

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 14 CAA 05 0034
KENNETH ANDERSON	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Delaware County Court of Common Pleas, Case No. 13-CR-I-08-0352 & 13-01-022DL

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 11, 2015

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Appellant Kenneth Anderson appeals his conviction and sentence after a negotiated guilty plea to one count of felonious assault in the Delaware County Court of Common Pleas.

Facts and Procedural History

{¶2} This matter originated with the filing of a Complaint of Delinquency on January 4, 2013 alleging that the Juvenile, Kenneth Anderson, b. 08.30.1997, committed the offenses of kidnapping, felonious assault, and complicity to felonious assault.

{¶3} On January 4, 2013, the state filed a Motion for Hearing on Discretionary Transfer of Jurisdiction with the juvenile court.

{¶4} Pursuant to Judgment Entry filed March 14, 2013, the juvenile court found probable cause that Anderson committed the offense of kidnapping, felonious assault, and complicity to felonious assault. Anderson was ordered to complete an amenability assessment as required under R.C. 2152.10 and 2152.12.

{¶5} On July 10, 2013, the juvenile court held a hearing to determine Anderson's amenability. The following evidence was produced during the evidentiary hearing.

{¶6} Anderson was committed to the Village Network facility by the Cuyahoga Juvenile Court because of an incident with a female cousin that lead to the filing of a juvenile complaint for gross sexual imposition involving his four-year-old cousin. On September 5, 2012, roughly a month after his arrival on the unit, Anderson was involved

in an assault on the Ohio Department of Youth Services ("ODYS") employee Jodi Dawson at the Scioto Juvenile Facility in which Ms. Dawson suffered extensive injuries.

{¶7} Ms. Jodi Dawson testified that she was employed by the ODYS from March 2005 to September 2012. During her time at ODYS, Ms. Dawson worked as an Officer ("JCO"), Social Worker, and Unit Manager at Scioto Juvenile Correctional Facility located in Delaware County, Ohio.

{¶8} When Anderson arrived, Ms. Dawson reviewed all of the rules and expectations of the Cottage with him. Ms. Dawson warned the inmates of gang activity within the Cottage and encouraged Anderson to stay away from such activity.

{¶9} On September 5, 2012, Ms. Dawson was working as the Unit Manager of Jefferson Cottage, located inside the Scioto Juvenile Correctional Facility. Ms. Dawson testified that Anderson came into her office and attacked her. Ms. Dawson identified Anderson as the principal actor, though two other juvenile inmates participated in the assault. Ms. Dawson testified she believed that she might have been attacked because of her position as Unit Manager of Anderson's specific housing placement.

{¶10} Because of the incident, Ms. Dawson suffered lacerations on her nose and forehead, a broken nose, deviated septum, multiple sprains, six (6) chipped teeth, a concussion, vertigo, and multiple contusions across her body. Ms. Dawson also suffered from psychological trauma, including posttraumatic stress disorder. Ms. Dawson was off work for ten (10) months due to her injuries. Ms. Dawson is no longer able to work at ODYS because of the injuries sustained during the incident.

{¶11} Ms. Dawson believes the attack may have been part of gang activity, but she has no evidence to verify her belief. Ms. Dawson testified that Anderson had

previous incidents of assaulting other inmates during his time at ODYS. Anderson was frequently placed on lock-down at the Cottage due to his assaultive behavior.

{¶12} Daniel Davis, PhD testified that he is employed as a psychologist at Netcare. Dr. Davis specialized in juvenile justice. Dr. Davis performed a forensic evaluation of Anderson at the court's request. During his evaluation, Dr. Davis obtained background information from Anderson including information about his schooling, family and treatment history. Dr. Davis interviewed Anderson two times. Dr. Davis administered several tests to Anderson, including the MMPI and HTI tests.

{¶13} Dr. Davis testified Anderson was placed in a community-based control residential facility. While there, his violent behaviors did not improve and that his behavior ultimately forced his placement at an ODYS facility. Dr. Davis also testified that he continued to exhibit aggression and violent behaviors following his placement into the DYS facility. Dr. Davis testified Anderson ranked in the highest percentile for reoffending and the lowest percentile for risk amenability. Dr. Davis' complete report was admitted into evidence. Anderson is diagnosed with conduct disorder and attention deficit hyperactivity disorder ("ADHD"). Additionally, Anderson was recently diagnosed with a mood disorder. Anderson further suffers from substance abuse, which complicates his mental health treatment

{¶14} Dr. Davis believes that Anderson could be rehabilitated in the juvenile justice system if he chooses to avail himself to treatment. However, Dr. Davis believes that Anderson has a low probability of availing himself to treatment. Anderson continues to exhibit aggressive behavior, although he has not had an aggressive incident at ODYS since January 2013. Dr. Davis acknowledged that this is a long period of compliance

given Anderson's history. Dr. Davis further acknowledged that not all treatment options have been exhausted in the juvenile court system.

{¶15} Menus Igwe, Anderson's counselor at ODYS from December 2012 through March 2013, testified that Anderson had been placed on "progress unit" at the ODYS facility. "The progress unit consists of inmates who committed an offense of violence or escape while at the Facility." Mr. Igwe testified that it was entirely possible for an inmate to finish his or her time in progress unit within one and a one-half (1.5) months, but that it took Anderson six months to finish his time on "progress unit." T. at 126-127. Mr. Igwe also testified that Anderson had incidents of violence on both May 29, 2013 and June 20, 2013.

{¶16} Ruth Gray, Anderson's grandmother testified on his behalf. Anderson was born to unwed teenage parents (fourteen and fifteen years old) who had met in a juvenile correctional facility. When Anderson was 19-months old, his mother was found to be neglectful and he was removed from her care. At that time, Anderson's paternal grandmother and her husband took him into their care.

{¶17} Mrs. Gray became aware of Anderson's behavioral issues when Anderson was diagnosed with ADHD and placed on an IEP program when he was in the first grade. When Anderson lived with Ms. Gray, he attended the South Euclid School District. Anderson attended a specialized school for children with behavioral issues. Anderson received medication for his mental health disorders.

{¶18} Ms. Gray testified that she visits with Anderson regularly. Ms. Gray believes Anderson has made progress since his placement at ODYS. Anderson seems more mature and focused. Anderson has less behavioral outbreaks and is better able to

deescalate. Anderson is doing well in school. Anderson expresses remorse about his delinquent behaviors.

{¶19} Dr. Franic Cripe testified on Anderson's behalf. Dr. Cripe is employed at ODYS as a licensed psychologist. Dr. Cripe works with juveniles through her employment at ODYS. Dr. Cripe began working with Anderson in September 2012. Dr. Cripe provided collateral information to Dr. Davis in connection with his amenability assessment. Dr. Cripe testified that Anderson has opened up and become more engaged in treatment. Dr. Cripe testified that she believes that Anderson has made progress in counseling.

{¶20} In a nine-page journal entry filed July 30, 2013, the Juvenile Court granted the state's motion for discretion transfer of jurisdiction and transferred jurisdiction to the Delaware County Court of Common Pleas.

{¶21} On August 30, 2014, an indictment issued charging Anderson with: one count of felonious assault pursuant to R.C. 2903.11(A)(1), a felony of the second degree; one count of complicity to felonious assault pursuant to R.C. 2923.02(A)(2) as it relates to R.C. 2903.11(A)(1), a felony of the second degree; and one count of kidnapping pursuant to R.C. 2905.01(A)(3), a felony of the second degree.

{¶22} Subsequently, Anderson entered a negotiated plea of guilty to count one of the indictment, in exchange for the state's dismissal of count two and count three.

{¶23} On April 22, 2014, Anderson was sentenced to six years in prison with credit for 228 days served, with a mandatory period of post-release control of three years.

Assignments of Error

{¶24} Anderson raises two assignments of error,

{¶25} “I. THE JUVENILE COURT COMMITTED AN ABUSE OF DISCRETION IN GRANTING THE STATE OF OHIO'S MOTION TO RELINQUISH JURISDICTION PURSUANT TO R.C. 2152.10 AND R.C. 2152.12.

{¶26} “II. THE TRIAL COURT ERRED BY IMPOSING A DISPROPORTIONATE SENTENCE AND FAILING TO CONSIDER THE DEFENDANTS "YOUTH" AS A MITIGATING FACTOR AT SENTENCING.”

I.

{¶27} In his first assignment of error, Anderson contends that the juvenile court erred in transferring jurisdiction over his case to the common pleas court.

{¶28} Pursuant to R.C. 2152.12(B), once a complaint has been filed alleging that a juvenile has committed an act that would be a felony if committed by an adult, the juvenile court may transfer the case to adult court if it finds that (1) at the time of the offense, the juvenile was 14 years of age or older, (2) probable cause exists that the juvenile committed the act charged, (3) the juvenile is not amenable to care or rehabilitation in the juvenile system, and (4) the safety of the community may require that the child be subject to adult sanctions.

{¶29} These factors need not all be resolved against the juvenile before a bindover is permitted. *State v. Douglas*, 20 Ohio St.3d 34, 37, 485 N.E.2d 711, 713(1985).

{¶30} In the case at bar, Anderson concedes that he had been 15 years old at the time the offense was committed. Anderson does not challenge the juvenile court's

finding probable cause existed to believe that Anderson had committed the charged acts. Anderson only challenges the juvenile court's discretionary transfer.

{¶31} An amenability hearing is a broad assessment of individual circumstances and is inherently individualized and fact-based. Thus, a juvenile court's determination regarding a child's amenability to rehabilitation in the juvenile system is reviewed by an appellate court under an abuse-of-discretion standard. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶39, 40; *In re M.P.*, 124 Ohio St.3d 445, 2010-Ohio-599, 923 N.E.2d 584, ¶14.

{¶32} R.C. 2152.12(D) lists the following factors that a juvenile court must consider in favor of transferring a juvenile to the general division of the common pleas court:

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

(3) The child's relationship with the victim facilitated the act charged.

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the

commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

{¶33} The juvenile court must then weigh the factors in R.C. 2152.12(D) against the factors listed in R.C. 2152.12(E) that weigh against transfer of jurisdiction, including:

(1) The victim induced or facilitated the act charged.

(2) The child acted under provocation in allegedly committing the act charged.

(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

(5) The child previously has not been adjudicated a delinquent child.

(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

(7) The child has a mental illness or is a mentally retarded person.

(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.

{¶34} In addition to considering the factors listed in R.C. 2152.12(D) and (E), the juvenile court “shall order an investigation into the child’s social history, education, family situation, and any other factor bearing on whether the child is amenable to juvenile rehabilitation, including a mental examination of the child by a public or private agency or a person qualified to make the examination.” R.C. 2152.12(C).

{¶35} In this case, Anderson contends that the juvenile court improperly weighed the factors listed above. He raises four specific objections.

1. R.C. 2152.12(D)(3) — the relationship of the Defendant and the Victim

{¶36} First, Anderson claims the Juvenile Court abused its discretion when it considered R.C. 2152.12(D)(3) - the relationship of the Defendant and the Victim.

{¶37} In the case at bar, the Juvenile Court specifically held that, "The Juvenile was familiar with Ms. Dawson prior to the alleged incident. The Juvenile recognized Ms. Dawson as an authority figure and the alleged incident was likely induced by Ms. Dawson's position as Unit Manager of the Cottage." Judgment Entry, Discretionary

Bindover Amiability Hearing, Filed Sept. 6, 2013 at 6. [“Amenability JE”] The Juvenile Court specifically stated that it believed that this relationship helped to facilitate the act.

{¶38} Anderson argues there is insufficient evidence in the record for the juvenile court to draw this conclusion. We disagree.

{¶39} Ms. Dawson testified she believed that she may have been attacked because of her position as Unit Manager of Defendant's specific housing placement. The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶40} In *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E. 2d 118 (1954), the Supreme Court further cautioned,

The mere number of witnesses, who may support a claim of one or the other of the parties to an action, is not to be taken as a basis for resolving disputed facts. The degree of proof required is determined by the impression which the testimony of the witnesses makes upon the trier of facts, and the character of the testimony itself. Credibility, intelligence, freedom from bias or prejudice, opportunity to be informed, the disposition to tell the truth or otherwise, and the probability or improbability of the statements made, are all tests of testimonial value. *Where the evidence is in conflict, the trier of facts may determine what should be accepted as the*

truth and what should be rejected as false. See Rice v. City of Cleveland,
114 Ohio St. 299, 58 N.E.2d 768.

161 Ohio St. at 477-478. (Emphasis added).

{¶41} It is beyond dispute that Anderson was a detainee in an ODYS facility and Ms. Dawson was in a supervisory position at that facility. (T. at 13). When she refused to return property that she had taken from Anderson, he began to assault her.(Defendant's Exhibit 4-A-2).

{¶42} Upon consideration of the evidence produced at the amenability hearing, along with the juvenile court's judgment entry, we find the record contains sufficient evidence from which the court could conclude that Anderson's relationship with Ms. Dawson's facilitated the act charged.

2. R.C. 2152.12(D)(7) – The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

{¶43} Anderson next contends there is no evidence in the record regarding his response to past juvenile sanctions pursuant to R.C. 2152.12(D)(7). We disagree.

{¶44} Specifically, the trial court noted,

The Juvenile has been subject to several juvenile sanctions and treatment programs, including extensive counseling programs and placement in residential treatment facilities. The Juvenile continues to reoffend. The Juvenile has not engaged in services offered to him in the past.

* * *

The Juvenile was fifteen (15) years old at the time of the alleged offense. Although juvenile court sanctions remain available until the age of twenty- one (21), the Juvenile has shown a repeated disregard for any treatment or sanctions offered by the juvenile court system. Virtually every treatment option available through the juvenile court system has been extended to the Juvenile. The Juvenile's behavior has not improved and he continues to be a threat to public safety.

The Juvenile has made minimal improvements since the alleged incident. The instances of violent behavior have somewhat subsided. However, the Juvenile continues to have infractions while at ODYS. The Juvenile continues to demonstrate an inability to respond to traditional juvenile court treatment options.

Amenability JE at 7; 9.

{¶45} Ms. Dawson testified that Anderson had been assaultive of other inmates in the facility, and had been placed on lock down because of his behavior.

{¶46} Dr. Davis testified that Anderson was placed in a community-based control residential facility and that while there, his violent behaviors did not improve and that his behavior ultimately forced his placement at an ODYS facility. Dr. Davis also testified that he continued to exhibit aggression and violent behaviors following his placement into the DYS facility. Dr. Davis testified that Anderson ranked in the highest percentile for reoffending and the lowest percentile for risk amenability.

{¶47} Mr. Igwe testified that Anderson had incidents of violence on both May 29, 2013 and June 20, 2013.

{¶48} “As long as the court considers the appropriate statutory factors and there is some rational basis in the record to support the court's findings when applying those factors, we cannot conclude that the [juvenile] court abused its discretion in deciding whether to transfer jurisdiction. *State v. West*, 167 Ohio App.3d 598, 856 N.E.2d 285, 2006–Ohio–3518, ¶ 10, citing R.C. 2152.12(B); *State v. Douglas*, 20 Ohio St.3d 34, 36–37, 485 N.E.2d 711(1985); and *State v. Hopfer*, 112 Ohio App.3d 521, 535–536, 679 N.E.2d 321(2nd Dist. 1996).

In this broad assessment, any one particular circumstance may carry more weight than other circumstances. For example, the seriousness of the alleged act may speak not only to a child's mental health, but also to her threat to the community and to her need for rehabilitation beyond her twenty-first birthday. See [*State v. Watson*, 47 Ohio St.3d at 96, 547 N.E.2d at 1184]. In sum, any evidence that reasonably supports the juvenile court's decision to relinquish jurisdiction will suffice to sustain that court's judgment.

State v. Hopfer, 112 Ohio App.3d 521 at 536, 679 N.E.2d 321.

{¶49} However, juvenile courts must also be mindful of the most important purpose behind this determination, which is, “the assessment of the probability of rehabilitating the child within the juvenile justice system.” *State v. Douglas* at 36, 485 N.E.2d 711, *citing State v. Adams*, 69 Ohio St.2d 120, 123, 431 N.E.2d 326(1982).

{¶50} In the case at bar, the record supports a finding that Anderson's unprovoked attack, along with two other juveniles, caused serious, lasting injuries to Ms. Dawson. In *State v. Watson*, Watson, was tried as an adult and convicted of involuntary

manslaughter and aggravated robbery for the 1986 beating death of Robert Cooley. Watson was fifteen at the time of the conduct charged. 47 Ohio St.3d at 93, 547 N.E.2d 1181. The Supreme Court noted,

A juvenile who has demonstrated the ability to commit a major felony may require more time for rehabilitation than one whose offenses are less serious. Because of a juvenile's age, there may not be sufficient time remaining for rehabilitation to take place before the twenty-first birthday, even though the juvenile is otherwise amenable to rehabilitation. This factor falls within the requirement of Rule 30(E) that the age of the juvenile be considered.

Further, the nature of the alleged act is usually relevant to the child's mental health, a factor which the court must also consider under Rule 30(E)(1). Generally the greater the culpability of the offense, the less amenable will the juvenile be to rehabilitation. In making the bindover decision, it would not be logical, or consistent with Rule 30(E), to consider the juvenile's past record but ignore the act which has brought the juvenile to court. Accordingly, we hold that in deciding whether to relinquish jurisdiction over a child, a juvenile court may consider the seriousness of the alleged offense when determining, pursuant to Juv.R. 30(C)(1), if the juvenile is "not amenable to care or rehabilitation" in the juvenile justice system.

47 Ohio St.3d at 96, 547 N.E.2d 1181.

{¶51} Upon consideration of the evidence produced at the amenability hearing, along with the juvenile court's judgment entry, we find the record contains sufficient evidence from which the juvenile court could conclude the results of Anderson's previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

3. R.C. 2152.12(E)(7) – Mental illness

{¶52} Anderson next argues that the juvenile court found that he "suffers from mental health problems"; however, Anderson claims the juvenile court did not assign this factor appropriate weight in favor of retaining jurisdiction over Anderson.

{¶53} The juvenile court "is not bound by expert opinion, and may assign any weight to expert opinion that it deems appropriate." *State v. West*, 167 Ohio App.3d 598, 2006–Ohio–3518, ¶30 (4th Dist.); *State v. Morgan*, 10th Dist. Franklin No. 13AP-620, 2014-Ohio-5661, ¶37. The statutory scheme does not dictate how much weight must be afforded to any specific factor and, instead, rests the ultimate decision in the discretion of the juvenile court. Anderson's disagreement with the weight afforded the various statutory factors does not amount to an abuse of discretion.

4. R.C. 22152.12(B)(3) Safety of the community.

{¶54} Anderson argues that the juvenile court failed to find that the safety of the community demanded that he be transferred to adult court.

{¶55} In the case at bar, the juvenile court, after considering all of the evidence, and specifically Anderson's behavior while subject to the juvenile justice system, expressly stated that Anderson "continues to be a threat to public safety."

{¶56} In the case at bar, the juvenile court found the following factors militated *against* bindover: 1). R.C. 2952.12(D)(2) – Ms. Dawson’s harm was not exacerbated by her age, or physical or mental vulnerability; 2). R.C. 2952.12(D)(4) – Anderson did not committed the act for hire or as part of a gang or organized; 3).R.C. 2152.12(D) - Anderson did not brandish, display, indicate, or use a firearm.

{¶57} In the case at bar, the juvenile court found the following factors mitigated *in favor* of bindover: 1) R.C. 2152.12(D)(1) – Ms. Dawson suffered physical or psychological harm; 2). R.C. 2152.12(D)(3) - Anderson’s relationship with Ms. Dawson facilitated the act charged; 3). R.C. 2152.12(D) (6) – Anderson was committed to the ODYS at the time of the offense for a prior adjudication of delinquent behavior; 4). R.C. 2952.12(D)(7) - the results of previous sanctions and programs showed rehabilitation would not occur in the juvenile system; 5). R.C. 2152.12(D)(8) – Anderson is emotionally, physically, or psychologically mature enough for transfer; and 6). R.C. 2152.12(D)(9) – Anderson has a low probability of amenability to treatment within the juvenile court system.

{¶58} In considering the factors against transfer of prosecution provided in R.C. 2152.12(E), the Juvenile Court found no factors in favor of retaining jurisdiction.

