[Cite as *State v. McCann*, 2011-Ohio-2077.]

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

State of Ohio — Court of Appeals No. L-10-1173

Appellee — Trial Court No. CR0201001314

v.

Robert Duwayne McCann — **DECISION AND JUDGMENT**

Appellant — Decided: April 29, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Robert E. Searfoss, III, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a sentencing judgment of the Lucas County Court of Common Pleas, which sentenced appellant to a five-year term of incarceration for attempted failure to notify, in violation of R.C. 2923.02, 2950.05(F)(1), and 2950.99(A)(1), from which he now appeals. For the reasons set forth below, this court affirms the sentencing judgment imposed by the trial court.

{¶ 2} Appellant, Robert McCann, has set forth the following assignment of error:

{¶ 3} "FIRST ASSIGNMENT OF ERROR: The trial court abused its discretion sentencing Appellant to the Maximum of five years in prison."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. In 1979, appellant was convicted of aggravated assault by the state of Pennsylvania in connection to the stabbing of a woman. Appellant served a ten-year sentence following his conviction.

{¶ 5} In 1993, appellant was indicted by Lucas County for attempted rape. Appellant was convicted and sentenced to a term of incarceration of 8 to 15 years. In 2006, appellant was released from prison.

{¶ 6} As a tier III sex offender, appellant was required to list with the Lucas County Sheriff's Office his place of residence, and notify them within three days if his residence changed. Appellant maintained these conditions up until February 11, 2010.

{¶ 7} Prior to February 11, appellant resided at 128 18th Street, Toledo, Ohio. This building is operated by the Cherry Street Mission. During the time he resided there, appellant made a disclosure to a staffer that triggered serious safety concerns pertaining to a female staff member. In response to the safety concerns, the staff member to whom the disclosure was made referred appellant to another agency for additional evaluation. Appellant consistently repeated his initial disclosure to the second agency.

{¶ 8} As a residential facility, due to these serious safety concerns regarding the staff member to whom appellant's repeat disclosures pertained, appellant was moved to

another residence operated by the mission, also located in Toledo. Appellant failed to report his change of residence to the sheriff's office as he was required to do.

{¶ 9} On February 19, 2010, appellant was indicted for failure to notify pursuant to R.C. 2950.05(F)(1) and R.C. 2950.99, a felony of the second degree. Appellant pled not guilty. On March 30, 2010, pursuant to a negotiated plea agreement, the charge was amended to attempted failure to notify, a third degree felony. In exchange for this reduction, appellant pled no contest to the lesser offense and was found guilty by the trial court.

{¶ 10} On appellant's motion, the court ordered a pre-sentence evaluation. The evaluation results raised the same serious safety concerns for the same staff member who initially triggered the series of events that led to this case.

{¶ 11} On April 14, 2010, a sentence hearing was conducted. The trial judge properly discussed and considered the purposes of felony sentencing pursuant to R.C. 2929.11, and likewise weighed the factors to be considered pursuant to R.C. 2929.12. After considering appellant's past felony criminal record involving criminal acts of violence against women and the detailed psychological evaluations that determined appellant had conditions indicative of a high risk of recidivism and escalation, and the repeated statements that appellant made to multiple parties in multiple contexts that raised consistent, serious staff safety concerns, the trial judge determined that the public would be best protected by sentencing appellant to a five-year term of incarceration. Appellant now appeals that sentence.

{¶ 12} Appellant claims that his sentence for the maximum allowable term was an abuse of discretion. When abuse of discretion is alleged, the moving party must do more than show an error of law or judgment. The party must show that "the trial court's decision was unreasonable, arbitrary or unconscionable." *Sarefin v. Sky Bank*, 6th Dist. No. L-05-1091, 2006-Ohio-466, ¶ 36 (citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217).

{¶ 13} Appellant's argument centers around two issues. Appellant argues that statements originally made to his counselor should not have been considered by the trial court in crafting a sentence. Appellant also argues that the trial court improperly weighed the factors under R.C. 2929.12.

{¶ 14} Both appellant and the state argue that *State v. Cooey* (1989), 46 Ohio St.3d 20, supports their position that statements appellant made that are included in his presentence investigation report about his sexual desires should or should not have been considered.

{¶ 15} In *Cooey*, the Ohio Supreme Court questioned whether statements pertaining to his actions should have been included in a psychological evaluation, but they did not find their inclusion to be plain error. Id. at 32. There, the court noted that the statements in question had been made to several other people and that defendant was given a chance to mitigate these statements. Id. at 32-33.

{¶ 16} We note that appellant likewise widely disseminated the statements made to his counselor, including the detective who investigated his case. Appellant wishes for

this court to affirmatively rule that statements made to a counselor and later admitted to cannot be made part of an individual's "social history." We decline the invitation. However, even if we were to assume, *arguendo*, that these statements should not have been considered, the record nevertheless does not demonstrate an abuse of discretion in sentencing appellant.

{¶ 17} When a trial court sentences a repeat felony offender, one of the overriding purposes it must consider is the need to protect the public from future crimes. R.C. 2929.11. In the present case, the record clearly shows that this public safety factor properly weighed significantly in trial court sentencing considerations. The record shows appellant has twice been convicted of violent crimes against women. Moreover, he has received diagnoses consistent with a high risk of recidivism and an accompanying risk of escalation. The record contains serious, significant evidence demonstrative of a compelling need to protect the public.

{¶ 18} Appellant claims that the court unreasonably weighed these factors to be greater than the factors suggesting mitigation. He argues that the fact that appellant has not violated any laws in the last four years outweighs other factors suggesting recidivism. This court takes note that this four-year period of time is the same amount of time between his release from prison for his assault conviction and his attempted rape that led to his second conviction.

{¶ 19} A third degree felony is punishable by a prison term of one, two, three, four, or five years. R.C. 2929.14(A)(3). Courts are vested with full discretion to impose

a sentence within that range. *State v. Foster* (2006), 109 Ohio St. 39 1, 2006-Ohio-856, paragraph seven of the syllabus. Given the nature of appellant's past convictions and evidence suggesting a substantial risk of recidivism and escalation, there is nothing unreasonable, arbitrary, or unconscionable in the disputed determination that the public was best protected by imposing the maximum sentence.

{¶ 20} For the reasons stated herein, we find the record clearly shows that the trial court did not abuse its discretion in sentencing appellant. Appellant's assignment of error is found not well-taken.

{¶ 21} In consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay 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, P.J. _____
CONCUR.
JUDGE