[Cite as *State v. McGowan*, 2015-Ohio-1804.]

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

STATE OF OHIO Appellee v. LARRY MCGOWAN Appellant	C.A. No. 27092 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 12 12 3401

DECISION AND JOURNAL ENTRY

Dated: May 13, 2015

WHITMORE, Judge.

{¶1} Appellant, Larry McGowan, appeals from his prison sentence of 11 years for rape under R.C. 2907.02(A)(2), a felony of the first degree. We affirm.

I

{¶2} Mr. McGowan pled guilty to rape under R.C. 2907.02(A)(2), a first-degree felony. The trial court found Mr. McGowan guilty of rape on September 3, 2013. The court dismissed sexually violent and repeat violent predator specifications. The court sentenced Mr. McGowan to 11 years in prison, the maximum sentence.

{¶3} This is a reopened appeal. In his original appeal, Mr. McGowan challenged his sentence to the maximum prison term of 11 years. This Court affirmed because the pre-sentence investigation ("PSI") report and psycho-sexual evaluation of Mr. McGowan were not in the record, and the Court was obliged to assume regularity in the sentencing. *State v. McGowan*, 9th Dist. Summit No. 27092, 2014-Ohio-2630, ¶ 7. This Court then denied Mr. McGowan's motion

to reconsider. The Court granted Mr. McGowan's motion to reopen the appeal on September 29, 2014 because, although Mr. McGowan's counsel had moved to include the PSI report in the record (and the trial court did so order), the report and other sentencing items were not included in the record transferred from the trial court. The PSI report is now in the record.

{¶4} There was no recommendation as to sentence at Mr. McGowan's plea hearing. The parties were free to argue sentence.

{¶5} At the sentencing hearing, the prosecutor emphasized Mr. McGowan's extensive criminal history starting when he was a juvenile. He had 12 prior convictions. Mr. McGowan spent numerous years in prison. He committed the rape to which he pled guilty shortly after his release from prison.

{¶6} The prosecutor stated that DNA results pointed to Mr. McGowan as the perpetrator of three yet uncharged sexual assaults on women living in Cuyahoga County. One victim had a finger shot off.

{¶7} Concerning the rape at issue, the prosecutor highlighted for the trial judge at sentencing that Mr. McGowan strangled the victim so violently that she urinated on herself. As a result of the strangulation, she passed out, falling face-first, causing extensive bleeding. After choking the victim, Mr. McGowan raped her vaginally and anally.

{¶8} The author of the psycho-sexual evaluation described Mr. McGowan as extremely hostile, violent and aggressive. He "is a very selfish individual who has learned to meet his needs through violence and intimidation. He is not concerned with the rights of others, does not show remorse for his actions or a desire to change." The psycho-sexual evaluation stated that Mr. McGowan poses a continuing danger, and there is very little chance for rehabilitation.

{¶9} Mr. McGowan did not speak at allocution.

{¶10} In imposing the maximum allowable sentence, the trial judge noted that there had been no conviction in the cases in Cuyahoga County, notwithstanding the DNA match. Accordingly, the trial judge did not take these offenses into account when formulating Mr. McGowan's sentence.[1] Instead, the trial court considered Mr. McGowan's history as reflected in the PSI report. The trial judge stated, "So what I'm looking at is this man's history that's presented to me, and several things are of note."

{¶11} As to Mr. McGowan's history, the trial judge stressed that Mr. McGowan recently had been released from prison when he committed the rape. The judge noted that the victim was seriously injured apart from the rape, and acknowledged the extent of the violent strangulation involved. The court remarked that first degree felony rape is one of the most serious types of crimes. The trial court was especially concerned with Mr. McGowan's very high risk of future sexually oriented offenses. The trial court further remarked that Mr. McGowan had committed a "string of offenses . . . over time with many incarcerations" and that his egregious conduct in prison had resulted in multiple transfers.

{¶12} The psycho-sexual assessment of Mr. McGowan revealed that he has poor insights about his conduct and how his conduct relates to others, that he is a manipulative individual who tends to be selfish and very hostile at times. Based on the evidence in the case, the trial judge found Mr. McGowan to be "violent and aggressive" and "the worst of the worst" before imposing the maximum sentence.

{¶13} Mr. McGowan now appeals from his sentence, raising two assignments of error for our review.

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[1]Mr. McGowan does not argue on appeal that the trial judge considered the uncharged offenses or that the prosecutor's mention of the uncharged offenses at the sentencing hearing led to error.

II

Assignment of Error Number One

THE TRIAL COURT ERRED WHEN IT ABUSED ITS DISCRETION AND SENTENCED APPELLANT TO THE MAXIMUM PRISON TERM OF ELEVEN YEARS.

{¶14} In his first assignment of error, Mr. McGowan argues that the trial court abused its discretion in imposing the maximum prison term by not considering the fact that Mr. McGowan pled guilty, thus sparing the victim from testifying, and accepting responsibility for his actions. We disagree.

