[Cite as *State v. Hess*, 2010-Ohio-3695.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

JOHN W. HESS, JR.

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 CA 0015

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Morrow County Court of Common Pleas, Case No. 09-CR-0019

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: July 29, 2010

APPEARANCES:

For Plaintiff-Appellant

CHARLES HOWLAND
Morrow County Prosecutor

BY: JOCELYN STEFANCIN
Assistant Prosecutor
60 East High Street
Mt. Gilead, Ohio 43338

For Defendant-Appellee

WILLIAM T. CRAMER
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Westerville, Ohio 43082

Hoffman, J.

{¶1} Plaintiff-appellant the State of Ohio appeals the sentence imposed by the Morrow County Court of Common Pleas as to Defendant-appellee John W. Hess, Jr. on one count of gross sexual imposition and one count of dissemination of material harmful to juveniles.

STATEMENT OF THE CASE AND FACTS

{¶2} On September 22, 2009, Appellee John W. Hess was found guilty by a jury of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree, and disseminating matter harmful to juveniles, in violation of R.C 2907.31(A)(1), a first degree misdemeanor. The trial court classified Appellee a Tier III sex offender.

{¶3} Via Judgment Entry of December 17, 2009, the trial court sentenced Appellee to four years in prison on the gross sexual imposition charge with one year mandatory. The court further ordered Appellee serve six months in jail and pay a fine of $1,000 on the dissemination charge.

{¶4} The State of Ohio now appeals, assigning as error:

{¶5} "I. WHEN A MANDATORY PRISON TERM IS REQUIRED, DOES THE SENTENCING JUDGE HAVE THE AUTHORITY TO IMPOSE A PRISON TERM FROM THE PERMISSIBLE RANGE AND MAKE ONLY A PORTION OF THE TERM MANDATORY?"

{¶6} R.C. 2907.05(C)(2) prescribes a mandatory prison term for gross sexual imposition. It reads:

{¶7} "(C) Whoever violates this section is guilty of gross sexual imposition.

{¶8} "(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revised Code to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

{¶9} "(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

{¶10} "(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

{¶11} "(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age."

{¶12} In the case sub judice, Appellee was previously convicted of gross sexual imposition in Meigs County, Ohio involving a victim younger than thirteen years of age.

{¶13} R.C. 2929.14 sets forth the range of sentences for a felony of the third degree:

{¶14} "(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

{¶15} "***

{¶16} "(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years." (Emphasis added).

{¶17} R.C. 2907.05(C)(2) requires the trial court impose a mandatory prison term from one of the range of sentences. The trial court herein sentenced Appellee to four years in prison, one of which is mandatory, on the gross sexual imposition conviction. With regard to dissemination of a material harmful to juveniles, the trial court imposed a jail term of six months and a fine of $1,000.00, to be served concurrent to the sentence on gross sexual imposition.

{¶18} The State argues herein the trial court was required to choose a term from the range prescribed and the prison term was mandatory for the full length of the sentence imposed. In *State v. Thomas*, 2005-Ohio-4616, the Third District Court of Appeals addressed the issue raised herein, holding R.C. 2925.11(C)(4)(e) required a mandatory prison term for the full length of the sentence imposed. The court held,

{¶19} "Finally, the plain and unambiguous language of R.C. 2925.11(C)(4)(e) requires imposition of a mandatory prison term. That section provides: 'possession of [25-99 grams of crack cocaine] is a felony of the first degree, and the court *shall* impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.' R.C. 2925.11(C)(4)(e). Ohio courts have consistently read this language as requiring the implementation of a mandatory sentence. As a result, courts in Ohio have found that a trial court errs when it accepts a guilty plea to an offense under R.C. 2925.11 after indicating to the defendant that community control sanctions are available. *State v. Ruby,* 4th Dist. No. 03CA780, 2004-Ohio-3708, ¶ 11; see also *State v. Davis,* 2nd Dist. No.2003-CA-87, 2004-Ohio-5979.

{¶20} "Accordingly, we hold that R.C. 2925.11(C)(4)(e) required the trial court to impose a mandatory term for the full length of the sentence imposed. Appellant's public policy arguments in favor of promoting criminal rehabilitation are better addressed to the legislature. When faced with a clear statutory directive we must refrain from interfering with the policy determinations of the legislative branch."

{¶21} We follow the holding in *Thomas,* supra, and find the trial court in the case sub judice was required to impose a mandatory prison term for the entire length of the sentence prescribed. The statutory requirement the court impose a definite prison term from one of the prison terms prescribed does not allow the trial court to create a hybrid sentence. Accordingly, Appellee's sentence in the Morrow County Court of Common Pleas is reversed and the matter remanded to the trial court for resentencing.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOHN W. HESS, JR.	:	
	:	
Defendant-Appellee	:	Case No. 2009 CA 0015

For the reason stated in our accompanying Opinion, the sentence imposed by the Morrow County Court of Common Pleas is reversed and the matter remanded to the trial court for resentencing. Costs to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY