

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

State of Ohio

Court of Appeals No. OT-11-021

Appellee

Trial Court No. 10-CR-016

v.

Michael D. Miller

DECISION AND JUDGMENT

Appellant

Decided: November 30, 2012

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
Andrew M. Bigler and David R. Boldt, Assistant Prosecuting
Attorneys, for appellee.

Jeffrey S. Richardson, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Michael Miller, appeals from a judgment of sentence imposed by the Ottawa County Court of Common Pleas for pandering obscenity involving a juvenile, a violation of R.C. 2907.321(A)(1), and disseminating matter harmful to juveniles, a violation of R.C. 2907.31(A)(1).

{¶ 2} On June 6, 2011, following his entry of guilty pleas, the trial court sentenced Miller to an eight-year prison term on the pandering charge and to a concurrent 18-month term on the dissemination charge. The court then ordered the aggregate eight-year sentence to be served consecutively to a six-year sentence imposed by the Cuyahoga County Court of Common Pleas on March 10, 2011, following Miller's guilty pleas there to pandering and gross sexual imposition (GSI), a violation of R.C. 2907.05(A)(4). (Miller's four-year prison term on the GSI conviction was made concurrent with the pandering sentence.) Both courts ordered Miller to be classified as a Tier II sex offender. The offenses in both counties arose from an incident involving three young girls from a Cleveland area family who had vacationed in Ottawa County with Miller and their mothers over the Labor Day weekend in 2008. At some point during this trip, Miller used a video camera to record one of the girls undressing.

{¶ 3} In appealing his Ottawa County sentence, Miller has assigned one error for review:

The trial court violated defendant-appellant's rights to equal protection and due process of law under the fifth and fourteenth amendments to the U.S. Constitution and under Section 2, 10 and 16, Article I of the Ohio Constitution when it sentenced him contrary to R.C. 2929.11.

{¶ 4} In challenging the legality of his sentence, Miller essentially offers two arguments. First, he contends that the eight-year prison term for the pandering conviction

“is not consistent to similarly situated criminals who committed similarly situated crimes.” Second, Miller complains that the court erred when it ordered that sentence to run consecutive to the six-year term he was already serving from Cuyahoga County. We are not persuaded by either argument.

{¶ 5} For the first argument, Miller cites R.C. 2929.11(B), which states:

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶ 6} In *State v. Lathan*, 6th Dist. No. L-03-1188, 2004-Ohio-7074, ¶ 28, *rev’d, in part, on other grounds, Lathan*, 6th Dist. No. L-03-1188, 2005-Ohio-321, we noted that “[w]hen a sentence [is] alleged to be inconsistent with other sentences, what is truly being contested is whether the sentence is supported by the record. Therefore, an appellate court’s task is to review the sentence to see if by clear and convincing evidence the appellant has shown the sentence was not supported by the record or was contrary to law.” *Id.* at ¶ 27.

{¶ 7} Furthermore, following *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the trial court is simply required to consider the purposes of felony sentencing under R.C. 2929.11 and to apply the seriousness and recidivism factors listed

in R.C. 2929.12. Express factual findings are no longer necessary, nor are courts required to state reasons for imposing a particular sentence. *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 10-11 (6th Dist.). Nor are sentencing comparisons necessary when the issue of consistency is raised; rather, it “is to be statutorily considered as but one of a number of factors.” *State v. Donahue*, 6th Dist. No. WD-03-083, 2004-Ohio-7161, ¶ 8; *State v. Holt*, 6th Dist. No. E-04-004, 2005-Ohio-1554, ¶ 40.

{¶ 8} Here, the court expressly considered the record, a victim impact statement, the presentence report, and a sentencing brief from Miller’s counsel. Both Miller and his counsel were given the opportunity to make statements in mitigation. The court then applied the factors in R.C. 2929.11 and 2929.12 to the specific facts of the case. Accordingly, under the applicable standard, Miller has failed to show that the eight-year prison sentence for pandering was not supported by the record. *Lathan* at ¶ 27.

{¶ 9} Taking up Miller’s second argument, his complaint that the trial court “erred” when it made the eight-year sentence consecutive to the six-year sentence from Cuyahoga County is essentially an assertion that the court abused its discretion by doing so.

{¶ 10} Following *Foster*, the Ohio Supreme Court established a two-step paradigm for evaluating felony sentences in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The first step asks whether the “sentencing [court complied] with all applicable rules and statutes.” *Id.* at ¶ 3. If the court did not comply

with all applicable rules and statutes, “the sentence is clearly and convincingly contrary to law.” *Id.* If the sentencing court did comply, the reviewing court moves to the second step where “the * * * decision [is] reviewed under an abuse-of-discretion standard.” *Id.* Here, Miller’s receipt of the maximum sentence for pandering obscenity involving a juvenile, a second degree felony, is plainly within the statutory range. Thus, *Kalish’s* first step is met.

{¶ 11} *Kalish’s* second step directs us to review the court’s “exercise of its discretion in selecting a sentence within the permissible statutory range,” using the sentencing record as the context. *Id.* at ¶ 17. This step employs the traditional language for assessing discretion, i.e., whether in selecting a specific prison term the sentencing court’s decision was “unreasonable, arbitrary or unconscionable.” *Id.* at ¶ 20.

{¶ 12} For this second step, Miller asserts a variation on his “consistency” argument, claiming that the maximum eight-year sentence for pandering is “disproportionate” in light of the comparative facts underlying the offenses to which he pled guilty in Cuyahoga County. Each county’s case involved young girls from the same extended family. Despite his guilty pleas, Miller points to the dismissal of some of the companion charges, including two counts of rape and two counts of public indecency, as evidence that on balance “the reported crimes ultimately proved to be dubious.” He contends that his conduct did not cause serious harm to the juvenile females, did not involve sexual conduct, and that a two-minute video-recording he made of one girl

undressing (naked for “only” about 45-seconds) was not serious enough to warrant an eight-year sentence.

{¶ 13} We find these contentions unconvincing. Having reviewed the sentencing record in its entirety, we cannot say the trial court abused its discretion either by imposing the maximum eight-year sentence or in making that sentence consecutive to the Cuyahoga County sentence.

{¶ 14} Accordingly, Miller’s sole assigned error is not well-taken.

{¶ 15} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24(A)(4), costs are assessed against appellant.

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

Stephen A. Yarbrough, 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>
