

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

State of Ohio

Court of Appeals No. WD-12-023

Appellee

Trial Court No. 2012CR0018

v.

John E. Thomas

DECISION AND JUDGMENT

Appellant

Decided: May 3, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Thomas Matuszak and Jacqueline M. Kirian, Assistant
Prosecuting Attorneys, for appellee.

J. Scott Hicks, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, John Thomas, appeals the judgment of the Wood County Court of Common Pleas, sentencing him to a prison term of 18 months following a jury trial in which he was found guilty of disrupting public service. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On January 1, 2012, Thomas and his girlfriend, Lisa Wittenberg, attended a “swinger’s party” at a Toledo-area Comfort Inn. According to Wittenberg, the couple originally intended to go to the party to “see what it was like.” However, after spending some time at the party, Thomas decided he wanted to participate in the party’s activities and posed the idea to Wittenberg. Wittenberg became upset at the thought that Thomas was willing to be unfaithful to her. Consequently, she decided to leave the party and wait for Thomas in her vehicle. After Thomas refused to give her the keys to the vehicle, Wittenberg began to kick him until he finally agreed to leave.

{¶ 3} Following their departure from the party, the couple was spotted by Donald Cox, a security guard for FedEx. At trial, Cox testified that he saw Thomas stop the vehicle along the drive leading up to the FedEx facility and proceed to pull Wittenberg out of the vehicle. Thomas appeared to be hitting Wittenberg as he was pulling her out of the vehicle. At that point, Cox notified the police of the incident. Eventually, Wittenberg was able to free herself and run off the road. Thomas proceeded to get back into the vehicle and chase Wittenberg. According to Cox, Thomas was driving erratically and appeared to be trying to run Wittenberg over with the vehicle. Ultimately, Thomas was able to pull Wittenberg back into the vehicle.

{¶ 4} The police eventually found the couple driving a vehicle that matched the description given by Cox. When they approached the vehicle, Wittenberg was quite shaken up. After initial questioning, Wittenberg stated that Thomas had pulled her from

the vehicle, knocked her down, and pulled her back into the vehicle. Further, she told police that Thomas was trying to kill her.

{¶ 5} Thomas was subsequently arrested and charged with one count of felonious assault with a specification in violation of R.C. 2903.11(A)(2), a felony of the fourth degree, one count of disrupting public services in violation of R.C. 2909.04(A)(1), a felony of the fourth degree, and one count of kidnapping with a specification in violation of R.C. 2905.01(A)(3), a felony of the first degree. After pleading not guilty, a two-day jury trial began on April 30, 2012.

{¶ 6} At trial, Wittenberg was called to testify regarding the events that transpired on January 1, 2012. Prior to Wittenberg taking the stand, the state's attorney was informed by Cox that he overheard her tell a friend on the phone that she was going to lie on the stand in order to exonerate Thomas. The prosecutor brought this information to the court's attention outside the presence of the jury. He requested leave to recall Cox in order to have him testify about what he overheard. Following the defense counsel's hearsay objection, the trial court instructed the prosecutor to question Wittenberg first to see whether she was going to tell the truth.

{¶ 7} As Cox predicted, Wittenberg's statements under oath at trial contradicted her statements made to the police immediately following the incident. Specifically, Wittenberg testified that Thomas never hit her. Further, she denied running away from him. Rather, Wittenberg stated that Thomas stopped the vehicle and went around to the

passenger side to help her because she was feeling ill. Finally, Wittenberg denied having told her friend that she was going to lie in order to help Thomas.

{¶ 8} The trial court eventually allowed the state to recall Cox to the stand. Cox testified that he overheard Wittenberg tell someone that she was going to lie to keep Thomas out of jail. Following Cox's testimony, Thomas' counsel requested a one-day continuance in order to procure the testimony of Wittenberg's friend. The court offered to continue the trial until the next morning, but Wittenberg's friend refused to miss work and would not be able to testify until the afternoon. Since a juror had a final exam scheduled for that afternoon, the court denied Thomas' request and the defense rested.

{¶ 9} At the close of trial, the jury found Thomas not guilty of the felonious assault and kidnapping charges, but guilty of disrupting public services, based on the evidence presented that Thomas damaged Wittenberg's cell phone during the altercation. Pursuant to the jury's determination of guilt, the trial court sentenced Thomas to a prison term of 18 months for disrupting public services. Thomas' timely appeal followed.

B. Assignments of Error

{¶ 10} Thomas assigns the following errors for our review:

I. THE TRIAL COURT ABUSED ITS DISCRETION BY
DENYING DEFENDANT/APPELLANT'S MOTION TO CONTINUE
THE TRIAL ONE DAY IN ORDER TO PRESENT A REBUTTAL
WITNESS TO TESTIFY OF NEWLY DISCOVERED EVIDENCE

PRESENTED BY THE STATE WHEN THE TRIAL WAS SCHEDULED FOR TWO DAYS.

II. THE TRIAL COURT ABUSED ITS DISCRETION WITH THE SENTENCE THAT WAS IMPOSED AND DID NOT FOLLOW THE APPLICABLE RULES AND STATUTES.

II. Motion to Continue

{¶ 11} In his first assignment of error, Thomas argues that the trial court erred in denying his motion to continue.

{¶ 12} “The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981), citing *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). “The term ‘abuse of discretion’ * * * implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 13} “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *Unger* at 67, quoting *Sarafite* at 589. When faced with a request for a continuance, the trial court should consider: (1) the length of the delay requested; (2) whether other continuances have been requested or received; (3) the inconvenience to

the litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons; (5) whether the defendant contributed to the circumstances which gave rise to the request for a continuance; and (6) any other relevant factors. *Id.* On appeal, our review of the trial court's exercise of discretion involves a weighing of concerns such as the court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice against any potential prejudice to the defendant. *Id.* at 67.

{¶ 14} Thomas argues that the trial court abused its discretion by denying his motion to continue because the *Unger* factors each weigh in his favor. As to the first factor, Thomas contends that the one-day delay was minimal. Regarding the second factor, Thomas points to the fact that he made no prior requests for continuances. Because a second day had already been set aside for the conclusion of the trial, Thomas argues that the trial court would not be inconvenienced and, thus, the third factor weighs in his favor. Finally, he asserts that the continuance was legitimate under the fourth factor because it was necessary in order to present rebuttal testimony to rehabilitate Wittenberg's credibility.

{¶ 15} Contrary to Thomas' arguments, our review of the record reveals that the trial court properly applied the *Unger* factors in arriving at its decision to deny the motion for continuance. While it is true that the trial was scheduled to last two days, the trial was not expected to continue into the afternoon of the second day. This was important insofar as one of the jurors would have encountered great difficulty in rescheduling a final exam

that was scheduled for that afternoon. Perhaps more importantly, the trial court could have reasonably concluded that the circumstances giving rise to the request for continuance were caused by Thomas' actions. Despite the trial court's order not to have any contact with Wittenberg, Thomas persisted in communicating with her via several hundred telephone calls, some of which were recorded, and a dozen visitations. During some of those calls, Thomas attempted to convince Wittenberg to lie under oath.

{¶ 16} In light of the foregoing, we find no persuasive evidence showing that the trial court's attitude was unreasonable, arbitrary, or unconscionable. Furthermore, even if we were to conclude that the trial court abused its discretion by denying the motion for continuance, any associated error would be harmless in light of evidence presented to the jury in the form of a taped conversation between Wittenberg and Thomas in which Wittenberg accused Thomas of breaking her phone. *State v. McWhite*, 6th Dist. No. L-95-007, 1995 WL 763898, *3 (Dec. 29, 1995).

{¶ 17} Accordingly, Thomas' first assignment of error is not well-taken.

III. Sentencing

{¶ 18} In his second assignment of error, Thomas argues that the trial court erred in sentencing him without complying with R.C. 2929.11 and 2929.12.

{¶ 19} An appellate court reviews challenges to the sentencing court's application of R.C. 2929.11 and 2929.12 using the method announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the Supreme Court established a "two-prong" process for appellate review of felony sentences, stating:

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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard. *Id.* at ¶ 4.

{¶ 20} Here, Thomas acknowledges that his sentence falls within the statutory range. Notably, a choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law. *State v. Sattler*, 6th Dist. No. E-11-085, 2013-Ohio-326, ¶ 10, citing *Kalish* at ¶ 15. Thus, the first prong under *Kalish* is satisfied.

{¶ 21} Under the second prong, we review the trial court's "exercise of its discretion in selecting a sentence within the permissible statutory range," using the sentencing record as the context. *Kalish* at ¶ 17. This prong asks whether, in selecting a specific prison term, the court's decision was "unreasonable, arbitrary or unconscionable." *Id.* at ¶ 20.

{¶ 22} Regarding the import of R.C. 2929.12, we have stated:

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. 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.)

{¶ 23} In its judgment entry, the trial court stated in relevant part: “For reasons stated on the record, and after consideration of any additional relevant factors and the recidivism and seriousness factors under R.C. 2929.12, the Court finds that a prison term is consistent, based upon the overriding purposes and principles of sentencing set forth in R.C. 2929.11.”

{¶ 24} Thomas argues that the trial court merely paid “lip service” to R.C. 2929.11 and 2929.12 by referencing the statutes using “boilerplate” language. Our review of the sentencing hearing transcript, as well as the judgment entry, contradicts Thomas’ argument. Based on our review, it is clear that the trial court fulfilled its obligation to consider the statutory factors. Therefore, we cannot say that the trial court abused its discretion by imposing the maximum sentence.

{¶ 25} Accordingly, Thomas’ second assignment of error is not well-taken.

IV. Conclusion

{¶ 26} Based on the foregoing, the judgment of the Wood County Court of Common Pleas is affirmed. Costs are hereby assessed to Thomas in accordance with 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.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

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>
