

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2009 CA 77
	:	
	:	
JASEN HICKS	:	<u>O P I N I O N</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Richland County Court of Common Pleas Case No. 2009 CR 0279
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	October 8, 2010
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Edwards, P.J.

{¶1} Appellant, Jasen Hicks, appeals a judgment of the Richland County Common Pleas Court convicting him of ten counts of rape, ten counts of sexual battery, ten counts of gross sexual imposition, one count of intimidation, four counts of endangering children, two counts of bribery and one count of theft. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On April 10, 2009, appellant was indicted by the Richland County Grand Jury on 38 counts. On May 20, 2009, he pleaded guilty to all counts: five counts of rape (R.C. 2907.02(A)(1)(b)), ten counts of sexual battery (R.C. 2907.03(A)(5)), ten counts of gross sexual imposition (R.C. 2907.05(A)(4)), five counts of rape (R.C. 2907.02(A)(2)), one count of intimidation of a crime victim (R.C. 2921.04(B)), one count of endangering children (R.C. 2919.22(B)(1)), two counts of bribery (R.C. 2921.02(C)), one count of theft (R.C. 2913.02(A)(1)), and three counts of endangering children (R.C. 2919.22(A)).

{¶3} The case proceeded to sentencing on June 3, 2009. At sentencing, the prosecutor represented to the court that from inside the walls of the county jail, appellant attempted to contact his children and to manipulate his wife and children by bribing them to change their testimony. He tried to persuade his other children to cajole the victim into changing her story. The court noted from the bench that he had to try to balance appellant's rights as a human being against the hurt and pain that he had caused his family, and had to consider appellant's "untoward and uncalled for" activities after he was indicted. The court sentenced appellant as follows:

{¶4} Count 1: Rape – 10 years

{¶5} Count 2: Rape – 6 years

{¶6} Counts 3, 4, 5: Rape – 3 years on each count

{¶7} Count 6: Sexual Battery – 4 years

{¶8} Counts 7 through 15: Sexual Battery – 1 year on each count

{¶9} Counts 16 through 25: Gross Sexual Imposition – 1 year on each count

{¶10} Counts 26 through 30: Rape – 3 years on each count

{¶11} Count 31: Intimidation of a Crime Victim – 1 year

{¶12} Count 32: Endangering a Child – 2 years

{¶13} Counts 33 and 34: Bribery – 1 year on each count

{¶14} Count 35: Theft – 1 day

{¶15} Counts 36 through 38: Endangering a Child – 1 day on each count

{¶16} The court ordered counts one, two and six to be served consecutively, and all other counts to be served concurrently. Appellant assigns error solely to the imposition of the maximum sentence of 10 years on Count 1 of Rape:

{¶17} “THE TRIAL COURT ERRED IN IT’S (SIC) SENTENCING OF THE DEFENDANT-APPELLANT TO THE STATUTORY MAXIMUM OF TEN YEARS ON COUNT I OF THIS CASE.”

{¶18} Appellant does not set forth any specific facts in support of his argument that the court erred in imposing the maximum sentence on count one, and argues generally that the court did not make the specific findings required to impose a maximum prison sentence.

{¶19} R.C. 2929.14(C) provides in pertinent part:

{¶20} “[T]he court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.”

{¶21} R.C. 2929.14(C)’s requirement that the trial court make specific findings in support of a maximum sentence was found unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶¶63-64. In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *Foster* as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶22} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding that “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and

2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.¹

{¶23} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant’s sentence. Instead, 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).” *Kalish* at paragraph 14.

{¶24} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. “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 in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard.” *Kalish* at paragraph 4, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶25} The sentence appellant received was within the permissible statutory range, and the court stated in its judgment that it had considered the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and

¹ “[P]ursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are ‘to protect the public from future crime by the offender and others and to punish the offender. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.’” *State v. Murray*, Lake App. No. 2007-L-098, 2007-Ohio-6733, paragraph 18, citing R.C. 2929.11(A).

recidivism factors under R.C. 2929.12. The sentence was not clearly and convincingly contrary to law.

{¶26} Further, appellant has not demonstrated that the court abused its discretion in imposing the maximum sentence. The record reflects that even after pleading guilty, appellant attempted to manipulate and control his family from inside the prison. Tr. 7. He contacted his daughter, causing her serious harm. Tr. 7. Appellant's wife, who is the mother of the victim, stated at the sentencing hearing that appellant deserves the strictest sentence he can receive because he has done a lot of damage to her and to the children. Tr. 6. The court noted on the record at the sentencing hearing that appellant caused his family hurt and pain and his activities after he was indicted were untoward and uncalled for. Tr. 9.

{¶27} The assignment of error is overruled.

{¶28} The judgment of the Richland County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES

JAЕ/r0715

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

JASEN HICKS

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2009 CA 0077

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES