[Cite as *State v. Smith*, 2015-Ohio-1531.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 14CAA100066
	:	
JESSICA SMITH	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 14 CR I 05 0190 B
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	April 14, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CAROL HAMILTON O'BRIEN DELAWARE CO. PROSECUTOR 140 North Sandusky Street Delaware, OH 43015	DAVID H. BIRCH 286 South Liberty St. Powell, OH 43065

Delaney, J.

{¶1} Appellant Jessica Smith appeals from the September 16, 2014 Judgment Entry of Prison Sentence of the Delaware County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal conviction is not necessary to our resolution of this appeal.

{¶3} Appellant and co-defendant Michael R. Smith II were charged by a single indictment.[1] Appellant was charged in Count III with one count of child endangering pursuant to R.C. 2919.22(A), a felony of the third degree, which states: "No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

{¶4} Appellee's Bill of Particulars filed July 3, 2014 states in pertinent part:

> During the period of April 1, 2014 through May 7, 2014, in Delaware County, Ohio, [appellant], being the parent and custodian of 10-year-old John Doe,[2] did create a substantial risk to the health and safety of John Doe by violating a duty of care, protection, or

[1] Michael R. Smith II was charged with one count of felonious assault pursuant to R.C. 2903.11(A)(1), a felony of the second degree [Count I]; one count of child endangering pursuant to R.C. 2919.22(B)(1), a felony of the second degree [Count II]; and one count of domestic violence pursuant to R.C. 2919.25(A), a misdemeanor of the first degree [Count IV].

[2] For consistency, the minor victim in this matter will be referred to throughout as "John Doe."

> support, which resulted in serious physical harm to John Doe in violation of 2919.21(A) (*sic*) of the Revised Code.
>
> To wit: [Appellant] admitted seeing signs of physical abuse on John Doe but claimed John Doe was being abused at school. Despite being aware of her son's injuries, [appellant] failed to get him the necessary medical care he required. As a result of these injuries, including a broken rib, a ruptured bowel, a distended stomach, and numerous bruises on his body, John Doe was taken to St. Ann's Hospital then life-flighted to Nationwide Children's Hospital in critical condition.

{¶5} Both defendants entered pleas of not guilty and the case was scheduled for joint trial. Appellee filed a Notice of Intent to Use 404(B) Evidence stating in pertinent part:

> In this case, the State intends to introduce evidence of the prior injuries suffered by the victim during the time period August 2012 through April 2014 as well as the school attendance records of the victim. Victim has indicated these injuries were caused by Defendant Michael Smith with the knowledge of [appellant] and that he missed school because of some of the injuries.
>
> The evidence will show that [appellant] was aware of the prior abuse [as] well as the abuse in the instant case, and made efforts to hide that abuse. * * * *.

{¶6} Appellant responded with a motion in opposition.

{¶7} On July 29, 2014, appellant entered a counseled plea of guilty to the amended lesser-included offense of attempted child endangering pursuant to R.C. 2923.02(A) and 2919.22(A), a felony of the fourth degree. The guilty plea was taken by the Hon. Everett H. Krueger of the Delaware County Court of Common Pleas. The trial court ordered appellant to report for a pre-sentence investigation and sentencing was ultimately scheduled for September 12, 2014. Both parties filed sentencing memoranda.

{¶8} On September 10, 2014, a notice was filed that the Ohio Supreme Court assigned Judge Joseph Timothy Campbell to preside in the case from September 1, 2014 through September 29, 2014.

{¶9} On September 12, 2014 the parties appeared before the trial court and appellant was sentenced to a prison term of 17 months.

{¶10} Appellant now appeals from the Judgment Entry of Prison Sentence entered on September 16, 2014.

{¶11} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶12} "I. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO A PRISON SENTENCE IN CONTRAVENTION OF THE SENTENCING STATUTES."

{¶13} "II. THE TRIAL COURT ERRED AND DENIED THE APPELLANT DUE PROCESS OF LAW BY PROCEEDING TO SENTENCING WITH AN ASSIGNED JUDGE THAT DID NOT PRESIDE OVER THE PLEA HEARING."

ANALYSIS

I.

{¶14} In her first assignment of error, appellant argues she must be sentenced to a term of community control because she was convicted of a non-violent fourth degree felony. We disagree.

