

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-A-0069
GEORGE T. TUCHOLSKI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 235.

Judgment: Affirmed in part; reversed in part and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Virginia K. Miller, Smith & Miller, 36 West Jefferson Street, Suite 1, Jefferson, OH 44047 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the sentencing judgment in a criminal action before the Ashtabula County Court of Common Pleas. Appellant, George T. Tucholski, primarily seeks reversal of certain sanctions that the trial court imposed in light of his conviction on various sexual offenses. According to appellant, the court failed to follow the proper procedure in imposing his prison term and ordering him to pay certain fees.

{¶2} In June 2011, the county grand jury returned an eighteen-count indictment

against appellant. Under each of the first two counts, he was charged with pandering sexually-oriented material involving a minor, a second-degree felony pursuant to R.C. 2907.322. In each of the next eight counts, appellant was charged with unlawful sexual conduct with a minor, a third-degree felony under R.C. 2907.04. Under each of the final eight counts, he was charged with sexual battery, a third-degree felony pursuant to R.C. 2907.03.

{¶3} In all eighteen counts of the indictment, the victim of the charged offense was appellant's granddaughter. Essentially, the counts alleged that he had engaged in sexual conduct with the victim on a number of occasions over an eighteen-month period of time. The counts further alleged that when the sexual conduct took place, the victim had been between the ages of thirteen and sixteen. In addition, the "pandering" counts asserted that, on two occasions, appellant had videotaped his conduct with the victim.

{¶4} After entering an initial plea of "not guilty" to the charges, appellant moved the trial court to suppress certain oral statements he had made to the police at the time of his arrest. Besides arguing that he was never informed of his Miranda rights during the interrogation, appellant also maintained that he had lacked the mental capacity to make a voluntary statement.

{¶5} An evidentiary hearing on appellant's suppression motion was scheduled for September 21, 2011. However, immediately prior to the hearing, he agreed to enter a plea of guilty to one count of pandering sexually-oriented materials involving a minor, four counts of unlawful sexual conduct with a minor, and three counts of sexual battery. In consideration for the guilty plea, the state agreed to dismiss the remaining counts of the indictment. Furthermore, as a term of his written guilty plea, the state and appellant

agreed that the state would recommend to the trial court that he be given an aggregate sentence of 15 years on the eight remaining counts.

{¶6} Upon accepting the guilty plea, the trial court held a separate oral hearing on sentencing. After considering statements from both attorneys and the victim, the trial court orally imposed an aggregate sentence of seven years on the eight counts. As to the single “pandering” count, appellant was given a five-year term; however, in regard to the four counts of unlawful sexual conduct and the three counts of sexual battery, he was given a total term of two years, to be served consecutive to the five-year term. The trial court also informed appellant that he would be designated as a Tier III sex offender, and that he would be subject to post-release control following his release from prison. Finally, the court expressly stated to appellant during the hearing that he would be liable for court costs.

{¶7} In its final sentencing judgment, the trial court restated the prison term that had been orally imposed during the hearing. Nevertheless, the sanctions imposed in the final judgment differed from those delineated orally in one respect; besides ordering the payment of court costs, the judgment stated that appellant was liable for “any other fees as permitted by Ohio Revised Code §2929.18(A)(4).”

{¶8} In appealing both his conviction and sentence, appellant has raised three assignments of error for review:

{¶9} “[1.] Defendant-appellant had ineffective assistance of counsel when counsel had Mr. Tucholski enter a plea of guilty, thereby waiving any suppression issue on appeal.

{¶10} “[2.] The lower court failed to properly consider the statutory principles and

purposes of sentencing and the seriousness and recidivism factors required by statute.

{¶11} “[3.] The trial court erred by including in its judgment entry of sentence an order requiring defendant-appellant to pay court costs which were not imposed during the sentencing hearing.”

{¶12} Under his first assignment, appellant maintains that his conviction on the eight counts must be reversed because he was denied effective assistance of counsel at the trial level. Specifically, appellant submits that the performance of his trial counsel fell below the standard of a competent attorney when counsel did not go forward on the motion to suppress prior to recommending acceptance of the state’s basic plea offer. It is appellant’s position that if trial counsel had proceeded with the suppression hearing, his statements to the police would have been excluded from evidence.

{¶13} As noted above, the motion to suppress at the trial level was based upon the assertion that appellant’s statements to the police were not given voluntarily. Before this court, appellant has not attempted to present any argument regarding the merits of the “voluntariness” issue or any other basis for the motion to suppress. Furthermore, he has not referred to any evidence or testimony which would show what took place when he made the disputed statements. Obviously, the lack of any relevant evidence is due to the fact that the scheduled hearing on the motion was cancelled.

{¶14} In considering similar situations in which an “ineffective assistance of trial counsel” argument has been predicated upon alleged evidence not set forth in the trial record, this court has concluded that the substance of the argument cannot be properly reviewed because it is impossible to determine whether the outcome of the case would have been different. See *State v. Kovacic*, 11th Dist. No. 2010-L-065, 2012-Ohio-219,

¶51. The same analysis is applicable in this case; i.e., in the absence of any indication of what evidence would have been presented at the suppression hearing, this court is unable to determine if the motion to suppress had any merit. Consequently, appellant cannot show whether the performance of his trial counsel was deficient, or whether the outcome of the proceeding was adversely affected. Accordingly, since the “ineffective assistance” argument cannot be adequately addressed in the context of a direct appeal, appellant’s first assignment does not assert a viable basis for reversing his conviction.

{¶15} Under his second assignment, appellant challenges the legal propriety of the procedure the trial court used in imposing his seven-year prison term. He contends that his sentence cannot be upheld because the record does not contain any indication that the trial court actually predicated its decision upon the relevant sentencing factors set forth in R.C. 2929.11 and 2929.12.

{¶16} Over the past six years, the question of whether a trial court must render specific factual findings as part of the imposition of a prison term has been the subject of considerable judicial discussion. In summarizing the present state of the law on this point, this court has recently noted:

{¶17} “Our review of the relevant case law readily shows that, since the demise of ‘judicial fact-finding’ in [*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856], Ohio courts have been mandated to follow a two-prong test in reviewing the legal propriety of a felony sentence. See, generally, *State v. Kirkpatrick*, 11th Dist. No. 2010-T-0025, 2010-Ohio-6578, at ¶16-22. Under the first prong of this test, the imposed sentence is examined to determine if it complies with all applicable rules and statutes; in performing this purely legal analysis, an appellate court can only strike down the sentence when it

is clearly and convincingly contrary to law. *State v. Bever*, 11th Dist. No. 2010-L-022, 2010-Ohio-6443, at ¶40, citing [*State v.*] *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, * * *. If the first prong is met, it must then be determined whether, even though the term was within the permissible statutory range, its imposition still resulted in an abuse of discretion by the trial court. *Kirkpatrick*, 2010-Ohio-6578, at ¶21. In the context of sentencing, this court has indicated that an abuse of discretion occurs when the trial court's judgment does not comport with reason or the record. *Bever*, 2010-Ohio-6443, at ¶40.

{¶18} “In applying the foregoing test, we have also stated that R.C. 2929.11 and 2929.12 delineate specific factors which a trial court is required to consider as a general guide for imposing a sentence. *Id.* at ¶41. However, in satisfying this obligation, the trial court does not have a corresponding duty to divulge its analysis of the various factors:

{¶19} “‘It is well-settled that R.C. 2929.12 does not require a sentencing court to discuss the statutory criteria on the record or even to state on the record that it has considered them. *State v. Chapdelaine*, 11th Dist. No. 2009-L-166, 2010-Ohio-2683, at ¶14. In fact, the Court in *Kalish* noted that where a sentencing court does not memorialize on the record that it considered the factors, a presumption arises that the factors were properly considered. (*Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912), at ¶27, * * *, f.n. 4. “By implication, as long as there is some indication that the factors were considered, a reviewing court is bound to uphold the sentence.” *Chapdelaine*, *supra*.’ *Id.* at ¶42.

{¶20} “See, also, *State v. Tenney*, 11th Dist. No. 2009-A-0015, 2010-Ohio-6248,

at ¶14, in which this court concluded that a silent record raises a presumption that the relevant statutory factors were duly considered before the sentencing determination was made.” *State v. Vargo*, 11th Dist. No. 2010-P-0065, 2011-Ohio-6690, ¶21-24.

{¶21} Our review of the trial record in the present case shows that trial court did not provide any specific discussion of the statutory sentencing factors during the oral sentencing hearing. Similarly, although the final sentencing judgment indicated that the factors under R.C. 2929.11 and 2929.12 had been considered, no legal analysis of any individual factor was set forth. Yet, pursuant to the precedent cited in *Vargo*, the lack of any formal discussion of the statutory factors did not constitute a procedural error on the part of the trial court. In fact, *Vargo* dictates that we must presume from a silent record that the trial court acted in accordance with the statutory procedure and considered all relevant factors before imposing the seven-year sentence.

{¶22} In conjunction with the foregoing, this court would further emphasize that our review of the trial record does not reveal any statement by the trial court that would be sufficient to rebut the foregoing presumption. That is, the trial court did not make any statement insinuating that it intended to ignore certain statutory factors even if they were relevant under the facts of the case. Hence, since the presumption is still applicable in this instance, the trial court’s sentencing decision can only be reviewed under the two-prong *Kalish* test for felony sentencing.

{¶23} Pursuant to the terms of his written guilty plea, appellant was convicted of one second-degree felony and seven third-degree felonies. Regarding the one second-degree felony, the trial court imposed a five-year term. Given that R.C. 2929.14(A)(2) permits the imposition of a term between two and eight years for a felony of the second

degree, the five-year term was clearly within the permissible statutory range.

{¶24} A similar analysis is applicable to the seven third-degree felonies. Under R.C. 2929.14(A)(3), a prison term between one and five years can be imposed for such a felony. In this case, the trial court imposed the shortest term possible for each of the seven third-degree felonies, i.e., one year. Thus, none of the eight terms ordered by the trial court was contrary to the governing statutory law.

{¶25} In relation to the “abuse of discretion” prong of the felony sentencing test, appellant submits that the trial court failed to accord proper weight to certain factors in deciding to impose an aggregate sentence of seven years. In summarizing the general statutory factors which may be relevant in a “sex offender” case, this court has stated:

{¶26} “[P]ursuant to R.C. 2929.11(A), the basic purposes of sentencing are to protect the public from future crime and to punish the offender. Furthermore, R.C. 2929.11(B) provides that, in attempting to act in accordance with those purposes, a trial court should impose a sentence that is commensurate with the seriousness of the crime and its impact upon the victim. In turn, R.C. 2929.12(B)(6) states that, in determining if the offender’s conduct is more serious than an act which typically forms the basis of the offense, the trial court can consider whether the offender’s relationship with the victim helped to facilitate the offense.” *Vargo*, 2011-Ohio-6690, at ¶28.

{¶27} In claiming that the prison term in this case was “unduly” harsh, appellant first notes that there was no evidence of any use of force on his part, and that he did not exploit any physical or mental impairment of the victim. While our review of the record does indicate that the foregoing assertions appear to technically be correct, they clearly were not entitled to any weight under the facts of this case. That is, although it may be

true that appellant never used force to compel the victim, it is evident that he did employ his position as the victim's grandfather as a means of ensuring her compliance with his requests. This type of action obviously could result in lasting psychological harm which could be just as serious as the infliction of physical harm.

{¶28} Appellant also emphasizes that, prior to being indicted in this case, he had been a law-abiding citizen. But, again, even if appellant's assertion is true, it is certainly not entitled to more weight than the nature of the underlying offenses. By entering his guilty plea, appellant admitted that he engaged in unlawful sexual conduct with his own granddaughter on a number of occasions when she was visiting him at his home. He further admitted that, when the offenses took place, the victim was between the ages of thirteen and sixteen. Finally, the victim's oral statement during the sentencing hearing readily established that appellant's acts have caused her continuing psychological harm, including an inability to trust or feel comfortable with other family members.

{¶29} As previously discussed, appellant's written guilty plea contained a clause indicating that he and the state had agreed that it would be recommended that a fifteen-year prison term be imposed. Despite this, the trial court only ordered him to serve an aggregate term of seven years. Given these circumstances, it cannot be said that the trial court's decision was inconsistent with reason or the trial record. Nor can it be said that the trial court exhibited an arbitrary or unconscionable attitude in setting the length of the term. Thus, because the trial court did not commit any procedural error or abuse its discretion in imposing the prison term, appellant's second assignment lacks merit.

{¶30} Under his final assignment, appellant questions the procedure which the trial court employed in ordering him to pay certain fees in light of his conviction. As part

of the final sentencing judgment, the trial court ordered that appellant would be liable for all court costs and “any other fees as permitted by Ohio Revised Code §2929.18(A)(4).” As to the quoted statutory fees, appellant maintains that this particular order cannot be enforced because the trial court did not orally refer to that sanction during the course of the sentencing hearing.

{¶31} Crim.R. 43(A) mandates that a defendant must be present at each stage of his trial, including the imposition of his sentence. In applying this rule, this court has held that a reversible error occurs when a trial court’s final sentencing judgment orders an additional sanction that was not referenced during the sentencing hearing. *State v. Clark*, 11th Dist. No. 2006-A-0004, 2007-Ohio-1780, ¶35, *reversed on other grounds*, 2008-Ohio-3748. As part of our analysis in *Clark*, we expressly applied the foregoing holding to an order concerning the payment of additional fees under R.C. 2929.18(A)(4); i.e., if such an order was not discussed during the oral sentencing hearing, it cannot be imposed in the final judgment. *Id.*

{¶32} In the five years since the release of our *Clark* opinion, at least one of our sister appellate districts have disagreed with our application of Crim.R. 43(A) in relation to any fees under R.C. 2929.18(A)(4). See *State v. Hall*, 12th Dist. No. CA2011-05-043, 2011-Ohio-5748, in which it was held that a direct reference during the oral sentencing hearing was not needed because any additional fee assessed under R.C. 2929.18(A)(4) would, by definition, be encompassed within normal “court costs.” *Id.* at ¶16. Regarding this point, it must be noted that, while other aspects of the *Clark* opinion were reversed on appeal by the Supreme Court of Ohio, our analysis of Crim.R. 43(A) and R.C. 2929.18 was not questioned. Based upon this, it logically follows that *Clark* is still

binding precedent of this court.

{¶33} In the instant case, the state has conceded that the trial court never made a reference to fees under R.C. 2929.18(A)(4) during the sentencing hearing. A review of the transcript of the sentencing hearing confirms that point. Therefore, given that appellant was not informed during the oral hearing that he would also be liable for the statutory fees, the trial court failed to follow the correct procedure for requiring the payment of such additional fees. Under these circumstances, this case must be remanded for a new sentencing hearing in which appellant is properly informed of the imposition of the fees under R.C. 2929.18(A)(4), and he is afforded an opportunity raise any permissible objection. *See, generally, State v. Lewis*, 11th Dist. No. 2010-P-0070, 2011-Ohio-3748. For this reason, appellant's third assignment of error has merit.

{¶34} Pursuant to our analysis under the third assignment, the judgment of the Ashtabula County Court of Common Pleas is reversed solely in regard to the imposition of the additional fees/costs under R.C. 2929.18(A)(4), and the case is hereby remanded for further proceedings consistent with this opinion. In all other respects, the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

MARYJANE TRAPP, J.,

concur.