

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

State of Ohio

Court of Appeals No. H-11-017

Appellee

Trial Court No. CRI-2010-0568

v.

Charles O. Sands

DECISION AND JUDGMENT

Appellant

Decided: December 21, 2012

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Chad A. Huber, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Charles O. Sands, appeals the January 20, 2011 judgment of the Huron County Court of Common Pleas which, following a guilty plea to two counts of unlawful sexual conduct with a minor and one count of attempted gross sexual imposition, sentenced appellant to a total of eight years of imprisonment. Because we find that the trial court's judgment is neither contrary to law nor an abuse of discretion, we affirm.

{¶ 2} On August 18, 2010, appellant was charged in a ten-count indictment with one count of unlawful sexual conduct with a minor, R.C. 2907.04(A) and (B)(3), a third degree felony, one count of gross sexual imposition, R.C. 2907.05(A)(4), a third degree felony, six counts of gross sexual imposition, R.C. 2907.05(A)(1), fourth degree felonies, one count of intimidation of a victim, R.C. 2921.04(B), and one count of rape, R.C. 2907.02(A)(2), a first degree felony. Appellant entered pleas of not guilty to the charges.

{¶ 3} On November 8, 2010, following negotiations with the state, appellant entered guilty pleas to two counts of unlawful sexual conduct with a minor and one count of attempted gross sexual imposition. The remaining charges were dismissed. On January 20, 2011, appellant was sentenced to four-year prison terms for each count of unlawful sexual conduct with a minor; the terms were ordered to be served consecutively. Appellant was sentenced to a one-year prison term for attempted gross sexual imposition to be served concurrently with the consecutive terms for a total eight-year imprisonment term. This appeal followed.

{¶ 4} Appellant raises two assignments of error for our consideration:

A. The trial court committed error and abused its discretion when it sentenced the appellant to four year sentences for counts one and two and ordered that those sentences be served consecutively.

B. The trial court violated appellant's rights under the Eighth Amendment of the United States Constitution and Section Nine, Article I of

the Ohio Constitution by sentencing him to a stated prison term of eight years.

{¶ 5} In appellant's first assignment of error, though he acknowledges that the eight-year sentence is within the statutory guidelines, he asserts that the sentence imposed was an abuse of the court's discretion. Specifically, appellant argues that the court failed to properly consider and apply the sentencing factors under R.C. 2929.11 and 2929.12.

{¶ 6} The Ohio Supreme Court has set forth a two-step analysis to be employed in reviewing felony sentences on appeal. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. 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.*

{¶ 7} Accordingly, because the sentence was within the statutory range we will now consider whether the trial court abused its discretion in sentencing appellant. 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.

{¶ 8} 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.*

{¶ 9} At the January 6, 2011 sentencing hearing, the court heard statements from the victim (through a representative), the victim’s mother, and the defendant. The court also noted that it had reviewed the presentence investigation report, the victim impact statement, the restitution report, and letters written in support of appellant.

{¶ 10} In sentencing appellant, the court stated that it considered the principles and purposes of R.C. 2929.11, and that it had tried to achieve the purposes by fashioning a sentence to reflect the seriousness of the crime and the impact on the victim and by making the sentence consistent with sentences for similar crimes and similar defendants.

{¶ 11} Examining the R.C. 2929.12(B) factors which make an offense more serious than conduct normally constituting the offense, the court found that the injury of the victim was exacerbated by his age (R.C. 2929.12(B)(1)), that the victim suffered both

serious physical and psychological harm (R.C. 2929.12(B)(2)), and that the relationship with the victim facilitated the offense (R.C. 2929.12(B)(6)). Specifically, the court found that the offenses occurred over a period of time when the victim was approximately 12 to 14 years of age, that the victim had been undergoing extensive counseling, and that the victim looked to appellant as a “grandfather figure.” The court found no factors to indicate that appellant’s conduct was less serious than the conduct normally constituting the offense.

{¶ 12} The court then turned to the recidivism factors under R.C. 2929.12(D) and found that although appellant expressed remorse for hurting his wife and for his own circumstances, he expressed no empathy for the victim. The court noted that appellant had no prior delinquency adjudications. In addition to noting that there had been many instances of abuse, the court stated that appellant had threatened to kill the victim and his family and showed him guns that he possessed and that appellant knew that the victim had been sexually abused in the past.

{¶ 13} Appellant now argues that the trial court erred when it made certain findings under R.C. 2929.12. Appellant disputes the findings that the victim’s age exacerbated the harm and that the victim suffered serious physical and psychological harm. Appellant contends that because the victim’s age was an element of the offense it cannot be used as factor making the crime more serious. Appellant further argues that there was nothing in the record to demonstrate that the victim suffered serious physical or psychological harm.

{¶ 14} We agree that the victim's age is implicit in appellant's convictions for unlawful sexual conduct with a minor; however, the fact that the abuse occurred over three years and the significant age difference between the victim and the appellant, 70 at the time of sentencing, is relevant to the factor that the court found most disturbing, that the victim considered appellant a grandfather figure and appellant abused that authority.

{¶ 15} In support of appellant's argument that the psychological harm caused by the offenses is not more serious than conduct normally constituting the offense appellant cites a Second Appellate District case wherein, the child victims, first and second grade students, were touched over their clothing in their buttock and pubic area by the school janitor. *State v. Nichols*, 195 Ohio App.3d 323, 2011-Ohio-4671, 959 N.E.2d 1082, ¶ 2 (2d Dist.). In *Nichols*, the victim impact statement showed that one of the girls had changes in behavior and had been crying a lot. Another victim stated that she was doing poorly in school due to the incidents. A third victim had nightmares, bedwetting, anger issues and anxiety. The reviewing court concluded that the psychological harm was "inherent in the offense" and did not appear to be more serious than what would result from conduct normally constituting the offense. *Id.* at ¶ 24.

{¶ 16} In the present case, the record shows that the victim had been sexually abused in the past and that appellant was aware of the abuse. Further, appellant threatened to kill the victim's family if he told them about the abuse; appellant showed the victim his firearms. Finally, the victim impact statement and his mother's comments at sentencing showed that the victim was in extensive counseling and has serious trust

and anger issues. We cannot say that the court erred in finding that the harm caused to the victim was more serious than the harm caused from conduct typical of the offense.

{¶ 17} Accordingly, we find that the court properly weighed the sentencing factors under R.C. 2929.11 and 2929.12. We do not find that appellant's consecutive sentences were an abuse of the court's discretion. Appellant's first assignment of error is not well-taken.

{¶ 18} In appellant's second assignment of error, he argues that his eight-year prison sentence constitutes cruel and unusual punishment. The Ohio Supreme Court has recognized that as a general rule a sentence that falls within the statutory range of sentence for an offense cannot amount to cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 21; *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). *See State v. French*, 6th Dist. No. L-09-1087, 2010-Ohio-6517, ¶ 20.

{¶ 19} At the time of appellant's sentencing, the range of prison terms for a third degree felony was from one to five years. R.C. 2929.14(A)(3). As set forth above, the four-year sentences imposed on appellant for these felonies fell within the statutory range. For the fifth degree felony, the court imposed a sentence of 12 months. This is also within the statutory range of six to 12 months. *See* R.C. 2929.14(A)(5). For purposes of the Eighth Amendment proportionality review, a court is to focus on the "individual sentences rather than the cumulative impact of multiple sentences imposed consecutively." *Hairston* at ¶ 20. Thus, we cannot say that the sentence was grossly

disproportionate for the charged offenses; that is, the sanctions imposed for these violations are not so disproportionate that they can be deemed shocking either to a reasonable person or to the community's sense of justice. *Id.* at ¶ 13-14. Accordingly, the trial court's imposition of an eight-year prison term does not constitute cruel and unusual punishment. Appellant's second assignment of error is not well-taken.

{¶ 20} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

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:
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