

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102175

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL SWITZER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-572441-A

BEFORE: Blackmon, J., McCormack, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 23, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Michael Switzer (“Switzer”) appeals his sentence and assigns the following error for our review:

The trial court erred in imposing the maximum prison sentence upon the defendant.

{¶2} Having reviewed the record and pertinent law, we affirm Switzer’s sentence. The apposite facts follow.

{¶3} The Cuyahoga County Grand Jury indicted Switzer for failure to verify his address, a felony of the fourth degree, and failure to provide notice of change of address, a felony of the third degree. Both of these counts were related to Switzer’s duty to register as a sex offender. Switzer entered a plea to the failure to verify his address. The remaining count for failing to provide notice of change of address was dismissed.

{¶4} Sentencing was continued in order for a presentence investigation report to be compiled. After receiving the report, the trial court conducted a hearing and sentenced Switzer to the maximum sentence of 18 months and imposed a \$250 fine.

Maximum Sentence

{¶5} In his sole assigned error, Switzer contends that his 18-month sentence did not comply with the purposes and principles of sentencing set forth in R.C. 2929.11(A) and (B), and that the seriousness and recidivism factors in R.C. 2929.12 also warranted a lesser sentence.

{¶6} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court’s standard for review is not whether the sentencing court abused its

discretion; rather, if this court “clearly and convincingly” finds that (1) “the record does not support the sentencing court’s findings under R.C. 2929.14(C)(4),” or that, (2) “the sentence is otherwise contrary to law,” then we “may increase, reduce, or otherwise modify a sentence * * * or [a reviewing court] may vacate the sentence and remand the matter to the sentencing court for resentencing.”

{¶7} A sentence is not clearly and convincingly contrary to law “where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences a defendant within the permissible statutory range.” *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18. The trial court did all of the above. The trial court stated in its sentencing entry that “prison is consistent with the purpose of R.C. 2929.11” and that it “considered all required factors of law.”

{¶8} Although the trial court has a mandatory duty to “consider” the statutory factors, the trial court is not required to explain its analysis of those factors in a given case. *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924, ¶ 11-12. The trial court’s statement that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes. *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18.

{¶9} Switzer does not claim that the trial court failed to consider R.C. 2929.11 and 2929.12, but disagrees regarding how the trial court weighed the factors. R.C.

2929.11 provides that a sentence imposed for a felony shall be reasonably calculated to achieve two “overriding purposes” of felony sentencing: (1) “to protect the public from future crime by the offender and others” and (2) “to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A), (B). R.C. 2929.11(A) states that “[t]o achieve these 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.” R.C. 2929.11(B) further requires that the sentence imposed 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.”

{¶10} R.C. 2929.12 grants discretion to the trial court to determine the most effective way to comply with the purposes and principles set forth in R.C. 2929.11 when imposing a sentence. However, in exercising this discretion, the court must consider a non-exhaustive list of factors relating to the seriousness of the offender’s conduct and the likelihood of recidivism and may, in addition, consider any other factors relevant to achieving these purposes and principles of sentencing.

{¶11} Switzer argues that his offense was a nonviolent fourth-degree felony and that a lesser sentence would accomplish the overriding purposes and principles of sentencing. However, in imposing the sentence, the trial court stressed that Switzer had

continually ignored his duty to register as a sex offender. This was his fifth violation. Therefore, the recidivism factor weighed heavily in favor of the maximum sentence.

{¶12} A reviewing court cannot review the sentencing judge's exercise of its discretion as "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2); *State v. Akins*, 8th Dist. Cuyahoga No. 99478, 2013-Ohio-5023, ¶ 18; *State v. Thompson*, 8th Dist. Cuyahoga No. 99628, 2014-Ohio-202, ¶ 22. Switzer's argument impermissibly intrudes into the realm of the sentencing court's discretion; it is the sentencing judge who has the "discretion to determine the weight to assign a particular statutory factor." *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793. We, therefore, have no jurisdiction to consider whether the court abused its discretion in how it applied the purposes and principles of felony sentencing in R.C. 2929.11, and the sentencing factors in R.C. 2929.12. *See State v. Szakacs*, 8th Dist. Cuyahoga No. 101787, 2015-Ohio-1382; *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 17.

{¶13} Switzer also contends his sentence was not consistent with sentences for similar crimes committed by similar offenders. R.C. 2929.11(B) requires a sentence to be "consistent with the sentences imposed for similar crimes committed by similar offenders." In *State v. Zaharie*, 9th Dist. Medina No. 09CA0077-M, 2010-Ohio-3542, the court held:

"Consistency, however, does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. [The task of an appellate court is to examine the available data, not to determine if the trial court has imposed a sentence that is in lockstep with others, but to

determine whether the sentence is so unusual as to be outside the mainstream of local judicial practice.] Although offenses may be similar, distinguishing factors may justify dissimilar sentences.”

Id. at ¶ 13, quoting *State v. Marriott*, 2d Dist. Clark No. 2008 CA 48, 2009-Ohio-2323, ¶ 37.

{¶14} Here, no evidence was presented regarding what sentence other offenders who committed similar crimes received or what was their likelihood of recidivism. Thus, there is no evidence that Switzer’s sentence was outside “the mainstream of local judicial practice.” As we stated above, the fact that this was Switzer’s fifth time for not complying with his notification duties as a sex offender, was the reason the trial court imposed the maximum sentence. Moreover, “[a] consistent sentence is not derived from a case-by-case comparison; rather, the trial court’s proper application of the statutory sentencing guidelines ensures consistency.” *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, ¶ 10 (10th Dist.). We have already determined that the trial court properly applied the statutory guidelines in imposing the sentence. Accordingly, Switzer’s sole assigned error is overruled.

{¶15} 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 be sent to 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.

PATRICIA ANN BLACKMON, JUDGE

TIM McCORMACK, P.J., and
ANITA LASTER MAYS, J., CONCUR