

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	
	:	CASE NOS. 2011-P-0085
- vs -	:	and 2011-P-0104
	:	
BRIAN J. LUECKE,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeals from the Portage County Court of Common Pleas, Case Nos. 2011 CR 0217, 2010 CR 0235.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Patricia J. Smith, 9442 State Route 43, Streetsboro, OH 44241 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Brian J. Luecke appeals from his sentence in the Portage County Court of Common Pleas, which was handed down in connection with two separate criminal cases. Mr. Luecke pleaded guilty to one count of Felonious Assault in Case No. 2010 CR 0235. In Case No. 2011 CR 0217, he pleaded guilty to three counts of Rape and

two counts of Importuning. The trial court held a sentencing hearing on both cases, and Mr. Luecke received a sentence of seven years of imprisonment in Case No. 2010 CR 0235, and a sentence of life imprisonment, with the possibility of parole after ten years, for the Rape counts and three years of imprisonment on the Importuning counts in Case No. 2011 CR 0217. Mr. Luecke now challenges the consecutive nature of the trial court's sentence, which has effectively sentenced him to life in prison plus ten years. Because we do not find the sentence contrary to law, nor do we find that the trial court abused its discretion in meting out a sentence within the statutorily permissible range, the sentence of the Portage County Court of Common Pleas is affirmed.

Substantive Facts and Procedural History

{¶2} In April 2010, Mr. Luecke was indicted by the Portage County Grand Jury on one count of Aggravated Vehicular Assault in violation of R.C. 2903.08(A)(1)(a), a third degree felony, one count of Vehicular Assault in violation of R.C. 2903.08(A)(2), a fourth degree felony, one count of OVI in violation of R.C. 4511.19(A)(1)(a) and (G), a first degree misdemeanor, and one count of Failure to Stop After an Accident in violation of R.C. 4549.02 and 4549.99(B)(2), a fifth degree felony. In October 2010, the Portage County Grand Jury returned a supplemental indictment for one count of Felonious Assault in violation of R.C. 2903.11, a second degree felony. The charges stemmed from a hit-skip incident on Interstate 76. Mr. Luecke initially pleaded not guilty to all counts, but, in February 2011, he entered a plea of guilty to the charge of felonious assault. The prosecution nolleed the remaining charges. This was Case No. 2010 CR 0235.

{¶3} In April 2011, Mr. Luecke was indicted by the Portage County Grand Jury on five counts of Rape in violation of R.C. 2907.02, a first degree felony, for sexually

assaulting his daughter, who was less than ten years old at the time. In May 2011, a supplemental indictment was filed adding four additional Rape charges in connection with his daughter, and two counts of Importuning, in violation of R.C. 2907.(A), a third degree felony, in connection with two additional victims, both under the age of 13. Mr. Luecke initially entered pleas of not guilty to all the charges. In August 2011, pursuant to a plea deal, Mr. Luecke pleaded guilty to three counts of Rape and two counts of Importuning. The written plea deal indicated a joint sentencing recommendation as follows: (1) a tier III sex offender classification; (2) life in prison with eligibility for parole after ten years for each Rape count, to be served concurrently; and (3) five years of imprisonment on each of the Importuning counts, to be served concurrently to one another and to the Rape counts. The prosecution nolleed the remaining charges. This was Case No. 2011 CR 0217.

{¶4} In September 2011, after ordering a PSI Report, the trial court held a sentencing hearing on both case numbers. In Case No. 2010 CR 0235, Mr. Luecke was sentenced to serve seven years in prison, and pay a fine of \$500, plus court costs. In Case No. 2011 CR 0217, Mr. Luecke was ordered to serve concurrent terms of life in prison, with eligibility for parole after ten years, on each of the Rape counts, and three years in prison for each of the Importuning counts. The trial court ordered the Importuning counts to run concurrently to one another, but consecutively to the Rape counts. The court further ordered Case No. 2010 CR 0235 to run consecutively to Case No. 2011 CR 0217. The aggregate total of Mr. Luecke's sentence was life in prison, plus ten years.

{¶5} Mr. Luecke timely appealed his sentence and now brings the following assignments of error:

{¶6} “[1.] The sentence of the trial court is contrary to law because it failed to reflect any consideration of the purposes and principles of felony sentencing contained in th [sic] RC 2929.11 or the seriousness and recidivism factors of RC 2929.12. The trial court committed abuse of discretion when it imposed consecutive sentences without adequate justification.”

{¶7} “[2.] The trial judge violated the appellant’s rights to due process when it sentenced the appellant to service consecutive prison terms and erred by failing to conduct a proportionality review in determining consecutive sentences to be appropriate.”

Consideration of the Sentencing Factors

{¶8} In his first assignment of error, Mr. Luecke challenges the propriety of the trial court’s sentence, arguing that it is contrary to law and that the trial court abused its discretion. Mr. Luecke suggests that the trial court failed to consider the requisite statutory factors in determining his sentence, rendering it contrary to law. He further argues that the trial court abused its discretion in sentencing him to consecutive sentences, because he was a first time offender and the trial court provided no justification for this determination.

Standard of Review

{¶9} The Supreme Court of Ohio, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, provided a two-step analysis for an appellate court to apply when reviewing felony sentences. First, the reviewing 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 appellate court then reviews the trial court’s decision under an abuse-of-

discretion standard. *Id.* at ¶4. The first prong of the analysis instructs that “the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.* at ¶14.

{¶10} The *Kalish* court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id.* at ¶17. As part of its analysis of whether the sentence is “clearly and convincing contrary to law,” an appellate court must be satisfied that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12. While the trial court is required to consider the principles contained in R.C. 2929.11 and R.C. 2929.12 factors, “the court is not required to ‘use specific language or make specific findings on the record * * *.’” *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, ¶10, citing *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000).

{¶11} If the first prong is satisfied, that is, the sentence is not “clearly and convincingly contrary to law,” the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶17. The *Kalish* court explained the effect of R.C. 2929.11 and 2929.12 in this connection:

{¶12} “R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the

trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Kalish* at ¶17.

{¶13} As this court recently stated, the term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. When an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id.* at ¶67.

Whether the Trial Court Considered R.C. 2929.11 and R.C. 2929.12

{¶14} Mr. Luecke argues that his sentence is contrary to law because the trial record is silent as to whether the trial court considered R.C. 2929.11 and R.C. 2929.12. Because we are able to glean from the meager record some indicia of the trial court's consideration of these factors, and because the sentence comports with the sentencing

range available to the trial court in a case such as this, we do not find the sentence contrary to law.

{¶15} In *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, this court adopted the pronouncement in *State v. Adams*, 37 Ohio St.3d 295 (1988), that “[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12.” *Adams*, *supra*, paragraph three of the syllabus. “This court recognized that Ohio Appellate Districts have adopted the holding in *Adams*, prior to and after the Supreme Court of Ohio’s decision in *State v. Foster* [109 Ohio St.3d 1 (2006)].” *State v. Tenney*, 11th Dist. No. 2009-A-0015, 2010-Ohio-6248, ¶14, citing *Greitzer* at ¶29.

{¶16} “[W]hen the record is silent, we generally presume that the trial court complied with its duty to consider the factors set forth in R.C. 2929.11 and R.C. 2929.12. * * * To rebut the presumption, a defendant must either affirmatively show that the court failed to do so, or that the sentence the court imposed is “strikingly inconsistent” with the statutory factors as they apply to his case.” *State v. Yount*, 2d Dist. No. 24023, 2011-Ohio-3107, ¶91, quoting *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, ¶34. See also *State v. Nenzoski*, 11th Dist. No. 2007-P-0044, 2008-Ohio-3253, ¶63 (“[t]he burden is on the defendant to come forward with evidence to rebut the presumption that the trial court considered the sentencing criteria”).

