

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

State of Ohio

Court of Appeals No. H-08-029

Appellee

Trial Court No. CRI-2008-0128

v.

Robert W. Miller

DECISION AND JUDGMENT

Appellant

Decided: June 19, 2009

* * * * *

Russell Leffler, Huron County Prosecuting Attorney, and
Dina Shenker, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his sentence from the Huron County Court of Common Pleas for unlawfully having sexual contact with a person less than 13 years of age, in violation of R.C. 2907.05(A)(4). Appellant contends in his appeal that the trial court

abused its discretion by not adhering to the provisions of R.C. 2929.11 and 2929.12.

Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} A United States Postal Inspector was conducting an investigation of appellant, Robert Miller, for possession and distribution of child pornography. The Norwalk Police Department joined the investigation and a search warrant was executed on January 17, 2008. Upon entering the residence of appellant, officers immediately noticed that the screen saver on appellant's computer was a photo of the victim, who at the time was nine years old. Officers also found numerous toys, candy, and jewelry that would be appropriate for pre-teen girls. The computer, a digital camera, and numerous other items were seized pursuant to the search warrant. Appellant admitted to inappropriate sexual contact with the victim, and was later arrested.

{¶ 3} Appellant was charged on a three count indictment of gross sexual imposition. Appellant pled guilty to one count of gross sexual imposition in exchange for the state dismissing the remaining two counts.

{¶ 4} The court sentenced appellant to four years in the Department of Rehabilitation and Corrections, and imposed a fine of \$500.

{¶ 5} From this judgment of conviction, appellant now brings this appeal, stating the following sole assignment of error:

{¶ 6} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN SENTENCING THE DEFENDANT TO A TERM OF FOUR YEARS ON A FELONY OF THE THIRD DEGREE"

{¶ 7} In order to make Ohio's sentencing scheme compatible with the United States Supreme Court decisions in *Blakely v. Washington* (2004), 542 U.S. 296 and *United States v. Booker* (2005), 543 U.S. 220, the Ohio Supreme Court held 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 minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. "Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 13, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 8} In applying *Foster*, appellate courts must use a two-step approach when examining a trial court's sentence. The first step asks whether the "sentencing [court complied] with all applicable rules and statutes." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 3. If the trial court did not comply with all applicable rules and statutes, "the sentence is clearly and convincingly contrary to law." *Id.* If the trial court did comply, the appellate court moves to the second step where "the * * * decision [is] reviewed under an abuse-of-discretion standard." *Id.*

{¶ 9} Appellant concedes that the trial court complied with all applicable rules and statutes; and therefore the sentence is not contrary to law. Accordingly, this court must move to the second step and review the decision under the abuse of discretion standard.

{¶ 10} "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. see also *Steiner v. Custer* (1940), 137 Ohio St. 448; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 11} Appellant advances two arguments why the trial court abused its discretion in his sole assignment of error, contending first that the sentence was inconsistent with other similarly situated defendants, and next that the trial court did not give appropriate weight factors indicating recidivism was less likely under R.C. 2929.12(D) and (E).

{¶ 12} In crafting his first argument, appellant relies on paragraph (B) of R.C. 2929.11 claiming that the "sentence was inconsistent with and disproportionate to other similarly situated defendants."

{¶ 13} It is no longer necessary for this court to do "case comparisons when the issue of 'consistency' is raised," *State v. Lathan*, 6th Dist. No. L-03-1188, 2004-Ohio-7074, ¶ 28, reversed, in part, on other grounds, 2005-Ohio-321, instead it "is to be statutorily considered as but one of a number of factors." *State v. Donahue*, 6th Dist. No. WD-03-083, 2004-Ohio-7161, ¶ 8.

{¶ 14} Thus, "[w]hen a sentence is objected to and alleged to be inconsistent with other sentences, what is truly being contested is whether the sentence is supported by the record. Therefore, an appellate court's task is to review the sentence to see if by clear and convincing evidence the appellant has shown the sentence was not supported by the record or was contrary to law." *State v. Lathan*, 6th Dist. No. L-03-1188, 2004-Ohio-

7074, ¶ 27 (additional grounds were considered in *State v. Lathan* 6th Dist. No. L-03-1188, 2005-Ohio-321.).

{¶ 15} The trial court expressly considered the oral statements, presentence investigation report, and afforded the appellant and his counsel an opportunity to make a statement. It then applied the specific facts of the case to the factors in R.C. 2929.11 and 2929.12. Accordingly, the sentence was supported by the record.

{¶ 16} Appellant next posits that the trial court abused its discretion by not considering the seriousness and recidivism factors of R.C. 2929.12.

{¶ 17} Again, the trial court expressly noted that it considered the purposes of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. Although the court observed that there were no prior delinquency adjudications or prior convictions, it found that the crime was exacerbated by the age of the victim, that the victim suffered serious psychological harm, and that the relationship with the victim facilitated the offense. It was also noted that appellant appears to be a pedophile, the incident had a serious impact on the victim, and appellant spent a substantial amount of time grooming the victim before taking advantage of her. Thus, after a thorough review of the record, we find that there is nothing to suggest that the trial court's decision was "unreasonable, arbitrary or unconscionable." *Adams*, 62 Ohio St.2d at 157.

{¶ 18} Appellant's sole assignment of error is found not well taken; the judgment is supported by the record and is not contrary to law.

{¶ 19} On consideration, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.