[Cite as *State v. Patrick*, 2011-Ohio-1592.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-26 (C.P.C. No. 09CR-04-2232)
Zandtania Patrick,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 31, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Olivia O. Singletary, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Zandtania Patrick ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a guilty plea of one count of unlawful sexual conduct with a minor, and imposing a maximum sentence of five years of incarceration. For the reasons that follow, we affirm.

{¶2} On April 15, 2009, appellant was indicted on one count of rape, a felony of the first degree, and one count of gross sexual imposition, a felony of the fourth degree. The charges arose out of an incident that occurred on April 5, 2009 involving a 14-year-

old girl (D.H.W.). Appellant entered pleas of not guilty and the matter was scheduled for trial.

{¶3} On October 13, 2009,[1] appellant entered a plea of guilty to the lesser included offense of unlawful sexual conduct with a minor, a felony of the third degree. A nolle prosequi was entered for the gross sexual imposition offense. The facts read by the State of Ohio at the plea hearing indicated that at the time of the incident, D.H.W. was a 14-year-old girl who was visiting appellant at his home with her mother and siblings. D.H.W. was called up to appellant's bedroom where he kissed and fondled her. D.H.W. left the bedroom but returned after being summonsed again, at which time there was digital vaginal penetration by appellant. During a police interview, appellant denied vaginal intercourse but did admit to molesting D.H.W.

{¶4} The trial court ordered a pre-sentence investigation report ("PSI"), as well as a Netcare assessment and scheduled sentencing for November 12, 2009. On November 12, 2009, the sentencing hearing was continued to November 24, 2009. The criminal processing sheet contained within the record indicates there was a second request for a Netcare assessment.

{¶5} Although the Netcare evaluation had apparently not been completed at the time of the sentencing hearing, the PSI had been completed and the trial court proceeded to sentencing on November 24, 2009. The trial court indicated it had reviewed the PSI.

{¶6} According to the PSI, D.H.W. is a client of the Franklin County Board of Mental Retardation and Developmental Disabilities ("MRDD"). Appellant had been a family friend of D.H.W.'s mother for approximately ten years and was also a provider of

MRDD-related services for D.H.W. The PSI reveals appellant was previously convicted of negligent assault in 2004, for which he was placed on probation, and also reflects several traffic-related offenses. Appellant has no juvenile arrest record.

{¶7} The PSI also states appellant is currently in good physical health, but that he was hit by a truck at the age of two, which caused paralysis on his left side, as well as a visible scar on the right side of his head. Appellant advised he has a metal plate in his head as a result of this incident and receives disability benefits, but previously had brief periods of employment. Appellant graduated from high school in 1997. Appellant reported sexual abuse as a child but denied any past mental health issues, diagnoses, counseling, or medications. He has one child, age ten, and shares custody with the child's mother.

{¶8} With respect to the details of the offense, the PSI provided some additional details beyond those stated at the plea hearing. D.H.W. indicated that during the incidents in appellant's room, appellant lay on top of her, kissed her, and squeezed her breasts. D.H.W. was very afraid and did not know what to do. Later, appellant inserted two fingers into D.H.W.'s "private parts." Appellant also ejaculated. D.H.W. experienced pain and burning after the incident and attempted to contact an uncle for help but appellant hung up the phone. D.H.W. began crying hysterically and screaming, which woke up her mother. Appellant begged D.H.W.'s mother not to call the police. When interviewed by police, appellant said he knew what he did was wrong and was sorry for his actions.

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[1] The entry of guilty plea form, as well as the sentencing judgment entry, indicates that the guilty plea was entered on October 13, 2009. However, the entry of guilty plea form was not journalized until October 15, 2009.

{¶9} During his PSI interview, appellant admitted that he improperly touched D.H.W. inside her vagina and ejaculated. Appellant also admitted he sent a text message to D.H.W.'s mother, in violation of a no contact order. Additionally, appellant admitted having a substance abuse problem and reported that he was under the influence of marijuana at the time of the offense.

{¶10} At the sentencing hearing, the trial court heard mitigation from appellant, his mother, and his counsel, as well as statements from the two maternal aunts of D.H.W.

