

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

State of Ohio

Court of Appeals No. WD-10-035

Appellee

Trial Court No. 2009CR0171

v.

Justin Bekier

DECISION AND JUDGMENT

Appellant

Decided: June 17, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Heather M. Baker and David E. Romaker, Jr., Assistant
Prosecuting Attorneys, for appellee.

C. Drew Griffith, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Justin Bekier, appellant, was initially indicted by the Wood County Grand Jury on one count of rape, a violation of R.C. 2907.02(A)(1)(b) and a felony of the first degree, and one count of dissemination of material harmful to juveniles, a violation of R.C. 2907.31(A)(3) and a misdemeanor of the first degree. The rape count included a

specification that the victim was under ten years of age at the time of the offense.

Appellant entered a plea of not guilty. After plea negotiations, appellant entered a plea of guilty pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, to an amended charge of sexual battery, a violation of R.C. 2907.03(A)(5) and a felony in the third degree. Under the plea agreement the dissemination charge was dismissed.

{¶ 2} In a final judgment journalized on May 18, 2010, the trial court sentenced appellant to serve four years in the Ohio Department of Rehabilitation and Correction. The trial court also classified appellant as a Tier III sex offender.

{¶ 3} Appellant appeals the judgment to this court and raises one assignment of error on appeal:

{¶ 4} "First Assignment of Error: The trial court's imposition of a four year sentence was contrary to law and constituted an abuse of discretion."

{¶ 5} Count 1 of the original indictment for rape was filed on April 1, 2009. The count charged appellant with engaging in sexual conduct with a four-year-old child during the period from September 1, 2008, through March 19, 2009. Under the plea agreement, the rape count was amended to charge sexual battery.

{¶ 6} Appellant pled guilty to the sexual battery charge (under *North Carolina v. Alford*) on March 19, 2010. The trial court accepted the change of plea and granted appellant release from custody pending sentencing, with restrictions.

{¶ 7} Prior to sentencing, a presentence investigation report was completed. The report set forth how the child victim ("A.W.") described to her father in vivid detail the

sexual acts done by appellant to her. Later, Meghan Faeth of Children's Services spoke to the child alone and concluded that the information provided by the child to her was very graphic in nature and not of the type one would expect a young child to have knowledge.

{¶ 8} During pretrial proceedings, the trial court conducted a child witness competency hearing to determine whether A.W. was competent to testify at trial. The trial court found that the child was capable of receiving just impressions and relating them truthfully and ruled that she was competent to testify at trial.

{¶ 9} Under the sole assignment of error, appellant asserts the trial court's imposition of a four-year sentence was contrary to law and constituted an abuse of discretion. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court stated 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." *Id.* at ¶ 100. The statutory range of sentence for a third degree felony is one to five years. R.C. 2929.14(A)(3).

{¶ 10} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the court applied *Foster* to the existing versions of R.C. 2929.11 and 2929.12 and commented that appellate courts, in establishing a two-pronged inquiry, "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first

prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.* at ¶ 26.

{¶ 11} Under the first prong of *Kalish*, appellant argues that his sentence is contrary to law because the trial court did not refer to statutory sentencing guidelines under R.C. 2929.11 and 2929.12 when imposing sentence. During appellant's sentencing, the trial court did not specifically refer to R.C. 2929.11 or 2929.12. However, a sentencing court is not required to use any specific language to demonstrate that it considered the statutory guidelines. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215; *State v. Warren*, 6th Dist. No. L-07-1057, 2008-Ohio-970, ¶ 9; *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 27.

{¶ 12} A review of the record demonstrates that the trial court considered the purposes and principles of felony sentencing under R.C. 2929.11 and sentencing factors under 2929.12 when imposing sentence. The trial court stated at sentencing:

{¶ 13} "* * * [T]he Court has to look at factors in this case, look at the purposes and principles of sentencing, and we look at seriousness factors. And in this case there are three seriousness factors that apply.

{¶ 14} "One is mental injury suffered by the victim which was exacerbated by the age of the victim being four years of age. The victim suffered serious psychological harm. And your relationship with the victim facilitated the commission of the offense.

{¶ 15} "There are no factors present deeming your actions to be less serious.

{¶ 16} "And the statute indicates that the showing of no genuine remorse is a factor that the Court considers in determining the likelihood of recidivism."

{¶ 17} The trial court specifically stated that it had "look[ed] at the purposes and principles of sentencing" before imposing the sentence. See R.C. 2929.11. The court also made reference to the "serious psychological harm" that the child victim experienced due to her relationship with appellant, a sentencing factor under R.C. 2929.12(B)(2). The trial court's consideration of whether "the offender's conduct is less serious than conduct normally constituting the offense" is a factor considered under R.C. 2929.12(C). Whether "[t]he offender shows no genuine remorse for the offense" is a recidivism factor under R.C. 2929.12(D)(5).

{¶ 18} We conclude appellant's argument that his sentence is contrary to law due to a failure to consider statutory sentencing guidelines under R.C. 2929.11 and 2929.12 in determining sentence is without merit.

{¶ 19} Appellant next claims that the trial court abused its discretion by relying on misinformation provided by the state and facts not in evidence to deny him a sentence to community control. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 20} At sentencing the state claimed appellant violated conditions of his release by visiting his mother's house. Appellant's mother operated a childcare business out of her home. The state argued at sentencing that appellant had contact with minor children

when visiting his mother and thereby violated child contact restrictions included in the trial court's order as conditions for release from custody pending sentencing. The state contended the order restricted contact with minor children except siblings and that appellant's failure to honor the restriction demonstrated that appellant was not amenable to a sentence of community control.

{¶ 21} At the sentencing hearing, appellant denied any breach of restrictions against child contact. Appellant contended that the order restricted unsupervised contact with children under 18 and that his mother supervised his visits with her. Appellant further argues that there is no basis in the record to conclude that he violated child contact restrictions on his release and that the trial court abused its discretion by relying on the state's claims to deny him a sentence to community control.

{¶ 22} The state argues that the record of the sentencing hearing demonstrates that the trial court did rely on claims of violation of restrictions against child contact to deny community control. In announcing sentence, the trial court stated:

{¶ 23} "We have to consider whether you are amenable to community control sanctions.

{¶ 24} "If the Court felt that community control sanctions were appropriate in this case, a core of that sentence would be that you would have to engage in and complete sexual offender treatment. However, because you are unable to acknowledge what has now been established in the Court's mind in this case, sexual offender treatment would not be effective.

{¶ 25} "Secondly, another core building block of community control sanctions would be that you have a family and home environment that would continue to support you in rehabilitation. And I don't see * * * there was direct contact with other children or not, but allowing you to return to the home during the day when children are present is the appropriate environment for someone that needs to have his family engaged in supervision and treatment. Therefore, it does not appear that you are amenable to any combination of community control sanctions."

{¶ 26} In our view, the record demonstrates that the trial court left the issue of whether appellant violated court ordered restrictions against child contact unresolved. The parties did not seek to introduce evidence on the issue at the sentencing hearing. Appellant denied the claim. When addressing the issue of community control, the trial court stated that it did not see "that there was direct contact with other children or not."

{¶ 27} Additionally, the record demonstrates that the trial court did not rely on the state's claim that appellant violated the conditions of his release to deny a sentence of community control. The trial court concluded that appellant was not likely to benefit from sex offender treatment and that his family environment was not appropriate for community control due to likely daily contact with children.

{¶ 28} Accordingly, we conclude that appellant's claim that the trial court abused its discretion by relying on state claims of violation of court ordered restrictions against child contact to deny a sentence of community control is without merit.

{¶ 29} Appellant next argues that statements by the trial court at sentencing demonstrated that it relied on facts not in evidence in determining sentence.

{¶ 30} The trial judge stated at appellant's sentencing:

{¶ 31} "There is no question that sometimes this child, as well as other children, make up things; no question about that at all. And I'm judging that from * * * my unique perspective in this case of having a competency hearing which I got to directly talk with this witness and victim and assess her competency and credibility from all of these perspectives. There is no question in my mind that children make things up; but, there is a huge difference between making up using the example in this case that someone is making out with them or someone is raping them, and the very detailed specifics that were provided by this witness in this case. Details which included - - I'm not going to get into all of the graphic details because no one should have to listen to this type of thing - - that she had seen pornographic images that you showed to her, which is fairly typical in grooming children to engage in this type of behavior."

{¶ 32} The state and appellant agree that the trial court spoke to the child victim during the competency hearing and that the child did not reveal any specific details of sexual conduct at the hearing. Appellant argues that the trial court concluded that statements of sexual conduct were made by the child at the competency hearing, when none in fact were made.

{¶ 33} The state argues that it is reasonable to believe that the court had read and retained the victim's statements contained in the presentence investigation report. The

presentence report does include a vivid, detailed description of sexual acts done by appellant to the victim as described by the child to her father.

{¶ 34} Considering the record as a whole, placing the trial court's statement in context, it is only reasonable to conclude that when the trial judge made reference to the sexual acts, he was in fact relying on the presentence investigation report. As set forth in *State v. Koons*, (1984), 14 Ohio App.3d 289, in reference to the presentence investigation report, "it must be necessarily concluded that its content is before the trial court and utilized by it in imposing sentence." *Id.* at 291.

{¶ 35} As there is competent, credible evidence in the record supporting the statements by the trial court challenged by appellant, although from a source other than the competency hearing, we conclude that the trial court did not act in an unreasonable, arbitrary, nor unconscionable manner in imposing sentence.

{¶ 36} We find appellant's first assignment of error not well-taken.

{¶ 37} We conclude that substantial justice was done the party complaining and affirm the judgment of the Wood County Court of Common Pleas. Appellant is ordered to pay the court costs, 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, P.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.
