

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

State of Ohio

Court of Appeals No. L-12-1224

Appellee

Trial Court No. CR0201101602

v.

Justin Lusher

DECISION AND JUDGMENT

Appellant

Decided: May 31, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

James J. Popil, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶1} Appellant, Justin Lusher, appeals the judgment of the Lucas County Court of Common Pleas, sentencing him to 18 months in prison for gross sexual imposition. For the following reasons, we affirm.

{¶2} On April 21, 2011, Lusher was indicted on one count of rape in violation of R.C. 2907.02(A)(1)(b) and (B), a felony of the first degree. The indictment stemmed from an incident that occurred on November 21, 2010. On that date, Lusher went to his girlfriend's house where he found his girlfriend's six-year-old daughter, M.A., sleeping in her bedroom. Lusher entered the room, where he proceeded to sexually assault M.A. by placing his penis in her mouth.

{¶3} At his arraignment, Lusher entered a plea of not guilty. However, on June 25, 2012, Lusher decided to withdraw his plea of not guilty and enter a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the lesser offense of attempt to commit gross sexual imposition in violation of R.C. 2923.02 and R.C. 2907.05(A)(4) and (C), a felony of the fourth degree. The trial court accepted Lusher's *Alford* plea, and continued the matter for sentencing at a later date. A subsequent sentencing hearing was held at which the trial court imposed a prison term of 18 months. Lusher's timely appeal followed.

{¶4} On appeal, Lusher assigns the following error for our review:

THE TRIAL COURT [ABUSED ITS] DISCRETION IN
SENTENCING APPELLANT TO A MAXIMUM PRISON TERM.

II. Analysis

{¶5} In his sole assignment of error, Lusher argues that the trial court abused its discretion when it sentenced him to the maximum allowable prison term for a felony of

the fourth degree. Specifically, Lusher argues that the trial court should have imposed a shorter prison term in light of his limited prior criminal record, which contains no other felony convictions.

{¶6} The Ohio Supreme Court’s decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, sets forth a two-step analysis to be employed in reviewing felony sentences on appeal. 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} Here, Lusher acknowledges that the sentence falls within the range allowed by statute. Indeed, a felony of the fourth degree is punishable by a prison term of up to 18 months. R.C. 2929.14(A)(4). 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* was satisfied.

{¶8} Next, we determine whether the trial court abused its discretion. An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶9} In the case sub judice, the trial court stated that it “considered the record, oral statements, any victim impact statement and has balanced the seriousness and recidivism factors under 2929.12, as well as the purposes of sentencing under 2929.11.” Nonetheless, Lusher argues that his sentence should have been less than the maximum since this was his first felony conviction. In making his argument, Lusher cites the Second District’s decision in *State v. Bowshier*, 2d Dist. No. 08-CA-58, 2009-Ohio-3429.

{¶10} In *Bowshier*, the Second District stated:

It is submitted that a first prison sentence above the minimum that is unsupported in the record that “the shortest prison term will demean the seriousness of the offender’s conduct or will not adequately protect the public from future crime by the offender or others” is contrary to law. Even though [*State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856] frees the trial judge from making the findings, support for the sentence should appear in the record to facilitate the appellate court’s review. *Id.* at ¶ 11, citing *Ohio Felony Sentencing Law*, 2007 Edition, Griffin and Katz, at 208.

{¶11} While it may be true that Lusher has no prior felony convictions, the record contains support for the trial court’s decision to impose the maximum sentence of 18 months. At sentencing, the trial court addressed Lusher and stated:

This offense is extremely serious, and you had an extremely significant reduction of the offense for which you were charged. What

makes this particularly reprehensible, Mr. Lusher, is the age of the victim because she is a victim of tender years. You took this child's innocence and no child should have to be subjected to that kind of behavior. Any physical harm has long since been cured but the emotional harm that this child is suffering and will continue to suffer is immeasurable.

{¶12} Based on our review, it is clear that the trial court fulfilled its obligation to consider the statutory factors it was obligated to consider under R.C. 2929.11 and R.C. 2929.12. In light of the seriousness of the offense, the age of the victim, and the fact that Lusher's potential sentence was reduced from life in prison to 18 months, we cannot say that the trial court abused its discretion in imposing the maximum prison term for a felony of the fourth degree.

{¶13} Accordingly, Lusher's sole assignment of error is not well-taken.

III. Conclusion

{¶14} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs are hereby assessed to Lusher 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.

JUDGE

Thomas J. Osowik, 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>
