

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

State of Ohio

Court of Appeals No. L-11-1312

Appellee

Trial Court No. CR0201102537

v.

Tony Elwood Connin

DECISION AND JUDGMENT

Appellant

Decided: October 26, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Tony Elwood Connin appeals his convictions and sentences in the Lucas County Court of Common Pleas on two counts of rape, both violations of R.C. 2907.02(A)(2) and (B) and first degree felonies, and one count of unlawful sexual conduct with a minor, a violation of R.C. 2907.04(A) and (B)(3) and a third degree felony. Appellant pled guilty to the charges on September 27, 2011.

{¶ 2} The guilty pleas were pursuant to a plea agreement. Appellant waived his right to a grand jury and agreed to proceed by information on the criminal charges. The trial court entered a nolle prosequi on criminal charges brought under an earlier indictment.

{¶ 3} The trial court sentenced appellant on December 15, 2011. The court ordered appellant to serve ten years in prison on each rape count and to serve five years in prison on the unlawful sexual conduct with a minor count. The court ordered that the sentences on the two rape counts be served consecutively to each other and the sentence on the unlawful sexual conduct with a minor count be served consecutively to those sentences, for a total aggregate prison sentence of 20 years.

{¶ 4} Appellant asserts four assignments of error on appeal:

1. Defendant's First Assignment of Error: The trial court erred in imposing maximum sentences and consecutive sentences and the sentences are contrary to law.
2. Defendant's Second Assignment of Error: The trial court abused its discretion in imposing the sentences.
3. Defendant's Third Assignment of Error: The state failed to prove all essential elements of the offenses.
4. Defendant's Fourth Assignment of Error: The information charging the appellant is defective and fails to state the adequate mens rea.

{¶ 5} We consider the challenges to appellant’s convictions under the third and fourth assignments of error first.

Sufficiency of Evidence Supporting Convictions

{¶ 6} In Assignment of Error No. 3, appellant argues that there is insufficient evidence in the record to support appellant’s convictions and that this court should reverse the trial court judgment of conviction and enter a judgment of acquittal on each count. The state argues that appellant is barred by his guilty pleas from challenging his convictions based upon sufficiency of the evidence. We agree.

{¶ 7} The Ohio Supreme Court has recognized that a valid guilty plea operates as a conviction and requires no factual findings or verdict to support it:

Unlike a plea of no contest, which requires a trial court to make a finding of guilt, *State v. Bird* (1998), 81 Ohio St.3d 582, 584, 692 N.E.2d 1013, a plea of guilty requires no finding or verdict. *Kercheval v. United States* (1927), 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009 (“A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence”). See also *State v. Bowen* (1977), 52 Ohio St.2d 27, 28, 6 O.O.3d 112, 368 N.E.2d 843. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 15, *holding modified on other grounds*,

State v. Lester, 119 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of syllabus.

{¶ 8} A valid guilty plea waives a defendant's right to challenge his conviction on the grounds of insufficiency of the evidence. *State v. Hill*, 8th Dist. No. 90513, 2008-Ohio-4857, ¶ 6; *State v. Siders*, 78 Ohio App.3d 699, 701, 605 N.E.2d 1283 (11th Dist.1992).

{¶ 9} We find appellant's Assignment of Error No. 3 not well-taken.

{¶ 10} Appellant waived his right to an indictment and agreed to proceed on criminal charges brought by information. In Assignment of Error No. 4, appellant argues that the information was defective because it fails to set forth the requisite state of mind, mens rea, to commit the charged offenses. Appellant relies on the Ohio Supreme Court decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*") in making this argument.

{¶ 11} In response, the state argues that the Ohio Supreme Court's decision in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, now controls on this issue. Under *Horner*, "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." *Id.* at paragraph one of the syllabus. The state contends that the wording of the information tracks the criminal statutes on both the charges of rape under R.C. 2907.02(A)(2) and (B) and charge of unlawful sexual conduct with a minor under R.C. 2907.04(A) and (B)(3).

{¶ 12} The wording of the rape charges in the information alleges that on specified time periods appellant did “knowingly engage in sexual conduct with another when the offender purposely compelled the other person to submit by force or threat of force” in violation of R.C. 2907.02(A)(2) and (B) and is punishable as a first degree felony under R.C. 2907.02(B). In our view, this language meets or exceeds the mens rea requirements under *Horner*. The information adds the word “knowingly” and otherwise tracks the wording of the statute.

{¶ 13} Similarly, the wording of the unlawful sexual conduct with a minor charge, inserts the word “knowingly” to allege that appellant did “knowingly engage in sexual conduct” but otherwise tracks the wording of R.C. 2907.04(A) and (B)(3).

{¶ 14} We conclude that the wording of the information meets or exceeds the mens rea requirements under *Horner*. Accordingly, we find appellant’s Assignment of Error No. 4 not well-taken.

