

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1112

Appellee

Trial Court No. CR0201101326

v.

Michael Degens

DECISION AND JUDGMENT

Appellant

Decided: June 1, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Martin E. Mohler and Deborah Kovac Rump, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Michael Degens appeals his sentence by the Lucas County Court of Common Pleas on a conviction of child endangering, a violation of R.C. 2919.22(A) and (E)(2)(c) and a third degree felony. Degens pled guilty to the offense on March 1, 2011. The trial court imposed sentence in a judgment filed on April 29, 2011.

{¶ 2} Degens was originally charged under a June 29, 2010 indictment with two sex offenses. Count 1 of the indictment charged Degens with gross sexual imposition, a violation of R.C. 2907.05(A)(4) and (C) and third degree felony. Count 2 charged Degens with rape, a violation of R.C. 2907.02(A)(1)(b) and (B). Because the victim was a child less than 10 years of age at the time of the alleged offense, the rape charge carried a sentence of life imprisonment. On February 25, 2011, the state filed an information charging appellant with endangering children in violation of R.C. 2919.22(A) and (E)(2)(c). Under a plea agreement, Degens pled guilty to the child endangering charge and a nolle prosequi was entered on both charges in the indictment.

{¶ 3} On the endangering children conviction, the trial court sentenced Degens to imprisonment for four years and ordered appellant to complete sex offender and alcohol and substance abuse treatment programs offered by the Ohio Department of Rehabilitation and Correction. The trial court also ordered that appellant have no contact with the child victim, appellant's daughter, while he participated in the sex offender treatment program.

Appellant asserts four assignments of error on appeal:

Assignment of Error No. I: The trial court abused Degens' right to due process of law by ordering an impossible prerequisite to him qualifying for judicial release. Also by not timely providing notice that the trial court was going to consider the dismissed indictment it precluded his ability to prepare for the sentencing.

Assignment of Error No. II: The sentence as imposed violated Crim.R. 32. It is therefore a nullity or is void.

Assignment of Error No. III: The trial court abused its discretion with the sentence that was imposed and did not follow the applicable rules and statutes. The sentence also violated Degens' right to have a sentence that was not cruel and excessive in violation of the 8th Amendment to the U.S. Constitution.

Assignment of Error No. IV: Degens' trial counsel was ineffective for not properly representing him at the sentencing.

{¶ 4} At the close of the plea hearing, counsel for appellant requested preparation of a presentence investigation report ("PSI"). At sentencing, the trial court advised the parties that it had reviewed the PSI report.

{¶ 5} Both appellant and his attorney spoke at the sentencing hearing. Counsel provided detailed information concerning appellant's past employment and the fact that appellant would begin new work shortly. Two defense exhibits were entered in evidence—an affidavit from Attorney Richard A. Mitchell and a letter from Richard D. Wolff, D.P.M. The Mitchell affidavit reported appellant's loss of employment with the Williams County Soil and Conservation District due to his guilty plea. The letter from Dr. Wolff reported that appellant was scheduled to begin employment with his office shortly after the sentencing hearing.

{¶ 6} Counsel also discussed that appellant recognized that he was an alcoholic and needed treatment for alcoholism. Counsel advised the court that appellant attended regular A.A. meetings for over a year and maintained his sobriety during the period. Counsel advised the court that “nothing could punish Mr. Degens more than the time away from his child” and requested a sentence of probation.

{¶ 7} Appellant admitted to having placed his daughter at risk through his intoxication on numerous occasions and denied that he ever inappropriately touched his daughter as charged in the indictment. He spoke of the need to repair his relationship with his daughter and of its importance to him.

{¶ 8} Appellant’s former spouse and mother of the victim, also spoke at the sentencing hearing. Mother stated that their daughter was abused by appellant and that the child remains afraid of appellant. Mother spoke of the harm caused the child by appellant’s actions. Mother requested that appellant have no contact with their daughter until after he received counseling. Mother also questioned whether appellant remained sober for the period claimed.

{¶ 9} Under Assignment of Error No. I, appellant asserts two arguments. Appellant argues first that the trial court erred and denied him due process of law by conditioning judicial release on his completing the ODRC sex offender treatment. Appellant argues that it is impossible to meet the condition as he does not qualify for the treatment program. Second, appellant argues the trial court erred in failing to provide

him timely notice that the court would consider at sentencing the rape and gross sexual imposition charges that were dropped under his plea agreement.

Judicial Release

{¶ 10} Appellant’s sentence requires appellant to “successfully complete the ODRC Sex Offender Program.” The issue of whether appellant qualified for the ODRC sex offender treatment program was raised at sentencing:

The Court: This is what I’m going to do. I am going to sentence you to prison today. But I’m going to tell you now that I’m going to consider letting you out early, but you are going to have certain obligations and responsibilities while you are there.

And one is that I want you to take part in a sex offender program. And because you have pled to endangering children, which is not a sexually-related offense, it is not – the institution does not have to accept you into that program unless you volunteer.

And so if you want me to consider letting you out, I want you to volunteer for that program. And you’re also going to have to take part in their substance abuse and alcohol treatment program.

{¶ 11} Appellant attached a document to his appellate brief that he identifies as ODRC Rule 67-MNH-12. Appellant argues that the rule limits sex offender treatment to “inmates classified as sex offenders.” Appellant was not convicted of a sex offense. The parties do not dispute that the rule was not submitted to the trial court in proceedings

below. On appeal, appellant claims the rule demonstrates that the trial court erred in conditioning judicial release on performance of an impossible task.

{¶ 12} The state argues that the ODRC rules were not admitted into evidence in the trial court and are not properly part of the record on appeal. The state also argues not only that appellant has not yet applied for judicial release, but also the trial court has not denied judicial release.

{¶ 13} The ODRC rule attached to appellant's brief is not part of the record and may not be considered in this appeal. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. The nature of the appellate process itself precludes consideration of such evidence: "Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *Id.* at 405-406.

{¶ 14} Furthermore, the issue of judicial release is not before this court. This is an appeal from the trial court's sentencing judgment of April 29, 2011. The judgment does not grant, deny, or set any condition for judicial release. Accordingly, we find appellant's claim that the judgment denies him due process of law by ordering an impossible prerequisite for judicial release is without merit.

Failure to Provide Notice that Court Would Consider at Sentencing Charges Dropped Under Plea Agreement

{¶ 15} Appellant also argues that the trial court denied him due process of law by failing to notify appellant before the sentencing hearing that it would consider at sentencing the charges dropped under his plea agreement. Appellant argues that had he received such notice he would have been able to address incorrect conclusions about the dismissed charges and provided additional matter in mitigation.

{¶ 16} We agree with the state that appellant has no basis to claim surprise that a trial court may consider at sentencing charges brought against him but dismissed under a plea agreement. The nature of the PSI report, requested by appellant, placed appellant on notice that the facts related to the charges of gross sexual imposition and rape were presented for court consideration at sentencing.

{¶ 17} The PSI report described how the issue of whether his daughter was a victim of sex abuse by him first arose at her elementary school during a child abuse prevention talk. The report also described the results of an investigation conducted by the Lucas County Children Services to determine whether there had been inappropriate sexual contact and activity between appellant and his daughter. The PSI report also states that appellant had fallen asleep after drinking beer while watching “dirty movies” during approximately ten visits by his daughter.

{¶ 18} The PSI report also stated that appellant denied any inappropriate touching of his daughter and indicated that he pled to the child endangering charge to prevent his

daughter from undergoing the trauma of testifying. The PSI report also stated that appellant's prior criminal record (other than the charges by indictment or information in this prosecution) consisted of a minor misdemeanor conviction on an open container charge in 1994.

{¶ 19} The Ohio Supreme Court has recognized that sentencing courts are “to acquire a thorough grasp of the character and history of the defendant before it.” *State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977). Consideration of arrests for other crimes comes within that function. *Id.* Ohio recognizes that sentencing courts may consider at sentencing charges that were reduced or dismissed under a plea agreement. *State v. Robbins*, 6th Dist. No. WM-10-018, 2011-Ohio-4141, ¶ 9; *State v. Banks*, 10th Dist. Nos. AP-1065, 10AP-1066, and 10AP-1067, 2011-Ohio-2749, ¶ 24; *State v. Johnson*, 7th Dist. No. 10 MA 32, 2010-Ohio-6387, ¶ 26.

