

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

STATE OF OHIO,	:	CASE NO. CA2015-03-023
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- VS -	:	10/13/2015
	:	
PAUL LESTER BYRD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 14CR30515

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

William F. Oswall, Jr., 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, for defendant-appellant

**S. POWELL, P.J.**

{¶ 1} Defendant-appellant, Paul L. Byrd, appeals his conviction in the Warren County Common Pleas Court for sexual battery and gross sexual imposition, for which he was sentenced to 12 years in prison. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} In 2014, appellant was indicted on one count of rape in violation of R.C.

2907.02(A)(1), a first-degree felony (Count One); two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony (Counts Two and Three); and one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2), a fourth-degree felony (Count Four). In 2015, appellant agreed to plead guilty to Counts One and Two after the state agreed to amend Count One to a charge of sexual battery in violation of R.C. 2907.03(A)(5), a second-degree felony, and to dismiss Counts Three and Four. At the plea hearing, the state asserted, and appellant admitted, that appellant had engaged in sexual conduct with his seven-year-old step-grandchild while he was acting as the child's caregiver. The trial court sentenced appellant to 12 years in prison, eight years of which are mandatory.

{¶ 3} Appellant now appeals, assigning the following as error:

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT ERRED BY IMPOSING A SENTENCE THAT IS NOT SUPPORTED BY THE FINDINGS IN THE RECORD.

{¶ 6} Appellant argues that the sentencing court failed to consider, as required by R.C. 2929.12(C)(4), the existence of substantial grounds that mitigated his conduct, including that he had no prior record before committing these offenses, he accepted responsibility for his acts by pleading guilty, and he was 65 years old at the time of the offense. He asserts that these mitigating factors should have led the trial court to impose a lesser prison sentence on him and to make a portion of his sentence community control in order to ensure that he received adequate treatment and counseling to address his issues. He further asserts that a 12-year prison sentence will not make the public safer should he be released from prison. He contends that the trial court "clearly abused its discretion and undermined the purpose of the felony sentencing guidelines by pre-determining [his] sentence before considering all the factors present in Ohio Revised Code Section 2929.12(C)." We disagree with appellant's arguments.

{¶ 7} The standard of review set forth in R.C. 2953.08(G)(2) governs all felony sentences. *State v. Durham*, 12th Dist. Warren No. CA2013-03-023, 2013-Ohio-4764, ¶ 41, citing *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. R.C. 2953.08(G)(2) states as follows:

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

{¶ 8} R.C. 2953.08(G)(2) explicitly states that "[t]he appellate court's standard of review is not whether the sentencing court abused its discretion." Rather, R.C. 2953.08(G)(2) provides that in considering an appeal brought under divisions (A), (B), or (C) of this section, the appellate court must review the record, including the findings underlying the sentence or modifications made by the sentencing court. The appellate court may increase, reduce, or otherwise modify the sentence being appealed if it "clearly and convincingly finds" that (1) the record does not support the sentencing court's findings made under R.C. 2929.13(B) or 2929.13(D), R.C. 2929.14(B)(2)(e) or 2929.14(C)(4), or R.C. 2929.20(I), or (2) the sentence is "otherwise contrary to law." R.C. 2953.08(G)(2).

{¶ 9} The "clear and convincing" standard in R.C. 2953.08(G)(2) does not require that the trial court have clear and convincing evidence to support its findings; rather, the clear

and convincing standard requires the appellate court "to clearly and convincingly find[]" that the record does not support the trial court's findings. *Durham*, 2013-Ohio-4764 at ¶ 43, citing *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, ¶ 21. Thus, "the language in R.C. 2953.08(G)(2) establishes an 'extremely deferential standard of review' for 'the restriction is on the appellate court, not the trial judge.'" *Durham*, quoting *Venes*.

{¶ 10} Additionally, "[a] sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range." *Durham* at ¶ 42, citing *State v. Pearce*, 12th Dist. Clermont No. CA2013-01-001, 2013-Ohio-3484, ¶ 25.

{¶ 11} Appellant argues the trial court "[o]bviously \* \* \* made up its mind prior to the sentencing hearing[,]" and thus "clearly abused its discretion and undermined the purpose of the felony sentencing guidelines" when it sentenced him to an aggregate term of 12 years in prison. However, as noted above, R.C. 2953.08(G)(2) explicitly states that "[t]he appellate court's standard of review is not whether the sentencing court abused its discretion." Further, an appellate court may increase, reduce, or otherwise modify the sentence being appealed only if it "clearly and convincingly finds" that the record does not support the sentencing court's findings made under the sections of the Ohio Revised Code enumerated in R.C. 2953.08(G)(2)(a) or that the sentence is otherwise contrary to law under R.C. 2953.08(G)(2)(a).

{¶ 12} Here, the 12-year aggregate prison sentence that the trial court imposed on appellant was jointly recommended by the parties. Additionally, the sentencing court stated in its judgment entry that it considered the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors under R.C. 2929.12, and considered the factors under R.C. 2929.13. Appellant has not alleged that the sentencing

court failed to properly apply postrelease control. The eight-year prison sentence imposed on appellant for his sexual battery conviction and the 48-month prison sentence imposed on him for his gross sexual imposition conviction are within the permissible sentencing range for convictions on those offenses. R.C. 2929.14(A)(2)-(3)(a). Therefore, appellant has failed to establish that his sentence is clearly and convincingly contrary to law under R.C. 2953.08(G)(2)(b).

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

{¶ 14} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.