

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09CA0083
MARVIN D. WILLIAMS	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 08 CR 559

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: April 8, 2010

APPEARANCES:

For Defendant-Appellant:

J. MATTHEW DAWSON
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Newark, OH 43055

For Plaintiff-Appellee:

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

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Delaney, J.

{¶1} Defendant-Appellant, Marvin D. Williams appeals his conviction and sentence for two counts of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4), and one count of Disseminating Matter Harmful to Juveniles, in violation of R.C. 2907.31(A)(1) and/or (A)(2). Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On August 15, 2008, the Licking County Grand Jury indicted Appellant on two counts of Gross Sexual Imposition and one count of Disseminating Matter Harmful to Juveniles. Appellant pled not guilty to the charges.

{¶3} Appellant filed a Motion to Suppress certain oral and written statements on November 12, 2008. An evidentiary hearing was held on the motion on January 20, 2009. The following facts were adduced at the hearing.

{¶4} On August 5, 2008, Detective William Davis of the Licking County Sheriff's Department was referred a case from Children Services regarding allegations of a child molestation/rape. The victim was a five-year-old girl who alleged that while she was at Appellant's home being babysat by Appellant's wife, Appellant put his hand down her pants and touched her "a lot of times." The child also stated that on one occasion, Appellant masturbated in front of her.

{¶5} Detective Brock Harmon worked with Detective Davis to investigate the case. On August 7, 2008, the detectives went to Appellant's residence to set up an interview with Appellant. Appellant was not home so Detective Davis left his business card with Appellant's wife and asked if she could have Appellant give Detective Davis a

call. Detective Davis told Appellant's wife that he thought Appellant had some information that might help him on a case.

{¶6} Detective Davis stated that Appellant called him at 8:30 a.m. on August 8, 2008. Detective Davis testified that Appellant told him that he wanted to go ahead and come in and talk to them, to get it over with, because Appellant had other things to do that day. Appellant drove himself to the Licking County Sheriff's Department.

{¶7} When Appellant arrived, Detective Davis brought Appellant to a conference room located on the second floor of the Licking County Sheriff's Department. The door to the conference room was not locked.

{¶8} Detective Harmon was also present in the conference room and he conducted the interview with Appellant. The interview commenced at 9:08 a.m. At the outset of the interview, Detective Harmon told Appellant that he was not under arrest; that Appellant was free to leave at any time; and that any statement that Appellant gave would be freely and voluntarily given. Appellant did not state to Detective Harmon that he had any reservations about the parameters.

{¶9} Detective Harmon started the interview by asking Appellant his date of birth, his residence, and if he knew why he was being interviewed. By 9:13 a.m., Appellant admitted to the detectives that he had inappropriately touched the victim. The detectives then tape-recorded the interview. The detectives advised Appellant that he was not under arrest; he was free to leave at any time; and the statements he gave were voluntary. The taped interview summarized Appellant's earlier admission. During the interview, Appellant was cooperative and willing to speak.

{¶10} After the interview concluded, the detective placed Appellant under arrest. Detective Harmon brought Appellant to the intake area of the Sheriff's Department. Shortly afterwards, the jail sergeant contacted the detective to let him know that Appellant wanted to speak with him again. Detective Harmon met with Appellant in a private room located in the intake area. Detective Harmon stated that before he spoke with Appellant, he read Appellant his *Miranda* rights and Appellant signed a form waiving his rights, signed at 2:25 p.m. on August 8, 2008. Appellant told the detective that he wanted to speak to the victim and the family, but the detective informed him that would not be possible. Detective Harmon told Appellant he could write a letter to the victim and the family if he wanted. The detective took Appellant back to the intake area and had no further contact with him.

{¶11} The jail sergeant later contacted Detective Harmon to tell him that he had two letters from Appellant in his possession. The detective retrieved the letters and brought them to the administrative section of the Sheriff's Department. The letters were for Appellant's family and the victim, expressing his sorrow for the acts that occurred.

{¶12} Based on the evidence presented, the trial court denied the Motion to Suppress by judgment entry on January 20, 2009. The trial court found that Appellant was not in custody at the time Appellant made his voluntary admission. The trial court further denied the suppression of Appellant's written statements because the statements were made after Appellant was informed of his *Miranda* rights and the statements were voluntarily given.

{¶13} Appellant changed his plea to no contest to the charges and the trial court held a change of plea and sentencing hearing on May 19, 2009. The trial court found

Appellant guilty of two counts of Gross Sexual Imposition and one count of Disseminating Matter Harmful to Juveniles. The trial court sentenced Appellant to three years on each count of Gross Sexual Imposition and twelve months on the charge of Disseminating Material Harmful to Juveniles. The sentences were to run consecutively for a total of seven years.

{¶14} It is from these decisions Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶15} Appellant raises two Assignments of Error:

{¶16} “I. WHETHER OR NOT THE TRIAL COURT’S IMPOSITION OF SENTENCE WAS CONTRARY TO LAW DUE TO THE LACK OF THE TRIAL COURT’S CONSIDERATION OF THE OVERRIDING PURPOSE AND FACTORS TO BE CONSIDERED IN FELONY SENTENCING.

{¶17} “II. WHETHER OR NOT THE TRIAL COURT ERRED IN ADMITTING STATEMENTS BOTH ORAL AND WRITTEN WITHOUT PROPER MIRANDA WARNINGS.”

I.

{¶18} Appellant argues in his first Assignment of Error the trial court erred because it failed to consider the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, before imposing sentencing. We disagree.