{¶ 20} Appellant has not cited any authority to this court that supports the contention that the trial court was required to provide prior notice that it may consider the gross sexual imposition and rape charges that were dismissed under his plea agreement. We find no such authority.

{¶ 21} We find appellant's Assignment of Error No. I not well-taken.

{¶ 22} Under Assignment of Error No. II, appellant argues that his sentence violated Crim.R. 32. Appellant argues that he was denied his Crim.R. 32(A)(1) right of allocution to present information in mitigation of punishment at sentencing because he

lacked notice that the trial court would consider the gross sexual imposition and rape charges at sentencing.

{¶ 23} The state argues that appellant and defense counsel were both permitted to speak at sentencing and that they provided extensive information concerning appellant's background, his employment history including future employment, and his lack of any extensive criminal record. Appellant also stated to the court at sentencing that he had not touched his daughter in any inappropriate manner. The state argues that appellant was not denied an opportunity to present evidence in mitigation of punishment.

{¶ 24} Appellant's Assignment of Error No. II restates appellant's claim as to lack of notice under Assignment of Error No. I in the context of a right to allocution under Crim.R. 32(A)(1). In our view, the nature of the PSI report and longstanding Ohio law on sentencing placed appellant on notice that the trial court at sentencing could consider facts surrounding the gross sexual imposition and rape charges when imposing sentence on his conviction for child endangerment. The trial court afforded appellant an opportunity to speak at sentencing to present information in mitigation of punishment. We conclude that the trial court did not deny appellant his right of allocution under Crim.R. 32(A)(1).

{¶ 25} We find appellant's Assignment of Error No. II not well-taken.

Sentence

{¶ 26} Under Assignment of Error No. III, appellant argues that the trial court erred as to sentence. The standard of review on appeal of felony sentencing is set forth in

the Ohio Supreme Court decision of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. Under the decision, appellate courts “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.” *Id.*

{¶ 27} Appellant argues that the trial court failed to comply with Crim.R. 32 at sentencing and restates the contention that appellant was denied his Crim.R. 32 right of allocution. For the reasons stated earlier in this decision, we find appellant’s Crim.R. 32 argument to be without merit.

{¶ 28} Appellant also argues that the trial court abused its discretion with respect to sentence and that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. We address the abuse of discretion argument first.

{¶ 29} Appellant’s conviction is for the offense of endangering children, a violation of R.C. 2919.22(A) and (E)(2)(c). Under the terms of R.C. 2919.22(E)(2)(c), the elements of the offense include causing serious physical harm to the child victim. The offense is a third degree felony. The statutory range of sentence for the offense is a prison term of one, two, three, four, or five years. R.C. 2929.14(A)(3). Appellant’s sentence to a four year prison term is within the statutory range of sentence and is less than the statutory maximum. *Id.*

{¶ 30} An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). After the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, “[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, consecutive, or more than the minimum sentences.” *Id.* at paragraph seven of syllabus. Sentencing courts, however, remain required to “carefully consider the statutes that apply to every felony case. Those include 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. In addition, the sentencing court must be guided by statutes that are specific to the case itself.” *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.

{¶ 31} R.C. 2929.11(A) provides:

A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. 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.

{¶ 32} R.C. 2929.12 sets forth a non-exhaustive list of “factors to consider in felony sentencing” including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A). Under the statute, a sentencing court may consider factors not listed in the statute where relevant to the principles and purposes of felony sentencing. *Id.*

{¶ 33} At sentencing the trial court discussed the purposes of felony sentencing under R.C. 2929.11. The court also stated that it had balanced the seriousness and recidivism factors under R.C. 2929.12. The court discussed at sentencing the fact that appellant admitted guilt to child endangering, an offense requiring proof that he caused serious physical harm to the child victim. The court also stated that the victim, his daughter, has needed continued counseling due to the harm caused by appellant. Serious physical harm to the victim of a felony is also a sentencing factor under R.C. 2929.12(B)(2). The court also stated that appellant had a drinking problem and that at a minimum appellant had exposed his daughter to pornographic movies.