{¶59} The Juvenile Court concluded,

After due consideration to both sets of factors contained within Section 2152.12, the Court finds good cause to grant the Motion for Discretionary Transfer of Jurisdiction. The Court has considered every factor and given appropriate weigh to all evidence presented at the amenability hearing. The Court has given thorough consideration to the

forensic psychological evaluation prepared by Dr. Dan Davis. Based on the totality of the circumstances, the Court finds that there are reasonable grounds to believe that the Juvenile is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children. Therefore, the State of Ohio's Motion for Discretionary Transfer of Jurisdiction should be granted.

Amenability JE at 9.

{¶60} While there is evidence in the record that supports the juvenile court retaining jurisdiction over this case, there was also evidence supporting the transfer. The court expressly based its decision upon Anderson's prior conduct, the severity of the crime and failure of the juvenile justice system to rehabilitate him. Because of the gravity of this crime, the court concluded that Anderson needed to be treated as an adult for the protection of the community and himself. Nothing in the record supports Anderson's argument that the juvenile court's decision was based on erroneous facts or that it was unreasonable, arbitrary, or capricious. Because the court weighed the appropriate statutory factors and the record contains credible evidence that supports its findings, we cannot say that the court abused its discretion in transferring jurisdiction over this case to the adult court.

{¶61} After carefully reviewing the hearing transcript and the juvenile court's nine-page judgment entry, we cannot say the court abused its discretion in granting the state's motion for discretionary bindover.

{¶62} Accordingly, Anderson's first assignment of error is not well taken.

II.

{¶63} In his second assignment of error, Anderson argues that the trial court's sentence is disproportionate to the offense and not supported by the record and further, that the trial court failed to consider his youth as a mitigating factor.

{¶64} At the outset, we note that the "Written Text of Criminal Rule 11(F) Agreement" filed in this case on February 7, 2014 contains the following provision,

4. The Defendant agrees:

* * *

C. To waive his/her rights to appeal, including, but not limited to the grounds listed in Ohio Revised Code {Section} 2953.08.

(Footnote omitted). This line of the agreement contains Anderson's initials, his trial counsel's initials and the prosecutor's initials.

{¶65} Assuming arguendo that Anderson's second assignment of error has not been waived, we note that because Anderson plead Guilty to a second-degree felony, there was a presumption of imprisonment in his case. R.C. 2929.13(D) provides:

(D) Except as provided in division (E) or (F) of this section, *for a felony of the first or second degree and for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729, of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code.* Notwithstanding the presumption established under this division, the sentencing court may impose a

community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(1) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(2) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(Emphasis added). Thus, in order to impose a community control sanction in the instant case, the trial court would have been required to find that such a sanction would adequately punish Anderson, that Anderson was less likely to re-offend, and that such a sanction would not demean the seriousness of the offense because Anderson's conduct

was less serious than conduct normally constituting the offense. *State v. Morin*, 5th Dist. Fairfield No. 2008-CA-10, 2008-Ohio-6707, ¶27.

{¶66} R.C. 2953.08(B) provides:

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925 of the Revised Code.

{¶67} The Legislature has expressly provided that the prosecution can appeal a trial court's decision overcoming the presumption of imprisonment contained in R.C. 2929.13. No such provision has been made for a defendant to appeal a sentence on the basis that the trial court refused to supersede the presumption for a prison term on a first or a second-degree felony. *Morin*, ¶31. In *Morin*, this Court noted:

Appellant seeks to appeal his sentence as of right based upon the trial court's refusal to supersede the presumption for a prison term on a second-degree felony. R.C. Section 2953.08 sets forth the circumstances

under which a defendant may appeal a felony sentence as of right. The statute does not provide an appeal as of right in this circumstance, nor does the ‘contrary to law’ provision require each and every sentence be subjected to review under the guidelines. *State v. Untied*, March 5, 1998, Muskingum App. No. CT97-18; *State v. Taylor*, August 8, 2003, Tuscarawas App. No. 2002CA78. Here, appellant was convicted of a first and a second-degree felony and was not given the maximum sentence for either; therefore, his appeal is not permitted by R.C. 2953.08. *Id.*” *State v. Barton*, 5th Dist. No. 2003CA00064, 2004-Ohio-3058 at ¶ 74; *State v. Miller*, 5th Dist. No. 04-COA-003, 2004-Ohio-4636 at ¶ 38.

Appellant’s contention, therefore, is that the trial court abused the discretion conferred on it, which is not a matter for which R.C. 2953.08(G) permits appellate review. See *State v. Cochran*, 2nd Dist. No. 20049, 2004-Ohio-4121; *State v. Alvarez* (2003), 154 Ohio App.3d 526, 2003-Ohio-5094, 797 N.E.2d 1043; *State v. Kennedy* (Sept. 12, 2003), Montgomery App. No. 19635, 2003-Ohio-4844; *State v. Miller*, supra at ¶ 38.

Morin, ¶¶32-33.

{¶68} 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 *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, 845 N.E.2d 470 as it relates to the remaining sentencing statutes and appellate review of felony sentencing. See, *State v. Snyder*, 5th Dist. Licking No. 2008–CA–25, 2080–Ohio–6709. 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 ¶1 and 11, 896 N.E.2d 124, citing *Foster* at ¶ 100, *See also*, *State v. Payne*, 114 Ohio St.3d 502, 2007–Ohio–4642, 873 N.E.2d 306; *State v. Firouzmandi*, 5th Dist. Licking No. 2006–CA–41, 2006–Ohio–5823.

{¶69} 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 ¶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.

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 ¶13, *see also State v. Mathis*, 109 Ohio St.3d 54, 2006–Ohio–855, 846 N.E.2d 1; *State v. Firouzmandi*, *supra* at ¶ 29.

{¶70} In the case at bar, Anderson did not receive the maximum sentence. R.C. 2929.14(A)(2). Upon review, we find that the trial court’s sentencing on the charge

complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Furthermore, the record reflects the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code and advised Anderson regarding post release control.

{¶71} Recently, in *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, syllabus, the Supreme Court of Ohio stated that:

In order to impose *consecutive* terms of imprisonment, a trial court is *required* to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.(Emphasis added.)

{¶72} While the sentencing court is required to make these findings, it is not required to give reasons explaining the findings. *Id.* at ¶27. Furthermore, the sentencing court is not required to recite “a word-for-word recitation of the language of the statute.” *Bonnell* at 29. “[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *Id.* A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Bonnell* at ¶ 34. The findings required by R.C. 2929.14(C)(4) must be made at the sentencing hearing and included in the sentencing entry. *Id.* at the syllabus. A sentencing court has broad discretion to determine the relative weight to assign the factors in R.C. 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶73} In the case at bar, Anderson was not sentenced to the maximum and did not receive consecutive sentences. Anderson does not cite to any specific case or cases to demonstrate that his sentence is disproportionate. In *State v. Curran*, the Court noted,

Curran did not object to the sentence on this basis in the trial court. If a defendant intends to argue that the sentence imposed in a particular case is so inconsistent with sentences imposed for similar offenses committed by similar offenders as to be disproportionately harsh, he must object or otherwise raise that issue in the trial court, affording that court an opportunity to correct the error. *State v. Johnson*, 164 Ohio App.3d 792, 2005-Ohio-6826, 844 N.E.2d 372, ¶ 53. Having failed to do so, Curran has waived all but plain error. No plain error has been demonstrated here.

Furthermore, a defendant who claims that his sentence is inconsistent with sentences given in other cases bears the burden of providing the court with sentences imposed for similar crimes by similar offenders that validate the claim of inconsistency. *State v. Friesen*, Crawford App. No. 3–05–06, 2005-Ohio-5760, 2005 WL 2840722. 166 Ohio App.3d 206, 2006-Ohio-773, 850 N.E.2d 81, ¶¶34, 35.

{¶74} In the case at bar, the trial court considered all of the statutory factors pursuant to R.C. 2929.11 and R.C. 2929.12 as noted in the Judgment Entry on Sentence filed April 22, 2014. The trial court further made the following specific findings,

1. Victim suffered serious physical harm.

2, Prior history of adjudication of delinquency, See page 4 & 5 of the Pre-sentence investigation report for additional information.

3. Failure to respond in past to sanctions imposed.

4. Shows no remorse for offense.

{¶75} Anderson's disagreement with the weight afforded the various statutory factors does not render a sentence disproportionate, contrary to law or amount to an abuse of discretion. There is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of Anderson's case to suggest that his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.

{¶76} Anderson's second assignment of error is overruled.

{¶77} For the forgoing reasons, the judgment of the Delaware County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur