[Cite as *State v. Siber*, 2011-Ohio-109.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94882

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FRED SIBER, A.K.A. SIVER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526529

BEFORE: Stewart, J., Rocco, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Fred Siber, a.k.a. Fred Siver ("appellant"), appeals his sentence and assigns four errors for our review. For the reasons stated below, we affirm.

{¶ 2} Appellant was indicted by the Cuyahoga County Grand Jury on 55 counts consisting of illegal use of a minor in nudity-oriented material, pandering sexually-oriented matter involving a minor, and possession of criminal tools. The offenses arose after a search of appellant's laptop

computer found numerous images of child pornography. Appellant entered a plea of guilty to nine fourth degree felony counts of pandering sexually-oriented matter involving a minor, five fifth degree felony counts of illegal use of a minor in nudity-oriented material, and one fifth degree felony count of possession of criminal tools.

{¶ 3} Appellant and the state both filed sentencing memoranda. After a hearing was conducted, during which appellant asked for the imposition of community control, the trial court sentenced appellant to prison for three years and nine months.

{¶ 4} On appeal, appellant raises four assigned errors challenging his sentence and arguing that the sentence is contrary to law and constitutes an abuse of the trial court's discretion. As all four assignments are substantially interrelated, we will address them together.

{¶ 5} Appellate courts review sentences by applying a two-prong approach set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. See *State v. Nolan*, 8th Dist. No. 90646, 2008-Ohio-5595. First, we must determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence to determine whether the sentence is contrary to law. *Kalish* at ¶4. If the sentence is not contrary to law, we then review the trial court's decision under an abuse-of-discretion standard. Id. The term "abuse of discretion"

connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 6} As a result of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." However, the trial court must still consider the sentencing guidelines contained in R.C. 2929.11 and 2929.12, as well as the sentencing statutes that are specific to the case itself. *Kalish* at ¶13. The trial court need not state its consideration of each individual sentencing factor as long as it is apparent from the record that it contemplated the principles of sentencing. *State v. Marshall*, 8th Dist. No. 89551, 2008-Ohio-1632, at ¶9, citing *State v. Watkins*, Lucas App. No. L-05-1336, 2007-Ohio-92.

{¶ 7} "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). The felony sentence imposed should 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." R.C. 2929.11(B).

To achieve the purposes and principles of sentencing set forth in R.C. 2929.11(A) and (B), the court should consider the factors relating to the seriousness of the offense and the recidivism of the offender set forth in R.C. 2929.12. "It is important to note that there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to 'consider' the statutory factors." *Foster* at ¶42.

{¶ 8} In *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, the Ohio Supreme Court explained the felony-sentencing considerations for fourth and fifth degree felonies, stating:

{¶ 9} "Consistent with the sentencing principles set forth in R.C. 2929.11, R.C. 2929.13(B)(1)(a) through (i) sets forth nine factors that a trial court must consider in sentencing an offender for fourth- and fifth-degree felonies. If a trial court does not make any of the findings in R.C. 2929.13(B)(1)(a) through (i), then an offender is sentenced pursuant to R.C. 2929.13(B)(2)(b), and if the court considers it appropriate, community control is the default sentence (except for those offenses identified as mandatory-prison offenses). R.C. 2929.13(B) creates a preference for (but not a presumption in favor of) community control (formerly probation) for lower-level felonies. However, if the trial court makes any of the findings set forth in R.C. 2929.13(B)(1)(a) through (i), then an offender is sentenced under R.C. 2929.13(B)(2)(a). After considering the seriousness and recidivism

factors set forth in R.C. 2929.12, if the court finds that a prison term is consistent with the principles and purposes of felony sentencing and that an offender is not amenable to community control, then the court shall impose a prison term upon the offender. Thus, although it does not preclude the imposition of community-control sanctions, a finding of any of the factors set forth in R.C. 2929.13(B)(1)(a) through (i) weighs against the preference for community control and may justify incarceration." Id. at ¶8 (internal citations omitted).

{¶ 10} One sentencing factor that a trial court must consider pursuant to R.C. 2929.13(B)(1)(f) is whether "[t]he offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code." Since appellant pleaded guilty to nine fourth degree felony sex offenses in violation of R.C. 2907.322 and five fifth degree felony sex offenses in violation of R.C. 2907.323, his convictions weigh against the preference for community control.

{¶ 11} The record reflects that at the sentencing hearing, appellant's counsel argued in favor of imposing community control rather than incarceration. During his argument, counsel addressed each of the seriousness and recidivism factors set forth in R.C. 2929.12 and the felony sentencing considerations set forth in R.C. 2929.13.

{¶ 12} The court stated that it had considered the presentence investigation report, sentencing memoranda from both the state and appellant, and documents submitted to the court under seal. The court informed appellant that although it could see that "he's taken a lot of responsibility, he has spared the community from a trial, he has voluntarily been monitored and he has entered treatment," the court still felt that prison was appropriate since appellant committed a "very serious crime." The court characterized child pornography as "one of the most heinous crimes imaginable" and expressed that "the viewing of each of these images is a revictimization of the children in them." The court acknowledged that the maximum sentence of 19½ years was not warranted, but that a prison term was appropriate given the seriousness of the offenses and the risk to the community.

{¶ 13} The trial court sentenced appellant within the statutory range for each conviction. The court made some of the sentences concurrent to one another and some of them consecutive, as provided for within the statutory framework. In the sentencing entry, the trial court noted that it considered "all required factors under law" and, further, that it found prison to be consistent with the purpose of R.C. 2929.11. Because the sentence is within the permissible statutory range and the court stated it had considered the applicable statutes, we find the sentence is not contrary to law. We also find

that the sentence imposed by the trial court is not unreasonable, arbitrary, or unconscionable. The first two assignments of error are overruled.

{¶ 14} In his third assignment of error, appellant argues that the sentence imposed by the trial court is not consistent with sentences imposed for similar crimes committed by similar offenders. He argues that in many cases in Cuyahoga County, the sex offender received a community control sentence for more serious offenses than those of which he was convicted. He presented the trial court with a list of citations showing child pornography cases in which the sentences ranged from community control to 20-year prison terms. Appellant argues that in most of the cases with community control sentences, the convictions were for second-degree felonies, a much higher degree than his convictions.

{¶ 15} The goal of felony sentencing pursuant to R.C. 2929.11(B) is to achieve "consistency" not "uniformity." *State v. Klepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529. "Simply pointing out an individual or series of cases with different results will not necessarily establish a record of inconsistency." *State v. Gorgakopoulos*, 8th Dist. No. 81934, 2003-Ohio-4341, ¶23. A list of child pornography cases is of questionable value in determining whether the sentences imposed are consistent for similar crimes committed by similar offenders since it does not take into account all the unique factors that may distinguish one case from another. *State v. Smith*, 8th Dist. No. 82061,

2003-Ohio-4062, citing Griffin and Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1.

{¶ 16} For example, in the instant case, the state dismissed 39 second degree felony charges in exchange for appellant's pleading guilty to 16 less serious fourth and fifth degree felony charges. At sentencing, the state presented evidence of the number of pornographic images found on appellant's computer and the disturbing nature of some of those images. There was also evidence that appellant attempted to conceal the evidence by hiding the computer with the incriminating images in a co-worker's car while the police searched appellant's home. Additionally, the court emphasized the fact that appellant had viewed the pornographic images of children similar in age to his own children while he was at home with his young children asleep in adjacent bedrooms. These are unique details that affect sentencing and cannot be determined from a random list of cases.

{¶ 17} We are satisfied from the record that the trial court fashioned a sentence that reflected the seriousness of appellant's behavior and fell within the purposes and principles of felony sentencing. Accordingly, the third assignment of error is overruled.

{¶ 18} In his fourth assignment of error, appellant argues that the trial court erred in imposing consecutive sentences without making the requisite

findings contained in R.C. 2929.19(B)(2)(c) and 2929.14(E)(4)(a)-(c). In *Foster*, the Ohio Supreme Court found those statutory provisions unconstitutional and severed them entirely. Id. at paragraphs one through five of the syllabus. Trial courts are no longer required to make findings or give reasons before imposing consecutive sentences. Id. at paragraph seven of the syllabus. Accordingly, the fourth assignment of error is overruled.

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.

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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR