

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No. 09CA14
	:
vs.	: Released: December 8, 2009
	:
MICHAEL J. BABCOCK,	: <u>DECISION AND JUDGMENT</u>
	: <u>ENTRY</u>
Defendant-Appellant.	:

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Appellant.

James Schneider, Washington County Prosecuting Attorney, Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

McFarland, J.:

{¶1} This is an appeal from a Washington County Common Pleas Court conviction and sentence, issued after Appellant, Michael Babcock pled guilty to a bill of information charging him with unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), a felony of the fourth degree. As a result of his plea, Appellant was sentenced to the maximum term of imprisonment for the conviction, eighteen months. On appeal, Appellant asserts that the trial court erred in sentencing him to the maximum available prison term. Because we find that the sentence imposed by the

trial court was not contrary to law and was not an abuse of discretion, we overrule Appellant's sole assignment of error. Accordingly, we affirm the judgment and sentence of the trial court.

FACTS

{¶2} Appellant pled guilty to a bill of information charging him with unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), a felony of the fourth degree. A review of the pre-sentence investigation report, which was ordered by the court and was considered by the court prior to sentencing, indicates that Appellant pled guilty to this charge in exchange for the State's agreement "not to further prosecute the defendant for any crimes involving the victim in this case that occurred in Washington County, Ohio during the summer of 2008 (Tampering with Evidence, Contributing, Other Sex Acts) in Case #08CR437 would [sic] be dismissed with prejudice (with consent of the victims)." The pre-sentence investigation report also detailed Appellant's prior criminal record, which was quite extensive, spanned over a period of thirteen years, and included prior felony convictions resulting in prison time served.

{¶3} Ultimately, the trial court sentenced Appellant to the maximum available term of imprisonment, which was eighteen months. After

sentencing, Appellant timely filed the current appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

“I. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THE MAXIMUM AVAILABLE PRISON TERM IN THIS CASE.”

LEGAL ANALYSIS

{¶4} In his first assignment of error, Appellant argues the trial court erred and abused its discretion in sentencing him to the maximum term of imprisonment for his offense. Appellant contends the trial court made several findings to substantiate the maximum sentences, but that those findings are not supported by the record. Specifically, Appellant contends that the trial court erroneously found that 1) the injury was made worse by the age of the victim; 2) that Appellant’s relationship with the victim facilitated the offense; 3) that Appellant showed no remorse; and 4) that Appellant failed to acknowledge a pattern of alcohol and drug abuse and need for treatment. Appellant also contends that the trial court erred in sentencing him to the maximum prison term available because the record does not contain evidence that Appellant’s actions in committing the offense constituted the “worst form of this offense.”

{¶5} We begin our analysis with the appropriate standard of review.

In the wake of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845

N.E.2d 470, there has been considerable and continuing confusion over the proper standard of review in felony sentencing. The Supreme Court of Ohio recently addressed the issue in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.¹

{¶6} Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. “First, they 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 trial court's decision shall be reviewed under an abuse-of-discretion standard.” *Kalish* at ¶ 4. “As to the first step, the *Kalish* court did not clearly specify what ‘pertinent laws’ we are to consider to ensure that the sentence ‘clearly and convincingly’ adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *.” *State v. Ross*, Adams App. No. 08CA872, 2009-Ohio-877, at ¶ 10; *State v. Fisher*, Washington App. No. 08CA37, 2009-Ohio-2915, at ¶6.

¹ In *State v. Fisher*, Washington App. No. 08CA37, 2009-Ohio-2915, at FN1 we recently noted that “ ‘[w]hether *Kalish* actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented. As a result, our colleagues on the Cuyahoga County Court of Appeals have announced they simply will not follow the plurality and will continue to apply the standard the Eighth District has used all along. (Internal citation omitted.) The same problem has been recognized in the Ninth District, but our colleagues on the Summit County Court of Appeals have applied the two-step *Kalish* analysis regardless. (Internal citation omitted.) We will do the same.’ ” Quoting, *State v. Ross*, Adams App. No. 08CA872, 2009-Ohio-877, at FN 2.

{¶7} In the case sub judice, Appellant contends that a number of findings in the trial court's sentencing entry were not supported by the record. Appellant acknowledges that, post- Foster, trial courts are no longer required to make findings or state reasons for imposing maximum or more than the minimum sentences. However, Appellant argues that the trial court erred and abused its discretion in imposing maximum sentences when some of the findings that it did make were not supported by the record.

Additionally, as set forth above, Appellant also contends that the trial court erred and abused its discretion in imposing a maximum sentence, arguing that Appellant did not commit the worst form of the offense.

{¶8} The sentencing entry in question reads, in pertinent part: “Whereupon the Court has considered the record of this case, the victim impact statement, the oral statements made this day, and the pre-sentence report, which report was received on March 16, 2009, as well as the principles and purposes of sentencing pursuant to Ohio Revised Code Sections 2929.11 through 2929.19, and the Court then made the following determinations:

[A] The Court FINDS the following prison factors to be present:

- (1) The offense committed was a sex offense.
- (2) The defendant has served prior prison terms.

[B] The Court FINDS that the following factors are present that make this crime more serious than the norm:

- (1) The injury was made worse by the age of the victim;
- (2) The defendant's relationship to the victim facilitated the offense. The victim was a 14 year old female who was the daughter of a family friend.

[C] The Court FINDS there are no factors present that make this crime less serious than the norm.

[D] The Court FINDS the following factors present which make the Defendant more likely to recidivate:

- (1) The defendant has prior adult criminal convictions:

02/21/95	Resisting Arrest
02/07/96	Disorderly Conduct/Fighting
07/18/96	OMVUAC
06/20/96	Alcohol Under 21 Years of Age
07/18/96	Aggravated Trespassing/Assault
08/28/96	Underage Drinking
11/02/96	OMVI
01/13/97	Aggravated Trespassing; Contributing/Assault
05/09/97	Open Container
11/07/97	Driving Under FRA Suspension
11/07/97	Alcohol Under 21 Years
11/29/97	Possession of Cocaine, Licking County, Ohio prison, Released Under PRC. PRC terminated due to a new felony.
06/30/01	Theft (F-5); Forgery (F-5) Case No. 01-CR-45, prison
07/09/01	Failed to Register Dog
07/19/01	Failed to Register Dog
01/23/02	Felon in Possession of a Firearm (M) Pleasants County, WV
07/25/04	Possession of Drugs; Paraphernalia (2 counts)

09/10/04	Failure to Control
09/25/04	Conspiracy to Commit 1 st Degree Robbery (Case 05F4) Wood County, WV Entered Mt. Olive Correctional Center; 03/13/06, Paroled; Parole Revoked
06/09/08	Theft; DUS

(2) The defendant demonstrated a pattern of drug/alcohol abuse related to the offense and refuses to acknowledge the pattern or refuses treatment.

(3) The defendant shows no remorse.

(4) Prior Court Ordered sanctions have been unsuccessful.

[E] The Court FINDS that the following factor is present that makes this defendant less likely to recidivate:

(1) The defendant has no prior juvenile convictions.

[F] The Court has weighed the seriousness and recidivism factors and has considered the over-riding purposes of felony sentencing to protect the public from future crime by this offender and others, and the purpose to punish this offender, and has considered the need for incapacitating this offender and deterring the offender and others from future crime, and for rehabilitating the offender. Thereupon the Court FINDS that the sentence it is about to impose is reasonably calculated to achieve these purposes, and is commensurate with, and does not demean the seriousness of the offender's

conduct, and its impact upon the victim, and is consistent with sentences imposed for similar crimes committed by similar offenders.

[G] The Court FINDS that the Defendant is not amenable to community control sanctions.”

{¶9} We first note that the trial court sentenced Appellant to eighteen months imprisonment for one fourth degree felony count of unlawful sexual conduct with a minor. Though this sentence constitutes the maximum sentence for the crime committed, it is within the statutory range. Further, the trial court specifically stated that it had weighed the applicable seriousness and recidivism factors, considered the principles and purposes of felony sentencing pursuant to R.C. 2929.11 through 2929.19, and it stated the sentence was calculated to achieve those purposes. Accordingly, we find the trial court complied with all applicable rules and statutes in imposing Appellant's sentence and that the sentence was not clearly and convincingly contrary to law. As such, the first prong of the *Kalish* test has been satisfied and we now turn to the second prong, whether or not the trial court abused its discretion in imposing the sentence.

{¶10} In this prong, we look at the specific factual findings of the trial court which are contested by Appellant. Appellant challenges the trial court's findings that the injury was made worse by the age of the victim, and

that his relationship to the victim facilitated the offense. Appellant further challenges the trial court's findings that he failed to show remorse or acknowledge a pattern of alcohol and drug abuse and need for treatment.

{¶11} Contrary to Appellant's argument, there is sufficient evidence in the record to support the findings of the trial court. With respect to the trial court's first finding, that the "injury was made worse by the age of the victim," the record shows that Appellant was charged with and pled guilty to unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A)&(B)(1), a felony of the fourth degree. R.C. 2907.04(A)&(B)(1) provides as follows:

- “(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.
- (B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.
 - (1) *Except as otherwise provided in (B)(2), (3), and (4) of this section, unlawful sexual conduct with a minor is a felony of the fourth degree.* (Emphasis added).

{¶12} However, because the victim was fourteen years old and Appellant was thirty-one years old at the time of the offense, Appellant could have been charged with third degree unlawful sexual conduct with a minor under R.C. 2907.04(A)&(B)(3), which provides that:

“(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree.”

Thus, the trial court’s finding that “the injury was made worse by the age of the victim” was proper, especially considering that the age difference between Appellant and the victim exceeded ten years and would have supported a conviction for a more serious offense. Accordingly, the trial court did not abuse its discretion in sentencing Appellant based upon this finding. Further, although it was no longer obligated to find, and, in fact, did not find, that Appellant’s conduct constituted the worst form of the offense for purposes of imposing a maximum sentence, because the age difference between Appellant and his victim far exceeded ten years, such a finding would have been supported by the record in this case.

{¶13} We next consider Appellant’s challenge to the trial court’s second finding, that the “defendant’s relationship to the victim facilitated the offense. The victim was a 14 year old female who was the daughter of a family friend.” Appellant argues that his relationship with the victim did not facilitate the offense, arguing that he was never in a position of authority or trust concerning the girl. We disagree.

{¶14} As set forth in the pre-sentence investigation report, Appellant was not only a family friend, by his own admission he had “a hit and miss

relationship” with the victim’s mother, that was sexual in nature. Contrary to Appellant’s argument, considering that the victim was only fourteen years of age and that Appellant had a relationship with the victim’s mother, such fact placed Appellant in a position of trust with respect to the victim.

Further, based upon our review of other details contained in the pre-sentence investigation report, which was relied upon by the trial court, we cannot conclude that the trial court abused its discretion in finding that Appellant’s relationship with the victim facilitated the offense. Nor can we conclude that the trial court abused its discretion in relying on this finding in imposing sentence.

{¶15} Next, we address Appellant’s challenge to the trial court’s findings regarding Appellant’s likelihood for recidivism, which included findings that he showed no remorse and failed to acknowledge a pattern of alcohol or drug abuse. Appellant argues that he acknowledged his addiction in open court and was interested in rehab or drug counseling. While this may be true, a review of the sentencing hearing transcript reveals that the trial court also found, based upon its review of the pre-sentence investigation report, that Appellant showed no remorse, in part based upon the fact that he blamed the victim and her mother for his conduct. In the sentencing entry,

the trial court further found that Appellant “has a long standing history of drug abuse, with no successful treatment.”

{¶16} Our review demonstrates these findings by the trial court are supported by the information contained in the pre-sentence report. As such, we cannot conclude that the trial court abused its discretion in making these findings or in relying upon these findings in imposing the maximum sentence upon Appellant. Thus, Appellant’s sole assignment of error is overruled. Accordingly, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of 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 Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.