{¶11} Counsel acknowledged that appellant was aware of D.H.W.'s age and mental issues, but asserted that no force was used and that D.H.W. consented to the conduct. Appellant's counsel submitted that appellant sometimes had difficulty realizing the ramifications of his actions and in weighing the consequences of his actions. Counsel emphasized appellant's lack of a prior felony record and noted appellant's paralysis in requesting a community control sentence.

{¶12} Appellant apologized for his actions and asserted he was drinking, smoking marijuana, stressed, and not in his right state of mind at the time of the incident. He admitted knowing D.H.W.'s family for approximately eight and one-half to nine years.

{¶13} Appellant's mother advised the trial court that the right side of appellant's brain was removed when he was two-years old and that he had difficulty learning in school, but he did graduate. Appellant's mother stated appellant knew right from wrong, but that sometimes he did not understand the extent of his actions, such as his act of sending a two-word text message to D.H.W.'s mother, despite a no contact order. She indicated that she wanted to get him counseling and have him evaluated, since he had

not been evaluated since the accident. She also reported that he needed assistance with substance abuse issues.

{¶14} D.H.W.'s maternal aunts, Vickie Harris and Stacy Harris each made statements on the victim's behalf. Collectively, they stated D.H.W. had the mental capacity of an eight or nine year-old girl. They asserted the families of both appellant and D.H.W. had been close friends for approximately eight or nine years and appellant was supposed to be a "male figure" in D.H.W.'s life. The aunts reported appellant was present during several of D.H.W.'s MRDD-related appointments.

{¶15} As a result of this incident, the aunts reported D.H.W., who had always been outgoing, was now more introverted and did not want to be around other people. She refused to attend school and was instead being homeschooled. She now experienced crying, outbursts and difficulty sleeping. D.H.W.'s trust was abused and the event had caused irreversible changes in her life. One of the aunts argued that despite his difficulties and limitations, appellant knew right from wrong and noted that appellant had been able to graduate from high school and obtain a driver's license. Both aunts also made a reference to appellant previously being accused of sexual assault against other children. Finally, both aunts requested that appellant receive a sentence of incarceration and serve as much time as possible.

{¶16} Prior to imposing sentence, the trial court found appellant had breached a trust between D.H.W. and himself and the two families and clearly understood that his conduct was wrong. The trial court determined D.H.W. had been mentally and psychologically scarred by the incident and had suffered traumatic injury. The trial court also considered the ages of the two individuals, as well as appellant's disabilities and

limitations. In addition, the trial court noted an obligation to protect the youth of this community. The trial court then imposed a maximum sentence of five years of incarceration and advised appellant that he was designated a Tier II sexual offender. Appellant now files this timely appeal and asserts two assignments of error for our review:

> I. THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM SENTENCE OF FIVE (5) YEARS WAS CONTRARY TO LAW AND AN ABUSE OF DISCRETION WHEN ALL THE FACTORS REQUIRED UNDER R.C. 2929.11 AND 2929.12 WERE NOT CONSIDERED.
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> II. THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT BY IMPOSING THE MAXIMUM SENTENCE PERMITTED FOR APPELLANT'S FIRST OFFENSE WHERE THE FACTS DID NOT WARRANT SUCH A HARSH SENTENCE.

{¶17} In his first assignment of error, appellant argues the trial court's imposition of a maximum sentence was contrary to law and an abuse of discretion because it failed to consider all of the required factors under R.C. 2929.11 and 2929.12.

{¶18} Specifically, appellant argues the transcript of proceedings fails to reflect that the trial court considered his lack of a felony record, whether he was likely to commit future crimes, or whether there were substantial grounds to mitigate his conduct, even though such grounds did not constitute a defense. Appellant also argues the record fails to reflect consideration of the specific nature of his actions, and that such actions did not warrant the imposition of a maximum sentence. Furthermore, because the trial court sentenced him without the benefit of a Netcare evaluation, and instead relied on the non-professional opinion of his mother, appellant argues the trial court lacked sufficient information to properly analyze the factors contained in R.C. 2929.12.

{¶19} In addition, appellant argues he was denied due process of law because the trial court considered victim impact information that went beyond the scope and purpose of informing the court of the actual harm inflicted upon the victim and her family. Appellant argues the victim's aunts made unsubstantiated allegations accusing appellant of having committed similar acts against other children. Appellant also argues the aunts exaggerated and overstated his role in the victim's life. He denies having significant involvement in D.H.W.'s life and submits he did not have the opportunity to dispute their allegations and asserts the victim impact statements should not have been considered because their truthfulness could not be verified. Finally, appellant submits the aunts' statements regarding the psychological damage suffered by D.H.W. should not be considered because there was no expert testimony to support their statements.

{¶20} We begin our analysis by discussing the applicable standard of review. Under R.C. 2953.08(G), an appellate court may modify a sentence or remand a case for resentencing if the court clearly and convincingly determines the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660; *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420. In post-*Foster*[2] cases, we have held that R.C. 2953.08(G) requires us to continue to review felony sentences under the clearly and convincingly contrary to law standard. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19; *Vaughn* at ¶12. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court considered and properly applied the

[2] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

[non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.' " *Burton* at ¶19, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶21} Following *Burton*, the Supreme Court of Ohio issued a plurality decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, finding appellate courts must apply a two-step approach when reviewing felony sentences. First, appellate courts 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 is satisfied, then the appellate court reviews the decision to impose a term of imprisonment under the abuse of discretion standard. Id. at ¶26; *Vaughn* at ¶13; and *Russell* at ¶13.

{¶22} Thus, under the plurality opinion set forth in *Kalish*, once an appellate court has determined the sentence is not contrary to law, it then must consider the sentencing court's post-*Foster* application of R.C. 2929.11 and 2929.12. *Vaughn* at ¶14; *Russell* at ¶13. R.C. 2929.11 and 2929.12 are not factfinding statutes. They serve as an "overarching guide" for a trial judge to consider in imposing an appropriate sentence. *Kalish* at ¶17. Consequently, *Foster* provided trial courts with "full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *Kalish* at ¶17. Furthermore, because R.C. 2929.12 allows the trial court to "exercise its discretion in considering whether its sentence complies with the purposes of sentencing[,]" the *Kalish* court concluded an appellate court's review of the actual term of incarceration should be under an abuse of discretion standard. *Kalish* at ¶17.

{¶23} Whether we apply the two-step analysis set forth in *Kalish* or simply the contrary to law standard used in *Burton*, we find the trial court did not err in sentencing appellant to a maximum period of incarceration.

{¶24} While a trial court's discretion to impose maximum and consecutive sentences is no longer limited by the statutes severed in *Foster*, the trial court is still required to consider the overriding purposes of sentencing, which include protecting the public from future crime and punishing the offender. R.C. 2929.11(A); *State v. Small*, 10th Dist. No. 09AP-1175, 2010-Ohio-5324, ¶16. This requires consideration of "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." R.C. 2929.11(A). And, pursuant to R.C. 2929.12(A), the court must consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors.

{¶25} However, the failure to indicate at the sentencing hearing that the court has considered the factors in R.C. 2929.11 and 2929.12 does not automatically require reversal. *State v. Reed*, 10th Dist. No. 09AP-1163, 2010-Ohio-5819, ¶8. "When the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." Id., citing *Kalish* at ¶18, fn. 4. "A trial court's rote recitation that it has considered applicable factors satisfies the court's duty to follow the relevant statutes in sentencing an offender." *State v. Easley*, 10th Dist. No. 08AP-755, 2009-Ohio-2984, ¶19 (citations omitted). "The Code does not specify that the sentencing judge must use specific language or make specific

findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302.

{¶26} Here, the trial court's December 17, 2009 journal entry states it has considered the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the factors set forth in R.C. 2929.12. (R. at 67.) We have previously found that such language in the judgment entry defeats a claim that the trial court failed to consider the purposes and principles of sentencing. *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶16.

{¶27} Moreover, although the trial court does not specifically state at the sentencing hearing that it has considered R.C. 2929.11 and 2929.12, the court's statements during the imposition of sentence reflect that it did in fact consider the purposes and principles of sentencing, as well as the seriousness and recidivism factors. For example, the trial court discussed protecting the community (particularly children), appellant's relationship with the victim and the resulting breach of trust, the serious psychological impact of the event on the victim, the age and condition of the victim, and appellant's disabilities and limitations, among other things.

{¶28} Furthermore, in considering the factors set forth in R.C. 2929.12, the trial court has the discretion "to determine the weight to assign a particular statutory factor." *Arnett* at 215, citing *State v. Fox* (1994), 69 Ohio St.3d 183, 193. In addition to considering the seriousness and recidivism factors, the trial court is permitted to consider any other factors which are relevant to achieving the purposes and principles of sentencing. See R.C. 2929.12(A).

{¶29} Appellant further contends the trial court failed to properly consider the applicable sentencing factors because there was no sworn testimony. Specifically, he points to the lack of sworn testimony with respect to the victim impact statements made by the aunts, as well as the lack of expert testimony (or at least a Netcare evaluation from an expert) on the issues of appellant's limitations and the psychological impact suffered by the victim. However, R.C. 2929.19(B)(1) states that prior to the imposition of sentence, the trial court is only required to consider the record before it, the information presented at the sentencing hearing, the PSI, and the victim impact statement. It is readily apparent that the trial court considered all of those things here.

{¶30} Appellant has also argued the trial court was improperly influenced by the victim impact statements made by D.H.W.'s aunts, claiming the statements went beyond its statutory purpose and beyond the scope of this case. However, we note that both statements by the aunts referencing alleged acts of abuse involving other children were very brief and contained no details. Furthermore, during one of the references, the trial court interrupted D.H.W.'s aunt and instructed her to tell him about the victim. It is apparent the trial court clearly focused its determination upon the facts in this case, not upon any other alleged incidents. In addition, regardless of appellant's specific role in the victim's family, it is undisputed that he was a family friend for many years and that he was aware of D.H.W.'s limitations. We do not believe the trial court was improperly influenced.

{¶31} Finally, appellant submits the trial court erred in going forward with the sentencing hearing without the Netcare assessment. The record does not reflect why the Netcare evaluation was not completed and available for review. However, we note that the record does not contain a judgment entry ordering the evaluation, but instead only

reflects a second request for a Netcare assessment as indicated on the court's criminal processing sheet. Furthermore, it is uncertain and merely speculative on appellant's part to presume that the Netcare evaluation would have persuaded the trial court to impose a community control sentence or a shorter prison term. The trial court clearly considered appellant's substance abuse issues as well as his mental limitations and clearly found that neither justified a lesser sentence.

{¶32} Despite appellant's assertion to the contrary, it is also apparent that the trial court considered the specific nature of appellant's conduct. The trial court specifically noted that, while the court appreciated the subtle distinction appellant attempted to make in arguing that he did not use force against the victim, whether or not D.H.W. acquiesced, appellant's conduct was still wrong and that "any rule written regarding the kids and sexual conduct against kids is a big no-no." (Tr. 27-28.) As the trial court indicated, sexual offenses against children are very serious, and given that the child at issue was mentally challenged, the instant circumstances serve to further exacerbate the seriousness of the offense. This reflects the seriousness of appellant's conduct. See R.C. 2929.12(B). And, with respect to appellant's condition, the trial court noted that it was "going to put his condition in its proper context [.]" (Tr. 15.) The trial court itself noted that appellant had graduated from high school and was partially responsible for the care of a ten-year-old child.

{¶33} We find the trial court properly considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the applicable factors set forth in R.C. 2929.12, along with any other relevant factors and circumstances. While appellant may disagree with the weight given to these factors by the trial judge, appellant's sentence

was within the applicable statutory range for a felony of the third degree and therefore, we have no basis for concluding that it is contrary to law. Similarly, the trial court's sentence cannot be said to be an abuse of discretion given the circumstances here. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (an abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable."). Accordingly, we overrule appellant's first assignment of error.

{¶34} In his second assignment of error, appellant argues imposition of the maximum sentence under these circumstances violated appellant's Eighth Amendment rights against cruel and unusual punishment. Appellant challenges his sentence on proportionality principles, arguing his sentence is disproportionate to the crime and the trial court failed to properly analyze the factors under R.C. 2929.12. Appellant submits that a person convicted of involuntary manslaughter, a crime by which one causes the death of another, could conceivably receive a lesser sentence than the one imposed upon appellant. Thus, appellant argues the punishment imposed was excessive. Appellant further argues the sentence was improperly influenced by the victim impact statements.

