

[Cite as *State v. Hutchinson*, 2018-Ohio-4792.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106755

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT M. HUTCHINSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-607873-A

BEFORE: Laster Mays, J., E.A. Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: November 29, 2018

ATTORNEYS FOR APPELLANT

Mark Stanton
Cuyahoga County Public Defender

By: David Martin King
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Steven N. Szlagiewicz
Assistant Prosecuting Attorney
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

{¶1} Appellant-defendant Robert M. Hutchinson (“Hutchinson”) appeals his guilty plea and sentence and asks this court to vacate his sentence and remand to the trial court for resentencing. We affirm the trial court’s decision.

{¶2} Hutchinson pleaded guilty to one count of attempted rape, a second- degree felony, in violation of R.C. 2923.02 and 2907.02; and one count of gross sexual imposition, a third-degree felony, in violation of R.C. 2907.05(A)(4). Hutchinson was sentenced to five years in prison.

I. Facts

{¶3} Hutchinson was charged with first-degree rape, gross sexual imposition, and

kidnapping of his granddaughter in July 29, 2016. As part of a plea agreement, the state amended the charges, and Hutchinson agreed to plead guilty. After pleading guilty on October 23, 2017, the matter was continued for sentencing to November 20, 2017. Hutchinson did not appear for sentencing and a capias was issued. On December 11, 2017, due to the illness of the assigned judge, Hutchinson's attorney appeared before another judge to have the capias lifted. The new hearing date was scheduled for January 3, 2018.

{¶4} Due to the assigned judge's absence, the administrative judge presided at the sentencing hearing. Hutchinson's counsel objected and asked for a continuance due to Hutchinson's health issues. (Tr. 22-25.) The trial court, over the objection of Hutchinson, moved forward with sentencing as scheduled because Hutchinson, the victim, and the victim's family were present. In reference to Hutchinson's medical issue, the trial court stated that, "I hand down the sentence in the capacity of having medical treatment after today if it's something that he needs as well." (Tr. 26.)

{¶5} During the sentencing hearing Hutchinson's counsel relayed to the court that Hutchinson was deemed low risk for sexually reoffending. The trial court then provided Hutchinson an opportunity for allocution. Hutchinson stated, "[t]hese allegations, I feel they're false. Some people take my kindness and love for something else when they're young. I didn't do anything. I'm being accused of something I didn't do, and I swear on the Bible." (Tr. 56.) Thereafter, the trial court reiterated that Hutchinson's guilty plea meant he accepted responsibility for attempted rape and gross sexual imposition. Hutchinson replied that he understood. The trial court then sentenced Hutchinson to five years incarceration and five years of postrelease control. Hutchinson filed this timely appeal assigning three errors for our review:

I. The trial court erred when it proceeded to sentence over the objection of

the accused in violation of R.C. 2929.11 and 2929.12, the Fifth, Sixth, and Fourteenth amendment to the U.S. Constitution, Article I Section 10 of the Ohio Constitution, and Ohio Crim.R. 32;

- II. The trial court erred when it imposed a sentence that was not supported by the record in violation of R.C. 2929.11 and 2929.12, the Fifth, Sixth, and Fourteenth amendment to the U.S. Constitution, Article I Section 10 of the Ohio Constitution, and Ohio Crim.R. 32; and
- III. The trial court erred and violated the defendant's due process rights when it failed to provide the defendant the opportunity for allocution at sentencing in violation of R.C. 2947.05, the Fifth, Sixth, and Fourteenth amendment to the U.S. Constitution, Article I Section 10 of the Ohio Constitution, and Ohio Crim.R. 32.

II. Sentencing Judge

{¶6} In Hutchinson's first assignment of error, he argues that the trial court erred because the administrative judge presided over the sentencing hearing rather than continuing the hearing until the assigned judge returned from medical leave. Hutchinson reasoned that the assigned judge had in depth knowledge of his illness and could have better related his illness during the analysis dealing with the purposes and principles of sentencing. We find Hutchinson's error misplaced.

{¶7} We note that "Crim.R. 25(B) provides that '[i]f for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by the administrative judge * * * may perform those duties.'" *State ex rel. Harris v. Hamilton Cty. Court of Common Pleas*, 139 Ohio St.3d 149, 2014-Ohio-1612, 9 N.E.3d 1057, ¶ 7. *See also State v. Cisternino*, 11th Dist. Lake No. 99-L-137, 2001 Ohio App. LEXIS 1593 (Mar. 30, 2001); *State v. Torrestoro*, 8th Dist. Cuyahoga No. 97224, 2012-Ohio-601, ¶ 10. The administrative judge can assign himself to preside over sentencing hearings. *See State v. Blythewood*, 60 Ohio App.2d 300, 396 N.E.2d 1068 (8th Dist.1978) (Criminal Rule 25(B) does not prohibit an administrative judge from

designating himself as “another judge” within the meaning of Crim.R. 25(B), so as to complete the duties of one unable to perform). We find not error in the administrative judge presiding over the sentencing hearing for the assigned judge in her absence.

{¶8} Hutchinson’s counsel argued that the assigned judge, not the administrative judge, was fully aware of Hutchinson’s health issues, and it would not have been inconvenient for the parties to return in the interest of justice as it relates to the purposes and principles of sentencing.

We note that Hutchinson did not object to the administrative judge presiding over the hearing generally. The record reflects that Hutchinson’s counsel stated that she thought the court would grant a continuance because of Hutchinson’s health, not because there was some concern with the administrative judge presiding over the sentencing hearing. Therefore, Hutchinson waived any possible error to sentencing because he failed to object prior to sentencing. *See State v. Pecina*, 76 Ohio App.3d 775, 603 N.E.2d 363 (6th Dist.1992) (a defendant waives his right to challenge the authority of the sentencing judge by his failure to make a timely objection prior to sentencing).

{¶9} Therefore, we overrule Hutchinson’s first assignment of error.

III. Sentencing Error

{¶10} In Hutchinson’s second assignment of error, he contends that the trial court erred in sentencing him to five years in prison because the sentence was unsupported by the record. Hutchinson argues that his ailing health, low-risk score for reoffending, and his lack of a criminal record indicated that he should have received a minimum period of incarceration, or a term of probation with conditions. In other words, Hutchinson states that the trial court considered the purposes and principles of felony sentencing but misapplied them.

[W]e may disturb a felony sentence only if we clearly and convincingly find that either “the record does not support the sentencing court’s findings” or “the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2); *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 21-23.

State v. Bush, 8th Dist. Cuyahoga No. 106392, 2018-Ohio-4213, ¶ 22.

{¶11} Further,

“In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are ‘to protect the public from future crime by the offender and others and to punish the offender.’ To achieve these two purposes, the court must consider the need for incapacitating the offender, deterring him from future crime, rehabilitating the offender, and making restitution to the victim. *Id.* R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.”

State v. Bedell, 11th Dist. Portage No. 2008-P-0044, 2009-Ohio-6031, ¶ 22, quoting *State v. Delmanzo*, 11th Dist. Lake No. 2007-L-218, 2008-Ohio-5856, at ¶ 21.

{¶12} Reviewing the record, the trial court noted the horrific nature of the crime stating that Hutchinson penetrated his seven-year-old granddaughter while she cried and objected. The trial court also noted how Hutchinson refused to show remorse or take responsibility for the trauma he caused. The trial court did take into account Hutchinson’s health and allowed Hutchinson to receive any medical treatment necessary. Additionally, the trial court took into

account that Hutchinson was deemed low risk for reoffending. The trial court stated,

Because of the nature of the offense that this court finds to be abusive in nature, being maybe not the worst form of the offense, the court is going to find a prison sentence is consistent with the purposes and principles of sentencing, and on Count 1 the court is going to sentence you to [five] years of incarceration at Lorain Correctional Institution. On Count 2, [three] years of incarceration at Lorain Correctional Institution. I'm going to run those times concurrent to each other for a term of [five] years of incarceration at Lorain Correctional Institution.

(Tr. 66.)

