The Supreme Court of Ohio

CASE ANNOUNCEMENTS

September 1, 2022

[Cite as *09/01/2022 Case Announcements #2*, 2022-Ohio-3029.]

APPEALS NOT ACCEPTED FOR REVIEW

2022-0556. State v. McCrory.
Cuyahoga App. No. 110202, 2022-Ohio-942.
Stewart, J., dissents, with an opinion joined by Donnelly and Brunner, JJ.

STEWART, J., dissenting.

{¶ 1} Appellant, James McCrory, seeks to appeal from a decision of the Eighth District Court of Appeals affirming his ten-year prison sentence for rape. On appeal to the Eighth District, McCrory argued that certain statements made by the trial-court judge at his plea and sentencing hearings and in the court's journal entry show that the judge was mistaken in her belief that McCrory's sentence did not require mandatory prison time when, in fact, it did. It is McCrory's position that the judge, mistaken in her belief about the applicability of mandatory prison time, sentenced him to a prison term at the higher end of what was permitted for the crime of rape because she believed that McCrory could be released from prison before he had served the full ten-year sentence. McCrory requested that the appellate court vacate his ten-year sentence and remand the cause to the trial court for resentencing.

{¶ 2} The Eighth District rejected McCrory's argument, affirming his sentence. In doing so, the Eighth District noted that R.C. 2953.08(G)(2) authorizes appellate courts to modify a sentence, or to vacate the sentence and remand the cause for resentencing, only when the appellate court clearly and convincingly finds that (1) the record does not support the trial court's sentencing findings under certain provisions of R.C. Chapter 2929 or (2) the sentence is otherwise contrary to law. Determining that McCrory's argument did not fall into either of these

categories, the Eighth District declined to review McCrory's arguments altogether. The Eighth District further noted that "[r]egardless of what the trial court may have believed, it imposed a proper sentence that was not contrary to law" because the ten-year prison sentence fell within the permissible sentencing range for the crime of rape at the time the offense was committed.[1] 2022-Ohio-842, ¶ 14-15. McCrory asks this court to accept his appeal to determine whether the appellate court had authority to review the merits of his argument and if so, whether the facts warrant reversal of his sentence.

{¶ 3} The scope of appellate review of felony sentences is a matter of great public importance, and the courts of appeals should have this court's further guidance in light of our recent decisions in *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649; *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952; and *State v. Bryant*, ___ Ohio St.3d ___, 2022-Ohio-1878, ___ N.E.3d ___. In each of these decisions, we interpreted the scope of appellate review under R.C. 2953.08, but in doing so, we opened the door to some additional pressing questions that McCrory's appeal could give us the opportunity to answer.

{¶ 4} In *Jones*, this court held that R.C. 2953.08(G)(2) does not allow an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12. *Jones* at ¶ 42. After reviewing the language of R.C. 2953.08 in *Patrick*, we determined that R.C. 2953.08 is not the only basis by which a party may appeal a sentence, *Patrick* at ¶ 15; we noted that the statute explicitly states that its provisions are " '[i]n addition to any other right to appeal' " *id.*, quoting R.C. 2953.08, and that R.C. 2953.02 broadly grants appellate courts authority to review final orders in criminal cases, including sentencing orders, *Patrick* at ¶ 16. Additionally, we determined in *Patrick* that R.C. 2953.08 does not prevent appellate courts from reviewing arguments in sentencing appeals that raise constitutional grounds for reversal. *Patrick* at ¶ 22. Most recently, in *Bryant*, we determined that our decision in *Jones* did not preclude appellate review of the appellant's claim that the trial court impermissibly increased his sentence after an intemperate outburst directed at the trial court. *Bryant* at ¶ 22, 32.

{¶ 5} In this case, the Eighth District focused solely on its appellate-review authority under R.C. 2953.08(G)(2) in determining that it was incapable of considering the merits of

1. This case also presents the interesting procedural question whether the Eighth District should have dismissed McCrory's appeal rather than affirming McCrory's sentence when it declined to answer the assignment of error entirely due to its perceived lack of authority under R.C. 2953.08.

McCrory's claim. Notably, however, McCrory never argued that his appeal was being brought pursuant to R.C. 2953.08—or any other statutory provision. The conclusion that McCrory brought his appeal under R.C. 2953.08 appears to be an assumption made by the Eighth District and one that appellate courts may be making routinely. Whether courts should be making such an assumption in light of this court's decision in *Patrick*, which holds that R.C. 2953.08 is not the sole basis for appealing a sentence, is a unique question presented by this case that this court could answer by accepting the appeal.

{¶ 6} Additionally, the Eighth District seems to take the position that as long as a sentence is within the applicable statutory range for the offense, it does not matter what might have influenced the trial court's decision, because that sentence is never going to be contrary to law and is thus unreviewable under R.C. 2953.08's contrary-to-law provisions. Our recent holding in *Bryant* calls this analysis into question. *See* ___ Ohio St.3d ___, 2022-Ohio-1878, ___ N.E.3d ___, at ¶ 22 (acknowledging that even if a sentence falls within the applicable sentencing range for a specified crime, a trial court could still render a sentence that is contrary to law and is therefore reviewable under R.C. 2953.08).

{¶ 7} Lastly, the Eighth District never questioned whether McCrory's arguments might have raised a constitutional basis for review. On appeal to this court however, McCrory asserts that "[w]hen a trial court sentences a defendant under a misapprehension of the sentencing laws, the defendant is denied due process under the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution." In other words, he frames his appeal as raising a constitutional question; once framed this way, the issue is appealable. *See Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, at ¶ 22. Although McCrory did not explicitly state in his brief to the court of appeals that the trial court's sentence violated his constitutional right to due process, his underlying contention on appeal to the Eighth District and on jurisdictional appeal to this court remains the same: confidence in the appropriateness of the punishment is jeopardized if the record shows that the trial court was misinformed about the nature and length of the sentence it was imposing. Thus, McCrory's claim arguably did then, and does now, raise due-process concerns. *See State v. Arnett*, 88 Ohio St. 3d 208, 217, 724 N.E.2d 793 (2000) (acknowledging that "even a sentence within the limits of a state's sentencing laws may violate due process if the sentencing proceedings are fundamentally unfair").

{¶ 8} Is it error for appellate courts to assume that all felony-sentencing appeals are brought under R.C. 2953.08? Are appellants required to explicitly state the basis by which the appellate court has authority to review their sentences, or is this a question that appellate courts can or must determine on their own? These are pressing questions that this court should address. Accordingly, I dissent from the majority's decision to decline to accept this appeal.

DONNELLY and BRUNNER, JJ., concur in the foregoing opinion.