Sentencing

{¶ 15} Under Assignments of Error Nos. 1 and 2, appellant argues that the trial court erred with respect to sentence. The Ohio Supreme Court decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, sets forth a two-step analysis to be employed in reviewing felony sentences on appeal. First, appellate courts are required to “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.” *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing sentence under an abuse of discretion standard. *Id.*

Claim that Sentences were Clearly and Convincingly Contrary to Law

{¶ 16} Under Assignment of Error No. 1, appellant argues trial court error under the first prong of the *Kalish* analysis. Appellant contends that the trial court judgment is clearly and contrary to law in its imposition of maximum and consecutive sentences.

Imposition of Maximum Sentences

{¶ 17} The version of R.C. 2929.14(A)(1) in effect at the time of the rape offenses charged under Counts 1 and 2 of the information set a statutory range of sentences for first degree felonies of imprisonment from a minimum of three to a maximum ten years. The version of R.C. 2929.14(A)(3) in effect at the time of the unlawful sexual conduct with a minor offense charged in Count 3 set a statutory range of sentence for third degree felonies of imprisonment for a minimum of one to a maximum of five years. The trial court imposed the maximum sentences of imprisonment under existing law on all three counts.

{¶ 18} Appellant does not dispute that the sentences are within the range of sentences authorized by statute. Appellant argues that his sentences are contrary to law under the *Kalish* analysis because they are contrary to the overriding principles of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12. Under *Kalish*, however, a trial court’s application of the principles and purposes of felony

sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12, in selecting a sentence within the authorized statutory range of sentence, is reviewed for error on appeal under an abuse of discretion standard. *Kalish*, ¶ 17.

{¶ 19} In Assignment of Error No. 2, appellant asserts an abuse of discretion as to his sentences. We will consider appellant's claims that the trial court erred as to sentence in its application of R.C. 2929.11 and 2929.12 in our consideration of the Assignment of Error No. 2.

{¶ 20} In Assignment of Error No. 1, appellant also raises the fact that 2011 Am.Sub.H.B. No. 86 took effect on September 30, 2011 and reinstates the requirement of judicial fact-finding before a court imposes consecutive sentences in a felony case. As sentencing in this case occurred on November 21, 2011, the parties agree that the statutory enactment applies. Appellant does not contend, however, that the trial court failed to make the required findings of fact under R.C. 2929.14(C)(4) before the court imposed consecutive sentences.

{¶ 21} We find appellant's argument that the trial court imposed sentences that are clearly and convincingly contrary to law is without merit. We find appellant's Assignment of Error No. 1 not well-taken.

Claimed Abuse of Discretion in Sentencing

{¶ 22} Appellant argues under Assignment of Error No. 2 that the trial court abused its discretion with respect to sentencing. An abuse of discretion implies that the

trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

R.C. 2929.11(A) provides:

A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. 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. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

{¶ 23} R.C. 2929.12 sets forth a non-exhaustive list of “factors to consider in felony sentencing” including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A). Under the statute, a sentencing court may consider factors not listed in the statute where relevant to the principles and purposes of felony sentencing. *Id.*

{¶ 24} A sentencing court is not required to use any specific language to demonstrate that it considered the applicable seriousness and recidivism factors under R.C. 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000); *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. The Ohio Supreme Court has recognized that where a trial court fails to put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the court gave proper consideration of those statutes. *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 18, fn. 4.

{¶ 25} While 2011 Am.Sub.H.B. No. 86 reinstated the requirement that trial courts make statutorily mandated findings of fact before imposing consecutive sentences, the statute nevertheless does not require trial courts to state their reasons for imposing consecutive sentences. *State v. Owens*, 5th Dist. No. 11CA104, 2012-Ohio-4393, ¶ 37; *State v. Walker*, 8th Dist. No. 97648, 2012-Ohio-4274, ¶ 84.

{¶ 26} Prior to sentencing, the trial court ordered preparation of a presentence investigation report (PSI). It also referred appellant to the Court Diagnostic and Treatment Center for a general presentence evaluation. The trial court stated at sentencing that it had reviewed a PSI report and a report by Dr. Mark S. Pittner, Ph.D., a clinical psychologist at the Court Diagnostic and Treatment Center, on appellant.

{¶ 27} These materials demonstrate that appellant lived with the child victim and her mother for ten or more years and that appellant engaged in oral sex, digital penetration, and other sexual contact with the child victim on a recurring basis for years. Appellant pled guilty to rape offenses that occurred during the period of time that the child was 11 and 12 years of age. He pled guilty to an unlawful sexual conduct with a minor charge that occurred when the child was age 13. The child victim reported that

appellant had threatened to abuse her friends if she did not submit to appellant's sexual demands.

{¶ 28} Appellant argues first that the trial court "considered matters outside the record, including letters, comments, and allegations concerning offenses to which the Appellant did not plead guilty." Appellant cited this court to pages of the sentencing hearing transcript in support of the claim.

{¶ 29} The cited portion of the sentencing hearing transcript includes a discussion of letters from third parties to the trial court, sent on appellant's behalf, with recommendations as to sentence. These letters and a similar statement by appellant to Dr. Pittner were discussed by the trial court and appellant at the hearing. The trial court stated that the letters and a prior statement by appellant contained the same misconception as to the nature of appellant's convictions. The trial court stated that the letters included statements that appellant pled guilty just to spare his family and the victim of any more pain and that his actions were more like gross sexual imposition rather than rape.

{¶ 30} The court reviewed the claims and appellant's own prior similar statement with appellant and explained that proof of sexual intercourse was not required for a conviction of rape under R.C. 2907.02(A)(2) and (B). *See* definition of sexual conduct in R.C. 2907.01(A).

{¶ 31} The court stated:

I know that at one point you had said – and I forget if you said it in open court or in another letter – that you thought you are really more guilty of just gross sexual imposition.

Well, under the laws of the State of Ohio, digitally penetrating the vagina of a child is a form of rape. All right. Performing oral sex on a young child is a type of rape. All right.

So when I hear your statements and when I hear – I have a letter here saying that he accepted a plea deal that he is not completely guilty of just to spare his family and the victim any more pain. That’s not right, is it?

That’s not true.

{¶ 32} In our view, the trial court’s inquiry was an appropriate effort to assure, before proceeding to sentence, that appellant understood the nature of the charges to which he had pled guilty and did not now deny guilt. We find no abuse of discretion by the trial court in this line of inquiry.

{¶ 33} Under this assignment of error, appellant also objects to consideration of “allegations concerning offenses to which the Appellant did not plead guilty.” Appellant has not identified any specific allegation to which he objects. We therefore must consider the issue in general terms.

{¶ 34} It is longstanding Ohio law that a sentencing court is not limited to consideration of prior convictions alone in determining sentence. We recently reviewed

the issue in the decision of *State v. Degens*, 6th Dist. No. L-11-1112, 2012-Ohio-2421, ¶ 19:

The Ohio Supreme Court has recognized that sentencing courts are “to acquire a thorough grasp of the character and history of the defendant before it.” *State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977). Consideration of arrests for other crimes comes within that function. *Id.* Ohio recognizes that sentencing courts may consider at sentencing charges that were reduced or dismissed under a plea agreement. *State v. Robbins*, 6th Dist. No. WM-10-018, 2011-Ohio-4141, ¶ 9; *State v. Banks*, 10th Dist. Nos. AP-1065, 10AP-1066, and 10AP-1067, 2011-Ohio-2749, ¶ 24; *State v. Johnson*, 7th Dist. No. 10 MA 32, 2010-Ohio-6387, ¶ 26.

{¶ 35} We find appellant’s objections to the materials considered by the trial court at sentencing to be without merit.

{¶ 36} The central argument of appellant under Assignment of Error No. 2 is the claim that the trial court abused its discretion as to sentence on the basis that the sentences imposed by the court are contrary to the overriding purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12.

{¶ 37} Appellant argues that no R.C. 2929.12(B) factors exist on which to conclude the offenses are more serious than conduct normally constituting the offense. As to risks of recidivism, appellant argues that the court failed to consider that Dr. Pittner of the Court Diagnostic and Treatment Center identified him as a good candidate for sex

offender treatment in that he is “amenable to therapy and open to examining his own inappropriate behavior.” Appellant argues that it is undisputed that he has shown remorse and that he has no adult criminal felony record. Appellant was age 31 at the time of sentencing. Appellant argues that there are no factors presented showing a risk of recidivism.

{¶ 38} The state argues that the victim was very young, the abuse occurred over a substantial period of her life, and her relationship with appellant facilitated the offense. The state argues that the psychological impact of sexual abuse on children is well recognized and that these facts demonstrate the existence of factors supporting treatment of the offenses as more serious than conduct normally constituting the offense of rape under R.C. 2907.02(A)(2).

{¶ 39} R.C. 2929.12(B)(1) identifies age as a seriousness factor where “[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 * * * age of the victim.” Age is not an element of an R.C. 2907.02(A)(2) rape offense. R.C. 2929.12(B)(6) provides that the fact that “[t]he offender’s relationship with the victim facilitated the offense” is also a seriousness factor.

{¶ 40} The trial court stated that it considered the seriousness of appellant’s conduct including its effect on the young child victim. The court also stated under R.C. 2929.11 there is a need to punish appellant for his actions and to deter appellant and others from engaging in such conduct in the future.

{¶ 41} In our view the trial court acted within its discretion in imposing maximum and consecutive sentences in this case. We find no abuse of discretion of the trial court as to sentence in its application of the principles and purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12.

{¶ 42} We find appellant's Assignment of Error No. 2 not well-taken.

{¶ 43} We conclude that justice has been afforded the party complaining and affirm the judgment of the Lucas County Court of Common Pleas. 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.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>
