[Cite as *State v. Gray*, 2009-Ohio-4200.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91806

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARY GRAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503576

BEFORE: Kilbane, J., Gallagher, P.J., and Blackmon, J.

RELEASED: August 20, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Gary Gray (Gray), appeals the trial court's sentence pursuant to Gray's admission of guilt on multiple counts of sexual battery, in violation of R.C. 2907.03; gross sexual imposition, in violation of R.C. 2907.05; and importuning, in violation of R.C. 2907.07. After reviewing the pertinent law and facts, we affirm.

{¶ 2} On November 20, 2007, a Cuyahoga County Grand Jury returned an 80-count indictment against Gray for sexual battery, unlawful sexual conduct with a minor, importuning, and gross sexual imposition for repeatedly molesting girls in his charge. The victims attended a children's karate class at Gray's Karate for Kids, a martial arts studio that Gray owned and operated in North Royalton, Ohio.

{¶ 3} On April 2, 2008, Gray pled guilty to 38 counts of sexual battery, one count of gross sexual imposition, and one count of importuning.

{¶ 4} On June 23, 2008, the trial court sentenced Gray to a total of 12 ½ years of incarceration.

{¶ 5} Gray appeals, raising one assignment of error for our review.

> **"The trial court abused its discretion by considering inappropriate and prejudicial matters outside the record when imposing sentence."**

Standard of Review

{¶ 6} Both the State and Gray's counsel submitted sentencing memoranda to the court. Because Gray's counsel did not object to admission of the State's memorandum at the sentencing hearing, we review this assignment of error under a plain error analysis. See Crim.R. 52(B). An appellate court will take notice of plain error with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Plain error does not exist unless it can be said that, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Biros*, 78 Ohio St.3d 426, 1997-Ohio-204.

Analysis

{¶ 7} The appellant argues in essence that the trial court considered conduct that Gray was neither charged with nor convicted of when it imposed its sentence; specifically, that Gray was under federal investigation for possession of child pornography on his home computer at the time of the plea and sentence in the instant matter. In support of his arguments, Gray points to the State's sentencing memorandum, which stated in part that Gray possessed child pornography on his home computer–a fact neither charged nor proven in the instant case. Gray argues that the trial court abused its

discretion when considering this information, and that its sentencing decision was influenced by it.

{¶ 8} Putting aside for the moment that it was entirely lawful for the trial court to consider this fact, the record reflects that the trial court also considered all the pertinent sentencing factors under R.C. 2929 et seq. in making its determination, including the fact that Gray was a mentor, teacher, coach, and in short, a person who was in a position of trust with children of tender years when it stated:

> **"What I gather from this is you've basically, I think, left [sic]– have led a double life. You took your position as a teacher and mentor and nurtured this twelve-year-old girl to fulfill your sick desires, quite honestly. You're an adult. You don't fall in love or tell a twelve-year-old you love her, much less have physical contact with her. That's not right. You have a personality or character flaw, because this was not an isolated incident of a lapse in judgment. This was a pattern of misconduct over a period of several years. When you throw in the fact that you're downloading child pornography on your computer just reaffirms what I feel is going on here. You're the proverbial wolf in sheep's clothing." (Tr. 47, 48.)**

{¶ 9} Gray neglects to mention in his arguments that his plea in the instant matter was negotiated in part because of that parallel federal investigation. At the sentencing hearing, Gray's counsel acknowledged that his client was under federal investigation for possessing child pornography, and stated: "We ask the court to recognize that these are the first criminal offenses and that he's plead [sic] guilty to more charges as a result of wishing to globally resolve any federal charges." (Tr. 43.) Therefore, Gray's own counsel acknowledged the influence of the alleged conduct on the plea in the instant case. At sentencing, the trial court's consideration of some of the very same acts that were a part of the plea negotiation cannot constitute plain error, especially when those acts are acknowledged by counsel in his statements before the court.

{¶ 10} Gray also cites *State v. Longo* (1982), 4 Ohio App.3d 136, 446 N.E.2d 1145, for the proposition that it is an abuse of discretion to consider inappropriate and prejudicial evidentiary material that clearly impacts the sentencing determination. Id. In *Longo*, the defendant was before the court for sentencing after pleading guilty to carrying a concealed weapon. The sentencing court, however, made several ex parte contacts and conducted its own presentence investigation and concluded that the defendant was involved in an organized car theft ring. The defendant had never been charged or convicted of such a crime. This court reversed, noting that the lower court's

"persuasion, on matters not charged or investigated, shaped its decision." Id. at 141.

{¶ 11} We find the facts in *Longo* are distinguishable from the case sub judice. First, as noted in *Longo*, the trial court has broad discretion in sentencing within statutory limits. Id. Second, in *Longo*, the trial court's "extramural" actions in conducting its ex parte investigation "went beyond any defensible limit." Id. No such facts are present here, as Gray concedes in his brief. The trial court did not conduct any ex parte investigation into the facts of this case, but relied on what the parties submitted on the record. As such, *Longo* is inapplicable to the present case.

{¶ 12} Further, we note that this court has previously rejected similar arguments in cases of this nature. See *State v. Edwards*, Cuyahoga App. No. 89181, 2007-Ohio-6068. In *Edwards*, as in the case sub judice, the trial court relied, in part, upon uncharged offenses of other sexual conduct against minors when sentencing the defendant. This court affirmed the sentence, stating:

> **"'A court may consider a defendant's uncharged yet undisputed conduct when determining an appropriate sentence. *State v. Scheer*, 158 Ohio App.3d 432, 2004-Ohio-4792, 816 N.E.2d 602, citing *State v. Steward*, 4th Dist. No. 02CA43, 2003-Ohio-4082; *State v. Shahan*, 4th Dist. No. 02CA63, 2003-Ohio-6945 (stating that as in sentencing hearings, the Rules of Evidence do not apply to sexual predator determination hearings, so the trial court may**

consider reliable hearsay contained in a PSI.).'" *Edwards* at ¶6.

{¶ 13} Lastly, the record is clear that the uncharged conduct in this case was only one factor among many the trial court considered in its sentencing decision under R.C. 2929 et seq. Ohio law is clear that "[u]nindicted acts or not guilty verdicts can be considered in sentencing without resulting in error when they are not the sole basis for the sentence. *State v. Williams*, Cuyahoga App. No. 79273, 2002-Ohio-503." Therefore, we conclude that the trial court did not commit plain error in considering these facts in its sentencing decision.

{¶ 14} For the foregoing reasons, Gray's sole assignment of error is overruled.

{¶ 15} Accordingly, the judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
PATRICIA A. BLACKMON, J., CONCUR