

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	Case No. 22CA4
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
JAMAL R. BEST,	:	
	:	RELEASED: 06/27/2023
Defendant-Appellant.	:	

APPEARANCES:

Eric J. Allen, Columbus, Ohio for Appellant.

Nicole Coil, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Assistant Washington County Prosecutor, Marietta, Ohio for Appellee.

Wilkin, J.

{¶1} This is an appeal from a Washington County Court of Common Pleas judgment that sentenced appellant, Jamal R. Best (“Best”), to a prison term of 54 months. Best asserts a single assignment of error: “The Trial Court Erred in Sentencing Appellant to Fifty-Four Months in Prison.” The state maintains that Best has failed to show that his sentence is contrary to law, so the trial court’s sentencing entry should be affirmed. After reviewing the parties’ arguments, the applicable law, and the record, we do not find that Best’s sentence is clearly and convincingly contrary to law. Therefore, we affirm the trial court’s sentencing entry.

BACKGROUND

{¶2} The state charged Best with: (1) unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), a third-degree felony; (2) corrupting another with drugs in violation of R.C. 2925.02(A)(4)(a) and (C)(3), a fifth-degree felony; and (3) violating a protection order in violation of R.C. 2919.27(A)(1) and (B)(3)(c), a fifth-degree felony. Best pleaded not guilty.

{¶3} The case went to trial before a jury where it was established that Best initially met the minor, female victim by chance in a cemetery where they had a 15 to 20 minute conversation that included the victim divulging that she was 15 years old. Several weeks later they both coincidentally happened to be at a Dollar General Store at the same time where they exchanged their social media information for Instagram. They began exchanging direct messages through Instagram, and eventually planned to meet in the cemetery again. There, Best, who was 35 years old at the time, had sex with the victim. Best also subsequently violated a protection order that had been issued against him. The jury found Best guilty of Count 1 (unlawful sexual conduct with a minor) and Count 3 (violating a protection order), but not guilty of Count 2 (corrupting another with drugs). The court ordered a presentence investigation (“PSI”) and scheduled a sentencing hearing.

{¶4} At the sentencing hearing the court heard from the state, the victim’s advocate, Best’s counsel, Best, and reviewed Best’s PSI, prior to imposing sentence.

{¶5} The court first addressed the seriousness of the offenses and found they were more serious because of the relationship Best had with the victim, which allowed him to facilitate the crimes. The court further found there was nothing that made the offenses less serious.

{¶6} The court then considered Best's chance of recidivism by looking at (1) his history of "adult convictions", (2) his inability to be "rehabilitated to a satisfactory degree, after his criminal convictions," (3) disturbances/disruptions that he had while in jail, and (4) his ORAS score. The court commented that it found Best's ORAS score "artificially low" because "he's a sex offender," and the ORAS score discussed Best's "financial situation." The court concluded that Best had a high chance of recidivism.

The court continued stating that it

has weighted [sic.] the seriousness and recidivism factors; has considered the overriding purposes of felony sentencing, and that's to protect the public from future crime by the defendant and others, and to punish the defendant using the minimum sanctions the Court determines accomplishes those purposes, without imposing unnecessary burden on the state or local government resources, and having considered the need for incapacitating the defendant, deterring the defendant and others from future crime[.]

Ultimately, the court concluded that a prison term of 54 months for the offense of engaging in unlawful sexual conduct with a minor, and 12 months for the offense of violating the protection order were necessary, with the sentences running concurrently for an aggregate prison term of 54 months.

{¶7} Subsequent to the hearing, the court issued a sentencing entry that again reflected that the court had considered the seriousness and recidivism factors (including Best's ORAS score), as well as the overriding purposes of

felony sentencing. And after considering those factors, the court found that Best was not amenable to community control, and the aggregate prison term of 54 months was necessary.

{¶8} It is the trial court's sentencing entry that Best appeals.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO FIFTY-FOUR MONTHS IN PRISON

{¶9} Best maintains that an ORAS test assesses an offender's likelihood of criminal recidivism. He claims that his ORAS score of 13 was "low[.]" and therefore his chance of criminal recidivism was low. Best argues that the trial court "abused its discretion by interpreting a positive [ORAS score] as a negative." Best effectively claims that his low ORAS score should have warranted a lesser prison sentence, and the court abused its discretion in not imposing a shorter prison sentence. Therefore, Best moves this court to vacate his prison sentence and remand for resentencing.

{¶10} In response, the state argues that an abuse of discretion is not the standard of review of a sentence on appeal under R.C. 2953.08(G)(2). The state claims that a court of appeals can vacate a sentence only if it clearly and convincingly finds that the record does not support the trial court's findings under the applicable sentencing statutes as set out in R.C. 2953.08(G)(2) [R.C. 2929.13(B) or (D), R.C. 2929.14(B)(2)(E) or R.C. 2929.20(I)], or (2) the sentence is contrary to law.

{¶11} The state maintains a trial court has "full discretion" to impose a sentence within the statutory range and is not required to make findings or

reasons in support. Further, an appellate court may not vacate a sentence under R.C. 2929.11 or R.C. 2929.12 because it finds that the trial court's decision to impose that sentence is not supported in the record. The state further maintains that "a sentence is not 'contrary to law' unless it is outside the statutory range or the sentencing court has failed to consider the purposes and principles of felony sentencing or the seriousness and recidivism factors."

{¶12} The state claims that because Best's sentence is within the statutory range for the offense of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and violating a protection order in violation of R.C. 2919.27(A)(1) and (B)(3)(c) and the judge considered both the seriousness and recidivism factors and the purposes and principals of felony sentencing, his sentence is not clearly and convincingly contrary to law. Therefore, the state asserts that we should affirm the trial court sentencing entry.

LAW

1. Standard of Review

{¶13} "When reviewing felony sentences, appellate courts must apply the standard of review outlined in R.C. 2953.08(G)(2)." *State v. Prater*, 4th Dist. Adams No. 18CA1069, 2019-Ohio-2745, ¶ 11, citing *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, ¶ 13. In part, R.C. 2953.08(G)(2) provides:

The appellate court may * * * vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following: (a) 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; (b) That the sentence is otherwise contrary to law.

Thus, our standard of review for a felony sentence is not an abuse of discretion.

Rather, an appellate court may vacate a sentence only “if [it] clearly and convincingly finds either ‘that the record does not support the sentencing court's findings’ under the specified statutory provisions, or ‘the sentence is otherwise contrary to law.’ ” *State v. Sawyer*, 4th Dist. Meigs No. 16CA2, 2017-Ohio-1433, ¶ 14, quoting *State v. Mitchell*, 4th Dist. Meigs No. 13CA13, 2015-Ohio-1132, ¶ 11. “[C]lear and convincing evidence is that measure or degree of proof which * * * will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶14} “This court has held that, generally, a sentence is not contrary to law if a trial court considered the R.C. 2929.11 purposes and principles of sentencing, as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a sentence within the statutory range.” *State v. Bowling*, 4th Dist. Jackson No. 19CA2, 2020-Ohio-813, ¶ 7, citing *State v. Prater*, 4th Dist. Adams No. 18CA1069, 2019-Ohio-2745, ¶ 20.

2. R.C. 2929.11 and R.C. 2929.12

{¶15} “ “[T]rial 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 the minimum sentences.” ’ ” (Ellipses sic.) *State v. Campbell*, 2020-Ohio-3146, 155 N.E.3d 16, ¶ 17 (4th

Dist.), quoting *State v. Davis*, 4th Dist. Highland No. 06CA21, 2007-Ohio-3944, ¶ 41, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 100. “ ‘However, in exercising their discretion, trial courts must still *consider* R.C. 2929.11 and R.C. 2929.12 before imposing a sentence within the authorized statutory range.’ ” (Emphasis sic.) *Id.*, quoting *Davis* at ¶ 41, citing *Foster* at ¶ 105.

{¶16} “ ‘R.C. 2929.11 states that the purpose of felony sentencing “is to protect the public from future crime and to punish the offender using the minimum sanctions to accomplish those purposes without imposing an unnecessary burden on state or local government resources.” ’ ” *State v. Moore*, 4th Dist. Washington No. 20CA35, 2021-Ohio-3149, ¶ 8, quoting *State v. Allen*, 4th Dist. Pickaway No. 19CA31, 2021-Ohio-648, ¶ 13, quoting *State v. Watson*, 4th Dist. Meigs No. 18CA20, 2019-Ohio-4385, ¶ 12. “To achieve those 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).

{¶17} “ ‘R.C. 2929.12 provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.’ ” *Allen*, at ¶ 15, quoting *State v. Watson*, 4th Dist. Meigs No. 18CA20, 2019-Ohio-4385, ¶ 12. In *State v. Snider*, we recognized that the ORAS test is a “tool” that the trial courts may use to assess an offender’s likelihood of recidivism even though it is not expressly

enumerated in R.C. 2929.12(D) or (E), which address recidivism. 4th Dist. Washington No. 20CA5, 2021-Ohio-348, ¶ 24. However, we also recognized that the ORAS test “ ‘ “is a work in progress,” and * * * does not eliminate the discretion of * * * a court * * * evaluating the rehabilitative needs of an offender.’ ” (Second and third Ellipses sic.) *Id.* at ¶ 25, quoting *State ex rel. Semenchuk v. Ohio Adult Parole Auth.*, 10th Dist., Franklin No. 19AP-361, 2019-Ohio-4641, ¶ 20, quoting *State v. Jennings*, 2d Dist. No. 2013 CA 60, 2014-Ohio-2307 at ¶ 28. “Consequently, [we found] ‘ “at most, [an ORAS score] may be one factor in informing a trial court's discretion[.]” ’ ” *Id.*, quoting *State v. Lawson*, 2d Dist. Champaign No. 2017-CA-28, 2018-Ohio-1532, 111 N.E.3d 98, fn. 2 (J. Froelich Concurring), quoting *Jennings*, 2d Dist. Clark No. 2013-CA-60, 2014-Ohio-2307, ¶ 28.

{¶18} “[I]t is the role of the trial court to determine the weight afforded to any particular statutory [sentencing] factors, mitigating grounds, or other relevant circumstances.” *State v. Pitzer*, 4th Dist. Highland No. 19CA23, 2020-Ohio-4322, ¶ 19, citing *State v. Bailey*, 4th Dist. Highland No. 11CA7, 2011-Ohio-6526, ¶ 34, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). On appeal, “[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12.” *State v. Smith*, 4th Dist. Scioto No. 20CA3934,

2022-Ohio-371, ¶ 126, citing *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 42.¹

{¶19} Consequently, we have recognized that a “sentence ‘ ‘cannot be deemed contrary to law because a defendant disagrees with the trial court's discretion to individually weigh the sentencing factors. As long as the trial court considered all sentencing factors, the sentence is not contrary to law and the appellate inquiry ends.’ ’ ” *State v. Layne*, 4th Dist. Adams No. 20CA1116, 2021-Ohio-255, ¶ 24, quoting *State v. Price*, 8th Dist. Cuyahoga No. 104341, 2017-Ohio-533, ¶ 20, quoting *State v. Ongert*, 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, ¶ 12; see also R.C. 2953.08(G)(2) (Expressly states that our standard of review “is not whether the sentencing court abused its discretion.”).

ANALYSIS

{¶20} Best complains that the trial court abused its discretion in rejecting his ORAS score, which pertains to recidivism pursuant to R.C. 2929.12(D) and (E). Best maintains that the trial court should have afforded more weight to his ORAS score, which would have resulted in a shorter prison term.

{¶21} The record in this matter is replete with commentary by the trial judge that the Court complied with its obligation to consider the sentencing factors in R.C. 2929.11 and 2929.12. More specifically, as required by R.C. 2929.12 (D) and (E), it is clear that court considered the factors pertaining to

¹ Similar to appellant herein, the appellant in *Snider*, argued that the trial court abused its discretion in failing to consider his ORAS score. *Snider* at ¶ 23. In *Snider*, we ultimately concluded that the trial court did not abuse its discretion in declining to consider Snider's ORAS score, which could be interpreted as suggesting that an offender may challenge that exercise of discretion on appeal. However, as we now make clear in this decision, the weight that a trial court affords a statutory sentencing factors, like an offender's ORAS score, cannot be challenged on appeal. Consequently, *Snider* should not be interpreted as holding otherwise.

Best's recidivism, including Best's ORAS score. At the sentencing hearing, the court considered: (1) Best's criminal history, (2) Best's "inability to be rehabilitated to a satisfactory degree[.]" and (3) "that [the court] did not believe that Best was genuinely remorseful[.]" The trial court also discussed Best's ORAS score. Merely because Best disagrees with the weight that the trial court afforded each sentencing factor, and in particular his ORAS score, does not cause his sentence to be contrary to law. *Layne*, 4th Dist. Adams No. 20CA1116, 2021-Ohio-255, ¶ 24. This is because "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Smith*, 4th Dist. Scioto No. 20CA3934, 2022-Ohio-371, ¶ 126, citing *Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 42.

{¶22} In addition to considering R.C. 2929.11 and R.C. 2929.12, the court sentenced Best to 54 months in prison, which is within the range of a prison sentence that a court can impose for the offense of unlawful sexual conduct with a minor (12 to 60 months), and properly imposed and notified Best of his post release control. Consequently, even aside from our inability to question the trial court's discretion in weighing the sentencing factors on appeal, Best's sentence is not otherwise contrary to law. See *Bowling*, 4th Dist. Jackson No. 19CA2, 2020-Ohio-813, ¶ 7. Therefore, because Best's sentence is not clearly and convincingly contrary to law, we overrule his sole assignment of error.

CONCLUSION

{¶23} Having overruled Best's assignment of error, we affirm the trial court's sentencing entry.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.