{¶15} In *State v. Kalish,* 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, the Ohio Supreme Court established a two-step procedure for reviewing a felony sentence. The first step is to "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." *State v. Conley,* 5th Dist. Stark No.2012CA00150, 2013–Ohio–4137, ¶ 35 citing *Kalish* at ¶ 4. If the first step is satisfied, the second step requires the trial court's decision be reviewed under an abuse-of-discretion standard. *Id.*

{¶16} Appellant argues she should have been sentenced to a term of community control, instead of prison, pursuant to R.C. 2929.13(B)(1)(a) and R.C. 2929.13(B)(1)(b), which state in pertinent part:

> Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

(iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

(b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) If the offense is a qualifying assault offense, the offender caused serious physical harm to another person while committing

the offense, and, if the offense is not a qualifying assault offense, the offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

(v) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907. of the Revised Code.

(vi) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(vii) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

> (viii) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.
>
> (ix) The offender committed the offense for hire or as part of an organized criminal activity.
>
> (x) The offender at the time of the offense was serving, or the offender previously had served, a prison term.
>
> (xi) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

{¶17} Appellant acknowledges the issue presented by this case is the applicability of R.C. 2929.13(B)(1)(b)(ii) and whether upon the facts of this case she "caused physical harm to another person while committing the offense." We find appellant, the mother of John Doe, did cause physical harm to her child by "creat[ing] a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."[3] The facts reveal appellant's husband and co-defendant pled guilty to striking John Doe, but appellant's ongoing violation of her duty of care, protection, and

[3] R.C. 2923.02(A), attempt, states "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

support was the proximate cause of John Doe's injuries festering to the point that sepsis set in and his condition became life-threatening.

{¶18} Because we find appellant caused physical harm to her son by failing to seek timely medical attention, we decline to reach appellee's argument that attempted child endangering is an "offense of violence" pursuant to R.C. 2901.01(A)(9)(c).

{¶19} The trial court's sentence is not clearly and convincingly contrary to law and is not an abuse of discretion. Appellant's first assignment of error is overruled.

II.

{¶20} In her second assignment of error, appellant argues she was denied due process because she was sentenced by a visiting judge instead of the judge who presided at her plea hearing. We disagree.

{¶21} Ohio Crim. R. 25(B) states in pertinent part: "If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by * * * the Chief Justice of the Supreme Court of Ohio, may perform those duties. * * * *." In this case, a Certificate of Assignment signed by Chief Justice Maureen O'Connor of the Ohio Supreme Court was filed on July 24, 2014, appointing Judge Campbell to serve for the days of September 1 through September 29, 2014. Appellant does not point to any evidence in the record that this appointment was procedurally improper.

{¶22} Appellant cites *Beatty v. Alston*, 43 Ohio St.2d 126, 127-28, 330 N.E.2d 921 (1975) as authority for her argument that a judge who takes a defendant's plea must also impose sentence, but that case is factually distinguishable. In *Beatty*, the judge who took the plea was available and able to sentence the defendant but failed to

do so due to procedural oversight. In this case, the appointment of an Acting Judge indicates some reason existed for the original judge's inability to sentence appellant and we cannot say the substitution of another judge was improper. See, *State v. Shine*, 2nd Dist. Montgomery No. 11092, 1988 WL 129177, *2 (Dec. 1, 1988).

{¶23} We also note no objection was raised to the assignment of a visiting judge. Appellant waived her right to challenge the authority of the sentencing court by her failure to make a timely objection prior to sentencing. *Shine*, supra, 1988 WL 129177 at *3; *State v. Carosella*, 7th Dist. Mahoning No. 07CR313, 2008-Ohio-6370, ¶ 17; see also, e.g., *State v. Pecina*, 76 Ohio App.3d 775, 778, 603 N.E.2d 363 (6th Dist.1992); *Brown v. Brown*, 15 Ohio App.3d 45, 47, 472 N.E.2d 361, 362 (2nd Dist.1984). Appellant did not raise the issue prior to, during, or after sentencing:

> [A]ny party objecting to a reassignment must raise that objection at the first opportunity to do so. If the party has knowledge of the transfer with sufficient time to object before the new judge takes any action, that party waives any objection to the transfer by failing to raise that issue on the record before the action is taken. If the party first learns about the transfer after action is taken by the new judge, the party waives any objection to the transfer by failing to raise that issue within a reasonable time thereafter.
>
> *Berger v. Berger*, 3 Ohio App.3d 125, 131443 N.E.2d 1375 (1981) (overruled on other grounds).

{¶24} The reassignment of the case for sentencing was not improper and appellant's second assignment of error is overruled.

CONCLUSION

{¶25} Appellant's two assignments of error are overruled and the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J. and

Gwin, P.J.

Baldwin, J., concur.