{¶17} Mr. Luecke suggests that because the trial court not only failed to make findings on the record in connection with R.C. 2929.11 and R.C. 2929.12, but also failed to make any reference to the statutes whatsoever, his sentence is contrary to law. In *State v. Hutchings*, 11th Dist. Nos. 2011-P-0019, 2011-P-0020, 2011-P-0021, and 2011-P-0022, 2012-Ohio-649, this court held that “the trial court’s failure to reference

R.C. 2929.11 or 2929.12 in its sentencing entry does not demonstrate its failure to consider the appropriate statutory factors.” *Id.* at ¶35.

{¶18} In *State v. Bernadine*, 11th Dist. No. 2010-P-0056, 2011-Ohio-4023, we held that the appellant had failed to rebut the presumption that the trial court considered the required statutory facts, and we determined that the record supported “the inference that the trial court properly considered the factors in R.C. 2929.12 and adhered to the purposes and principles of sentencing set forth in R.C. 2929.11. The trial court stated that it considered all evidence presented by counsel, oral statements, the PSI, and Bernadine’s statement in reaching its decision.”

{¶19} In Mr. Luecke’s case, the trial court stated in the sentencing entry that it had “considered evidence presented by counsel, oral statements, any victim impact statement, the pre sentence report, and/or the Defendant’s statements.” Furthermore, the trial judge alluded to the fact that she had wrestled with the statutory factors and considerations in deciding not to strictly follow the jointly recommended sentence when she stated that:

{¶20} “Again, I want to reiterate, Mr. Luecke, you are very fortunate. You have two excellent attorneys.

{¶21} “Mr. Malarcik made a hell of a deal on your behalf.

{¶22} “Again, this is only a recommendation by the parties, and normally I follow that recommendation. I’m having a hard time swallowing that in this case.”

{¶23} Despite the trial court’s failure to specifically mention the statutory sections in the record, we presume the court considered such factors, particularly in light of the specific crimes committed by Mr. Luecke, the age of his victims, the victim impact statements present in the record, and the PSI report, as well the fact that the sentence

was within the statutory range. See *Nenzoski*, *supra*, at ¶¶65-67. Mr. Luecke bears the burden of rebutting such a presumption; he has failed to rebut this presumption, and thus his first assignment of error is without merit.

Sentence Comports With Due Process

{¶24} In his second assignment of error, Mr. Luecke argues that the sentence violates his constitutional right to due process, in that the trial court failed to “conduct a proportionality review in determining consecutive sentences to be appropriate.” Mr. Luecke also suggests that his sentence is per se unreasonable and violates his Eighth Amendment rights.

{¶25} This court has stated that “a proper circumspect application of the sentencing guidelines acts to ensure proportionality and consistency under R.C. 2929.11(B).” *State v. Marker*, 11th Dist. No. 2006-P-0014, 2007-Ohio-3379, ¶34, citing *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, ¶58. “Therefore, to the extent the trial court considered and applied the necessary statutory provisions, a sentence shall be deemed consistent and proportionate to those imposed for similar crimes.” *Id.*

{¶26} We have determined that the trial court properly considered the required statutory provisions when it imposed Mr. Luecke’s sentence. Necessarily then, we find that the required consideration of proportionality and consistency was met.

{¶27} As to Mr. Luecke’s suggestion that his sentence was per se unreasonable, we are not persuaded. Mr. Luecke repeatedly raped his biological daughter while she was between the ages of seven and nine years old. Further, Mr. Luecke attempted to engage in sexual acts with his daughter’s friend and cousin, while both girls were under the age of 13. He pleaded guilty and agreed to a term of life in prison, with eligibility for

parole after ten years on the rape counts, and five years each on the importuning counts, to run concurrently to one another and to the rape counts. The trial judge, on the record, stated that she was having trouble “swallowing” the recommended sentence. Instead of running the importuning counts concurrently to the rape counts, she gave Mr. Luecke three years each on the importuning counts, to run concurrently to one another, but consecutive to the rape counts. The effect on Mr. Luecke’s sentence in Case No. 2011 CR 0217 was that he would become eligible for parole after 13 years, not simply ten. Given the grievous facts of this case, this variance from the recommended sentence is not contrary to law, nor is it an abuse of discretion by the trial court. Mr. Luecke’s second assignment of error is without merit, and the judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.