[Cite as *State v. Gore*, 2013-Ohio-520.]

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

State of Ohio	Court of Appeals No. E-12-038
Appellee	Trial Court No. 2012-CR-139
v.	
Dwayne P. Gore	**DECISION AND JUDGMENT**
Appellant	Decided: February 15, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

John F. Kirwan, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Defendant-appellant, Dwayne P. Gore, appeals his sentence for domestic violence following a negotiated guilty plea. Gore contends that the trial court erred by imposing the maximum period of incarceration in contravention of his plea agreement and by failing to make certain presentence investigation and crime reports available for

his examination. For the following reasons, we affirm the judgment of the Erie County Court of Common Pleas.

{¶ 2} On April 11, 2012, Gore was indicted on two third-degree felony counts of domestic violence in violation of R.C. 2919.25(A) and (D)(4). The charges stemmed from an incident on February 28, 2012, when Gore allegedly assaulted his girlfriend, Heidi Thompson (Count 1 of the indictment), and Heidi's three-year-old son (Count 2 of the indictment) at their home in Sandusky, Ohio. On May 14, 2012, Gore entered a negotiated plea of guilty to an amended charge of domestic violence against Heidi's son in violation of R.C. 2919.25(A) and (D)(3), a fourth-degree felony, in exchange for the state's dismissal of Count 1 and a recommended sentence of 12 months in prison.

{¶ 3} On May 21, 2012, the trial court rejected the jointly recommended sentence of 12 months incarceration and imposed the maximum prison term of 18 months. The sentence was journalized on June 7, 2012, and this appeal followed.

{¶ 4} Gore asserts the following three assignments of error:

> I. The trial court abused its discretion in sentencing defendant to a maximum sentence of 18 months when the defendant and prosecutor had agreed to a sentence of 12 months. And the victim agreed to the sentencing.
>
> II. Trial court violated the purposes of felony sentencing set forth in ORC 2929.11.

III. The trial court failed to comply with ORC 2917.39 to allow defendant to review its pre-sentence investigation prior to sentencing.

{¶ 5} In his first assignment of error, Gore contends that the trial court abused its discretion in deviating from the recommended sentence, arguing that "not only did the State and Defendant come to a plea agreement whereby Defendant was to be sentence[d] to twelve months, but, the mother of the victim and children services both likewise agreed that the twelve month sentence was proper under the circumstances."

{¶ 6} It is well-established, however, that a trial court does not commit error "by imposing a sentence greater than 'that forming the inducement for the defendant to plead guilty when the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor.'" *State ex rel. Duran*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430, ¶ 6, quoting *State v. Buchanan*, 154 Ohio App.3d 250, 2003-Ohio-4772, 796 N.E.2d 1003, ¶ 13 (5th Dist.). Here, the trial court informed Gore at the plea hearing that the charge to which he was pleading guilty "carries a possible prison term anywhere from six months up to 18 months" and specifically warned him that the recommended one-year prison sentence is "only a recommendation," that "[t]his Court does not have to go along with that," and that the court "could give you more time."

{¶ 7} Gore also argues that certain comments made by the trial court during sentencing "show the court's attitude as unreasonable, arbitrary, or unconscionable." Specifically, the trial judge stated that in light of Gore's history, he wished the maximum

sentence was 18 years, rather than 18 months, "because individuals like you do not belong living in a society that we want to live in and that's one free of any threats and harm to other individuals, more importantly, to children, a three year-old child."

{¶ 8} In considering whether comments made by a trial judge at sentencing are indicative of bias, prejudice, or a failure to exercise proper discretion, an appellate court must view the remarks in the context of the entire record and determine whether improper or indiscriminate considerations brought to bear upon the judge's decision-making process. *See State v. Arnett*, 88 Ohio St.3d 208, 218, 724 Ohio St.3d 793 (2000); *State v. Lundgren*, 73 Ohio St.3d 474, 493, 653 N.E.2d 304 (1995); *State v. Brown*, 5th Dist. No. 11 CA 42, 2012-Ohio-2672, ¶ 86; *State v. Vaughn Hardware*, 8th Dist. No. 93639, 2010-Ohio-4346, ¶ 18; *State v. Moore*, 7th Dist. No. 05 MA 178, 2007-Ohio-7215, ¶ 24.

{¶ 9} Viewed in their full context, the contested remarks in this case, while decidedly direct in nature, do not evince any improper bias, prejudice, or want of rationality or discernment on the part of the trial court. Prior to making the above-quoted comments, the trial judge stated, in regard to the underlying facts of the present offense:

> Dwayne walked into the room, became angry because he thought that [C.T.] was on a three-way telephone call with his grandmother and his father. Dwayne pulled [C.T.] off the couch by his legs * * * causing [C.T.] to hit his head on the coffee table.
>
> Dwayne then took [C.T.] into the bedroom and slammed him on the bed, causing the bed to break * * * twisting and attempting to break

[C.T.'s] arm. Heidi was able to remove Dwayne [from C.T.], with [Dwayne] then directing his attention on her. Heidi said she was then slammed into several walls while Dwayne threatened to kill her, her son, and her whole family.

Heidi made several attempts to leave the residence out of the bedroom window, windows, but Dwayne prevented her from leaving. Heidi said she was able to move to the living room and was able to grab [C.T.] and lay on top of him on a couch to prevent Dwayne from striking him. While they were on the couch, Dwayne struck Heidi several times. Heidi said she told Dwayne that she was going to call the police and * * * this is when Dwayne left the residence.

As Dwayne left the residence, he told Heidi that if she didn't lie to the police about what happened, he would kill [C.T.].

Heidi said she was scared for her life and for [C.T.'s] life. Heidi said she believed Dwayne would harm and kill her and [C.T.] if given the chance.

Now, * * * a neighbor * * * who lives in the apartment above Heidi, he came down earlier in the day and he heard, quote, Dwayne yell, I will tie you up, kill you, your son, and your family.

{¶ 10} The judge then recited Gore's prior convictions in detail and summarized his criminal history:

> You have a history of crimes of violence. You have stolen from other people; property, your theft convictions, the innocence of the youth through your corruption [of a minor], and the safety of others through your domestic violence. You've been to prison four times. You've been on either future good behavior or community sanctions five times. You were on two different [domestic violence] cases for community sanctions or future good behavior * * * when you committed this domestic violence. The child was three years old, and if I'm not mistaken, according to the police report, this would have been his birthday.

{¶ 11} Properly understood, the quoted comments are merely the end product of a rather meticulous and appropriate explanation of why a consideration of the applicable sentencing criteria, including Gore's lengthy criminal history and his particularly egregious conduct toward a three-year-old child and the child's mother in this case, led the judge to reject the recommended sentence.

{¶ 12} Accordingly, Gore's first assignment of error is not well-taken.

{¶ 13} In his second assignment of error, Gore challenges the trial court's application of the sentencing guidelines in R.C. 2929.11, arguing that the recommended sentence of 12 months comported with the statutory principles and purposes of felony sentencing.

{¶ 14} This court reviews challenges to a sentencing court's application of R.C. 2929.11 and 2929.12 under the approach adopted by a plurality of the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26:

> 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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard. *See State v. Willis*, 6th Dist. No. L-11-1274, 2012-Ohio-6070, ¶ 8; *State v. Barnhart*, 6th Dist. No. OT-10-032, 2011-Ohio-5685, ¶ 13-14.

{¶ 15} Here, the trial court expressly considered the guidelines for felony sentencing under R.C. 2929.11 and 2929.12, properly applied postrelease control, and imposed a sentence within the permissible statutory range. Thus, the sentence is not clearly and convincingly contrary to law. Moreover, the trial court gave careful consideration to the facts of Gore's current offense, particularly the victim's age, and his extensive criminal history, including prior domestic violence offenses, in accordance with R.C. 2929.12. Further, as noted above, the court provided a cogent justification for rejecting the recommended sentence in favor of the maximum sentence, which the court clearly believed was necessary to protect the public and adequately punish the offender so as not to demean the seriousness of his conduct and its impact upon the victim as provided in R.C. 2929.11. There is nothing unreasonable, arbitrary, or unconscionable in

the court's application or balancing of the relevant statutory considerations. Thus, the trial court's imposition of the maximum 18 month sentence does not constitute an abuse of its discretion.

{¶ 16} Accordingly, Gore's second assignment of error is not well-taken.

{¶ 17} In his third assignment of error, Gore asserts that the trial court erred when it relied upon an "old" presentence investigation report ("PSI"), as well as police reports and criminal history information obtained from the probation department. Gore argues that in relying on those materials, the court acted contrary to R.C. 2317.39, which provides that the parties must be given five days notice and an opportunity to examine an investigative report before its contents may be considered by the judge.

{¶ 18} Gore, however, did not object to the trial court's reliance on the prior PSI or other materials, and he expressly declined a PSI in this case. Thus, he has waived all but plain error. *See, e.g., State v. Leonard*, 8th Dist. No. 88299, 2007-Ohio-3745, ¶ 16-20; *State v. King*, 5th Dist. No. 01-CA-5, 2001 WL 1913822, *3 (Oct. 17, 2001); *In re Honaker*, 10th Dist. No. 00AP-1269, 2001 WL 491893, *3 (May 10, 2001). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Plain error does not exist unless, but for the error, the outcome of the proceeding manifestly would have been otherwise. *See State v. McMillen*, 5th Dist. No. 2008-CA-00122, 2009-Ohio-210, ¶ 81.

{¶ 19} Upon review of the facts, we find no plain error. The trial court's decision to reject the recommended sentence was obviously based on two sources of information, i.e., the facts contained in the narrative portion of the Sandusky Police Department's offense report in this case and Gore's criminal history. The defense was manifestly aware of the contents of the current offense report, as both Gore and Thompson made reference to it in their statements to the court. Moreover, the trial court detailed the contents of Gore's prior criminal history, including the names, dates, disposition, case numbers, and sentences of each offense, and neither Gore nor his counsel have claimed then or now that there were any inaccuracies or inconsistencies in the court's recitation. Indeed, Gore himself apologized "for my actions for the last 16 years," stating, "I know my past record is horrible, but I served my time and it's behind me, even though at least two convictions * * * I really didn't do." It can hardly be said, under these circumstances, that the outcome would clearly have been different but for the alleged error.

{¶ 20} Accordingly, Gore's third assignment of error is not well-taken.

{¶ 21} The judgment of the Erie County Court of Common Pleas is hereby affirmed. Costs of this appeal are assessed against appellant pursuant to App.R. 24(A).

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE