

[Cite as *State v. Bokisa*, 2011-Ohio-845.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95293

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID BOKISA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-533433

BEFORE: Boyle, P.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: February 24, 2011

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MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, David Bokisa, pleaded guilty to gross sexual imposition of a minor child under 13 years of age and abduction of a minor child under 13 years of age, with a sexual motivation specification. The trial court sentenced him to five years in prison for each offense and ordered that he serve them concurrently. It is his sentence that he is challenging on appeal. In his sole assignment of error, he claims:

{¶ 2} “The trial court abused its discretion in imposing a sentence which did not

adequately consider the seriousness and recidivism factors listed in the Ohio Revised Code, and which was inconsistent with the principles and purposes of sentencing.”

{¶ 3} Finding no merit to his argument, we affirm.

Standard of Review

{¶ 4} Appellate courts must apply a two-step approach when reviewing a defendant’s sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14. “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.*

R.C. 2929.11 and 2929.12

{¶ 5} There is no question that Bokisa’s sentence is within the statutory limits, and thus, not contrary to law. But Bokisa contends that the trial court erred in sentencing him to a maximum prison term of five years because “its analysis was inconsistent with the principles and purposes of sentencing, and failed to balance the seriousness and recidivism factors” of R.C. 2929.12. Specifically, with respect to R.C. 2929.12, Bokisa argues none of the R.C. 2929.12(D) factors indicate that he is “likely to commit future crimes,” and he further maintains that all of the R.C. 2929.12(E) factors indicate that he is “not likely to commit future crimes.”

{¶ 6} Bokisa was convicted of gross sexual imposition and abduction, both third-degree felonies. The state indicated at the plea hearing that Bokisa’s conviction for gross sexual imposition against a child under 13 years of age carried a presumption for prison, but prison was not mandatory.¹

{¶ 7} When sentencing an offender for a third-degree felony that does not carry a mandatory prison term, the sentencing court has discretion to either impose a definite prison term or community control sanctions. R.C. 2929.13(C). In making this determination, “the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.” *Id.* If the trial court elects to impose prison, however, it shall impose a period of two to five years. R.C. 2929.14(A)(3).

{¶ 8} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that 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.” *Id.* at ¶100.

{¶ 9} The Supreme Court explained in *Kalish* that “[a]lthough *Foster* eliminated

¹R.C. 2907.05(C)(2) provides in part that for gross sexual imposition committed against a child under 13, prison is mandatory if either (1) evidence other than the testimony of the victim was admitted in the case corroborating the violation; or (2) the offender previously was convicted of or pleaded guilty to various other sexual offenses.

mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes.” *Id.* at ¶13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶38.

{¶ 10} R.C. 2929.11 and 2929.12 “are not fact-finding statutes.” *Kalish* at ¶17. “Instead, they serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. Moreover, R.C. 2929.12 explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing.” *Id.* “Therefore, assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster*.” *Id.*

{¶ 11} In *Kalish*, the Supreme Court also made clear that even after *Foster*, “where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.” *Id.* at fn. 4, citing *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.

{¶ 12} R.C. 2929.11(A) provides that when a trial court sentences an offender for a felony conviction it must be guided by the “overriding purposes of felony sentencing.” Those purposes are “to protect the public from future crime by the offender and others and to

punish the offender.” R.C. 2929.11(B) states that a felony sentence “must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” And R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors.

{¶ 13} After reviewing the record in this case, we find that it supports the inference that the trial court properly considered the factors in R.C. 2929.12 and adhered to the purposes and principles of sentencing set forth in R.C. 2929.11.

{¶ 14} After hearing statements from the prosecutor, the victim’s mother and father, Bokisa, Bokisa’s brother, and Bokisa’s attorney, the trial court stated:

{¶ 15} “With all due respect, I never think that a request for leniency is appropriate in a case any more than I think a request for harshness is appropriate. I believe a request for fairness is what any judge should strive to achieve. And fairness in this case, sir, may be different than what you’re looking for.

{¶ 16} “You violated your own. This is against the laws of nature. You shattered the trust and innocence of these two little girls. It’s incalculable what kind of harm they will have but they never, ever deserved this, let alone at the hands of someone that should protect them as well as anyone should from any danger out there or any predator out there. The last person in the world that should victimize a child is their grandparent.

{¶ 17} “***

{¶ 18} “But you didn’t stop and it happened. And while you may need help, sir, the courts are not simply to see what we can do for you. This is a specific proceeding about punishment. And in determining the appropriate sentence in these offenses, the court will follow statutory guidance and strive to reach the goals set forth in 2929.11, which is to protect the public from future crimes by you and to punish you.

{¶ 19} “I respectfully disagree that you are not a threat to society. I believe that your actions show as crystal-clear evidence that you indeed are a threat to the most vulnerable in society.

{¶ 20} “In determining whether you are likely or unlikely to reoffend, which the court must pursuant to 2929.12 in furtherance of the 2929.11 goals, I agree with your attorney, there’s an absence of a criminal history.

{¶ 21} “So often we see people with very serious offenses that have no record. They could be leading a lifelong, law-abiding life and then go out and kill somebody or rape somebody or commit gross sexual imposition and abduction on a little girl.

{¶ 22} “So I certainly accept what your attorney is saying and I will consider the fact that you don’t have a criminal history.

{¶ 23} “With respect to the seriousness factors here, sir, they weigh heavily against. Specifically again pursuant to 2929.12, this time subsection B, the ages of the — the age of

the victim is a statutory sentencing factor that must be considered by the court. When a victim is of tender years, it renders your conduct more serious.

{¶ 24} “Clearly the harm suffered is serious harm. That’s another statutory sentencing factor rendering your conduct more serious.

{¶ 25} “You were in a position of trust with these girls, they should have every reason in the world to believe that you were the last person in the world to do this to them. Your relationship with them facilitated this.

{¶ 26} “What great advantage. How dare you do this to your own? There’s nothing that renders your conduct less serious than conduct that ordinarily constitutes the offense.”

{¶ 27} The trial court then sentenced Bokisa to five years in prison on each offense and ordered that they be served concurrently to each other. It further notified him that he would be subject to five years of postrelease control and that he was automatically labeled a Tier II sex offender.

{¶ 28} We find, based on the record before us, that the trial court carefully considered the factors in R.C. 2929.11 and 2929.12.

{¶ 29} Accordingly, Bokisa’s sentence is neither contrary to law nor an abuse of discretion.

Judgment affirmed.

It is ordered that appellee recover of 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.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR