

[Cite as *State v. Bonnell*, 2009-Ohio-2721.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91785**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**JASON BONNELL**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-496628

**BEFORE:** Stewart, P.J., Boyle, J., and Sweeney, J.

**RELEASED:** June 11, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Jason Bonnell, pleaded guilty to a fourth degree felony count of endangering a child, admitting that he recklessly created a substantial risk to the health and safety of a six-month-old child who suffered permanent brain damage from shaken baby syndrome. The court sentenced him to a four-year term of incarceration. Bonnell complains that the trial judge showed a demonstrable animus toward him prior to sentencing, that defense counsel should have asked the trial judge to recuse herself based on that bias, and that the sentence was disproportionate to the offense. We find no error and affirm.

I

{¶ 2} Bonnell first argues that he was denied a fair sentencing before an impartial judge because the trial judge was heard to refer to him as a “monster” in off-the-record proceedings before sentencing.

{¶ 3} Although a trial judge must remain fair and impartial at all times, we see nothing in the record to show that the trial judge in this case lacked the impartiality necessary to sentence Bonnell. To support his theory of bias, Bonnell cites to remarks made by defense counsel during the sentencing hearing. Counsel stated:

{¶ 4} “And respectfully, Judge, I have to address a comment made by your Honor in the characterization of Mr. Bonnell as a monster. And while I certainly

respect the Court, and the Court knows that very well, I feel that the evidence in this case just doesn't support that characterization."

{¶ 5} The judge did not acknowledge these remarks.

{¶ 6} Even if we assume without deciding that the record sufficiently shows that the trial judge referred to Bonnell as a "monster" prior to sentencing (the judge's failure to contradict defense counsel's assertion is telling), that characterization does not prove that the judge was biased or impartial. Canon 3 of the Code of Judicial Conduct states that "[a] judge shall perform the duties of judicial office impartially and diligently." The term "bias or prejudice," when used in reference to a judge, "implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, paragraph four of the syllabus.

{¶ 7} That the trial judge had formed an opinion on Bonnell's character prior to sentencing is of no significance given the amount of information available to the judge about Bonnell and the case. Even though there had been no trial because Bonnell chose to plead guilty, there were several pretrials at which the trial judge presumably became acquainted with the facts supporting the indictment. The judge also had the benefit of a presentence investigation

report and a sentencing memorandum from Bonnell. The record includes the state's production of medical records and interviews with Bonnell in which the underlying facts of the incident giving rise to the victim's shaken baby syndrome were set forth in detail.

{¶ 8} The judge's access to all of these materials immediately prior to sentencing undoubtedly created in her mind an initial impression on Bonnell's character and his prospects for rehabilitation. The judge should have kept that impression to herself prior to pronouncing sentence rather than open herself to the kind of complaint raised in this appeal. But apart from her remark about Bonnell being a "monster," the judge offered no other indication of bias or prejudice against him during the sentencing hearing. The judge allowed both defense counsel and Bonnell to address the court without interruption or commentary. The judge conducted the sentencing hearing without making any personal comments or references to Bonnell's character.

{¶ 9} The judge's off-the-record remark in the presence of defense counsel was unfortunate, but there is nothing in the record to show that the judge acted from personal animosity when imposing the sentence. The judge did not impose the maximum sentence, so it cannot be said that her personal characterization of Bonnell's conduct resulted in a sentencing that was inherently unfair to Bonnell.

{¶ 10} Bonnell next argues that trial counsel was ineffective for failing to ask the trial judge to recuse herself following the off-the-record “monster” remark.

{¶ 11} To show ineffective assistance of counsel, Bonnell must first establish that counsel’s performance was deficient by showing that counsel committed errors so serious that he or she was not, in effect, functioning as counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Second, Bonnell must demonstrate that these errors prejudiced his defense such that there exists a reasonable probability that, were it not for counsel’s errors, the outcome of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

{¶ 12} A judge is presumed to be unbiased and unprejudiced over the matters in which she or he presides. *In re Disqualification of Olivito* (1994), 74 Ohio St.3d 1261, 1263. Although we agree that the trial judge should not have voiced her impressions of Bonnell’s character to defense counsel in off-the-record remarks made prior to sentencing, there is no indication that the court’s impressions showed the kind of bias or prejudice that required her recusal. The record does not show that the judge intended to give Bonnell a more severe sentence based on this impression. See, e.g., *State v. Warner [In re Ruehlman]* (1991), 74 Ohio St.3d 1229 (ordering disqualification of trial judge on grounds of bias and prejudice when judge remarked during sentencing that “[i]f the parole board calls me I am going to tell them that you should serve the full three and

one-half years.”). Nor is this a case where the judge imposed sentence because of improper considerations such as Bonnell’s race, national origin, or religious considerations. *State v. Arnett*, 88 Ohio St.3d 208, 218, 2000-Ohio-302. A showing of bias must be compelling. Because defense counsel could only point to an isolated, off-the-record remark by the trial judge, he did not violate an essential duty by failing to request the judge’s recusal.

### III

{¶ 13} Finally, Bonnell argues that the court’s sentence is both contrary to law and an abuse of discretion. He maintains that as a first offender, he was entitled to a presumption in favor of the statutory minimum.

{¶ 14} As required by *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, we review felony sentences to determine whether there is statutory compliance with sentencing and whether the court abused its discretion by imposing sentence. *Id.* at ¶4. Bonnell’s four-year sentence was within the five-year range for third degree felonies, so we only determine whether the court abused its discretion when imposing sentence.

{¶ 15} Bonnell was not entitled to a presumption of the shortest available prison term as a first offender. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the supreme court severed former R.C. 2929.14(B) relating to minimum terms of incarceration. *Id.* at paragraph two of the syllabus. The court was

vested with the discretion to sentence Bonnell to any prison term allowable by law under R.C. 2929.14(A). *Id.* at paragraph seven of the syllabus.

{¶ 16} Bonnell also argues that the court abused its discretion by imposing a four-year sentence because the sentencing guidelines and factors do not justify the length of his sentence. He maintains that he is a first-time offender, showed remorse for the victim's injuries by apologizing to the victim's family and that he completed an adult parenting program.

{¶ 17} In its sentencing journal entry, the court noted that it considered all required factors of the law and that a prison term for Bonnell would be consistent with the purpose of R.C. 2929.11.<sup>1</sup> At oral argument, appellant's counsel insisted that the court did not consider any mitigating factors during the sentencing hearing. However, apart from stating that it considered all applicable factors, the court had no obligation to state in detail what factors it considered when deciding on Bonnell's sentence. *Kalish*, 120 Ohio St.3d at fn.4. As we previously noted, the court had the benefit of a presentence investigation report. It also had access to the medical records provided by the state during discovery and various statements made by the parties to the police and hospital personnel. Finally, the record contains a sentencing memorandum submitted by

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<sup>1</sup>R.C. 2929.11 states: "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender \*\*\*, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."



Bonnell. That sentencing memorandum set forth in detail Bonnell's arguments for receiving a community controlled sanction and included a number of letters sent by Bonnell's friends and family that attested to his good character and prospects for rehabilitation. The court apparently found that the severity of Bonnell's crime, directed as it was toward a baby, outweighed any factors that mitigated punishment. There is no basis for concluding that the court abused its discretion by so concluding.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

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MARY J. BOYLE, J., and  
JAMES J. SWEENEY, J., CONCUR

