

[Cite as *State v. Witt*, 2011-Ohio-336.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94800**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**BRANDON WITT**

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-529323

**BEFORE:** Celebrezze, J., Stewart, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** January 27, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Brandon Witt, challenges the sentence meted out for his improper sexual conduct with a minor conviction. After a thorough review of the record and law, we affirm.

{¶ 2} The record in this case is sparse, but the following facts can be gleaned from the paucity. Appellant, along with co-defendant Corey Woodard, met a young female, G.B.,<sup>1</sup> who was 15 years old at the time. The

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<sup>1</sup>The victim is referred to herein by her initials in accordance with this court's established policy.

three wound up going to Woodard's house and having sex. The police became involved, and G.B. informed them that appellant and Woodard had forced or coerced her into having sex with them, a statement that she later retracted.

{¶ 3} On September 30, 2009, appellant was indicted by a Cuyahoga County grand jury on charges of rape, kidnapping, gross sexual imposition, and unlawful sexual conduct with a minor. He agreed to plead guilty to one count of unlawful sexual conduct with a minor and entered his plea on January 6, 2010, with the state agreeing to dismiss the remaining charges. A presentence investigation report ("PSI") was ordered, and a sentencing hearing occurred on February 9, 2010, where appellant was sentenced to a maximum term of five years incarceration, five years of postrelease control, and labeled a Tier II sex offender. Appellant now appeals his sentence arguing three assignments of error.<sup>2</sup>

### **Law and Analysis**

#### **Sentence Contrary to Law**

{¶ 4} Appellant argues that the sentence he received is contrary to law and, therefore, cannot stand. More specifically, he argues that the court improperly based his sentence on a finding that he had committed rape.

{¶ 5} 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

and excised former R.C. 2929.14(E)(4) and former R.C. 2929.41(A). *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶18.<sup>3</sup> Post-*Foster*, appellate courts should 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.<sup>4</sup> “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.*

{¶ 6} In the present case, appellant was convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). This section prohibits one “who is eighteen years of age or older” from engaging in “sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.” Further, when the offender is ten or more years older than the minor, as we have in this case, the offense becomes a third-degree felony. R.C. 2907.04(B)(3). As set forth in R.C.

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<sup>2</sup>Appellant’s assignments of error are contained in the appendix to this Opinion.

<sup>3</sup>This conclusion was recently upheld in *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320, paragraph two of the syllabus.

<sup>4</sup> We recognize that *Kalish* is a plurality opinion and is merely instructive.

2929.14(A)(3), a third-degree felony is punishable by incarceration for a period of up to five years. Appellant's sentence is within the statutory range befitting his crime, as designated by the legislature.

{¶ 7} However, at sentencing, the trial court referenced the fact that appellant was initially charged with rape, but pled only to sexual conduct with a minor, and that the court found evidence of force in the PSI. Appellant claims this is evidence that he was punished for rape, even though that charge was dismissed. Appellant's allegation that the trial court found at least that he had committed rape and sentenced him accordingly is unpersuasive.

{¶ 8} The trial court found that in the range of actions that could constitute unlawful sexual conduct with a minor, this was among the worst forms. The trial court, even though not required, merely indicated to appellant why it was imposing the maximum sentence of five years. The trial court used this factor to determine the seriousness of the offense, along with other permissible factors set forth in R.C. 2929.12, in crafting appellant's sentence as discussed below. See *State v. Huntley*, Hocking App. No. 02CA15, 2002-Ohio-6806, ¶13. It did not base appellant's sentence on a charge not pled to. Therefore, appellant's sentence is not contrary to law.

### **Imposition of the Maximum Sentence**

{¶ 9} While appellant's sentence is not contrary to law, *Kalish* instructs this court to investigate further to determine if the trial court abused its discretion when it imposed sentence.

{¶ 10} To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." *Id.*

{¶ 11} In determining an appropriate sentence, a trial court is guided by the principals set forth in R.C. 2929.11(A) — "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 and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 12} Appellant argues that the trial court based his sentence on a finding that he had actually committed rape. However, the record discloses that the trial court determined that appellant had “previously served a prison sentence,” that he had “failed to respond favorably to sanctions previously imposed,” that he received unfavorable termination from prior postrelease control, that he showed no remorse, and that appellant caused serious psychological harm to the victim, which was exacerbated by her age.<sup>5</sup> The court also noted that, of the range of conduct that could constitute gross sexual imposition, this was the worst form because it involved some element of force or coercion.

{¶ 13} This evidence demonstrates that the trial court did not abuse its discretion when imposing the maximum sentence since it was supported by the purposes and principles set forth in R.C. 2929.11.

### **Inaccuracy within a PSI**

{¶ 14} Appellant also argues that once he brought to the trial court’s attention an alleged inaccuracy contained within the PSI, the court failed to follow the dictates of R.C. 2951.03, and that requires reversal.

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<sup>5</sup> In her victim impact statement, she explained quite poetically that “sometimes I want to talk about it but I can’t explain. So I sit alone like in a corner holding an endless pain.” She also stated she was “kept in the house from nine at night to the morning, ten or 11.”

{¶ 15} R.C. 2951.03 statutorily mandates that before a defendant convicted of a felony offense may be placed under community control sanctions, a PSI must be ordered and submitted to the trial court prior to sentencing. R.C. 2951.03(B)(5) gives defendants a way to challenge perceived inaccuracies contained within the PSI. It gives the trial court two options when comments of defendants, their counsel, or other information introduced allege a factual inaccuracy. A court may “[m]ake a finding as to the allegation” or “[m]ake a determination that no finding is necessary \* \* \* because the factual matter will not be taken into account in the sentencing of the defendant.”

{¶ 16} Prior to the imposition of sentence, appellant alleged that the victim had initially indicated that some sort of force or intimidation was used by appellant, but in later interviews with the police and prosecutors, she said she went along with it and no force was used. Although this court did not review the PSI itself, we did review the transcript of the sentencing hearing where the trial court found, “as I review [the facts] in the P.S.I., nothing that I’ve heard in this court would convince me otherwise that this was certainly unwelcomed, and forced sexual conduct, and contact, and that the defendants certainly, at this point, are without any type of excuse.” The court went on to note, “even if I – the Court was to accept the fact that there was consensual conduct here, there is also adequate evidence within the P.S.I. that there was



unconsented conduct and forced sexual acts with respect to both defendants.”

This is bolstered by the victim’s statement, read in open court, which indicated that she had been kept in the home all night.

{¶ 17} First, while the trial court did not specifically issue findings of fact, the above passage indicates that the court did make a finding as to the alleged inaccuracy contained within the report. Appellant points to *State v. Jackson* (Mar. 30, 2001), Erie App. No. E-00-023, for support where the Sixth District reversed and remanded for a new sentencing hearing after finding that the trial court “quoted the criminal record without addressing the factual accuracy of the report.” That is not the case here. The trial court addressed the alleged inaccuracy and made a finding contrary to appellant’s position.

{¶ 18} Formalistic wording need not be used when it is clear from the record that the court considered the alleged inaccuracy and determined none to exist. See *State v. Hoffman*, Erie App. No. E-03-057, 2004-Ohio-6655, ¶22.

The trial court did not ignore the dictates of R.C. 2951.03. The court considered the allegations of inaccuracy and found none. That is clear in the record.

{¶ 19} Appellant’s assignments of error are 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. 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and  
LARRY A. JONES, J., CONCUR

APPENDIX

Appellant's three assignments of error:

"I. The trial court's sentence was contrary to law."

"II. The trial court abused its discretion in imposing the maximum prison sentence upon defendant."

"III. The trial court erred in disregarding Ohio R.C. §2951.03 in determining whether factual inaccuracy was contained in defendant's pre-sentence report."