sentence is not so ill-fitting as to be an abuse of discretion. See *Kalish*, at ¶17. Here, White’s sentence falls within the statutory range for his offenses, and White fails to show that the sentence is an abuse of discretion. White asserts that a shorter sentence would be commensurate with and would not demean the seriousness of his offenses and the impact they had on his wife and children. But he fails to give any reason for this alleged sentencing-principle violation. And, logically, even if the allegation were true, it would not mean that the sentence he actually received necessarily violates this principle or that the sentence he actually received must be considered an abuse of discretion. Also, White does not compare his sentence with sentences of similar offenders, or offer any other reason that his sentence is inconsistent, so he offers no basis for us to conclude that his sentence violates the principle of consistency.

{¶ 12} The first assignment of error is overruled.

{¶ 13} The second assignment of error alleges:

{¶ 14} “WHETHER APPELLANT’S TRIAL COUNSEL’S FAILURE TO OBJECT TO APPELLANT’S SENTENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 15} White here contends that because trial counsel did not object to the 10-year sentence imposed by the court he could not raise sentencing errors on appeal. We notice that White mentioned no such problem when he raised the sentencing error in the first assignment of error. White has failed to demonstrate that his counsel was constitutionally ineffective as required by *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 16} The second assignment of error, too, is overruled.

{¶ 17} Judgment Affirmed.

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DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

Mathias H. Heck, Jr.
Johnna M. Shia
Frank A. Malocu
Hon. Frances E. McGee

Case Name: State of Ohio v. Mark A. White
Case No: Montgomery App. No. 23288
Panel: Donovan, Brogan, Froelich
Author: James A. Brogan