ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio

Appellant,

vs.

Susan L Gwynne

Appellee.

Case No. 2017-1506

On Appeal from the Delaware County Court of Appeals. Fifth Appellate District, Case No. 16 CAA 12 0056

BRIEF OF APPELLEE SUSAN L. GWYNNE

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

STATEMENT OF THE FACTS

The appellee does not take exception to the appellant's statement of the case or their statement of facts.

ARGUEMENT

Proposition of Law No. I

R.C. 2953.08(G)(2) does permit an appellate court to review a sentencing court's findings under R.C. 2929.11 and 2929.12.

The Fifth District Court of Appeals was correct when it found that R.C. 2953.08(G)(2) permitted it to conduct an independent evaluation of the considerations set forth in R.C. 2929.11 and R.C. 2929.12 and after review deciding the record does not support the sentence.

The Fifth District Court of Appeals appropriate review of this case started with an analysis of R.C. 2953.08(G)(2). That section specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds that the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14 or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant or the sentence is otherwise contrary to law. The Fifth District then said that the provisions of R.C. 2953.08(G)(2) specifically mention R.C.2929.13, 2929.14(B)(2)(e) and (C)(4) and R.C. 2929.20(I), but is silent as to R.C.2929.11 and 2929.12, the seriousness and recidivism factors. Relying on this Court's decision in *State v. Marcum*, 146 Ohio St.3d 516,2016-Ohio1002 (2016), the Fifth District found it was appropriate to

review those sentences that are imposed after consideration of the factors in R.C. 2929.11 and 2929.12, seriousness and recidivism. This is exactly what the Fifth District did in their decision. They analyzed the record of this case and concluded by clear and convincing evidence that the sentence is contrary to law and they modified it.

The Fifth District accurately analyzed the record and found that a 65 year prison sentence for first felony offence, nonviolent theft charges was plainly excessive and does not comply with the purposes and principals of felony sentencing. The Fifth District went on to accurately analyze the seriousness and recidivism factors outlined in R.C. 2929.12, and again concluded a 65 year sentence was excessive under those criteria.

Using the authority set forth in R.C. 2953.08(G)(3) and applying this Courts instruction as to scope as set forth in *Marcum Id.*, the Fifth District Court of Appeals correctly and accurately concluded by clear and convincing evidence that the trial court's sentencing was excessive and contrary to law.

In their brief the appellant argues that the absence of express authorization within R.C. 2953.08(G)(2) to include R.C. 292911 and R.C. 2929.12 precludes the appellate court from increasing, reducing or otherwise modifying a trial court sentence. This ignores the widespread application of those provisions.

R.C. 2929.11 sets forth the overriding purposes of felony sentencing. There is a

reason the term "overriding" is included. This section sets forth the basic principle for all courts to consider in sentencing. It overrides all sentencing considerations. It would be impossible for any court, trial or appellate not to consider this provision in creating or reviewing a sentence. By its very nature this section is to be included is all sentencing statutes. It was unnecessary for the legislature to include this section by number in R.C. 2953.08(G)(2)(a) to give it effect.

Similarly. R.C.2929.12, seriousness and recidivism factors, are universal criteria that the courts shall consider in fashioning or reviewing sentences. While not titled overriding their application is universal in sentencing.

The appellate suggests that if *Marcum Id.* is upheld all trial courts would be required to journalize by entry the reasons for their sentences. While this is probably a good practice it would not be the result. Appellate review would be, as it has always been, on a finding, from the record, that the sentence is contrary to law by clear and convincing evidence. That would not change.

As the appellant asserts in their brief, sentencing courts are generally in a better position to assess the defendant *vis-à-vis* the sentencing criteria. But when, as in the instant case, the record demonstrates the trial court becomes emotional or clearly imposes a sentence in direct contravention to the purposes and principles of sentencing, a sentence that is otherwise contrary to law appellate review is essential for the interests of justice.

Appellant argues that the sentence of the trial court is not contrary to law and thus not subject to appeal. The Fifth District Court found the sentence was contrary to law in this case. Appellant's position is that if the trial court **considers** the factors enumerated in R.C. 2929.11 and R.C.2929.12 then that is sufficient. That clearly elevates form over substance. Inherent in the consideration of factors is that they are correctly and accurately considered and applied. To act otherwise is to ignore not consider.

In this case before the Court the Fifth District accurately considered the factors and correctly arrived at a decision based on more than merely reciting that they considered the factors. They considered and subsequently applied the factors to arrive at a decision.

This Courts decision in *Marcum Id.* is correct and appropriate. But more importantly the guidelines are expanded beyond the limited scope of the certified question in that case. As the appellant points out in their brief, the application of R.C. 2929.11 and R.C. 2929.12 to R.C. 2953.08(G)(2) in *Marcum Id.* is indeed dictum. But it is very persuasive reasoning.

Since this Court's decision in *Marcum Id.* this Court has remanded a number of cases to follow that decision. See: *State v. Brandenburg* 146 Ohio St.3d 221, 2016-Ohio 2970 (2016); *State v. Overholser* 147 Ohio St.3d 165, 2016-Ohio2969 (2016), *State v. Cormelison* 146 Ohio St.3d 220, 2016-Ohio-2968 (2016), and *State v.*

McGowan 147 Ohio St,3d 166, 2016-Ohio2071 (2016). Further appellate courts from Montgomery, Clark, Clermont, Delaware and Franklin Counties have cited the *Marcum Id.* case with approval. See: *State v. Benlon* 2018-Ohio 2042, 2018 Ohio App, LEXIS 2210, (2018); *State v. Abures* 2018-Ohio-1984, 2018 Ohio App. LEXIS 2136 (2018), *State v. Lumsford* 2018-Ohio-1949, 2018 Ohio App LEXIS 2101** (2018) and *State v. Wilburn* 2018-Ohio-1917. 2018 Ohio App LEXIS 2054 (2018). The *Marcum Id.* decision is well reasoned and accepted by Ohio courts.

Proposition of Law II: When a defendant knowingly, intelligently and voluntarily waives her right to appeal as part of her plea agreement an appellate court still has the right to address the merits of the appeal for the purposes of reviewing the sentence.

Appellant argues that under principles of contract law the appellee is bound by her waiver of right to appeal she signed in the written plea agreement. What appellant fails to consider in this argument is that if contract law applies, then all provisions of contract law apply.

The appellant argues that appellee gave up a right for due consideration. That consideration was, as appellant points out, a reduction of her potential exposure from 320 years in prison to a mere 160 years. The appellee was 56 years old at the time of the sentencing and she obviously gained nothing by this reduction. She would obviously not see the end of either sentence. Contract law has long held that

consideration must be something that is intended to have value. *Borgerding v. Ginocchio* 69 Ohio App 231, 24 Ohio Ops 27 (19). The consideration in this case has no value.

But even beyond that, contract law states that which is plainly implied in the language of a contract is part of it and will be given effect. *Walter v. Steel* l36 Ohio Ops 4, 74 N.E. 571, (19) The appellee waived her right to appeal a legal sentence. The appellee expected, as a condition to her agreement that the trial judge would act in accordance with tenants of the Revised Code. Even appellant would agree that if the trial judge had sentenced the appellee to death, the agreement would not preclude an appeal. The trial judge in this case sentenced the appellee to life in prison. Her agreement does not preclude an appeal.

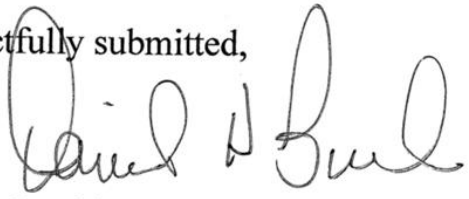
CONCLUSION

At sentencing the trial judge misapplied or ignored statutory criteria that mitigated for a lesser sentence. The Fifth District Court of Appeals corrected this error. The appellant now argues to this Court that the appellate court was without statutory authority to intervene. This argument is without merit The appellate court relied on this Court's prior and accepted rational that it had authority to review a sentence that was outside the purposes of felony sentencing and contrary to law.

The appellant further argues that the appellee waived her right to appeal and that is failtle to the proceeding in the appellate court. This is also without merit. When an appellee waives the right to appeal she assumes the sentencing court will follow the law. That was not done here and this appeal is appropriate.

This court should affirm the decision of the Fifth district court of Appeals in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true copy of the forgoing was served upon Attorney for Appellant (prosecutor) and counsel for both amicus by regular US mail this 19 day of June, 2018.

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APPENDIX

All the material necessary for this Court to decide these issues are included in the appellant's brief and pursuant to S.Ct.Prac.R. 16.03(B)(3) are not duplicated here.