{¶35} Appellant did not raise an Eighth Amendment challenge at his sentencing hearing. Thus, we review this assignment of error under a plain error analysis. Plain error is limited to the exceptional case in which the error, which was not objected to at the trial court, " 'rises to the level of challenging the legitimacy of the underlying judicial process itself.' " *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶11, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 1997-Ohio-401.

{¶36} The Eighth Amendment of the United States Constitution, as well as Section 9, Article I of the Ohio Constitution, prohibit the infliction of cruel and unusual punishment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶12. However, reviewing courts must give substantial deference to the broad authority bestowed upon the legislature to determine the types and limits of punishment for crimes. Id. at ¶22; *State v. Weitbrecht*, 86 Ohio St.3d 368, 373-74, 1999-Ohio-113. As a general rule, a sentence which falls within the terms of a valid statute does not constitute cruel and unusual punishment. *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶74; *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69; *State v. Richey*, 10th Dist. No. 09AP-36, 2009-Ohio-4487, ¶14; *State v. Small*, 10th Dist. No. 01AP-1007, 2002-Ohio-3320, ¶22.

{¶37} " '[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' " *Weitbrecht* at 371, quoting *McDougle* at 70. " 'The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.' " *Carse* at ¶72, quoting *Lockyer v. Andrade* (2003), 538 U.S. 63, 77, 123 S.Ct. 1166, 1175. The "[c]onstitutional prohibition against cruel and unusual punishment is limited to extreme sentences that are grossly disproportionate to the crime." *Richey* at ¶16, citing *Hairston* at ¶13. Such sentences must be "shocking to a reasonable person and to the community's sense of justice." *Hairston* at ¶14.

{¶38} Courts conduct a three-part analysis to determine whether the imposed penalty is disproportionate to the committed offense. This analysis considers: (1) the gravity of the offense, along with the harshness of the penalty; (2) a comparison of the

sentences imposed on other criminals in the same jurisdiction; and (3) a comparison of the sentences imposed for commission of the same crime in other jurisdictions. *Richey* at ¶16; *Weitbrecht* at 371; and *Solem v. Helm* (1983), 463 U.S. 277, 290-91, 103 S.Ct. 3001, 3010. Analysis of the second and third prongs of this test occurs only in rare cases where a threshold comparison of the crime committed and the sentence imposed leads to the inference that they are grossly disproportionate. *Weitbrech* at 373, fn. 4; *Richey* at ¶17; and *State v. Silverman*, 10th Dist. No. 05AP-837, 2006-Ohio-3826, ¶132.

{¶39} We disagree with appellant's contention that the trial court failed to completely analyze the factors set forth in R.C. 2929.12, as set forth in our analysis of the first assignment of error. The trial court was not improperly influenced by the victim impact statements. In addition, appellant has not challenged the validity of a particular sentencing statute. Moreover, numerous other portions of the record support and justify the sentence imposed by the trial court. The offense at issue was a sexual offense involving a child who was not only under the age of consent, but also severely autistic. Appellant was a person whom she knew and trusted. Appellant admitted his guilt and conceded that he had digitally penetrated the victim. D.H.W.'s aunts indicated that D.H.W. had been seriously psychologically injured as a result of the incident, and even without their statements, the trial court could reasonably infer that under the circumstances of this event, the child could not help but be scarred by the event. All of these factors arguably work to make appellant's conduct more serious than conduct normally constituting this offense, even in spite of appellant's own mental limitations and lack of a significant prior criminal record.

{¶40} Given all of this, we cannot say that the sentence here is one of the rare cases where it is so extreme as to be grossly disproportionate to the crime. Nor can we say that the sentence is "shocking to a reasonable person and to the community's sense of justice." *Hairston* at ¶11. Accordingly, we find the sentence imposed does not amount to the infliction of cruel and unusual punishment, and we overrule appellant's second assignment of error.

{¶41} In conclusion, we overrule appellant's first and second assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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