{¶13} We find that the record supports the trial court's findings and sentence. The trial court considered both R.C. 2929.11(A) and 2929.12. The record supports that the trial court engaged in a lengthy analysis of why it sentenced Hutchinson to five years in prison. Nevertheless, Hutchinson argues that the trial court did not effectively comply with the purpose and principles of sentencing. However,

The court that imposes a felony sentence has the discretion to determine the most effective way to comply with the purposes and principles of sentencing as outlined above. R.C. 2929.12(A); *State v. Switzer*, 8th Dist. Cuyahoga No. 102175, 2015-Ohio-2954, ¶ 10. In exercising this discretion, however, the sentencing court must consider a statutory list of factors regarding the seriousness of the offender's conduct and the likelihood of recidivism, as well as any other factors relevant to achieving these purposes and principles of sentencing. *See* R.C. 2929.12; *Switzer*.

Although the trial court has a mandatory duty to "consider" the statutory factors under R.C. 2929.11 and 2929.12, the court is not required to engage in any factual findings under R.C. 2929.11 or 2929.12. *State v. Combs*, 8th Dist. Cuyahoga No. 99852, 2014-Ohio-497, ¶ 52; *State v. Bement*, 8th Dist. Cuyahoga No. 99914, 2013-Ohio-5437, ¶ 17. Nor is the trial court required to explain its analysis of those factors. *Switzer* at ¶ 8. "While trial courts must carefully consider the statutes that apply to every felony case, it is not necessary for the trial court to articulate its consideration of each individual factor as long as it is evident from the record that the principles of sentencing were considered." *State v. Gonzalez*, 8th Dist. Cuyahoga No. 102579, 2015-Ohio-4765, ¶ 6, citing *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶ 10.

State v. Osborn, 8th Dist. Cuyahoga No. 105196, 2017-Ohio-8228, ¶ 27-28. For the foregoing reasons, we overrule Hutchinson's second assignment of error.

IV. Allocution

{¶14} In Hutchinson's third assignment of error, he contends that the trial court violated his right to due process when it failed to provide the defendant opportunity for allocution. Crim.R. 32(A)(1) states,

[a]t the time of imposing sentence, the court shall do all of the following:

- (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

{¶15} We find Hutchinson's assigned error to be meritless. The record reveals that the trial court did give Hutchinson an opportunity for allocution. The trial court stated, "Okay. Mr. Hutchinson, I'll hear from you." (Tr. 56.) Hutchinson stated, "[t]hese allegations, I feel they're false. Some people take my kindness and love for something else when they're young. I didn't do anything. I'm being accused of something I didn't do, and I swear on the Bible." *Id.*

Hutchinson argues that the trial court interrupted him and did not let him finish. The record does not support that assertion. However, "even if a court interrupts a defendant's allocution, his right is not violated if he is permitted to speak after the interruption. *See State v. Bodnar*, 7th Dist. Mahoning No. 12-MA-77, 2013-Ohio-1115, ¶ 12." *State v. Roach*, 7th Dist. Belmont No. 15 BE 0031, 2016-Ohio-4656, ¶ 16. The record reflects that the trial court allowed Hutchinson an opportunity to allocute, then the trial court made a statement, and then allowed Hutchinson an opportunity to speak again, after asking him questions regarding his plea. The trial court stated, "I know that you haven't accepted responsibility with the police, you haven't accepted responsibility with the doctor, you haven't given any statement to the court through the probation department, and today you sit here maintaining your innocence and that's your

statement today, correct?” (Tr. 57.) Hutchinson replied, “Yes, Your Honor.” *Id.* We find that this demonstrates that Hutchinson completed his allocution. Hutchinson argues that the trial court’s tone implied sarcasm. However, we find no indication of this, and furthermore, the trial court’s tone is not a sufficient legal argument.

{¶16} Therefore, we overrule Hutchinson’s third assignment of error.

{¶17} Judgment affirmed.

It is ordered that the appellee recover from 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 common pleas court to carry this judgment into execution.

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

ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, A.J., and
LARRY A. JONES, SR., J., CONCUR