

[Cite as *State v. Lycans*, 2010-Ohio-2780.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93480

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES LYCANS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515313

BEFORE: Celebrezze, J., McMonagle, P.J., and Dyke, J.

RELEASED: June 17, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, James Lycans (“appellant”), appeals his sentence imposed by the trial court. Based on our review of the record and pertinent case law, we affirm.

{¶ 2} On September 12, 2008, appellant was charged in a six-count indictment with two counts of rape in violation of R.C. 2907.02(A)(2), three counts of gross sexual imposition in violation of R.C. 2907.05(A)(1), and one count of kidnapping in violation of R.C. 2905.01(A)(4) with a sexual motivation specification. As the result of a plea deal, appellant pled guilty to one count of attempted rape, a second-degree felony; the remaining counts were nolle.

{¶ 3} On May 18, 2009, the trial court sentenced appellant to seven years in prison. The trial court also informed him that he would face a mandatory five-year period of postrelease control and would be required to register as a Tier III sex offender pursuant to Ohio’s version of the Adam Walsh Act. This appeal followed.

{¶ 4} Appellant presents one assignment of error for our review wherein he argues that his sentence is contrary to law because “the trial court failed to consider whether the sentence was consistent with the sentences imposed for similar crimes committed by similar offenders.”

Law and Analysis

{¶ 5} This court has repeatedly held that “in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal.” *State v. Christinger*, Cuyahoga App. No. 91984, 2009-Ohio-3610, ¶66; *State v. Jordan*, Cuyahoga App. No. 91869, 2009-Ohio-3078, ¶18; *State v. Calvillo*, Cuyahoga App. No. 90146, 2009-Ohio-2024, ¶16. At no point during the May 18, 2009 sentencing hearing did appellant argue that a seven-year sentence was disproportionate to sentences imposed on similarly situated offenders. As such, any argument on this issue was waived.

{¶ 6} Even if appellant had preserved his proportionality argument for appeal, his claim lacks merit. In 2006, the Ohio Supreme Court released its opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, wherein it severed portions of Ohio’s sentencing statutes. Post-*Foster*, appellate courts are to apply a two-step analysis in determining the validity of a sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4. “First, they 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 shall be reviewed under an abuse-of-discretion standard." Id.

{¶ 7} The crux of appellant's argument is that the trial judge failed to consider R.C. 2929.11(B) when imposing his sentence. R.C. 2929.11(B) provides that "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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."

{¶ 8} Although the trial judge did not specifically mention proportionality at the sentencing hearing, she did state that she had "considered all the factors under 2929.11, 12, 13." In addition, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus. Despite appellant's contentions to the contrary, the trial judge indicated on the record that she did, in fact, consider R.C. 2929.11 when sentencing appellant.

{¶ 9} Although appellant argues that his sentence is disproportionate to that imposed upon similarly situated offenders, he "offers no other cases in

which a similarly situated defendant was given a lighter sentence[.]” *Jordan* at ¶19. The goal of felony sentencing is to achieve consistency rather than uniformity. *Calvillo* at ¶15. Since there is no grid in place to ensure identical sentences for various classifications of offenders, consistency is achieved by weighing the factors enumerated in R.C. 2929.11 and 2929.12. *State v. Rabel*, Cuyahoga App. No. 91280, 2009-Ohio-350, ¶15.

{¶ 10} As an appellate court, we are not required to decide whether the lower court “imposed a sentence in lockstep with others, but whether the sentence is so unusual as to be outside the mainstream of local judicial practice. Although the offense[s] may be similar, distinguishing factors may justify dissimilar treatment.” *Id.*, quoting *State v. Dawson*, Cuyahoga App. No. 86417, 2006-Ohio-1083, ¶31.

{¶ 11} There is nothing in the record nor does appellant present any evidence to show that the sentence imposed is “outside the mainstream of local judicial practice.” Appellant pled guilty to attempted rape, a second-degree felony that is punishable by two to eight years in prison. R.C. 2907.02; R.C. 2923.02(E)(1); R.C. 2929.14(A)(2). Since appellant was sentenced within the statutory range and has pointed to no evidence demonstrating that his sentence was violative of Ohio’s sentencing statutes, we cannot find that his sentence was contrary to law.

{¶ 12} Having determined that appellant's sentence was not contrary to law, we are left only to determine whether the trial judge abused her discretion in sentencing appellant to seven years in prison. *Kalish* at ¶4. To constitute an abuse of discretion, the ruling must be must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 13} In this case, the trial judge reviewed the presentence investigation report and the mitigation of penalty report before sentencing appellant. She also read letters and listened to statements from the victim and her mother as well as from members of appellant's family and friends. The trial judge noted on the record that the egregiousness of appellant's behavior was elevated in light of his relationship of trust to the victim.¹

{¶ 14} There is nothing in the record to indicate that the trial judge acted unreasonably, arbitrarily, or unconscionably when sentencing appellant. In reviewing the trial judge's comments at sentencing, it is clear that the statutory purpose was upheld in determining appellant's sentence. The trial judge indicated that she had considered the relevant statutory factors in making her decision, and appellant has presented no evidence that the trial judge abused her discretion. Accordingly, appellant's sole assignment of error is overruled.

Conclusion

{¶ 15} Since appellant did not argue that his sentence was disproportionate at the lower level, he failed to preserve this issue for appeal and his argument was waived. Even if he had preserved his claim for appeal, the trial judge considered the requisite sentencing factors, and appellant has presented no evidence that similarly situated offenders received lighter sentences. After reviewing the record in this case, we cannot find that the trial judge abused her discretion when sentencing appellant. As such, we find no merit to appellant's argument, and his sole assignment of error is overruled.

Judgment 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. 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.

FRANK D. CELEBREZZE, JR., JUDGE

¹The victim was a 13-year-old girl who considered appellant to be her uncle.

CHRISTINE T. McMONAGLE, P.J., and
ANN DYKE, J., CONCUR