**[Cite as *State v. Ortega*, 2013-Ohio-1092.]**

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

State of Ohio

Appellee

v.

Emilio Lopez Ortega

Appellant

Court of Appeals No. L-12-1006
L-12-1007

Trial Court No. CR0201102526
CR0201102063

**DECISION AND JUDGMENT**

Decided: March 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Louis E. Kountouris, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

**JENSEN, J.**

**{¶ 1}** Defendant-appellant, Emilio Ortega, a convicted sexual offender, timely appeals his 30-month prison sentence imposed for failing to notify the sheriff of his change of address, a violation of R.C. 2950.05(F)(1). Appellant claims (1) that the trial court improperly denied him a presentence investigation report before sentencing him, and (2) that the trial court abused its discretion as to the length of his sentence and in

ordering his sentence be served consecutively with sentences imposed for gross sexual imposition convictions for which he was sentenced the same day. He assigns two errors for our review:

> I. The trial court violated defendant's due process rights by denying him a presentence report[.]
>
> II. Defendant's sentence was an abuse of discretion[.]

**{¶ 2}** For the reasons that follow, we affirm the trial court's decision.

## I. Factual Background

**{¶ 3}** Stemming from his conviction in 1992 for corruption of a minor, appellant was deemed a sexual offender in March 2001, after passage of H.B. No. 180, and was required to annually notify the sheriff of his address for ten years. On or about June 15, 2011, appellant reported an address of 1915 Rivard in Toledo, Ohio, however, when authorities sought to verify that address, they learned that appellant had never lived there. The fugitive task force went to several locations in Toledo, searching for appellant. The U.S. Marshal Service eventually found him on July 27, 2011, in Detroit, Michigan. He was indicted on the charge of failure to notify, a violation of R.C. 2950.02(F)(1), on September 27, 2011, in case No. CR0201102526.

**{¶ 4}** In July of 2011, in case No. CR0201102063, appellant was indicted on two counts of rape and four counts of gross sexual imposition in connection with sexual offenses he committed against his nine-year-old grandson, his stepdaughter who was seven or eight years old, and an unrelated minor who was ten or eleven.

**{¶ 5}** Case Nos. CR0201102526 and CR0201102063 were both scheduled for trial on November 29, 2011. On that date, appellant entered a plea of no contest on the failure to notify charge (case No. CR0201102526)–a third degree felony. The plea was accepted, the court found him guilty, the matter was referred for presentence investigation, and sentencing was scheduled for December 13, 2011.

**{¶ 6}** On December 12, 2011, in case No. CR0201102063, appellant entered a negotiated *North Carolina v. Alford* plea to four counts of gross sexual imposition, each a felony of the fourth degree. Both case Nos. CR0201102526 and CR0201102063 proceeded to sentencing that day. The court imposed a sentence of 30 months in prison on the failure to notify conviction and 12 months for each of the four gross sexual imposition convictions, all to be served consecutively.

**{¶ 7}** Appellant now claims that the trial court violated his due process rights by denying him a presentence investigation report before sentencing him and that the court abused its discretion both in the length of the sentence imposed on the failure to notify conviction and in ordering each of his sentences to be served consecutively.

## II. Standard of Review

**{¶ 8}** In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court set forth a two-step analysis for reviewing felony sentences on appeal. 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." *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing the sentence under an abuse

of discretion standard. *Id. See also State v. Williams*, 6th Dist. No. WD-12-007, 2013-Ohio-413. 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).

## III. Analysis

### A. FIRST ASSIGNMENT OF ERROR: The trial court violated defendant's due process rights by denying him a presentence report.

**{¶ 9}** Appellant first claims that the trial court violated Crim.R. 32.2 and R.C. 2951.03 when it sentenced him without a presentence investigation report. Crim.R. 32.2 provides that "In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report *before imposing community control sanctions or granting probation*." (Emphasis added.) Similarly, R.C. 2951.03(A)(1) provides that "No person who has been convicted of or pleaded guilty to a felony shall be placed under a *community control sanction* until a written presentence investigation report has been considered by the court." (Emphasis added.)

**{¶ 10}** Appellant was not sentenced to community control–he was sentenced to 30 months in prison. In fact, in its December 13, 2011 judgment entry, the trial court specifically found that appellant was not amenable to community control. Crim.R. 32.2 and R.C. 2951.03(A)(1) are, therefore, inapplicable. *See, e.g., State v. Zimmerman*, 6th Dist. No. S-11-007, 2012-Ohio-2813, ¶ 5 ("Under Crim.R. 32.2, a trial court is only required to obtain a presentence investigation report prior to sentencing if the trial court is imposing community control or granting probation."); *State v. Neville*, 7th Dist. No. 07

CO 11, 2008-Ohio-1554, ¶ 28, citing *State v. Cyrus*, 63 Ohio St.3d 164, 586 N.E.2d 94 (1992), syllabus, ("The Ohio Supreme Court has held that a trial court need not order a presentence report in a felony case when probation or a community control sanction is not granted.")

**{¶ 11}** Appellant is correct that in *State v. Posey*, 6th Dist. No. OT-10-044, 2012-Ohio-1108, ¶ 7, we held that the trial court must provide the defendant access to certain portions of the presentence report if one is prepared. However, no presentence investigation report was contained in the record transmitted to this court. It is the duty of counsel to ensure that all documents and reports, including any presentence investigation report, are made a part of the trial court's record and are actually transmitted to this court. *See State v. Ray*, 181 Ohio App.3d 590, 2009-Ohio-1395, 910 N.E.2d 34, ¶ 28. Presentence investigation reports may be submitted under seal. *Id.*

**{¶ 12}** Having said this, however, the hearing transcripts seem to indicate that a presentence investigation report may have been prepared in case No. CR0201102526. At page 16 of the November 29, 2011 hearing at which appellant entered his plea in that case (i.e., the failure to notify charge), the court ordered a presentence investigation. Then, at page 18 of the December 12, 2011 transcript of the sentencing hearing, the court indicated that in case No. CR0201102526, the matter had been referred to the adult probation department for a presentence investigation and report and that the court had received the report. But there is no indication that appellant requested but was denied an opportunity to review that report. At page 19 of the December 12, 2011 transcript, appellant's attorney stated as follows:

> [F]or the record, I would request that the case number 11-2526,[1] I would request that that matter be referred for a presentence investigation. I feel like there's some background that the court might find helpful to that case. *We are, however, prepared obviously to proceed with sentencing on the failure to register matter*. (Emphasis added.)

**{¶ 13}** So although defense counsel asked that a presentence investigation report be prepared in the case involving the gross sexual imposition convictions, which request was denied, there is no indication in the record and no allegation in appellant's brief, that defense counsel asked for but was deprived the opportunity to review an existing presentence investigation report on the failure to notify conviction. And at the sentencing hearing on December 12, 2011, defense counsel specifically indicated that appellant was prepared to proceed with sentencing on the failure to notify matter.

**{¶ 14}** Thus, to the extent that appellant claims that a presentence investigation report should have been ordered but was not, appellant was not entitled to one under Crim.R. 32.2 and R.C. 2951.03. To the extent that appellant claims that he was denied access to a report that had been generated and reviewed by the trial court, there is nothing in the record indicating that to be the case and, in fact, the record indicates the contrary.

[1] Reading the transcript in context, it is apparent that defense counsel mistakenly referred to the gross sexual imposition case as case No. CR2011-2526.

**B. SECOND ASSIGNMENT OF ERROR: Defendant's sentence was an abuse of discretion.**

**{¶ 15}** Appellant next argues that the court relied on inaccurate information when it sentenced him to 30 months incarceration and ordered that his 12-month sentences on the gross sexual imposition convictions be served consecutively with the 30-month sentence. Appellant bases this argument on statements made by the trial court during the sentencing hearing indicating that appellant had been on community control or probation at the time of his offense. The court apparently confused appellant's reporting requirements as a form of community control or probation. Appellant believes that this mistaken belief improperly affected his sentence.

**{¶ 16}** Under *Kalish*, in reviewing a felony sentence on appeal, we must first "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."

**{¶ 17}** R.C. 2929.14(C)(4)(c) provides that:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

* * *

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

**{¶ 18}** In its December 13, 2011 judgment entry, the court identified two separate reasons for ordering consecutive sentences: that appellant was on community control at the time of the offense and that he had a prior criminal history. This was discussed in greater detail at the sentencing hearing:

Court: The court further finds being necessary to fulfill the purposes set forth in 2929.11 and not disproportionate to the seriousness of the offender's conduct or the danger to offender poses, the court further finds that the defendant was under community control when the offense or offenses were committed. And the defendant's criminal history, that being three misdemeanors and ten prior felonies, requires consecutive sentences. The order of the court as it relates to this case number, counts three, four, five, and six, the sentences shall be run consecutive, one to the other, as well as consecutive to the sentence imposed in case number 11-2063 of the thirty months.

Mr. Kountouris: That's 25—

The Court: 11-2526, being a sentence of thirty months.

Mr. Arnold: May I interrupt, your Honor?

The Court: Sure.

Mr. Arnold: I don't believe as to case number 2063—my client denies that he was under any form of community control or parole at that time. I acknowledge that he was under a reporting duty.

The Court: Which he was violating. And part of that was under community control, on probation, or on bond, but he has previously served prison terms, so either one of those would be sufficient pursuant to 2929.13(B)(2) to overcome any presumption of community control as it relates to those offenses.

**{¶ 19}** The trial court specifically identified that appellant had a criminal history that included three misdemeanors and ten prior felonies and correctly explained that appellant's history of criminal conduct was sufficient to justify consecutive sentences.

**{¶ 20}** As to the length of the sentences, appellant was convicted of one third degree felony and four fourth degree felonies. For the third degree felony, the court could have imposed a sentence of 9, 12, 18, 24, 30, or 36 months. R.C. 2929.14(A)(3)(b). The court imposed a 30-month sentence. This sentence is within the statutory guidelines. As for the fourth degree felonies, the court could have imposed a sentence of 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, or 18 months. R.C. 2929.14(A)(4). The court sentenced appellant to 12 months on each count. This too is within the guidelines. In addition, the trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. The record demonstrates that the sentencing court complied with all applicable rules and statutes in

imposing the sentence. The sentences were not clearly and convincingly contrary to law. *See Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 450 N.E.2d 1140 at ¶ 18 (finding that trial court's sentencing decision was not contrary to law).

**{¶ 21}** The first prong of *Kalish* having been satisfied, we now review the trial court's sentencing decision under an abuse of discretion standard. 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." *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

**{¶ 22}** In this case, the court permitted appellant's counsel to make a statement and the court considered that statement in imposing his sentence. The court also invited the appellant to make a statement, which the appellant declined to do. It expressly balanced the principles and purposes of sentencing under R.C. 2929.11 against the seriousness and recidivism factors under R.C. 2929.12 .

**{¶ 23}** In *State v. Willis*, 6th Dist. No. L-11-1274, 2012-Ohio-6070, ¶ 10, we explained:

> R.C. 2929.12 is a guidance statute. It sets forth the seriousness and recidivism criteria that a trial court "shall consider" in fashioning a felony sentence. * * * Subsections (B) and (C) establish the factors indicating whether the offender's conduct is more serious or less serious than conduct normally constituting the offense. Subsections (D) and (E) contain the factors bearing on whether the offender is likely or not likely to commit future crimes. While the phrase "shall consider" is used throughout R.C.

10.

2929.12, the sentencing court is not obligated to give a detailed explanation of how it algebraically applied each seriousness and recidivism factor to the offender. Indeed, no specific recitation is required. * * * Merely stating that the court considered the statutory factors is enough. *State v. Brimacombe*, 6th Dist. No. L-10-1179, 2011-Ohio-5032, ¶ 11. (Internal citations omitted.)

**{¶ 24}** In imposing appellant's sentence, the trial court considered the statutory factors. And taking into consideration appellant's criminal history and the facts upon which the conviction was premised, the sentence the court imposed was not unreasonable, arbitrary, or unconscionable.

## IV. Conclusion

**{¶ 25}** Appellant was not improperly denied a presentence investigation report with respect to the felonies for which he was sentenced, and the court's sentencing decisions were consistent with all statutes and rules and were not unreasonable, arbitrary, or unconscionable. Appellant's two assignments of error are found not well taken. The judgment of the Lucas County Court of Common Pleas is affirmed. 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

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

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JUDGE