

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

State of Ohio

Court of Appeals No. L-10-1339

Appellee

Trial Court No. CR0201002747

v.

Larry A. Miltz, Jr.

**DECISION AND JUDGMENT**

Appellant

Decided: February 24, 2012

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

**I. INTRODUCTION**

{¶ 1} Appellant, Larry A. Miltz, Jr., appeals a judgment of the Lucas County Court of Common Pleas in which he was sentenced to 32 years in prison following convictions for four counts of rape in violation of R.C. 2907.02(A)(2) and (B), felonies of the first degree.

## **A. Facts and Procedural Background**

{¶ 2} On September 24, 2010, an information was filed by the prosecution charging appellant with four counts of rape.

{¶ 3} On September 27, 2010, a plea hearing was held and appellant entered pleas to all four counts of rape pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).<sup>1</sup>

{¶ 4} Appellant also waived indictment and signed a plea agreement which indicated that the maximum penalty for the offense could be up to \$10,000 in fines and up to 40 years in prison. Following appellant's pleas, the prosecution gave a recitation of the relevant facts. The prosecution stated that between June 1, 2009, and September 1, 2009, appellant engaged in vaginal intercourse on two separate occasions with his niece who was six or seven years old at the time of the offenses.<sup>2</sup> Appellant also engaged in anal intercourse with the same victim and also had her perform fellatio on him. Appellant threatened to cut the victim if she told anyone about these sexual encounters. The prosecution went on to state that appellant, who was 33 or 34 years old<sup>3</sup> at the time of the offenses, was interviewed by a detective and "admit[ted] to engaging in vaginal intercourse on at least two occasions \* \* \* and did in fact admit that he engaged in anal intercourse with this little girl." The prosecution also stated that appellant admitted to the

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<sup>1</sup> In an "*Alford* plea," a defendant pleads guilty yet maintains actual innocence of the charges.

<sup>2</sup> The victim's seventh birthday occurred between June and September 2009.

<sup>3</sup> Appellant's birthdate is July 1, 1975.

detective that the victim performed fellatio on him. Appellant was subsequently found guilty of each count by the trial court.

{¶ 5} A sentencing hearing was held on October 20, 2010.<sup>4</sup> For each count of rape, appellant was sentenced to serve an eight-year term in prison. The terms were ordered to be served consecutively, for an aggregate term of 32 years. Appellant was also ordered to serve five years mandatory postrelease control for each count and was found to be a Tier III child victim offender. This appeal followed.

### **B. Assignment of Error**

{¶ 6} Appellant asserts the following single assignment of error:

The Trial Court abused its discretion in sentencing Appellant to four consecutive sentences for a total prison term of thirty-two years.

## **II. ANALYSIS**

{¶ 7} In reviewing a felony sentence, we utilize the two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4. First, we examine the trial 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.* If we determine that the first prong is satisfied, a trial court's decision will be reviewed for an abuse of discretion. *Id.* "The term abuse of discretion \* \* \* implies that

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<sup>4</sup> The record reflects that at sentencing, the prosecution dismissed case number CR10-1671, in which appellant was initially indicted for four counts of rape which included a "life tail."

the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v.*

*Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} Based on the facts in this case, we uphold appellant's sentence. The trial court sentenced appellant within the range of sentences permitted by R.C. 2907.02(B), which defines the offenses as first degree felonies. Pursuant to R.C. 2929.14(A)(1)<sup>5</sup>, as it existed at the time of the offenses, appellant was required to be incarcerated for a term of three to ten years for each offense. Trial courts have discretion to impose a prison sentence within the statutory range for the offense. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. Thus, we must give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and authorized consecutive sentences for multiple offenses. *State v. Weitbrecht*, 86 Ohio St.3d 368, 373-374, 715 N.E.2d 167 (1999). Appellant's sentence is a penalty provided under R.C. 2907.02(B) and R.C. 2929.14(A)(1), thereby satisfying the first prong articulated in *Kalish*.

{¶ 9} We next turn to the second prong which directs us to review the trial court's “exercise of its discretion in selecting a sentence within the permissible statutory range \* \* \*.” *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 17. A review of the record demonstrates that the trial court took into consideration the factors enumerated in R.C. 2929.11 and R.C. 2929.12 prior to sentencing appellant. In its judgment entry,

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<sup>5</sup> Former R.C. 2929.14(A)(1) provided: “For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.”

the trial court stated that it had “considered the record, oral statements, any victim impact statement, and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.” There is no mandate for judicial fact-finding in the general guidance statutes.<sup>6</sup> Rather, the court is merely to *consider* the statutory factors. *Foster* at ¶ 42.

{¶ 10} Nevertheless, 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. 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.

{¶ 11} R.C. 2929.12 sets forth a non-exhaustive list of factors that the trial court must consider when determining whether the defendant’s conduct is more or less serious

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<sup>6</sup> A sentencing court need not give any reason for the sentence selected within the permissible range and a sentence imposed on a silent record will be presumed compliant with R.C. 2929.11 and 2929.12. *See Kalish*, 120 Ohio St.3d, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 12 and 18, fn. 4, citing *State v. Adams* 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988), paragraph three of the syllabus.

than conduct normally constituting the offense. The trial court must also consider the likelihood that the offender will commit future crimes.

{¶ 12} In this case, the record contained a presentence investigation report for the trial court's consideration. This report included appellant's criminal history which showed multiple misdemeanor and felony convictions. Furthermore, a transcript of the proceedings reveals that the trial court also considered a court diagnostic report indicating that appellant has borderline intelligence with an IQ somewhere between 70 and 92. The trial court noted that earlier in appellant's life, he had serious physical problems with his hearing and speech, but those problems have been corrected. While there was no victim impact statement, the record reflects that the trial court considered the young age of the victim and that appellant threatened the victim with physical harm so that he would not be caught. The trial court also considered that one of appellant's convictions was for an offense against his own sister where he was required to complete sexual offender treatment.

{¶ 13} Thus, applying the second prong of the *Kalish* analysis, we do not find that the trial court abused its discretion in selecting a sentence within the permitted statutory range. We are satisfied that the trial court made the relevant statutory considerations. Nothing in the record indicates that the court's imposition of a 32-year sentence was unreasonable, arbitrary, or unconscionable. Accordingly, appellant's assignment of error is not well-taken.

### III. CONCLUSION

{¶ 14} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed.

{¶ 15} Pursuant to App.R. 24, costs are taxed to 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.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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