[Cite as *State v. Lacumsky*, 2009-Ohio-3214.]

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

State of Ohio — Court of Appeals No. OT-08-060

Appellee — Trial Court No. 08-CR-107

v.

Michael Lacumsky — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2009

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellee.

Sarah A. Nation, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for gross sexual imposition and providing alcohol to a minor in the Ottawa County Court of Common Pleas. Since we find the trial court properly accepted appellant's plea, we affirm.

{¶ 2} In the early morning hours of June 1, 2008, a 15 year old boy arrived at a Port Clinton emergency room: highly intoxicated and unresponsive. The boy's parents informed police that an adult provided their son with alcohol. Witnesses identified appellant, Michael A. Lacumsky, then 21 years of age, as the individual who provided alcohol to the boy. Appellant was also observed attempting to reach into the boy's pants. The 15 year old recalls pushing appellant away when appellant touched him several times in an unsolicited and unwanted sexual manner.

{¶ 3} On July 31, 2008, appellant was indicted on 13 separate counts: one count of gross sexual imposition under R.C. 2907.05; two counts of importuning under R.C. 2907.07; five counts of contributing to the delinquency of a child under R.C. 2907.07; and five counts of furnishing alcohol to an underage person under R.C. 4301.69. Appellant initially pled not guilty but, following negotiations, agreed to enter an *Alford* plea to gross sexual imposition, a fourth degree felony, and furnishing alcohol to one who is underage, a first degree misdemeanor. The remaining counts of the indictment were dismissed. Following a hearing, the court accepted appellant's plea, found him guilty, and sentenced him to 18 months in prison. Appellant was also classified as a Tier I Sexual Offender.

{¶ 4} Appellant now appeals setting forth the following assignments of error:

{¶ 5} "I. The trial court committed prejudicial error in failing to determine whether appellant has made a rational calculation to plead guilty pursuant to *North Carolina v. Alford* and failed to make an inquiry into his reasons for the plea.

{¶ 6} "II. The trial court committed prejudicial error and improperly engaged in judicial fact-finding during sentencing when it considered the R.C. 2929.12 factors."

I.

{¶ 7} In his first assignment of error, appellant claims that the trial court committed reversible error by failing to determine whether appellant rationally calculated that an *Alford* plea was in his best interests. "An *Alford* plea is one in which a defendant pleads guilty to an offense, with a qualification of innocence." *State v. Ware*, 6th Dist. No. L-08-1050, 2008-Ohio-6944, ¶ 11. Under *North Carolina v. Alford* (1970), 400 U.S. 25, 31, the standard for determining the plea's validity is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant." The Supreme Court of Ohio has interpreted this as "where the record affirmatively discloses that: (1) a guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the plea; (4) the plea was made with the understanding of the nature of the charges; and, (5) the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made." *State v. Piacello* (1971), 27 Ohio St.2d 92, 96.

{¶ 8} Upon review of the record, we determine that the trial court conducted a proper Crim.R.11 plea colloquy with appellant. There is no indication that appellant's *Alford* plea was involuntary. Appellant stated that he understood the effect of the *Alford*

plea and the nature of the charges against him. Appellant's counsel was present at the plea hearing, and no evidence is presented that the advice appellant received from his counsel was incompetent. Nor does appellant assert that he was deceived, intimidated, or coerced into taking the plea. The record also indicates that defendant was motivated to accept the plea by the evidence against him and the greater amount of charges he was facing.

{¶ 9} Appellant relies *State v. Byrd*, 4th Dist. No. 07-CA-29, 2008-Ohio-3909, in his assertion that the trial court failed to determine that he had made a rational calculation to plead guilty and that the *Alford* plea was in his best interests. The court in *Byrd* stated that "a trial court must determine that the defendant has made a rational calculation to plead guilty notwithstanding the assertion of factual innocence and that this requires an inquiry into the reasons for the plea." *Id.* at ¶ 20. However, this court has rejected the proposition that "the trial court must make an inquiry of defendant that he has made a rational calculation to plead guilty." *State v. Kafai*, 6th Dist. No. WM-99-001, 1999-Ohio-986 (holding the state's production of the evidence at the plea hearing that it would have produced at trial sufficient for the trial court to determine plea was in appellant's best interests), *State v. McDay* (May 9, 1997), 6th Dist. No. L-96-027 (holding the state's production of the evidence at the plea hearing that it would have produced at trial sufficient to provide the trial court with a factual basis whereupon it could determine whether appellant's plea was voluntary and intelligent). Further, the court in *Byrd* found the requirement to be met if the trial court was provided with "sufficient information ***

to determine Appellant was making a rational calculation to plead guilty though maintaining factual innocence." *Byrd* at ¶ 21.

{¶ 10} Here, the state summarized the facts it would have presented at trial, which included the following: that defendant had sexual contact with the 15 year old victim; that defendant provided the victim with enough alcohol that medical care was needed; that the victim could not have resisted defendant's sexual advances due to his intoxication; and that defendant tried to touch the victim in the groin area several times and the contact was of a sexual nature and unwanted by the victim. This court has found that such statements by the state, of claims to produce evidence, satisfies this requirement. *Kafai*, supra.

{¶ 11} Accordingly, we find the trial court did not abuse its discretion in accepting the *Alford* plea. Therefore, appellant's first assignment of error is not well-taken.

II.

{¶ 12} In his second assignment of error, appellant asserts that the trial court committed reversible error by engaging in judicial factfinding during sentencing when it considered the R.C. 2929.12 seriousness and recidivism factors. Appellant relies on the decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 97, for his contention that judicial factfinding regarding the seriousness and recidivism factors is forbidden, but *Foster* only declared judicial factfinding unconstitutional with regard to certain statutory sections that "either create presumptive minimum or concurrent terms or require judicial factfinding to overcome the presumption." As this court has interpreted *Foster*, "sentencing courts are to continue to consider 'the statutory considerations' and 'factors' in

the 'general guidance statutes' – R.C. 2929.11 and 2929.12 in imposing sentences, as these statutes do not include a 'mandate for judicial fact finding'" *State v. Like*, 6th Dist. No. WM-08-002, 2008-Ohio-4615, ¶ 9 (citing *Foster* at ¶ 36-42).

{¶ 13} This court has held that it is not an abuse of discretion for a trial court to consider the statutory considerations and factors in R.C. 2929.12 in imposing a sentence. *Like* at ¶ 12. R.C. 2929.12 (B)(1) lists as a factor to consider in the seriousness of the offender's conduct "[t]he physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim." Here, the trial court considered the age of the victim, 15 years of age, as a seriousness indicator under this statute. The sentence imposed was proper under R.C. 2929.14. "A trial court's discretion to impose a sentence within the statutory guidelines is very broad and an appellate court cannot hold that a trial court abused its discretion by imposing a severe sentence on a defendant where that sentence is within limits authorized by the applicable statute." *Like* at ¶ 13 (quoting *State v. Harmon*, 6th Dist. No. L-05-1078, 2006-Ohio-4642, ¶ 16; citing *Harris v. U.S.* (2002), 536 U.S. 545, 565). Accordingly, we find appellant's second assignment of error is not well-taken.

{¶ 14} On consideration, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE