

[Cite as *State v. Shivers*, 2018-Ohio-99.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105621

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MITCHELL SHIVERS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-602796-A

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

RELEASED AND JOURNALIZED: January 11, 2018

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Mitchell Shivers appeals the sentence imposed upon his conviction for sexual battery and challenges the trial court's failure to rule upon his motion to dismiss for preindictment delay. Upon review, we affirm the judgment of the trial court.

{¶2} In Cuyahoga C.P. No. CR-16-602796-A, appellant was charged with two counts of rape, each with a sexually violent predator specification, and one count of kidnapping with a sexual motivation specification and a sexually violent predator specification. Appellant filed a motion to dismiss for preindictment delay. Thereafter, he entered a plea of guilty to Count 1 as amended to sexual battery in violation of R.C. 2907.03(A)(1), a felony of the third degree, which was punishable by a prison term of one to five years. Further, as part of the plea, appellant agreed to be found a sexually oriented offender. The remaining counts were nolle.

{¶3} The trial court sentenced appellant to a prison term of 42 months and classified appellant as a sexually oriented offender. The trial court ordered the sentence to run concurrent to a one-year prison sentence imposed on the same date in another case, Cuyahoga C.P. No. CR-15-601210-A, to which appellant had pled guilty for an offense of domestic violence in violation of R.C. 2919.25(A), with a furthermore clause alleging a prior conviction, a felony of the fourth degree.

{¶4} On appeal, appellant raises two assignments of error for our review. Appellant's first assignment of error claims:

The sentence imposed was not supported by the record and is contrary to law as it violates the ex post facto clauses of the Ohio and U.S. Constitutions.

{¶5} Appellant challenges the trial court's consideration of the purposes and principles of felony sentencing under R.C. 2929.11 and the factors of sentencing under R.C. 2929.12. Appellant argues that the trial court should have taken into consideration certain factors relating to his criminal history for which he had never served a prison term, his lack of education beyond the fifth grade, and his entry of guilty pleas. However, all of these factors were in the record for the court's consideration. Although a trial court is required to consider the principles and purposes of sentencing and the various factors under R.C. 2929.11 and 2929.12, it need not make specific findings. *State v. Osborn*, 8th Dist. Cuyahoga No. 105196, 2017-Ohio-8228, ¶ 28.

{¶6} Appellant claims that the 42-month concurrent sentence the trial court imposed was not supported by the record, and that the trial court should have considered and imposed a minimum concurrent term of incarceration of one year. The record reflects that before imposing sentence, the trial court heard from the assistant county prosecutor, defense counsel, appellant, and appellant's brother. Defense counsel requested the court to impose community control sanctions. Before imposing sentence, the trial court stated on the record that it had considered the record, the oral statements made to the court, the presentence investigation report, the purposes and principles of sentencing under R.C. 2929.11, and the seriousness and recidivism factors relevant to the offense under 2929.12.

{¶7} The presentence investigation report contained details of the sexual assault that occurred on or about June 5, 2004. The victim reported that she had met with appellant, whom she only knew by the name of “Black,” two weeks prior to that day. She went out with appellant that night, and he had her drive him to a reported address at around 1:45 a.m. She reported that they started watching a movie and within minutes appellant climbed on top of her and began removing her clothing. She told appellant to “stop, you don’t have any condoms or anything and I am not going to do anything with you.” She reported that appellant then digitally penetrated her and asked “do you have anything?” He then continued to vaginally rape her over her protests, and he also attempted to penetrate her from behind. After the appellant received a phone call, the victim was able to leave. She went to a hospital where a rape kit was performed and the police were notified. The victim signed a no prosecution form because she was afraid. Although the victim had been drinking alcohol the night of the incident, she stated she was not drunk and was not ever in a situation where she did not know what was going on around her. In December 2015, a DNA match was obtained and investigators discovered appellant’s name. They showed the victim a photograph of appellant, who the victim stated “looked like the person” who had sexually assaulted her.

{¶8} The trial court determined that a 42-month sentence was appropriate and commented that although the incident occurred long ago, the victim “is living with this every day” and appellant needed “to pay the consequences” for his actions.

{¶9} Under the plain language of R.C. 2953.08(G)(2), “an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 21. Appellate courts are to afford deference to a trial court’s broad discretion in making sentencing decisions. *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10.

{¶10} We have reviewed the entire record and the presentence investigation report. The sentencing transcript and the judgment entry of conviction reflect that the court considered the factors set forth in R.C. 2929.11 and R.C. 2929.12. We are unable to determine by clear and convincing evidence that the record does not support the sentence or that the sentence is otherwise contrary to law. Further, appellant has not shown that the trial court violated the ex post facto law in sentencing appellant because the sentencing range has remained the same and the trial court did not increase the maximum penalty from what it could have been under the version of the sentencing statute that was effective in 2004. Appellant’s first assignment of error is overruled.

{¶11} Appellant’s second assignment of error claims:

The trial court committed plain error when it failed to rule on appellant’s motion to dismiss for pre-indictment delay resulting in a violation of his due process rights.

Appellant disregards the fact that he pled guilty in this case. By pleading guilty, appellant waived all constitutional violations apart from those related to the entry of his

guilty plea. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 104.

Accordingly, appellant's guilty plea resulted in a waiver of any alleged due process violation arising from preindictment delay. *State v. Taylor*, 8th Dist. Cuyahoga No. 105322, 2017-Ohio-8066, ¶ 12; *State v. Brown*, 8th Dist. Cuyahoga No. 104095, 2017-Ohio-184, ¶ 9.

{¶12} Irrespective of waiver, appellant also fails to demonstrate that he was actually prejudiced by the preindictment delay. Under the burden-shifting framework for analyzing a due-process claim based on preindictment delay, a defendant must present evidence of actual prejudice before the burden shifts to the state to produce evidence of a justifiable reason for the delay. *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶ 13-14.

{¶13} Appellant asserts that the present case involves a nearly 12-year delay in procuring an indictment in a case where the alleged victim and her attacker were known to each other. As the law stands, however, the statute of limitations for rape is 20 years regardless of whether the identity of the alleged offender was known or should have been known by police upon investigation of the incident when it occurred. R.C. 2901.13(A)(3)(a). Whether the statute of limitations should be changed with regard to known offenders is a matter for the legislature to consider.

{¶14} Appellant further argues that he suffered actual prejudice as a result of the preindictment delay because he does not remember the incident and is unable to assist his counsel in his defense. Appellant's own general assertion that he does not remember the

incident does not, in and of itself, constitute actual prejudice. *State v. Hunter*, 8th Dist. Cuyahoga No. 104789, 2017-Ohio-4180, ¶ 18. Appellant has failed to present any evidence to establish that he suffered actual prejudice due to preindictment delay.

{¶15} Accordingly, appellant's second assignment of error is overruled.

{¶16} Judgment affirmed.

It is ordered that 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, A.J., and
ANITA LASTER MAYS, J., CONCUR