{¶19} Upon appellate review of felony sentences, the Ohio Supreme Court has established a two-step approach: “First, [the appellate court] 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 in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard." *State v. Walton*, Delaware App. No. 07-CA-A-12-0066, 2008-Ohio-7033, ¶18 citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, paragraph four of syllabus; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶20} The Supreme Court held, in *Kalish*, that the trial court's sentencing decision was not contrary to law. "The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law." *Kalish* at ¶18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and that there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable." *Kalish* at ¶ 20.

{¶21} In this case, Appellant was convicted of two counts of Gross Sexual Imposition under R. C. 2907.05(A)(4), felonies of the third degree. A felony of the third degree is punishable by one, two, three, four or five years in prison under R.C. 2929.14(A)(3). Appellant was sentenced to three years in prison for each count, to be served consecutively. Appellant was also convicted of one count Disseminating Matter Harmful to Juveniles pursuant to R.C. 2907.31(A)(1), a felony of the fourth degree. Pursuant to R.C. 2929.14, the sentencing range for a fourth degree felony is a prison term of either six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen,

sixteen, seventeen, or eighteen months. Appellant was sentenced to twelve months in prison, to be served consecutively with the prior counts.

{¶22} Upon review, we find that the trial court's sentencing complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range.

{¶23} The record further reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code and advised Appellant regarding post release control. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶24} Having determined Appellant's sentence is not contrary to law, we now review Appellant's sentence pursuant to an abuse of discretion standard. *Kalish*, ¶4. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations. The trial court had the benefit of a pre-sentence investigation report. The trial court heard statements from Appellant's family and a statement from the victim's family. The trial court considered the vulnerability of the five-year-old victim and the position of trust Appellant held as the husband of the victim's babysitter.

{¶25} Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably.

{¶26} Appellant's first Assignment of Error is overruled.

II.

{¶27} Appellant argues in his second Assignment of Error that the trial court erred in denying Appellant's Motion to Suppress. We disagree.

{¶28} Appellant argues that Appellant's oral statements made during the initial interview with the detectives and Appellant's later written statements should have been suppressed because they were taken in violation of Appellant's Fifth Amendment right against self-incrimination.

{¶29} The State is prohibited from using any statements made by a defendant during a custodial interrogation unless proper *Miranda* warnings have been given. *State v. King*, 179 Ohio App.3d 1, 2008-Ohio-5363, 900 N.E.2d 645, ¶14 citing *State v. Mason* (1998), 82 Ohio St.3d 144, 153, 694 N.E.2d 932 (“[o]nly a custodial interrogation triggers the need for a *Miranda* rights warning”). The first issue to be determined is whether Appellant was in custody when he interviewed with the detectives and made his admission. “In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a ‘reasonable person would have believed that he was not free to leave.’” *State v. King*, supra citing *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, 653 N.E.2d 253.

{¶30} The second issue is whether statements made by Appellant were made with a voluntary, knowing, and intelligent waiver of his Fifth Amendment right against self-incrimination. “In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and

the existence of threat or inducement.” *State v. King*, supra citing *State v. Wood*, Greene App. No. 2006 CA 1, 2007-Ohio-1027, 2007 WL 706807.

{¶31} In reviewing a trial court's ruling on a motion to suppress, the reviewing court must keep in mind that weighing the evidence and determining the credibility of witnesses are functions for the trier of fact. *State v. DePew* (1988), 38 Ohio St.3d 275, 277, 528 N.E.2d 542. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. See *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172. The reviewing court, however, must decide de novo whether, as a matter of law, the facts meet the appropriate legal standard. *Id.*

{¶32} We will first address Appellant's oral admission made during the interview with the detectives. Upon a review of the record, we agree with the trial court's determination that Appellant was not in custody. On August 7, 2008, Detective Davis left his business card with Appellant's wife and asked that Appellant contact him. Appellant returned the detective's call the next day and Appellant drove himself to the Sheriff's Department for an interview. Appellant was interviewed in a conference room with the detectives, where he was informed that he was not under arrest, he was not charged with a crime, and he was free to leave at any time. *Miranda* requires a police officer to give warnings whenever a suspect is under custodial interrogation. *Miranda* warnings are not required simply because questioning takes place at a police station and the questioned person is a suspect, especially when a suspect voluntarily submits to questioning and is at all times free to leave. *State v. Barnes* (1986), 25 Ohio St.3d 203, 495 N.E.2d 922.

{¶33} We further find Appellant's Fifth Amendment right against self-incrimination was not violated when he made his oral statement to the detectives. Appellant was 53 years old at the time of the interview. Appellant voluntarily appeared for the interview. Appellant was brought to a conference room where he was informed that he that he was not under arrest, he was not charged with a crime, and he was free to leave at any time. The interview began at 9:08 a.m., and at 9:13 a.m., Appellant admitted his inappropriate actions. Considering the totality of the circumstances, we find that Appellant's statements were voluntary and not in violation of Appellant's Fifth Amendment right against self-incrimination.

{¶34} We will next address Appellant's written statements. Appellant made written statements, letters to his family and the victim expressing his sorrow and apologies for the acts that occurred, after he was arrested. Detective Harmon spoke to Appellant before Appellant wrote the letters and provided Appellant with a *Miranda* warning, which Appellant waived. The trial court found that Appellant was in custody at the time he made the written statements, but Appellant had been given his *Miranda* warning and Appellant voluntarily made the statements; therefore, the written statements were not subject to suppression.

{¶35} Upon our review of the record, we agree with the trial court's conclusions.

{¶36} Appellant's second Assignment of Error is overruled.

{¶37} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

[Cite as *State v. Williams*, 2010-Ohio-1644.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARVIN D. WILLIAMS	:	
	:	
	:	Case No. 09CA0083
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Licking County Court of Common Pleas is AFFIRMED. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN