[Cite as *State v. Hofmann*, 2003-Ohio-5193.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-02-035

Appellee — Trial Court No. 02-CR-208

v.

James R. Hofmann — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: September 30, 2003

* * * * *

Dean Holman, Medina County Prosecuting Attorney, and Matthew K. Razavi, Assistant County Prosecuting Attorney, for appellee.

K. Ronald Bailey, for appellant.

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PIETRYKOWSKI, J.

{¶1} This matter is before the court on appeal from the judgment and sentence of the Erie County Court of Common Pleas which, following a guilty plea to two counts of gross sexual imposition under R.C. 2907.05(A)(4), sentenced appellant, James R. Hofmann, to concurrent three year terms of imprisonment.

{¶2} On May 8, 2002, an information was filed charging appellant with two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), third degree felonies. The

charges stemmed from evidence that appellant, on multiple occasions, had sexual contact with his nephew who, at the time of the offenses, was under the age of thirteen.

{¶3} Appellant was arraigned on May 8, 2003, and entered a plea of guilty to the charges. The matter was then referred to the Adult Probation Department for a presentence investigation and to the Court Diagnostic and Treatment Center for a sexual offender classification evaluation.

{¶4} On August 1, 2002, the sentencing hearing was held. Prior to imposing sentence, the court indicated that it had considered the Court Diagnostic and Treatment Center report, defendant's sentencing memorandum, and the presentence investigation ("PSI") report prepared by the Erie County Probation Department. Sentencing appellant to concurrent three year prison terms, the court found that: "[T]here has been a physical or mental injury to the victim due to your conduct and it was exacerbated because of the physical and mental condition and the age of the victim. There was a relationship, family relationship between you and the victim." The court further found that appellant was a sexually oriented offender under R.C. Chapter 2950.

{¶5} In its August 2, 2002 judgment entry, the court stated that it had balanced the seriousness and recidivism factors under R.C. 2929.12 and found, under R.C. 2929.14(B), "that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender or others." Appellant timely appealed from this judgment and raises the following assignment of error:

{¶6} "The trial court erred in sentencing a sixty-seven (67) year old, first time

offender to more than the minimum sentence for committing a third degree felony."

{¶7} Appellant contends that the record fails to support a deviation from the statutorily required minimum sentence for first time offenders. R.C. 2929.14(B) requires that:

{¶8} "[I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

{¶9} As to this section, the Supreme Court of Ohio's recent pronouncement in *State v. Comer* (2003), 99 Ohio St.3d 463, 2003-Ohio-4165 provides:

{¶10} "Pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings at the sentencing hearing." Id. at paragraph two of the syllabus.

{¶11} On consideration whereof, because the trial court did not recite the necessary R.C. 2929.14(B) findings at the sentencing hearing, appellant's sole assignment of error is well-taken. The judgment of the Erie County Court of Common Pleas is reversed, appellant's sentence is vacated, and the matter is remanded to the trial court for resentencing. Costs assessed to the state of Ohio.

JUDGMENT REVERSED.

Mark L. Pietrykowski, J. _____

JUDGE

Judith Ann Lanzinger, J. _____

_____

Arlene Singer, J. _____ JUDGE

CONCUR.

_____

JUDGE

LANZINGER, J., Concurring and writing separately

{¶12} In *State v. Comer*, 99 Ohio St. 463, 2003-Ohio-4165, the Supreme Court of Ohio resolved a conflict in the lower courts over what "on the record" means with respect to felony sentencing. By interpreting these words to mean "oral findings * * * at the sentencing hearing," Id. at ¶26, the Supreme Court has ensured that felony sentencing will be more complicated for the trial courts.

{¶13} As of July 1, 1996, trial courts navigate through a sea of findings which must be made under R.C. 2929.03, 2929.04, 2929.11, 2929.12, 2929.13, and 2929.14, and at least for maximum and consecutive sentences, give the "reasons" for the specific findings. *State v. Edmonson* (1999), 86 Ohio St. 3d 324, 326-327. The new statutes, however, were not designed to hamper a judge's exercise of discretion within the parameters of a range for a particular felony. See, *State v. Arnett* (2000), 88 Ohio St.3d. 208, 215-217 (unanimous opinion upholding judicial discretion in sentencing).

{¶14} Hofmann's sentence was not "contrary to law" by being greater than the permissible range of incarceration for this type of offense. He was simply not given a minimum sentence as a first time felon. The court is not required to give reasons for the findings with respect to giving more than a minimum sentence; it is merely to make those findings. *Edmonson*, supra. at the syllabus. Here, the sentencing judge made the appropriate findings within the sentencing entry itself--where a court formally speaks when the entry is journalized. *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, paragraph three of syllabus. The sole problem was the judge simply did not use the appropriate incantation at the moment of sentencing.

{¶15} I must agree with reversal and remand because the trial court did not *say* the talismanic language from R.C. 2929.14(B): "that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others." Unfortunately, particularly in courts handling a high volume of cases, the pitfall that *Comer* has now created may cause more sentences such as Hofmann's to be returned for a mere recitation "on the record," even though the specific language deemed necessary was found in the court's judgment entry of sentence. The General Assembly surely did not intend for the court's discretion to be bound up in mere formalities such as this.