

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

State of Ohio

Court of Appeals No. S-14-037

Appellee

Trial Court No. 14CR121

v.

John W. Smith, II

DECISION AND JUDGMENT

Appellant

Decided: May 15, 2015

* * * * *

Thomas L. Steirwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Timothy F. Braun, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, John W. Smith II, appeals the June 25, 2014 judgment of the Sandusky County Court of Common Pleas sentencing him to a five-year prison term following his conviction of unlawful sexual conduct with a minor. For the reasons that follow, we affirm the trial court judgment.

I. Background

{¶ 2} Smith was indicted on March 21, 2014, on one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A)(4), a felony of the third degree. In a companion case involving the same victim—Sandusky County case No. 14 CR 53—Smith was charged with importuning with a telecommunication device a victim under the age of thirteen. On May 13, 2014, Smith and the state reached an agreement whereby Smith would enter a plea of guilty in exchange for the state’s dismissal of case No. 14 CR 53. The state also agreed to remain silent at sentencing. The court accepted Smith’s plea, finding it had been made knowingly, voluntarily, and intelligently, and referred the matter for a presentence investigation.

{¶ 3} On June 24, 2014, the trial court sentenced Smith to the maximum prison term of five years, a mandatory five-year term of post-release control, and court costs, and Smith was designated a Tier II sexual offender pursuant to R.C. 2950. Smith appealed the court’s judgment, journalized June 25, 2014, and assigns the following error for our review:

THE MAXIMUM SENTENCE WAS NOT IMPOSED
LAWFULLY BY THE TRIAL COURT.

II. Law and Analysis

{¶ 4} In Smith’s sole assignment of error, he argues that the trial court erred in imposing the maximum sentence of incarceration. Smith contends that the trial court was guided by personal opinion rather than the statutory guidelines.

{¶ 5} As an appellate court, we review felony sentences pursuant to R.C. 2953.08(G)(2). *State v. Goings*, 6th Dist. Lucas No. L-13-1103, 2014-Ohio-2322, ¶ 20. We may increase, modify, or vacate and remand a judgment only if we clearly and convincingly find that: (1) “the record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant,” or (2) “the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2).

{¶ 6} None of the statutes listed in the first prong of R.C. 2953.08(G)(2) are applicable, so we turn to the second prong: whether “the sentence is otherwise contrary to law.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 provides guidance to reviewing courts in determining whether a sentence is contrary to law. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 15. In *Kalish*, the court determined that the sentence at issue was not contrary to law where the trial court considered the R.C. 2929.11 purposes and principles of sentencing, considered the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a sentence within the statutory range. *Id.*

{¶ 7} As described in R.C. 2929.11(A):

The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the

offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.

“In order to achieve those purposes, the court must consider the need for incapacitating the offender, deterring future crime, rehabilitating the offender, and making restitution.” *State v. Foster*, 10th Dist. Franklin No. 12-AP-69, 2012-Ohio-4129, ¶ 11, citing R.C. 2929.11(A). The sentence must be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” *Id.* at ¶ 12, quoting R.C. 2929.11(B).

{¶ 8} The sentencing court must also consider the seriousness and recidivism factors set forth in R.C. 2929.12 in determining the most effective way to comply with the purposes and principles of sentencing. *Id.* at ¶ 13. The statute identifies a list of factors for the court to consider. R.C. 2929.12(A) permits the court to consider additional factors relevant to achieving the purposes and principles of sentencing.

{¶ 9} We begin by observing that R.C. 2907.04(A)(4) is a third degree felony sex offense punishable by a prison term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months. R.C. 2929.14(A)(3)(a). Smith’s sixty-month prison term was within the statutory range. Likewise, the five-year term of post-release control ordered by the court was mandatory under R.C. 2967.28(B)(1), and was therefore, properly applied.

{¶ 10} Turning to the R.C. 2929.11 and 2929.12 considerations, Smith argues that the trial judge relied solely on his personal opinion in crafting Smith’s sentence rather than properly considering the R.C. 2929.11 purposes and principles of sentencing and the R.C. 2929.12 seriousness and recidivism factors. He contends that because the judgment entry is silent on the two statutes, the trial court failed to consider them. While Smith concedes that at the sentencing hearing, the trial court referenced the purposes of felony sentencing, specifically the need to protect the public and incapacitate the offender, he claims that it did not balance public protection against the possibility of minimum sanctions that accomplish the same purpose.

{¶ 11} Where the record is silent, there is a presumption that the trial court gave proper consideration to R.C. 2929.11 and 2929.12. *State v. Adams*, 37 Ohio St.3d 295, 297, 525 N.E.2d 1361 (1988); *State v. Rutherford*, 2d Dist. Champaign No. 08CA11, 2009-Ohio-2071, ¶ 34-35. It is up to the defendant to rebut that presumption. *Rutherford* at ¶ 34-35.

{¶ 12} Here, the trial court ordered a presentence investigation (“PSI”) and received a PSI report. The court’s statements at the sentencing hearing make clear that it read and considered that report. According to the PSI, the victim was the 13-year-old child of Smith’s girlfriend. This case came to the attention of law enforcement when the victim’s father found inappropriate text messages between Smith and the victim. Smith

maintained that his sexual relationship with the victim was consensual and was initiated by the victim. Both the victim and her mother became pregnant by Smith. Smith also has a six-year-old child with another woman.

{¶ 13} The trial court noted that Smith's record began as a juvenile and that at 34 years old, Smith had accumulated a list of 38 prior offenses identified in the PSI. The court noted that one such offense was for failure to support his six-year-old child. The court remarked at the havoc created by Smith by bringing two more children into the world. The trial court articulated that it arrived at Smith's sentence based on Smith's criminal history, the serious nature of the offense, and the court's obligation to protect the public. Significantly, Smith was on community control when he was charged with the present offense.

{¶ 14} Smith points to a number of facts that he believes should have resulted in a more lenient sentence: his prior offenses show a pattern of drug and alcohol abuse; he sought inpatient treatment and counseling after his indictment; he is a high school graduate with an associate's degree; he is a member of the Ironworkers Union Local 55 and was gainfully employed at the time of the offense; he has no prior offenses involving children; and this was his first sex offense.

{¶ 15} The facts the trial court had before it and as set forth in Smith's PSI demonstrate conduct that is more serious than conduct normally constituting the offense (R.C. 2929.12(B)). They also demonstrate a likelihood that Smith will commit future

crimes (R.C. 2929.12(E)). The facts before the court certainly did not lend themselves to a finding that Smith's conduct was less serious than conduct normally constituting the offense (R.C. 2929.12(C)) or that he is unlikely to commit future crimes (R.C. 2929.12(E)). We believe that these considerations are reflected in the trial court's statements at sentencing and in the sentence it imposed. Accordingly, although it would have been ideal for the trial court to have specifically articulated that it considered the relevant statutes, we find no indication that it failed to do so.

{¶ 16} We find Smith's sole assignment of error not well-taken.

III. Conclusion

{¶ 17} Having found no error in the trial court, we affirm the June 25, 2014 judgment of the Sandusky County Court of Common Pleas. Pursuant to App.R. 24, Smith is ordered to pay the costs of this appeal.

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.

Thomas J. Osowik, J. _____

JUDGE

Stephen A. Yarbrough, P.J. _____

JUDGE

James D. Jensen, J. _____
CONCUR.

JUDGE

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