

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

State of Ohio

Court of Appeals No. L-11-1154

Appellee

Trial Court No. CR0201101528

v.

Nicholas Thornton

DECISION AND JUDGMENT

Appellant

Decided: October 5, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer L. Donovan, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Nicholas Thornton, appeals from a judgment of the Lucas County Court of Common Pleas that sentenced him to five years in prison following his guilty plea to one count of endangering children, a third-degree felony. He asserts a single assignment of error:

The Trial Court abused its discretion in sentencing Appellant to a maximum prison term.

{¶ 2} Finding that the sentence was neither contrary to law nor an abuse of the trial court's discretion, we affirm the judgment of the Lucas County Court of Common Pleas.

{¶ 3} The record reflects that on April 5, 2011, the Lucas County Grand Jury indicted Thornton on two counts of endangering children in violation of R.C. 2919.22(B)(2) and (E)(1) and (3), felonies of the second and third degree, respectively. Both counts alleged the torture or abuse of a child, but the first count contained the additional charge that the violation resulted in serious physical harm to the child involved, which raises the offense from a third-degree felony to a second-degree felony under R.C. 2919.22(E)(3). Thornton initially pleaded not guilty to both charges. Pursuant to a plea agreement, Thornton later entered a guilty plea to the second count in exchange for the state's dismissal of the first count.

{¶ 4} According to the facts presented at the plea hearing, Thornton, on March 10, 2011, used a cigarette lighter to repeatedly burn his then three-year old stepdaughter as punishment for having wet her pants. Specifically, appellant dressed the child in a diaper, forced her to assume a push-up position, and administered multiple burns over an extended period of time to her torso and limbs when she was unable to hold the position. A presentence investigation revealed that in addition to the burns, appellant had also hit his stepdaughter in the head with a screwdriver, pulled out clumps of her hair, and used a

key to cut across her wrist. The child was also observed to possess numerous bruises on her legs that were different colors.

{¶ 5} At sentencing, defense counsel asked the court to consider community control, arguing that Thornton had no prior criminal record and that his present offense was the result of mental health conditions that could be successfully treated outside of prison. After reviewing the record, including the presentence investigation report, a general clinical evaluation report prepared by the Court Diagnostic and Treatment Center (“CDTC”), photographs of the victim’s injuries, and statements from Thornton and the victim’s step-grandmother, the trial court elected to impose a five-year prison sentence.

{¶ 6} In his sole assignment of error, Thornton contends that the trial court abused its discretion by failing to “properly balance the factors in ORC §2929.11 and §2929.12.” He essentially argues that a five-year prison term is unjustified because (1) he has “clear mental health problems” and “there is no indication that, with help for his mental health issues, [he] would commit more crimes like this,” (2) he has no prior criminal record, and (3) the CDTC report “implies out that a sentence of community control would have likely helped [his] mental health issues, and even went so far as to state that a sentence of Community Control seemed appropriate.” In addition, Thornton argues that in considering his history of aggressive behavior, the trial court “found [past] crimes where none had ever been charged.” Finally, Thornton maintains, “It is clear from the Trial Court’s oral statements that the Trial Court had decided to sentence [him] to the maximum sentence of five years before the sentencing hearing.”

{¶ 7} In reviewing felony sentences, this court follows the two-step approach set forth by a plurality of the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26:

First, [appellate courts] 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.

See State v. Ruby, 6th Dist. No. S-10-028, 2011-Ohio-4864, ¶ 22.¹

{¶ 8} Addressing the first prong of the *Kalish* test, we find that the trial court complied with all applicable rules and statutes in sentencing Thornton. The court expressly stated in its judgment entry that it considered the principles and purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. The transcript of the sentencing hearing indicates that the trial court did, in fact, consider those guidelines in rendering its decision. Although Thornton contends

¹ We note at this point that the General Assembly recently amended R.C. 2929.11(A) as part of 2011 Am.Sub.H.B. No. 86, effective September 30, 2011. The amendment adds the following italicized language: "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.*" Thornton's sentence, however, was imposed on May 26, 2011, prior to the effective date of Am.Sub.H.B. No. 86. Thus, amended R.C. 2929.11(A) is not applicable to his sentence. *See State v. Oldiges*, 12th Dist. No. CA2011-10-073, 2012-Ohio-3535, ¶ 18, fn. 1.

that the trial court did not give proper weight to the statutory sentencing factors, he does not dispute that the trial court considered them. In addition, the trial court properly applied and advised Thornton as to postrelease control, and a five-year prison sentence is within the permissible statutory range. Thus, the sentence in this case is not clearly and convincingly contrary to law.

{¶ 9} We must next determine whether the imposition of a five-year prison term constitutes an abuse of the trial court's discretion. In so doing, we recognize that R.C. 2929.11 and 2929.12 "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence" and that they "delineate, to a certain extent, the trial court's exercise of discretion." *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 17, fn. 3. *See also State v. Conner*, 192 Ohio App.3d 166, 2011-Ohio-146, 948 N.E.2d 497, ¶ 62 (6th Dist.). The abuse-of-discretion standard, however, precludes this court from substituting its judgment for that of the trial court. *See State v. Fletcher*, 8th Dist. No. 94807, 2011-Ohio-474, ¶ 10. "An abuse of discretion is 'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Kalish* at ¶ 19, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 10} In reviewing the record, we find nothing unreasonable, arbitrary, or unconscionable in the trial court's application or weighing of the relevant considerations in R.C. 2929.11 and 2929.12. Before imposing sentence, the trial court considered the presentence investigation and CDTC reports, the victim impact statement made by the

child's step-grandmother, the photographs of the victim's injuries, and the statements of Thornton and his counsel. The court explicitly determined that Thornton is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11. In selecting an appropriate sentence, the court recognized that Thornton suffered from mental health problems and had no prior criminal record. The court balanced these factors, however, against other considerations, including that the victim was a small child, that the abuse was severe, repeated, and prolonged, that the different colored bruises on the victim's legs were indicative of different times of impact, that Thornton acted from a position of trust and authority over his stepdaughter, and that the child has suffered serious and continuing physical and emotional harm.

{¶ 11} The trial court also disagreed with Thornton that his mental health conditions and lack of a prior criminal record militated against incarceration or merited leniency under the facts of this case. Specifically, the court felt that certain information contained in the CDTC report served to diminish or negate the otherwise positive significance of those factors. Thus, in considering that Thornton suffered from anger-related psychiatric conditions, the trial court noted that he had previously balked at the opportunity to obtain treatment for those conditions. According to statements made by Thornton during his presentence clinical interview, he was diagnosed with the same psychiatric conditions in 2008, and referred to a psychiatrist at the Unison Behavioral Health Group. However, he never saw an individual therapist or received medication for

his problems. Instead, he discontinued mental health services because, in his words, “I got mad at that guy at Unison.”

{¶ 12} In addressing the fact that Thornton had no prior criminal record, the trial court remarked:

What has happened is, no, you don’t have a criminal history, you kind of slithered around the eye of the justice system with your attitude and school [suspensions for fighting] and your assaultive behavior, and what was going on in that house for all that time, and then the box was lifted, and there you were, and we [saw] the violence that you’re capable of, not once, not twice, this was repeated conduct on that day, and that little girl has endured other conduct which is criminal in nature before that day.

{¶ 13} The information contained in the CDTC report confirms that Thornton had engaged in violent and aggressive behavior beyond his offense of conviction. The report discloses that “Thornton was repeatedly suspended in both elementary and middle school for fighting” and that he “has an extensive history of antisocial behavior marked by impulsivity * * * and temper/anger control issues.” Indeed, the examining psychologist found it surprising that “Mr. Thornton has never come to the attention of a criminal court in the past for his aggressive behavior.” Notwithstanding Thornton’s assertions to the contrary, the trial court “was permitted to take this uncharged conduct into consideration when evaluating his character and social history to determine an appropriate sentence.”

State v. Bodkins, 2d Dist. No. 10-CA-38, 2011-Ohio-1274, ¶ 45.

{¶ 14} As to Thornton’s suggestion that the trial court should have attached more weight to the purported recommendation for community control contained in the CDTC report, we disagree. In the first place, it is not clear from the report that the examining psychologist was actually making such a recommendation. The report states: “Should the Court consider probation rather than jail time (which appears warranted in this case), Mr. Thornton should be mandated to see a psychiatrist * * *.” From a syntactical standpoint, it is impossible for this court to judge whether it is “jail time” or “probation rather than jail time” that the writer believes is “warranted in this case.” Moreover, assuming that the CDTC report contains a recommendation for community control, the sentencing record also includes a presentence investigation report, which contains a recommendation for incarceration so as not to demean the seriousness of the offense. In any event, the trial court was not required to follow any of the recommendations contained in the presentence reports, and the decision to impose a harsher sentence than recommended was entirely within the court’s discretion. *See State v. Rittenhour*, 112 Ohio App.3d 219, 224, 678 N.E.2d 293 (3d Dist.1996).

{¶ 15} Finally, we cannot find any “oral statements” or other evidence in the record to support Thornton’s assertion that the trial court determined his sentence prior to the sentencing hearing. More to the point, our review of the record reveals that the trial court gave careful and substantial deliberation to both the relevant statutory considerations and the evidence presented at the sentencing hearing in reaching its

decision. We cannot say, therefore, that the trial court abused its discretion in sentencing Thornton to a five-year prison term.

{¶ 16} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 17} The judgment of the Lucas County Court of Common Pleas is affirmed.

Costs are assessed against appellant pursuant to App.R. 24(A).

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>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.</p>
