[Cite as *State v. Litten*, 2015-Ohio-1250.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JOSEPH LITTEN Appellant	C.A. No. 27414 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2012-07-2103

DECISION AND JOURNAL ENTRY

Dated: March 31, 2015

CARR, Judge.

{¶1} Joseph Litten appeals from his conviction in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} We recounted this case's history in Litten's previous appeal:

> During the early afternoon hours of July 16, 2012, Litten took his daughter, C.S., to visit his 86 year old grandmother, Helen Litten. After arriving at Helen's house, Litten asked his grandmother to accompany him into the other room to look at his ruptured hernia. Litten left C.S. at the kitchen table. Once he was alone with his grandmother, Litten dropped his pants and began fondling himself. He then grabbed onto his grandmother, forced his hand into her underwear, and repeatedly inserted his fingers into her vagina. When the attack ended, Litten left his grandmother in the family room, collected his daughter, and went home. Litten later told the police that he never left his house that day.
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> A grand jury indicted Litten on one count of rape, in violation of R.C. 2907.02(A)(2), and one count of kidnapping, in violation of R.C. 2905.01(A)(4). A jury trial ensued, and the jury found Litten guilty on both counts. The trial court sentenced Litten on both counts and ordered his sentences to run consecutively for a total of 20 years in prison.

State v. Litten, 9th Dist. Summit No. 26812, 2014-Ohio-577, ¶ 2-3. Concluding that Litten's offenses were allied offenses of similar import, we reversed Litten's conviction and remanded the matter for resentencing. *See id.* at ¶ 49-57. We overruled his remaining assignments of error. *See id.* at ¶ 62.

{¶3} On remand, the State elected to have Litten sentenced for rape, and the trial court imposed an 11-year prison term. The trial court informed Litten that he was subject to the same registration requirements as a Tier-III sex offender that it had notified him about at his original sentencing hearing; the court also confirmed with Litten that it had notified him about the registration requirements.

{¶4} Litten has appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED WHEN IT SENTENCED LITTEN TO THE MAXIMUM POSSIBLE PRISON SENTENCE.

{¶5} Litten argues in his first assignment of error that the trial court failed to consider the principles and purposes of sentencing set forth in R.C. 2929.11 and 2929.12 when it sentenced him to the maximum term of imprisonment for rape. Litten also argues that the trial court's imposition of the maximum prison term was an abuse of discretion.

{¶6} This Court utilizes the test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, when reviewing criminal sentences. *See State v. Roper*, 9th Dist. Summit No. 27025, 2014-Ohio-4786, ¶ 30.

> First, [we] 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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.

Kalish at ¶ 26. The Supreme Court of Ohio has held that "[t]rial courts have full discretion to impose a prison sentence within the [applicable] statutory range[.]" *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. In exercising that discretion, "'[a] court must carefully consider the statutes that apply to every felony case[,] * * * includ[ing] R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender.'" *State v. Davison*, 9th Dist. Lorain No. 10CA009803, 2011-Ohio-1528, ¶ 12, quoting *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. "[W]here the trial court does not put on the record its consideration of [Sections] 2929.11 and 2929.12 [of the Ohio Revised Code], it is presumed that the trial court gave proper consideration to those statutes." (Alterations sic.) *State v. Steidl*, 9th Dist. Medina No. 10CA0025–M, 2011–Ohio–2320, ¶ 13, quoting *Kalish* at ¶ 18, fn. 4. "Unless the record shows that the court failed to consider the factors, or that the sentence is strikingly inconsistent with the factors, the court is presumed to have considered the statutory factors if the sentence is within the statutory range." (Internal quotations and citations omitted.) *State v. Fernandez*, 9th Dist. Medina No. 13CA0054-M, 2014-Ohio-3651, ¶ 8.

{¶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 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). R.C. 2929.12 in turn provides that a sentencing judge has discretion to determine the most effective means of complying with the purposes and principles of sentencing. R.C. 2929.12(B) includes factors that suggest that the offense is more serious. R.C. 2929.12(C) includes factors suggesting the offense is less serious.

The recidivism factors—factors indicating an offender is more or less likely to commit future crimes—are set forth in R.C. 2929.12(D) and (E).

{¶8} At the resentencing hearing, the trial court told Litten, "You preyed upon [the victim]. You called to make sure she was alone. You actually brought your daughter and had her in the next room while this happened and then attempted to have your daughter to cover up for you on this offense. The [c]ourt does not feel even 11 years adequately addresses your conduct in this case." The trial court also noted that Litten's victim was his 86-year-old grandmother and that, despite DNA evidence supporting his conviction, Litten denied committing the offense. The trial court also heard from the State about Litten's criminal history, which included "M1 ag (sic) menacing, F5 forgery and two F2 burglaries from 1999. And then a handful of misdemeanors since then, tampering with coin machines, passing bad checks, domestic violence, ag (sic) menacing, and littering from a vehicle."[1]

{¶9} Litten argues that the record demonstrates that the trial court failed to consider the principles and purposes of sentencing when it imposed the maximum prison term because the trial court did not mention the statutes during his resentencing hearing and because certain factors would weigh against imposing the maximum prison term. Specifically, Litten points to his criminal history, arguing that he had no convictions related to violence. He also argues that other forms of rape could be considered worse than the digital penetration that occurred in this case. However, as the trial court noted, the victim in this case was Litten's 86-year-old grandmother and Litten denied committing the crime—i.e., did not express remorse. *See* R.C. 2929.12(B)(6) ("The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the

[1] Litten disputed the burglary charges, telling the court that he had committed those offenses when he was 13 and that the juvenile court had reduced the level of the offense.

offender's conduct is more serious than conduct normally constituting the offense: * * * [t]he offender's relationship with the victim facilitated the offense."); R.C. 2929.12(D)(5) ("The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes: * * * [t]he offender shows no genuine remorse for the offense."). Furthermore, the trial court noted the evidence indicating that the attack was premeditated, which would readily fall under the penumbra of "any other relevant factors" that R.C. 2929.12 permits a sentencing court to consider.

{¶10} Regarding his criminal history, Litten has not disputed the accuracy of the prosecutor's summary other than telling the court that the burglary charges had been reduced in the juvenile court. Under the circumstances, we cannot say that his criminal history would weigh in favor of a lesser sentence as there were a number of convictions, including one for domestic violence. *See* R.C. 2929.12(D)(2) (having a history of criminal conviction and juvenile adjudications is a factor indicating that the offender is likely to commit future crimes).

{¶11} In light of the record in this case and the arguments advanced by Litten on appeal, we cannot say that Litten has overcome the presumption that the trial court considered R.C. 2929.11 and R.C. 2929.12, nor can we conclude that the trial court abused its discretion in imposing the maximum prison term. Accordingly, Litten's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT DID NOT INFORM LITTEN OF HIS SEX OFFENDER REGISTRATION DUTIES.

{¶12} Litten argues in his second assignment of error that the trial court failed to comply with R.C. 2950.03 and 2929.19(B) because it confirmed that he had previously received the

information regarding his duties to register as a Tier-III sex offender rather than notifying him again in full.

{¶13} R.C. 2950.03(A)(2) provides,

> Each person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense and who has a duty to register pursuant to section 2950.04 or 2950.041 of the Revised Code * * * shall be provided notice in accordance with this section of the offender's * * * duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and of the offender's duties to similarly register, provide notice of a change, and verify addresses in another state if the offender resides, is temporarily domiciled, attends a school or institution of higher education, or is employed in a state other than this state. The following official shall provide the notice required under this division to the specified person at the following time:
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> * * * [I]f the person is an offender who is sentenced on or after January 1, 2008 for any offense, * * * the judge shall provide the notice to the offender at the time of sentencing.

Pursuant to R.C. 2950.03(B)(1)(a),

> [the] judge shall require the offender to read and sign a form stating that the offender's duties to register, to file a notice of intent to reside, if applicable, to register a new residence address or new school, institution of higher education, or place of employment address, and to periodically verify those addresses, and the offender's duties in other states as described in division (A) of this section have been explained to the offender. If the offender is unable to read, the * * * judge shall certify on the form that the official, designee, or judge specifically informed the offender of those duties and that the offender indicated an understanding of those duties.

Similarly, R.C. 2929.19(B)(3)(a)(ii) requires the sentencing court to "include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender[] and * * * [to] comply with the requirements of section 2950.03 of the Revised Code if * * * [t]he offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense."

{¶14} At the resentencing hearing, the trial court made the following statement: "I don't know that I need to once again reiterate that you are declared a Tier III[2] sex offender with lifetime registration requirements. We had previously given you all of that information; is that correct?" Litten responded in the affirmative, and the trial court moved on to notify him about post-release control.

{¶15} On appeal, Litten argues that the trial court committed reversible error by not engaging in the more thorough notification required by R.C. 2950.03. However, Litten has not cited any authority to support this proposition. To be sure, a trial court must comply with R.C. 2950.03 and give the required notifications. However, the clear intention of R.C. 2950.03 is for a defendant to be notified of his or her registration requirements as a Tier III sex-offender, and Litten did receive that notification, albeit at his original sentencing hearing. Litten has not suggested that the prior notification was deficient in any way, either in his first appeal or in this appeal, or otherwise explained how the trial court not repeating the notification affected his substantial rights. *See* Crim.R. 52(A)("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). Thus, even assuming for the sake of argument that the trial court should have engaged in a more thorough exchange with Litten at his resentencing hearing, we conclude that any such error was harmless in light of the previous notification. *See also State v. Kase*, 187 Ohio App.3d 590, 2010-Ohio-2688, ¶ 28 (7th Dist.) (concluding that no reversible error occurred when court gave the sexual offender registration notification after accepting the offender's guilty plea and did not re-notify the offender at the subsequent sentencing hearing).

[2] At this point, Litten's counsel and the assistant prosecutor both interjected "Yes."

{¶16} Accordingly, Litten's second assignment of error is overruled.

III.

{¶17} Litten's assignments of error are overruled, and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

EDWARD M. HEINDEL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.