{¶15} In reviewing a felony sentence, this Court follows the two-step approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912.[2] *E.g., State v. Shank*, 9th Dist. Medina No. 12CA0104–M, 2013–Ohio–5368, ¶ 31. First, we "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." *Kalish* at ¶ 26. If the sentence is not contrary to law, then we review the trial court's sentence under an abuse-of-discretion standard. *Id.* An abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

[2]While acknowledging that this Court follows *Kalish*, Mr. McGowan appears to invite the Court to apply a de novo standard of review when reviewing a maximum sentence. We decline, and instead will continue to apply *Kalish* to appeals involving felony sentencing. We recognize, however, that other appellate districts have elected to follow the standard of review set forth in R.C. 2953.08(G)(2). *See, e.g., State v. White*, 1st Dist. Hamilton No. C-130114, 2013-Ohio-4225, ¶ 9; *State v. Rodeffer*, 2d Dist. Montgomery Nos. 25574, 25575, and 25576, 2013-Ohio-5759, ¶ 29; *State v. Fletcher*, 3d Dist. Auglaize No. 2-13-02, 2013-Ohio-3076, ¶ 14; *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903, ¶ 33; *State v. McCormick*, 6th Dist. Lucas Nos. L-13-1147 and L-13-1148, 2014-Ohio-2433, ¶ 20-22; *State v. Wellington*, 7th Dist. Mahoning No. 14 MA 115, 2015-Ohio-1359, ¶ 13; *State v. Kopilchack*, 8th Dist. Cuyahoga No. 98984, 2013-Ohio-5016, ¶ 9-10; *State v. Allen*, 10th Dist. Franklin No. 10AP-487, 2011-Ohio-1757, ¶ 19-21; *State v. Long*, 11th Dist. Lake No. 2013-L-102, 2014-Ohio-4416, ¶ 71; *State v. Waggoner*, 12th Dist. Butler No. CA2013-02-027, 2013-Ohio-5204, ¶ 6.

{¶16} Mr. McGowan does not contest that his 11 year sentence fell within the permitted statutory range, and thus was not contrary to law under the first prong of *Kalish*.[3] His only argument is that the trial court abused its discretion under the second step of the *Kalish* approach by imposing the maximum prison sentence despite his purported display of remorse and acceptance of responsibility as demonstrated by his guilty plea.

{¶17} 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 or more than minimum sentences.[4] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 99. Nonetheless, trial courts are to consider the statutory considerations and factors in the general guidance statutes R.C. 2929.11 and R.C. 2929.12. These two sections apply as a general judicial guideline for every sentencing. *Foster* at ¶ 36; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶18} R.C. 2929.12 lists general factors which must be considered by the trial court in determining the sentence to be imposed for a felony, and gives detailed criteria which do not control the court's discretion but which must be considered for or against severity or leniency in

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[3]The trial court had the option of sentencing Mr. McGowan to a prison term of either three, four, five, six, seven, eight, nine, ten, or eleven years. R.C. 2929.14(A)(1).

[4]*Foster* declared unconstitutional portions of Ohio's felony sentencing statutes that required judges to make certain findings before imposing maximum, consecutive, or more than the minimum sentences. The United States Supreme Court later made it clear, however, that it was constitutionally permissible to require judicial fact-finding as a prerequisite for the imposition of consecutive sentences. *Oregon v. Ice*, 555 U.S. 160 (2009). The Supreme Court of Ohio subsequently acknowledged that the legislature could reenact consecutive sentence finding requirements. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶ 36. The legislature responded by enacting 2011 Am.Sub.H.B. No. 86 ("H.B. 86"). The new legislation, effective September 30, 2011, revived the judicial fact-finding requirement for consecutive sentences, but did not revive the requirement for maximum or more than minimum sentences.

a particular case. The trial court retains discretion to determine the most effective way to comply with the purpose and principles of sentencing as set forth in R.C. 2929.11. R.C. 2929.12.

{¶19} Under R.C. 2929.11(A), 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. To 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(A).

{¶20} Among the various factors that the trial court must consider and balance under R.C. 2929.12 are: (1) serious physical, psychological, or economic harm to the victim as a result of the offense; (2) whether the offender has a history of criminal convictions; (3) whether the offender has not responded favorably to sanctions previously imposed by criminal convictions; and (4) whether the offender shows genuine remorse for the offense. R.C. 2929.12.

{¶21} Regarding the relevant R.C. 2929.12 factors, the trial court in this case had before it ample evidence that Mr. McGowan violently strangled the victim, causing her grievous physical harm apart from the rape. Mr. McGowan had 12 prior convictions. He had not responded favorably to previously-imposed criminal sanctions, as evidenced by the fact that he committed the rape shortly after being released from prison. Moreover, Mr. McGowan continued to engage in egregious misconduct while incarcerated. According to the psycho-sexual evaluation considered by the trial court, Mr. McGowan reportedly received up to 150 disciplinary infractions during his time at various correctional institutions. The court also found, based on the PSI report and psycho-sexual evaluation, that Mr. McGowan was not likely to

respond to rehabilitation, had a high likelihood of recidivism, and did not show remorse for the offense.

{¶22} Mr. McGowan claims that the conclusion in the PSI report that he lacked remorse and did not demonstrate acceptance of responsibility for his actions should have been given little weight. Mr. McGowan contends that this conclusion should be discounted because counsel had instructed him to limit his remarks to evaluators in light of the pending rape charges in Cuyahoga County.

{¶23} This argument rings hollow, however, considering that during the psycho-sexual evaluation Mr. McGowan's lack of remorse and acceptance of responsibility pertained to the rape at issue here – to which he had already pled guilty – and not to the uncharged offenses in Cuyahoga County. Indeed, Mr. McGowan claimed to the evaluators that he did not commit the rape in the instant case, despite his guilty plea. According to the evaluators, Mr. McGowan "did not appear anxious about his upcoming sentencing but rather spoke very matter-of-factly about having to spend ten years in prison and pleading guilty to an offense that he did not commit." Further, the evaluators did not express any problems with Mr. McGowan's cooperation. To the contrary, according to the evaluators Mr. McGowan was "cooperative" and "eager to answer questions." Mr. McGowan "often laughed while talking about his legal history and appeared to enjoy talking about the different correctional institutions in which he was incarcerated."

{¶24} However, Mr. McGowan remained silent at allocution. The trial court could not consider any acceptance of responsibility or remorse evident from Mr. McGowan's own statement.[5]

[5]Although the trial court did not rely on the uncharged assaults concerning the Cuyahoga County victims, uncharged conduct may be considered at sentencing. *State v. D'Amico*, 9th Dist. Summit No. 27258, 2015-Ohio-278, ¶ 6 (citations omitted) (a defendant's uncharged conduct

{¶25} The crux of Mr. McGowan's abuse of discretion argument appears to be that that he indeed showed remorse when he entered a guilty plea in open court, thus obviating the need for the admittedly-traumatized victim to testify, and accepting responsibility for his actions (despite having retracted this admission of guilt during the psycho-sexual evaluation). It certainly is true that a defendant's guilty plea could be a consideration in favor of a lesser sentence. However, even when a guilty plea is entered, a trial court does not abuse its discretion in assessing the relevant factors under R.C. 2929.12 and finding that a defendant's concession of guilt of the offense charged is outweighed by other factors: the severity of harm to the victim; the offender's extensive criminal record and lack of response to previous criminal sanctions; a demonstrated lack of remorse or willingness to change criminal behavior; the likelihood of the offender committing future, similar crimes; and other factors. Thus, there is no basis here to conclude that the trial court abused its discretion in sentencing Mr. McGowan to the maximum allowable prison term.

{¶26} Indeed, the evidence supports that the trial court fully discharged its duty to protect the public from future crime by Mr. McGowan and to punish him in accordance with R.C. 2929.11(A). A trial court does not abuse its discretion by sentencing an offender to as much time as the law allows under the circumstances present in this case. Mr. McGowan's first assignment of error is overruled.

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may be considered in sentencing without resulting in error when it is not the sole basis for the sentence). The prosecutor's statements that DNA tests very strongly indicate that McGowan sexually assaulted these women, shooting the finger off of one of them, did not contribute to any abuse of discretion by the trial court. Mr. McGowan does not raise an argument to the contrary.

Assignment of Error Number Two

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE FROM HIS COUNSEL.

{¶27} In his second assignment of error, Mr. McGowan argues that he received ineffective assistance of appellate counsel who, during his initial appeal, requested that the PSI report and other documents used by the trial court in sentencing be included in the record transferred to this Court, but did not confirm that the documents were, in fact, included in the appellate record.[6] This assignment of error lacks merit.

{¶28} An appellant must show prejudice to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. McGowan cannot demonstrate prejudice, for at least two reasons. First, Mr. McGowan received an adequate remedy for any error by counsel in the initial appeal, because this Court reopened the appeal and now has before it as part of the appellate record the sentencing materials upon which the trial court relied. Second, even with the complete record that includes the documents that the trial court relied upon at sentencing, this Court holds that the trial court did not abuse its discretion in imposing the maximum sentence. Accordingly, Mr. McGowan's second assignment of error is overruled.

III

{¶29} Mr. McGowan's assignments of error are overruled.

Judgment affirmed.

There were reasonable grounds for this appeal.

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[6]Mr. McGowan is represented by the same counsel in this reopened appeal as in the original 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.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

JAMES W. ARMSTRONG, Attorney at Law, for Appellant.

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