{¶ 34} We conclude that the record demonstrates that the trial court considered the purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12 and did not abuse its discretion in sentencing appellant to imprisonment for four years.

{¶ 35} We do not find any abuse of discretion in requiring appellant to pursue sex offender treatment despite the fact that child endangering is not a sex offense. As we discussed under Assignment of Error No. I, sentencing courts may consider at sentencing charges that were reduced or dismissed under a plea agreement.

{¶ 36} At sentencing appellant stated repairing his relationship with his daughter was of the highest priority to him. The child's mother stated that the child remained afraid of appellant. The mother also requested that appellant receive extensive treatment before appellant renews contact with the child.

{¶ 37} We consider the requirement that appellant undergo sex offender treatment is reasonably calculated to achieve rehabilitation of the offender in furtherance of the overriding purposes of felony sentencing under R.C. 2929.11. The requirement can reasonably be understood as an aid to help restore appellant's relationship with his daughter and to further appellant's rehabilitation generally. We find no abuse of discretion in the trial court's judgment requiring appellant to pursue sex offender treatment.

{¶ 38} If appellant proves unsuccessful in his efforts to secure sex offender treatment through the ODRC, he can address that difficulty with the trial court when it arises.

Cruel and Unusual Punishment

{¶ 39} The Ohio Supreme Court has recognized that as a general rule a sentence that falls within the statutory range of sentence for an offense cannot amount to cruel and

unusual punishment under the Eighth Amendment to the United States Constitution. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 21; *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). See *State v. French*, 6th Dist. No. L-09-1087, 2010-Ohio-6517, ¶ 20.

It is generally accepted that punishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community. 24B C.J.S. 551, Criminal Law § 1978; 15 American Jurisprudence, 171, 172 Criminal Law, Section 523. See definitions of cruel and unusual punishment in Black, Law Dictionary (4 Ed.), and Webster's New International Dictionary (3 Ed.).

McDougle, 1 Ohio St.2d at 69; *State v. Dombrowsky*, 6th Dist. No. L-06-1234, 2007-Ohio-1194, ¶ 8.

{¶ 40} By his plea, appellant made a complete admission of guilt to causing serious physical harm to his daughter in violation of R.C. 2919.22(A) and (E)(2)(c). His sentence falls within the statutory range of sentences for the offense. We find Assignment of Error No. III not well-taken. We agree with the state that appellant's sentence is not the type that is so disproportionate to the offense of child endangering so as to shock the community.

Ineffective Assistance of Counsel

{¶ 41} Under Assignment of Error No. IV, appellant argues that his trial counsel provided ineffective assistance at sentencing. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

The trial court recognized at sentencing that whether sex offender treatment would be made available under the ODRC treatment program, as anticipated by the court’s judgment, was uncertain. Appellant argues that trial counsel was deficient in failing to seek a continuance of sentencing in order to address, before the court rendered judgment, whether the ODRC sex offender treatment program would be available to appellant at the institution where appellant will serve his sentence.

{¶ 42} Even if we were to conclude that counsel was deficient in failing to request a continuance to determine whether an ODRC treatment program would be available to appellant, additional evidence outside the record would be necessary to demonstrate that

appellant was prejudiced by the failure. On this record any claimed prejudice is speculative. A claim of ineffective assistance of counsel that requires consideration of evidence outside the record of trial court proceedings cannot be considered on direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Carter*, 89 Ohio St.3d 593, 606, 734 N.E.2d 345 (2000).

{¶ 43} Although appellant argues that trial counsel should have sought a continuance, if necessary, due to surprise at the severity of sentence, appellant has not argued whether a continuance was necessary on that basis. Appellant has not argued how he was prejudiced by the failure.

{¶ 44} Accordingly, we find appellant's Assignment of Error No. IV not well-taken.

{¶ 45} We conclude that justice has been afforded the party complaining and affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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