

[Cite as *State v. Schneider*, 2010-Ohio-2089.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93128

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JOANNE SCHNEIDER

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Common Pleas Court
Case No. CR-472739

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: May 13, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, state of Ohio, appeals a sentence imposed on defendant-appellee, Joanne Schneider. The state raises one assignment of error for our review:

{¶ 2} “[1.] The trial court’s three-year sentence was contrary to law when defendant-appellee entered a guilty plea to engaging in a pattern of corrupt activity when the most serious offense in the pattern of corrupt activity is a felony of the first degree, as indicated, which pursuant to R.C. 2929.14(D)(3)(a) mandates that the trial court shall impose a minimum term of incarceration of ten-years [sic].”

{¶ 3} Finding merit to the appeal, we reverse and vacate Schneider’s sentence and remand for resentencing.

Procedural History and Factual Background

{¶ 4} In November 2005, Schneider was indicted on 163 counts involving an alleged pattern of corrupt activity, theft, false representation in the sale of securities, money laundering, telecommunications fraud, and securities fraud violations.

{¶ 5} In March 2009, Schneider entered into a plea bargain with the state. In exchange for all other counts being dismissed, Schneider pled guilty to 13 counts: Count 1, engaging in a pattern of corrupt activity, a felony of the first degree; Count 21, securities fraud, a felony of the first degree; Count 35,

false representation in the sale of a security, a felony of the first degree; Count 38, sale of unregistered securities, a felony of the first degree; Count 49, theft, a felony of the second degree; Count 61, securities fraud, a felony of the first degree; Count 74, sale of unregistered securities, a felony of the second degree; Count 78, false representation in the sale of a security, a felony of the second degree; Count 81, securities fraud, a felony of the first degree; Count 84, securities fraud, a felony of the first degree; Count 91, sale of unregistered securities, a felony of the second degree; Count 111, securities fraud, a felony of the first degree; and Count 140, money laundering, a felony of the third degree.

{¶ 6} The trial court sentenced Schneider to three years on Count 1, three years on each of the remaining counts, and ordered that they all run concurrent to each other, for an aggregate term of three years in prison. The trial court also informed Schneider that she would be subject to five years of postrelease control upon her release from prison.

{¶ 7} We review felony sentences as the Ohio Supreme Court declared in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The *Kalish* court, in a split decision, declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts “must apply a two-step approach.” *Kalish* at ¶4.

{¶ 8} Appellate courts must first “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.” Id. at ¶4, 14, 18. If the sentence is not contrary to law, then we review the trial court’s decision under an abuse of discretion standard. Id. at ¶4, 19.

{¶ 9} The state maintains that Schneider’s three-year sentence is contrary to law pursuant to the mandatory provisions of R.C. 2929.14(D)(3)(a). We agree.

{¶ 10} R.C. 2929.14(D)(3)(a) provides in relevant part: “*** if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, ***, the court *shall* impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.” (Emphasis added.) See footnote 1, *infra* (to read this convoluted provision in its entirety).

{¶ 11} Under R.C. 2929.14(D)(3)(a), a ten-year sentence is mandatory when the most serious offense in the pattern of corrupt activity is a felony of the first degree. *State v. Phillips* (Dec. 13, 2001), 8th Dist. No. 79192 (when violation of R.C. 2923.32 included a felony of the first degree, trial court properly sentenced defendant to a mandatory ten-year term).

{¶ 12} R.C. 2923.31(l)(2)(a) defines “corrupt activity” in relevant part as

“engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in *** division (B), (C)(4), (D), (E), or (F) of section 1707.44.”

{¶ 13} Here, two of Schneider’s convictions (or “corrupt activities”) involved false representations in the sale of securities under R.C. 1707.44(B)(4). One of these was a first degree felony because the amount involved was over one hundred thousand dollars. Thus, the most serious corrupt activity Schneider was convicted of “in the pattern of corrupt activity” was a first degree felony. Therefore, a ten-year prison term was mandatory. Accordingly, we find Schneider’s three-year prison term to be contrary to law.

{¶ 14} Schneider first argues that the state did not object to the three-year sentence. Indeed, as Schneider points out, the state wrongly informed the trial court that for a first degree felony it could sentence Schneider anywhere from three to ten years. Because of this, Schneider contends that three to ten years was “jointly recommended” by her and the state. But the state cannot validly recommend to the trial court that it impose a sentence that is contrary to law; a sentence that is contrary to law is void, and amounts to plain error. See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶14 (Ohio Supreme Court has “consistently held that a sentence that does not contain a statutorily mandated term is a void sentence”).

{¶ 15} Schneider further argues that the state is misinterpreting R.C. 2929.14(D)(3)(a). She maintains that a “precondition to the imposition of the ten (10) year mandatory sentence must be a determination that the most serious offense within the pattern of corrupt activity is a felony of the first degree.” She therefore maintains that the trial court could not impose a ten-year sentence here because it did not first make a determination “as to which specific offenses constituted a violation of R.C. 2923.32 for purposes of the plea agreement.”

{¶ 16} This court disagrees with Schneider’s interpretation. This provision is mandatory; the trial court has no discretion. If Schneider had only been convicted of a “pattern of corrupt activity” for committing second-degree “corrupt activities,” then the trial court could have lawfully imposed a three-year sentence — that is, because the “most serious offense in the pattern of corrupt activity” would not have been a “felony of the first degree.” R.C. 2929.14(D)(3)(a). But the most serious offense of Schneider’s pattern of corrupt activity was clearly a felony of the first degree.

{¶ 17} Finally, Schneider argues that R.C. 2929.14(D)(3)(a) is ambiguous because “the reference to engaging in a pattern of corrupt activity can reasonably be interpreted as applying only when the conduct is committed in conjunction with a drug offense.” As evidence of this, she states, “R.C. 2923.32

is not expressly cited, and the only reference thereto is immediately preceded by a description of drug offenses subject to a mandatory term of incarceration.”

{¶ 18} Again, we disagree with Schneider’s claim. Schneider is correct that the language of R.C. 2929.14(D)(3)(a) referring to “pattern of corrupt activity” is “immediately preceded by a description of drug offenses,” set off only by a comma.¹ But immediately following the “pattern of corrupt activity” language, separated again only by a comma, the statute refers to attempted rape. See R.C. 2929.14(D)(3)(a). Under Schneider’s interpretation, one who

¹ Although we do not find R.C. 2929.14(D)(3)(a) to be ambiguous, we acknowledge that it is not the General Assembly’s finest work. The entire section is one sentence that is 307 words long and has 23 commas. It provides: “Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, *if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree*, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.” (Emphasis added on “pattern of corrupt activity” language.)

attempted to rape another person (that if completed would have resulted in a life sentence) could only be sentenced to a ten-year mandatory term if “the conduct is committed in conjunction with a drug offense.” It is our view that the legislature did not intend such a result.

{¶ 19} Accordingly, we find that the trial court erred when it sentenced Schneider to three years in prison for Count 1. The state’s first assignment of error is sustained.

{¶ 20} Schneider’s sentence is reversed and vacated. This case is remanded for resentencing.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR